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ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain

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INTRODUCTION

In recent times, low wage non-union workers have staged noteworthy protests and job actions against alleged inferior working conditions. Protests against Walmart, strikes against fast food restaurants, and immigration rallies by unauthorized workers offer ready examples. In these protests and job actions various *non*-union labor advocacy groups, sometimes collectively denoted as "ALT-Labor," have often led the involved workers.[1] This article addresses legal problems that might arise from ALT-Labor coordination[2]: when one ALT-Labor group protests on behalf of or assists another such group.[3] Imagine, for example, a situation in which

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1 Some of the groups operate within an entire industry, examples include Restaurant Opportunities Center, the New York Taxi Drivers' Alliance, and Domestic Workers United; *see* Josh Eidelson, *ALT-Labor*, THE AMERICAN PROSPECT (January 29, 2013) *available at* http://prospect.org/article/ALT-Labor; others operate throughout a region premised on religious or racial justice motivations. *See e.g*., Arise Chicago (Religious), http://arisechicago.org/, and New Orleans Workers' Center for Racial Justice (Racial), https://www.google.com/#q=New+Orleans+Worker+Center. A single-employer example of such a group is OURWalmart, which has staged work stoppages against Walmart. *See* Josh Eidelson, Breaking: Wal-Mart workers on strike, defying firings, Salon (October 18, 2013) *available at* http://www.salon.com/2013/10/18/breaking_wal_mart_workers_on_strike_in_florida/. Even a brief review of Janice Fine's work will reveal the very broad array of worker center structures. JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006). Also continuously useful to my purposes is Alan Hyde's work on new forms of labor institutions. Alan Hyde, *New Institutions for Worker Representation in the United States: Some Theoretical Issues*, 50 N.Y.L.S. L. REV. 385 (2006)

2 *See e.g*. Micah Uetricht, *Retail and Fast Food Workers Strike in Chicago's Magnificent Mile*, THE NATION (Apr. 24, 2013) (describing a protest event at Chicago's "Miracle Mile" participated in by low wage employees of Macy's, Subway, Victoria's Secret, McDonald's, Nike, and Dunkin Donuts) *available at* http://www.thenation.com/article/174016/retail-and-fast-food-workers-strike-chicagos-magnificent-mile#. The "miracle mile" event was apparently coordinated by "Fight For 15," an umbrella group coordinating workers across employers and industries—the fast food and retail industries. Among "Fight For 15"'s demands is "the right to form a union without retaliation." http://fightfor15.org/en/for-workers/.

3 As David Rosenfeld usefully notes ALT-Labor, especially worker centers, actually pre-dates the existence of unions or modern labor statutes, so it makes some sense that as modern labor law has been effectively dismantled earlier prototypes of collective labor groups would emerge. *See* David Rosenfeld, *Worker Centers: Emerging Labor Organizations – Until they Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & L. LAW 469, 472-74 (2006) (hereinafter Rosenfeld, *Worker Centers*). A full discussion of the matter is beyond the scope of this article.

OURWalmart members[4] participate in a protest organized by Fast Food Forward[5] at the premises of a fast food restaurant. Imagine further that the OURWalmart members attempt to persuade fast food workers to strike or customers not to enter the restaurant. In such circumstances the OURWalmart group could incur very serious legal liability under labor law's obscure and complicated "secondary boycott" rules.[6] Those rules in essence prohibit "labor organizations" involved in a labor dispute to pressure in specific proscribed ways "neutrals" to a labor dispute.[7] Thus, if OURWalmart has a dispute with Walmart any pressure it applies to a neutral fast food restaurant could be subjected to legal scrutiny.

Secondary boycott complications are made more likely by recent escalation of nonunion ALT-Labor activity. Fast food worker strikes occurring regularly over the last couple of years led by groups like Fast Food Forward offer a prime example of ALT-Labor in action. On August 29, 2013, workers in sixty cities walked off the job, a significant labor development that followed a series of smaller such strikes earlier in 2013.[8] The strikes were conducted at McDonald's, Burger King, and Kentucky Fried Chicken, and extended to the Southern United States, historically a region hostile to traditional labor union organizing.[9] The impact of the strikes was mixed: "Some targeted restaurants were temporarily unable to do business because they had too few employees, and others seemingly operated normally."[10] A second wave of similar strikes transpired in about one hundred U.S. cities on December 5, 2013.[11] The impact of those strikes was also inconclusive as of this writing though their notoriety is undeniable.[12] The "days without immigrants" rallies of 2006 provide another example of widespread ALT-Labor protest.[13]

4 The group's website reflects that its mission is "to ensure that every Associate [of Walmart], regardless of his or her title, age, race, or sex, is respected at Walmart. We join together to offer strength and support in addressing the challenges that arise in our stores and our company every day." OURWalmart website *available at* http://forrespect.org/our-walmart/about-us/. The acronym "OUR" stands for "Organization United for Respect."

5 According to the group's website, "Fast Food Forward is a movement of NYC fast food workers to raise wages and gain rights at work. It is part of the national movement of low-wage workers fighting for a better future." *See* http://fastfoodforward.org/.

6 29 U.S.C. 158(b)(4)(B)

7 *See infra*. Section I

8 Atossa Araxia Abrahamian, U.S. Fast-Food Workers Protest, Demand A 'Living Wage', Reuters, *available at* http://www.reuters.com/article/2013/08/29/us-usa-restaurants-strike-idUSBRE97S05320130829

9 *Id.*

10 Candice Choi, *Fast-Food Workers Stage Largest Protests Yet*, ASSOCIATED PRESS, August 29, 2013, *available at* http://bigstory.ap.org/article/fast-food-protests-under-way (last accessed October 17, 2013)

11 John Bacon, *Fast-food workers strike, protest for higher pay*, USA TODAY, December 5, 2013, *available at* http://www.usatoday.com/story/money/business/2013/12/05/fast-food-strike-wages/3877023/

12 As noted in the New York Times, ALT-Labor activity has definitely gotten the attention of business. Steven Greenhouse, *Advocates for Workers Raise the Ire of Business*, N.Y. TIMES (January 16, 2014) *available at* http://www.nytimes.com/2014/01/17/business/as-worker-advocacy-groups-gain-momentum-businesses-fight-back.html?hp&_r=1 (last accessed January 18, 2014)

13 I have elsewhere written about the traditional labor law connotations of the rallies. Michael C. Duff, *Days*

Immigration issues intensified in the early months of that year following news of a federal legislative proposal that would have essentially classified all employees working without required immigration documentation as felons.[14] In reaction to the proposed legislation a variety of ALT-Labor groups, and others, coordinated and organized mass rallies in more than a hundred U.S. cities.[15] The participants included authorized and unauthorized workers and various allies and supporters of unauthorized workers, including ALT-Labor groups.[16] Work in many locations stopped while the rallies were underway as workers joined the protests.[17] The various campaigns against Walmart represent another well-known area of ALT-Labor activity.[18] The "Black Friday" protests, organized by OURWalmart, are probably the most widely known of these campaigns.[19] Finally, there has been a recent groundswell of strike activity by low wage employees of federal government contractors. For example, the group Good Jobs Nation[20] in conjunction with a group of unions coordinated a strike in January of 2014 against contractors of the Pentagon.[21]

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without Immigrants: Analysis and Implications of Immigration Rallies under the National Labor Relations Act, 85 Denver U. L. Rev. 93 (2007)

14 *See, e.g.*, Monica Davey, *Protest Rallies End in Job Loss for Immigrants*, N.Y. Times, April 15, 2006, *at* A1 & *Employers Gird for Immigrant Boycott*, N.Y. TIMES, May 1, 2006, at A12. Rallies occurred nationwide throughout this period. Attendance at a rally held on March 25, 2006 in Los Angeles was estimated at between 500,000 and 750,000 protesters. *See* Jim Newton, *Villaraigosa Tells Where He Stands*, L.A. TIMES, April 15, 2006, A1; *see also Thousands March for Immigrant Rights: Schools, Businesses Feel Impact as Students, Workers Walk Out*, CNN.Com, May 1, 2006, http://www.cnn.com/2006/US/05/01/immigrant.day/index.html (last visited February 12, 2007).

15 *Id.*

16 Davey, *supra*., *Protest Rallies End in Job Loss*

17 *See* Carol McKinley et al. *A Day Without Immigrants*, FOX NEWS.COM (May 1. 2006) *available at* http://www.foxnews.com/story/2006/05/01/day-without-immigrants/

18 The search query "Walmart campaign" will produce many hits in any internet search engine.

19 *See e.g.* Raya Zimmerman, *St. Paul: 26 arrested in Black Friday protests over low retail wages*, TWIN CITIES.COM (November 29, 2013) *available at* http://www.twincities.com/business/ci_24625449/st-paul-26-arrested-black-friday-protests-over

20 The group describes itself at its website, at http://goodjobsnation.org/#about, as follows:

> We are workers who do important jobs for our nation. We pick and process food for school children, greet visitors at our National Parks, clean and safeguard government buildings, sew the uniforms for our troops, haul cargo to military bases, and even answer calls when people have questions about government benefits, like Social Security . . . We are the workers who are employed by private companies through federal contracts, concessions and leases. Yet, while our employers reap billions of dollars in profits from taxpayers every year, we are paid such low wages that we are unable to afford basic needs such as food, clothing, and even rent . . . We are uniting to call on the federal government to stop being America's leading poverty job creator by paying us living wages and benefits. We are fighting to make America a Good Jobs Nation once again.

21 Josh Eidelson, *Breaking: Pentagon workers strike over poverty pay*, SALON (January 22, 2014) *available at* http://www.salon.com/2014/01/22/breaking_pentagon_workers_strike_over_poverty_pay/

From the perspective of business the commercial problem presented by non-union ALT-Labor protests—especially coordinated protests involving multiple employers—is identical to that presented by traditional union protests: workplaces may be shut down and customers may be unable to access businesses while the protests are in progress, outcomes directly threatening commercial activity.[22] Public relations considerations soon come into play. After all, ALT-Labor protesters are arguing in a very moral and emotional way, often (when the protesters are employees) at risk of losing their jobs, that they are being treated unfairly.[23] The potential for negative public relations in reaction to the protest is real.[24] The negative perception of businesses by potential customers, and others in the community, could harm accounting goodwill or other intangible assets.[25] It may be true, as some commentators have argued,[26] that business interests simply do not care about these kinds of disruptions or perceptions. But historically business interests *have* cared about such volatility,[27] and have usually desired that labor protests—strikes,

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22 Federal labor policy has from its inception been centered on prevention of such threats to the economy. *See e.g.*, Section 1 of the NLRA, which reads in pertinent part:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce . . .

23 Theodore J. St. Antoine, *Keynote Address: The Moral Dimension Of Employment Dispute Resolution*, 86 SAINT JOHN'S L. REV. 391, 402 (" . . . [C]onstructing a system of dispute resolution, especially when the parties have unequal bargaining power as is usually true of employers and employees, implicates moral values profoundly.)

24 This explains why the risk of labor disputes is routinely included as a "forward looking information" item on the financial statements of major corporations involving future risks and uncertainties. Such statements are allowed as a "Cautionary Statement for Purposes of the 'Safe Harbor' Provisions of the Private Securities Litigation Reform Act of 1995." *See e.g.* the statement of Pool Corporation *available at* http://ir.poolcorp.com/profiles/investor/ResLibraryView.asp?BzID=603&ResLibraryID=66095&Category=43

25 Indeed, employers have been bringing racketeering cases against traditional unions under RICO premised on just these kinds of interferences with intangible "property," though the claims are probably meritless. James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 775-776 (pointing out that unions do not attempt to acquire control of employer property within the meaning of the racketeering statutes — RICO and the Hobbs Act — but to regulate its use through the collective bargaining process).

26 Brian Solomon, *Memo to the Fast Food Minimum Wage Strikers: Investors Don't Care*, FORBES, December 5, 2013 available at http://www.forbes.com/sites/briansolomon/2013/12/05/fast-food-investors-not-scared-of-minimum-wage-worker-strike/

27 The involvement of business lobbyists like Richard Berman belie the notion that business is unconcerned. *See generally supra* n.___, Greenhouse, *Advocates for Workers Raise the Ire of Business*

picketing, and handbilling—be promptly suppressed.[28] This article discusses one method business might employ to achieve suppression: bringing legal actions on the theory that the ALT-Labor coordination constitutes unlawful secondary boycotts.[29]

In reality, the opening salvo of a skirmish between employers and ALT-Labor that is likely to intensify quickly has already been fired. On about November 16, 2012, Walmart filed an unfair labor practice charge against the United Food and Commercial Workers' Union alleging that "the union" had engaged in unlawful picketing.[30] Although the theory of unlawfulness differed from the one that will be discussed in this article,[31] the charge alleged that "OURWalmart" was a subsidiary, affiliated organization, or agent of the United Food and Commercial Workers.[32] Although the NLRB informally resolved the charge without having to reach the substance of the allegations,[33] had the case been actively litigated the status of OURWalmart would have to have been determined. Either it was an agent of the union in connection with the conduct complained of, or, alternatively, it was a labor organization in its own right, and therefore independently subject to liability under the NLRA.[34] This article discusses the threshold question of whether ALT-Labor groups independently possess status as labor organizations under the NLRA in order to determine whether they are capable of engaging in secondary boycotts.

