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Labor Law - Common Situs Picketing - The Reserve Gate Doctrine

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LABOR LAW — COMMON SITUS PICKETING — THE RESERVED GATE DOCTRINE

by Gerard B. Rickey

I.

The legality of common situs picketing under the National Labor Relations Act is often difficult to determine in individual cases. The common situs arises when the employees of the primary employer, the one with whom the dispute exists, are working on the same general site as the employees of the secondary employers, unoffending third parties. The types of common situs situations are varied, and application of the term "common situs" does not depend upon what employer owns or is in control of the premises.[1]

The classification of picketing as lawful activity or illegal secondary activity is complicated by the vagueness of section 8(b)(4) of the National Labor Relations Act.[2] The pertinent language of this section, called "one of the most labyrinthine provisions ever included in a federal labor statute,"[3] follows:

> 8(b) It shall be an unfair labor practice for a labor organization or its agent . . .
>
> (4) (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 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 . . .
>
> (B) forcing or requiring a person to . . . cease doing business with any other person . . . .[4]

This language could not be interpreted literally because it would seemingly ban picketing traditionally considered lawful primary activity.[5] However, it is well recognized that the impact of the section is directed toward what is known as the secondary boycott whose "sanctions bear, not upon the employer who alone is a party to the

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[1] United Steelworkers Union v. NLRB, 376 U.S. 492, 497 (1964).

[2] 49 Stat. 449 (1935), as amended by 61 Stat. 141 (1947) and 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (1964).

[3] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959* (pt. 2), 73 HARV. L. REV. 1086, 1113 (1960).

[4] For examples of secondary conduct not prohibited, see Comment, 19 Sw. L.J. 567 (1965).

[5] Electrical Workers Union, Local 761 v. NLRB, 366 U.S. 667, 672 (1961).

dispute, but upon some third party who has no concern in it."[6] The section does not prohibit secondary boycotts in general but instead condemns specific objectives. "Much that might arguably be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited."[7]

Traditional interpretation regarding the union's "object" referred to in section 8(b)(4) recognizes that every union picketing an employer hopes, even if it does not intend, that all persons will honor the picket line. "[T]hat hope encompasses employees of neutral employers who may in the course of their employment have to enter the premises."[8] "But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in . . . conduct against their employer in order to force him to refuse to deal with the struck employer."[9] Theoretically, the question under section 8(b)(4) is not one of "effect," but of the "intended object."

To assist in determining what the union's object is and whether the union's picketing is lawful activity the Supreme Court has found two congressional objectives in formulating section 8(b)(4). The dual congressional objectives are "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . shielding unoffending [secondary] employers and others from pressures in controversies not their own."[10] Striking a balance between these two goals so that violence to either one does not result may prove difficult, especially in a common situs situation where a conflict between the two is likely.

The scope of this Comment is to examine the standards that have been established to inject objectivity into the nebulous language of section 8(b)(4). The recently established "reserved gate" doctrine will be considered in regard to the extent of its application and its effect on the more traditional and established standards.

II. NLRB Application of Section 8(b)(4)

A. *Early Board Position*

Unfortunately, the National Labor Relations Board's decisions often have strayed from the dual congressional objectives in reconciling the primary-secondary dichotomy between primary and sec-

[6] Electrical Workers Union, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950).
[7] United Bhd. of Carpenters, Local 1976 v. NLRB, 357 U.S. 93, 98 (1958).
[8] Seafarers Int'l Union v. NLRB, 265 F.2d 585, 591 (D.C. Cir. 1959).
[9] Electrical Workers, Local 761 v. NLRB, 366 U.S. 667, 673 (1961).
[10] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

ondary picketing. In cases where the business of the primary employer is stationary and geographically removed from the premises of any other employer, the Board has with unanimous approval based its decision on whether the pressures were geographically confined to the primary premises.[11] If the picketing is limited to the premises occupied solely by the primary employer, though it affects those desiring to enter for pick-up, delivery or any similar business purpose, the Board would find it lawful.[12] Accordingly, picketing premises occupied solely by the secondary employer is prohibited.[13] But in the common situs situation application of section 8(b)(4) has proved much more difficult.

In the early cases the Board formulated the arbitrary "primary situs doctrine."[14] All picketing directed at the premises of the primary employer, even if on a common situs, was lawful. In the *Ryan Constr. Corp.* case,[15] Ryan was to perform construction work on a building adjacent to the Bucyrus plant and inside the company fence. Despite picketing by Bucyrus employees at a separate gate established for the sole use of Ryan employees, the Board found such picketing lawful primary activity. After the *Ryan* decision, it seemed firmly established that any picketing at the premises of the primary employer, was per se lawful activity. Under the "primary situs doctrine," extenuating circumstances could not convert such picketing into secondary activity.

In the common situs situation in which the picketing took place at the premises of a secondary employer, the Board developed a test more in line with the dual congressional objectives.[16] This test was based not on ownership but on four objective standards designed to balance the interests of the union in its dispute with the primary employer and of the neutral employer in the protection of his business. In the *Moore Dry Dock* case[17] the union picketed at the entrance to a dry dock at

[11] Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 129 (1959).

[12] Santa Ana Lumber Co., 87 N.L.R.B. 937 (1949); Di Giorgio Wine Co., 87 N.L.R.B. 720 (1949), *aff'd*, 191 F.2d 642 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 869 (1951); International Rice Milling Co., 84 N.L.R.B. 360 (1949), *rev'd*, 183 F.2d 21 (5th Cir. 1950), *rev'd*, 341 U.S. 665 (1951).

[13] *E.g.*, NLRB v. UAW, Local 365, 200 F. Supp. 778 (E.D.N.Y. 1962). Howland Dry Goods Co., 85 N.L.R.B. 1037 (1949), *enforced in part, remanded in part*, 191 F.2d 65 (2d Cir. 1951); Sealright Pac., Ltd., 82 N.L.R.B. 271 (1949); Wadsworth Bldg. Co., 81 N.L.R.B. 802 (1949), *enforced*, 184 F.2d 60 (10th Cir. 1950), *cert. denied*, 341 U.S. 947 (1951).

[14] Interborough News Co., 90 N.L.R.B. 2135 (1950); Di Giorgio Wine Co., 87 N.L.R.B. 720 (1949); Ryan Constr. Corp., 85 N.L.R.B. 417, 418 (1949); Rice Milling Co., 84 N.L.R.B. 360 (1949); Pure Oil Co., 84 N.L.R.B. 315, 318 (1949).

[15] Ryan Constr. Corp., 85 N.L.R.B. 417, 418 (1949).

[16] Schultz Refrigerated Serv., Inc., 87 N.L.R.B. 502 (1949).

