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In a major labor dispute between the Brotherhood of Railroad Trainmen and the Florida East Coast Railway Company (FEC), the parties, having exhausted all the procedures of the Railway Labor Act (RLA)[1] for resolving a major dispute,[2] resorted to self-help remedies.[3] FEC unilaterally changed its operating employees' rates

* 394 U.S. 369, *rehearing denied*, 394 U.S. 1024 (1969).

1. 45 U.S.C. §§ 151-88 (1964).

2. The RLA provides a panoply of procedures which disputants must follow before they may resort to self-help. Railway Labor Act §§ 1, 4-10, 45 U.S.C. §§ 151, 154-60 (1964) [hereinafter RLA]. The procedures are purposely complex in order to facilitate the voluntary settlement of major disputes. The final step in those procedures is the creation of a presidential emergency board to investigate and report on the dispute. RLA § 10, 45 U.S.C. § 160 (1964). But the parties are not bound by the decision of the board, and nowhere in the RLA is compulsory arbitration required. *See* text accompanying notes 34-37 *infra*.

3. The United States Supreme Court has consistently held that a full range of self-help remedies is available to labor disputants after the procedures of the RLA have been exhausted. *See, e.g.*, Brotherhood of Ry. & S.S. Clerks v. Florida E. Coast Ry., 387 U.S. 238, 244 (1966); Brotherhood of Locomotive Engrs. v. Baltimore & Ohio R.R., 372 U.S. 284, 291 (1963); Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 725 (1945).

of pay, rules, and working conditions; and the union, in turn, called a strike and picketed peacefully at locations where FEC operated, including the premises of the Jacksonville Terminal Company, which served a number of other railroads.[4] The avowed objective of the union's picketing was to cause the other carriers using the terminal to cease interchanging with the FEC. It was an attempt to "elicit a secondary boycott of the FEC . . . , [a boycott] which depended for its success upon the aid of the . . . [other companies'] employees in refusing to cross . . . [the union's] picket lines."[5] A federal district court enjoined all picketing on the terminal premises except that which was restricted to a "reserved gate" set aside for FEC employees. The United States Court of Appeals for the Fifth Circuit reversed, holding that the Norris-LaGuardia Act[6] barred issuance of a federal injunction,[7] and its decision was affirmed by an equally divided Supreme Court.[8]

While this litigation was pending, the terminal company obtained from a Florida state court an injunction that was virtually identical to the earlier federal order.[9] That decision was affirmed by

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4. The Jacksonville terminal facility is a corporation owned and controlled jointly by four railroads, including the FEC.

5. Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 651 (5th Cir. 1966). The picket signs read:

Fellow Railroad Men
Do Not Cross or Assist F.E.C.
B. of R.T.
On Lawful
Strike
Against F.E.C.
Please Make Common Cause With Us In
Major Dispute Against F.E.C.

6. 29 U.S.C. §§ 101-15 (1964). Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1964), provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> . . .
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> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
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> . . .
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> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

7. Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649, 655 (5th Cir. 1966).

8. Atlantic Coast Line R.R. v. Brotherhood of R.R. Trainmen, 385 U.S. 20 (1966) (mem.).

9. The Florida trial court held that the union activity constituted a secondary boycott which was illegal under state law [FLA. STAT. ANN. § 447.09(12) (1966)], that it violated the state's restraint-of-trade laws [FLA. STAT. ANN. §§ 542.01-.12 (1962)], and

a Florida district court of appeal.[10] The United States Supreme Court granted certiorari[11] to "determine the extent of state power to regulate the economic combat of parties subject to the Railway Labor Act."[12] This case was the first one in which the Supreme Court faced a situation involving secondary activity[13] by a labor union subject to the RLA.[14] The RLA itself is completely silent on the subject of secondary activity; it neither prohibits it nor protects it.[15]

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that it sought to force the terminal company to violate its duties as a carrier under the Florida Transportation Act [FLA. STAT. ANN. §§ 351.12, .14-.17, .19 (1968)].

10. 201 S.2d 253, *appeal dismissed*, 207 S.2d 458 (1967), *cert. denied*, 209 S.2d 670 (1968).

11. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 392 U.S. 904 (1968).

12. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 372 (1969).

