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EMPLOYER NEUTRALITY AS HOT CARGO: THOUGHTS ON THE MAKING OF LABOR POLICY

MATTHEW W. FINKIN*

INTRODUCTION

This Article is about the manufacture of labor policy at the hands of the National Labor Relations Board (NLRB). The question presented concerns the Board's role in accommodating a statute, whose last major legislative reconsideration took place nearly a half-century ago, to the business, social, and legal landscape of the twenty-first century. This is too large a question for a little Article. What follows is more a provocation than an effort at definitive resolution.

The portal of entry is the potential applicability of Section 8(e) of the Act, the prohibition of so-called "hot cargo" contracts to social clauses agreed to by unions and employers, whereby the latter commit themselves to contract only with businesses that observe fair labor standards; in particular, those willing to remain neutral and non-oppositional, when faced with union organizing. I will argue that a literal reading of that Section, currently signaled by the Board's General Counsel, is not commanded by the Act, is out of keeping with the tenor of the times, and would do a disservice to the Republic.

I. THE CONTEMPORARY LABOR BOARD

The leitmotiv of Otto Kahn-Freund's socio-legal scholarship, Mark Freedland tells us, was his conviction that "the social and economic function of a given body of law could be entirely transformed behind a curtain of ostensible legal continuity."¹ That conviction drew, rightly or wrongly, from Kahn-Freund's percep-

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1. Mark Freedland, *Otto Kahn-Freund (1900–1979)*, in *JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* 299, 305 (Jack Beatson & Reinhard Zimmermann eds., 2004).

tion of the work of the labor courts of Weimar, Germany; but, it could draw a parallel from observation of the work of the National Labor Relations Board today.

The NLRB (and the Office of General Counsel), a majority of whose members are now firmly in the hands of the administration of Bush-*files*, have tacitly adopted a policy of curtailing the extension of collective bargaining.² There is little legal impediment for it to pursue that end. Administrative law accords the

2. The Board has, among other things,

- denied the Act's coverage to graduate teaching assistants, *Brown Univ.*, 342 N.L.R.B. No. 42 (July 13, 2004) (overruling *New York Univ.*, 332 N.L.R.B. 111 (2000)).
- excluded temporary agency workers from bargaining units with the receiving employer's complement of regular employees making it much more difficult, if not impossible, to represent them, *Oakwood Care Ctr.*, 343 N.L.R.B. No. 76 (Nov. 19, 2004) (overruling *M.B. Sturgis*, 331 N.L.R.B. 1298 (2000)).
- abandoned the presumption accorded under prior law that a supervisor's threat of plant closure in the event of unionization would have been widely disseminated among the workers, *Crown Bolt, Inc.*, 343 N.L.R.B. No. 86 (Nov. 29, 2004) (overruling *Gen. Stencils, Inc.*, 195 N.L.R.B. 1109 (1972)).
- reversed prior precedent to hold a supervisor's words in support of a union (and contrary to her employer's anti-union posture) are "inherently coercive" of employee free choice sufficient to set an election aside, *Haborside Healthcare, Inc.*, 343 N.L.R.B. No. 100 (Dec. 8, 2004).
- granted review and so signaled the Board majority's intent to abandon policy of long standing that gives a union voluntarily (and lawfully) recognized by an employer as its employees' bargaining agent a reasonable period of unchallengeable representative status, *Dana Corp.*, 341 N.L.R.B. No. 150 (June 7, 2004).
- granted review and so signaled the majority's intent to exclude airport security screeners, who are employees of private contractors, from the Act, *Firstline Transp. Sec., Inc.*, 344 N.L.R.B. No. 124 (June 7, 2004).

In all these decisions, the Board divided along partisan lines. In *Firstline*, for example, Member Liebman dissented on the claim that the case was a novel one insofar as it implicated the relationship of statutory coverage to national security:

The Board's historical approach has been precisely the opposite, asserting jurisdiction *because*, for example, an employer's operations have a substantial impact on national defense. See *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318, 320 (1958). . . .

Similarly, the Board has rejected arguments that it should not assert jurisdiction over workers employed at nuclear energy plants, operated under contract with the federal government, on national security-related grounds. See, e.g., *General Electric Co.*, 89 NLRB 726, 736 (1950). And during the Second World War, the Board exercised jurisdiction over militarized plant guards, with the Supreme Court's approval. See *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947); *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947).

Firstline, 344 N.L.R.B. No. 124, at 2 (emphasis in original) (footnotes omitted).

agency broad discretion in how it chooses to read the Act, and the United States Supreme Court has repeatedly emphasized the Board's "primary responsibility for developing and applying national labor policy."³ The Board may modify antecedent doctrine or abandon it altogether by decisions "interstitial" to the Act,⁴ i.e., at the Act's margins, even if it is at the margins where the law might most importantly be felt in the face of contemporary circumstances. In principle, an agency may not change the basic focus or function of its organic law, for example, by a decision that construes a key word of the text,⁵ but that principle fails to address the systematic narrowing of the organic law's mission by a combination of marginal decisions no one of which, taken only on its own, can be said to lie outside the ambit of adminis-

3. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) ("This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy." (citing *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957)). In *Beth Israel Hospital* the Court states:

Because it is to the Board that Congress entrusted the task of "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms," that body, if it is to accomplish the task which Congress set of it, necessarily must have authority to formulate rules *to fill the interstices of the broad statutory provisions.*

Beth Israel Hosp., *supra*, at 500-01 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)). In *Curtin Matheson Scientific*, the Court declared:

This Court therefore has accorded Board rules considerable deference. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *NLRB v. Iron Workers*, 482 U.S. 335, 350 (1978). We will uphold a Board rule as long as it is rational and consistent with the Act, *Fall River*, *supra*, at 42, even if we would have formulated a different rule had we sat on the Board, *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 413, 418 (1982). Furthermore, a Board rule is entitled to deference even if it represents a departure from the Board's prior policy. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) ("The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking.") Accord, *Iron Workers*, *supra*, at 351.