In Part I of this article I discuss secondary boycotts. ALT-Labor groups cannot violate the secondary boycott provisions of the NLRA unless they are labor organizations. Thus, in Part II of the article I engage in extended discussion of the surprisingly complicated question of when a "group" is an NLRA labor organization subject to the secondary boycott provisions. In Part III, following up on the preceding section's discussion of the complexity inherent in determining whether ALT-Labor groups are labor organizations, I suggest that, in light of the risks occasioned by unpredictable litigation outcomes, the time may be ripe for a "bipartisan" modification of the NLRA's labor organization definition. Anticipating the objection that no modification of labor

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28 Indeed, such protest was originally under the common law conceived as simple criminal conspiracy. *See* Commonwealth v. Hunt, 45 Mass. 111 (1842) (rejecting the general view but chronicling well its prevalence in the mid-19th century)

29 As I will develop in the article, a conclusion of ALT-Labor liability under labor law will turn on whether a group is a "labor organization." Assuming a group is a labor organization it is capable of violating a variety of labor laws. I focus here on violations of the NLRA's secondary boycott prohibitions under Sections 8(b)(4)(B) and 303 of the NLRA, as amended. For an exhaustive discussion of the variety of potential violations see Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law*, 30 BERKELEY J. EMP. & LAB. L. 232, 263-271 (2009). [hereinafter Naduris-Weismann, *The Worker Center Movement*]

30 Lawrence E. Dubé, *Wal-Mart Bid To Block 'Black Friday' Action Requires Retailer To Prove UFCW's Objective*, BLOOMBERG LAW *available at* http://about.bloomberglaw.com/law-reports/wal-mart-bid-to-block-black-friday/

31 My discussion will involve only Section 8(b)(4) of the NLRA. The Walmart charge alleged that the union and its "affiliates" engaged in unlawful "recognitional" picketing under Section 8(b)(7) of the NLRA. *Id*.

32 *Id.*

33 NLRB Advice Memorandum, United Food & Commercial Workers International Union (Wal-Mart Stores, Inc.) Case 26-CP-093377 (Apr. 10, 2013) *available at* http://www.nlrb.gov/case/26-CP-093377

34 See generally NLRA, as amended. The NLRA by its terms prohibits only "employers" and "labor organizations" from engaging in specified conduct.

law is likely in light of the omnipresence of legislative gridlock, I underscore that employers have badly wanted to modify the NLRA labor organization definition for two decades, and actually achieved a (remarkable) bipartisan modification in 1996, only to see the compromise vetoed by President Clinton.[35] I argue that organized labor may be similarly amenable to compromise on a narrowing of the labor organization definition in light of ALT-Labor's vulnerability to liability under the secondary boycott provisions, of organized labor's increasing embrace of ALT-Labor, and of a growing precariat[36] that will not be easily organized using traditional labor organizing principles.

I. SECONDARY BOYCOTTS

A. *Secondary Boycotts & Labor Injunctions*

Traditionally, one of the quickest ways for businesses to quash labor protest—besides summarily firing employee activists[37]—was to obtain court-issued labor injunctions.[38] However, this generation of business leaders, coming to age during docile labor times[39] and therefore having little need to understand traditional labor law, may not realize that obtaining labor injunctions in the federal courts to suspend *peaceful* labor activity of the type presently engaged in by ALT-Labor is typically not possible.[40] The Norris-LaGuardia Act of 1932 broadly prohibits federal courts from issuing such injunctions.[41] An important exception to this rule, however, is that injunctions against "labor organizations"[42] remain available for certain conduct specifically

35 WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 85 (Cambridge University Press 5th Ed. 2013)

36 Precariat may be defined as a social group consisting of people whose lives are difficult because they have little or no job security and few employment rights. MACMILLAN DICTIONARY, BUZZWORD *available at* http://www.macmillandictionary.com/us/buzzword/entries/precariat.html

37 An action now unlawful under 29 U.S.C. 158(a) (1) and/or (3) [Sections 8(a)(1) and/or (3) of the NLRA].

38 F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 201 (The MacMillan Co. 1930)

39 *See* Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES (Jan. 23, 2013) *available at* http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?_r=0

40 With private sector union density at historic lows—6.6% of the private sector work force and 11.3% of the work force overall, the lowest rate since 1916, *see* http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?_r=0 — the risk of strikes and picketing and the law surrounding those activities would understandably be of diminished interest to the business community.

41 29 U.S.C. §101 *et seq*. Many states have in effect almost identical "little Norris-LaGuardia Acts," See Ariz. Rev. Stat. § 12-1808; Colo. Rev. Stat. § 8-3-118; Conn. Gen. Stat. §§ 31-112 et seq; Haw. Rev. Stat. § 380-7; Idaho Code § 44-701 et seq.; Ill. Comp. Stat. ch. 820 § 5/1 et seq.; Ind. Code § 22-6-1-6; Kan. Stat. § 60-904; La. Rev. Stat. § 23:844; 26 Me. Rev. Stat. § 5; Md. Lab. & Empl. Code § 4-314; Mass. Gen. Laws 214 § 6; Minn. Stat. § 185.13; N.J. Stat. § 2A:15-51; N.M. Stat. § 50-3-1; N.Y. Lab. ch. 31, art. 22-a, § 807; N.D. Century Code § 34-08-01; Or. Rev. Stat. § 662.080; 43 Pa. Stat. § 206i; R.I. Gen. Laws § 28-10-2; Utah Code U.C.A. § 34-19-1; Wash. Rev. Code § 49.32.072; Wis. Stat. § 103.56; Wyo. Stat. § 27-7-101 et seq., and this discussion has in theory broader applicability under state law but such considerations are beyond the scope of this article.

42 A term that I will define and explore in the next section.

prohibited by the National Labor Relations Act ("the NLRA").[43] In my judgment the most important example of NLRA-prohibited conduct[44] subject to federal court injunction is the secondary boycott.[45] A secondary boycott—not defined with precision in the NLRA[46]—has traditionally been explained as some combination to influence *A* by exerting economic or social pressure against persons with whom *A* deals.[47]

Workers may naturally wish to support the causes of other workers.[48] But American labor law has always sought to prevent general strikes, that is to say simultaneous work stoppages of workers in all or most industries.[49] Labor organizations are not permitted to expand the "front" of a labor dispute they may have with one employer, known as the "primary" employer, to the

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43 *See* 29 U.S.C. 160(j) and (l) [NLRA, Sections 10(j) and (l)] (NLRB authorized to seek injunctive relief in federal district courts generally to temporarily restrain alleged commission of an unfair labor practice under the National Labor Relations Act and required to seek such relief when it has cause to believe that Sections 8(b)(4) or 8(b)(7) of the Act has been violated).

44 A full discussion of the Labor Management and Reporting Disclosure Act (LMRDA)-inspired objections to worker centers are beyond the scope of this discussion. I will say generally that while the definition of labor organization under the LMRDA seems broader than the NLRA definition, *see* Stefan J. Marculewicz and Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA*, 13 ENGAGE 79 n.166-184 and accompanying text (2012) (hereinafter Marculewicz and Thomas, *Labor Organizations by Another Name*] *available at* https://www.fed-soc.org/publications/detail/labor-organizations-by-another-name-the-worker-center-movement-and-its-evolution-into-coverage-under-the-nlra-and-lmrda, it does not appear that Congress considered its application to entities like worker centers when enacting the LMRDA. *See* Naduris-Weismann, *The Worker Center Movement* at 287-291. The question whether that intent should matter in the context of the statute's text is of course the typical quandary.

45 Some commentators have focused on the potential for ALT-Labor groups violating the recognitional picketing provisions of the NLRA, especially in Section 8(b)(7)(C). A full discussion of those provisions is beyond the scope of this article. As a general proposition, "labor organizations" picketing for "recognition or bargaining" must comply with a precise regulatory framework or risk violating the NLRA. *See generally* San Francisco Culinary Workers. v. NLRB, 501 F.2d 794 (1974). However, it may be quite hard to characterize ALT-Labor activity as having the requisite "recognition or bargaining object." Protest activity may be protected by the publicity provisos to Section 8(b)(7) or characterized as "area standards" picketing independently protected by Section 7 of the NLRA. *See* Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 207 n. 42 (1978); Hod Carriers Local 41 (Calumet Contractors Ass'n), 133 NLRB 512 (1961). To my mind, protest activity is, from the employer's vantage, more reliably characterized as a secondary boycott. *See* International Longshoremen's Association v. Allied International, Inc., 456 U.S. 212 (1982) (holding that union's refusal to handle goods from Soviet Union in protest of Soviet invasion of Afghanistan violated secondary boycott provisions of NLRA). I do agree, however, that *if* an ALT-Labor group is an NLRA labor organization it is capable of violating the recognitional picketing provisions of the Act. In truth, the labor organization question, see infra, is closely caught up in the question because a labor organization is more likely in my view to have a recognitional or bargaining objective.

46 Indeed there were no secondary boycott provisions in the first iteration of the NLRA. The Taft-Hartley Act, a 1947 amendment of the NLRA, for the first time added a secondary boycott prohibition in Section 8(b)(4)(A) of the NLRA as then-amended. United Food and Commercial Workers' Union Local 1996, 336 NLRB 421, 423-424 (2001). Certain loopholes to the prohibition were closed off as part of the Labor Management Reporting and Disclosure Act of 1959, and the secondary prohibition was refined to its present form and is included in Section 8(b)(4)(B) of the NLRA, as amended. *Id*. The LMRDA also independently outlawed in Section 8(e) of the NLRA, as amended, a specific form of secondary conduct in which a union and a neutral employer agree that the neutral employer will not handle the products of an employer with whom the union has a primary labor dispute. *See* Ets-Hokin Corp.154 NLRB 839 (1965). Throughout these mutations it has remained true "that union pressures calculated to induce the employees of a secondary employer to withhold their services in order to force their

premises of a "secondary" or "neutral" employer.[50] If they do, injunctive relief and damages are available to such neutral employers in the federal courts to suppress the conduct.[51] Various policies attempt to justify this limitation, including containing primary labor disputes to minimize injury to interstate commerce and the notion that is not fair to allow pressuring of a neutral employer not having the ability or duty to control the labor relations of the involved union and primary employer.[52] If the NLRB finds that a labor organization has engaged in a secondary boycott it is *required* (in the absence of very prompt settlement) to seek a temporary injunction in federal district court to restrain the conduct.[53]

A labor organization could engage in either of two types of conduct possibly violating Section 8(b)(4) of the NLRA *if* it is coupled with a prohibited object.[54] With respect to the first type of conduct, it is potentially unlawful for a labor organization "to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal . . . to use, manufacture, process, transport, or otherwise handle or work on any goods . . . or to perform any services . . ."[55] With respect to the second type of conduct, it is potentially unlawful for a labor organization "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce."[56] However, for the conduct ultimately to be found unlawful it must be coupled with a proscribed object.[57] In the case of a secondary boycott, a violation occurs

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employer to cease dealing with their employer" are illegal. Local 1996, *supra*. 336 NLRB at 425.

47 FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 43 (1930). There are of course some who object to the whole idea of a secondary boycott on strictly moral grounds. Jonathan H. Adler, *Secondary Boycotts and the Breakdown of Civil Society*, VOLOKH CONSPIRACY (May 3, 2012) *available at* http://www.volokh.com/2012/05/03/secondary-boycotts-and-the-breakdown-of-civil-society/

48 *See generally* Staughton Lynd and Daniel Gross, SOLIDARITY UNIONISM AT STARBUCKS (PM Press 2011)

49 OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/general-strike (last accessed Jan. 19, 2014). This was a central purpose of the 1946-47 Taft-Hartley reforms, *see* National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 623-25 (1967), though it must be admitted, as Josiah Lambert has shown, that it is difficult to conceive of the *early* American state as excessively hostile to any form of strike. Josiah Bartlett Lambert, IF THE WORKERS TOOK A NOTION 21-23 (Cornell University Press 2005).

50 *See* Douds v. Metropolitan Federation of Architects, 75 F.Supp. 672, 677 (D.C.S.D.N.Y.1948)

51 ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN & MATHEW W. FINKIN, LABOR LAW: CASES AND MATERIALS 691-692 (14th Ed. 2006).

52 *See* Carpenters Local 1976 (Sand Door) v. N.L.R.B., 357 U.S. 93 (1958)

53 Pursuant to Section 10(l) of the NLRA.

54 The statutory language has been set forth above.

55 Section 8(b)(i)(4) of the NLRA.

56 Section 8(b)(ii)(4) of the NLRA. Both employers and employees are extremely broadly defined in Section 8(b)(4), effectively discouraging esoteric argument regarding the status of actors in secondary boycott scenarios.

57 There are four proscribed objects under Section 8(b)(4). Here I concern myself solely with the "secondary boycott" object.

when any of the conduct just mentioned is engaged in with the object of "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."[58] Some narrow provisos to the rule exist that are beyond the scope of this discussion.

Thus, to continue with the hypothetical at the beginning of this article, if OURWalmart pickets at a protest organized by Fast Food Forward at the premises of a fast food restaurant with the object of persuading fast food workers to strike, or even with the object of forcing any person to cease doing business with any other person, which of course is the essence of a boycott, OURWalmart is in jeopardy of violating the NLRA's secondary boycott provision. OURWalmart may argue that it is merely protesting the fact that *all* workers are being paid substandard wages or working in substandard conditions. But unless it proceeds with great caution in communicating and investigating the basis for this "area standards" message the NLRB may nonetheless deem it "secondary" and therefore unlawful.[59]

If OURWalmart is, for example, suggesting to workers that they should not go to work, or is persuading customers to boycott a fast food restaurant, a serious "cease doing business" issue will have arisen, for the underlying presumption of this strictly enforced provision is that OURWalmart is surreptitiously pressuring a neutral in the hope of indirectly improving working conditions at Walmart.[60] Moreover, the NLRB need only find that *an* object of OURWalmart is to cause some person to cease doing business with any other person in order for a violation to be established.[61] Additionally, in some instances a "cease doing business" object may simply be *inferred*. In *International Longshoremen's Association v. Allied International*,[62] for example, the Supreme Court stated, "When a purely secondary boycott 'reasonably can be expected to threaten neutral parties with ruin or substantial loss' . . . the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless."[63] In other words, if the secondary activity of OURWalmart resulted in

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58 NLRA, Section 8(b)(4)(B)

59 Local 7, Sheet Metal Workers International Association, 345 NLRB 1322, 1331 (2005)("When area standards picketing is involved, the burden is on the union to first make reasonable inquiry to determine whether or not the picketed employer is meeting area standards, wages, and benefits. Otherwise, the purported purpose of area standards picketing may be deemed pretextual, and evidence of improper motive found.")