13. Secondary activity includes various methods by which a union disputing with one employer may bring pressure to bear on other persons—including other employers, employees of other employers, and customers—in order to induce them to cease doing business with the employer who is party to the dispute. The gravamen of such activity is that it involves new parties in the dispute. Under the National Labor Relations Act, secondary boycotts are prohibited by § 8(b)(4), 29 U.S.C. § 158(b)(4) (1964). *See* note 15 *infra*.

14. The industries subject to the RLA are the transportation industries other than trucking. The Act traditionally covered only railways, but its coverage has been extended to include the airline industry. RLA §§ 1 First, 201-08, 45 U.S.C. §§ 151 First, 181-88 (1964). Labor relations in the railroad industry have generally been thought to present unique problems. As Justice Frankfurter once stated: "From the point of view of industrial relations our railroads are largely a thing apart." Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 751 (1945) (dissenting opinion). Indeed, the more general National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-68 (1964), expressly exempts from the Act's coverage employees and employers subject to the Railway Labor Act. National Labor Relations Act §§ 2(2), (3), 29 U.S.C. §§ 152(2), (3) (1964).

The RLA procedures cover two basic kinds of labor disputes. First, § 2(4), 45 U.S.C. § 151a(4) (1964), provides for "the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions"; disputes over these issues have been labeled "major disputes." Second, § 2(5), 45 U.S.C. § 151a(5) (1964), provides for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." These latter disputes have been labeled "minor." Major disputes, as defined by the Supreme Court,

> present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. . . .
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> The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality.

Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 723-24 (1945).

15. When an act of Congress is silent on a particular problem, that silence may breed complicated problems of federalism. The congressional silence may be interpreted as expressing an intent to leave room for state regulation or it may be interpreted as indicating that Congress intended to leave the particular conduct free from all regulation. Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 225 (1950). One reason for the RLA's silence on secondary activity, however, may be that such activity in the transportation industries has been a rare, indeed almost nonexistent, occurrence. In the 1947 debates over the proposed § 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1964), Senator Taft stated:

> I want to point out that railway labor has never been covered by the Wagner

In a 4-3 decision,[16] the Supreme Court held that until Congress acts, "picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription."[17] Accordingly, the Court reversed the decision of the Florida court and lifted the state injunction. Justice Harlan, writing for the majority, stated that, although state court jurisdiction over the cause was not preempted, the issues must be governed by federal law, rather than state law, because of paramount federal policies.[18] By referring to

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Act; it has always been covered by the Railway Labor Act, which provides a somewhat different procedure. We saw no reason to change that situation, because there were no abuses which had arisen in connection with the operation of the Railway Labor Act.

93 CONG. REC. 6498 (1947).

Contrast the silence of the RLA with the direct prohibition of secondary activity under § 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1964), which was specifically designed to deal with this problem. That section makes it an unfair labor practice for a labor organization:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
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> . . .
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

16. Justices Fortas and Marshall did not participate.

17. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 393 (1969). Justice Harlan, who wrote the majority opinion, noted that in the context of labor relations the word "protected" may have two distinct meanings. It may refer to employee conduct which the states may not prohibit, or to conduct against which the employer may not retaliate. 394 U.S. at 382 n.17. Throughout the opinion he used the term only in the former sense, and this Recent Development conforms to his usage.

18. 394 U.S. at 382. The basic standard for the doctrine of pre-emption was established in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), in which the Court stated: "When an activity is arguably subject to § 7 or § 8 or the Act [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245. The *Garmon* doctrine was extended in Teamsters Local 20 v. Morton, 377 U.S. 252 (1964), in which the Court considered a peaceful secondary boycott and a suit for damages under § 303 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 187 (1964). The particular conduct involved was arguably neither prohibited nor protected by § 7 or § 8 of the NLRA. Nevertheless, the Court held that Congress, by enacting § 303 of the LMRA, had effectively focused upon a general area and type of conduct, that the particular conduct involved was within the ambit of federal regulation under the NLRA, and that the state was, therefore, pre-empted from regulating the secondary boycott involved in this case. Although the Court in *Jacksonville Terminal* seems to be correct in its holding that state jurisdiction was not pre-empted, since the RLA is silent on the subject of secondary activity, its further conclusion that the states cannot regulate picketing by an RLA union goes beyond *Garmon* and *Morton*. In *Morton*, the state court was precluded from regulating the particular activity because Congress had focused on a general type of conduct in the NLRA. The RLA, however, does not