Curtin Matheson, *supra*, at 786-87 (internal citations abbreviated)(emphasis added).

4. See *Republic Aviation Corp.*, 324 U.S. at 798.

5. See, e.g., *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994). Cf. Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 495 ("It [the question as seen by Justice Scalia in the *MCI* case] is not merely the largeness of the change being effected, but also that accepting it will entail accepting that an agency can be empowered to change its mandate.").

trative discretion. The appearance of legal continuity is thus maintained even as the Act's stated purpose, of "encouraging the practice . . . of collective bargaining,"⁶ is transformed.

Philosophy can be fine-spun in a hermit's hut,⁷ but public policy cannot be made, not well made, in isolation. Sound labor policy has to draw sustenance from a thoughtful engagement with long-term economic, legal, and social trends. In this, the Labor Board is twice hobbled. First, basic guidance on how the law should respond to deep-seated change should come from the legislature: it is equipped, by the creation of commissions of inquiry, or by the processes of legislative investigation, to inform itself of how the landscape is changing and of where the law ill fits. More important, as an elected body it is best situated to strike a compromise that, if not optimal from an academic's perspective, at least maintains social cohesion, i.e., to reach a result the citizenry would regard as legitimate because of the very nature of the body and the process. Such, at least, is the teaching of Civics 101, but in that the legislature has failed miserably.⁸ The last major legislative recalibration of the Labor Act occurred in 1959. (The Act was amended thirty years ago, but only to extend jurisdiction to non-profit health care institutions.) Since then, every serious effort to fine-tune the law has met with political stalemate. This places the Labor Board in the awkward position of having to react to a rapidly changing world, guided only by the text of a statute whose last significant legislative reconsideration is now near a half-century old.

This first conundrum is not of the Board's making, but the second one is, for nothing prevents the Board from developing on its own an appreciation of where the world it regulates is going—what needs are being unmet, what trends are emerging—and to adapt the law within the limits of its discretion. This the Board gives no promise of doing. National labor policy, as fashioned today, draws its sustenance only from the Board majority's ideological pre-disposition and its legitimacy only from the Board's power.⁹

6. 29 U.S.C. § 151 (2000).

7. See RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 362–63 (1990).

8. See Thomas A. Kochan, *A Silver Anniversary Not Worth Celebrating: The Impasse Over American Labor and Employment Policies*, 25 COMP. LAB. L. & POL'Y J. 79 (2003).

9. A nuanced analysis of this situation is provided by James Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 27 COMP. LAB. L. & POL'Y J. 221 (2005), accompanied by a set of comments from various foreign perspectives.

It would be foolish to ignore the fact that the Labor Board is a political body, a fact the draftsmen of the Act knew very well. In 1935, Philip Levy, a member of Senator Wagner's staff, was engaged in drafting the Act that was to bear the Senator's name. Calvert Magruder, on leave from Harvard Law School as General Counsel of the then (now "old") National Labor Relations Board, was also engaged at a higher level in the drafting process. That spring, Levy wrote to Magruder apropos some proposed changes in the draft:

At the hearings last year there was considerable opposition on the part of some protagonists of the bill [the proposed National Labor Relations Act], to giving the [proposed National Labor Relations] Board the power to certify representatives in the absence of an election by secret ballot. The argument was made that at some future time the Board might come under the influence of an anti-labor administration or that it will use its power to freeze out independent or progressive groups. . . . We feel that the argument is unsound; first, it is extremely important that the Board have the power to certify or to determine representation in any manner it sees fit, and secondly, *if the Board is going to be pro-employer, the jig is up.*¹⁰

It also follows from Levy's quip that an agency so driven garners not the public's respect, but its cynicism.

By blinding itself to demonstrable contemporary circumstances and needs, the body bids fair to blunder, and in blundering to ill serve the Republic. A small object lesson in the making of labor policy is supplied by the General Counsel's proposed engagement (and so, potentially, the Board's) with the application of Section 8(e) to employer-union neutrality agreements.

II. THE CONTEMPORARY DOMESTIC CONTEXT

The future of the American labor movement has moved to the fore with the withdrawal of three large unions—the Service Employees International Union (SEIU), the International Brotherhood of Teamsters (IBT), and the United Food and Commercial Workers (UFCW)—from the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and their creation of a Change to Win Coalition. High on the Coalition's agenda is a reversal in the decades-long decline in union representation in the private sector—from well over a third of the eli-

10. Memorandum from Philip Levy to Calvert Magruder (undated) (on file with the author) (emphasis added).

gible workforce in the 1950s to just about eight percent today—a decline which has, among other things, contributed to the increasing wage inequality the nation has experienced over the past several decades. Sound survey data suggest that thirty percent of the unrepresented workforce—over twenty million workers—desire union representation.¹¹ The disparity between representational want and representational reality has been explained, if only in part, by the effects of active employer opposition to union organizing, including opposition that may be perfectly lawful as a matter of employer free speech sheltered by the Act.¹² Even in the 1950s, however, when union density was at its height, the Act's defects in the face of employer opposition to unionization were obvious. As Archibald Cox observed at the time, "The protection against employer interference available under the NLRA is imperfect, because of the delays and uncertainties of litigation, the manifold opportunities for subtle discrimination, and the coercion exercised through freedom of expression."¹³

In response, an avenue that some unions have found productive is the negotiation of neutrality agreements whereby a company agrees that in the event of a union organizing effort the company will remain neutral, i.e., non-belligerent: it will leave the workers, those supportive of as well as antagonistic toward the union, to sort it out amongst themselves.¹⁴ Because, under Section 8(a)(2), the Act also forbids an employer to "support" a labor organization impermissibly, e.g., to favor one union over another, a neutrality agreement could not be applied one-sidedly should another labor organization not a party to the neutrality agreement present itself. And because the Act's basic right to form or assist a labor organization includes a right to refrain from organization, the employer could not forbid its workers to oppose a union's organizing effort, and vigorously. Under these conditions, more employees may be securing union representation by voluntary action today than by resort to the Board's processes. Even as unions may be more successful in organizing under conditions of neutrality than under conditions of belliger-

11. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999); see also Symposium, *What Do Workers Want: Reflections on the Implications of the Freeman & Rodgers Study*, 3 U. PA. J. LAB. & EMP. L. 375 (2001).

