Winning is Secondary: Secondary Boycotts in the United States and Denmark [Note]

WINNING IS SECONDARY: SECONDARY BOYCOTTS IN THE UNITED STATES AND DENMARK

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ABSTRACT

The Taft-Hartley Act of 1947 removed some of labor's most effective tools for collective bargaining without providing any alternatives. Among other tools, the Act made secondary boycotts illegal and allowed employers to recover damages caused by secondary boycotts. This Note will show how effective these secondary boycotts can be internationally and discuss how the lack of clarity in the American law prevents workers from engaging in constitutionally protected speech. Many argue that the current law is in place to prevent industrial strife from affecting third-party employers. The current law, however, places too powerful of a thumb on the scale in favor of management and effectively chills labor organizations' speech out of fear of a lawsuit over one misstep. This Note explores how Denmark regulates secondary boycotts in an effort to provide an alternative way of thinking about this powerful tool of labor and considers potential next steps to improve existing American law.

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I. INTRODUCTION

In 1981, as part of an effort to expand into Europe, the McDonald's fast-food chain opened its first restaurant in Denmark.[1] The notoriously anti-union chain had managed to avoid engaging in collective bargaining in every country it had expanded into, with the exception of Sweden.[2] In Sweden, McDonald's bowed to the norms of the labor-friendly country right away.[3] However, McDonald's opted against joining the Danish Model of collective bargaining.[4] Instead, it began dealing individually with each employee as it does in most countries.[5]

The Danish Confederation of Trade Unions (LO) was unhappy with this situation and began a campaign against McDonald's in 1982 to pressure it to enter collective bargaining.[6] Initially, the campaign struggled to take off due to the allure and novelty of American fast food.[7] Throughout the eighties, however, the tides began to shift against McDonald's as LO ramped up its campaign.[8]

In 1988, the hotel and restaurant unions' aggressive campaign of picketing in front of McDonald's Danish restaurants helped catalyze a shift in public opinion.[9] By 1989, several of the trade unions represented by LO initiated "sympathy conflicts" with McDonald's.[10] These sympathy conflicts saw the builders' unions refuse to construct any new McDonald's restaurants, the dockworkers' union refuse to unload any McDonald's freight, and the typesetters' union refuse to run any advertisements for McDonald's.[11] Within months of this aggressive new campaign, McDonald's crumbled and agreed to bargain with the hotel and restaurant union.[12] This agreement saw an immediate salary increase for all Danish McDonald's

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1 *McDonald's*, HOVEDBANENS, https://en.hovedbanen.dk/stores-restaurants/mcdonalds/ (last visited Oct. 20, 2022).

2 Matt Bruenig, *When McDonalds Came to Denmark*, PEOPLE'S POL'Y PROJECT (Sept. 21, 2021), https://www.peoplespolicyproject.org/2021/09/21/when-mcdonalds-came-to-denmark/; *see generally* Indigo Oliver, *McDonald's Spies on Union Activists – That's How Scared They are of Workers' Rights*, GUARDIAN (Mar. 2, 2021), https://www.theguardian.com/commentisfree/2021/mar/02/mcdonalds-unions-workers-rights.

3 *See* Bruenig, *supra* note 2.

4 Hans Uwe Petersen, *Boykot McDonalds-Kampagnen,* ARBEJDERMUSEET THE WORKERS MUSEUM, https://www.arbejdermuseet.dk/viden-samlinger/arbejderhistorien/temaer/fagbevaegelsen/boykot-mcdonalds/ (last visited Oct. 20, 2022).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Petersen, *supra* note 4.

10 Thorkild Knudsen, *McDonald's i Defensiven*, ARBEJDERMUSEET THE WORKERS MUSEUM, 7 (Feb. 1989), https://www.arbejdermuseet.dk/wp-content/uploads/2016/09/1989.02-McDonalds-i-defensiven-3-Kuverter-2.1989.pdf.

11 *Id.* at 8.

12 Knudsen, *supra* note 10, at 7.

employees, as well as immediate access to workplace rights they did not have before.[13]

Thirty years later, Danish McDonald's workers are often used as a talking point in the American discourse surrounding the minimum wage.[14] Proponents of raising the minimum wage point out the disparity between Danish workers making $22 per hour while their American counterparts have been fighting for $15 per hour for over a decade.[15] The American conservative might answer that this disparity is unrelated to the minimum wage because Denmark, in reality, has no minimum wage.[16] Both lines of argument ignore the real mechanism of how Danish workers achieved their desirable wages—labor power.

Labor power comes from two main sources: membership in labor organizations and the legal tools available to labor organizations during disputes.[17] Both resources are needed for labor to truly have power. For example, a country with low union membership but very labor-friendly laws would have very limited labor power. Similarly, a country with very high union membership but no laws protecting labor organizations in disputes would also have very low labor power. These concepts can begin to work hand in hand because workers are more likely to join a labor organization if the labor organization has real power under the law.

There are countless aspects of American labor law, unique to the United States, that are not conducive to growing labor power.[18] This Note will focus on one specific aspect, the American prohibition on secondary boycotts, and compare that to the legal regime in Denmark. This Note will argue that clarity of the law is of the utmost importance in labor law because the existence of a right is not meaningful if the workers do not understand its functional limitations. Further, if labor organizations and their workers can face punishment for improperly exercising their unclear rights, then they will likely refrain from engaging in any borderline activity.

The wide disparity in union membership rates between Denmark and the United States is a testament to Denmark's welcoming stance toward labor power. Only 10% of American employees belong to a union, whereas 67% of their Danish

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[13] Petersen, *supra* note 4.

[14] *See* Weston Blasi, *Alexandria Ocasio-Cortez Points Out That McDonald's Workers in Denmark Make $22 an Hour*, MARKET WATCH (Mar. 4, 2021), https://www.marketwatch.com/story/alexandria-ocasio-cortez-points-out-that-mcdonalds-workers-in-denmark-make-22-an-hour-11614798365?mod=search_headline.

[15] *About Us*, FIGHT FOR $15, https://fightfor15.org/about-us/ (last visited Apr. 14, 2021).

[16] *See* Ida Auken, *Danes Don't Have a Minimum Wage. We Have Something Even Better.*, WASH. POST (Mar. 8, 2021, 12:27 PM), https://www.washingtonpost.com/outlook/2021/03/08/denmark-minimum-wage-mcdonalds-aoc/.

[17] *See generally Building Worker Power*, ECON. POL'Y INST., https://www.epi.org/resources/building-worker-power-2021/ (last visited Mar. 17, 2024).