[17] Moore Dry Dock Co., 92 N.L.R.B. 547 (1950).

which a ship owned by the primary employer was being converted. The crew of the ship was aboard undergoing training for a voyage. Unable to picket alongside the ship, the union picketed the only place it could—at the entrance to the dock. The Board took this opportunity to set forth specific standards for picketing in such situations which would be presumptive of valid primary activity:

> (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises;
> (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;*
> (c) the picketing is limited to places reasonably close to the location of the *situs;* and
> (d) the picketing discloses clearly that the dispute is with the primary employer.[18]

This presumption of legality could be overcome by admissions of union members, but it was apparent from the Board's application of the *Moore Dry Dock* standards that failure to meet these standards was not intended to create a presumption that the picketing was illegal activity. These four rules were accepted and approved by the federal courts.[19]

B. *The Rice Milling Case And The New Board Approach*

In 1951 the Supreme Court had an opportunity to review the direction the Board decisions were taking. The *Rice Milling* case[20] involved picketing at a mill, the premises of the primary employer. The picketing encouraged two truck drivers to refuse to pick up certain goods. This was activity traditionally considered primary picketing. The literal language of the statute could have prohibited the picketing, but the Supreme Court held that such picketing incidentally affecting delivery and pick-up men was lawful. The decision relied on the fact that picketing the drivers was not "concerted" conduct under section 8(b)(4). Important dictum in the case fell short of approving the primary situs test, which would have assured the legality of the picketing in *Rice Milling*. The court said that "the limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive."[21]

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[18] *Id.* at 549.

[19] Piezonki v. NLRB, 219 F.2d 879 (4th Cir. 1955); NLRB v. Local 55, 218 F.2d 216 (7th Cir. 1954); NLRB v. Services Trade Chauffeurs, Local 145, 191 F.2d 65 (2d Cir. 1951).

[20] NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

[21] *Id.* at 671. The word "concerted" now has been deleted from the statute. A proviso to the effect that nothing contained in clause B should be construed to make unlawful where not otherwise unlawful any primary strike or primary picketing, added by 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(B) (1964), was inserted intending that (among other

However, when the word "concerted" was later deleted from section 8(b)(4), Congress added a primary picketing proviso to insure protection of such activity.

Shortly after this subtle disapproval of the primary situs test the National Labor Relations Board revised its approach. The Board in *Local 55 (PBM)*[22] decided that an adaptation of the *Moore Dry Dock* rules would best coincide with the objectives of Congress where the picketing was at the primary situs as well as where it was at a secondary situs. In that case an insurance company developing its own land and serving as general contractor was picketed by a union which desired a bargaining contract. A neutral subcontractor walked off and the Board found that the picket sign did not measure up to the *Dry Dock* requirement that the picketing clearly disclose that the dispute is with the primary employer. The Board forcefully reiterated this new tact in *Crystal Palace Mkt.*[23] The Board stated that where picketing occurs at premises occupied jointly by primary and secondary employers, the timing and location of the picketing, and the legends on the picket signs must be tailored to reach the employees of the primary employer rather than those of neutral employers. "[T]he controlling consideration has been to require that the picketing be so conducted as *to minimize its impact on neutral employees in so far as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees.*"[24] The Board saw no reason why the legality of picketing at the primary premises should depend on title to the property. "[T]he foregoing principles should apply to all common situs picketing, including cases where . . . the picketed premises are owned by the primary employer."[25]

As time passed this general application of the *Moore Dry Dock* rules became mechanical, with little consideration being given to the dual objectives. The Board began to direct its inquiry toward whether the union had appealed directly to neutrals. Failure to meet one of the standards was now presumptive of illegal activity. A noted

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intentions) no one would fear that Congress intended to reverse the traditional interpretation that this sort of activity was primary. 105 CONG. REC. 15221 (1951), and also in 2 L.M.R.D.A. LEG. HIST. 1707.

[22] Professional & Business Men's Life Ins. Co., 108 N.L.R.B. 363, *enforced*, 218 F.2d 226 (10th Cir. 1959).

[23] Crystal Palace Mkt., 116 N.L.R.B. 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957).

[24] *Id.* at 859. See Note, 16 Sw. L.J. 162, 166 (1962).

[25] *Id.* at 859. *E.g.*, Columbia-Southern Chem. Corp., 110 N.L.R.B. 206, 221 (1954); Hoosier Petroleum Co., 106 N.L.R.B. 629 (1953), *enforced*, 212 F.2d 216 (7th Cir. 1954).

author[26] listed the various evidentiary bases used by the Board in such decisions. They include the following:

(1) statements by union representatives that picketing is designed to induce employees of secondary employers to cease work;[27]
(2) requests to secondary employers that they cease dealing with the primary employer;[28]
(3) failure to observe *Moore Dry Dock* limitations as to space, publicity and time;[29]
(4) actual work stoppages by employees of secondary employers;[30]
(5) direct appeals to employees of secondary employers;[31] and
(6) even silence by a union agent when asked by secondary employees about the purpose of the picketing.[32]

Some courts of appeals categorically disagreed with the Board's mechanical approach.[33] In *Salt Dome*[34] the union had been picketing at a shipyard where a ship of the primary employer was being serviced. After two days, Salt Dome removed all its non-supervisory employees from the vessels, and the Board found that the continued picketing violated the *Moore Dry Dock* rule that the primary employer must be engaged in normal business at the situs. The District of Columbia Court of Appeals disagreed with the application of that rule. Because the ship was present in the yard, that court felt Salt Dome was engaged in its normal business at that location. It reversed saying, "The critical consideration is that the pressure put upon [the neutral employer] was not different from that felt by servicers or suppliers under the most ordinary circumstances when a customer of theirs is picketed."[35]

In this same period, during which the Board mechanically applied the *Dry Dock* rules apparently without regard to a balancing of the

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

[27] *E.g.*, Euclid Foods, Inc., 118 N.L.R.B. 130, 155 (1959); Rollins Broadcasting Inc., 117 N.L.R.B. 1491, 1492 (1957); Ready Mixed Concrete Co., 117 N.L.R.B. 1266, 1267 (1957); Professional & Business Men's Life Ins. Co., 108 N.L.R.B. 363, *enforced*, 218 F.2d 226 (10th Cir. 1954).

[28] *E.g.*, Roberts & Associates, 119 N.L.R.B. 962 (1957); Ready Mixed Concrete Co., 117 N.L.R.B. 1266, 1267-68 (1957).

[29] *E.g.*, Freeman Constr. Co., 120 N.L.R.B. 753 (1958); Roberts & Associates, 119 N.L.R.B. 962 (1957); Euclid Food, Inc., 118 N.L.R.B. 130, 131 (1957); Ready Mixed Concrete Co., 117 N.L.R.B. 1266, 1268 (1957).

[30] See note 29 *supra*.

[31] *E.g.*, Adolph Coors Co., 121 N.L.R.B. 271 (1958); U & ME Transfer, 119 N.L.R.B. 852 (1957); Babcock & Lee Petroleum Co., 106 N.L.R.B. 629 (1953), *enforced*, 212 F.2d 216 (7th Cir. 1954).

[32] Superior Derrick Corp., 122 N.L.R.B. 52 (1958).

