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COMMON SITUS PICKETING AND SECTION 8(b)(4) OF THE NATIONAL LABOR RELATIONS ACT

Prior to 1947, employer practices alone were regulated by the National Labor Relations Act.¹ In that year, however, Congress passed the Taft-Hartley Act,² which served “ to prescribe the legitimate rights of both employees and employers in their relations affecting commerce and to define and prescribe practices on the part of labor and management which affect commerce. ”³

By section 8(b)(4)(A),⁴ all union activities which forced any employer to cease doing business with any other employer were illegal. Senator Taft, in discussing the merits of that section, emphasized that all the provision did was to reverse the effect of the law as to secondary boycotts.⁵ Despite this glowing testimonial, many in Congress felt that it so weakened the National Labor Relations Act, that it, in effect, repealed it.⁶ It was reasoned that labor was placed in a precarious position by having its most effective weapon—the right to strike—taken away.⁷ Nevertheless, Congress passed the measure, subjecting it to judicial interpretation.

The biggest problem that faced the judiciary in trying to establish

1. 49 Stat. 449 (1935), 29 U.S.C. § 141 (1964).

2. Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947).

3. *Id.*

4. *Id.* at § 8(b)(4)(A), 61 Stat. 141. This section was amended and re-enacted by the Labor-Management Reporting and Disclosure Act of 1959, ch. 135, § 704, 73 Stat. 542 as § 8(b)(4)(B). (To avoid confusion future reference to these sections will be made as § 8(b)(4).)

5. 93 CONG. REC. 4198 (1947).

Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purposes of forcing that employer to cease doing business with employer B. Similarly, it would not be lawful for a union to boycott employer A because A uses or otherwise deals in the goods of, or does business with, employer B.

H.R. REP. NO. 510, 80th Cong., 1st Sess. 43 (1947).

6. It was stated that:

This provision is presumably designed to outlaw secondary boycotts and is predicated on the assumption that all secondary boycotts are unjustified. In [some] situations the efforts of the unionized workers are primarily directed at protecting their own organizations and their wage and hour standards against the destructive competition of non-union labor. [This bill] indiscriminately bans all such boycotts, whether justified or not.

S. REP. NO. 105, 80th Cong., 1st Sess. (1947) (Minority Report).

7. 93 CONG. REC. 6452 (1947)

a concrete doctrine was to reflect the intent of the legislature. The hearing on the bill presented no more than vague guidelines to follow and prior history was of no avail, as employee practices had not been regulated by the N.L.R.A. What this discussion proposes to do is to examine the evolution of the system of regulation and control over one of the more difficult areas of labor law—common situs picketing.

COMMON SITUS PICKETING

The right of employees to strike and picket, which is guaranteed by the N.L.R.A., can take many forms. If, for example, a labor union (*U*) has a dispute with its employer (*C*₁), it can register this protest by striking *C*₁ and picketing his place of employment. In this situation *U*, acting at the situs of the dispute, is engaged in a primary strike and picketing, legal activities under the Act.⁸

Conversely, if *U* has a dispute with *C*₁ and registers its complaint by picketing another employer (*C*₂) with whom *C*₁ does business, this is clearly a form of secondary pressure made illegal by the Act.⁹ In this case the situs of the dispute is not at *C*₂ where *U* set up its pickets, but still at *C*₁, the primary employer.

A third type of picketing may occur when both *C*₁ and *C*₂ are working on the same premises. In this situation a determination of where the situs of the dispute is located is not a vital factor, as no place is exclusively occupied by one employer. What is important, however, is the balancing of the two alternatives—the union's right to strike and the right of the secondary employer to be free from the labor disputes of another employer.¹⁰

8. See, e.g., *Lumber & Sawmill Workers Union*, 87 NLRB 937 (1949); *Di Gorgio Fruit Corp.*, 87 NLRB 720 (1949), enforced 191 F.2d 642 (D.C. Cir. 1951), cert. denied, 342 U.S. 869 (1951); *Deena Artware, Inc.*, 86 NLRB 732 (1949), modified, 198 F.2d 645 (6th Cir. 1952), cert. denied, 345 U.S. 906 (1953).