[18] *See Right to Work*, AM. FED'N OF LAB. & CONG. OF INDUS. ORGS., https://aflcio.org/issues/right-work (last visited Mar. 6, 2024).

counterparts are members of a union.[19] There are a variety of differences between Danish and American culture that may account for the disparity in labor power, but the collective bargaining options that are legally available change what unions are able to accomplish.[20] One powerful tool that is a legal right afforded to Danish unions, but not available to American unions in all contexts, is the "Sympatistrejke."[21] Translated to "sympathy strike," a Sympatistreike is defined as any pressure a labor organization puts on an employer with whom they do not have a labor dispute, with the goal of pressuring an employer with whom they do have a dispute.[22] Danish law does not draw distinctions between any secondary activity, considering it all to be legal sympathy action as long as the underlying primary dispute is lawful.[23] The American National Labor Relations Act makes illegal a subset of secondary activity that has power behind it.[24] The tactics used by the LO and McDonald's workers during their Sympatistrejkes in 1989 would be classified as illegal secondary boycotts under the National Labor Relations Board.[25]

This Note will explain the development of the laws surrounding secondary boycotts in both the United States and Denmark. It will argue that the Taft-Hartley Amendment to the National Labor Relations Act has had disastrous effects on labor power in the United States. It will then briefly explore a potential solution to this problem by examining the Biden Administration's proposed Protecting the Right to Organize (PRO) Act.

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[19] News Release, U.S. Dep't of Lab., Bureau of Lab. Stat., *Union Members-2023* (Jan. 23, 2024), https://www.bls.gov/news.release/pdf/union2.pdf; *The Danish Labour Market* DENMARK.DK, https://denmark.dk/society-and-business/the-danish-labour-market (last visited Oct. 20, 2022).

[20] *See generally* Bruenig, *supra* note 2.

[21] *Id.*

[22] *Id.*; Knudsen, *supra* note 10.

[23] *See generally* A&B v. Danish Confederation of Trade Unions, Case No. AR2016.0633 (Arbejdsretten [Lab. Ct.] Mar. 31, 2017) (Den.).

[24] 29 U.S.C. § 158(b)(4).

[25] *See Secondary Boycotts (Section 8(b)(4))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/secondary-boycotts-section-8b4 (last visited Oct. 20, 2022) (Section 8(b)(4) of the [National Labor Relations] Act makes it unlawful for a labor organization or its agents "(i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services.").

II. AMERICAN LABOR LAW

A. The Wagner Act Era

In 1935, as part of the New Deal, the National Labor Relations (Wagner) Act (NLRA) was passed to encourage collective bargaining and discourage work stoppages.[26] As a general matter, the NLRA maintains labor peace by protecting strikes when there is no collective bargaining agreement between parties and withdrawing that protection when parties have entered into a contract containing alternative methods for resolving disputes.[27] The NLRA enumerated a number of rights that employees have, such as the rights to organize, bargain collectively, and engage in concerted activity.[28] The Act also established rules prohibiting employers from restraining these rights.[29]

Further, the NLRA created the National Labor Relations Board (NLRB), a federal agency tasked with enforcing the NLRA.[30] The NLRB is comprised of the Board and the General Counsel—the chief prosecutor for the Board which conducts its work through regional offices.[31] The regional offices investigate and prosecute violations of the NLRA, while the Board acts as a quasi-judicial body that decides whether the cases can be appealed to a federal court.[32] Evidentiary hearings are held before Administrative Law judges who produce recommended orders that are appealable to the Board.[33]

The original text of the NLRA made no mention of secondary boycotts.[34] Many states outlawed secondary strikes through their common law, but some more progressive states permitted them.[35] The Taft-Hartley Act changed all of that.

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26 29 U.S.C. § 151.

27 § 151.

28 § 157.

29 § 158.

30 § 153.

31 *Who We Are*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are (last visited Nov. 21, 2022).

32 *Id.*

33 *See id.*

34 *See National Labor Relations Act (1935)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/national-labor-relations-act (last visited Mar. 5, 2024) [hereinafter NLRA Archives].

35 *See generally* Jerome R. Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 YALE L.J. 341 (1938).

B. The Taft-Hartley Act

The Labor Management Relations (Taft-Hartley) Act of 1947 was drafted in response to a perceived imbalance of labor relations in favor of labor.[36] It was written to amend the NLRA, with the express purpose of "proscrib[ing] practices on the part of labor and management which affect commerce and are inimical to the general welfare" and the implied purpose of putting a finger on the scale to favor management in labor disputes.[37] At the time, the Taft-Hartley Act was controversial, with union leaders referring to it as the "Slave-Labor Bill."[38] When first passed through Congress, President Harry S. Truman even vetoed it, describing it as "unfair to the working people of this country."[39] The veto was subsequently overridden
by Congress.[40]

1. Proscription on Secondary Boycotts

The Taft-Hartley Act defined several unfair labor practices on the part of labor organizations, among them secondary boycotts.[41] Before, the only unfair labor practices included in the NLRA were on the part of employers.[42] Section 8(b)(4)(B) defines secondary boycotts using a two-part test.[43] To establish a violation, the General Counsel must establish that the labor organization engaged in proscribed conduct, and that this conduct had an unlawful object.[44] The Act lists two types of conduct referred to as (i) or (ii) (single 'i' or double 'ii').[45] Single 'i' conduct is defined so as to prevent employees engaged in a labor dispute from convincing individuals employed by a secondary employer to stop working:

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[36] Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 176 (1988).

[37] 29 U.S.C. § 141(b).

[38] *See* Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 766 (1998).

[39] Harry S. Truman, *Veto of the Taft-Hartley Labor Bill*, HARRY S. TRUMAN PRESIDENTIAL LIBR., https://www.trumanlibrary.gov/library/public-papers/120/veto-taft-hartley-labor-bill (last visited Feb. 24, 2023); Audio Recording: Harry S. Truman on the Veto of the Taft-Hartley Bill, UNIV. OF VA. MILLER CTR., at 5:33 (June 20, 1947) https://millercenter.org/the-presidency/presidential-speeches/june-20-1947-veto-taft-hartley-bill.

[40] *Id.*

[41] 29 U.S.C. § 158(b)(4).

[42] NLRA Archives, *supra* note 34.

[43] *Secondary Boycotts (Section 8(b)(4))*, *supra* note 25.

[44] 29 U.S.C. § 158(b)(4).

[45] § 158(b)(4)(i).

