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The Effect of the PRO Act on Secondary Activity and International Trade

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The Effect of the PRO Act on Secondary Activity and International Trade

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I. INTRODUCTION

A labor practice banned in the United States for nearly 76 years could be added back to unions' toolkits. On May 2nd, 2019, Representative Bobby Scott (D-VA) introduced H.R. 2474, the Protecting the Right to Organize Act (PRO Act).¹ Though the PRO Act is unlikely to be passed during this congressional session,² its proposed legalization of secondary activity may be revived in subsequent sessions. The Act amends the National Labor Relations Act of 1935 (NLRA or Wagner Act).³ The NLRA was passed during the New Deal and established basic rights for American workers engaged in concerted activity for the purposes of collective bargaining.⁴ Since then, the NLRA has been amended multiple times to restrain worker power, putting American labor rights behind those of many other industrial powers.⁵ The most impactful of these was the Taft–Hartley Act of 1947.⁶ The Act was passed in reaction to a massive strike wave by workers after World War II.⁷ The Act prohibited secondary activity, a practice in which unions strike, boycott, or picket enterprises that are not their direct employers.⁸ Secondary activity became listed under Section 8, which defines unfair labor practices by unions and employers.⁹

The PRO Act, on the other hand, seeks to bolster worker power by removing this prohibition.¹⁰ Such a change would bring American labor rights into closer step with those in Europe, forging a new transatlantic consensus. The PRO Act's potential re-expansion of labor power through secondary activity has significant implications not only for the domestic American economy, but for global markets and international trade.

This article examines the history of secondary activity and its causes in the United States and Europe. It will then discuss the proposed legalization of secondary activity under the PRO Act and its ramifications, ultimately concluding that legalization will lead to significant international trade and

¹ H.R.2474 - 116th Congress (2019-2020): Protecting the Right to Organize Act of 2019, H.R.2474, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/2474>.

² Allen Smith, *Labor-Friendly PRO Act Reintroduced in Congress*, SHRM (Mar. 1, 2023).

³ National Labor Relations Act, 29 U.S.C § 151 (1935).

⁴ Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 496 (1993).

⁵ See Wiebke Warneck, *Strike rules in the EU27 and beyond*, EUR. TRADE UNION INST. 9 (2007).

⁶ See JOSEPH S. SMOLEN, *THE NATIONAL LABOR RELATIONS ACT: AS AMENDED BY THE TAFT-HARTLEY ACT AND THE LANDRUM-GRIFFIN ACT 1* (1962).

⁷ Joseph A. McCartin, *Unexpected Convergence: Values, Assumptions and the Right to Strike in Public and Private Sectors, 1945-2005*, 57 Buff. L.J. 727, 733 (2009).

⁸ Labor Management Relations Act of 1947, 29 U.S.C. § 141-197.

⁹ Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-197.

¹⁰ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 104(2)(A)(2021).

manufacturing disruptions but will increase equity and labor rights for workers worldwide.

II. HISTORY AND STATUS OF SECONDARY ACTIVITY

A. *Labor Organization Under the Wagner Act*

A strike is a “concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees.”¹¹ The workers can call these strikes for economic reasons, such as higher wages, shorter hours, or better conditions, or to protest an unfair labor practice in which the employer has engaged.¹² Unions count on the pressure employers feel during strikes due to lost sales and production, supplier complaints, and disaffected customers.¹³ Strikes are specifically protected under Section 13 of the NLRA.¹⁴ Strikes and other forms of concerted activity are necessary for a productive labor relations system since they encourage fair negotiations between unions and employers.¹⁵ Without strikes, workers could not press demands or resist employer pressure during negotiations.¹⁶ Employers themselves have the inverse weapon: lockouts, which prevent workers from doing their jobs and withhold their pay.¹⁷ This NLRA-protected strategy resists union power by putting economic pressure on workers themselves.¹⁸

Before the passage of the National Labor Relations Act, labor actions such as strikes and pickets arose on an unprecedented scale.¹⁹ The Great Railway Strike of 1877,²⁰ the Pullman Strike of 1894,²¹ and the Battle of Blair Mountain in 1921 were some of the largest labor uprisings in American history.²² These often violent struggles for improved wages and working conditions involved employees across many companies. All these events occurred before the National Labor Relations Act established

¹¹ 29 U.S.C. §142.

¹² *The Right to Strike*, NAT’L LAB. RELS. BD., <https://www.nlrb.gov/strikes> (last visited Mar. 14, 2023).

¹³ KENNETH G. DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 814 (3rd ed. 2019).

¹⁴ 29 U.S.C. §163.

¹⁵ DOUGLAS E. RAY ET AL., *UNDERSTANDING LABOR LAW* 219 (5th ed. 2019).

¹⁶ HUGH COLLINS ET AL., *LABOUR LAW* 706 (2019).

¹⁷ *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310–311 (1965).

¹⁸ *Id.* at 304.

¹⁹ FRED S. HALL, *SYMPATHETIC STRIKES AND SYMPATHETIC LOCKOUTS* 9–10 (1898).

²⁰ Walter Nelles, *A Strike and Its Legal Consequences—An Examination of the Revership Precedent for the Labor Injunction*, 40 *YALE L.J.* 507, 516 (1931).

²¹ A. P. Winston, *The Significance of the Pullman Strike*, 9 *J. OF POL. ECON.* 540, 540 (1901).