[33] *E.g.*, UAW, Local 618 (Site Oil) v. NLRB, 249 F.2d 332, 336 (8th Cir. 1957).

[34] Seafarers Union (Salt Dome Prod. Co.) v. NLRB, 265 F.2d 585 (D.C. Cir. 1959).

[35] *Id.* at 592.

dual congressional objectives, a fifth rule was developed. The Board construed *Washington Coca Cola*[36] as imposing a rigid rule that picketing at the common situs is unlawful when the primary employer has a regular place of business in the locality which can be picketed. Application of this rule automatically foreclosed any application of the rules in *Moore Dry Dock*. There is doubt that *Washington Coca Cola* forecast a rule as rigid as that which followed.[37] Although decisions immediately following showed a degre of leniency,[38] the doctrine soon developed into a true fifth rule in which picketing was conclusively presumed illegal without considering the actual amount of time employees spent at the regular place of business.[39] All that was required to make picketing at any other site illegal was that the employees report at the regular place of business for a few minutes at the beginning and end of the day.

Several federal courts rejected the *Washington Coca Cola* doctrine.[40] The Court of Appeals of the District of Columbia said:

> Section 8(b)(4)(A) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another, even where the activity could be carried on at a place where the primary employer alone does the business. The existence of a common site of such incidental effect and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive. The presence of these factors does not warrant a failure to consider other facts which are relevant and perhaps countervailing.[41]

In the light of such judicial criticism the Board in *Plauche Elec.*[42] overruled the rigid *Washington Coca Cola* doctrine. After *Plauche* the location of an office of the primary employer in the locality was only one factor to be considered. Even in the construction industry picketing at the common situs was allowed for the first time in years.[43]

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[36] 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955).

[37] Lesnick, *Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1376 (1962).

[38] See Pittsburgh Plate Glass Co., 110 N.L.R.B. 455 (1954); Otis Massey Co., 109 N.L.R.B. 275 (1954), 225 F.2d 205 (5th Cir. 1955), *cert. denied*, 350 U.S. 914 (1955).

[39] NLRB v. Local 182, Teamsters Union, 272 F.2d 85 (2d Cir. 1959); NLRB v. General Drivers Union, 251 F.2d 494 (6th Cir. 1958); NLRB v. United Steelworkers Union, 250 F.2d 184 (1st Cir. 1957); Albert Evans, 110 N.L.R.B. 748 (1954).

[40] Campbell Coal, 110 N.L.R.B. 2192 (1954), *enforcement denied*, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956); NLRB v. General Drivers Union, Local 968, 225 F.2d 205 (5th Cir. 1955).

[41] 229 F.2d 514 (D.C. Cir. 1955).

[42] 135 N.L.R.B. 250 (1962). See also Houston Armored Car, 136 N.L.R.B. 110 (1962).

[43] Wyckoff Plumbing, 135 N.L.R.B. 329 (1962); Andersen Co. Elec. Services, 135 N.L.R.B. 504 (1962).

This turn of events followed the Supreme Court's repudiation in *General Elec.*[44] of the per se application of the *Moore Dry Dock* rules. *General Elec.* was a landmark decision which not only foreshadowed an end to rigid application by the Board of traditional *Moore Dry Dock* criteria, but also affected the *Dry Dock* rules' application directly by firmly establishing a new reserved gate doctrine.

III. The Reserved Gate Doctrine

Implementation of a separate gate by employers made unions reluctant to picket because any focus upon neutral employees could be more easily exposed. Numerous decisions appeared declaring unlawful picketing at a gate used only by secondary employees working on the premises.[45] These cases in effect overruled *Ryan* which applied the primary situs test in the same situation. A fortiori, the Board declared unlawful picketing at reserve or separate gates for secondary employees on secondary premises.[46] The Board usually declared that the object of the activity was inducement of neutral employees. In one such case[47] the Board held illegal union picketing at one of ten entrances, the entrance used by neutral truckers. The court of appeals, however, held that peaceful primary activity and its *normal incidents* cannot be forbidden.[48] Further dissatisfaction in the courts of appeals with the manner of application of the *Moore Dry Dock* rules to the reserved gate cases was evidenced in the significant *Phelps Dodge* case,[49] which, in addition, presented a new approach to the reserved gate question. The owner of a refinery had set up a reserved gate for contractors on an improvement job, and the union picketed those secondary employees. The Second Circuit Court of Appeals upheld the Board's ruling that the activity was illegal, but stated that it would have been legal if the contractor's employees were engaged in work that would have required closing down the activity at the plant. If it were work of that type the employer might be escaping the nor-

[44] Electrical Workers Union, Local 761 v. NLRB, 366 U.S. 667 (1961). See notes 52-58 *infra* and accompanying text.

[45] United Steelworkers Union, Local 4355 v. NLRB, 289 F.2d 591 (2d Cir. 1961); Chemical Workers Union, Local 36 v. NLRB, *enforced per curiam*, CCH Lab. Cas. ¶ 16,748 (D.C. Cir. 1961), *cert. denied*, 366 U.S. 949 (1961); McLeod v. United Steelworkers, 176 F. Supp. 813 (E.D.N.Y. 1959); NLRB v. Chemical Workers Union, Local 434, CCH Lab. Cas. ¶ 65,753 (D.N.J. 1959); Boire v. Chemical Workers Union, Local 36, 126 N.L.R.B. 907 (1960); Atomic Projects & Prod. Workers, 120 N.L.R.B. 400 (1958), *enforced*, 262 F.2d 931 (D.C. Cir. 1959); Freeman Constr. Co., 120 N.L.R.B. 753 (1958).

[46] *E.g.*, Freeman Constr. Co., 120 N.L.R.B. 753 (1958); Atomic Projects & Prod. Workers, 120 N.L.R.B. 400 (1958), *enforced per curiam*, 262 F.2d 931 (D.C. Cir. 1959).

[47] McJunkin Corp., 128 N.L.R.B. 522 (1960), *rev'd*, 294 F.2d 261 (D.C. Cir. 1961).

[48] 294 F.2d 261, 262 (1961).

[49] United Steelworkers Union (Phelps Dodge Ref. Corp.) v. NLRB, 289 F.2d (2d Cir. 1961).

mal effects of the strike. Also, the activity would have been legal if the employees picketed were allies of the struck employer hired to take over the employer's work after the strike began, or were merely the alter ego of the primary employer, *i.e.*, a concern having taken over part of the ordinary business at any time. The employees picketed in this case, the court found, were "truly neutral."[50] It has been argued that the case was just an application of the "ally doctrine,"[51] but the reasoning went further. This case would also take away protection from the secondary employer performing work related to the normal operations of the struck plant, contracted out *before* the dispute arose.