12. See 29 U.S.C. § 158(c) (2000).

13. Archibald Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 270 (1959) (emphasis added).

14. The state of the law on the issues presented by neutrality agreements is thoroughly analyzed by James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

ence, however, a substantial number of these organizing efforts fail. Based on the demonstrated failure of the electoral model and the normative advantages of employer neutrality, James Brudney concludes that the latter provides a more level playing field than that provided under the rules governing NLRB-held representation elections.¹⁵

There is no doubt that a neutrality agreement is lawful. Nevertheless, the Board and the General Counsel are exploring ways of limiting its use or impact. The Board has announced its intent to abandon its long-standing policy of affording a voluntarily-recognized union—one that has support from an employee majority and which the employer agrees in consequence to bargain with—a period of time during which its representational status cannot be contested; a so-called “recognition bar” to an untimely petition by dissident workers to oust the union.¹⁶ On his part, the General Counsel has issued an instruction requiring central review of—and so signaling the importance attached to—an unfair labor practice charge implicating one of three issues which the General Counsel sees these agreements potentially to pose.¹⁷ The first goes hand-in-glove with the Board’s announced reconsideration of its recognition bar doctrine, just discussed. The second concerns the prohibition of impermissible “support” to a labor organization, also discussed above. The third concerns any allegation that “an employer and a union agreed that the employer would require entities that it *owns or does business with* to execute a neutrality agreement.”¹⁸ “It is argued,” the General Counsel opined, “that such agreements are unlawful secondary agreements under Section 8(e),” the so-called “hot cargo” clause, to which our attention next turns.

III. THE HOT CARGO CLAUSE

In 1947, in a reaction to a wave of major strikes (in which workers were seeking to regain purchasing power lost during war-time wage controls) and to the public perception that organized labor had become “too” powerful (as a result of the cost and inconvenience these strikes imposed), Congress amended the Labor Act to curtail union power by enacting prohibitions on secondary boycotts. This provision, Section 8(b)(4), made it unlawful, among other things, for a union to strike or engage in a concerted refusal to handle goods or perform services with an

15. *Id.* at 876–77.

16. *See* Dana Corp., 341 N.L.R.B. No. 150 (June 7, 2004).

17. NLRB General Counsel Mem. OM 04-76 (July 29, 2004).

18. *Id.* (emphasis added).

object of forcing an employer, one with whom the union had otherwise no dispute, to cease doing business with another employer, the one with whom the union had a dispute, though the text drew no such distinction. In 1958, in the *Sand Door* case,¹⁹ the United States Supreme Court held that the presence of a "will not handle" clause in a collective bargaining agreement was no defense under Section 8(b)(4) to the conduct of a strike to enforce it; but the Court found nothing in the Act to vitiate such an agreement per se or to deprive an employer of the power to observe it if the employer chose to do so free of coercion.

A boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute. Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees.²⁰

The Court's solicitude was for the insulation of the targeted (or "neutral") employer's freedom of choice: to allow it to engage in a boycott or not as it saw its interests best to lie.²¹

Sand Door was thought to create a legal loophole which Congress addressed the following year. The Senate's version of the proposed law focused on the literal "hot cargo" situation, i.e., of collective agreements in the trucking industry that allowed the Teamsters' Union to refuse to handle non-union and struck goods.²² The House sought a broader prohibition. The Senate acceded to the House version with two exceptions not relevant here. And so Section 8(e) rendered an agreement void irrespective of the absence of any coercion in securing it. It became an unfair labor practice for

any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees to cease . . . doing business with any other person, and any contract or agreement entered

19. *Local 1976, United Bhd. of Carpenters & Joiners of America v. NLRB (Sand Door)*, 357 U.S. 93 (1958).

20. *Id.* at 98-99.

21. See Note, *Hot Cargo Clauses: The Scope of Section 8(e)*, 71 *YALE L.J.* 158 (1961).

22. *Cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962) (discussing the role of the Interstate Commerce Commission in assuring that common carriers do not impose such restrictions).

into . . . or containing such an agreement shall be to such extent unenforceable and void²³

The conclusion presumably to be drawn from the General Counsel's memorandum follows accordingly from the "plain meaning" of the statute: an employer may not agree with a union to make neutrality a factor in deciding what companies it will do business with.

The problem with this "plain meaning" approach is that Section 8(e) cannot be read, and has not been read, plainly. Nor has it been read at all in the context of a neutrality clause—more on that in a moment. Whether it should be applied in this context therefore poses a question of national labor policy in the resolution of which the text of the Act is of no assistance. That this is so is explained in the next section.

IV. SECTION 8(e): A PROHIBITION IN SEARCH OF A POLICY

The problematic nature of the prohibition was addressed on the floor of the House by Representative Thompson, who pointed to two areas of application where the proposed text was at once unclear and vexing:

(b) Subcontracting clauses: Companies and unions in manufacturing industries often agree upon restrictions upon subcontracting in order to protect the employees against the loss of jobs These clauses . . . have nothing to do with hot cargo agreements or secondary boycotts. Yet they appear to be outlawed by the House bill.