60 *See* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(B) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 908 (2005)

61 N.L.R.B. v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 689 (1951)

62 456 U.S. 212 (1982)

63 *Id*. at 224.

"substantial loss"[64] to the "neutral" fast food restaurant, an unlawful secondary object would very likely be presumed.[65]

When it has been found that a labor organization has violated Section 8(b)(4)(B) of the NLRA, say by picketing a neutral employer, by striking and enlisting employees employed by a different employer to also strike, or by persuading customers of an employer not their own to refrain from doing business with that employer, a Regional Director of the NLRB is *required* to seek injunctive relief in a district court, even when the secondary picketing is peaceful.[66] If the court grants the injunction, there are at least two significant consequences. First, all present secondary picketing must cease, with severe sanctions, including the possibility of criminal liability, attaching for violations of the injunction.[67] Second, as a practical matter, strikes or any other labor activity will likely be "broken" by an injunction, as has been known for more than a century.[68] If federal courts embarked on a course of enjoining ALT-Labor the probable response of protesting employees—especially those without the benefit of the elucidating legal counsel unions might be expected to enjoy—would be to sharply curtail protest activity.

B. *Secondary Boycotts & Civil Damages*

In addition to the risk of injunction, the NLRA, as amended in Section 303 of the Labor Management Relations Act,[69] provides employers with a private right of action for compensatory

64 In an earlier case, NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 [Tree Fruits], 377 U.S. 58 (1964), the Court held that certain unions did not violate Section 8(b)(4) when they limited secondary picketing of retail stores to appeals to customers not to buy the products of firms against which one of the unions was on strike. The Court found that consumer picketing of the neutral retailer was permissible unless "employed to persuade customers not to trade at all with the secondary employer." *Id*. at 72. The Safeco case, cited by the Court in ILA, altered the *Tree Fruits* rule by holding that "[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language of the purpose of [section] 8(b)(4)(ii)(B)." Safeco, 447 U.S. at 614-15.

65 This interpretation appears to read the "object" requirement out of the statute entirely. The conclusion begs the question of whether the injured employers are truly neutral because the Court failed to identify *any* object on the part of the union to do injury to them, which is the statutory predicate. The conclusion is actually the fruition of developments begun much earlier with cases focusing on injuries to neutrals in the context of limited "object evidence." *See e.g.* N.L.R.B. v. Carpenters District Council of New Orleans, 407 F.2d 804, 806 (C.A. La. 1969) (though statute in fact requires cease doing business object, objective to cause "serious disruption to existing business relationship" sufficient to satisfy statutory requirement). In *ILA*, and as the union argued, there was not a "primary" at all, so the primary-neutral distinction was completely collapsed, and reference to statutory "neutrals" was a legal fiction. *See* ILA, Petitioner's Brief at 28-9, 1980 WL 390100. While in mixed object scenarios a labor organization will be found to have engaged in unlawful secondary activity where only one of its objects is proscribed by the NLRA, NLRB v. Denver Building & Construction Trades Council, *supra*., 341 US at 689, the courts have relaxed even that forgiving standard by whittling away its predicate to a skeletal core requiring merely that the possibility of the fruit of an unlawful object – even an unintended one - be foreseen.

66 NLRA, Section 10(l)

67 Ahmed A. White, *The Crime of Staging an Effective Strike*, Working USA: The Journal of Labor and Society, Volume 11, 31-33 (2008) *available at* http://lawweb.colorado.edu/profiles/pubpdfs/white/White11WUSA.pdf

68 Julie Greene, Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881-1917, 84-85 (Cambridge University Press 2004)

69 The Labor Management Relations Act is the National Labor Relations Act as amended by the Taft-Hartley Act

damages arising from secondary activity found by a federal district court to violate Section 8(b)(4) of the NLRA.[70] The availability of court-awarded civil damages in this context is an anomaly of the American labor law system in which most adjudication occurs in administrative agencies and compensatory damages are unavailable.[71] Section 303 declares that anyone injured in business or property by a secondary boycott possesses a private right of action for damages.[72] The provision renders any "labor organization" violating the secondary boycott prohibition of Section 8(b)(4)(B) broadly liable for damages and the cost of suit in connection with the violation.[73] Employers may recover business losses caused by a labor organization's peaceful but unlawful secondary activities.[74] Section 303 may arguably also act as a kind of protection to ALT-Labor because it preempts *state* law actions for damages premised on a peaceful secondary boycott theory.[75] Nevertheless, under Section 303 ALT-Labor groups are exposed to civil liability for damage to business relationships; for loss of business profits; for idled equipment; and for additional personnel required to operate a business during the period of an illegal work stoppage. Punitive damages are unavailable, however.[76]

Interestingly, to the extent that an ALT-Labor group was found to be an agent of a union rather than a labor organization in its own right there is developing authority that it would not be liable under Section 303.[77]

To consider how this provision might operate let us modify some of the facts of our earlier ALT-Labor hypothetical. This time, let us imagine that Fast Food Forward members appear at a local Walmart in support of an OURWalmart protest. Imagine further that the protest is extremely successful and that many customers decline to cross the ALT-Labor "picket lines."[78] If a federal district court concluded that a "labor organization" had "threaten[ed], coerce[ed], or restrain[ed] any person engaged in commerce or in an industry affecting commerce"[79] with the

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and the Labor Management Reporting and Disclosure Act of 1959. Pub. L. No. 101, 80th Cong., 1st Sess., 1947, 61 Stat. 136, as amended by Pub. L. No. 257, 86th Cong., 1st Sess., 1959; 29 U.S.C. §§141-67, 201-97, F.C.A. 29 §§ 141-67, 201-97

70 Teamsters Union v. Morton, 377 U.S. 252, 258 (1964)

71 *See generally* Section 10 of the NLRA

72 LMRA § 303

73 *Id.*

74 Teamsters v. Morton, 377 U.S. 252, 260 (1964).

75 *See* Labor-Ready Inc. v. Tri-State Building and Construction Trades Council, 2001 WL 1358708 (S.D.W.Va.), 168 L.R.R.M. (BNA) 2642

76 *See* Archibald Cox, Derek Curtis Bok, et al., Labor Law: Cases and Materials 771 (Foundation Press, 14th Ed.)

77 Jung Sun Laundry Group Corp. v. Laundry, Dry Cleaning, & Allied Workers Joint Bd., 2010 WL 4457135 citing Wild Edibles Inc. v. Indus. Workers of World Local 460/640, No. 07 Civ. 9225, 2008 WL 4548392, slip op. at 3 (S.D.N.Y. Oct. 9, 2008).

78 Picketing does not necessarily require the customary stick and placard; patrolling will suffice.

79 *See supra*. n.49 and accompanying text

object of "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"[80] the ALT-Labor group could be liable for the loss of business occasioned by the action. It might also be liable for other compensatory costs involving items such as personnel modifications, inventory control, enhanced on site security, and so forth. It does not require a great deal of imagination to think of ways in which these costs could escalate and be very difficult to bear by an ALT-Labor group.

II. LABOR ORGANIZATIONS

A. *Introductory Remarks on the Labor Organization Question*

Secondary boycott prohibitions apply only to labor organizations.[81] If ALT-Labor groups are *not* labor organizations they are not bound by the NLRA's secondary boycott provisions and the groups' peaceful labor protest activities are likely immune from federal court injunctions.[82] Employers and their allies have in the main[83] been skirting the question of whether ALT-Labor groups are themselves labor organizations by arguing that unions are "behind" ALT-Labor and that ALT-Labor should therefore be bound to labor rules binding unions.[84] The role of unions in encouraging ALT-Labor is becoming well known;[85] and the connection between unions and ALT-Labor groups like worker centers is openly acknowledged and embraced by the AFL-CIO.[86] Tellingly, the AFL-CIO underscores that its increasingly formalizing relationship with worker centers began in 2006, the year in which the massive "days without immigrants" rallies

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80 *See supra.* n.51 and accompanying text

81 *See generally* Section 8(b)(4)(B)

82 Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429 (1987) (holding that in the absence of specific Congressional authorization to the contrary the Norris LaGuardia Act prevents federal courts from issuing labor injunctions in peaceful labor disputes).

83 *But see generally* Marculewicz and Thomas, *Labor Organizations by Another Name* (discussing the precise question in detail)

84 *See e.g*. Kevin Bogardus, *Chamber takes aim at worker centers*, THE HILL (November 20, 2013) *available at* http://thehill.com/business-a-lobbying/191011-chamber-takes-aim-at-worker-centers-over-funding (last accessed December 10, 2013)

85 The Center for Union Facts has been engaged in a reasonably successful campaign to make the connection known to the general public. *See e.g.* Richard Berman, Worker centers: A Backdoor for Unions, U.S. News & World Report, News Opinion, Op-Ed (October 14, 2013) available at http://www.usnews.com/opinion/articles/2013/10/14/worker-centers-are-just-a-backdoor-for-unions

86 *See* AFL-CIO, Worker Center Partnerships *available at* http://www.aflcio.org/About/Worker-Center-Partnerships; at the recent AFL-CIO convention there was much discussion of the strengthening ties between organized labor and ALT-Labor. *See* Mark Vorpahl, *At AFL-CIO Convention, Leaders Ask: What Direction for Labor*?, TRUTHOUT (Sep. 11, 2013) *available at* http://www.truth-out.org/opinion/item/18769-at-afl-cio-convention-leaders-ask-what-direction-for-labor

transpired. Unions have fairly consistently provided expertise and counsel to ALT-Labor.[87] Still, the involvement of unions in ALT-Labor is complex and vague by historical labor movement standards,[88] and often community groups, worker centers, and other non-union advocacy groups are as a practical matter in the lead of the tactics if not always the financing of ALT-Labor protests.[89] This does not mean of course that ALT-Labor is not receiving considerable assistance from unions. But there is a good deal of evidence that many "activist charitable foundations," to borrow the U.S. Chamber of Commerce's term for the groups,[90] have been heavily funding ALT-Labor, and in particular worker centers.[91] The Department of Labor has apparently also directly funded worker centers.[92] All of this complexity makes it much more difficult to agree with any simplistic formulation that "unions are behind" worker centers or other ALT-Labor groups. Such funding, moreover, implicates broader civil society protest and nudges the context of ALT-Labor slightly away from traditional, unmixed labor activism. For example, it is easier to conceive of an ALT-Labor group funded by the Ford Foundation as a social activist group than it is to see a group funded and directed exclusively by the United Food and Commercial Workers Union as one.

The inchoate, elusive involvement of unions in ALT-Labor—as opposed to their direct, unabashed, traditional involvement—has multiple explanations. The notoriously high employee turnover rate[93] of low wage workers makes them especially hard for unions to organize using

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87 *See, e.g.*, Teresa Watanabe and Joe Mathews, *Unions Helped to Organize `Day without Immigrants'*, Los Angeles Times (May 3, 2006) *available at* http://articles.latimes.com/2006/may/03/local/me-organizers3; Josh Eidelson, *Walmart Asks a Judge to Block Historic Strikes*, THE NATION, November 19, 2012 *available at* http://www.thenation.com/blog/171348/walmart-asks-judge-block-historic-strikes. With respect to the more recent December 5, 2013, fast food strikes, news outlets freely reported that the Service Employees International Union was "leading" an informal cluster of labor advocates. *See* Bacon, *Fast-food workers strike*

88 Interview by Jaisal Noor with Leo Panitch, Canada Research Chair in Comparative Political Economy, York University, in Baltimore Md., THE REAL NEWS NETWORK (Dec. 4, 2013) *available at* http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=11136 (last accessed December 10, 2013)

89 Jarol B. Manheim, *The Emerging Role of Worker Centers in Union Organizing: A Strategic Assessment* (U.S. Chamber of Commerce Working Paper, November 2013) *available at* http://www.workforcefreedom.com/sites/default/files/WFI%20Manheim%20Study%2011-21-2013.pdf (hereinafter "Chamber of Commerce Paper") (describing *also* Sam Ross-Brown, *Labor Gets Militant*, UTNE READER (February 22, 2013) *available at* http://twww.utnereader.com/politics/labor-gets-militant.aspx#axzz2n8yUKWKk ("Although [ALT-Labor at Walmart] relied on support from recognized unions like the United Food and Commercial Workers (UFCW), their grievances, demands, tactics, and victories were entirely their own.")

90 Chamber of Commerce Paper at 13

91 *Id.* The Chamber of Commerce Paper identifies many such charitable organizations including such notable groups as the Ben & Jerry's Foundation, the Marguerite Foundation, the Ford Foundation, and the Kresge Foundation. *Id.* at 15-20.

92 *Id*. at 21.

93 Arindrajit Dube, T. William Lester, and Michael Reich, *Minimum Wage Shocks, Employment Flows and Labor Market Frictions*, Institute for Research on Labor and Employment, Working Paper No. 149-13 (July 2013) *available at* http://www.irle.berkeley.edu/workingpapers/149-13.pdf.

traditional union organizing methods.[94] Workers often voluntarily depart from a low wage workplace before they can be organized.[95] Unauthorized workers fired during traditional union organizing campaigns are not entitled to remedies under the NLRA following the Supreme Court's edict in *Hoffman Plastic Compounds*,[96] making immigrant workers understandably reluctant to openly support a union.[97] In the current extremely difficult legal terrain for organizing, unions may be correspondingly reluctant to devote *full* resources to organizing low wage workers, but may be very willing to render *some* lesser level of assistance, especially where outside charitable organizations are contributing to the cause. Unions may also be better able to face workers in unsuccessful campaigns outside of the traditional labor organizing drive. Low wage workers seem anecdotally to understand that the possibility of failure in nontraditional drives is high and that they are involved in a Sysephean struggle in which "we have nothing to lose."[98] The gambit may be understood from the beginning to be desperate, and the union seems less likely to be blamed if it fails.