> Engag[ing] in, or induc[ing] or encourage[ing] any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services.[46]

Single 'i' conduct is geared toward protecting secondary employers from their own employees turning against them for something that the secondary employer could not control; for example, the Danish McDonald's boycott referred to earlier.[47] There, the LO encouraged typesetters and construction workers (secondary employees) to stop working on McDonald's (primary employer) related products.[48]

Section 8(b)(4)(ii) proscribes labor organizations from "threaten[ing], coerc[ing], or restrain[ing] any person engaged in commerce or in an industry affecting commerce."[49] Double 'ii' conduct attempts to protect a secondary employer or customers of a secondary employer from direct intimidation or coercion by a union.[50] The actions covered by (ii) effects can be more extreme than those covered by (i) because they must rise to the level of threat or coercion instead of encouragement or inducement.[51] Either of these forms of conduct are only unlawful when they are paired with the following object:

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9; provided that nothing contained in clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;[52]

When passed, the Taft-Hartley Act was framed by proponents as a protection for employers against the "abuses which have developed in the field of

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46 29 U.S.C. § 158(b)(4)(i).
47 *Id.*
48 Bruenig, *supra* note 2.
49 § 158(b)(4)(ii).
50 *Id.*
51 § 158(b)(4).
52 § 158(b)(4)(B).

labor relations."[53] The reality is that it took away a very powerful tool previously used by unions without providing any legal alternative.[54] Section 8(b)(4) allows for otherwise prohibited secondary boycotts only when a labor organization has been certified, but the employer refuses to bargain with them.[55]

Additionally, the Taft-Hartley Act allows for secondary employers to recover monetary damages from labor organizations that engaged in secondary boycott activity.[56] This provision is the only instance in the NLRA in which damages can be recovered from unfair labor practices.[57] This inclusion makes it even more important to understand the confusing distinction between illegal secondary boycotts and legal sympathy, considering labor organizations risk a lot of money through missteps. Further, this Act added a requirement that the NLRB prioritize secondary boycott cases and immediately seek an injunction to stop the boycotts.[58]

In an effort to work around this prohibition, the Teamsters union began to insist on "hot cargo" agreements.[59] A hot cargo agreement is one where the employer will agree to cease or refrain from handling, using, selling, transporting, or otherwise dealing in the products of another employer.[60] Hot cargo agreements were highly effective because truck drivers represented by the Teamsters union came into contact with a wide variety of products.[61] The Teamsters would require an agreement that they not transport any nonunion cargo, thus forcing the trucking employers to put pressure on nonunion producers.[62] The success of this loophole led to it being closed with the passage of the Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959.[63]

C. United States Case Law Development of Secondary Boycotts

The American litigation surrounding secondary boycotts primarily focuses on two doctrinal issues. First, there is a grouping of cases that focuses on the statutory interpretation of the text itself. Second, § 8(b)(4)(B) has faced First

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[53] Audio Recording: Senator Robert Taft explains the terms and the purposes for the proposed enactment of the Taft-Hartley Labor Bill, fighting to override President Truman's veto, MICH. STATE UNIV. VINCENT VOICE LIBR., at 00:23 (June 22, 1947), https://catalog.lib.msu.edu/Record/folio.in00004833291.

[54] 29 U.S.C. § 158(b).

[55] § 158(b)(4)(B).

[56] 29 U.S.C. § 160(l).

[57] *Id.*

[58] *Id.*

[59] *Hot Cargo Clauses: The Scope of Section 8(e)*, 71 YALE L.J. 158, 159 (1961).

[60] 29 U.S.C. §§ 158(b)(4)(A), 159(e).

[61] Loc. 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB, 357 U.S. 93, 108–09 (1958).

[62] *Id.* at 106.

[63] 29 U.S.C. §§ 158(b)(4)(A), 159(e).

Amendment constitutional challenges because it treats individuals engaged in the same conduct differently. I will discuss both veins of litigation below.

1. Statutory Interpretation

In 1950, the NLRB decided one of its first secondary boycott cases, *In re Sailors' Union of the Pacific* (*Dry Dock*).[64] There, a labor organization was engaged in a labor dispute with a shipowner.[65] While the ship was parked at a dock owned by a third-party neutral, the labor organization engaged in a picket of the dock.[66] The court explained that a picket on the premises of a primary employer was traditionally viewed as a primary boycott, even though it attempted to dissuade all people from entering or doing business with the employer.[67] The question faced by the court was whether that view changed when the premises of the primary employer was ambulatory and moved to the premises of another employer.[68] The Board held that the move of the premises did not change the character of the dispute.[69] In doing so, it outlined four requirements for labor organizations to follow when engaging in picketing on a secondary employers premises:

> (a) The picketing is strictly limited to times when the situs dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of situs of the dispute ;and (d) the picketing discloses clearly that the dispute is with the primary employer.[70]

Still today, if these *Dry Dock* requirements are not met, the conduct is presumed to be unlawful, but this presumption is rebuttable.[71]

In 1964, the Supreme Court dealt with the distinction between (i) and (ii) conduct in *NLRB v. Servette Inc.*[72] There, a labor organization representing delivery drivers conducted a strike against Servette, a wholesale food distributor.[73] During this strike, union representatives began asking managers of grocery stores to stop handling Servette's goods.[74] Some representative threatened handbilling in front of the stores, but only a small number of handbills were ever distributed.[75] The Court held that this activity would not constitute (i) or (ii) conduct under § 8(4)(B).[76] First,

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64 *See* 92 NLRB 547 (1950).
65 *Dry Dock*, 92 NLRB 547 (1950).
66 *Dry Dock*, 92 NLRB at 548.
67 *Id.*
68 *Id.* at 549.
69 *Id.*
70 *Id.*
71 *Secondary Boycotts (Section 8(b)(4))*, *supra* note 25.
72 *See* 377 U.S. 46 (1964).
73 *Id.* at 47.
74 *Id.*
75 *Id.* at 48.
76 *Id.* at 49.

the activity was not (i) conduct because, while the representatives were attempting to "induce or encourage" the managers, they were doing so only to effect a decision that the manager had the discretion to make, rather than getting the manager to engage in a work stoppage himself.[77] Next, the activity did not constitute (ii) conduct because, as a statutorily protected action, handbilling did not rise to the level of threat, coercion, or restraint.[78]

The Court decided that handbilling was statutorily protected because of the "publicity" proviso included in the Landrum-Griffin Amendments to the NLRA.[79] Section 8(b)(4) has two provisos that seek to explain or limit the other text of the section.[80] First, the sympathy strike proviso allows secondary employees to refrain from crossing a picket line on the primary employer's premise.[81] Next, § 8(b)(4) also includes the publicity proviso which states:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;[82]

On the same day as *Servette*, the Court published an opinion explaining the publicity proviso in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760* (*Fruit Trees*).[83] There, the labor organization called a strike on fruit packers in Washington.[84] The organization sought to institute a consumer boycott of all apples produced in Washington.[85] To grow this boycott, the labor organization began picketing and handbilling in front of Safeway grocery stores, encouraging consumers to not buy Washington apples.[86] The Court held that this activity was not (ii) conduct because it was essentially an extension of the primary dispute.[87]

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77 *Servette Inc.*, 377 U.S. at 51.
78 *Id.* at 57.
79 *Id.*
80 29 U.S.C. § 158(b)(4).
81 § 158(b)(4)(D).
82 § 158(b)(4).
83 *See generally* 377 U.S. 58 (1964).
84 *Id.* at 59.
85 *Id.* at 60.
86 *Id.*
87 *Id.* at 72.