(c) Primary boycotts: The House bill makes it unlawful for an employer ever to accede to a union's request that he cease doing business with another employer who is failing to maintain fair labor standards. If the employer acceded, there would be an implied agreement

It would seem that a union ought to be able to ask a friendly concern to stop dealing with a company which will not observe fair labor standards.²⁴

The first was addressed by a sharply divided United States Supreme Court in 1967. The latter, the issue presented here, has yet to be addressed.

The first was dealt with by the United States Supreme Court's decision in *National Woodwork Manufacturers Association v.*

23. 29 U.S.C. § 158(e) (2000).

24. 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1708 (1985) (remarks of Rep. Thompson).

NLRB,²⁵ concerning an agreement whereby carpenters would not handle pre-fitted doors; all such work would have to be done at the work site, which meant that the contractor could not purchase pre-fitted doors. The majority opinion centered on the tactical objective of a “do not handle” clause: did it address the labor relations of the contracting employer, for example, to preserve the work done by its employees? If so, the provision would not fall afoul of Section 8(e), despite the plain language of the text. Was the provision “tactically calculated to satisfy union objectives elsewhere”? If so, it was proscribed. Which is which? “This,” the Court opined, “will not always be a simple test to apply. But ‘[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task.’”²⁶ This leaves it to the Labor Board to cobble together a distinction as best it might for, as Clyde Summers and Harry Wellington observed, the conflicting positions taken by the Justices demonstrated that “Congress had in mind no plainly perceived policy and articulated no rationalizing principle.”²⁷

Now, into this legal muddle comes the General Counsel’s concern for neutrality agreements whereby a company agrees with a union that it will require companies it “owns or does business with” to remain non-belligerent in the face of a representation drive.²⁸ The General Counsel’s legal theory has to be that, as the promise of non-belligerence does not benefit the contracting employer’s employees—is intended, that is, to achieve the union’s organizational objective elsewhere—it is proscribed. Of course, the ultimate objective of requiring neutrality of a company the employer controls may well be to facilitate the contracting union’s ability to organize those employees; but, because the employer must treat all would-be representatives equally under Section 8(a)(2), the “certain effect”²⁹ is to create better

25. 386 U.S. 612 (1967).

26. *Id.* at 645 (quoting *Local 761, Int’l Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 674 (1961)). For a suggestion of how variable, and complex, the line-drawing can be see Howard Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965).

27. CLYDE SUMMERS & HARRY WELLINGTON, *CASES AND MATERIALS ON LABOR LAW* 336 (1968).

28. The General Counsel’s theory, that imposing neutrality on a company the contracting employer “owns” would violate the Act has, thus far, come a cropper. *Heartland Industrial Partners, JD(NY)-23-05* (NLRB Div. of Judges June 16, 2005). Inasmuch as the commitment applied to companies the employer owned, the ALJ reasoned, it would constitute a commitment to “cease doing business with” the company itself. *Id.* at 4.

29. See *infra* text accompanying note 32.

conditions for the exercise of employee free choice for or against any union that presents itself. Moreover, the objective of requiring neutrality of the employer's contractors may have nothing to do with the contracting union's organizational objective and everything to do with creating conditions conducive to the fullest exercise of freedom of workplace association at the contractor, here or abroad. In other words, the resolution of Rep. Thompson's second problem turns on what our national labor policy should be with respect to such an objective.

In deciding that question, guidance can be drawn from one element that, the United States Supreme Court has told us, is an indisputable, "overriding policy"—the fostering of labor peace.³⁰ That policy played a critical role in the Court's rejection in 1982 of any distinction between a labor objective and a political objective in the prohibition of coercion, i.e., of the use of a strike.³¹ In that case, a longshoring union refused to load or unload cargoes destined to or coming from the Soviet Union, to protest the Russian invasion of Afghanistan. The Court stated:

As understandable and even commendable as the ILA's [International Longshoremen's Association] ultimate objectives may be, the *certain effect* of its action is to impose a heavy burden on neutral employers. And it is just such a burden, as well as widening of industrial strife, that the secondary boycott provisions were designed to prevent.³²

The policy disfavoring the widening of industrial strife is of help by negative implication: a union is forbidden by Section 8(b)(4) to strike (or picket) to secure an employer's promise to contract only with neutral contractors, and breach of such a contract may not be redressed by that action. That is, nothing in the ILA decision would disallow an *agreement* to achieve a social purpose, or "commendable . . . objectives."³³ If we regard the labor condition the agreement would require to be socially beneficial, the next question is why an employer should be disallowed contractual autonomy to require it of those it does business with, and then only when the contract is made with a labor organization. In other words, just what evil would the extension of Section 8(e) in this context address?

30. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 794 (1990) (quoting Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987)).

31. See Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982).

32. *Id.* at 223 (emphasis added).

33. *Id.*

Two policy arguments drawn from extant law could be essayed in support of the General Counsel's position. First, it has been argued that a refusal to do business provision embodies the evil of "top-down" organizing.³⁴ Second, it could be argued that such a provision unduly burdens a neutral employer by enmeshing it in another's labor dispute. Let us take each in turn.