A. *The General Elec. Case*

The Supreme Court finally considered the ramifications of application of *Moore Dry Dock* in common situs picketing decisions in the *General Elec.* case.[52] General Electric had reserved Gate 3-A for employees of contractors only. The independent contractors included construction workers on new buildings, repairmen, men engaged in retooling, and others doing general maintenance work. Union members on strike against General Electric picketed these employees at their own gate. The Court opinion was written by Mr. Justice Frankfurter. It took cognizance of the *Phelps Dodge* case in answering the question whether the *Moore Dry Dock* rules may be applied to make unlawful picketing at a gate used by neutral employees entering the primary premises. The Court rejected both the prevailing Board approach of rigid application of the *Dry Dock* rules, which it criticized as unduly mechanical, and the old "primary situs doctrine." The Court held that the key to the question is found in the type of work that is being performed by the employees using a separate gate. It remanded the case for the Board to determine the precise nature of the work.[53] The Court quoted the requirements for preventing picketing established in *Phelps Dodge:*

> There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.[54]

In essence, the decision held that picketing at the primary premises

[50] *Id.* at 595.
[51] Comment, 47 VA. L. REV. 1164 (1961).
[52] Electrical Workers Union, Local 761 v. NLRB, 366 U.S. 667 (1961).
[53] The Board found the nature of the work was sufficiently related to the work of the primary employer to permit the picketing. General Elec. Co., 138 N.L.R.B. 342 (1962).
[54] 289 F.2d 591, 595.

may be prohibited only where there is a reserved gate and the employees using the gate are engaged in work unrelated to the normal operations of the struck employer. The Court reminded that "if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations."[55] The 1959 primary picketing proviso was added to enforce this very right, as it was detailed in the *Rice Milling* case. The proviso reads, "[N]othing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."[56] It follows that picketing of other related contractors performing day-to-day work and entering a reserved gate should be equally protected.

The court found important the fact that Board decisions in reserved gate cases only declared picketing unlawful in situations where the independent contractors were performing work unconnected with the normal operations of the struck employer—usually construction work on his buildings. In those cases the decisions were in accord with the dual congressional objectives. The Supreme Court expressly approved the *Moore Dry Dock* standards as carrying out those objectives.[57] Generally, where the work is unrelated and a reserved gate established, picketing may be found illegal when the *Moore Dry Dock* standards are not met. In remanding the case, the Court cautioned that mixed use of the gate would not bar picketing unless the "instances of these maintenance tasks were so insubstantial as to be treated by the Board as *de minimis*."[58] Congress intended to preserve the right to picket neutral employees furnishing day-to-day service essential to the regular operations of the plant.

B. *The Carrier Case*

The *Carrier Corp.* case[59] provided the Supreme Court an opportunity to reiterate its new "related work" doctrine and to dispel any uncertainty as to its application in reserved gate cases. The case involved the gate to a railroad spur which was locked when not in use and which was accessible only to railroad employees. The spur ran across a public road and through the gate, located in a continuous chain-link fence. The fence enclosed both the Carrier property

[55] Electrical Workers Union, Local 761 v. NLRB, 366 U.S. 667, 681 (1961).
[56] LABOR MANAGEMENT, REPORTING AND DISCLOSURE ACT OF 1959, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(B) (1964).
[57] 366 U.S. 667, 679 (1961).
[58] 366 U.S. 667, 682 (1961).
[59] United Steelworkers Union v. NLRB, 376 U.S. 492 (1964).

and the railroad right-of-way. The spur served three other plants but the picketing by Carrier employees was designed to interfere only with cars destined for the Carrier plant. Threats and violence accompanied the picketing, but the Court rejected the argument that the picketing violated section 8(b)(4) because it was accompanied by violence. Mr. Justice White held that "the distinction between primary and secondary picketing carried on at a separate gate maintained on the premises of the primary employer, does not rest upon the peaceful or violent nature of the conduct, but upon the type of work being done by the picketed secondary employees."[60] Since it was undisputed that the railroad's operations were of the type that furthered Carrier's normal business, the picketing was held lawful primary activity.

The Court reasoned that "the primary strike . . . is aimed at applying economic pressure by halting the day-to-day operations of the struck employer."[61] Picketing is a tool to implement the goals of the strike and it has "characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt."[62] Congress intended to preserve the right to picket neutral employees furnishing day-to-day service essential to the regular operations of the plant.

A proviso to the "reserved gate" doctrine is the requirement that there is a right to picket employees performing work which, if done when the plant were engaged in its regular operation, would necessitate curtailing normal operations. This proviso operates even if the work of the neutral employees is not related to the regular operations of the primary employer. Contract work which could continue either while normal business was carried on or while the plant was partially shut down may be protected. But work which can be completed only while the plant is shut down cannot be. Even though the related work rationale would not apply, the employer cannot take advantage of a shut-down to have work performed it could have done only at that time anyway. Such an allowance would offset the economic pressure a strike culminates in when it closes down the ordinary operations of the struck employer. Thus, the underlying basis of the "reserved gate" doctrine and its proviso is to permit the economic pressure which would ordinarily result on the closing down of the struck employer's normal business.

To express this principle in other words, the *Dry Dock* standards

[60] *Id.* at 501.
[61] *Id.* at 499.
[62] *Ibid.*

in cases such as these will embody the dual congressional objectives by prohibiting union activity only when the secondary employer is truly neutral. The interests of secondary employers in a dispute on the primary premises should be considered controlling only when such employers are neutral according to the "related work" test. Accordingly, the congressional goals could be more accurately termed the right to picket primary employers and protection for neutral employers doing unrelated work.

Significantly, the Supreme Court in *Carrier* seems to recognize the legitimacy in *directing* an appeal to secondary employees when their work is related to that of the primary employer.[63] Previous court decisions had mechanically observed the rule of fiction that a union may hope, though it may not intend, that all persons will respect picket lines.[64] Reflections on object, intent, hope and desire were merely semantic tools. The Supreme Court, however, now honestly talks about the union intent which everyone knows to exist. It recognizes that the primary strike is "aimed at" halting normal operations of the primary employer. When that is the design, picketing directed at related work is deemed permissible without the necessity of semantic trickery referring to the union's "hope" rather than its "intent." Therefore, in future cases an objective approach will be injected into an area where the applicable statutory language is quite subjective.

The *Carrier* case restated the "reserved gate" doctrine in eloquent terms and extended its applicability. In *Carrier* the picketing occurred on premises owned by the neutral employer—the railroad. "The picketing," the Court said, "was designed to accomplish no more than picketing outside of one of Carrier's own delivery entrances might have accomplished."[65] In fact, it was a matter of necessity since "there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier."[66] This simple extension of the "reserved gate" doctrine to picketing on neutral property near the primary situs, however, is only a beginning point for speculation on future extension.