²² Abby Lee Hood, *What Made the Battle of Blair Mountain the Largest Labor Uprising in American History*, *SMITHSONIAN MAGAZINE* (Aug. 25, 2021), <https://www.smithsonianmag.com/history/battle-blair-mountain-largest-labor-uprising-american-history-180978520/>.

protocols through which labor organizations may non-violently present grievances, such as putting labor disputes before the National Labor Relations Board. However, the legal status of secondary strikes has changed dramatically since the class struggles of the late nineteenth and early twentieth centuries. This section will outline the statutes and court decisions that have prohibited secondary strikes in the United States and compare this status to European labor laws to understand the broader environment in which the PRO Act will operate.

B. *The Legal Status of Secondary Activity in the United States*

Secondary activity is different in scope from primary activity. For the purposes of collective bargaining, union members are formed into discrete bargaining units based on whether a particular group of workers holds a community of interest (similarity of earnings, supervision, and kind of work performed).²³ The NLRA protects the rights of bargaining units to engage in concerted activity to affect the labor policies of their primary employer.²⁴ Thus, primary activity is aimed at the employer with whom a union has a direct dispute concerning the terms of its members' employment.²⁵ Activities such as primary picketing typically take place at the situs, or workplace, of that employer in order to apply direct economic pressure.²⁶

By contrast, secondary activities are employee actions that seek to coerce or pressure an entity that is outside of a specific union dispute.²⁷ For example, in *NLRB v. Denver Building & Construction Trades Council*, unionized workers struck the jobsite of a general contractor who hired them because a subcontractor who used non-union labor was hired for the same project.²⁸ Under this pressure, the general contractor agreed to the union's demands and fired the subcontractor.²⁹ The subcontractor subsequently filed charges with the NLRB.³⁰ Because the object of the strike was to target an employer who was not their immediate employer, the union was found by both the NLRB and the Supreme Court to have engaged in unlawful secondary activity.³¹

However, secondary activity has also been found in cases where the "neutral" employers are significantly associated with the primary employer.

²³ *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); *Macy's, Inc. v. NLRB*, 824 F.3d 557, 564 (5th Cir. 2016).

²⁴ 29 U.S.C. § 157.

²⁵ *Landgrebe Motor Transp., Inc. v. Dist. 72, Int'l Ass'n of Machinists & Aerospace Workers*, 763 F.2d 241, 245 (7th Cir. 1985).

²⁶ *Id.*

²⁷ ALEXANDRA HEGJI, CONG. RSCH. SERV., R42526, FEDERAL LABOR RELATIONS STATUTES: AN OVERVIEW 43 (2012).

²⁸ *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 678-79 (1951).

²⁹ *Id.* at 679.

³⁰ *Id.* at 679-80.

³¹ *Id.* at 689.

In *NLRB v. Retail Store Employees Union* (commonly known as *Safeco*), the unionized employees of an insurance underwriter went on strike due to a breakdown in contract negotiations.³² The employees proceeded to not only picket their employer's office but also the offices of five other insurance firms. Each of these firms derived over 90% of their income from the underwriter company, which held significant stock in each of them.³³ However, the underwriter did not control their daily operations, and they were therefore held to be independent.³⁴ Both the NLRB and the Supreme Court found that the union engaged in unlawful secondary picketing since it encouraged customers of these ostensibly neutral firms to engage in a boycott, amounting to coercion.³⁵

This case provided the corollary to the Supreme Court's earlier decision in *Tree Fruits*. Fruit and vegetable packers struck their apple-growing company and picketed Safeway stores that carried their apples.³⁶ The Court did not find their actions to be secondary activity even though they were encouraging customers of a neutral company to boycott the apples.³⁷ The distinction with *Safeco* is that the apples were a small part of Safeway's business, whereas in *Safeco*, the struck underwriter generated 90% of the income of the neutrals.³⁸ A boycott against the apples was not a boycott of Safeway as a whole.

The fears of employers regarding secondary strikes are summed up by Learned Hand: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it."³⁹ However, given the holdings in *Safeco* and *Tree Fruits*, an interesting irony arises. In *Safeco*, the insurance companies were highly associated with the primary underwriter. This gave them some degree of concern in the labor dispute—undoubtedly more significant than any concern Safeway would have in the packers' dispute in *Tree Fruits*. Despite this, unfair practices by the union were found in the former case and not the latter. As the degree of association between two companies increases, the possibility of coercion also increases. If this is true, then the current caselaw seems to contradict Learned Hand's conclusion. Secondary actions often target wholly owned subsidiaries or parent companies of the contractual employer.⁴⁰ These are not third parties with no concern in the dispute but rather parties with legitimate interests in the outcome of the negotiations.

³² *NLRB v. Retail Store Emps. Union*, 447 U.S. 607, 609 (1980).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 610–11.

³⁶ *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 59-60 (1964).

³⁷ *Id.* at 72-73.

³⁸ *Id.* at 72.

³⁹ *IBEW Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950).

⁴⁰ *Pet, Inc. v. NLRB*, 641 F.2d 545, 546–47 (8th Cir. 1981).

A more general fear surrounding secondary strikes is their widened field of effect. One late nineteenth-century commentator stated somewhat melodramatically that there is no limit to the “infinite extension” of workers who could go on strike to maximize their bargaining power.⁴¹ Such concerns prompted Congress to prohibit secondary action in 1947 with the Taft-Hartley Act.⁴² Restrictions on secondary activities have often followed periods of mass industrial action; this Act was no different. The Strike Wave of 1946 saw unions call for a general strike in which over five million workers walked off the job for better pay and working conditions.⁴³ These cross-industry strikes were not necessarily related to specific labor disputes with primary employers⁴⁴ and thus were a form of secondary activity. The Taft–Hartley Act, also known as the Labor Management Relations Act of 1947, was passed in direct reaction.⁴⁵ Section 8(b)(4) of the NLRA, added by Taft-Hartley, makes it illegal for unions to engage in or encourage strikes or work refusals regarding other employers.⁴⁶ The prohibition against secondary activity is operative only when the object of a union’s actions is to coerce other neutral parties into taking action.⁴⁷ Congress aimed to prevent employers that are otherwise neutral to a labor dispute from being dragged into it.⁴⁸ The penalties for secondary activity

⁴¹ FRED S. HALL, SYMPATHETIC STRIKES AND SYMPATHETIC LOCKOUTS 10 (1898).