national labor policy as manifested in the National Labor Relations Act (NLRA), Harlan concluded that at the one extreme, peaceful primary picketing was protected from state regulation, and that, at the other extreme, conduct involving violence was definitely not protected. Thus, he felt, since the picketing in this case was not violent, its susceptibility to state regulation would arguably turn on whether it was primary or secondary. But when he was faced with the problem of making that determination, Harlan noted the "fuzziness" of the distinction between primary activity and secondary activity.[19] He concluded that to condem all of the petitioners' activities which carried any "secondary" implications would be to "paint with much too broad a brush."[20] He found that the question of which picketing activities are federally protected under the RLA and therefore immune from state interference, and which activities are subject to prohibition by the states, is a question for consideration by Congress rather than by the Supreme Court.[21] Thus, in the view of the majority, until Congress establishes standards, the least unsatisfactory judicial solution is to hold all picketing protected against state proscription.[22]

The *Jacksonville Terminal* decision is anomalous in several respects and seems to have created a "no man's land" with respect to governmental control of picketing carried on by unions subject to the RLA,[23] primarily railroad and airline unions.[24] Although secondary picketing is prohibited in other industries by section 8(b)

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purport to focus on any type of union activity. Thus, the Court, by not allowing the state to regulate the picketing in *Jacksonville Terminal*, pre-empted the state from regulating an area in which Congress has not acted at all. That result should be recognized as a significant extension of the pre-emption doctrine, even as developed in *Morton*.

19. Primary activity is always protected and secondary activity is prohibited under the NLRA. In dealing with a situation covered by the NLRA, the Court stated: "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade." Local 761, International Union of Elec. Workers v. NLRB, 366 U.S. 667, 673 (1961).

20. 394 U.S. at 390.

21. 394 U.S. at 391.

22. 394 U.S. at 392-93. Justice Douglas, in dissent, expressed the view that the right to self-help under the RLA should not override state law when a secondary boycott threatens to paralyze a whole community. He argued that the states should have a free hand in labor controversies unless Congress adopts a contrary policy, and he found no such policy concerning secondary activity in the silence of the RLA. 394 U.S. at 397.

23. Brief for Respondent at 25, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969). The power of a federal court to enjoin the union's picketing had been previously denied. Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649 (5th Cir.), *aff'd.*, 385 U.S. 20 (1966) (4-4 decision).

24. For a discussion of the coverage of the RLA, see note 14 *supra*.

(4) of the NLRA,[25] the Court has given RLA unions the freedom to engage in such conduct by saying that, until Congress acts, no one may regulate it.[26] The Court's method in reaching this result, in conjunction with its proclaimed deference to Congress, suggests that the *Jacksonville Terminal* decision is intended to prod Congress into action on the problem of secondary activity by unions subject to the RLA. Consequently, it is essential to inquire into the likelihood of congressional action that would remedy both the avowedly "unsatisfactory" nature of the Court's decision[27] and the void that presently exists in the RLA. If congressional action in this area does not occur in the near future, it may be that the Court's decision will turn out to be even more unsatisfactory than imagined. In such circumstances, the Court, faced with a similar situation in the future, should pursue another alternative.[28]

If permanent congressional legislation is passed as a response to the *Jacksonville Terminal* decision, it could take one of two forms: (1) the legislation might amend the RLA to deal directly and specifically with the problem of secondary boycotts and picketing, or (2) the legislation might amend the RLA's emergency procedures to fill the void left by the *Jacksonville Terminal* case. The probability of both of these forms of legislation must now be discussed.

If Congress were to adopt the first method and deal specifically with secondary conduct, it seems likely that it would prohibit such conduct just as has been done under the NLRA.[29] Federal labor policy is well set against secondary activity by labor unions,[30] and there is no apparent reason why this policy should not apply to industries covered by the RLA as well as to those under the NLRA.

There is good reason to believe, however, that even though secondary activity does run counter to the labor policy of this country, congressional legislation making such activity illegal under the RLA is highly unlikely. For one thing, secondary conduct applied by rail unions or other unions subject to the RLA has been a rare

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25. 29 U.S.C. § 158(b)(4) (1964), quoted in note 15 *supra*.