IV. Future of The Reserved Gate Doctrine

A. *Restrictions On The Type Of Gate And Type Of Situs At Which The Related Work Doctrine Is To Be Applied*

The requirement that to prohibit picketing there must be not

[63] *Ibid.*
[64] See text at note 8 *supra.*
[65] 376 U.S. 492, 499-500 (1964).
[66] *Id.* at 500.

only work unrelated to that of the primary employer but also a separate gate has been applied literally by the District of Columbia Court of Appeals. In the *Gonzales* case[67] construction contractors doing work at a chemical plant used a common gate but wore green safety helmets as opposed to the white ones worn by employees of the primary employer and entered the gate at different hours from the primary employees. The striking employees appealed directly to known neutral employees. The Board contended that "there should be no difference between (1) separate gates and (2) distinct uniforms and times of starting and stopping work."[68] The court of appeals said that whether or not the Board's contentions were sound as an economical consideration, as a legal matter they were not. The requirement that there must be a separate gate is controlling. This decision, in effect, means that when there is a common gate, the privilege of peaceful picketing will be allowed unions in all cases where the common situs is owned by the primary employer.

Hopefully, the Supreme Court will not tenaciously insist on the requirement of a separate gate. The "related work" rationale should comply just as well with the dual congressional objectives in a common gate situation on the primary premises as in a separate gate situation. The reserved gate requirement discriminates against employers who are unable because of space or finances to erect an additional gate. There is no sound reason for such discrimination. In any case, the common entrance situation where neutral employees possess distinctive identification and enter the gate at times peculiar to them should be the equivalent of a reserved gate.

Litigation has arisen also as to the technical question whether a gate is constructed and maintained in a manner which is sufficient to satisfy the Supreme Court's requirement of a separate gate. In the *Mack Truck* case[69] a neglected dirt road was established as a separate gate. Two tall posts were erected on either side of the road at the point of its inception but no fence enclosed the road and the field across which it ran, and no guards were posted to prohibit unauthorized persons from using the road. The Board held that this special entrance was the equivalent of a reserved gate. The district court held that such a claim was not so frivolous that it would prevent the issuance of a temporary injunction.[70]

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[67] Teamsters Union, Local 90 v. NLRB, 293 F.2d 881 (D.C. Cir. 1961) (per curiam), *denying enforcement to* 128 N.L.R.B. 1352 (1960).

[68] *Id.* at 882.

[69] NLRB v. UAW, Local 677, 201 F. Supp. 637 (E.D. Penna. 1961).

[70] Labor Management Relations Act, 61 Stat. 141 (1947), as amended, 29 U.S.C. § 160(1) (1964).

The broad language of the "reserved gate" doctrine might conceivably be applied where picketing occurs at the secondary premises. In *General Elec.* Mr. Justice Frankfurter rejected any "control of premises" test by saying "where the work done by the secondary employees is unrelated to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer."[71] However, it must be realized that there is, in fact, an inherent difference between picketing on the primary premises and picketing on the premises of the neutral employer. In *Salt Dome* the District of Columbia Court of Appeals observed, "no matter how great the pressure on a neutral employer may be when somebody else's place of business is picketed, it is essentially different from the pressure such a neutral feels when his own business is being picketed."[72] When the pickets confront an employer in front of his plant or office, reaction to such a signal is very likely to disrupt his entire business. Continued application of the *Moore Dry Dock* rules in this area seems necessary to preserve any semblance of protection for the neutral employer. The National Labor Relations Board[73] and several federal courts[74] have deemed it equitable to apply the *Moore* rules in common situs cases involving the secondary premises. The Board has utilized the *Dry Dock* rules, especially the one requiring that the employees of the primary employer be at work while the picketing continues at the secondary premises. In one of these cases[75] the Board also considered the fact that the union had threatened any one crossing the picket line with union discipline. In all the cases, the *Moore* rules were applied objectively.[76] A good example of the trend is a discussion in which the

[71] 366 U.S. 667, 679 (1961).

[72] 265 F.2d 585, 591 (D.C. Cir. 1959).

[73] L. G. Elec. Contractors, 154 N.L.R.B. No. 59 (1965); Staresky, 153 N.L.R.B. No. 42 (1965); Northwestern Constr. Co., 152 N.L.R.B. No. 99 (1965); General Tel. Co., 151 N.L.R.B. No. 145 (1965); Merchandise Properties, Inc., 149 N.L.R.B. 82 (1964); Driscoll Transp., Inc., 148 N.L.R.B. 845 (1964); Plauche Elec., Inc., 142 N.L.R.B. 1106 (1963); Anderson Co. Elec. Serv., 135 N.L.R.B. 504 (1962); Wyckoff Plumbing, 135 N.L.R.B. 329 (1962); Middle So. Broadcasting Co., 133 N.L.R.B. 1698 (1961); Administrative Decision of General Counsel Case. No. SR-2191 (1963).

[74] *E.g.*, New Power Wire & Elec. Corp. v. NLRB, 340 F.2d 71 (2d Cir. 1965); Brown Transp. Corp. v. NLRB, 334 F.2d 30 (5th Cir. 1964); Gibbs v. UMW, 220 F. Supp. 871 (E.D. Tenn. 1963).

[75] 153 N.L.R.B. No. 42 (1965).

[76] Compare the Fifth Circuit decision, 334 F.2d 30 (1964). Testimony of union pickets was relied on along with the Washington Coca Cola Doctrine, 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955), that the picketing is unlawful if the primary employer has a regular place of business in the locality which can be picketed. This limitation was rejected by the Board in *Plauche*, 35 N.L.R.B. 250 (1962) after steady repudiation by most of the courts. The location of such offices was to be only entitled to weight. Most courts left the doctrine alone, but the Fifth Circuit used it reasoning that a large part of the time

Second Circuit Court of Appeals[77] approved a Board decision that applied the rule requiring the primary employees to be engaged in normal work at the time of the picketing in a reasonable and not literal manner. The primary employer was performing work at various apartments. The union picketed the primary employer at each apartment until the particular job was completed. The picketing continued even though workers were temporarily absent from one of the jobs. This absence was due to a shortage of workers caused by the strike. The Board allowed the picketing, and the court of appeals affirmed saying that to hold otherwise would require the union to play a game of "hide and seek." A per se violation of the *Dry Dock* rules was not conclusively presumptive of illegal activity. The Board's determination of cases taking place on the secondary situs, using *Moore* and other traditional criteria, have been more objective since the *General Electric* decision. Their decisions are sound and are based on rationale incorporating a fair balance of interests.

B. *Degree Of Relationship Necessary—The Construction Site*

The nature of the relationship required between work done by primary employees and secondary employees for union picketing to be privileged is very important in the large building and construction industry. A great many of the common situs picketing cases which arise involve construction site jobs. However, whether or not the various aspects of construction work are so related as to allow application of the "related work" doctrine is still an open question. The Board has avoided the question as to the degree of relationship involved and has held as a matter of law that the "related work" doctrine was not meant to be applied to the building and construction site.[78] In the recent *Markwell & Hartz* case[79] the Board discussed issues regarding the use of the reserved gate by a construction contractor. Markwell and Hartz, Inc. was the general contractor in charge of expansion at a filtration plant in the East Jefferson Water Works near New Orleans. The employees of Binnings, a subcontractor, were affiliated with the respondent union, and the union's

was spent by employees at the company office. In regard to the *Moore* requirement that the picketing take place reasonably close to the situs, the court held that the picket must always be within sight of the primary employee. Ambulatory picketing of a truck driver outside the entrance to a delivery point while the driver is out of view is prohibited.