The law prohibits efforts by employers to force unions on their employees. That is what "top-down" organizing means. As Archibald Cox explained, the Norris-La Guardia Act of 1932 (which took the federal courts out of labor disputes) was indifferent to the techniques unions could employ to build organizations of countervailing power to employers. Employees could join because they

wished to join, because the employer forced them to join in order to save his business, or because the power of the union to deprive them of jobs by shutting down the business left no viable alternative "Top-down organizing" is obviously inconsistent with the NLRA ideal of employee self-organization *without interference by employers*. A union's exertion of economic pressure upon employees may also be inconsistent with the ideal of freedom of choice.³⁵

Top-down organizing was addressed in the 1947 and 1959 amendments: A company's contracting with a union to buy only from unionized suppliers inevitably pressures would-be suppliers in turn to pressure their employees for union recognition.³⁶ But "top-down" organizing is the diametrical opposite of a promise to remain neutral in the face of an organizational effort. Neutrality—non-belligerence—affords employees freedom of choice "without interference by employers." To be sure, the Labor Act gives the employer a qualified privilege to campaign against unionization without governmental sanction; but an employer is not obligated to exercise it. Nor do employees opposed to unionization have a right to compel their employer to exercise it.

34. See *Kentucky Workers Resist 'Top-Down' Organizing*, NAT'L RIGHT TO WORK NEWSL. (Nat'l Right to Work Comm., Springfield, Va.), Sept. 2003, at 3 (challenging neutrality, or as it colorfully puts it, "so-called 'neutrality,'" agreements as a form of "top-down" organizing).

35. Cox, *supra* note 13, at 263 (citation omitted) (emphasis added).

36. See *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 632 (1975) ("One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees."). This Article does not address the antitrust consequences, if any, of agreements governing employer-contractor conditions.

Given the substantial body of criticism directed to the role of employers in resisting unionization, employer neutrality is, though not a statutory policy, at least a statutorily unobjectionable policy.

The second argument resting on the “burdening of the neutral” justification in the ILA case, has to take account of the two subsequent Supreme Court decisions. In the first, the Court sheltered a politically-inspired consumer boycott from legal sanction distinguishing the “coerced participation in industrial strife” presented in the ILA case.³⁷ In the second, the Court sheltered union consumer handbilling and other forms of publicity directed against the purchaser of construction services, a shopping mall, for its selection of a non-union construction contractor, i.e., to bring public pressure to bear to persuade it to cease doing business with the contractor.³⁸

As a result, the law regarding the burdening of neutrals today is this: (1) a union can use any means short of statutory coercion—it can leaflet, put ads in the papers, purchase air time, hold campus and other public rallies, engage in “street theater”³⁹—to call for a boycott of an employer until that employer ceases doing business with another; (2) an employer lawfully may accede to the union’s request that it cease that business relationship; but, (3) if that accession constitutes an implied agreement it is of no legal effect—the employer may change its mind at any time—for the remedy Section 8(e) affords is merely an order nullifying the agreement; and, even then, (4) nothing forbids the employer to continue to cease doing business even if the agreement to do so is unenforceable. The statutory evil, then, is neither the involvement of an ostensibly “neutral” employer in another’s labor dispute, nor even involvement as a result of persuasion by a labor organization, but the company’s having made the business judgment that its interests are served by committing itself to do so for a period of time and only when it makes that commitment to a labor organization.

37. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (quoting *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 617–18 (1980) (Blackmun, J., concurring in part)) (emphasis added).

38. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). On the reception thus far of the NLRB General Counsel’s effort to narrow the application of *DeBartolo*, see *Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199 (9th Cir. 2005) and *Kentov v. Sheet Metal Workers’ Int’l Ass’n, Local 15*, 418 F.3d 1259 (11th Cir. 2005).

39. See *Kentov*, 418 F.3d at 1266.

James Brudney tells us that employers agree to neutrality agreements when it is in their interest to do so,⁴⁰ and it can reasonably be assumed that as much would be said of their suppliers and contractors. Why Section 8(e) should insulate the employer from making that decision contractually binding remains to be seen, for all this provision does, in practical terms, is to allow the employer to conclude that this contract, unlike other of its business agreements, can be escaped. The obvious answer to this question is that such a “will not deal with” provision, unlike the terms of other, permissible business deals, is unlawful. But that answer begs the question.

Furthermore, nothing in Section 8(e) denies enforceability to an agreement, to contract only with contractors who observe fair labor standards, when made by an employer with community groups, churches, campus and human rights organizations, and like coalitions—unless the coalition includes a labor organization. (And in which case, to anticipate the later discussion, it is arguable that the employer would have made an implied agreement violative under Section 8(e), one it would therefore be free to escape, as it would not absent the union’s participation.)⁴¹ Thus, the only ground on which the extension of Section 8(e) rests to proscribe a promise of non-belligerence to be required of contractors is the unstated assumption that the employer, as a neutral, *must* be unencumbered by contract (and only by contract with a union) in continuously calculating the benefits and risks of requiring such a condition. And this is grounded in turn on the notion that our overriding policy of industrial peace would be threatened *more* by an employer’s making an agreement to monitor its suppliers (commonly with provision for peaceful dispute resolution) than by having it act in response to an intense but altogether lawful and possibly bitter campaign of public pressure. This reasoning is difficult to explain, let alone defend.

The point is that Section 8(e), which has not been given a literal reading in another setting, need not be given a literal reading in this one. That it should not becomes obvious once the policy-maker considers economic, legal, and social developments in the half-century since Section 8(e) was enacted: the increasingly tight integration of markets, which places in question the automatic assumption of the neutrality (or bystanderly innocence) of a purchaser of goods or services *vis-à-vis* the labor policies of its business partner; the increasing acceptance inter-

40. See Brudney, *supra* note 14; see also *infra* text accompanying note 52.

41. *But see infra* note 64.

nationally of the right to representation in the workplace as a fundamental or "core" labor right; and, the consequent growth of corporate codes and of agreements between unions and employers whereby employers agree to observe core labor standards for themselves *and* their contractors.