Sinister explanations abound when there is *any* union involvement in ALT-Labor. Space permits only discussion of a few. Commentators assert that unions are using worker centers to insulate themselves from labor law liability.[99] Under the National Labor Relations Act, unions, as acknowledged labor organizations, are proscribed from engaging in certain conduct.[100] Commentators allege that unions evade such proscriptions by acting through ALT-Labor.[101] This curious argument assumes that unions would deliberately expose potential future members to

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94 *See* Molly Korab, *Can Fast-Food Workers Raise Wages With One-Day Strikes?*, NEW REPUBLIC (Aug. 2, 2013) *available at* http://www.newrepublic.com/article/114147/fast-food-workers-one-day-strike-and-future-labor-organizing (quoting Nelson Lichtenstein: "You have 200-300 percent turnover in the fast food industry")

95 Eduardo Porter, *Unionizing the Bottom of the Pay Scale*, N. Y. TIMES, December 4, 2012 *available at* http://www.nytimes.com/2012/12/05/business/unionizing-at-the-low-end-of-the-pay-scale.html?pagewanted=1&_r=0&ref=business.

96 *See* Hoffman Plastic Compounds v. N.L.R.B, 535 U.S. 137 (2002),

97 *Hoffman* may in the final analysis turn out to have had more symbolic than actual impact because of the limited nature of labor law remedies but the symbol has been lasting and powerful. See Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 Cornell J. of Law & Pub. Pol'y 659, 669-674 (2012).

98 Steven Greenhouse, *A Day's Strike Seeks to Raise Fast-Food Pay*, N.Y. TIMES (Jul. 31, 2013) (quoting Columbia political science professor Dorian T. Warren, "Many are earning so little they have nothing to lose.") *available at* http://www.nytimes.com/2013/08/01/business/strike-for-day-seeks-to-raise-fast-food-pay.html?pagewanted=all&_r=0

99 *See* Kris Maher, *Nonunion Worker Advocacy Groups under Scrutiny*, WALL STREET JOURNAL (July 24, 2013) available at http://online.wsj.com/news/articles/SB10001424127887323971204578626283846775530.

100 *See generally* NLRA, Section 8(b)

101 The Center on Union Facts allegations more or less capture the full scope of the allegations. That group claims that, "[Worker centers'] legal status allows them to dodge all of the financial transparency, governance and organizational regulations established by federal law. There are no officer elections, no annual financial filings with the federal government and no guarantees that they're acting on behalf of the employees they claim to represent." *See also* Marculewicz & Thomas, *Labor Organizations by Another Name*, notes 5-12 and accompanying text

surrogate legal liability.[102] Less curious is the argument that unions, in acting through ALT-Labor, are simply avoiding a purportedly "tainted" union "brand."[103] According to the argument, the heart strings might be more readily pulled by the cause of unaffiliated low wage restaurant workers than by the unsavory image of union organizers or supporters. The point is debatable.[104]

Whether ALT-Labor groups are *de facto* agents of unions is in any event of questionable *legal* significance. A union may lawfully organize employees and employees may lawfully assist unions; organization and representation of employees by unions are the most basic of protected activities under the NLRA.[105] Whether unions provide to employees or receive from employees organizing assistance directly or through intermediaries appears immaterial. Employees independently possess NLRA rights to engage in concerted activities under the NLRA.[106] They may choose to exercise the rights with the guidance and technical direction of an organization or not.[107] Union assistance of employees to exercise rights through ALT-Labor amounts to no more than *any* actor helping workers to obtain rights they already possess under the NLRA. "Labor organizations," however, are regulated under both the NLRA and the LMRDA, and are required to operate by certain rules, whatever the rights possessed by employees.[108] Unions as labor organizations are undeniably required to adhere to these rules. Ultimately, it is only when

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102 Even the Chamber of Commerce Paper seems to struggle with explaining the motivation.

> In the purest sense, this type of organization [worker center's clearly functioning as mere surrogates for unions] may not be a worker center at all, but merely another in a series of secondary mechanisms for building alliance structures or appealing for public approbation while obscuring somewhat the union label, presumably because the union strategists find such limiting of transparency advantageous *for some reason*. *Chamber of Commerce Paper* at 35. (Emphasis supplied).

It is far easier for me to accept that unions are beginning to agree with Michael LeRoy's argument that employee participation in alternative forms of employee representation could help individuals develop "political skills and voice functions" that may serve as a precursor to unionization. *See* Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) Of The NLRA,* 72 S. CAL. L. REV. 1651, 1703 (1999) [hereinafter LeRoy, *Employee Participation*].

103 Chamber of Commerce Paper at 35

104 The marketing strategy, if that is what it is, could have questionable underpinnings because just over one-half of major poll respondents presently have a positive view of unions. Harold Meyerson, *The State of Unions*, THE AMERICAN PROSPECT (July 8, 2013) *available at* http://prospect.org/article/state-unions-0

105 *See generally* NLRA, Section 7

106 Section 7 of the NLRA states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

107 Washington Aluminum, 370 U.S. 9 (1962)

108 See in particular NLRA Section 8(b) & LMRDA Sections 102, 209 & 210

violation of the rules are at issue that questions of agency have any legal significance. The more difficult question is whether ALT-Labor groups are capable of violating these rules in their own right and not as the agents of unions.[109]

B. *The Labor Organization Analysis*

The question, therefore, is whether ALT-Labor groups are labor organizations in their own right. Under the NLRA, the term labor organization is defined as:

> . . . [A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.[110]

ALT-Labor groups are surely "organizations of any kind" almost of necessity having as their purpose, or as part of their purpose, addressing in *some* manner employee grievances, advancing the cause of employees in labor disputes, and improving employee wages, rates of pay, hours of employment, or conditions of work.[111] It may not always be as clear, however, that ALT-Labor groups have the purpose of addressing those statutorily enumerated work-related issues by

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109 For example, in response to ALT-Labor activities leading up to and planned for Black Friday 2012 Walmart filed charges against the United Food and Commercial Workers Union even though the activities in question involved, at least on the surface of things, the ALT-Labor group OURWalmart, apparently because it was unsure of the legal status of OURWalmart. *See* http://about.bloomberglaw.com/blaw2/files/2013/01/Walmart-8b7C-charge.pdf

110 Section 2(5) NLRA; 29 U.S.C. § 152(5).

111 *See e.g*. the "front page" of the OURWalmart website available at http://forrespect.org/ in which it describes for the public how it has communicated its mission to Walmart management:

- Listen to us, the Associates
- Have respect for the individual
- Recognize freedom of association and freedom of speech
- Fix the Open Door policy
- Pay a minimum of $13/hour and make full-time jobs available for Associates who want them
- Create dependable, predictable work schedules
- Provide affordable healthcare
- Provide every Associate with a policy manual, ensure equal enforcement of policy and no discrimination, and give every Associate equal opportunity to succeed and advance in his or her career
- Provide wages and benefits that ensure that no Associate has to rely on government assistance.

Adopting this Declaration will make Walmart a better company for Associates, customers and the communities in which it operates. As Sam Walton said, "Share your profits with all your Associates, and treat them as partners."

"dealing with" employers,[112] and I turn now to that prickly subject.[113] Black's Dictionary defines purpose as "an objective, goal, or end."[114] Regrettably, the NLRA does not define purpose. Not surprisingly, therefore, one is led into the traditional morass of determining whether an "objective, goal, or end" has been happily and explicitly stated or, more problematically, must be inferred from surrounding conduct.

1. Express versus Inferred Dealing With Purpose

ALT-Labor organizations containing explicit statements within their charters acknowledging their purpose as "dealing with" employers over the 2(5) statutory subjects would find it difficult to argue that they did not possess such a purpose.[115] However, explicit avowal of a dealing with purpose is not required under the NLRA to establish that a group falls under the definition of labor organization. In *N.L.R.B. v. Cabot Carbon Co*.,[116] the Supreme Court established that the purpose of a putative labor organization may be discovered not merely with reference to the organization's stated purpose, but also by determining what *in reality* the organization does.[117] In that case multiple affiliated employers had established and supported certain "employee committees" in several plants.[118] The committees had as their explicitly written purpose "meeting regularly with management to consider and discuss problems of mutual interest, including grievances, and of handling "grievances at nonunion plants and departments."[119] In addition to this explicit expression of purpose it was also obvious that the established committees made

112 I do not dwell here to consider whether employees participate in the ranks of ALT-Labor groups. Obviously if they did not in a particular group that would militate against a finding of labor organization status. The employee participation requirement would presumably be easily met because ALT-Labor groups seem to go to lengths to explain the inclusive nature of their organizations. *See* n.97 *supra*. Also see Fast Food Forward's description of itself *available at* http://fastfoodforward.org/: "Fast Food Forward is a movement of NYC fast food workers to raise wages and gain rights at work. It is part of the national movement of low-wage workers fighting for a better future. When *we* make enough to live - instead of barely getting by - *our* community and economy benefit".

113 I am much indebted throughout this discussion to the work of Eli Naduris-Weismann, who has very thoroughly analyzed the labor organization question in the context of worker centers. Naduris-Weismann, The Worker Center Movement_____

114 BLACKS' DICTIONARY (9th Edition 2009)

115 *See* Thompson Ramo Woolridge, Inc., 132 NLRB 993, 994 (1961) modified on other grounds and enforced, 305 F.2d 807 (7th Cir. 1962) ("The best evidence of the purpose of the Association [found to be a 2(5) labor organization] may be found in its charter and bylaws.")

116 360 U.S. 203 (1959)

117 *Id*. at 213. The NLRB has had occasion to underscore this point. In *Electromation*, 309 NLRB 990 (1992), a case in which non-union employee committees were found to be labor organizations under the NLRA, the NLRB stated, "Purpose is a matter of what the organization is set up to do, and that may be shown by what the organization actually does." *Id*. at 996. *See also* Keeler Brass Automotive Group, 317 NLRB 1110, 1113 (1995).

118 N.L.R.B. v. Cabot Carbon Co., *supra*. 360 U.S. at 205-206.

119 *Id*. at 205

many types of work-related proposals that were actively considered by management.[120] Thus, the Court observed, "Consideration of the declared purposes *and actual functions* of these Committees shows that they existed for the purpose, in part at least, 'of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'"[121] It is possible to argue in a similar fashion that ALT-Labor groups satisfy the "purpose" element when their actual functions demonstrate that they exist at least in part for the purpose of dealing with employers even where their foundational charters or mission statements express no such purpose.

It may be necessary, therefore, to consider whether ALT-Labor groups' actual activities reveal their "dealing with" purpose when no such purpose is explicitly revealed. That consideration may allow the NLRB, or a court, to in effect construct the purpose element. The NLRB has at times been confusingly obsessed, however, with arguing that a group is *not* a labor organization because it has found insufficient evidence to construct a "dealing with" purpose from the functions and activities of the group even where an explicit purpose is manifest.[122] As I have argued elsewhere, this overemphasis can be a distraction when explicit evidence of purpose exists and therefore no reason exists for *post hoc ergo propter hoc* inference.[123] For example, the Restaurant Opportunities Center of New York, a group concerning which I have written previously,[124] at one time behaved like a statutory labor organization because it routinely negotiated with employers on behalf of employees.[125] The NLRB's Division

120 *Id*. at 207-208: "During the period here involved (from May 1954 to the date of the hearing before the Board in June 1956), the Employee Committees, in addition to considering and discussing with respondents' plant officials problems of the nature covered by the bylaws, made and discussed proposals and requests respecting many other aspects of the employee relationship, including seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage corrections, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions. Respondents' plant officials participated in those discussions and in some instances granted the Committees' requests."

121 *Id.* at 213

122 Restaurant Opportunities Center of New York (Redeye Grill; Firemen Hospitality Group Café Concepts; Restaurant Daniel), "ROC-NY," Cases 2-CP-1071 and 2-CB-20643, General Counsel Advice Memorandum (November 30, 2006).

123 Duff, *Days without Immigrants* at 134-136

124 *See* Duff, *Days without Immigrants* at 135; *see also* Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y. L. Sch. L. Rev. 417 (2005)

125 In recent years the group has understandably become much more careful in its public relations not to claim that it is bargaining on behalf of employees. But consider the phenomenon of the "restaurant industry roundtable" touted on the group's web site:

> The New York City Restaurant Industry Roundtable is a collaboration of restaurant owners, workers, government agencies, city officials, and ROC-NY. The group meets regularly to provide valuable services and information to each other, as well as develop strategies that help restaurants take the "high road" to profitability. All New York City restaurants are encouraged to learn about and become a part of the Roundtable; the information and services offered are vitally important to the success of any restaurant. In addition, the roundtable provides valuable support for an employer striving to become a High Road restaurant.

of Advice found that it was not a labor organization, however, because "ROC-NY's conduct has not been shown to constitute a pattern or practice of dealing over time. Rather, ROC-NY's attempts to negotiate settlement agreements with the Employers here were discrete, non-recurring transactions with each Employer." The first difficulty with this statement is that the Supreme Court made abundantly clear in *Cabot Carbon* that a group need not be collectively bargaining to achieve labor organization status, and, as I will discuss momentarily, "pattern and practice of dealing over time" sounds a *lot* like collective bargaining.[126] Even more problematically, whatever an ALT-Labor group may be doing functionally is not of greater significance than an *explicit avowal* of "dealing with" purpose, which I continue to believe was the situation when the NLRB previously considered ROC-NY's labor organization status in 2006.[127] Thus, assessing groups' actions as evidence of purpose should not be controlling when an explicit "dealing with" purpose *must* reasonably be conceded.

In the context of broadly inferring a dealing with purpose the NLRB has determined that minimal contacts between a labor "group" is usually insufficient to establish that the group is a labor organization. The confusion comes when attempting to determine first, whether *any* bilateral activity between a group and an employer must be demonstrated to show that a group is a statutory labor organization; and, second, what the nature of that bilateral activity must be. Relatively recent NLRB authority, for example, has held that some "bilateral mechanism" between a putative labor organization and "target" employer must be established before the agency will find that labor organization status has been established.[128] The bilateral mechanism

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The round table seems at least on the surface to be an instance of ROC-NY dealing with employers within the meaning of Section 2(5). I cannot think why the presence of government officials should alter the conclusion. Furthermore, this makes sense. Manifestly advocacy organizations must eventually communicate actual proposals to their antagonists, either directly or through intermediaries.