The court explained that the boycott's object was to target only the products produced or distributed by the primary employer.[88] Further, the Court explained that even a successful boycott that saw Washington apples dropped from Safeway stores due to low sales would not remove it from a primary dispute.[89] The Court reasoned that the boycott would only be illegal if the object was to generally target Safeway to get them to drop Washington apples.[90] Here, the Court explained that the object was clearly directed toward the primary employer and, thus, was not an illegal
secondary boycott.[91]

The Court has interpreted the words "produced" and "distributed" in the publicity proviso broadly to include wholesalers as producers when their products are distributed in retail stores.[92] The proviso is always at issue when the target of the boycott is too broad.[93] For example, in *DeBartolo I*, the Court held that a labor organization conducted an illegal secondary boycott when it distributed handbills at the entrance of the mall, calling on customers to not shop at any store therein until the owner of the mall used fairly paid labor.[94] There, the Court determined that the labor organization was engaging in (ii) conduct by attempting to coerce the stores to stop doing business with the mall owner.[95]

In *DeBartolo I*, the labor organization argued that the handbilling it had engaged in was protected by the First Amendment, but the Court decided the case without reaching that issue.[96] A few years later, the Court faced this issue again in *DeBartolo II*.[97] This case arose after the Court remanded *DeBartolo I* to the Board to implement its decision.[98] The Board determined that the peaceful handbilling in question was coercive and fell within (ii) conduct.[99] The labor organization appealed, claiming that the Board's interpretation of § 8(b)(4) was a violation of the First Amendment.[100] This time, the Court interpreted § 8(b)(4) as to not prohibit peaceful handbilling or publication, but rather picketing in front of a secondary employer or violent conduct.[101] This time, the Court came to the conclusion that interpreting § 8(b)(4)(B)(ii) to proscribe peaceful handbilling would violate the

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88 *Fruit Trees*, 377 U.S. at 71.
89 *Id.* at 72.
90 *Id.*
91 *Id.*
92 Edward J. DeBartolo Corp. v. NLRB (*DeBartolo I*), 463 U.S. 147, 153 (1983).
93 *Id.*
94 *Id.* at 151.
95 *Id.* at 157.
96 *Id.* at 158.
97 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council (*DeBartolo II*), 485 U.S. 568 (1988).
98 *Id.*
99 *Id.* at 573.
100 *Id.*
101 *Id.* at 577.

First Amendment.[102] Instead of declaring the entire provision as unconstitutional, the Court put a limit on what type of conduct could be considered coercive.[103]

The distinction between peaceful handbilling and illegal picketing seems helpful, but there is a wide range of conduct that would not clearly be categorized as either.[104] For example, bannering, the practice of hanging signs or banners at locations of secondary employers, is widely allowed under § 8(b)(4) unless it is determined to be signal picketing.[105] Signal picketing occurs when a labor organization erects—but does not patrol with—signage that indicates that secondary action is requested.[106]

The Board has opted to classify experimental bannering operations as expressive speech rather than signal picketing, unless it begins to resemble picketing.[107] For example, the Board dealt with a case in which a construction labor organization was involved in a labor dispute with a construction firm tasked with renovating a hospital.[108] The hospital filed a charge with the NLRB, citing violations of § 8(b)(4) on the part of the labor organization for two separate experimental operations.[109] First, the labor organization staged a mock funeral in front of the hospital.[110] The labor organization also erected a 12-foot tall inflatable rat named "Scabby" in front of the hospital.[111] Initially, the Board determined that, under the law, the mock funeral was picketing because it consisted of patrolling and leafleting around the entrance of the hospital.[112] They were able to make this decision without reaching the issue of the rat, but this decision was overturned by the D.C. Circuit.[113] Upon remand, the Board determined the rat was not (ii) conduct because it did not involve patrolling or masses of people.[114]

Further, the Board illustrated clear instances that would not be considered picketing but are still coercive and constitute (ii) conduct.[115] For example, throwing bags of trash in the lobby of a secondary employer would not be picketing but may be coercive and still rise to (ii) conduct.[116] The court explained that the inflatable rat did not rise to the level of coercive conduct.[117]

In summary, the Board and the Supreme Court have provided a fair amount of guidance on the statutory interpretation of § 8(b)(4). First, the Board outlined the

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102 *DeBartolo II*, 485 U.S. at 588.
103 *Id.*
104 *Secondary Boycotts (Section 8(b)(4))*, *supra* note 25.
105 *Id.*
106 Sheet Metal Workers Int'l Ass'n, Loc. 15, 356 NLRB 1290, 1293 (2011).
107 *Id.* at 1292.
108 *Id.*
109 *Id.*
110 *Id.* at 1290–91.
111 *Id.* at 1290.
112 *Sheet Metal Workers*, 356 NLRB at 1291.
113 *Id.*
114 *Id.*
115 *Id.* at 1292.
116 *Id.*
117 *Id.*

rules that labor organizations are to follow in common situs cases.[118] Next, the Court provided guidance on how to interpret the publicity proviso of § 8(b)(4).[119] Finally, the Board provided some guidance on how to deal with the grey area between peaceful handbilling and picketing.[120]

2. First Amendment

Next, I will examine the cases in which courts deal directly with the First Amendment concerns of § 8(b)(4). In 1951, the Supreme Court took on a case involving a general contractor building a single-family home with the help of electrical and carpentry subcontractors.[121] There, the electrical subcontractor became engaged in a labor dispute with a labor organization.[122] The labor organization's agent went to the site of the home and talked with the carpentry subcontractor and his workers, who were members of a separate labor organization.[123] The agent told them that his labor organization was engaged in a dispute with the other subcontractor and then began picketing outside of the house.[124] The other subcontractor and his workers stopped working.[125] The general contractor filed an NLRB charge against the electrical labor organization citing (i) conduct.[126] The labor organization argued that a prohibition against peaceful pickets would constitute First Amendment infringement.[127] The Court held that even peaceful picketing is prohibited through the text of the NLRA because it serves as inducement or encouragement for secondary workers to cease working.[128] The Court further held that this prohibition does not violate the First Amendment because Congress was entitled to prohibit the "substantive evil" that is secondary boycotting.[129] Since then, the Court has routinely found peaceful picketing to be expressive conduct that is entitled to less protection than "pure speech."[130]

Of note, this case was decided before the Landrum-Griffin amendments of § 8(b)(4), which created the distinction between (i) and (ii) conduct.[131] Consequently, it is important to consider the substantial change in First Amendment