⁴² RAY, *supra* note 15, at 13.

⁴³ Jennifer McDaid, *Wages and Working Conditions: The Railroad Strike of 1946*, THE NATIONAL WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/1946-railroad-strike>.

⁴⁴ To the Best of My Ability, *Season 2 - Episode 5 – Strike Wave*, THE NATIONAL WWII MUSEUM, <https://www.nationalww2museum.org/war/podcasts/best-my-abilitypodcast/season-2-archive/episode-5-strike-wave> (last visited Sep. 12, 2023).

⁴⁵ Joseph. A. McCartin, *Unexpected Convergence: Values, Assumptions and the Right to Strike in Public and Private Sectors, 1945-2005*, 57 Buff. L. Rev. 727, 733 (2009).

⁴⁶ “It shall be an unfair labor practice for a labor organization or its agents to . . . (i) engage in, or induce or encourage any individual employed by any person engaged in commerce . . . , a strike or a refusal in the course of his employment . . . to perform any services; or (ii) threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e) of the Act; (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such.” 29 U.S.C §8(b)(4) (1935).

⁴⁷ *SEIU Local 87 v. NLRB*, 995 F.3d 1032, 1041 (9th Cir. 2021). However, it is permissible for employees of “neutral” businesses to refuse to cross the picket line. Such cases are not properly considered “secondary activity” because they are merely the incidental effect of a primary strike. See *NLRB v. International Rice Milling*, 341 U.S. 665 (1951); also see DAU-SCHMIDT, *supra* note 13, at 816.

⁴⁸ Secondary boycotts (Section 8(b)4)), Nat’l Lab. Rels. Bd., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/secondary-boycotts-section-8b4> (last visited Nov. 1,

“are the harshest and most effective in all of federal labor law.”⁴⁹ NLRB remedies are commonly slow and toothless (for example, it cannot assess penalties),⁵⁰ whereas § 8(b)(4) violations are harsh and timely.⁵¹ If charges are brought, the investigation of the charge takes precedence over all other cases.⁵² If there is reasonable cause to believe a violation is occurring, then the NLRB regional office is required to seek a federal injunction, and the employer may sue the union in federal court to recover damages in tort.⁵³

C. *The Legal Status of Secondary Activity in the United Kingdom and Continental Europe*

The United Kingdom, on the other hand, has waffled on the legality of secondary strikes. The Trade Disputes and Trade Unions Act 1927, which banned secondary strikes, mass picketing, and general strikes (the stoppage of work by many workers across multiple industries to achieve broader economic or political goals),⁵⁴ was passed in direct response to the 1926 United Kingdom General Strike.⁵⁵ The General Strike saw up to 1.75 million workers go on strike over wage reductions and worsening conditions for coal miners.⁵⁶ Many of the strikers were not themselves affected miners but rather workers in other industrial unions, such as those in transportation.⁵⁷ Many of these unions were a part of the “Triple Alliance” of coal, rail, and transport workers that pursued joint economic objectives.⁵⁸

Against the backdrop of a growing fear of communism, the Conservative government under Stanley Baldwin sent policemen, volunteer militia, tanks, and even a warship to force the protestors into submission.⁵⁹ Prime Minister Stanley Baldwin described the General Strike as a “challenge to Parliament and the road to anarchy and ruin.”⁶⁰ Given the sheer scope that such secondary actions can take, governments may

2022).

⁴⁹ DAU-SCHMIDT, *supra* note 13, at 817.

⁵⁰ *Investigate Charges*, Nat’l Lab. Rels. Bd., <https://www.nlr.gov/about-nlr/what-we-do/investigate-charges>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Iain Watson, *Are we set for a general strike?*, BBC NEWS (July 28, 2022).

⁵⁵ COLLINS, *supra* note 16, at 534.

⁵⁶ *What was the General Strike of 1926?*, BBC NEWS (June 19, 2011).

⁵⁷ *Id.*

⁵⁸ Peter Catterall, *Winston Churchill and the General Strike 3* (WestminsterResearch Accepted Manuscript, 2017), <https://westminsterresearch.westminster.ac.uk/download/b25bb295b59526f3c0abf21f66702a6f67711a69295fe310a379034da2380925/157467/CHURCHILL%20AND%20THE%20GENERAL%20STRIKE%20copyedited.pdf>.

⁵⁹ *Supra* note 56.