126 *Cabot Carbon* at 211-212: "It is therefore quite clear that Congress, by adopting the broad term 'dealing' and rejecting the more limited term 'bargaining collectively,' did not intend that the broad term 'dealing with' should be limited to and mean only 'bargaining with' as held by the Court of Appeals." As Alan Hyde wrote presciently,

> In my opinion, worker centers like the Workplace Project, and worker groups like ROC-NY, are quite likely to be statutory labor organizations. They do indeed raise grievances with particular employers on behalf of particular employees. Even if this is not collective bargaining, it is similar to activity that has been held to constitute the activity of dealing with employers. Moreover, it is hard to come up with any compelling policy reason why such groups should be exempt from disclosure requirements, or restrictions such as the thirty-day limit on organizational picketing that bind more traditional unions. Hyde, *New Institutions* at 408-409.

127 As I wrote back in 2007, a visit to the then-existing ROC-NY web site showed the organization claimed that over the prior two years it had engaged in six campaigns against employers for back wages and discrimination claims for food service workers; negotiated a settlement for workers from a Brooklyn deli; and negotiated a settlement with a restaurant involving "compensation for discrimination, paid vacations, promotions, the firing of an abusive waiter, and a posting in the restaurant guaranteeing workers the right to organize and the involvement of ROC-NY in the case of any future discrimination." The group also advertised to employees: "If you are a restaurant worker who has problems with your employer, call us or come by ROC-NY!" Duff, *Days without Immigrants* at 135. I continue to contend that this is an explicit admission that ROC-NY existed for the purpose in whole or in part of dealing with employers.

128 Syracuse University, 350 NLRB 755 (2007); E.I. Du Pont De Nemours & Co., 311 NLRB 893, 894 (1993); Electromation, 309 NLRB 990, 995 n.21 (1992) enfd. 35 F.3d 1148 (7th Cir. 1994)

must involve exchanges of proposals on 2(5) subjects from the organization coupled with real or apparent consideration of those proposals by management.[129] The bilateral "mechanism" ordinarily entails a "pattern or practice" in which a group that employees participate in, over time, makes proposals to management, and management responds to those proposals by acceptance or rejection by word or deed:

> If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.[130]

This attempted line drawing between a bilateral proposal "pattern and practice mechanism" and statutory "bargaining" is not a clear one and feels clumsy at times. It is outright confusing to say that a statutory labor organization may be found without "bargaining" but that a "pattern and practice of exchanging proposals over time" *is* required to find that a group is a labor organization. That is the stuff of Scholastic Philosophy and in pretty obvious tension with *Cabot Carbon*. Furthermore, there is little indication that the NLRB intends to cease speaking in this way any time soon.[131] But this is not the NLRB's doing. The space between collective bargaining and "dealing with" is on its statutory face a semantic smidgen. It is often true, of course, that collective bargaining usually has as its goal the negotiation of a comprehensive collective bargaining agreement,[132] while bilateral discussions—even over time—may have narrower objectives. The problem, however, is that the NLRA's definition of "bargaining in good faith" is so broad that it begins to merge imperceptibly with the NLRB's "pattern and practice" invention. Section 8(a)(5) and 8(b)(3) of the NLRA make it in an unfair labor practice for an employer or a labor organization, respectively, to refuse to bargain in good faith over terms and conditions of employment. Section 8(d) of the NLRA,

> [R]equires the parties to 'meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement.' This requirement has been interpreted as establishing a general duty between an employer and its employees' bargaining representative 'to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement.'[133]

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129 Electromation, Inc., *supra*. 309 NLRB at 995 fn. 21.

130 E.I. Du Pont, *supra*. 311 NLRB at 894

131 Danite Sign Company, 356 NLRB No. 124 , n.1, slip op. at 2 (2011); Polaroid Corp., 329 NLRB 424, 429-432 (1999)

132 *See e.g*. Cabot Carbon, *supra.*, 360 U.S. at 213

133 Bryant & Stratton Business Institute, Inc. v. N.L.R.B., 140 F.3d 169, 182 (2d Cir. 1998)

Logically under *Cabot Carbon* a group *might* be found a labor organization even if it does *not* do any of the things described under Section 8(d). Equally logically, under the NLRB's formulation a group will *not* be found a labor organization *unless* its relationship with an employer amounts to a "bilateral mechanism of pattern and practice over time." The NLRB's pattern and practice interpretation has thus far inured to ALT-Labor's benefit in that is has found certain groups not have that kind of a durable relationship with any particular employer.[134] As a practical matter a finding of "no labor organization status" means no ALT-Labor liability under *any* NLRA prohibitions applicable to labor organizations.[135]

However, it is often risky business to hang one's hat on the NLRB's statutory interpretations given the reality of hostile appellate review.[136] The tension between the Supreme Court's discussion of labor organization status and the NLRB's discussion of it is palpable. So long as the NLRB is acting as prosecutor in deciding, for example, whether an ALT-Labor group has a "dealing with" purpose rendering it liable for Section 8(b)(4)(B) violations, all may be well and good, as it will have discretion whether to issue an administrative complaint,[137] though this

134 Cite to ROC NY memo and any other "no go" doc. Check Federalist memo.

135 For a discussion of other potential 8(b) violations see

136 *See* Ellen Dannin, *Hoffman Plastics as Labor Law: Equality at Last for Immigrant Workers*?, U. SAN. FRAN. L. REV. 393, 394 (explaining that the written labor law as it is applied today is a product of many years of "judicial amendments.")

137 *See generally* Heckler v. Chaney, 470 U.S. 821, 838 (1985) (concluding that an agency's decision not to enforce is unreviewable under the Administrative Procedure Act and the common law of judicial review); NLRB v. UFCW, Local 23, 484 U.S. 112, 124 (1987); however, where a statute possess provisions requiring enforcement action in specified circumstances a court has meaningful standards to apply concerning a non-enforcement decision and is authorized to undertake judicial review. Heckler v. Chaney, *supra*., 470 U.S at 833.

principle has its limits.[138] With the exception of the Fourth Circuit's opinion in *Waugh Chapel South*,[139] there is precious little authority on the question of what labor organization analysis federal courts would apply in Section 303 actions, and that is where real trouble may lurk for ALT-Labor. District court judges in that venue may be much more inclined to apply *Cabot Carbon* as an open-ended vacuum machine indiscriminately inhaling ALT-Labor groups. The NLRB's "pattern and practice over time" formulation, though accepted by the Fourth Circuit, cannot comfortably be seen as a majority judicial approach to the labor organization question.

How did the NLRB's focus on "pattern and practice" develop? One suspects *Cabot Carbon*'s discussion of "pattern and practice" issues throughout the opinion, a discussion it might be argued was *obiter dictum*, had the possibly unintended consequence of underemphasizing that the case most strongly turned on its finding of an *express* purpose. To see how this thinking can go awry consider the following thought experiment. Imagine a workplace "committee" in which employees clearly participate and which equally clearly states in its charter that it exists for the purpose of bargaining with the employer in that workplace regarding wages. The statute says nothing about the additional requirement that it *actually* deal with the employer regarding wages. *Cabot Carbon* does not so hold. Rather, it permits a fact finder to evaluate what the group does as part of the overall analysis. It strains credulity to claim that a group does not exist for the reason its founding documents say it exists.

The NLRB itself has acknowledged in several cases that it is unnecessary to *infer* a dealing with purpose from pattern and practice when it can otherwise be determined; it simply has not applied the principle consistently. In *Coinmach Laundry*,[140] a representation case, the NLRB upheld without discussion a Regional Director's determination that a group started by three

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138 *Id*. Under Section 10(l) a Regional Director is required to seek an injunction when there is reasonable cause to believe that the NLRA has been violated and that a complaint should issue, NLRA, Section 10(l), a standard that has been interpreted as meaning not that the it is likely that the NLRA has been violated but that the factual allegations and propositions of law underlying the Regional Director's petition are not "insubstantial and frivolous." San Francisco–Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 544 (9th Cir.1969). Thus, courts rarely scrutinize Regional Directors' conclusions that the NLRB has reasonable cause to believe the NLRA has been violated in 10(l) petitions. But see Overstreet v. Carpenters Local 1506, 409 F.3d 1199 (9th Cir. 2005) (denying regional director's 10(l) petition because "reasonable cause" test applied to agency but not court). There is some uncertainty about whether the standard for *finding* a Section 8(b)(4) violation—thereby triggering a mandatory statutory duty to seek 10(l) injunctive relief—differs from ordinary principles of "prosecutorial" discretion. In Saint Elizabeth's Hospital v. N.L.R.B. 2010 WL 796824 (N.D.Ohio), for example, an employer petitioned for a writ of mandamus premised on an oral opinion communicated by the Regional office that a Section 8(b)(4) charge had "arguable merit." *Id*. slip op. at 1. The Regional Director nevertheless declined to issue a complaint because the subject of the administrative charge—whether the displaying of an inflatable rat was unlawful signal picketing under Section 8(b)(4)—was already under review in the General Counsel's office in several other cases. *Id*. The employer took the position that because the Region had informally opined that the charge had "arguable merit" it was not "insubstantial and frivolous" and the Region was therefore required to seek a 10(l) injunction, and filed a writ of mandamus to compel the Region to do so. Id. Ultimately the court denied the employer's writ, *Id*. slip op, at 12, but the facts were strongly in the Region's favor. It is notable that the court failed to cite a single case in which the NLRB's refusal to find a Section 8(b)(4) violation and pursue a 10(l) injunction had been upheld by a reviewing court on generic "prosecutorial discretion" grounds. Perhaps the issue is too obvious to spur substantial litigation, but the question for ALT-Labor is whether a region refusing to find an 8(b)(4) violation on a "no labor organization" theory would be vulnerable to attack.

139 *See infra*. at II.B.2.b

140 337 NLRB 1286 (2003)

employees, and consisting of approximately fifty employees, was a labor organization though it had unsigned by-laws, had never taken minutes, had not been recognized by any employer or certified by the NLRB, had not negotiated any contracts, had not received dues from employees, had no income, assets or paid staff, and was operating out of one employee's house.[141] One employee testified that, "the Petitioner was created to 'organize, negotiate contracts regarding wages, working conditions, hours of employment … [and] grievance procedures.'"[142] That was enough for the Regional Director to conclude that the organization in question was a labor organization within the meaning of the NLRA,[143] and the NLRB in short order affirmed the determination.[144] In support of the decision the Regional Director cited a number of cases in which the NLRB found that groups were statutory labor organizations in circumstances where there was no evidence of pattern or practice or of the existence of a bilateral mechanism.[145] Each of the cases involved very early organizational efforts and were either representation cases or involved unfair labor practices in nascent organizing drives.[146] This makes a great deal of sense. At the inception of an organizing drive there can be no bilateral mechanism or pattern of bargaining with an employer, and in the case of unaffiliated labor organizations, of the kind apparently at issue in Coinmach, there is unlikely to be a practice of dealing with any employer. The decisions of the NLRB suggest that it is much more willing to look exclusively at express purpose and ignore "pattern and practice" in representational or early organizational cases. The problem is that the decisions seem to establish a principle that the barest expression of a purpose to represent employees is sufficient as a matter of law to establish labor organization status. It is difficult to reconcile Coinmach with ROC-NY. The "dealing with purpose" evidence in the latter was much greater than the evidence in the former. Such sharp inconsistency may not go unnoticed by courts in secondary boycott contexts, especially in Section 303 actions. Courts may prefer the representational cases so as to find ALT-Labor groups Section 2(5) labor organizations by virtue of the groups' express statements of purpose.

2. Dealing With Purpose Inferred from Protest

Perhaps this much is clear: ALT-Labor *protest* with *no* bargaining *or* "bilateral mechanism" involved should not be adequate in itself to render an ALT-Labor group a "labor organization." The difficulty is that protest may create discussion leading to consideration of how much dialogue would be required to establish a bilateral mechanism or a pattern and practice of interaction and consideration of proposals. Assuming, however, an ALT-Labor group is *solely* protesting employer practices its "message" appears more like a unilateral demand and less like

141 *Id*. at 1287

142 *Id*. at 1288, n.2

143 *Id*. at 1287

144 *Id.* at 1286

145 Coinmach, 337 NLRB at 1286 *citing* Butler Mfg. Co., 167 NLRB 308 (1967); East Dayton Tool & Die Co., 194 NLRB 266 (1971); Comet Rice Mills, 195 NLRB 671, 674 (1972); Yale New Haven Hospital, 309 NLRB 363 (1992); Betances Health Unit, 283 NLRB 369, 375 (1987)

146 *Id.*

any form of bilateral discussion or invitation to engage in bargaining. In the posture of protest the group's demand is as much a message to the general public about the targeted employer's practices as it is a communication to the employer with whom it has a dispute. Courts have previously utilized avoidance canons when interpreting portions of the NLRA that might have rendered predominantly expressive activity unlawful under the statute,[147] messages directed to consumers rather than to employees, for example, and indeed there are a number of "publicity provisos" built into the statute that operate in practice as a kind of constitutional safety valve.[148] Interpreting the labor organization definition in such a way as to broadly convert social advocacy groups into labor organizations subject to NLRA injunction carries obvious chilling potential. Courts may therefore be inclined to interpret the definition of labor organization narrowly when it is clear there is no colorable union activity at issue.

a. *Center for United Labor Action*

This avoidance rationale may respond to an objection that David Rosenfeld has raised that something akin to protest *may* in fact be deemed a form of "dealing with." Mr. Rosenfeld recounts the case of *Center for United Labor Action*[149] ("CULA") in which CULA, arguably an NLRA labor organization, was found by the NLRB *not* to be such an organization. The question was of threshold importance because the charging party, Sibley, a retail clothing store in Rochester, New York, alleged that CULA was engaged in a secondary boycott against it. The primary employer, it was alleged, was Farah Manufacturing, a maker of clothes, which was involved in a nationwide labor dispute with the Amalgamated Clothing Workers of America (the ACA). The charge had been filed against both the CULA and the ACA. The ACA, an admitted NLRA labor organization, quickly and predictably settled the case, after the NLRB found administratively that it had engaged in an unlawful secondary boycott. CULA, which had become involved in the labor dispute once it became clear that the ACA was meeting with little success, declined to settle, and the secondary boycott case went to trial. The question presented was whether CULA was a "labor organization" so as to bring it within the ambit of the NLRA's secondary boycott provisions. The NLRB found that it was not. Mr. Rosenfeld, echoing the dissenting Board member, finds the majority opinion problematic. Yet it is explainable by reference to Constitutional avoidance principles if it is accepted that there was a *substantial* argument that a putative labor organization was engaging in *predominantly* expressive activity.