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118 *Dry Dock*, 92 NLRB. at 547.
119 See *DeBartolo II*, 485 U.S. 568.
120 *Sheet Metal Workers*, 356 NLRB at 1293.
121 Int'l Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 695 (1951).
122 *Id.* at 697.
123 *Id.* at 696–97.
124 *Id.* at 697.
125 *Id.*
126 *Id.* at 697–98.
127 *Int'l Bhd. of Elec. Workers*, 341 U.S. at 705.
128 *Id.*
129 *Id.*
130 Carey v. Brown, 447 U.S. 455, 460 (1980).
131 29 U.S.C. § 158(b)(4).

law since 1951.[132] First, in 1972, the Court was faced with a constitutional challenge to an Illinois ordinance.[133] The ordinance in question prohibited all picketing within a certain distance from a school.[134] The only exception to this rule was for peaceful picketing of a school involved in a labor dispute.[135] The Court declared the ordinance to be unconstitutional, explaining that it discriminated on the basis of the subject matter of the message.[136] The Court claimed that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[137] Section 8(b)(4) is the opposite of the ordinance in this case; it allows all picketing other than secondary boycotts.[138] This reasoning would equally apply to § 8(b)(4) because enforcement of the secondary boycott proscription requires discrimination on the basis of the content of the message.[139] For example, two union members could be picketing outside of a grocery store—one with a sign that says, "Do not buy Washington Apples" and the other holding a sign that reads, "Do not shop at Safeway because they sell Washington Apples." In this example, one union member is likely to be found to have violated § 8(b)(4) while the other will not be. The only distinction between the two speakers is the content of their message, yet they would likely face different legal consequences. This example clearly shows that § 8(b)(4) is a restriction on expression because of its message.

A constitutional challenge of § 8(b)(4) was brought in the Ninth Circuit in 2019.[140] There, a general contractor had hired two subcontractors to aid the construction of a casino.[141] Like the 1951 case, one of the subcontractors became embroiled in a labor dispute with the labor organization representing his workforce.[142] The labor organization began lawfully picketing the jobsite.[143] Then, an agent of the labor organization began sending messages to the workers of the other subcontractor, such as "Friends don't let friends cross" and links to webpages containing "Picket Line Etiquette."[144] The Ninth Circuit held that these messages were (i) conduct because they were made to induce or encourage neutral employees to stop working.[145] Relying solely on the 1951 case, the Ninth Circuit concluded

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132 *See generally* Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Reed v. Town of Gilbert, 576 U.S. 155 (2015); Janus v. Am. Fed'n State, Cnty. & Mun. Emps., Council 31, 942 F.3d 352 (2019).

133 *See generally* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

134 *Mosley*, 408 U.S. at 92.

135 *Id.* at 93.

136 *Id.* at 94.

137 *Id.* at 95.

138 29 U.S.C. § 158(b)(4).

139 *See* § 158(b); *Mosley*, 408 U.S. at 92.

140 *See* NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers (*Bridge Workers I*), 941 F.3d 902, 904 (9th Cir. 2019).

141 *Id.*

142 *Id.* at 905.

143 *Id.* at 904.

144 *Id.*

145 *Bridge Workers I*, 941 F.3d. at 905.

that § 8(b)(4) did not infringe on the First Amendment.[146] The Supreme Court denied certiorari on this case in 2021.[147]

This case illustrates the reluctance of courts to make findings of unconstitutionality in § 8(b)(4). The agent was not prohibited from talking with the workers employed by the other subcontractor.[148] A court would therefore have to examine the content of the speech because although sending a birthday card would not be an unfair labor practice, sending picket etiquette information would be.

The United States law surrounding secondary boycotts is difficult for most labor lawyers to understand, let alone the average worker. This confusion emanates from both a strange statutory construction and a labored constitutional interpretation. Between the inherent confusion surrounding the law, the NLRA's allowance of civil damages for its violation, and the zeal required by the NLRB in enjoining secondary boycotts, it makes sense why labor organizations are reluctant to engage in any secondary activity.

III. LABOR LAW IN DENMARK

Like the history of labor laws in the United States, the development of labor law in Denmark tracks the history of the labor movement in the country.[149] In the late nineteenth century, there was widespread labor unrest in Denmark.[150] In many localities, workers began using 'turn-screw' tactics that saw them strike a single business in a locality until that employer caved to their demands.[151] Then, they would use the same tactics on a different employer in the locality.[152] In response, Danish employers began counteracting these labor tactics through the use of lockouts, effectively barring entire workforces from employment when strikes began to develop.[153]

Ongoing disputes prompted employers to come together and to establish an employers' association, the Danish Employers Confederation (DA), in 1896.[154] DA's objective was to take "joint action in the event of labor conflicts arising and

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146 *Id.* at 906.

147 *See* Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers v. NLRB, 141 S. Ct. 2671 (2021).

148 *See generally Bridge Workers I*, 941 F.3d at 902.

149 *See A Brief History of the Danish Workers' Movement*, FAGLIGT FAELLES FORBUND, https://tema.3f.dk/bjmfimmigrant/about-the-union/a-brief-history-of-the-danish-workers-movement. (last visited Oct. 20, 2022).

150 *Id.*

151 Carsten Jørgensen, *September Compromise Marks 100th Anniversary*, EUROFOUND (Aug. 27, 1999), https://www.eurofound.europa.eu/en/resources/article/1999/september-compromise-marks-100th-anniversary.

152 *Id.*

153 *Id.*

154 *DA's History*, CONFEDERATION OF DANISH EMPS., https://www.da.dk/en/about-da/das-history/ (last visited Oct. 21, 2022).

. . . to achieve more peaceful and stable conditions in the workplace."[155] In 1898, employers acting together pressured smaller unions to unite and begin LO, a conglomeration of unions across different industrial sectors.[156] At first, the creation of these competing federations only served to heighten labor tensions in the country.[157] These tensions culminated in a "preventative war" of lockouts initiated by DA that saw half of the country's workforce cease work between May and September of 1899 and resulted in over three million labor hours lost. [158]

Widespread tension was finally quelled in September of 1899, when the two federations signed the Hovedaftale mellem LO og DA (Main Agreement between LO and DA).[159] This agreement, also known as the September Compromise, has been amended many times since 1899 and serves as the foundational text of the labor law regime in Denmark.[160] While this agreement only binds the Federations and their member parties, it has positive effects for all workers because it acts as a starting point for all employment negotiations.[161]

The Main Agreement established the framework for collective bargaining between the two parties' member organizations.[162] It is not a collective bargaining agreement itself, but it provides both parties with important rights to put an end to the labor unrest.[163] Among other provisions, it granted the workers the right to unionize and collectively bargain, which gave them protections against employer lockouts.[164] For employers, it secured their right to direct the work of their employees under collective bargaining agreements, putting an end to the successive turn-screw strikes.[165] The Main Agreement also explicitly protects the workers' right to engage in secondary boycotts:

> Where a collective agreement has been concluded, no industrial action (strike, blockade, lockout or boycott) may be taken in the area covered by the agreement and for as long as the agreement is in force, unless this is provided for in the "Standard rules governing industrial disputes" or in the collective agreement. Sympathy strikes or sympathy lockouts may otherwise be established in accordance with agreements and case law.[166]

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155 *DA's History*, *supra* note 154.