9. See, e.g., *Truck Drivers & Helpers*, 111 NLRB 483 (1955), enforced, 228 F.2d 791 (5th Cir. 1956); *Associated Musicians*, 110 NLRB 2166 (1954), enforced, 226 F.2d 900 (2d Cir. 1955); *United Brotherhood*, 81 NLRB 802 (1949), enforced, 184 F.2d 60 (10th Cir. 1950), cert. denied, 341 U.S. 947 (1951).

There are two situations in which such activity has been held to be legal:

If during a strike or other dispute *C*₁ contracts out its usual work to *C*₂, the union may picket *C*₂ under the "ally theory" by which the primary premises is said to extend to *C*₂. See *Truck Drivers Union v. NLRB*, 334 F.2d 539 (D.C. Cir. 1964); *NLRB v. Business Mach. Mechanics*, 228 F.2d 553 (2d Cir. 1955), cert. denied, 351 U.S. 962 (1956); *Douds v. Metropolitan Fed'n of Architects*, 75 F. Supp. 672 (S.D. N.Y. 1948).

A union may also picket *C*₂ to induce customers of *C*₂ not to buy goods which were obtained from *C*₁. See *NLRB v. Fruit & Vegetable Packers Union*, 377 U.S. 58 (1964); *contra*, *Honolulu Typographical Union v. NLRB*, 167 NLRB No. 150, — F.2d — (1968).

10. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

This form of picketing, called common situs picketing, may be subdivided into two parts: when C_1 conducts normal business at C_2 , and when C_2 performs duties at C_1 .

The first part has been characterized as ambulatory or roving situs picketing¹¹ since the U will only picket when C_1 is at C_2 . The latter has been called constant situs picketing¹² since the U will picket the premises of C_1 , whether C_2 would be present or not.

A. Ambulatory or Roving Situs Picketing

Two years after the passage of Taft-Hartley, the National Labor Relations Board had an opportunity to consider the relationship of section 8(b)(4) to the roving situs problem. In *International Brotherhood of Teamsters (Shultz Refrigerated Service, Inc.)*,¹³ a New York union, after the employer had moved operations to New Jersey, picketed the employer's trucks when they made deliveries in New York. Whenever the employer's trucks would appear, the union would form picket lines, informing the public of the nature of the dispute. The Board rejected the charge of an unfair labor practice, basing its decision on two factors:

1. New York was the best place to *effectively* advertise the dispute.¹⁴ (Emphasis added.)
2. Union limited picketing to the time and place that the employer's trucks were present.¹⁵

11. See generally Kovarsky, *The Supreme Court and the Secondary Boycott*, 16 LAB. L.J. 216 (1965); Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Note, *Intermittent and Constant Common Situs Picketing*, 36 IND. L.J. 203 (1961).

12. This is to be distinguished from a situation in which the employees of a secondary employer occasionally go on the premises of the primary employer for making deliveries or picking up merchandise. This type of picketing has been classified as primary and thus not prohibited by the Act.

13. 87 NLRB 502 (1949).

14. *Id.* at 506.

In view of the roving nature of its business, the only effective means of bringing direct pressure on Shultz was the type of picketing engaged in by the Respondent. It would have been pointless, indeed, of the union to establish a picket line at the New Jersey terminal and allow Shultz to carry on its extensive business activities in New York City. . . .

15. The emphasis of this point can readily be seen in a case the following year, in which the Board held it to be a violation of section 8(b)(4) for a union to establish an ambulatory or roving situs picket before the employer's trucks came and after the employer's trucks left. *International Bhd. of Teamsters (Sterling Beverages, Inc.)*, 90 NLRB 401 (1950).

This rationale is important, not only because it represents the Board's initial effort in trying to interpret logically the significance of the 1947 Act, but also because it set the stage for the decision in *Sailor's Union of the Pacific (Moore Dry Dock)*.¹⁶

In that case the ship S.S. Propheo was in port for repairs. The union, which had a dispute with the owner of the ship, attempted to picket the ship at its berth. When the Moore Dry Dock Company refused to allow the pickets on the premises, the union picketed outside the gates of the shipyard. The Board in its decision established four evidentiary standards for picketing in such situations. If the standards were met, a presumption of valid picketing arose.