⁶⁰ Laura Beers, “*Is This Man an Anarchist?*” *Industrial Action and the Battle for Public Opinion in Interwar Britain*, 82 J. OF MOD. HIST. 30, 30 (2010).

wrongly characterize them not as protests against government policy or as expressions of sympathy with other workers but rather as existential threats to the government itself and democracy in general.⁶¹

This ban was not to last long. In the landmark 1942 case *Crofter Hand Woven Harris Tweed v. Veitch*, a union had a labor dispute with the producers of Harris tweed and asked local dockworkers, who were members of that same union but not employees of the tweed producers, not to handle the yarn nor finished fabric of those producers.⁶² When the producers' complaint of illegal secondary action was brought to the House of Lords, Lord Thankerton decided for the union, finding that:

[E]mployees in this trade were members of the same union, and the interest of the dockers and the trade employees in the union and its welfare were mutual, and I can see no ground for holding that it was not legitimate for the union to avail itself of the services of its docker members to promote the interests of the union.⁶³

The Trade Disputes and Trade Unions Act 1927, including the provision against secondary activity, was then repealed in 1946.⁶⁴ However, when the Thatcher government took power, labor rights were strongly curtailed.⁶⁵ These efforts culminated in the Employment Act 1990, which outlawed secondary strikes entirely.⁶⁶ This ban was challenged in 2010 by the National Union of Rail, Maritime and Transport Workers, who applied for a judgment from the European Court of Human Rights.⁶⁷ A group of companies known as Jarvis plc, which specialized in construction, transferred workers from one of its unionized subsidiaries to another subsidiary where the Union was weaker.⁶⁸ These workers were then told that their wages would be slashed by up to 40%, so they voted to go on strike.⁶⁹ Because there were relatively few workers in the subsidiary that were part of the union, the action was weak; the Union argued to the Court that had secondary strikes been legal, then workers across the company group could have added to the action's strength by striking at their own workplaces as well.⁷⁰ The Union claimed that secondary strikes were

⁶¹ COLLINS, *supra* note 16, at 707.

⁶² *Crofter Hand Woven Harris Tweed Company Ltd. and Others v. Veitch and Another* [1942] 1 All ER 142 (HL) 144 (appeal taken from Ct. Session).

⁶³ *Id.* at 157.

⁶⁴ COLLINS, *supra* note 16, at 534.

⁶⁵ Sandra Fredman, *The New Rights: Labour Law and Ideology in the Thatcher Years*, 12 Oxford J. of Legal Stud. 24, 24 (1992).

⁶⁶ Employment Act 1990, c. 38 (UK) ¶ 4.

⁶⁷ *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] IRLR 467 (ECHR)

⁶⁸ *Id.* at §14.

⁶⁹ *Id.* at §15.

⁷⁰ *Id.* at §16.

protected under Article 11 of the European Convention on Human Rights, which guarantees freedom of assembly, association, and trade unionization.⁷¹ Nonetheless, the Court found that bans on secondary activity did not violate the Convention and thus sided with the United Kingdom.⁷²

However, out of thirty European countries, twenty-two have protected secondary strikes as a valid concerted action, with some requiring specific circumstances.⁷³ For secondary actions to be considered lawful in Germany, for example, they must not aim at promoting the participants' own interests, must affect a party in the primary dispute, must be necessary and reasonable, and the primary action must be lawful.⁷⁴ If, however, the secondary employer has not remained neutral in the primary dispute or if the secondary and primary employers constitute an economic entity, the secondary strike is likely lawful since the secondary employer has a demonstrated influence on the employer of the primary dispute.⁷⁵

In some countries such as Belgium, Greece, Ireland, Italy, and Sweden, workers are not only permitted to engage in secondary strikes against domestic employers but may also strike in solidarity with workers abroad.⁷⁶ Belgian workers, in particular, have wide legal latitude to participate in international secondary strikes, and it is not required that the primary action be lawful.⁷⁷

III. LEGALIZATION AND TRADE DISRUPTIONS

A. *Legalization of Secondary Activity Under the PRO Act*

On the other side of the Atlantic, the PRO Act stands to bring the U.S. in line with European labor standards. After it was referred to the House Committee on Education and Labor during the 116th Congress,⁷⁸ the Protecting the Right to Organize Act was re-introduced to the 117th Congress as House Resolution 842 to amend three previous Acts of Congress: the National Labor Relations Act of 1935 (Wagner Act), the Labor Management Relations Act of 1947 (Taft–Hartley Act), and the Labor-Management Reporting and Disclosure Act of 1959 (Landrum–

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 11, Apr. 11, 1950, 213 U.N.T.S. 2889.

⁷² Nat'l Union of Rail, Maritime, and Transport Workers v United Kingdom [2014] ECHR 366 at §105.

⁷³ Wiebke Warneck, *Strike rules in the EU27 and beyond*, EUROPEAN TRADE UNION INSTITUTE at 9 (2007).

⁷⁴ *Id.* at 32.

⁷⁵ *Id.*

⁷⁶ *Id.* at 8.

⁷⁷ *Id.* at 17.

⁷⁸ H.R.2474 - 116th Congress (2019-2020): Protecting the Right to Organize Act of 2019, H.R.2474, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/2474>.

Griffin).⁷⁹

The legalization of secondary activity in the act is accomplished in Section 104(2)(A), which entirely strikes paragraph (4) in Section 8(b) containing the provision banning secondary strikes.⁸⁰ In striking this provision, Congress would permit unions “to encourage participation of union members in strikes initiated by employees represented by a different labor organization (i.e., secondary strikes).”⁸¹ This proposal has caused controversy in hearings before the Subcommittee and was a particular focus of the witness statement of Mr. Philip A. Miscimarra, former chairman of the National Labor Relations Board under President Donald Trump.⁸² Mr. Miscimarra argued that the NLRA as it stands “carefully balances the competing interests of employees, employers, unions and the public,” and that the PRO Act would upset this balance by targeting neutral parties.⁸³

However, the Act’s supporters argue that the PRO Act in fact addresses an imbalance: bargaining power. A rethinking of the primary/secondary divide may be necessary in a modern, global economy “characterized by global supply chains, multiple levels of contracting, and widespread use of independent contractors, franchise relationships, and other non-traditional and fissured forms of employment.”⁸⁴ A workplace is fissured when it heavily outsources jobs and entire departments to subcontractor firms while the lead business maintains tight control of those subsidiaries.⁸⁵ It used to be the case that employees of a major company were actually employed by that company; now, a conservative estimate finds that 19% of the entire private-sector workforce is in industries where fissuring predominates.⁸⁶ Since subcontracting firms involved in fissured business arrangements are technically independent, unions cannot call strikes across the lead business since it would constitute secondary activity.