26. The respondents felt that the result of the *Jacksonville Terminal* decision was "to put in the hands of railway labor powers to use weapons against third parties which are without counterpart in all of American industry." Respondent's Petition for Rehearing at 10, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, *rehearing denied*, 394 U.S. 1024 (1969).

27. 394 U.S. at 392.

28. *See* text accompanying notes 60-69 *supra*.

29. § 8(b)(4), 29 U.S.C. § 158(b)(4) (1964), quoted in note 15 *supra*.

30. Congressional debates over the Taft-Hartley Act in 1947 and the Landrum-Griffin Act in 1959 evinced a noticeable congressional hostility to secondary activity: "In this bill we prohibit secondary boycotts all over this country." 93 CONG. REC. 7537 (1947) (remarks of Senator Taft); "[I]t was the clear and unequivocal intention of Congress in 1947 to outlaw the evils of secondary boycotts . . . .", 105 CONG. REC. 15,531 (1959) (remarks of Representative Griffin).

occurrence,[31] whereas permanent legislation normally deals with abuses of a general or recurring nature. Thus, the problem is sufficiently infrequent that it does not commend itself to a legislative solution.[32] Moreover, the silence of Congress with respect to secondary conduct in the railroad and airline industries suggests that it has confidence that, when such conduct occurs, the RLA procedures can deal effectively with it.[33] Consequently, unless the frequency and seriousness of secondary activity in these industries increase substantially, the necessary motivation for an amendment to deal directly with such activity will be lacking.

The other possible congressional response to the *Jacksonville Terminal* case would be the amendment of the emergency procedures of the RLA. The method presently established by the RLA for resolving serious disputes culminates in the creation of a presidential emergency board.[34] The report of that board, however, is not binding on the parties.[35] Furthermore, there is no indication that Congress has any intention of incorporating compulsory arbitration into the procedural scheme of the RLA[36] since that course of action would frustrate the policy of encouraging the voluntary settlement of disputes.[37] Thus, there is no machinery, either established or contemplated, for dealing effectively with situations arising under the RLA, such as that presented by the union picketing at the Jacksonville terminal. Despite this lack of effective machinery to deal with serious labor problems in the railway and airline industries, recent legislative attempts to amend the emergency procedures of the RLA

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31. 93 CONG. REC. 6498 (1947) (remarks of Senator Taft), quoted in note 15 *supra*.

32. *Id.* Moreover, congressional action in response to a particular conflict is impeded by obvious political problems. For example, any attempt to deal specifically with the *Jacksonville Terminal* situation "would be inextricably intertwined, as a legislative matter, with supporting the strikebreaking efforts of the FEC." Respondent's Petition for Rehearing at 19, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, *rehearing denied*, 394 U.S. 1024 (1969).

33. Note, *Judicial Approaches to Secondary Boycotts Under the Railway Labor Act*, 42 N.Y.U. L. REV. 928, 946 (1967).

34. RLA § 10, 45 U.S.C. § 160 (1964).

35. RLA § 10, 45 U.S.C. § 160 (1964). One commentator has noted that presidential boards under the RLA have lost all of their effectiveness as a settler of major disputes. Theoretically, the prestige of such a board is supposed to induce the parties to accept the board's proposals voluntarily. However, since a board is automatically appointed in almost every dispute under the RLA, it has lost its character as an emergency measure, and its prestige has diminished accordingly. Curtin, *National Emergency Legislation: Its Need and Its Prospects in the Transportation Industries*, 55 GEO. L.J. 786 (1967).

36. *See, e.g.*, S. REP. No. 459, 88th Cong., 1st Sess. 7 (1963). *See also*, Curtin, *National Emergency Legislation: Its Need and Its Prospects in the Transportation Industries*, 55 GEO. L.J. 786, 803 (1967).

37. *See* RLA §§ 2-10, 45 U.S.C. §§ 151a-60 (1964). Indeed, even the ad hoc use of compulsory arbitration (*see* note 39 *infra*) has been criticized as violative of the spirit of the RLA. Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115 (1964).

have met with little success.[38] Congress continues to approach emergency labor problems in the transporation industries on an ad hoc basis.[39]

It appears that it would take a true "national" emergency, created by secondary activity of a union subject to the RLA, to induce Congress to make a permanent amendment of the emergency procedures of the Act.[40] The situation created by the picketing at the Jacksonville terminal, while harmful to Florida's economy,[41] is not the kind of nationwide emergency that would compel congressional action. Thus, the regulatory void created by the *Jacksonville Terminal* decision is unlikely to be sufficient by itself to overcome congressional inertia. In all probability, then, the Supreme Court's prodding of Congress in the *Jacksonville Terminal* decision will be fruitless.