1. The picketing must be limited to times when the situs of the dispute was located on the secondary premises.
2. The primary employer must be engaged in his normal business at the situs.
3. The picketing must take place reasonably close to the situs.
4. The picketing must clearly disclose that the dispute was only with the primary employer.¹⁷

These tests were widely accepted by the federal courts in their review of Board decisions, as well as by the Board itself.¹⁸

One of the primary tests enunciated in *Shultz*—the place of picketing was the best place to advertise the dispute—was ignored by the Board in *Moore*.¹⁹ Subsequently, however, the Board in *Brewery & Beverage Drivers (Washington Coca Cola Bottling Works, Inc.)*²⁰ recognized this test as an addition to the *Moore* rules. The facts were similar to *Shultz*, in that the union followed the employer's trucks and picketed them when they attempted to make deliveries. The Board held that where the primary employer has a permanent place of business, picketing

16. 92 NLRB 547 (1950).

17. *Id.* at 549.

18. *See, e.g.,* NLRB v. Local 55, 218 F.2d 226 (10th Cir. 1954); NLRB v. Chauffeurs, Teamsters, 212 F.2d 216 (7th Cir. 1954); NLRB v. Service Trade Chauffeurs, 191 F.2d 65 (2d Cir. 1951).

19. Although *Shultz* permitted picketing at the secondary premises in New York despite the existence of a place of business in New Jersey, the main thrust rested on the effect of such picketing in furthering the union objectives. In *International Bhd. of Boiler Makers (Richfield Oil Co.)*, 95 NLRB 1191 (1951), the Board in finding an unfair labor practice when the union picketed the premises of the secondary employer hinted that this place was not the most effective place for the union to picket.

20. 107 NLRB 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955).

must be done at that place or else it would be a violation of the Act.²¹ Although it would appear to be an accommodation of *Moore*, the Board distinguished the cases by an emphasis upon the employer's permanent place of business. Regardless of its adherence to the *Moore* standards, the Board found the Union in violation of the Act in its picketing of a secondary situs when the employer had a permanent place of business.²² In a series of later cases, the Board demonstrated its reliance on the rationale in *Washington* rather than on *Moore*, when a permanent place of business was present.²³

In addition to this mechanistic adherence to the rationale of *Washington*, the Board continued rigidly to apply the *Moore* standards when no permanent place of business was present. Numerous acts were continually cited by the Board as inferences of this unlawful activity: Statements by union representatives that picketing was designed to induce employees of secondary employers to cease work; requests to secondary employers that they stop dealing with the primary employer; failure to observe the *Moore* rules with respect to space; publicity and time; actual stoppages of work by the employees of the secondary employer; direct appeals to the employees of the secondary employer; and silence as to the nature of the picketing.²⁴

This mechanical approach, however, was not to be free from criticism.²⁵ In *Sales Drivers Union (Campbell Coal Co.)*,²⁶ the court ig-

21. *Brewery & Beverage Drivers (Washington Coca Cola Bottling Works, Inc.)*, 107 NLRB 299, 303 (1953).

22. It would appear that if the primary employer had a permanent place of business, *Washington* could not be applied, as this would deny the union its right to strike. See *Wilson Teaming Co.*, 140 NLRB 164 (1962); *Upper Lakes Shipping, Ltd.*, 139 NLRB 216 (1962); cf. *NLRB v. Service Trade Chauffeurs*, 191 F.2d 65 (2d Cir. 1951).

23. See, e.g., *Commission House Drivers Union (Euclid Foods, Inc.)*, 118 NLRB 130 (1957); *Local 117, United Glassworkers (Mason & Dixon Lines, Inc.)*, 117 NLRB 622 (1957); *United Steelworkers (Barry Controls, Inc.)*, 116 NLRB 1470 (1956), *enforced*, 250 F.2d 184 (1st Cir. 1957); *Sheet Metal Workers (W.H. Arthur Co.)*, 115 NLRB 1137 (1956).

24. Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 141 (1959).

25. In assailing the Board's application of the *Moore* rules, as disregarding the intent of Congress, it was said: "The *Moore Dry Dock* criteria were developed as evidentiary tests, not of the 'unlawful objective' but in order to determine whether the picketing was primary or secondary. . . ." Note, *Common Situs Rules Fade Away as NLRB and Courts Look to Object of Union's Picketing in Taft-Hartley Section 8(b) (4) (A) Cases*, 45 GEO. L.J. 614, 623 (1957).

26. 110 NLRB 2192 (1954), *enforced*, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956).

nored the Board's ruling that there had been an unfair labor practice merely because the primary employer had a permanent place of business and the union picketed at the secondary employer. The court found no violation as the picketing only incidentally effected employees of secondary employers working at a common site. To be a violation, the court held that it must be shown that an object of the union's actions was directed at those employees.²⁷ Despite this ruling, the Board continued to apply *Washington*, although its application was apparently *sub silentio*.

In non-*Washington* cases, the Board began slowly to apply the *Moore* standards with increased flexibility. At first, the tests were met if the pickets merely refrained from trying to induce neutrals from dealing with the struck employer.²⁸ Later, as a more literal approach to the Act developed, the Board in fact examined the picketing to learn if an object of such picketing was to induce neutrals not to trade with the employer, whether such object was achieved or not.²⁹ This increased flexibility eventually influenced the Board to modify the *Washington* decision in *International Brotherhood of Electrical Workers, Local 861 (Plauche Electric)*³⁰ in 1962. In that case, the Board held that the existence of a permanent place of business was just another factor in discovering whether the union was engaging in an unfair labor practice.³¹ As it exists today, this modified approach has the approval of both the Board and the courts.

B. Constant Situs Picketing

Although a literal reading of the N.L.R.A. appears to outlaw all forms of boycotts and pickets, the legislative history of the Act makes it clear that primary actions are not condemned.³² As with

27. 229 F.2d at 517.

28. See, e.g., *Amarillo Drivers Union (Crowe-Gulde Cement Co.)*, 122 NLRB 1275, *aff'd*, 273 F.2d 519 (D.C. Cir. 1959); *General Drivers Union (Caradine Co.)*, 116 NLRB 1559 (1956), *enforced*, 251 F.2d 494 (6th Cir. 1958).

29. See, e.g., *United Ass'n of Journeymen (Bishop Plumbing & Elec. Co.)*, 126 NLRB 1142 (1960); *Journeymen Barbers Union (Chicago & Ill. Hairdressers Ass'n.)*, 120 NLRB 936 (1958) (alternative holding).

30. 135 NLRB 250 (1962); *accord*, *Teamsters Local 222 (Utah Sand & Gravel Products Corp.)*, 148 NLRB 118 (1964); *Hotel, Motel & Clerks Employee Union, Local 568*, 135 NLRB 567 (1962); *Plumbers & Pipe Fitters, Local 471*, 135 NLRB 329 (1962).

31. *IBEW Local 861 (Plauche Elec.)*, 135 NLRB 250, 254 (1962).

32. See *Lesnick*, *supra* note 11, at 1398 (1962), where the author states:

The major supports, in the statute as enacted in 1947, for the rejection of the literal approach to section 8(b)(4) have been sections 7 and 13. Sec-

the roving situs problems, the first constant situs case came before the Board in 1949.

In *Oil Workers (Pure Oil Co.)*³³ the union had a contract dispute with the primary employer and picketed his premises. The secondary employer, who occupied the same premises, refused to cross the picket lines and the union was charged with an unfair labor practice. The Board rejected this contention, stating that: "A strike, by its very nature, inconveniences those who customarily do business with the struck employer. . . . It does not follow that such . . . is therefore proscribed by the [Act]. . . ." ³⁴

This doctrine became the basis for the primary situs rationale; a rationale which infrequently recognized that picketing at the primary situs could be secondary in nature.