[77] New Power Wire & Elec. Corp. v. NLRB, 340 F.2d 71 (2d Cir. 1965).

[78] Dobson Heavy Haul, Inc., 155 N.L.R.B. No. 126 (1965); Markwell & Hartz, Inc., 155 N.L.R.B. No. 42 (1965); Calhoun Drywall Co., 154 N.L.R.B. No. 83 (1965). In this discussion "construction site" will mean a site not owned by either the primary or secondary employers.

[79] 155 N.L.R.B. No. 42 (1965); This is the first case reported in which a reserved gate was utilized at a construction site not owned by the primary or secondary employers.

only dispute was with the general contractor. The East Jefferson Water Works is surrounded by a chain-link fence with four gates. The union picketed all four gates with signs directed specifically toward Markwell and Hartz. After a week Markwell and Hartz posted three gates reserving them for the use of subcontractors and suppliers. The rear gate was marked for employees of the general contractor. Pile driving crews under Binnings entered their newly posted gates after the pickets had moved to the rear gate. Picketing later resumed at the three gates used by the neutral employees, resulting in further disruption of the business. After three weeks had passed, the Markwell company changed the signs. Two gates were restricted to use by the employees of the subcontractors only, and the other two were restricted to use by the employees of the general contractor and carriers or suppliers making deliveries to the general contractor. Picketing continued in front of the gates posted for use by the subcontractors until it was enjoined in a 10(1) proceeding.[80]

The Board held that the question of whether such picketing was lawful should be resolved by employing the *Moore Dry Dock* rules. The *General Elec.* case involved, the Board said, picketing at the premises of a struck manufacturer while the facts of this case involved picketing of one of several employers operating on premises owned by a third party. The Board then surprisingly declared that only the latter presented a "common situs" problem. In reality, it is implicit in the term "common situs" that by it is meant any premises at which two distinct employers are both working at the same time, no matter how short that period of time may be. In fact, in the *Carrier* case the Board had insisted that the facts presented a common situs problem since the regular work of the railroad employees was continuously done on the primary premises.[81] The Supreme Court in *Carrier* held that the location of the picketing, though important, was not deemed of decisive significance.[82] Just the same, the Board reasoned in *Markwell & Hartz* that wide latitude has been granted to picketing when confined to the sole premises of the primary employer. On the other hand, "the Board has taken a more restrictive view of common situs picketing, requiring that it be conducted so as to 'minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees.' "[83] The Supreme Court did not

[80] See note 70 *supra.*

[81] United Steelworkers Union v. NLRB, 376 U.S. 492, 497 (1964).

[82] *Ibid.*

[83] Crystal Palace Mkt., 116 N.L.R.B. 856, 860 n.10, *enforced*, 249 F.2d 591 (9th Cir. 1957).

seek, the Board says, to interfere with the traditional approach to common situs problems. *General Elec.* did not present a common situs problem, the opinion continues, and that case, "merely represents an implementation of the concomitant policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer."[84]

The Board in applying the *Moore Dry Dock* rules also equates picketing at a gate used solely by neutral employees with a picket that fails to name the party with whom there is a dispute.[85] It said that if the latter picketing indirectly demonstrates that a union is seeking to induce neutrals not to work, then a fortiori, the direct inducement of neutral employees at a separate gate demonstrates that illegal object. The Board applies the *Moore* standard that picketing should disclose clearly that the dispute is with the primary employer in such a strained fashion that it is equated with the directing of picketing at secondary employees. This trend could be considered a step beyond the *Moore Dry Dock* standards which are required for a presumption of lawful picketing. A presumption of invalidity when the picketing is directed at secondary employees is a rather unobjective approach. The Board quoted from *Crystal Palace*[86] the strong language that the timing and location of the picketing and the legends on the picket signs must be tailored to reach the employees of the primary employer. The Supreme Court in *Carrier* spoke frankly regarding picketing aimed at secondary employers. The Court seemed to disapprove the unrealistic language in which unions are allowed to hope but not intend picketing to discourage picket line crossing.[87] It recognized that the union does intend its pickets to affect persons other than primary employees.[88] Those primary employees are strike breakers who most probably will not pay any attention to the picket line anyway. And the Court in *Carrier* recognized the legitimacy of directing an appeal to secondary employees when the work they are performing is related to the work of the primary employer. The Board does not answer the question whether the work is related or not. The Board held that the picketing of the subcontractor's gate after the gate designations were changed to exclude suppliers did not comply with the requirement that such action take place reasonably close to the situs of the union's dispute with the primary employer.

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[84] 155 N.L.R.B. No. 42 (1965).
[85] NLRB v. Local 55 (PBM), 218 F.2d 226 (10th Cir. 1954).
[86] Crystal Palace Mkt., 116 N.L.R.B. 856, 859 (1956).
[87] See text accompanying note 63 *supra*.
[88] See New Power Wire & Elec. Corp., 144 N.L.R.B. 1089 ,1093 (1963).

In *O'Brien Elec. Co.*,[89] the Board limited the completeness of this holding. It said that, while picketing at locations other than a properly marked primary gate may indicate a noncompliance with *Moore Dry Dock* standards, the mere posting of signs at an unenclosed site does not in itself limit the situs of the dispute. The "gate" in this case consisted of three-foot-high stakes holding signs which said, "O'Brien Electric Employees entrance only." The Board found the separately marked entrance at the construction site ambiguous, insufficiently marked, and at times disregarded by both suppliers and primary employees. Because of these findings the Board decided no departure from the *Moore Dry Dock* requirement that picketing take place reasonably close to the situs existed. The Board stated that to hold that the posting of a primary entrance in itself restricted the situs of the dispute to that location would condone a mechanistic application of *Moore Dry Dock* requirements. Such a mechanistic application would disregard the competing interests that must be accommodated in ascertaining an objective under section 8(b)(4)(B).

In way of answer to the dissent, the majority in *Markwell & Hartz* mentions that the minority opinion would, in effect, contravene a well-accepted principle enunciated in the *Denver Bldg. Trades* case.[90] The Supreme Court in that case said:

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction projects, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other.[91]

The majority does not actually reach the question whether contractors on a construction site performed related work. It is Board dictum that such work is not related in law.

The *Markwell & Hartz* decision precipitates a change in picketing at a construction site owned by neither the primary employer nor the secondary employer. In early construction site cases, picketing was upheld when the *Moore Dry Dock* rules were met. These decisions were found to be in accord with the *Denver Bldg. Trades* case. The rules added a degree of objectivity in any attempt to find the object of the picket line at a construction site. Later during the reign of the *Washington Coca Cola* doctrine, picketing at the construction site was effectively prevented when the primary employees had a principal place of business at which to report nearby. After the

[89] O'Brien Elec. Co., 158 N.L.R.B. No. 57 (1966).
[90] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).
[91] *Id.* at 689-90.