What did CULA do? Well, to begin with, unlike much of ALT-Labor, it defined itself as a defender of unions and as an aggressive supporter of the union cause.[150] It supported union strikes. It engaged in picketing of other retailers carrying Farah's products, in other words it participated directly in the union campaign, and across state lines.[151] It even assisted striking

147 DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568 (1988) (interpreting Section 8(b)(4) of the NLRA not to prohibit peaceful but arguably secondary leafleting to avoid the serious First Amendment problems that would be created by a finding of prohibition).

148 *See* Section 8(b)(4)(B) and Section 8(b)(7)

149 219 NLRB 879 (1975)

150 *Id*. at 877

151 *Id*.

employees of *other* unionized employers involved in wholly separate labor disputes.[152] In sum, it was engaged in a broad variety of activities in those disputes.[153] Some examples included representation of discharged workers before the state unemployment commission in opposition to an employer's position;[154] and helping and assisting employees at a plant who wanted to unionize.[155] However, what it primarily did *in the actual case under consideration with respect to Sibley* was to picket,[156] albeit in a manner, *if* it was a labor organization, that would almost certainly violate Section 8(b)(4) of the NLRA. In connection with the labor organization question, it was quite evident that employees participated in CULA.[157] It was equally evident, however, that despite all of the labor organization-like activity in the record CULA had *never* attempted to negotiate or communicate with Sibley.[158] It has solely engaged in protest activity. The question for the ALJ hearing the case was whether by engaging in concerted activities or assisting and persuading employees to do so CULA was "dealing with" Sibley.[159] The ALJ, despite finding that CULA's activity *did* render it an NLRA labor organization,[160] nevertheless refused to find a violation because "such a result tends to warp the structure and distort the policy and purposes of the Act."[161] Sibley objected that such a conclusion would tend to encourage "outside organizations" to engage in secondary boycotts,[162] an argument essentially anticipating this discussion.

Perhaps not surprisingly, the NLRB on appeal did *not* adopt the reasoning of the ALJ insofar as he found CULA to be a labor organization, although it did uphold his finding of "no violation."[163] The NLRB concluded that the ALJ erroneously equated support for a "social

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152 *Id.*

153 Center for United Labor Action, *supra*. at 877

154 *Id*. at 878

155 *Id*.

156 *Id*. at 878

157 Center for United Labor Action, *supra*. at 878

158 *Id*.

159 *Id*. at 879

160 *Id.* On this point I read the case differently than Mr. Rosenfeld, who concluded that the ALJ did *not* find labor organization status. Rosenfeld, *Worker Centers* at 487.

161 Center for United Labor Action, *supra*. at 879. The ALJ cited the familiar rule of statutory construction that "a thing may be within the letter of a statute and yet not within a statute . . ." *Id*.

162 *Id.* at 880

163 *Id*. at 873

cause" with the desire to *represent* individuals in pursuit of such a cause.[164] In rejecting the ALJ's reasoning the NLRB said,

> Many present day labor disputes are viewed by some as problems which extend beyond the confines of the plant involved and have an impact on the community at large or, in some instances, on the Nation itself. In such circumstances, it is not unusual for social activist groups, newspapers, and clergy to actively support the employees' cause and to seek to marshal public opinion in support of it. It would also be uncommon if, among those who belong to such organizations, there were not some individuals who would meet the definition of employees under our Act. But are we then to conclude that any organization which engages in strike-supporting activities exists, at least in part, for the purpose of dealing with employers over employee labor relations matters? We believe that such a conclusion would be ridiculous on its face. Support for a cause, no matter how active it may become, does not rise to the level of representation unless it can be demonstrated that the organization in question is expressly or implicitly seeking to deal with the employer over matters affecting the employees.[165]

It may well be true, as Mr. Rosenfeld has argued, that the NLRB majority was applying extra-statutory criteria, or even an incorrect standard altogether, when it additionally opined that "to qualify as a labor organization under our Act the organization must be selected and designated by employees for the purpose of resolving their conflicts with employers."[166] The labor organization doctrine as it appears to exist today would clearly not support the NLRB's proposition.[167] The *gist* of the opinion, however, seems to be that to define a labor organization as the ALJ did would be to embroil the Act in interpretive difficulties. It should be remembered that at that time the Board did not yet have the benefit of labor-specific avoidance canon cases like *DeBartolo* and *Catholic Bishop of Chicago*,[168] which emphasized in the context of the NLRA that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly

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164 *Id*.

165 *Id.*

166 Rosenfeld, *Worker Centers* at 487 *citing* Center for United Labor Action at 873

167 The NLRB's statement seems to refer to Section 9(a) of the NLRA:

> Representatives *designated* or *selected* for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. (Emphases mine).

The NLRB appeared, in effect, to be saying that only certified representatives could be labor organizations, which seems obviously wrong.

168 DeBartolo *supra*. at 575; NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501, 504 (1979)

contrary to the intent of Congress."[169] To hold that an activist group is an NLRA labor organization merely because it protests repeatedly and employees participate in it, so as to expose the group to civil liability for peaceful expressive activity, appears to activate this principle.[170]

It is worth noting that some contemporaneous commentary on *Center for United Labor Action* imagined that the case *did* stand for the proposition that almost *any* group admitting employees to its membership, including broader civil society protest groups, might add up to a labor organization:

> In light of the consistently liberal interpretations-of "organization," it appears that a group, even less structured than CULA would come within the ambit of this term under section 2(5) . . . for instance, a group of workers who suddenly decided to visit the president's office and demand higher wages was held to be a labor organization. The implication of [CULA] is that any protest group, no matter how loosely formed, will-be deemed an organization under the Act. Illustrative of such groups are two individuals who, upon seeing one another in front of a store, agree to take shifts and picket, or interested citizens who decide spontaneously to join and sells products through the store, or finally, several dissenting CULA members who agree to picket, contrary to their group's decision. Such ad hoc protest groups are less structured than CULA in that they are not "highly purposed with a continuous existence." Yet under the standards of [the liberal NLRB cases] they surely would be deemed [labor] organizations. Indeed, under [one especially liberal] interpretation of section 2(5), perhaps only a single picket would be outside the ambit of the "organization" element.[171]

Even outside the confines of *Center for United Labor Action* some scholars appeared at that point in time to assume that all kinds of groups might be labor organizations. For example, Professor Meltzer argued in connection with the celebrated case *Emporium Capwell*[172] that the

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169 DeBartolo *supra*. at 575

170 It is worth noting, even if in passing, that the Supreme Court's treatment of speech issues in the context of secondary picketing in which a labor organization was clearly involved was in my judgment far from compelling. Although a full analysis of the foundational case in this area, Electrical Workers v. N.L.R.B., 341 U.S. 694 (1951), is beyond the scope of this discussion, it is very clear that the Court did not apply anything approaching "strict scrutiny" to Section 8(b)(4), nor did it hew closely to avoidance canon principles. To expand the doctrine to groups whose labor organization status is unclear may have the effect of reopening decades-old discussions on picketing and speech issues glossed over in the union context. As Charlotte Garden has argued, "the Court has yet to place union speech on the same footing as the speech of other social movements or to present a coherent theory of the First Amendment as it applies to labor speech." Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive*
Campaigns Are Protected Speech, 79 FORDHAM L. REV. 2617, 2647 (2011). ALT-Labor may represent a kind of conflation of movements creating confusion in the courts and accordingly promoting unpredictability in litigation.

171 Comment, *Protest Groups and Labor Disputes - Toward a Definition of Labor Organization: Center for United Labor Action*, 17 WM. & MARY L. REV. 795, 801-802 (1976)

172 Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975)

dissident group of minority employees in opposition to the incumbent union in that case[173] were themselves probably a labor organization. Such a contention sounds odd to my 21st century ears. It would seem to follow that the minority dissident group, in addition to being denied the protection of Section 7 of the NLRA may additionally have been capable of violating Section 8(b).[174]

The *CULA* Board could only respond that the proposition was "ridiculous on its face" but when it attempted to say why it apparently found it necessary to evade the actual language of Section 2(5) in order to arrive at what I think was the right outcome.[175]

b. *Waugh Chapel South*

Perhaps such an avoidance policy was also operating *sub silentio* in the Fourth Circuit's recent opinion in *Waugh Chapel South*.[176] In that case, a commercial real estate developer of a shopping center in Anne Arundel County, Maryland planned to lease a storefront unit to Wegmans Food Markets (the supermarket).[177] The United Food and Commercial Workers Union (the union) and the Mid-Atlantic Retail Food Industry Joint Labor Management Fund (the fund) opposed the project because the supermarket was not unionized.[178] A union official allegedly threatened to oppose any future projects of the developer in which the supermarket would be a tenant.[179] Because the union's dispute was with the supermarket the developer was a neutral to

173 The employees engaged in protest activities in a manner that was at odds with the incumbent union in the workplace. The employees were fired and the Supreme Court ultimately concluded that they were deprived of the protection of the NLRA for acting in derogation of their exclusive bargaining representative. *Id*. at 52-56, 70

174 Professor Meltzer was at the time criticizing the circuit court's decision to reverse the NLRB's decision denying protection to the dissidents. Western Addition Community Organization v. N. L. R. B., 485 F.2d 917 (D.C. Cir. 1973) rev'd on other grounds 420 U.S. 50 (1975). Professor Meltzer's point was that the court appeared to be conferring the protection of the NLRA under Section 8(a) even as it was, as he saw it, undermining Section 8(b). His confidence that the dissident employees comprised a 2(5) labor organization is striking.

175 At roughly the same time the NLRB was deciding CULA its prosecutorial arm, the General Counsel's Office, was occasionally deciding in Advice Memoranda that loosely structured picketing and protesting groups were Section 2(5) labor organizations. Marculewicz and Thomas, *Labor Organizations by Another Name* at 83; *see* Acme/Alltrans Strike Committee, Case No. 21-CB-6318, Division of Advice Memorandum (April 25, 1978) (a group of former employees picketing for a job); Protesting Citizens and its Agent Elvin Winn, Case 15-CC-681, Advice Memorandum (August 30, 1977) (group of unemployed workers picketing for a job and union scales); *but see* Michael E. Drobney, an Agent of Laborers Local 498 (T.E. Ibberson), Cases 8-CC-835, 8-CB-3229 Advice Memorandum (December 30, 1976) (group of job applicants picketing for a job not labor organization because no evidence of desire for employer to deal with them as a group, but simply hire them). It does not appear that the cases found meritorious proceeded to litigation. Given the unstructured and apparently unsophisticated nature of the ad hoc groups involved the cases probably settled quickly. None of the "labor organizations" involved looked remotely like a hybrid social advocacy group.

176 728 F.3d 354 (4th Cir. 2013)

177 *Id*. at 356

178 *Id.* at 357

179 *Id.*

the labor dispute. The union and the fund were subsequently involved in the filing of fourteen legal challenges to the development.[180] Each of the challenges was dismissed, withdrawn, or mooted by subsequent developments.[181] The developer thereafter sued the union and the fund in federal district court under Section 303 of the NLRA, arguing that the legal challenges filed against it as a neutral were a sham and thus a form of secondary boycott.[182] The court held that while sham litigation *could* violate the secondary boycott provisions of the NLRA,[183] and a genuine issue of material fact existed as to whether the *union* had engaged in such conduct,[184] the *fund* was not a "labor organization" subject to the NLRA.[185] The court noted that in order to fall under the NLRA's definition of labor organization an entity must meet the "dealing with employers" requirement, and that neither the purpose nor the activity of the fund involved "dealing with" employers.[186] In coming to this conclusion the court cited circuit precedent holding that no labor organization status may be applied in the absence of a bilateral mechanism through which "there is a 'pattern or practice' over time of employee proposals concerning working conditions, coupled with management consideration thereof . . ."[187] The court, in other words, applied the NLRB's interpretive formulation from cases like *DuPont* and *Electromation* and placed significant emphasis on the fact that the fund's charter explicitly prohibited it from "participating directly or indirectly ... in union collective activities."[188] The conclusion is puzzling because the fund was involved in the alleged sham litigation with the union and therefore participating directly in union activities in violation of its charter— the same litigation that the court was in the same breath saying rendered the union potentially liable to a secondary boycott violation. One could certainly argue that the fund's actions in violation of its charter made its subsequent characterization of its organizational purposes suspect. It could also be argued that a series of legal actions between the contractor and the fund (an organization in which employees participated) amounted to a bilateral mechanism in which proposals between employer and group were exchanged—for example, settlement proposals and demand. Nevertheless, the court concluded that

> [T]he only fact suggesting any interactions between the Fund and an employer concerns the alleged secondary boycott. There is plainly no "bilateral mechanism"

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180 Waugh Chapel South *supra*. at 357-358

181 *Id*. at 358

182 *Id.*

183 *Id*. at 367

184 Waugh Chapel South, *supra*. at 367

185 *Id*. at 362

186 *Id*. at 361-62.

187 *Id*. at 361 *citing* N.L.R.B. v. Peninsula General Hospital Medical Center, 36 F.3d 1262, 1270 (4th Cir. 1994)

188 Waugh Chapel South *supra*. at 361

> when the only alleged contact between an employee entity and management is an unfair labor practice directed against an employer.