An example of this dynamic can be found in *SEIU Local 87 v. NLRB*.⁸⁷ Union janitors picketed an office building owned by Harvest Properties due to low wages, poor working conditions, and sexual

⁷⁹ H.R. 842, 117 Cong. (2021).

⁸⁰ *Id.*

⁸¹ H.R.842 - 117th Congress (2021-2022): Protecting the Right to Organize Act of 2021, H.R.842, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/842>.

⁸² Deterring Unfair Labor Practices: Hearing on H.R. 2474 Before the Subcomm. on Health, Emp., Lab., and Pensions, 116th Cong. 21 (2019) (statement of Philip A. Miscimarra J.D., Partner, Morgan, Lewis & Bockius LLP).

⁸³ *Id.*

⁸⁴ Kate Andrias, *Union Rights for All: Toward Sectoral Bargaining in the United States*, in *THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY* 56, 57 (Richard A. Bales & Charlotte Garden eds., 2020).

⁸⁵ David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 Russell Sage Found. J. Soc. Sci. 147, 148 (2019).

⁸⁶ *Id.* at 151.

⁸⁷ *SEIU Local 87 v. NLRB*, 995 F.3d 1032, 1036 (9th Cir. 2021).

harassment by managers.⁸⁸ However, Harvest Properties had subcontracted with Preferred Building Services for their janitors; this company in turn subcontracted with Ortiz Janitorial Service.⁸⁹ An administrative law judge found the janitors to be joint employees of the two subcontractors.⁹⁰ However, the workers understandably picketed outside Harvest Properties' office building as this was the only physical workplace they knew.⁹¹ The NLRB found that the janitors had engaged in unlawful secondary activity, though it was overruled by the 9th Circuit which held that the janitors only intended to target Preferred Building Services, not the building itself.⁹² Such fragmented situations can obscure which businesses are directly responsible for working conditions and cause workers to act against the wrong entity.⁹³ In addition, the fear of violating the law due to this confusion may create a chilling effect on protected speech and activity, discouraging workers from engaging in legitimate activities.

There is a far greater danger to fragmentation: lead businesses may exercise control over working conditions yet escape labor actions due to the ban on secondary activity. Economic giants such as Amazon and Google are no exception to this fragmentation. Amazon has not only hired hundreds of subcontracted companies to perform deliveries,⁹⁴ but it also hires gig workers as "Delivery Partners" who deliver packages for a part-time income of \$5.30 per hour, accounting for driver costs.⁹⁵ Even the workforce of Google, a tech giant that depends on highly skilled labor, is 54% composed of subcontractors and temporary workers.⁹⁶ This kind of contingent labor makes up 40–50% of the workforce of most technology firms.⁹⁷ These "dependent contractors," not within the contemplation of the Congress that passed the NLRA, were entirely excluded from the NLRA's protections and are, therefore, not permitted to form a union.⁹⁸ Even if these dependent contractors worked in concert to increase their wages through

⁸⁸ *Id.* at 1036.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1040–1041.

⁹³ Modernizing America's Labor Laws: Hearing on H.R. 2474 Before the Subcomm. on Health, Emp., Lab., and Pensions, 116th Cong. 9 (2019) (statement of Charlotte Garden, J.D., LL.M., Co-Associate Dean for Research & Faculty Development and Associate Professor, Seattle University School of Law).

⁹⁴ Kate Cox, *Amazon delivery contractors operate with little oversight, report finds*, ARS TECHNICA (Sept. 3, 2019).

⁹⁵ Weil, *supra* note 85, at 154.

⁹⁶ Daisuke Wakabayashi, *Google's Shadow Work Force: Temps Who Outnumber Full-Time Employees*, N.Y. TIMES, May 28, 2019.

⁹⁷ *Id.*

⁹⁸ Elizabeth J. Kennedy, *Employed by an Algorithm: Labor Rights in the On-Demand Economy*, 40 SEATTLE U. L. REV. 987, 1001-1002 (2017).

work refusals, they could risk violating antitrust law.⁹⁹

By fragmenting their workforces in these ways, lead businesses can determine wages and conditions while forcing workers, already in meager bargaining units, to restrain their industrial actions to their smaller employer to avoid charges of secondary activity.¹⁰⁰ While lead businesses naturally attempt to lower contract costs as much as feasibly possible, subcontractors increase profits by reducing their labor costs in turn. This means that contracted workers are doubly burdened by downward wage pressure. Despite this, these contingent employees are prohibited from influencing what the work site pays them or how it treats them since this could violate § 8(b)(4). This is a massive imbalance in labor/employer power which the NLRA was intended to correct: its declaration of policy states that “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers . . . substantially burdens and affects the flow of commerce.”¹⁰¹ However, the NLRA’s understanding of workplaces is nearly a century out of date; widespread subcontracting and other business models were uncommon or virtually unknown in the early twentieth century.¹⁰²

With the PRO Act’s legalization of secondary activity, workers may avoid being pigeonholed into staffing agencies with little power to effect change—they instead may join with each other across massive company groups in industrial action. This pigeonholing raises another concern addressed by the PRO Act’s sponsors: the right to free speech, especially concerning picketing.¹⁰³ Not only has the Supreme Court determined that restrictions on speech based on speaker and content are presumptively invalid,¹⁰⁴ but the fissuring of workplaces limits the ability of workers to engage in free speech due to fears that their picketing may be unlawful.¹⁰⁵

B. The Effects of Secondary Activity on International Trade

Domestic and international trade partners have not had to contend with many American strikes in recent history. Work stoppages and strikes have

⁹⁹ *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769, 780-81 (9th Cir. 2018).