General Elec. decision discouraged per se doctrines such as *Washington Coca Cola*,[92] the Board retreated by overruling *Washington Coca Cola*[93] and by refusing to treat the *Moore Dry Dock* rules as presumptive of illegal activity. Picketing then became easier to effectuate at construction sites than ever before, *i.e.*, until *Markwell & Hartz*. The *Markwell & Hartz* decision seems to stifle completely any union attempt to picket at a construction site. Any informed employer will know to utilize separate gates to indicate a violation of the *Dry Dock* rules. The use of sufficiently defined separate gates may well preclude any objective application of the *Moore Dry Dock* rules. Under the *Markwell & Hartz* decision picketing at a separate gate is the equivalent of picketing that fails to describe the party with whom the dispute exists. *Markwell & Hartz* is the most stringent measure ever taken to control union picketing at a construction site, surpassing even *Washington Coca Cola*. Hopefully, the more recent *O'Brien* case indicates a desire to soften the rigidity of *Markwell & Hartz*.

The dissenting members[94] believed the crucial consideration to be not that the conduct did not occur in connection with a strike at an industrial plant, but that appeals to respect a picket line made to employees of secondary employers depend upon the type of work that is being performed. The principles set forth in *General Elec.*, they felt, govern picketing in the construction industry as well as in other industries: "It is only by determining the legality of reserved gate picketing by standards generally applicable to all industries that the dual congressional objectives are served and the competing interests of picketing unions and secondary employers protected."[95]

The dissent pointed out that there is no logic in the majority's conclusion that the picketing of the reserved gate did not violate section 8(b)(4)(B) before suppliers were excluded from using the neutral gate. The dissenting members agreed that it is clear that appeals to suppliers making deliveries to the primary employer in the construction industry are not legitimate primary activity.[96] But since "the Supreme Court clearly equated picket line appeals to employees of neutral subcontractors whose tasks aid the everyday operations of the struck employer with similar appeals to employees of neutral suppliers and deliveries, there is no warrant for distinguishing be-

[92] 158 N.L.R.B. No. 57 (1966).
[93] 366 U.S. 667 (1961).
[94] Members Fanning and Jenkins.
[95] 155 N.L.R.B. No. 42 (1965).
[96] NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

tween the two."[97] According to the majority's logic, the picketing of suppliers would be as unlawful as the picketing of other neutrals.

The dissenting members discussed the relationship of the work done by the neutrals to that done by the primary employer. The dissent admitted that the Supreme Court in *General Elec.* affirmed the rule stated in *Denver* that the various contractors at a construction job are separate employers. But that did not preclude their finding that the work of Binnings was related to the normal operations of Markwell and Hartz, the general contractor. They considered it important that the employees of the subcontractors were scheduled to work together with the employees of the general contractor. The dissent also thought it important that the general contractor's engineer and superintendent were present to insure that the subcontractors fulfilled the general contractor's commitment to the owner according to the standards required. From these facts they found that the work of the subcontractors was related to both the general contractor's work on the job and its responsibility to complete the project itself, and thus, the work was related to the normal operations of the general contractor. The dissenting members rejected the general counsel's view that the work is not related unless the work is identical or substantially similar to that of the primary employer. They reminded that the Board on the remand of *General Elec.* found the construction of a truck dock by neutral contractors related to the primary employer's normal operations, even though it was not the type that previously had been performed by General Electric employees.[98]

The dissent emphasized that it did not imply that when a union had a dispute with one subcontractor on a construction project, appeals to employees of other subcontractors or, a fortiori, the general contractor using different gates constituted legal, primary activity. The dissenters said:

> [T]he work of the employees of the neutral, general contractor and subcontractors, though obviously bearing a close relationship to the work of the primary employees, is nevertheless not work which the primary subcontractor has obligated himself to perform or which lies within his power to control or to assign to whomsoever he sees fit.[99]

The dissent seems to hold that the obligation of the general contractor to the owner and the concommitant supervision by the general contractor of the subcontractor's work are pre-eminent in

[97] 155 N.L.R.B. No. 42 (1965).
[98] General Elec. Co., 138 N.L.R.B. 342 (1962).
[99] 155 N.L.R.B. No. 42 n.35 (1965).

holding such work related to the normal operations which the strike is attempting to curtail. The fact that the work of the two distinct employers was scheduled to be done contemporaneously, the dissent feels, supports any finding of a relationship to the normal operations.

This criteria based primarily on supervision does not flaunt the statement in *Denver* that each employer on a construction site is an independent contractor and that no one contractor is the employee of the other. The independent contractor can be subjected to supervision, and he does not lose that status unless the supervision becomes as stringent and direct as that exercised over an employee. General supervision designed to secure a desired object is different from constant supervision and direction as to every detail and manner of operation. The holding in the *Denver* case was designed to deal with pressure specifically and openly exerted upon a general contractor to force him to terminate his contract with a subcontractor with whom the union had a dispute.[100] If the Court had held the general contractor to be the primary employer, the picketing would have been lawful primary activity. In this situation assuming that the companies involved are two separate employers, the problem is whether one is doing work related to the normal operations of the other. The work of the general contractor involves some degree of general supervision over other independent contractors on the job. It cannot be denied that that supervision is part of his normal duties. Thus, any work he supervises is sufficiently related to be subject to peaceful picketing. Primary picketing is permitted to halt the normal business of the primary employer, and the normal business of the general contractor is both performing construction work himself and seeing that the work he does not do is performed satisfactorily. In this event, it seems to make no difference whether the work of both employers can be done contemporaneously. The question seems to be whether economic pressure can be effectively applied to halt the general contractor's job of general supervision and completion of an entire project.

Conversely, when the dispute lies with a subcontractor on a construction site, the *Denver* case could prohibit picketing aimed at other contractors.[101] The *Denver* case has been followed consistently when the object was to force the general contractor on a construction project to terminate its contract with a subcontractor who employs nonunion men.[102] The "related work doctrine" could reverse that trend.

[100] 342 U.S. 675 (1951).

[101] See text at note 42 *supra*.

[102] Ralph Davis Plumbing, 159 N.L.R.B. No. 41 (1966); General Tel. Co. of Calif., 151 N.L.R.B. 1490 (1965); Great Falls Bldg. & Constr. Trades Council, 154 N.L.R.B. No. 128 (1965); Jones & Jones, Inc., 154 N.L.R.B. No. 59 (1965); Pass Development, Inc., 154 N.L.R.B. No. 10 (1965).

But a definite problem is posed in showing that (1) the work of a subcontractor on the same project or (2) the work of a general contractor is related to the normal business of a subcontractor with whom a dispute exists. A comparison of the work of two subcontractors can point out some of the problems involved in both cases.