V. THE INTERNATIONAL CONTEXT: THE SOCIAL, LEGAL, AND ECONOMIC TOPOGRAPHY FIFTY YEARS ON

A critical change in this period consequent upon the growth of world trade and the fear of a "race to the bottom" in labor standards is the increasing and now general acceptance of a set of internationally recognized fundamental or "core" worker rights. Since its creation in 1919, the International Labour Organization (ILO) has addressed labor standards via the promulgation of conventions (and recommendations), few of which have been ratified by the United States. But "major upheavals at the turn of the 1980s"⁴² placed the matter of labor rights high on public agendas, including the European Community (EC), the Organisation for Economic Co-Operation and Development (OECD) (whose 1976 Declaration on International Investment and Multinational Enterprises dealt in part with labor rights and freedom of collective bargaining), the Organization for Security and Co-Operation in Europe (OSCE) (formerly the Conference for Security and Co-Operation in Europe (CSCE)), the World Bank, the World Trade Organization (WTO), the United Nations (U.N.), numerous public and non-governmental organizations (NGOs), and individual nation-states⁴³ including the United States, which has connected the grant of trade privileges to the observation of "internationally recognized worker rights."⁴⁴ The activity here (and the literature surrounding it) is far too rich briefly to recount.⁴⁵ Suffice it to say, after decades of

42. JEAN-MICHEL SERVAIS, INTERNATIONAL LABOUR ORGANIZATION 33 (2005).

43. The European Convention on Human Rights and Fundamental Freedoms (ECHR) was agreed between the member states of the Council of Europe in 1950, but it requires enabling legislation to become part of domestic law. The United Kingdom did not do so until the Human Rights Act of 1998, which came into force in 2000. How the Act will bear on British law in the workplace remains to be worked out by the judiciary. For an overview, see generally HUMAN RIGHTS AT WORK 1-18 (K.D. Ewing ed., 2000).

44. 19 U.S.C. § 2462(b)(2)(G); see generally Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL'Y J. 199 (2001).

45. Some of it is surveyed in INTERNATIONAL LABOUR OFFICE, FREEDOM OF ASSOCIATION: AN ANNOTATED BIBLIOGRAPHY (1999) and CONFRONTING GLOBALIZATION: THE QUEST FOR A SOCIAL AGENDA (Roger Blanpain ed., 2005).

growing international attention, these efforts culminated in the ILO Declaration on Fundamental Principles and Rights at Work in 1998. It declares, *inter alia*, that,

all Members, even if they have not ratified the Conventions in question [e.g., the United States], have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions namely: freedom of association and the *effective* recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; the elimination of discrimination in respect of employment and occupation.⁴⁶

Although the Declaration's status is promotional, it represents an international policy consensus strongly supported by the United States,⁴⁷ and it calls for action by private actors as well as by governments.

Apropos the latter, the following year, U.N. Secretary General Kofi Annan called for business leaders, governments, unions, financial institutions, and civil society organizations (CSOs) to form a Global Compact to support ten universal social principles including the four "core" or fundamental rights identified in the ILO Declaration. The text is noteworthy: of three of

46. ILO Declaration on Fundamental Principles and Rights at Work (June 1998), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT (emphasis added); *see also* MULTINATIONAL ENTERPRISES AND THE SOCIAL CHALLENGES OF THE XXIST CENTURY: THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AT WORK (Roger Blanpain ed., 2000).

47. The Secretary of Labor addressed the 1998 International Labor Conference on behalf of the United States regarding the purpose of the Declaration:

[T]o make clear what we know to be true—and to thereby deepen our will to act in that knowledge. And we need a credible and meaningful follow-up mechanism to assure that our declaration will be a living document for the 21st century.

We know that fundamental rights of workers—the freedom of association, the right of collective bargaining, non-discrimination in employment, the prohibitions on forced labor and exploitative child labor—ought be implemented by all nations, and certainly by all who would claim to be members in good standing of this organization [*i.e.*, the United States].

Alexis M. Herman, Address at the International Labor Conference (June 9, 1998), *available at* <http://www.dol.gov/asp/programs/history/herman/speeches/980609ah.htm>.

the four core rights the call is to a general audience of all the above actors—for “the elimination of all forms of forced and compulsory labor,” for “the effective abolition of child labor,” and for “the elimination of discrimination in respect of employment and occupation”; but on the fourth, the call is far more sharply focused: “*Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.*”⁴⁸ The U.N.’s Global Compact Office states even more explicitly that companies are expected “to embrace, support and enact, *within their sphere of influence*, a set of core values” that includes the above.⁴⁹ It follows that domestic law is called upon to allow business to do just that.

This is not to argue that the Labor Board is necessarily bound by these international standards⁵⁰ (and, in any event, the ILO Right to Organise and Collective Bargaining Convention, which the United States has not ratified, has not been interpreted to mandate employer neutrality); nor, even to argue less strongly, that the NLRB is legally obligated to accommodate them to the extent national law can be read as compatible with them. It is to argue that national labor policy cannot be fashioned, not *wisely* fashioned, in a vacuum; that our labor law has been placed, in part by the economics of a global economy, in part by the policies the United States government has adopted in consequence of it, in a global framework, legally and socially as well as economically; and that it would be irresponsible for the Labor Board to make policy uninformed by these developments. It should follow that where the Labor Act, as in Section 8(e), has ample flexibility to accommodate those international labor policies the United States has endorsed, the Act should be read, as a matter of our own national labor policy, to be in keeping with them.⁵¹ Anything less would amount to public adherence to a double standard—the homage vice pays to virtue.

48. UNITED NATIONS GLOBAL COMPACT OFFICE, THE UNITED NATIONS GLOBAL COMPACT: ADVANCING CORPORATE CITIZENSHIP 3 (2005), available at http://www.unglobalcompact.org/docs/about_the_gc/2.0.2.pdf (emphasis added).