The extent to which this presumption was carried, even in these first years, was evidenced in *United Electrical Workers (Ryan Construction Corp.)*³⁵ The union picketed a separate gate, which was used by the employees of the secondary employer. It is apparent that in this situation the union was directly interfering with the activities of a second employer, and not just incidentally affecting them. Nevertheless, the Board, with relative ease, disposed of the problem in favor of the striking union:

When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called "secondary" even though, as is virtually always the case, *an object* of that picketing is to dissuade all persons from entering such premises for business reasons.³⁶ (Emphasis added.)

tion 7 purports to guarantee labor the right to engage in concerted activities, including strikes and picketing, for the purpose of mutual aid or protection, and section 13 permits inroads on that right only as specifically provided in the Act.

In 1959 the inclusion of the "primary strike and picketing" provision made that intention clearer:

Provided, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

73 Stat. 543 (1959), 29 U.S.C. § 158(b) (4) (B) (1964).

33. 84 NLRB 315 (1949).

34. *Id.* at 318. For later cases which uphold this general principle see *Milwaukee Plywood Co. v. NLRB*, 285 F.2d 325 (7th Cir. 1960); *Teamsters Local 317 (Iroquois Door Co.)*, 132 NLRB 1101 (1961).

35. 85 NLRB 417 (1949).

36. *Id.* at 418. See generally Farmer, *Secondary Boycotts—Loopholes Closed or Reopened*, 52 GEO. L.J. 392 (1964).

It became apparent, as the Board continued to apply these standards to the primary situs picketing, that such an approach was both illogical and unsatisfactory. By virtue of an unrealistic fiat, the Board wholly ignored possible unlawful activity by the union in picketing at the primary premises.

In 1951, either reacting to this unsatisfactory condition or evolving a new postulate based on four years of experience with the Act, the Supreme Court in *International Rice Milling Co. v. NLRB*³⁷ shifted slightly from this previous intransigent position. In that case, the union's picketing of the premises of a primary employer had the effect of stopping the trucks of a neutral employer. The Court, in holding the union activities to be legal implementations of policy, stated that the stoppage of neutral trucks was merely an incidental effect of legal picketing. The object of picketing was to prevent the operation of the primary employer and in no way was there a *concerted* effort on the part of the union to stop the work of the neutral employer.³⁸

The Court was examining the provisions of section 8(b)(4), which made it an unfair labor practice for a union "to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment. . . ." ³⁹ They determined that even in applying this new test, the union's activities were not violative of the Act as they were directed toward individuals and were not "concerted" within the meaning of the Act.⁴⁰

This movement away from a strict primary-secondary dichotomy was accepted, although some cases still adhered to the older philosophy.⁴¹ The one area of labor law which was influenced by this change the most was the construction industry. Even before the passage of Taft-Hartley, the N.L.R.B. refused to take jurisdiction in cases dealing with that industry.⁴² Although the reason for such refusal was un-

37. 84 N.L.R.B. 360 (1949), *rev'd*, 183 F.2d 21 (5th Cir. 1950), *rev'd*, 341 U.S. 665 (1951).

38. 341 U.S. at 670. It is important to note that the Board's determination rested on the primary situs doctrine, while the Supreme Court rested its finding on a literal interpretation of section 8(b)(4).

39. 49 Stat. 449 (1935), 29 U.S.C. § 163 (1958).

40. See generally Koretz, *supra* note 24; Note, *supra* note 25. In IBEW Local 3 (Surf Hunter Elec. Co.), 172 NLRB No. 115 (1968), similar logic was used to defeat an employer's claim. The Board said that there was no concerted activity toward the workers, but the union's objectives were towards the public alone.

41. See, e.g., District 50, UMW (Marion Mach. Works), 112 NLRB 348 (1955); General Teamsters Union (Crump, Inc.), 112 NLRB 311 (1955).