Nevertheless, the Court's conclusion in *Jacksonville Terminal* that federal law should govern appears sound. As the Court stated, "the potentials for conflict . . . and for the imposition of inconsistent state obligations . . . are simply too great to allow each state which happens to gain personal jurisdiction over a party to a railroad labor dispute to decide for itself what economic self-help that party may or may not pursue."[42] Moreover, the subject matter of the RLA—labor relations in the transportation industries—is peculiarly susceptible to uniform national regulation.[43] If federal law is to govern

38. For example, in 1967, Representative Pickle of Texas proposed to amend § 10 of the RLA, 45 U.S.C. § 160 (1964), to provide for a "Special Board" whose determination would be binding on the parties for up to two years. H.R. 5638, 90th Cong., 1st Sess. (1967). The proposal was referred to the House Committee on Interstate and Foreign Commerce, but no further action on the bill has been reported.

39. Two of the most recent examples of such emergency congressional legislation were concerned with the work rules dispute in the railroad industry in 1963 and the threatened airline strike in 1967. In the work rules dispute, Congress, in effect, ordered compulsory arbitration on the two basic issues of disagreement. Act of Aug. 28, 1963, 77 Stat. 132. That law was upheld in Brotherhood of Locomotive Firemen v. Chicago, Burlington & Quincy R.R., 225 F. Supp. 11 (D.D.C.), *aff'd.*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964). To deal with the impending airlines strike, Congress passed emergency legislation that temporarily extended the time within which, under § 10 of the RLA, no change of conditions could be made. Act of April 12, 1967, 81 Stat. 12. The parties eventually resolved their dispute within that extended time period.

40. As one commentator has observed: "While the public's representatives appear to recognize the need for legislative reform, the appropriate combination of circumstances to support enactment of effective laws may not be present until another major strike occurs." Curtin, *National Emergency Legislation: Its Need and Its Prospects in the Transportation Industries*, 55 GEO. L.J. 786, 809 (1967).

41. The Florida trial court found that a continuation of the picketing would cause the "economic strangulation" of Florida. Brief for Respondent at 13, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).

42. 394 U.S. at 381. *See also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 250 (1959) (Justice Harlan, concurring); Note, *Judicial Approaches to Secondary Boycotts Under the Railway Labor Act*, 42 N.Y.U. L. REV. 928, 944 (1967).

43. *See, e.g.*, International Assn. of Machinists v. Central Airlines, Inc., 372 U.S. 682, 691-92 (1963).

cases such as *Jacksonville Terminal,* however, it is arguable that in future cases, the Court should be more responsive to the need for a definition of that law.[44]

The *Jacksonville Terminal* decision can be interpreted in such a way as to permit the Court to develop appropriate federal law on secondary activity by RLA unions if the issue is presented to the Court a second time. Several factors support this view. First, as discussed above, the unsatisfactory nature of the Court's solution in *Jacksonville Terminal* was admitted by Justice Harlan himself.[45] Second, the Court in *Jacksonville Terminal* did not actually negate its power to act in such circumstances. Rather, its decision rested more on a theory of discretionary judicial abstention, due in this case to an alleged lack of guidelines available to the Court.[46] Finally, there is precedent for the Court's determination that it should assume the responsibility for developing a uniform federal standard concerning secondary activity by unions subject to the RLA. In *Textile Workers Union v. Lincoln Mills,*[47] the Court held that the substantive law to be applied in suits under section 301(a) of the NLRA[48] was federal law and was to be developed on a case-by-case basis. According to that decision, the Court was to fashion a body of federal common law to govern the enforcement of collective bargaining agreements.[49] Its sources were to be "the policies of the federal labor statutes, state contract law where appropriate, arbitrators' decisions, and so on."[50]

44. Since the RLA itself is silent on the question of secondary activity, the present gap in federal regulation of such activity must be filled either by new legislation or by judicial interpretation. It is unlikely that Congress will provide the former (*see* notes 29-41 *supra* and accompanying text), and the Court in *Jacksonville Terminal* refused to supply the latter.