¹⁰⁰ Modernizing America’s Labor Laws: Hearing on H.R. 2474 Before the Subcomm. on Health, Employment, Lab., and Pensions, 116th Cong. 9 (2019) (statement of Charlotte Garden, J.D., LL.M, Co-Associate Dean for Research & Faculty Development and Associate Professor, Seattle University School of Law).

¹⁰¹ 29 U.S.C. § 151.

¹⁰² DAU-SCHMIDT, *supra* note 13, at 824.

¹⁰³ Modernizing America’s Labor Laws: Hearing on H.R. 2474 Before the Subcomm. on Health, Employment, Lab., and Pensions, 116th Cong. 84 (2019) (statement of Charlotte Garden, J.D., LL.M, Co-Associate Dean for Research & Faculty Development and Associate Professor, Seattle University School of Law).

¹⁰⁴ *Id.* at 16.

¹⁰⁵ H.R. Rep. No. 116–347, at 34 (2019).

drastically decreased over the past seventy years.¹⁰⁶ Only counting strikes involving over 1,000 workers, such stoppages reached a height of 400-500 per year in the early 1950s and decreased to only five in 2009.¹⁰⁷ Even more recent increases in strike activity pale in comparison to the amount of workers on strike fifty years ago. In 1971, around 2,516,000 workers were on strike.¹⁰⁸ In 2022, only 120,000 workers went on strike, a 50% increase from the year before.¹⁰⁹

This drop in strikes correlates with the massive decrease in unionization over the past forty years. This decrease followed a time known as the “Great Compression,” in which incomes equalized in the mid-twentieth century.¹¹⁰ However, this progress frayed beginning in 1979, and income inequality rose throughout the 1980s and the 2000s in a period described by economist Paul Krugman as the “Great Divergence.” Unions could provide their members with as much as a 20% wage premium and have been demonstrated to decrease income inequalities;¹¹¹ however, from 1983 to 2019, the percentage of workers who were union members fell from 20% to only 10%.¹¹² This mirrors the stagnant wages experienced by many workers over the same period, as between 1979 and 2013, the real hourly pay of middle-wage workers rose by only 6% while the pay of low-wage workers decreased by 5%.¹¹³ This has occurred despite a 356% increase in real GDP per capita over the same period.¹¹⁴ The more dramatic incongruity with wage stagnation is the rate of realized (i.e., counting stock options only when cashed) real CEO compensation, which has risen by 1,322% since 1978.¹¹⁵

Secondary activity, with its industry-wide effects, raises the scope of labor disputes to the global level. After all, stagnant wages are not solely

¹⁰⁶ JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 89 (2014).

¹⁰⁷ Richard A. Bales, *Union Trends*, in THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 3, 4 (Richard A. Bales & Charlotte Garden eds., 2020).

¹⁰⁸ U.S. BUREAU OF LABOR STATISTICS, WORK STOPPAGES (2023), <https://www.bls.gov/web/wkstp/annual-listing.htm>.

¹⁰⁹ *Id.*

¹¹⁰ Timothy Noah, *The Great Divergence* 2 (SLATE 2010), https://img.slate.com/media/3/100914_NoahT_GreatDivergence.pdf.

¹¹¹ Thomas A. Kochan & William T. Kimball, *Unions, Worker Voice, and Management Practices: Implications for a High-Productivity, High-Wage Economy*, 5 RUSSELL SAGE FOUND. OF THE SOC. SCIS. 88, 91 (2019).

¹¹² Jerzy Eisenberg-Guyot et al., *Union Burying Ground: Mortality, Mortality Inequities, and Sinking Labor Union Membership in the United States*, 32 EPIDEMIOLOGY 721, 722 (Sept. 2021).

¹¹³ Lawrence Mishel, *Wage Stagnation in Nine Charts*, ECONOMIC POLICY INSTITUTE, Jan 6, 2015.

¹¹⁴ *GDP per capita (current US\$) – United States*, THE WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?end=2013&locations=US&start=1979>.

¹¹⁵ Lawrence Mishel & Jori Kandra, *CEO pay has skyrocketed 1,322% since 1978*, ECONOMIC POLICY INSTITUTE, August 10, 2021.

domestic problems; all international actors are engaged in a “race to the bottom” to compete in trade and investment by lowering wages and labor standards as far as possible.¹¹⁶ Globalization has transferred a significant amount of power from nation-states to multinational corporations, and “there is little evidence of any capacity to bring the transnational corporation within some kind of effective global regulation.”¹¹⁷ These companies even have difficulty regulating their own supply chains. Though several have made environmental, social, and governance-oriented pledges regarding their supplies, they do not and, in some cases, cannot always fulfill them.¹¹⁸ These pledges can only go as far as expecting their immediate suppliers to comply with their standards, who in turn purportedly expect their own suppliers to comply, and so on.¹¹⁹ However, this cascade effect rarely occurs.¹²⁰ Because multinational corporations too often impose unrealistic deadlines and demands on the capacity of their suppliers, suppliers are forced to work under exploitative working conditions to prevent their customers from finding other suppliers to fulfill their orders.¹²¹ Because of this state of affairs, the most effective agent through which working conditions can be improved may not be governmental regulators or the companies, but rather the workers themselves.