42. See Johns-Manville Corp. (Home Insulator's Union), 61 NLRB 1 (1945); Brown Shipbuilding Co., 57 NLRB 326 (1944); Brown & Root, Inc., 51 NLRB 820 (1943).

clear, apparently the temporary nature of the industry, where a union's presence at a job site would only last until the task was completed, made the designation of an appropriate bargaining unit difficult and the issuance of cease and desist orders ineffective.⁴³ Taft-Hartley did not solve this problem, as nothing in the legislative history of section 8(b)(4) indicated the congressional attitude toward it.⁴⁴

It was not until 1951, after *Rice Milling* had established a new standard based on "concerted activity," that the Supreme Court brought the construction industry under the guise of section 8(b)(4). In *NLRB v. Denver Building & Construction Trades Council*,⁴⁵ union contractors picketed a construction project, protesting the employment of non-union contractors. When the general contractor fired the non-union contractor, the union was charged with an unfair labor practice. The court of appeals refused to enforce the Board's order,⁴⁶ stating that the situation involved a primary employer and, therefore, there was no violation of the Act. This reasoning, although on the surface based on the rejected primary situs rationale, actually recognized the unique nature of the construction industry, in that it was denied the more conventional means of persuading workers to organize and was thus forced to rely on the strike.⁴⁷

The Supreme Court, however, recognizing that an object of the union's activities was to force the general contractor to cease doing business with the sub-contractor, upheld the Board's decision. The Court, over the dissent of Justice Douglas, ignored the special nature of the construction industry and subjected it to the same standards of common situs picketing as the other industries.

With the apparent demise of the primary situs doctrine and the advent of the *Moore* rules with respect to roving situs picketing, the Board

43. Note, *The Import of the Taft-Hartley Act on the Building & Construction Industry*, 60 YALE L.J. 673 (1951).

44. It is illuminating to reflect that the record of the Taft-Hartley Act debates 20 years ago, discloses that almost every reference to boycotts involved plant and retail situations . . . None of the proponents of section 8(b)(4) talked about the construction industry or common situs picketing on construction jobs.

Hearings on H.R. 100 Before Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. 5 (1967).

45. 341 U.S. 675 (1951).

46. *Denver Bldg. & Constr. Trades Council v. NLRB*, 186 F.2d 326 (1950).

47. 341 U.S. 675, 692-93 (1951) (dissenting opinion). See also 100 U. PA. L. REV. 141, 144 (1951).

was faced with the dilemma of the application of these rules to constant situs situations. A definitive determination of this problem did not occur until 1954 in the case of *Local 55, Carpenters Council (Professional and Businessmen's Life Ins. Co.)*.⁴⁸ A similar fact situation developed as in *Denver*, with a union picketing a construction site. In rejecting any remnants of the ownership test, the Board emphasized that the union violated the fourth requirement of the *Moore* rules in that the picketing did not clearly direct itself toward the primary employer, but went beyond to the employees of secondary employers.⁴⁹

As in the evolution of acceptable standards in the roving situs problem, the Board struggled to articulate a workable interpretation of the Act with an interplay of the *Moore* rules. Subsequently, the Board developed the yardstick that picketing at the primary employer would be legal, if the union made a bona fide effort to minimize its impact on neutrals.⁵⁰ Thus the Board attempted to balance both the union's rights and the secondary employer's rights.

With this uniformity, the question arose whether picketing at a reserved gate would come under the rules. In such a situation, a secondary employer is performing work on the premises of a primary employer, as in a typical constant situs situation. What is distinguishing, however, is that the employees of the secondary employer have a separate gate, which they alone use. Early Board decisions held such picketing to be violative of the Act; however, with the modified approach that was developing, the question again was presented in *United Steelworkers (Phelps Dodge Refining Co.)*.⁵¹ The court of appeals held in 1961 that such picketing would be unlawful under the secondary picketing provisions of the Act if the gate is separate, marked and set apart from the other gates; the work done by the men who use the gate is unrelated to the normal operations of the employer; and the work is of a kind that would not, if done when the plant is engaged in its regular operations, necessitate curtailing those operations.⁵²

Subsequently in two later cases,⁵³ the Court emphasized this related

48. 108 NLRB 363, *enforced*, 218 F.2d 226 (10th Cir. 1954).

49. *Id.* at 367-70.

50. Retail Fruit & Vegetable Clerks Union (Crystal Palace), 116 NLRB 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957); *see also* Seafarers Int'l Union (Salt Dome Production Co.) v. NLRB, 265 F.2d 585 (D.C. Cir. 1959); Local 618, Automotive Employees Union (Incorporated Oil Co.), 116 NLRB 1844 (1956).