45. 394 U.S. at 392. This factor is underscored by the slim majority in *Jacksonville Terminal,* a 4-3 decision, with Justices Fortas and Marshall not participating.

46. 394 U.S. at 391-92. Justice Harlan expressed the view that the Court lacked the "expertise and competence" (394 U.S. at 392) to designate which of the union's picketing activities are "federally protected, and therefore immune from state interference, and which of them . . . [are] . . . subject to prohibition by the State." 394 U.S. at 391. However, the question is not so much one of the expertise and competence of the Court as it is one of the Court's power and duty. *See* notes 51-59 *infra* and accompanying text.

47. 353 U.S. 448 (1957).

48. 29 U.S.C. § 185(a) (1964), which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

49. *See, e.g.,* UAW v. Hoosiers Cardinal Corp., 383 U.S. 696 (1966); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

50. St. Antoine, *Judicial Valour and the Warren Court's Labor Decisions,* 67 MICH. L. REV. 317, 322 (1968).

On the other hand, the movement of the Court into areas in which the legislature has not acted has been criticised,[51] and the critics' arguments deserve attention. Their central concern is with the proper role of the Court in the area of labor relations. By formulating a federal law governing secondary activity by unions covered by the RLA, they feel, the Court would be passing judgment on important policy matters of labor relations. The Court's assumption of that task would arguably go beyond its action in *Lincoln Mills*. In that case the Court was assuming a traditional judicial function—reserving the right to review the formulation of basic contract law. In the situation at hand, however, the Court would be fashioning standards which go to the heart of what unions can and cannot do, that is, it would be making labor relations policy. Such a task, the critics contend, is peculiarly appropriate for the legislative branch of the government.[52] Indeed, if the critics of judicial activism would allow the Court to fill a legislative void at all, they would require that a clear legislative intent be ascertainable so that the judicial decision could be guided by definitive standards.[53]

Nevertheless, since Congress is unlikely to express itself with respect to secondary activity by unions covered by the RLA,[54] and since the area is particularly suited to regulation by a uniform rule of federal law, the mere existence of congressional power to fill the legistative gap should not require judicial abstention.[55] The crucial inquiry is whether the need for a federal rule is immediate and serious enough to offset the Court's reluctance to enter what is

51. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 464-65 (1957) (Justice Frankfurter, dissenting); H. WELLINGTON, LABOR AND THE LEGAL PROCESS (1968).

52. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 100 (1958) (Justice Frankfurter). On the other hand, counsel for the terminal company argued that the task which the Court refused to assume was basically one of filling a small interstitial gap in the federal labor law, and that such a task was of "considerably less magnitude than that which the Court undertook for the Federal judiciary in the *Lincoln Mills* case—that of articulating a corpus of Federal labor contract law—not to mention the bodies of adjudication which resulted from this Court's decision in Brown v. Board of Education, 394 U.S. 294 (1955), and . . . Reynolds v. Sims, 377 U.S. 533 (1964)." Respondent's Petition for Rehearing at 18, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).

53. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). Indeed the Court in *Jacksonville Terminal* used similar language. 394 U.S. at 391.

54. *See* notes 32-41 *supra* and accompanying text.

55. *Cf.* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), in which the Court held that the United States rights and duties with respect to the commercial paper which it issues are governed by federal rather than local law. In that case, the Court stated: "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." 318 U.S. at 367.

ordinarily the province of the legislature.[56] Although the Court recognized a vital need for a uniform rule,[57] it does not appear to have directly considered the further question of the importance of developing that rule immediately, as a court, but not a legislature, could do. The fact that the *Jacksonville Terminal* decision was based on the Court's lack of expertise and competence confirms the suggestion that the Court did not reach the question of timely judicial action.[58] It appears, however, in light of the Florida court's finding that the activity of the union in these circumstances could cause serious economic damage to the entire state,[59] that the need in this area is sufficiently serious to warrant judicial action.

If the Court in a future case should decide to formulate a federal rule of protected and prohibited secondary activity under the RLA, it must then examine the available sources and guidelines that it might use in creating the appropriate federal law.[60] The RLA itself provides no assistance since it is completely silent on the subject of secondary activity. The *Jacksonville Terminal* Court specifically rejected the possibility of using common-law principles concerning secondary activity as a basis for formulating standards of protected and prohibited conduct under the RLA.[61] Indeed, since common-law definitions as to what constitutes illegal secondary activity vary widely from court to court, the majority in *Jacksonville Terminal* was probably correct in its decision to refrain from using the common law as a source of available standards.[62] The most obvious

56. *See, e.g.*, Friedman, *Limits of Judicial Lawmaking and Prospective Overruling*, 29 MODERN L. REV. 593 (1966).