49. *Id.* (emphasis added).

50. On that possibility, see Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK TRANSNAT’L L. REV. 243 (2005).

51. This argument is advanced in a time of legal xenophobia expressed by some of the nation’s political leadership. Matthew W. Finkin, *On the Journal’s Mission in the Next Quarter Century*, 25 COMP. LAB. L. & POL’Y J. 1 (2003). And even so, no decision of the NLRB “has ever even so much as made passing mention of, let alone to have placed reliance on” any foreign or international source. *Id.* at 4. Contrary to the Board, such open-mindedness has long been a

Second, and bearing on the compatibility of reading Section 8(e) to be in accordance with recommended business practice, it should be noted that multinational enterprises have heeded the call for social responsibility. The primary reaction has been in the unilateral adoption of corporate codes, so-called “soft law,” the promulgation of which has surged phenomenally from the late 1980s.⁵² Bob Hepple has accounted for this development thusly:

First, the corporate codes are a response to public pressure from consumers, investors, trade unions and NGOs. TNCs [transnational corporations] wish to avoid negative publicity—or worse still, organised boycotts. . . . Secondly, many managers believe that the benefits of good employment (and environmental) practices outweigh the costs. Those costs include monitoring and corrective action. The benefits may be improved employee morale, lower labour turnover, fewer accidents, enhanced product quality, and greater consumer and investor confidence. Thirdly, the codes can be used to strengthen the power of senior central management. *This is particularly the case with outsourcing guidelines which enable central management to dictate the labour practices of sub-contractors and suppliers* as part of a monitoring process which leads to better product quality. Contractors, too, may welcome a level playing field in the otherwise cut-throat competition for supply contracts. By complying with code standards they may be assured of long-term contractual relationships and protect themselves from ‘free-riders.’ Corporate social responsibility, says the US Council for International Business (USCIB), is ‘good business’ helping to maintain ‘the competitiveness of companies over time and in highly diverse parts of the world’.⁵³

Finally, and toward the same end, international union federations and European-wide works councils have negotiated “framework agreements” with transnational companies that embody these principles. A survey of thirty agreements indicates that twenty-six apply the four core principles to entities which the company manages, controls, or contracts with.⁵⁴ Some require

feature of the judiciary. *Id.* at 3. *E.g.*, *Muller v. Oregon*, 208 U.S. 412, 419–20 n.1 (1908).

52. See generally ROGER BLANPAIN & MICHELE COLUCCI, *THE GLOBALIZATION OF LABOUR STANDARDS: THE SOFT LAW TRACK* (2004).

53. BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 71 (2005) (emphasis added) (footnote omitted).

54. *Framework Agreements Concluded Between Transnational Companies and Global Union Federations*, HAZARD MAGAZINE, <http://www.hazards.org/union>

and monitor compliance by contractors; others require “best efforts” to find contractors willing to follow these principles or contain an obligation to “encourage” contractors to comply. Importantly, in nine agreements, employers have adopted neutrality (or “will not oppose”) requirements as in furtherance of the obligation to uphold their employees’ freedom of collective bargaining,⁵⁵ and eight of these expressly extend this requirement to their contractors. Two such framework agreements that have domestic application in the United States are illustrative: the agreement between Daimler Chrysler and the International Metalworkers Federation (IMF) provides that, “During organization campaigns the company and the executives will remain neutral,” and states that the company “expects its suppliers to incorporate these principles as a basis for relations with” it.⁵⁶ The agreement between IKEA and the International Federation of Building and Wood Workers (IFBWW) provides that, “Employers [that is, the company *and* its suppliers and contractors] shall adopt positive views of the activities of trade unions and an open attitude toward their organizing efforts.”⁵⁷ These agreements, have been made because it is to the contracting companies’ and to their contractors’ business interests to make them; and, one might add, they challenge as well the assumption, fifty years after Section 8(e) was enacted, that, in a world of intense economic interconnectedness, a purchaser should be

effect/gufagreements.htm (last visited Oct. 1, 2005). The Labor and Employment Relations Convention’s listserv posts a smaller list and there are doubtless numerous others.

55. Nor are they unique. The Base Code of the Ethical Trading Initiative, a multi-partite body established in the United Kingdom, provides that: “The employer adopts an open attitude towards the activities of trade unions and their organisational activities.” ETHICAL TRADING INITIATIVE, THE BASE CODE (2005), *available at* http://www.ethicaltrade.org/Z/lib/base/code_en.shtml. The Union Network International (UNI), a global alliance of nine-hundred unions in one-hundred fifty countries, has negotiated nine framework agreements since 2000 and is negotiating several more, e.g., with Deutsche Telecom and Deutsche Post. Michael Bologna, *International Union Close to Agreement on Organizing Deutsche Telekom Subsidiaries*, DAILY LAB. REP. (BNA) No. 165, at A-11 (Aug. 26, 2005). The latter would govern T-Mobile and DHL in the United States.

56. DAIMLERCHRYSLER & THE DC WORLD EMPLOYEE COMMITTEE ON BEHALF OF THE INTERNATIONAL METALWORKERS FEDERATION (IMF), SOCIAL RESPONSIBILITY PRINCIPLES OF DAIMLERCHRYSLER 2, 3 (2002), *available at* <http://www.imfmetal.org/main/files/DC%20code%20in%20English.pdf>.

57. AGREEMENT BETWEEN IKEA INTERNATIONAL AND INTERNATIONAL FEDERATION OF BUILDING AND WOOD WORKERS (IFBWW) WOOD AND FORESTRY COMMITTEE app. 1 (1998), *available at* <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/ifbww.htm>.

considered a moral *naïf*, “neutral” to the labor practices of those it purchases from.