51. 126 NLRB 1367 (1960), *enforced*, 289 F.2d 591 (2d Cir. 1961).

52. *Id.* at 595.

53. Local 5895, United Steelworkers (Carrier Corp.) v. NLRB, 376 U.S. 492 (1964);

work concept. It was inclined, however, to modify the standards in *Phelps* to hold that even if the work was related within the purview of the second requirement, there would be no violation of the Act if such work were *de minimis*.

With the related work concept solidifying, the proponents of its applicability to the construction industry brought a test case before the court in 1967. In *Building & Construction Trades Council (Maxwell & Hartz)*,⁵⁴ union employees picketed a general contractor who hired non-union workers. Even after separate gates were established, the union continued to picket. The union argued that by the related work concept, all the employees became allies instead of neutrals⁵⁵ and, if this were the case, the picketing would be primary instead of secondary. The Board refused to apply the related work concept and found a violation of the Act.⁵⁶ On petition for enforcement, the court supported the Board in its finding that the related work concept was not applicable to the construction industry and if any change in the law was to occur, it was for the legislature and not the judiciary.⁵⁷

Subsequent cases have upheld the ruling of the court.⁵⁸ It appears, therefore, that any attempt to alter the law in this field will not be able to hurdle the *Denver* case. Although the related work concept was applicable to other industries, that concept appears inapplicable to the construction industry.

CONCLUSION

The historical approach outlined above clearly demonstrates the struggle of the Board and the courts to develop a workable philosophy with respect to common situs picketing. It represents an attempt to

Local 761, Int'l Union of Elec. Workers (General Elec.) v. NLRB, 366 U.S. 667 (1961).

54. 383 F.2d 562 (6th Cir. 1967).

55. If they were neutrals then it would be possible to find some unlawful secondary activity. If, on the other hand, they were considered allies, then all parties would be considered as one. See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951) (dissenting opinion).

56. 164 NLRB No. 50 (1966).

57. 383 F.2d at 56. For a concise history of the various attempts by Congress to amend Taft-Hartley, so as to overrule the effect of the *Denver* decision, see *Hearings on H.R. 100 Before Subcommittee on Labor of the House Committee on Education and Labor*, 90th Cong., 1st Sess. 3 (1967). See also *Note, Common Situs Picketing and the Construction Industry*, 54 GEO. L.J. 962, 976-89 (1966), where the author analyzes section by section the 1965 proposal, which was almost identical to that considered in H.R. 100.

58. See *Operating Engineers Local 701 (Cascade Employment Ass'n)*, 172 NLRB No. 127 (1968); *Nashville Bldg. & Constr. Trades Council (H.E. Collins Constr. Co.)*, 172 NLRB No. 105 (1968).

balance the alternatives of the union's right to strike and a secondary employer to be free from the disputes of another employer with the intention of Congress, as mirrored in the various labor acts. As it has developed the following may be concluded:

1. The Board and the courts no longer consider the primary situs per se as conclusive of lawful activity.
2. Conversely, all activities at the secondary premises are not illegal.
3. The *Moore* tests represent a flexible index of activities which must be done in order to make such secondary activities lawful.
4. The *Washington* doctrine, once rigidly interpreted, has been reduced to one of the evidentiary factors in analyzing the *Moore* criteria.
5. In picketing at a separate gate, the *Phelps* criteria, as modified by *General Electric* and *Carrier Corp.*, are taken as determinative of lawful activity.
6. The construction industry is still forced to work under the stigma of *Denver*, as neither the Congress nor the courts are willing to alter it.

This development has been a slow process. Even the enunciation of the seemingly solid test of *Moore* did not escape the microscopic dissection and modification by the Board and the courts. Similarly, the attempt by the construction industry to overrule the *Denver* decision has been stalled in Congress for over eighteen years. Consequently, no radical departures from this current philosophy can be expected, as both the courts and the legislatures are unwilling to alter concrete doctrine in this complex labor field.

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