57. 394 U.S. at 381.

58. 394 U.S. at 390-91.

59. 394 U.S. at 374; *see* note 41 *supra*.

60. The absence of such sources was apparently a major obstacle for the Court in *Jacksonville Terminal*. *See* 394 U.S. at 391-92. *See also* Note, *Judicial Approaches to Secondary Boycotts Under the Railway Labor Act*, 42 N.Y.U. L. REV. 928 (1967).

61. 394 U.S. at 386-87, 391.

62. The Court stated: "And the common law of labor relations has created no concept more elusive than that of 'secondary' conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating 'primary' from 'secondary' activities. . . . For these reasons . . . this body of common law offers no guidance for the problem at hand." 394 U.S. at 386-87. At common law, the secondary boycott was a tort, characterized either as an intentional infliction of economic harm or as a wrongful interference with contractual relations. *See* W. PROSSER, TORTS § 124, at 992 (3d ed. 1965). The general rule was that secondary activity could not lawfully be employed in a labor dispute. *See* E. OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS § 428, at 658 (1927). But the agreement ended there, and virtually every court employed a different standard in deciding whether certain conduct was secondary and therefore illegal. As one study has noted:

> An elementary familiarity with the dogma of labor law discloses the touchstone of the law of the "secondary boycott"—its illegality. The term has been the function of a desired result rather than a functional characteristic of any given fact situation or situations. Identical fact situations have been found to be and not to be a "secondary boycott" and their legality has varied with this nominalism. . . .
>
> It is in the treatment of those cases involving labor's most utilized weapon—

source available to the Court is section 8(b)(4) of the NLRA[63] and the various interpretations that have been given to that section by the National Labor Relations Board and by the Court itself. The Court in *Jacksonville Terminal,* however, concluded that there was no justification for incorporating into the RLA the "panoply of detailed law developed by the National Labor Relations Board and courts under § 8(b)(4)."[64] That view was reinforced by the specific exemption of those labor organizations subject to the RLA.[65] Yet total incorporation of section 8(b)(4) is not the only means of utilizing that source. Thus, reluctance to adopt the entire doctrine should not prevent the Court from employing, as a foundation for its fashioning of federal law, the basic policies and guidelines which both the NLRB and the courts have used in construing section 8(b)(4).

It can be argued that such an approach would eventually lead to the very result which Justice Harlan warned against in *Jacksonville Terminal*—that the Court could not begin to draw analogies to the NLRA without incorporating the "full panoply" of law that has been developed under section 8(b)(4). But even if that result should occur, it might not be totally objectionable so long as the Court can retain some flexibility in its approach to disputes in the industries covered by the RLA.

In this connection, it should be recognized that there may be some factual disputes in these industries which cannot be resolved solely by the application of section 8(b)(4) concepts. In such cases, the Court must draw upon other relevant federal policies and statutes in deciding whether particular union activity should be protected or prohibited. For example, the union's picketing at the Jacksonville terminal, if analyzed solely in terms of section 8(b)(4), might very well be found to be protected conduct under the "common situs" and "roving situs" doctrines.[66] Indeed, under the "roving

the picket—that the analytical treatment of the "secondary boycott" has sunk to its lowest ebb.

Bernard & Graham, *Labor and the Secondary Boycott,* 15 WASH. L. REV. 137, 138-39, 149 (1940). *Compare, e.g.,* Quinton's Market, Inc. v. Patterson, 303 Mass. 315, 21 N.E.2d 546 (1939), *with In re* Lyons, 27 Cal. App. 2d 293, 81 P.2d 190 (1938).

63. 29 U.S.C. § 158(b)(4) (1964); *see* note 15 *supra.*

64. 394 U.S. at 391.

65. § 2(3), 29 U.S.C. § 152(3) (1964).

66. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 389-90 (1969). The basis for these doctrines was first announced in Sailors' Union & Moore Dry Dock Co., 92 N.L.R.B. 547 (1950). Under the "common situs" doctrine, when a primary employer does business on the premises of a secondary employer, or when the primary and secondary do business on the same premises, the picketing of the primary is lawful primary activity as long as four conditions are present: (1) the picketing is strictly limited to times when primary employees are present on the premises of the secondary employer or on common premises; (2) the primary employer is engaged in his normal business at the picketed premises at the time of the picket-

situs" doctrine, a striking RLA union might be able to carry on protected picketing at every terminal at which the primary employer stops.[67] But if the Court is not limited in its analysis to analogies drawn from section 8(b)(4), it could consider the policies evinced by the Interstate Commerce Act[68] and the duties placed on common carriers by that Act to furnish transportation and to afford reasonable and proper facilities for the interchange of traffic.[69] In doing so, the Court might find that the public's right to free access to transportation facilities outweighs the interest of RLA unions in picketing every terminal serviced by a particular carrier. The crucial point is that in cases in which section 8(b)(4) would not provide a complete framework of guidelines because of the peculiarities of the transportation industries, the Court should examine other statutes and national policies before deciding whether the alleged secondary activity is to be protected or prohibited.

In the final analysis, however, the *Jacksonville Terminal* Court may well have been correct in concluding that "there is no really satisfactory judicial solution"[70] to the problem of secondary activity engaged in by unions subject to the RLA. In fact, a decision that the Court should develop the federal law to govern the area would place an enormous burden on the judicial system. Nevertheless, although the *Jacksonville Terminal* Court purported to abstain from formulating a rule and ostensibly deferred to Congress, it unavoidably did formulate law in the area.[71] As it now stands, should congressional

ing; (3) the picketing clearly discloses that the dispute is with the primary employer alone; (4) the picketing is limited to places reasonably close to the location of the situs. Under the "roving situs" doctrine, when the business operations of the primary employer are ambulatory and come to rest on the premises of a secondary employer, a union is permitted to picket the premises of the secondary as long as the "common situs" test is met. For discussions of the "common situs" doctrine by the Supreme Court, see United Steelworkers of America v. NLRB, 367 U.S. 492 (1964); Local 761, International Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961).

67. *See* Note, *Judicial Approaches to Secondary Boycotts Under the Railway Labor Act*, 42 N.Y.U. L. REV. 928, 945 n.125 (1967).

68. 49 U.S.C. §§ 1-27 (1964).

69. 49 U.S.C. §§ 1(4), 3(4) (1964).

70. 394 U.S. at 392. One commentator has noted:

> In the context of labor relations, the judicial process is a doubtful instrument for filling the policy and power vacuum left by Congress. . . . [T]he Court, no matter how it decides, cannot escape the charge that it is preferring one powerful interest over another, or one of two competing faiths about the contemporary role of State as opposed to federal power.

Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations* (pt. II), 59 COLUM. L. REV. 269, 301 (1959).

71. Counsel for the terminal company has argued this proposition:

> The Court's decision accordingly belies the principle of neutrality on which it purports to be based.
>
> . . . The result is precisely the same as if Congress had passed a statute affirmatively declaring the practice of secondary boycotts on the nation's railroad system to be one of the keystones of the country's public policy.

Respondent's Petition for Rehearing at 8-9, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, *rehearing denied*, 394 U.S. 1024 (1969).

action not occur, picketing by RLA unions cannot be regulated by the states and cannot be enjoined by either state or federal courts.[72]

Of course, if secondary activity in the transportation industries continues to be an uncommon occurrence, or if Congress does amend the RLA in response to *Jacksonville Terminal*, the Court's decision not to formulate standards of protected and prohibited activity will be vindicated. Indeed, it is possible that the holding in *Jacksonville Terminal* could itself encourage increased secondary activity by unions subject to the RLA and thus create a national transporation emergency which could trigger congressional amendment of the Act. But in the absence of such an emergency, Congress is unlikely to amend the RLA in the near future.[73] For this reason, the Court should assume a more active role in creating a uniform federal law when it is again faced with the choice of protecting or prohibiting secondary activity by RLA unions.

72. *See* Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649 (5th Cir.), *aff'd.*, 385 U.S. 20 (1966) (4-4 decision).

73. Curtin, *National Emergency Legislation: Its Need and Its Prospects in the Transportation Industries*, 55 GEO. L.J. 786, 809 (1967). *See also* notes 29-41 *supra* and accompanying text.