As it stands, the prohibition on secondary activity means that workers cannot refuse to work with companies that engage in these practices. However, the PRO Act will not only allow workers to strike, picket, or boycott employers doing business with their primary employer, but it will also end the prohibition on “hot cargo” agreements.¹²² These agreements are a form of secondary activity in which an employer promises in the collective bargaining agreement not to force their employees to handle goods of other employers whose workers were on strike or picketing.¹²³

These forms of secondary industrial action have major implications for international trade. In the era of globalization, supply chain networks (SCNs) have grown to monumental proportions, and products as simple as school blazers may have the input of labor and materials from seven or

¹¹⁶ Maayan Menashe, *The Race to the Bottom Revisited: International Labour Law, Global Trade and Evolutionary Game Theory*, 40 OXFORD J. OF LEGAL STUD. 53, 54 (Nov. 13, 2019).

¹¹⁷ COLLINS, *supra* note 16, at 49.

¹¹⁸ Verónica Villena & Dennis Gioia, *A More Sustainable Supply Chain*, HARVARD BUS. REV., March–April 2020, at 1.

¹¹⁹ *Id.* at 2.

¹²⁰ *Id.*

¹²¹ *Id.* at 4.

¹²² Andy Levin & Colton Pucket, *Labor Law Reform at a Critical Juncture: The Case for the Protecting the Right to Organize Act*, 59 HARV. J. ON LEGIS. 1, 25 (2022).

¹²³ DAU-SCHMIDT, *supra* note 13, at 860.

more countries.¹²⁴ Secondary strikes and hot cargo provisions have a unique ability to disrupt SCNs. During the Strike Wave of 1946, America was brought to a standstill—transportation workers went on strike while freight trains remained idle.¹²⁵ The ability of secondary strikes to paralyze SCNs is not only the result of striking at the primary company, but of inducing labor actions at companies both upstream (closer to the starting point of production chains) and downstream (closer to the final consumers) of the primary one.¹²⁶ The magnification of this effect to the scale of global supply networks will likely cause even more significant trade disruptions.

If a “hazard event” such as a strike occurs at a single node of an SCN, it can cause bottlenecking of shipping and production.¹²⁷ The magnitude of the bottlenecking will depend not only on the size of the company affected but also on its centrality within the SCN.¹²⁸ Suppose a large number of companies are dependent upon a particular firm’s manufacturing and shipping. In that case, a strike at that firm can cause their operations to slow or even cease altogether if they cannot find another supplier. Another factor in the magnitude of a strike is how upstream the firm is in its SCN. Bottlenecks due to strikes in more upstream industries can create much more significant effects than strikes in downstream industries because more companies depend on their product.¹²⁹ For example, a bottleneck in energy commodities or semiconductors can cause industry-wide declines in output that are 3.5 to 4.5 times the size of the initial impact.¹³⁰ Secondary strikes across company groups can cause much more significant bottlenecking than primary strikes alone. If several companies in a company group are involved in the same industry, a secondary strike at some or all would make it much more difficult for downstream industries to find substitute services and upstream ones to find substitute customers. Secondary strikes could even cause multiple nodes of an SCN to bottleneck if two or more companies in a company group are within the same SCN.

Even the threat of a strike can have significant consequences for production. If labor negotiations begin to sour at a particular firm, other firms in their SCN may anticipate a strike in the future and choose to hoard their inventory of the firm’s product—which can further aggravate supply shortages if a strike is called.¹³¹ Further repercussions may be brought by the “bullwhip effect,” which states that when a retailer changes how much

¹²⁴ COLLINS, *supra* note 16, at 48.

¹²⁵ McDaid, *supra* note 43.

¹²⁶ COLLINS, *supra* note 16, at 746-47.

¹²⁷ Kamil J. Mizgier et al., *Bottleneck Identification in Supply Chain Networks*, 51 INT’L J. OF PROD. RSCH. 1477, 1477 (2012).

¹²⁸ *Id.* at 1485–1486.

¹²⁹ DANIEL REES & PHURUCHAI RUNGCHAROENKITKUL, *BOTTLENECKS: CAUSES AND MACROECONOMIC IMPLICATIONS* 4 (2021).

¹³⁰ *Id.*

¹³¹ *Id.* at 3.

of a product it buys, wholesalers can misinterpret the demand signal and overcompensate by ordering even more product from suppliers.¹³² These companies see a one-off order as an increase in general demand, which will cause them to increase production, causing an inefficiency that will magnify in distortion as it travels upstream along the supply chain.¹³³ The bullwhip effect could cause strike-related hoarding to magnify as it travels through the SCN. Furthermore, substitution orders by downstream firms attempting to find new suppliers may cause those suppliers and their own suppliers to misinterpret the temporary substitution as a demand signal and begin to overproduce as a result. Swings in supply and demand can wreak havoc upon SCNs as firms adjust operations in significant ways to cope with the perceived changing market. Given that many more employers could be exposed to industrial action through secondary strikes, there will be more opportunities for such disruptions.