* * *

In 1965, Howard Lesnick lamented the poverty of U.S. labor policy: “The pressures created by momentous problems,” then of adjustment to technological change, “are contained or released by no more sensitive a legal instrument than a legislative determination to protect neutrals from being drawn into the disputes of others.”⁵⁸ “Those who administer the act,” he thought, should be called upon to “refashion that instrument to serve weightier purposes.”⁵⁹ The call to those who administer the act echoes more insistently anew.

VI. A CONCLUDING OBSERVATION

Section 8(e) is a child of its time: Congress was not alone in being concerned about excessive union power at a time when union power was at its apogee,⁶⁰ of union aggrandizement and “top-down organizing” by the use of secondary boycotts. These tactics were paradigmatic embodiments of the American model of “business,” “bread and butter,” or “pure and simple” unionism.⁶¹ Agreements grounded in social purposes that transcend immediate self-seeking do not fit this model. Whence the second of Thompson’s questions: May a company and a union agree not that the company will deal only with unionized suppliers, but with suppliers who observe generally recognized fair labor standards? The objective is “elsewhere,” to use *National Woodwork* taxonomy, but is it impermissible? May not a union and a company agree that the company will not deal with contractors who exploit child labor?

No case presents itself because American unions, traditionally committed primarily to business unionism, did not seek such agreements. But now, at a time when the statutory promise of employee representation remains just that, an unfulfilled promise, American unions are exploring alternative modalities including, Hoyt Wheeler tells us, variations on models of reformist and social democratic unionism common in Western Europe. This form of unionism aims at “improving the lives of all those human beings who produce goods and services, insuring that they will

58. Lesnick, *supra* note 26, at 1041.

59. *Id.*

60. *E.g.*, Symposium, *Labor Union Power and the Public Interest*, 35 NOTRE DAME L. 591 (1960).

61. HOYT N. WHEELER, *THE FUTURE OF THE AMERICAN LABOR MOVEMENT* 19–20 (2002).

receive the full fruits of their labor.”⁶² Reformist or social democratic unions seek to make common cause with community, church, student, and other groups;⁶³ they use collective bargaining as one, but only one, means of achieving these ends. Note that the presence of a collective bargaining relationship with an employer is not a pre-condition of negotiating a neutrality agreement, binding the employer regarding its contractors, any more than were the agreement to be made by a broad-based community coalition.

Eight American unions are affiliated with the IMF, four with the IFBWW. Consequently, it may well be that the Daimler Chrysler and IKEA framework agreements (among others) made with these (and other) international union federations have “impliedly” been made with a U.S. labor organization. If so, and if the Labor Board were to pursue the General Counsel’s approach, the result would be this: these agreements can continue to govern Daimler Chrysler’s, IKEA’s, and the others’ contracting abroad, for the Labor Act has no extraterritorial application.⁶⁴ So too, absent these U.S. unions’ affiliations, these agreements could have effect here, and for the same reason.⁶⁵ But once an agreement can be implied between a U.S. union and an employer in the U.S. containing social clauses governing whom it will contract with here, Section 8(e) would nullify it. Consequently, it would be permissible for social democratic unions in Europe to export their ideals here, better to realize fundamental labor rights (which the United States has endorsed) and our law’s unrealized promise of workplace representation; but it would be unlawful for domestic unions to import them.

Almost invariably, Section 8(e) is invoked by an employer seeking to free itself of an unwanted agreement. Inasmuch as these global framework agreements have been made willingly,

62. *Id.* at 21–22. Even at the height of union power, Derek Bok and John Dunlop urged American unions to make “an effort at the grass-roots level to work with other groups in resolving community problems.” DEREK C. BOK & JOHN T. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 468 (1970). For a more radical contemporary argument, see DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS* (2003).

63. See, e.g., Michael Bologna, *Attorney Warns Activism is Replacing NLRB Process in Unionizing Drives*, DAILY LAB. REP. (BNA) No. 152, at C-3 (Aug. 9, 2005) (reporting that to secure neutrality agreements, unions are “building coalitions with non-union groups such as civil rights organizations, churches, and environmental groups to pressure employers” as well as other more public tactics).

64. *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168 (3d Cir. 2004).

65. *Int’l Longshoremen’s Ass’n v. NLRB*, 56 F.3d 205 (D.C. Cir. 1995) (secondary boycott ordered by Japanese union having effect in the United States is not governed by U.S. law).

accompanied by publicity attesting to the corporation's social responsibility, one would not expect them to be challenged that way. But the Board's unfair labor practice power is triggered by the complaint of any person: there need be no showing of any adverse effect on the charging party; any person or ideological interest group is free to file a charge.⁶⁶ Inasmuch as an employer who willingly entered upon such an agreement and who is made an unwilling object of such a charge is free nevertheless to continue of its own volition to abide by the agreement's legally unenforceable terms, one has to inquire what earthly purpose would be served by the General Counsel's expenditure of effort and the public's funds to nullify these social clauses.

The most likely practical effect would be to cast a pall of unlawfulness over them, giving legal color to those domestic companies uncertain about assuming the responsibility of monitoring their contractors. A further effect might make church, community, student, and other groups chary of cooperating with unions in pursuit of core labor rights, and, by dividing unions from these coalitions, to dampen the growth of reformist or social democratic unionism, if only in seeking corporate social clauses.⁶⁷ To that perhaps limited extent, Philip Levy's quip that the Board would have the power to freeze progressive groups out of the workplace will have proven prescient.

66. One of the charging parties in the *Heartland Industrial Partners* case, *supra* note 28, was the National Right to Work Legal Foundation.

67. It is possible that such an agreement could continue once the union was severed as a party to it; but that would only emphasize the cleavage.