156 *See A Brief History of the Danish Workers' Movement*, *supra* note 149.

157 *Id.*

158 Jørgensen, *supra* note 151.

159 *Id.*

160 *Introduction to the Danish Labour Court*, ARBEJDSRETTEN, *https://arbejdsretten.dk/labour-court/* (last visited Oct. 22, 2022).

161 Natalie V. Munkholm, *Lawful Secondary Action - The Case of Denmark and Cross-Border Establishments*, 5 KUTAFIN L. REV. 222, 225 (Apr. 2018).

162 *Id.*

163 *Id.*

164 *Introduction to the Danish Labour Court*, *supra* note 160.

165 *Id.*

166 Munkholm, *supra* note 161, at 226.

A. Dispute Resolution under the Main Agreement

The Main Agreement gave both parties many rights, but it was initially unclear who would resolve disputes as to these rights.[167] In 1900, the Danish government created Arbejdsretten (Labor Court), which served as a dispute resolving body for labor purposes.[168] The Labor Court, existing outside of the traditional Danish court system, is located in Copenhagen but has jurisdiction over the entire country.[169] The court is composed of 49 members: a president, 5 vice presidents, 12 ordinary members, and 31 substitute members.[170] The president and vice presidents are appointed by the Minister of Employment and are usually members of the Danish Supreme Court.[171] The remaining ordinary and substitute members are equitably appointed on the recommendation of employer and employee organizations and are usually the chairmen of said organizations.[172] Cases before the court are heard by 3 members appointed by employees, 3 members appointed by employers, and either a vice president or the president.[173] If the party initiating the dispute is not represented by the trade organizations that recommended side-specific members, then they may opt to have their case heard by one vice president or the president alone.[174]

Once it is determined who will be on the panel hearing the case, the process follows that of a traditional trial—with evidence production and witness testimony.[175] For a case to initiate, both sides must have attempted settlement negotiations and exhausted their remedies under industrial arbitration.[176] Once completed, the Labor Court will order a joint meeting between the involved parties, as well as other representatives for the LO and DA, to discuss the alleged violation of the main agreement.[177] If a labor organization begins a work stoppage, then they must alert the involved trade organizations as well as the Labor Court, which must hold a joint meeting within a day of the commencement of the work stoppage.[178]

In absence of a work stoppage, a case comes to the Labor Court in the form of a complaint that includes the factual and textual basis from the Main Agreement upon which the allegation is founded.[179] For each dispute, the tribunal hearing the

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167 *Introduction to the Danish Labour Court*, *supra* note 160.
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*
173 *Introduction to the Danish Labour Court*, *supra* note 160.
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.*
178 *Introduction to the Danish Labour Court*, *supra* note 160.
179 *Id.*

case will convene only twice: once to hear the evidence and once to announce the decision.[180] After both sides have presented their case, the panel retires to a conference room to deliberate.[181]

At this time, each member of the panel will vote for the outcome of the case and explain why they believe the outcome is appropriate.[182] The voting process begins with a member of the panel who was appointed on recommendation of the employer organizations, then alternates to an employee-side member, finishing with the vote of the presiding judge.[183] Once decided, a summary brief of the case is released with the outcome.[184] There are no dissenting opinions, and the panel members are barred from discussing the voting, making all decisions appear unanimous.[185] Unlike American courts, the Danish Labor Court does not have the power to issue injunctions to end work stoppages.[186] Instead, the remedy most commonly awarded by the Labor Court is monetary damages for illegal work stoppages.[187] Decisions made by the court are broadly unappealable and final.[188]

The court labels conflicts between the employers and workers as either a conflict of interest or a conflict of right.[189] A conflict of interest is a normal dispute between the employer and worker that does not implicate a right laid out in the Main Agreement.[190] These disputes must be resolved between the parties or by an industrial arbitration tribunal.[191] Conflicts of right, on the other hand, are disagreements that implicate a right laid out in the Main Agreement.[192] The Arbejdstretten only hears cases on conflicts of rights that allege a breach of the Main Agreement.[193]

Different from the American system, the Danish industrial arbitration regime remains directly in the realm of the Labor Court. In Denmark, arbitration cases are heard by five-member-panels composed of two arbiters selected by each side and a presiding arbiter selected by the President of the Labor Court.[194] The main purpose of these tribunals is to ascertain the proper interpretation of the collective bargaining agreement.[195] There are a small number of issue areas that

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180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Introduction to the Danish Labour Court*, *supra* note 160.
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 *Introduction to the Danish Labour Court*, *supra* note 160.
191 *Id.*
192 *Id.*
193 *Id.*
194 *Introduction to the Danish Labour Court*, *supra* note 160.
195 *Id.*

have permanent arbitration tribunals.[196] For example, non-objective dismissals are always decided by a permanent tribunal.[197]

The parties to cases before the Labor Court are always the employer or employee organizations to which the parties of the original conflict belong.[198] For example, if there were a conflict of rights between a McDonald's worker and his employer after 1989, the case in front of the Arbejdstretten would be partied by the Restaurant and Hotel Workers Union and the Restaurant and Hotel Employers instead of McDonald's and the individual.

B. Secondary Boycotts in Denmark

While secondary boycotts are widely available to Danish labor organizations, there are some rules that the organization must follow to be legally protected.[199] Among these rules is a requirement to give the primary employer proper notice of the initial strike and of the subsequent secondary boycott.[200]

In 2017, the Labor Court released a decision that defined the bounds of a proper notification of a secondary boycott.[201] There, two sole-proprietorship farmers had filed complaints with the Labor Court concerning notifications from F3, a labor organization representing agricultural workers, which suggested an impending secondary boycott.[202] Both farmers had exclusive milk deals with Arla, the largest dairy distributor in Scandinavia.[203] Both farms employed very few people and guaranteed no minimum wage, overtime pay, or other workplace protections afforded by bigger farms.[204] One farm employed three individuals who were members of F3, while the other employed none.[205]

At that time, under the belief that membership would soon follow, F3 utilized a strategy of securing agreements with potential employers even before any employees were available to work.[206] Importantly, pre-hire agreements like these are also mostly illegal under the American NLRA.[207]

F3 sent both farms an initial notification requesting that the farmers engage in collective bargaining with F3 at risk of a "strike, blockade or secondary

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196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.*
200 A&B v. Danish Confederation of Trade Unions (*A&B*), Case No: AR2016.0633 (Arbejdsretten [Lab. Ct.] Mar. 31, 2017) (Den.).
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*
205 *A&B*, Case No. AR2016.0633.
206 *A&B*, Case No. AR2016.0633.
207 *See generally* 29 U.S.C. § 158(a)(3).