No two subcontractors can be called the employees of a common employer. If they were fellow employees, their work would certainly be related. Despite the realities of the situation, whatever they might be, each could be regarded as if he were a contractor performing distinctive work for a factory owner. Thus, their work would not be related to each other's business. If both a bricklayer and a plumber were engaged in a construction project, the bricklayer, for instance, could continue his work even if the plumber refused. The two work near each other on the same project but not "together." It is true that the unavailability of the plumber would eventually cause the project to close down. But that result does not differ from the one in which a plant closes because of the cessation of a flow of necessary supplies and materials. On the other side, it may be argued that subcontractors' work may be so inter-related that it is, indeed, closely enough related to call for application of the "reserved gate" doctrine. The installation work of the air conditioning subcontractor depends on where the electrical subcontractor runs his wiring, and the two must work closely together. The subcontractor doing carpenter work also must cooperate and make vent openings where the air conditioning workers need to run their ducts.

A series of somewhat emotional questions can point out possible hardships resulting if the degree to which the work is considered related is extended very far: Would the relationship be one that would fairly require permitting, for example, picketing by employees of the plumber for, perhaps, two months or more, even before installation of plumbing or introduction of plumbing employees became necessary to the project? In other words, should the work of the bricklayers and others setting the foundation be prevented by employees of the plumber? And after the plumbing is completed should picketing the roofers and painters be allowed? In conclusion, the question could be fairly asked whether, in fact, the work of the entire project should be tied up because of one small subcontractor? The answers to all these questions are unquestionably, "No!" The effect upon the neutral employer in such a case would be greater than that which would result from halting the ordinary business of a subcontractor. The effect would be the cessation of the ordinary business of every employer on the project.

V. Conclusion

With the recent Supreme Court pronouncements in *General Elec.* and *Carrier,* a restatement of the law regarding common situs picketing seems appropriate. The prerequisites for preventing picketing at the premises of the primary employer are:

> (1) A separate gate marked and set apart from other gates;
> (2) the work done by the men who use the gate must be unrelated to the normal operations of the employer; and
> (3) the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.[103]

The underlying basis of the second and third requirements is the desire to protect picketing which is calculated to create the effect that would be felt ordinarily by an employer forced to cease the normal operations of his business. Such traditional picketing has been recognized by the courts as worthy of protection. The first requirement that there must be a separate gate seems arbitrary and not related to the goal of protecting traditional picketing in a primary dispute. The "related work" doctrine in a primary situs case would, doubtless, comply with the dual congressional objectives of preserving the right to bring pressure to bear on offending employers in primary labor disputes and shielding unoffending secondary employers from pressures in controversies not their own. It would comply in the situation involving picketing at the primary situs, whether or not a separate gate had been established. The *Gonzales* case,[104] however, indicates the requirement that there must be a separate gate will be strictly complied with. The concept of what constitutes a gate has also been subject to narrow construction. The *Gonzales* case decided that separate hours for entering and distinct uniforms for various employees was not an equivalent to a separate gate. Application of the "related work" doctrine to picketing at the premises of a secondary employer is not precluded, but the National Labor Relations Board's present policy of applying the *Moore Dry Dock* rules in cases in this area seems fair. The Board's application of these rules since the *General Elec.* decision has been more objective and more refined than before. Attorneys in the Fifth Circuit, however, should take cognizance of a recent decision[105] that relied on the old *Wash-*

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[103] United Steelworkers Union (Phelps Dodge Ref. Corp.) v. NLRB, 289 F.2d 591, 595 (2d Cir. 1961).

[104] Teamsters Union v. NLRB, 293 F.2d 881 (D.C. Cir. 1961) (per curiam).

[105] Brown Transp. Corp. v. NLRB, 334 F.2d 30 (5th Cir. 1964).

ington Coca Cola[106] doctrine, often considered permanently discarded. The court held the picketing unlawful because the primary employer had a place of business in the locality at which his employees spent a large part of the time. This limitation, a fifth item added to the *Moore Dry Dock* standards, was abandoned by the Board in *Plauche Elec.*[107] after steady repudiation by most courts. The location of such offices was only one factor to be considered. Most courts left the doctrine alone, but the Fifth Circuit accorded it a generous share of weight. This decision may not square with the holding that compliance with *Moore Dry Dock* is presumptive of valid activity.[108] The Fifth Circuit relies on *Superior Derrick*[109] and *National Trucking*.[110] The Supreme Court denounced these cases specifically as examples of the *Dry Dock* tests being mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity.[111] In the same case, the Fifth Circuit Court of Appeals construed the *Moore Dry Dock* requirement that the picketing take place close to the situs in a novel fashion. The union had picketed outside the delivery destination, while the driver of the primary employer was inside the premises. The court held that ambulatory picketing is secondary activity unless the employee of the primary employer is within view of the picket.

In *Markwell & Hartz*, the Board refuses to apply the "related work" test to contractors engaged in a construction project at a common situs. Indeed, the Board did not even reach the question of related work. There would, no doubt, be a sufficient relationship if the primary employer were a general contractor, exercising supervision over the entire project. On the other hand, if the dispute were with a subcontractor, the *Denver Bldg. Trades* decision might preclude finding the necessary relationship with the work of the primary employer.[112] The decision forbids considering independent subcontractors as employees of the general contractor. This interpretation of

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[106] Washington Coca Cola, 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955).

[107] Plauche Elec., 135 N.L.R.B. 250 (1962).

[108] Electrical Workers Union v. NLRB, 366 U.S. 667, 677 (1961).

[109] Superior Derrick Corp. v. NLRB, 273 F.2d 891 (5th Cir. 1960).

[110] NLRB v. Truck Drivers & Helpers Union, Local 728, 228 F.2d 791, 795 (5th

[110] NLRB v. Truck Drivers Union, Local 728, 228 F.2d 791, 795 (5th Cir. 1956).

[111] 366 U.S. 667, 677-78 (1961).

[112] The Board has held that a union's picketing for the purpose of securing a contract with an employer in the construction industry containing a prohibition on subcontracting to non-union employers does not constitute unlawful activity since this type of clause is permitted under the National Labor Relations Act, § 8(e). Melody Homes, Inc., 151 N.L.R.B. No. 46 (1965). This holding seems inconsistent with *Markwell & Hartz*. It allows the union to do indirectly what it cannot do otherwise.

Denver seems fair when considering that cessation of normal business would be suffered by all the other employers.

On the other hand, it may be said that resort to sufficiently establish reserved gates is likely to be had by most contractors. Therefore, if *Markwell & Hartz* remains the law, most union picketing will be effectively curtailed at construction sites. Congress has before it a pervasive bill making lawful almost any picketing that might arise at a construction site.[113] As long as the *Markwell & Hartz* decision is the law, union pressure for passage of such a bill will be immense. Some middle ground more closely in balance with the dual congressional objectives should be maintained.[114]

[113] H. R. REP. No. 10027, 89th Cong., 1st Sess. (1966).

[114] The *O'Brien* case, note 89 *supra* may indicate a desire to soften the Board approach.