The "fact," however, consisted of a series of legal and administrative challenges spanning the period from August 2008 to July 2011.[189]

It seems reasonable to speculate whether the court was anxiously dismissive of the argument that the fund was a labor organization because it had before it a difficult question involving whether alleged sham litigation could violate the secondary boycott provisions of the NLRA. On the merits of the case the court was unsure about the appropriate "sham legal action" standard to apply when multiple instances rather than a single incident of sham legal actions had been alleged.[190] In the context of a difficult First Amendment issue involving court access one suspects the court preferred a "clean" jurisdictional posture, and the labor organization issue, had it continued to be pressed by the fund, was not clean. By dismissing the fund, the jurisdictional issue—and potentially an additional constitutional issue—was avoided.

C. *The Crux of the Statutory Interpretation Problem*

Whether ALT-Labor groups are NLRA labor organizations therefore appears in practice to be a function of at least three factors: (i) how a particular group *explicitly* defines its purpose; (ii) a fact-finder's *inference* drawn from the group's actions; and (iii) whether the group's actions implicate *constitutionally protected* conduct.[191] Member Devaney expressed the problem succinctly in the NLRB's *Electromation* decision, "I note that *Cabot Carbon*'s rejection of the notion that "dealing with" is synonymous with collective bargaining failed to delineate the lower limits of the conduct: if 'dealing with' is less than bargaining, what is it more than?"[192] The question has not yet been answered in a satisfactory manner. The risk for ALT-Labor today is that the lower limits are in flux and could "descend" to the conduct in which it is customarily engaged.

The crux of the statutory interpretation problem in Section 2(5) may not have been clearly enough identified by decision makers. At the heart of the confusion may be a failure to distinguish what might be called "internal" from "external" labor organization applications. The broad labor organization definition was crafted with an eye to internal workplace applications. It was intended to outlaw the internal "company union." The idea was to define labor organization broadly and then, through operation of Section 8(a)(2) of the NLRA, to prevent an employer from controlling the organization. The resulting statutory formulation makes it an unfair labor

189 Waugh Chapel South *supra*. at 357-58

190 *Id*. at 363 ("We have not had occasion to confront this issue, as our precedent has applied [sham litigation doctrine] only where a party has alleged a single sham proceeding.")

191 Mr. Naduris-Weissman more formally describes the general interpretive approaches at play in this area as "textualism" and "intentionalism." Naduris-Weissman, *Worker Center Movement* at 273-276. I agree almost completely with his formal discussion of interpretive methods. My classification is meant to describe in context and somewhat informally what courts and the NLRB appear generally to be doing with respect to the labor organization definition. Regardless the classification scheme, the lesson to be drawn is that cases as a practical matter may be decided different ways in different contexts. That is the problem ALT-Labor faces.

192 Electromation, 309 NLRB 990, 1002 (1992)

practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[193] The question of who can violate the secondary boycott provisions, on the other hand, is a labor organization *external* application of Taft-Hartley, a version of the NLRA that was obviously not in existence when the labor organization definition was initially conceived. The external application arises not in the context of the putative labor organization's internal interaction with employees of a particular employer but rather in the context of the organization externally interacting with *other* employers. *Cabot Carbon*, and the NLRB's subsequent interpretation of the case in internal application contexts does not speak to that situation. To have any chance of placing the situation in proper statutory context the preferable approach is to consult Taft-Hartley's legislative history.

In lieu of an exhaustive examination of the legislative history of the Taft-Harley Act or the LMRDA respecting the labor organization definition,[194] it better suits my purposes to explore roughly contemporaneous court decisions in secondary boycott, "external application" contexts. In *DiGiorgio Fruit v. N.L.R.B.*,[195] a case decided by the D.C. Circuit Court of Appeals a few years after enactment of Taft-Hartley, the court upheld the NLRB's determination that a farm workers' union could not be held liable under the NLRA's secondary boycott provisions because it was comprised exclusively of agricultural workers not covered under the NLRA; accordingly, no "employees" participated in the group and by definition the union did not qualify as an NLRA labor organization.[196] In the course of the court's discussion there was no consideration of the different "external" circumstances to which the labor organization definition was being applied.[197] Soon after the enactment of the LMRDA in 1959, which among other things, amended and tightened the secondary boycott provisions, in the case of *International Organization of Masters, M & P v. N.L.R.B.*,[198] the D.C. Circuit Court of Appeals struggled with whether Masters, M & P, the involved putative labor organization engaged in alleged secondary boycotting, was a statutory labor organization.[199] The NLRB concluded that it was, and applied the secondary boycott provisions to the group, finding a violation.[200] Masters, M & P argued that it could not be held responsible for an unfair labor practice as a labor organization because the pilots for whose

193 NLRA Section 8(a)(2)

194 There was apparently primarily a great deal of discussion about how labor organizations should be restrained and little discussion about what they in fact were. *See* Marculewicz and Thomas, *Labor Organizations by Another Name* at 80-82. The legislative history of the Taft-Hartley that there were some early committee drafts that would have permitted an employer to lawfully form an employee committee provided that the employer would only "discuss" workplace issues with it. The proposal was defeated because it was assumed it was merely an attempt to legalize company unions. LeRoy, *Employee Participation* at 1704-1705.

195 191 F.2d 642 (1951)

196 Id. 644-648

197 The definition is set forth without discussion of its legislative origins in the Wagner Act. Id. at 644.

198 351 F.2d 771 (1965)

199 *Id*. at 774-778

200 *Id*. at 773

benefit the secondary boycott had been effected were not themselves employees under the NLRA.[201] However, unlike the situation in *DiGiorgio Fruit* some of the group's members were statutory employees,[202] thereby satisfying the 2(5) statutory requirement that employees must participate for a group to be found a labor organization. After eventually concluding that Masters, M & P was a 2(5) labor organization, the court said,

> We observe that this characterization of MMP as a 'labor organization' means simply that that entity, as presently constituted, is such an organization *for all purposes under the Act*. In other words, the use of the term 'labor organization' in any section of the Act must apply to MMP unless some further language of the section or its legislative history indicates a contrary result.[203] (Emphasis supplied)

Cases like *DiGiorgio Fruit* and *Masters, M & P*[204] strongly suggest that courts deciding cases at around the time of the enactment of the secondary boycott provisions did not view the scope of the labor organization definition as being narrowed in application to secondary boycotts. That is not good news for ALT-Labor, for it suggests that courts may find no *interpretive* reason arising from the *statute* to narrow the labor standard labor organization definition in "external" secondary boycott contexts.[205]

Stefan Marculewicz and Jennifer Thomas identified one explanation for courts' unwillingness to interpretively narrow the scope of the labor organization definition.[206] As they point out, the LMRDA, a substantial amendment of the NLRA directed at, among other things, the corrupt internal practices of unions, arguably *broadened* the labor organization definition.[207] Although some commentators have argued that the definition was narrowed rather than broadened,[208] it seems unlikely that in the course of tinkering with the labor organization

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201 *Id*. at 774

202 Masters, M & P, *supra*, at 774

203 *Id*. at 777

204 I will merely also mention in passing that another contemporaneous case in which labor organization status was found with no suggestion that Taft-Hartley had modified the labor organization definition was Judge Friendly's opinion in Nat'l Marine Engineers Beneficial Ass'n v. NLRB, 274 F.2d 167 (2 Cir. 1960)

205 There are of course many approaches that the court might use in marching through their exegetical mission. Those methods in the context of the labor organization question have been exhaustively canvassed by Eli Naduris-Weissman.

206 Marculewicz and Thomas, *Labor Organizations by Another Name* at 85

207 *Id*. Because part of the purpose of the amended statute was to eliminate union corruption it would make little sense to permit unions with opportunities to wiggle out of the labor organization definition. However, broadening respecting internal applications—and I view the anticorruption measures of the LMRDA as directed at the internal relations between worker and union in a particular workplace or bargaining unit—does not ultimately speak to the question of the appropriate scope of the labor organization definition in external applications.

208 Naduris-Weissman, *Worker Center Movement* at 289

definition in one part of the amended statute the secondary boycott provisions would have been left unmodified if narrowing had been legislatively contemplated.

Thus, whatever the theoretical validity to the contention that the internal origins of the labor organization definition is not easily exportable to external circumstances courts have not said as much and, on the contrary, seem oriented to a universal statutory definition. This conclusion appears especially troublesome for ALT-Labor in the context of Section 303 actions. While the NLRB may continue at the administrative level to decline pursuit of Section 8(b)(4) violations involving ALT-Labor on the "pattern and practice" theory, what the federal courts will do with the labor organization definition in the context of secondary boycott cases is anyone's guess. While the courts have been quite clear that under Section 303 *individuals* may not be sued,[209] there has been no distinction of which I am aware made between unions and other kinds of labor organizations. Indeed, I am not aware of cases discussing *Cabot Carbon* or the NLRB's pattern or practice theory in the context of a Section 303 action.

If I were representing an ALT-Labor group contemplating an arguable secondary boycott I would feel compelled to acknowledge my inability to predict with confidence whether my client would be deemed a labor organization by the NLRB or by a federal district court. My best counsel would probably be that the *NLRB* would probably not issue an administrative complaint or seek a 10(l) injunction in connection with an ALT-Labor secondary boycott. To make more likely that outcome I would warn against setting up durable bilateral mechanisms for interacting with employers, establishing *any* sustained negotiations with specific employers, or even focusing on individual companies in broader campaigns.[210] None of that would overcome an explicit statement in the group's charter or mission statements that it in fact existed for the purpose of dealing with employers over statutory subjects. However, *Cabot Carbon* with its undefined lower limits of conduct for establishment of labor organization status stands like a shadowy sentry continually calling into question whether that advice would carry the day. Its lower boundaries could reach all the way to a Section 303 action.

III. TOWARD A "LABOR ORGANIZATION" BARGAIN

ALT-Labor—indeed all of labor—should understand the considerable risk to nascent labor groups embedded in traditional labor law. Both unions and non-traditional labor advocates have been eager to avoid traditional labor law because of its well-known deficiencies in adequately protecting the exercise of concerted employee rights, especially during traditional representational election campaigns.[211] The question for the labor movement now is not whether it should avoid labor law because of its notoriously inadequate protective shield, but whether the

209 *See e.g.* Schultz v. N.L.R.B., 284 F.2d 254 (D.C. Cir. 1960)

210 This is apparently the advice of labor lawyer Eli Naduris-Weissman, a leading commentator in this area of the law who has in fact counseled worker centers on some of these issues. Eli Naduris-Weissman, *Worker Center Strategy Guide on Traditional Labor Law available at* http://nlg-laboremploy-comm.org/media/ProjWkrCtr_2010_Naduris-W_WkrCtrStratGuideLbrLaw.pdf (Jan. 2010) (last accessed January 31, 2014); *see also* Thomas Brom, *Solidarity for Later*, CALIFORNIA LAWYER *available at* http://www.callawyer.com/clstory.cfm?eid=932277&wteid=932277_Solidarity_for_Later

211 James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828-830 (2005) (explaining that unions began to avoid the NLRB altogether in the mid-1990s)

labor movement can avoid labor law as a sword.[212] The simple truth is that traditional labor law imposes significant restraints on labor organizations, including the secondary boycott prohibitions that have been under discussion here,[213] and a number of ALT-Labor groups almost certainly fall within the labor organization definition.[214]

Yet there is an opportunity presented for both labor and business. Devised in the 1930s as an important part of the original NLRA, the broad labor organization definition was originally meant to ward off the early 1930s employer tactic of creating puppet, in house unions to distract employee interest in authentic unions.[215] The statutory strategy was to define labor organizations (as we have seen) very broadly and then to strictly prohibit employer involvement in them.[216] The present iteration of ALT-Labor may be merely the tip of the proverbial iceberg with respect to folks who have simply had enough organizing themselves into non-traditional or even unrecognizable kinds of groupings. In all sorts of workplaces non-union employees routinely initiate concerted protest online, and the NLRB has in several cases acted to protect such activity.[217] Imagine a group of cyber protesters, angry at their company, who electronically attempt to persuade other workers employed by other companies—say customers of their company—not to go to work to pressure their company to agree to their demands.[218] The cyber group could be found a labor organization; it may have violated secondary boycott prohibitions.

Even more broadly, one can conceive current low wage workers as simply the front edge of a rapidly expanding precariat. As Katherine Stone has recently written, "More and more, workers are hired on temporary or fixed term contracts, without any hope of regular employment. The new 'precariat' move in and out of the labor market, earning low wages when they have work, and putting strains on public welfare and health care systems when they do not."[219] Policy

212 Rosenfeld, *Worker Centers* at 471 ("As they grow in number and scope, worker centers will have their development and effectiveness arrested by the very problem they were designed to avoid: the regulation of and restrictions on labor organizations under the National Labor Relations Act (NLRA).")

213 *See supra*. Section I

214 *See supra*. Section II

215 LeRoy, *Employee Participation* at 1654-55

216 Section 8(a)(2) states in relevant part that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

217 *See* Steven Greenhouse, *Even if it Enrages Your Boss, Social Net Speech is Protected*, N.Y. TIMES (Jan. 21, 2013) *available at* http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all&_r=0

218 Professors Martin Malin and Henry Perritt hint at this emerging problem when they note, in a discussion of the NLRB's early stage deliberations over the "electronic workplace," that among the questions that will have to be considered are the types of economic pressure that may lawfully be brought to bear on all-electronic workplaces. Martin H. Malin and Henry H Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces* 49 U. KAN. L. REV. 1, 4 (2000). One might add that both the questions of primary and secondary pressure will have to be considered. It is extremely easy to imagine unintentional formation of an electronic, cyber "labor organization" unwittingly "dealing with" an employer and then applying secondary pressure to it.

219Katherine Van Wezel Stone, *Green Shoots in the Labor Market: A Cornucopia of Social Experiments*, UCLA School of Law, Law-Econ Research Paper No. 14-01 at 10 (Jan. 22, 2014) *available at*

makers' usual reaction to developments such as these is to argue that the regulatory state should become more "flexible" to accommodate the "new" economic reality.[220] However, there is nothing new about this reality. It was the reality of the 19th century, a reality that forward thinking policy makers and an energetic, organized working class was able to alter. The question is whether unions wish to accept a world of flexibility or create a world of stability, as did their forbears, by assisting pockets of resistance even if it means risking changes in a statutory regime that has become more talismanic than real.