boycott."[208] The notice to the farmer that employed F3 members included notification of member employees but did not name the employed members.[209] Both farmers decided against collectively bargaining with F3.[210] Then, F3 sent a second notification announcing the date the strike was to begin, along with an announcement that F3 would request LO to engage in a sympathy conflict.[211] Strikes began at both farms, but did not have a strong initial effect due to the low F3 membership of the employees.[212] Another notice was then sent to both farmers explaining that in a week's time a secondary conflict would be initiated that would see all union transportation, electricity, agricultural, etc. workers stop engaging with the farmers.[213] Both farmers claimed that this secondary boycott would put them out of business and filed complaints to the Labor Court.[214]

The Labor Court explained that the only two requirements for a legally protected secondary boycott are a finding that the underlying main conflict is legally justified, and proper notice to the employer of the nature of the secondary action.[215] They further explained that in order to notify an employer when a collective bargaining agreement is not in place, the strike notice must include the names of the member employees.[216] With this reasoning, the court found for the farmer who employed three F3 members because proper notice to him about the primary strike required the names of his employees who were also members of F3.[217] Thus, they concluded that the underlying primary conflict was not legally justified due to insufficient notice.[218] As such, the subsequent secondary boycott was not legally protected.[219]

As to the farmer who employed no F3 members, the Labor Court held for F3.[220] In this instance, F3 had no duty to alert the farmer because none of the employees were members.[221]

This case serves to illustrate just how powerful the labor unions are in Denmark with the help of secondary boycotts. If the union had done everything properly, it is hard to imagine what the farmers could have done to stop the secondary boycott other than engaging in collective bargaining. It is easy to begin to believe that this system offers no limits on the power of labor organizations except minor procedural requirements.

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208 *A&B*, Case No. AR2016.0633.
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 *A&B*, Case No. AR2016.0633.
215 *Id.*
216 *See id.*
217 *See id.*
218 *Id.*
219 *Id.*
220 *A&B*, Case No. AR2016.0633.
221 *Id.*

In 2012, the Labor Court dealt directly with how far employers could go.[222] Once again, F3 became engaged in a dispute with a restaurant owner over a collective bargaining agreement.[223] The restaurant owner had recently purchased the restaurant and registered with the Christian Trade Association (CTA).[224] The CTA is a trade organization that represents employers across many sectors, but has a preexisting agreement to only employ members of the Christian Trade Union (CTU).[225] Before his purchase, the restaurant had an agreement in place with F3 that ceased to have authority upon registration with the CTA.[226]

This change in registration upset F3, who began sending strike notices and requesting a new agreement with the restaurant owner.[227] The restaurant owner explained that because he already had a similar agreement with the CTU, he would not negotiate with F3.[228] This did not satisfy F3, who initiated a strike and blockade against the restaurant.[229] The blockade effort included the hanging of signage and distributing of leaflets asking customers to avoid the restaurant.[230] Some signage included a poor review of the restaurant, and others even suggested alternative restaurants that had agreements with F3.[231]

After months of no change from the restaurant owner, F3 announced that it was initiating a sympathy conflict that would affect the mail delivery, waste removal, beer and wine supply line, and advertising ability of the restaurant.[232] The restaurant was still able to operate, and the owner was motivated to outlast F3, causing a significant amount of media attention to be directed at the dispute.[233] Within a month of announcing the sympathy conflict, F3 began surveilling the restaurant and sending threatening emails to known business-owning guests, implying secondary repercussions for their businesses.[234] These messages made the issue more controversial and caused people to support the restaurant against what was seen as an overstep by F3.[235] At one point, the owner of the restaurant even claimed that the dispute had been good for business.[236] It was disputed between the

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222 Christian Emps. Ass'n for Rest. Vejlegården v. Danish Confederation of Trade Unions (*Christian Emps. Ass'n*), Case No. AR2012.0341 (Arbejdsretten [Lab. Ct.] Nov. 29, 2012) (Den.).

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 *Id.*

228 *Christian Emps. Ass'n*, Case No. AR2012.0341.

229 *Id.*

230 *See id.*

231 *Id.*

232 *Id.*

233 *See id.*

234 *Christian Emps. Ass'n*, Case No. AR2012.0341.

235 *Christian Emps. Ass'n*, Case No. AR2012.0341.

236 *Id.*

parties which collective agreement was better for the employees.[237] In preparation for the case, the court requested Bent Moos, a notable Danish trade unionist and co-founder of the Danish Communist Party (KP), to review both collective agreements, and he determined the F3 agreement was better for the employee.[238]

The Labor Court took the case after a complaint was filed by the restaurant owner.[239] The Court explained that secondary conflicts are widely available to Danish unions, with the only major requirement being the legality of the underlying primary action.[240] In determining the legality of the underlying primary action, the court looks to four factors: the nature of the conflict, the purpose of the conflict, the means of the conflict, and the scope and effects of the conflict.[241]

First, the conflict must be between an employee organization and an employer and about the terms and conditions of a new collective bargaining agreement.[242] Next, the purpose of the conflict must be a reasonable attempt to provide uncovered employees with a collective bargaining agreement.[243] Further, the means taken to further the strike must themselves be legal.[244] For example, it is illegal for unions to physically block the entrance or exit of a workplace.[245] Finally, the scope and impact of the conflict must be proportionate to the goal the union seeks to achieve.[246] When engaging in a proportionality assessment, the Labor Court is very reluctant to find the action to be unproportionally illegal.[247] The only real proportionality question is whether or not the employer is entirely cut off from maintaining his business.[248]

Here, the court determined that the valid purpose of F3 was to maintain and defend the established contractual position before the restaurant owner purchased the restaurant.[249] The court further found that F3's purpose was legal, as they were using reasonable efforts to facilitate the urgent adoption of F3's agreement.[250]

The court did take issue with the underlying legality of some of F3's actions.[251] Included among these actions were the posting of signs and leaflets encouraging customers to eat elsewhere, the emailing of restaurant customers, and the prohibition on waste collection, which created a safety issue.[252] Since these

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237 *Id.*
238 *Id.*
239 *Id.*
240 *Christian Emps. Ass'n*, Case No. AR2012.0341.
241 *Id.*
242 *Id.*
243 *Id.*
244 *Id.*
245 *Id.*
246 *Christian Emps. Ass'n*, Case No. AR2012.0341.
247 *Id.*
248 *Id.*
249 *Id.*
250 *Id.*
251 *Christian Emps. Ass'n*, Case No. AR2012.0341.
252 *Id.*

actions did not implicate the legality of the primary dispute, the court held that these actions could not be used to challenge any other legal means of the secondary boycott.[253]