Just as important is the effect that secondary strikes will have on transnational business groups. Massive transnational companies such as Amazon¹³⁴ and Google¹³⁵ can be composed of dozens of subsidiaries with operations across many countries. Legalizing secondary activity in the United States would mean that American workers could engage in industrial action along with workers in other countries with legalized secondary activity, such as Belgium, Sweden, and Italy.¹³⁶ This means that if the employees of a multinational's subsidiary in Italy go on strike, then American employees of the multinational's subsidiary in the United States may also go on strike, picket, or boycott their company or their trading partners.

Recent labor organization efforts at Amazon provide a good illustration of the effect that the PRO Act could have on industrial action. These organization efforts and failed votes, which in general have spurred renewed energy behind the PRO Act, have outlined the difficulties associated with unionization.¹³⁷ These difficulties can be compounded by fissured workplaces in which potential bargaining units may only be able to negotiate with their direct employers, who themselves are constrained by their contract with the lead business.¹³⁸ Secondary activity, in particular,

¹³² Maximiliano Udenio et al., *Behavioral Causes of The Bullwhip Effect: An Analysis Using Linear Control Theory*, 49 IISE TRANSACTIONS 980, 980 (2017).

¹³³ *Id.*

¹³⁴ Ryan McQueeney, *The Complete Guide To Everything Owned By Amazon*, NASDAQ, June 21, 2017.

¹³⁵ List of Subsidiaries of Registrant Google Inc., SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1288776/000119312508032690/dex2101.htm>.

¹³⁶ Warneck, *supra* note 73 at 8.

¹³⁷ Diane Bartz & Hilary Russ, *Failed Amazon Union Effort Renews Call For Updated U.S. Labor laws*, REUTERS, Apr. 9, 2021.

¹³⁸ Charlotte Garden, *The PRO Act and Workplace Fissuring*, THE CENTURY FOUND,

adds to the tools available to Amazon workers, as it can allow them to engage in actions such as encouraging strikes among subcontracted and subsidiary workers across the globe while also removing Section 8 barriers to their free speech. Workers may also decide to engage in picketing or boycotting of companies upstream and downstream of Amazon on its supply line, causing severe bottlenecks in Amazon's operations.¹³⁹ Hot cargo provisions can further bolster union power. If nearby Amazon warehouses go on strike, unaffiliated transportation workers can refuse to carry Amazon packages so long as such a provision is included in their collective bargaining agreement. All these actions would heighten the pressure on Amazon to settle on the union's terms.

These strategies could be deployed against any firm in the United States—even those that may not be able to survive the economic effects. Secondary strikes will doubtlessly lead some businesses to close their operations, as has resulted from primary and sympathy strikes such as those at Hostess Brands and Eastern Airlines.¹⁴⁰ However, even these closures were not brought about solely due to labor strikes but by larger market forces and an inability to adapt. In the case of Hostess, consumer tastes changing away from junk food made the company fatally outdated.¹⁴¹ Rather than shifting to more profitable operations, the company decided to severely cut wages and benefits, which Forbes contributor Adam Hartung described as “tantamount to management saying to those who sell wheat they expect to buy flour at 2/3 the market price.”¹⁴² Thus, putting more tools at the disposal of unions may ultimately create a greater drive in American capitalism toward efficiency and adaptation. The risk of closure was even an acknowledged effect of the New Deal slate of legislation; in fact, President Franklin Roosevelt stated that “no business which depends for existence on paying less than living wages to its workers has any right to continue in this country . . . [A]nd by living wages I mean more than a bare subsistence level—I mean the wages of decent living.”

IV. CONCLUSION

The PRO Act passed the House of Representatives by a vote of 225—206 in 2021 but was unsuccessful in the Senate.¹⁴³ It was reintroduced in

Nov. 25, 2019, at 3.

¹³⁹ COLLINS, *supra* note 16, at 746.

¹⁴⁰ Susan Adams, *Why Hostess Had To Die*, FORBES, Nov. 21, 2012; Agis Salpukas, *Eastern Airlines Brought Down by a Strike So Bitter It Became a Crusade*, N.Y. TIMES, Jan. 20, 1991.

¹⁴¹ Adam Hartung, *Hostess' Twinkie Defense Is a Management Failure*, FORBES, Nov. 18, 2012.

¹⁴² *Id.*

¹⁴³ Actions - H.R. 842 - 117th Congress (2021-2022): Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/842/all-actions>.

the House on January 6th, 2023, as H.R. 20 - the Richard L. Trumka Protecting the Right to Organize Act of 2023 (named in honor of the late labor leader).¹⁴⁴ Given the Republican control of the House, passage is very unlikely during this Congressional session.¹⁴⁵ If Congress, in future sessions, decides to pass a similar bill, the resulting legalization of secondary strikes in the United States may lead to large work stoppages across several industries. The effects of these stoppages could be felt through global supply networks, causing costly delays and disruptions. However, American workers will gain a labor right held by citizens of most European countries¹⁴⁶—one which is necessary in an era where workers increasingly find themselves in fissured and conglomerated workplaces. The current tools available to unions to assert their bargaining power have been rendered obsolete by these developments. For this reason, secondary activity is necessary to even the playing field. Because pressure will be heightened on employers to come to bargaining agreements on union terms, the Act will improve wages, benefits, and conditions for workers across the United States.

¹⁴⁴ H.R. 20 - 118th Congress (2023-2024): Richard L. Trumka Protecting the Right to Organize Act of 2023, H.R. 20, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/20?s=1&r=70>.

¹⁴⁵ Allen Smith, *Labor-Friendly PRO Act Reintroduced in Congress*, SHRM (Mar. 1, 2023).

¹⁴⁶ Warneck, *supra* note 73, at 9.