Unions can diminish concern respecting modification of the labor organization definition by thinking "horizontally." The concerns associated with dominated "committees"—internal employee committees arguably "dealing with" employers respecting conditions of employment — arose during a time when there was some prospect of an intra-workplace struggle, a "vertical" contest over control of continuing employment. Now, however, unions will be more likely to turn to the business of what might be called "serial organizing." Serial organizing recognizes that workers will increasingly be moving quickly, from insecure job to insecure job. It makes little sense for a union to expend resources to organize workers in ephemeral workplaces. Rather, organization will most efficiently be undertaken *between* workplaces, guiding, educating, and "connecting up" workers as they themselves engage in quick sharp conflicts with their precariat employers.

A recent labor dispute illustrates the idea. On January 28, 2014, a worker at a Whole Foods grocery in Chicago missed work when she had to stay home with her special needs child when school was cancelled as a result of a snow storm.[221] The woman and her co-workers, none of whom were represented by a union, believed that they had previously negotiated an attendance policy agreement with their employer that would have excused the woman under its terms.[222] The woman was fired, however, and her co-workers walked off the job in protest.[223] One of the employees interviewed in connection with the job action said,

> We're not "union workers" in the sense that we don't have a contract – we certainly would like to have one eventually . . . But the reality is that the union is you deciding with your co-workers to actually join together and exert collective power against the boss. That's what the essence of a union is.[224]

After the walkout Chicago Teachers Union President Karen Lewis headlined a supportive rally that was organized by the Workers Organizing Committee of Chicago, the Chicago chapter of

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383575; GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS (Bloomsbury Academic, 2011) (hereinafter Stone, *Green Shoots*)

220 *See e.g. Id*. at 7-10

221 Josh Eidelson, *That's cold, Whole Foods: Polar vortex firing spurs Chicago strike*, SALON (Feb. 5, 2014) *available at* http://www.salon.com/2014/02/05/thats_cold_whole_foods_polar_vortex_firing_spurs_chicago_strike/

222 *Id.*

223 *Id.*

224 *Id.*

Fast Forward.[225]

This situation illustrates that workers are capable of independent, smaller scale organizing at their own discreet workplaces and of conceptualizing in broad terms collective power. At the same time, unions are capable of "connecting up" with those workers afterwards. However, it also illustrates some of the coordination risks under discussion in this article. The magazine article from which the story is recounted does not mention the location of the rally, the message of the rally participants, or to whom, precisely, the message was directed. As already explained, these inquiries would be critical in assessing whether a secondary boycott could be alleged by an employer.

Some have argued in essence that sections 2(5) and/or 8(a)(2) should simply be eliminated because, as the argument has been expressed, the interplay of the provisions leaves employees, as a practical matter, with a choice between unionized participation in workplace governance and no participation at all.[226] Professor Clyde Summers has argued, however, that if Section 8(a)(2) were eliminated it would set the stage for massive employer anti-union campaigns and establishment of sham unions that employees would be poorly equipped to identify.[227] A similar outcome might be produced, of course, if Section 2(5)'s labor organization definition were narrowed in some manner to cover "a certified union" or a "union representing employees," or something of the sort. A narrower definition might mean that employers could establish and dominate non-labor organizations not fitting into the narrower definition, thereby deceiving employees into thinking they have independent representation when they do not. To contend with this problem Samuel Estreicher has proposed a modified Section 8(a)(2) that would ban employers from installing organizations "that purport to function as the independent collective agency of the workers," but would in all other respects permit business-related employee participation schemes.[228] Such a modification might simultaneously narrow the applicability of Section 2(5), possibly having the practical effect of rescuing ALT-Labor from secondary boycott liability. However, when considering such modifications there is no escaping the continuing risk of employee deception engendered by relaxation of the Section 2(5) labor organization definition if Section 8(a)(2) is simultaneously weakened.

Labor-sympathetic commentators have also argued for the elimination of Section 8(b)(4) altogether. Professor Julius Getman has contended, for example that,

> Section 8(b)(4) places massive and unique limitations upon the ability of unions to use economic pressure to support each other's strikes. No one doubts that its repeal would be a great victory for unions and that legislative achievement of this goal has been long sought and almost impossible to achieve.[229]

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225 *Id.*

226 *See* Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 140-41 (1993)(discussing and rejecting views of proponents of the sections' elimination)

227 *Id*.

228 Samuel Estreicher, *Employee Involvement And The "Company Union" Prohibition: The Case For Partial Repeal Of Section 8(A)(2) Of The NLRA*, 69 N.Y.U. L. Rev. 125, 127 (1994)

229 Julius Getman, *National Labor Relations Act: What Went Wrong; Can We Fix It*?, 45 B.C. L. REV. 140 (2003)

That may be true, but such a thing seemed practically impossible when he wrote the words a decade ago and virtually unthinkable in the present ossified reality. Similarly, employers have had intense interest for over a decade in modifying or abolishing Section 8(a)(2) or Section 2(5) of the NLRA, or both, and this interest culminated in the passage of the TEAM Act in 1995,[230] a bill that was ultimately vetoed by Bill Clinton.[231] While the TEAM Act, or something like it, has had its supporters over the years, it is just as obvious that *it* cannot pass in the current political environment as secondary boycotts would not be eliminated. It would be hard to argue that the present environment is not more polarized than it was during the Clinton Administration. The surprisingly underdeveloped and unpredictable law surrounding the labor organization definition explored in this article, and in the work of lead commentators like Eli Naduris-Weismann, leads to the conclusion that some present and future ALT-Labor groups may be found labor organizations and some may not. One senses, however, that the likelihood of litigation over the labor organization question is not so unpredictable. As things stand now it is easy to imagine secondary boycott cases being decided one way at the NLRB and in an entirely different manner in the federal courts, for example in the course of Section 303 actions. That kind of uncertainty does not seem especially desirable for anyone.

Those outside of business circles opposed to unions on policy grounds might also support a re-worked labor organization definition—for reasons other than the reflexive rationale that it could increase opportunities for employers to establish participatory committees. A libertarian argument in support of ALT-Labor has been under discussion recently: ALT-Labor, whatever it is, represents a labor relations model outside the "compulsory unionism" that conservatives and libertarians tend to deride. If we conceive of union unfair labor practices as the Taft-Hartley policy counterweight to exclusive representation and employee funded unions—to union power — ALT-Labor is outside that paradigm. It does not enjoy governmental, exclusive representation protection.[232] In the NLRA regime (as in any functioning *political* democracy) the majority rules, achieves governmental status, and *that* is in theory the end of the matter.[233] Any non-majority,

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230 H.R.743, 104th Cong. (1995); S. 295, 104th Cong. (1995). Section 3 of the Bill would have amended Section 8(a)(2) of the NLRA as follows:

> Provided further, that it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including issues of quality, productivity and efficiency, and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization.

Although the Bill would have amended Section 8(a)(2) the language would also effectively have amended Section 2(5).

231 Rafael Gely, *Whose Team are You On? My Team or my TEAM?: The NLRA's Section 8(a)(2) and the TEAM Act*, 49 RUTGERS L REV. 323, 325 (1997)

232 Robert VerBruggen, *Why Conservatives Should Love 'Alt-Labor'*, REAL CLEAR POLICY (Oct. 16, 2013) *available at* http://www.realclearpolicy.com/articles/2013/10/16/why_conservatives_should_love_alt-labor.html (last accessed February 1, 2014)

233 Anarchists argue that democracy is coercive.

non-supporting employee interests are to yield and to financially support the union to the limits of a representational ceiling. As one is often told in discussions of employment at will, one is always "free" to quit.[234] This is a rational if sometimes scorned free-rider policy. ALT-Labor—though it is hard to speak of it monolithically—appears to be entirely *voluntary* under any reasonable definition of the term. No employee is required to join or support it as a condition of employment. Arguably, then, it represents a "free market" alternative to unionism, even if it is unclear whether it is an actual alternative since at this early date it has not delivered much more than positive public relations for low wage workers. Still, such groups seem evocative of a certain 19th century élan, a panache that might have been embraced by Samuel Gompers and the "libertarians" of his day.[235] The groups are supported by private money—*Citizens United* money—and not by the State.

Labor advocates will continue to see in attempts to loosen the Section 2(5) and 8(a)(2) lockbox threats to unions' bargaining exclusivity. There are two immediate responses to this concern. First, either unions want to help ALT-Labor or they do not. If it is the former they will have to eventually address the labor organization vulnerability on display in this article. Second, if the underlying dynamic of the labor relationship is fundamentally adversarial and inevitable unions have nothing to fear from nonunion participatory schemes. The model cannot lead anywhere under that assumption because, at the end of the day, the boss will not give up anything significantly affecting the bottom line. Once workers are organized in their "action committees," and see what is *not* happening, they may be more inclined to wonder what happens next than if they had never been in such a group. Unions might find themselves in a good position to call the participatory bluff and dare management to allow authentic competition between unions and committees. Perhaps unions will find ways to access employees participating in internal groups to help them leverage an ongoing credible threat of independent unionism.[236] This may sharpen unions and employees alike in an even broader "School for Democracy,"[237] and put to rest conservative claims that unions fear competition and insist upon monopoly. Given the overall weakness of labor law, what do unions *really* have to lose?

The time seems opportune for a compromise. Organized labor and business should push jointly for a narrowing of the section 2(5) definition and make certain that the definition means in practice that the now-and-future ALT-Labor is not subject to liability under the secondary boycott provisions of the NLRA. Michael LeRoy has proposed the following amendment of Section 8(a)(2):

> Notwithstanding any other provision of this Section, it shall not constitute or be evidence of an unfair labor practice for an employer to form or maintain a

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234 *See* Benjamin Sachs, *Conservatives, Alt-Labor, and "Coercion,"* ON LABOR: WORKERS, UNIONS, AND POLITICS (Oct. 22, 2013) *available at* http://onlabor.org/2013/10/21/conservatives-alt-labor-and-coercion/

235 Aaron Steelman, *If Only Samuel Gompers Were Alive Today*, CATO INSTITUTE (Oct. 28, 1996) *available at* http://www.cato.org/publications/commentary/only-samuel-gompers-were-alive-today (last visited Feb. 2, 2014)

236 *See* LeRoy, *Employee Participation* at 1702 (discussing the Canadian experience and how "employees are able to leverage . . . internal democracy with a credible threat to unionize).

237 *See generally* Charlotte Garden, *Labor Values Are First Amendment Values* at 2657

> committee in which employees participate to at least the same extent practicable as representatives of management participate to discuss with it matters of mutual interest, including grievances, wages, hours of employment and other working conditions, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to enter into collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply.[238]

My proposal would first be to accept this language, which essentially keeps intact the broad definition of a labor organization but partially insulates the employer from violations in connection with it. However, I would go further to make clear that the conceptual structure identified in the language, a group that "does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to enter into collective bargaining agreements between the employer and any labor organization"—a structure that would seem to include much of ALT-Labor—be similarly insulated from liability under Section 8(b)(4)(B).

CONCLUSION

The transparent reasons for the emergence of ALT-Labor groups is the reality of weak labor law protections for employees and the broad formation of a transient precariat. In this environment unions have been unable to gain traction. But labor law, with all its weaknesses and maddening irrelevance in certain contexts, has prohibitory dimensions that must not be ignored. For some observers ALT-Labor represents the potential for a reinvigorated labor movement and an energized precariat. For others, ALT-Labor represents, at least with respect to low wage workers, an exercise in futility—no amount of pressure, they claim, will force employers to pay wages and benefits that the market simply will not bear. To an observer of labor history, however, ALT-Labor is a vulnerable, fragile phenomenon likely to be dealt with—if agitation intensifies—as militant labor has always been dealt with in the United States: injunctions and civil actions, one way or another, are likely to rain down upon the heads of the actors. Secondary boycott prohibitions are an engine that could quite possibly drive such litigation. Workers flouting secondary boycott prohibitions would be engaging in civil disobedience. Civil disobedience will always have its risks and costs, but defiance in the face of the risk is a course some might choose. However, the risks should be understood. Communicating the nature of the risk is not arguing against its legitimacy.

Nevertheless the pragmatic conclusion of this article is that ALT-Labor groups would be well advised to disavow *in explicit terms* any purpose of negotiating with employers. The better course is to train workers in discreet workplaces how *they* can engage in negotiations. Such a disavowal should diminish but not eliminate arguments that an ALT-Labor group's purpose is to "deal with" employers. It would have to be followed by conduct from which a "pattern and practice" of interacting with employers was found insufficiently pervasive for a legal fact finder to discover a "bilateral mechanism." It is reasonable to think that courts will not be quick to

238 LeRoy, *Employee Participation* at 1708. As Professor LeRoy explains, the proposal is an amalgam of sections of the Team Act and of a committee proposal arising during the Taft-Hartley deliberations. *Id*. at 1706-1707

equate “pure” protest directed at an employer with a “dealing with” purpose sufficient to create labor organization status, thereby exposing ALT-Labor to secondary boycott liability. Thus, ALT-Labor should be careful to direct its protest message to the general public wherever possible.

More broadly, “outside” civil society groups are becoming increasingly invested in ALT-Labor, which represents one face of the precariat. Restricting ALT-Labor conduct that might, if engaged in by a union, violate the NLRA is an altogether different exercise than regulating “industrial strife.” One hopes that such restrictions would be undertaken, if at all, only with the greatest caution and subjected to strict scrutiny. A good way to avoid impacts on the broader civil society is to ensure that ALT-Labor is not subjected to the secondary boycott provisions of the NLRA. Whether or not organized labor and business can negotiate some kind of deal that Congress would be willing to enact, it is in the broader public interest that the government not be permitted to further conflate traditional labor regulation with historically protected speech and protest. ~~One cannot wonder at why the precariat is agitated. It should be permitted, in a free society, to express its dissatisfaction with the status quo.~~