This outcome is particularly interesting because it does nothing to punish F3 for the illegal action—other than mandating an acknowledgment that the actions were illegal.[254] This is intriguing because at trial, the restaurant owner claimed that the secondary action had actually caused him to lose hundreds of thousands of Kroner.[255] Surely some of that loss could be attributed to the illegal actions of F3, but F3 was not ordered to pay anything.[256] The only charges that the Labor Court levied were court costs, and they were to be paid by the CTA and the LO.[257] This decision is further interesting because the court makes clear they are very hesitant to find a lack of proportionality between the goal and the means of the union's activity, unless the activity substantially negatively affects employers who are not a member of the employers confederation.[258]

It appears that Danish labor unions are able to do virtually anything and, even when they are wrong, they will face no consequences. While the court offers broad deference to the actions of the unions, there are some occasions where they will prevent planned actions by declaring them illegal: for example, when the union seeks a collective bargaining agreement for work that is already covered by unions that belong to the same trade union confederation.[259] This type of conflict is seen as going against the essence of the Main Agreement.[260]

The Labor Court explained another exception to the general deference to union behavior in a 2014 case.[261] There, F3 sought to initiate a blockade and strike against a multinational transportation employer.[262] The transportation employer began in Denmark, but over its life expanded to many countries, including Estonia.[263] Each country was represented by a separate corporate entity, but were all owned by the transportation employer.[264] While some vehicles were in Denmark, most had to travel in and out of many countries across the European Union.[265] Obviously, this problem of crossing many borders also applied to the employees

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253 *Id.*

254 *See id.*

255 *Id.*

256 *Id.*

257 *Christian Emps. Ass'n*, Case No. AR2012.0341.

258 *Id.*

259 CAC Au2parts v. Danish Confederation of Trade Unions, Case No. AR2017.0662 (Arbejdsretten [Lab. Ct.] June 11, 2018) (Den.).

260 *Id.*

261 *See generally* Kim Johansen Transport OÜ v. Danish Confederation of Trade Unions, Case No: AR2014.0028 (Arbejdsretten [Lab. Ct.] Apr. 9, 2014) (Den.).

262 *Id.*

263 *Id.*

264 *See Kim Johansen Transport OÜ*, Case No. AR2014.0028.

265 *Id.*

driving the vehicles.[266] Thus, at any given moment the driver could be from one country, driving a vehicle owned by an entity in another country, while physically in a third country altogether.[267] Here, the employees at issue were hired in Estonia, but required to drive cars registered in Denmark and owned by the umbrella corporation while in Denmark.[268] These employees were not paid according to the existing agreement between F3 and the transportation employers union that covered Danish employees.[269] F3 became aware of this and began sending requests to bargain, as well as notices of strike to seek coverage for the Estonian drivers.[270]

Here, the court determined that the activities of the Estonian drivers in Denmark were a natural and subordinate aspect of the transportation industry.[271] They further explained that the distance in Denmark made up less than 3% of all distance traveled by the Estonian drivers.[272] Thus, the court determined that F3's interest in covering those workers did not entitle them to engage in primary or secondary conflicts.[273] However, they did not preclude the possibility of entitling the unions to these actions when there are special circumstances that have sufficient strength and topicality.[274]

IV. THE PRO ACT AND WHAT COMES NEXT

The Protecting the Right to Organize (PRO) Act was introduced in the House of Representatives in February of 2021 with a goal of increasing labor power in the United States.[275] The Act would remove the § 8(b)(4) provisions of the NLRA, ending the proscription on secondary boycotts.[276] This change would increase labor power simply because § 8(b)(4) has a chilling effect on the conduct that labor organizations are willing to engage in.

Additionally, the PRO Act would allow employees to recover damages from their employer for illegally firing or retaliating against them.[277] Currently, the only civil damages that the NLRA authorizes are the result of injury from illegal

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266 *Id.*
267 *Id.*
268 *Id.*
269 *Id.*
270 *See Kim Johansen Transport OÜ*, Case No. AR2014.0028.
271 *Id.*
272 *Id.*
273 *Id.*
274 *Id.*
275 Don Gonyea, *House Democrats Pass Bill that Would Protect Worker Organizing Efforts*, NAT'L PUB. RADIO (Mar. 9, 2021), https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts.
276 *Id.*
277 Celine McNicholas & Lynn Rhinehart, *The Pro Act*, ECON. POL'Y INST. (May 2, 2019, 3:25 PM), https://www.epi.org/blog/the-pro-act-giving-workers-more-bargaining-power-on-the-job/.

secondary boycotts.[278] The Act also would require the NLRB to seek an injunction to reinstate employers who were illegally fired or retaliated against.[279] This change would flip the current power balance from favoring management to favoring employees.

The PRO Act would also override state "right-to-work" laws that allow employees to refuse membership in a union representing their workplace.[280] These laws allow employees to get all the benefits of union representation without any of the burden of paying dues.[281]

This bill passed the House a month after being introduced but is unlikely to be introduced in the Senate anytime soon.[282] The expansive nature of this Act illustrates how much of the current labor law regime suppresses labor power. With this iteration unlikely to become federal law anytime soon, future iterations of a PRO Act should, at minimum, seek to make the law surrounding secondary boycotts in the United States as clear as possible because workers are unlikely to exercise their rights if they do not fully understand them.

Alternatively, politicians may need to adopt other strategies to make these changes, such as passing smaller provisions independently. A good start for this strategy could be a small change that would prove valuable to unions: simply repealing § 10(l) of the NLRA, which allows for employers to seek damages from labor organizations who engage in secondary boycotts. While this would not directly change the legality of secondary boycotts, it would take away much of the current risk faced by labor organizations wishing to engage in secondary pressure that they deem lawful. This simple change would allow for a more balanced application of the law and would provide labor organizations with more freedom to engage in borderline or experimental secondary behavior.

V. CONCLUSION

If a sweeping labor bill is not politically feasible, then other changes need to be made to add clarity on the law. One way to do this is for the Supreme Court to take up a secondary boycott case and directly deal with the First Amendment issues presented. This would be the first time since 1951 that the Court has directly dealt with the issue.[283] Currently, § 8(b)(4) seems to go against the developments in First Amendment law since 1951. Whether the Court upholds it is not relevant; what matters is the clarity the Court would provide regarding how it interacts with First Amendment doctrine.

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278 29 U.S.C. § 160(l).
279 McNicholas & Rhinehart, *supra* note 277.
280 *Id.*
281 *See Right to Work*, *supra* note 18.
282 Gonyea, *supra* note 275.
283 *See Int'l Bhd. of Elec. Workers,* 341 U.S. at 694.

While a radical move towards the labor policies of Denmark is exceedingly improbable, it is illustrative of the power of secondary action. Even if the United States adopted all of Denmark's labor policies, there would still be an uphill battle for labor organizations to grow their power to levels comparable to those in Denmark. Nevertheless, certain aspects of labor law policy need to change before such levels could become attainable.