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Separate Gates and Secondary Picketing

Roy J. true

alternative does not seem very practical, and the second one is obviously unsatisfactory.[34] The moving of plants may, thus, be greatly hindered. The impact would be greatest on the South, which, having a labor surplus as a result of mechanization of agriculture, has been trying to attract industry through special concessions in addition to its low-cost labor supply. Tennessee, for example, has had 1,065 new plants established between 1953 and 1960, creating 122,050 new jobs; seventy per cent of these plants have moved from other states.[35] If the decision is upheld, our country may have lost an important safety valve in its economy, which has assisted us in remaining competitive in world markets.

David C. Briggs

Separate Gates and Secondary Picketing

Petitioner Union, comprised of the majority of the working force at an appliance construction plant, struck against the company. Picketing by Petitioner was carried on at each of five gates serving as entrances and exits for the plant. Gate 3-A, one of the five gates picketed, had for four years prior to this strike been confined to the use of employees of independent contractors who work on the premises. Automobiles and persons were checked for authorization to enter Gate 3-A and a sign was prominently posted to inform company employees to use other entrances. The nearest entrance available for use by company employees was 550 feet away. On rare occasions, in violation of company policies, a company employee was allowed to enter Gate 3-A. As a result of the picketing of Gate 3-A, almost all of the employees of independent contractors refused to enter the company premises. The federal district court enjoined picketing two weeks after it had begun. Subsequently, the National Labor Relations Board ruled that the Union's picketing was a violation of Section 8(b)(4)(A) of the National Labor Relations Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.[1] After enforcement of the Board's decision by the

[34] A company could also, of course, offer its employees their "vested rights" at the new plant, hoping they would not all elect to move. However, the company would risk losing much of the advantage in moving if many employees decided to go along.

[35] The Wall Street Journal, July 21, 1961, pp. 1, 4. Cheap power from T.V.A. was a possible additional motivating factor.

[1] Section 8(b)(4)(A) provides that it shall be an unfair labor practice for a labor organization

> 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

court of appeals,[2] certiorari was granted by the Supreme Court. *Held:* Picketing is prohibited by Section 8(b)(4)(A) where there is a separate clearly marked gate for the exclusive use of employees of independent contractors if they are performing tasks *unconnected* with the *normal* operations of the struck employer.[3] *Local 761, IUEW v. NLRB*, 366 U.S. 677 (1961).

Prior to 1937 picketing of all forms was usually considered prima facie a tort to be proven lawful.[4] However, beginning early in this century courts began to differentiate between picketing which was peaceful and that which was not,[5] and between employee and non-employee picketing.[6] Thus, peaceful picketing by employees was accorded legality. Even though the Supreme Court refused to recognize picketing as being within "speech" in its 1921 consideration of picketing and constitutional liberties,[7] earlier in that same term the Court defined "peaceful picketing" and prescribed conditions under which it might be considered legal.[8] These conditions continued to govern peaceful picketing until 1937. During that period, Congress accorded protection from federal injunction to peaceful picketing through the Norris-LaGuardia Act of 1932.[9] In 1937, two years after the passage of the National Labor Relations Act[10] and creation of the National Labor Relations Board, the Supreme Court held

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> to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . to cease doing business with any other person . . . .

[2] 278 F.2d 282 (D.C. Cir. 1960).

[3] However, the Court reversed and remanded the case to establish the scope of work performed by the employees of the independent contractors who used the separate gate.

[4] *E.g.*, Atchison, T. & S.F. Ry. v. Gee, 139 Fed. 582 (S.D. Iowa 1905); *Re* Langell, 178 Mich. 305, 144 N.W. 841 (1914); Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N.W. 13 (1898). The tort was the interference and intimidation of employees and customers.

[5] *E.g.*, Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45 (7th Cir. 1908); Pope Motor Car Co. v. Keegan, 150 Fed. 148 (N.D. Ohio 1906); State v. Stockford, 77 Conn. 227, 58 Atl. 769 (1904); Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927).

[6] *E.g.*, Jones v. E. Van Winkle Gin & Mach. Works, 131 Ga. 336, 62 S.E. 236 (1908); Chicago Typographical Union v. Barnes, 232 Ill. 424, 83 N.E. 940 (1908). *But see* Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188, 53 S.E. 273 (1906).

[7] Truax v. Corrigan, 257 U.S. 312 (1921).

[8] American Steel Foundaries Co. v. Tri-City Central Trades Council, 257 U.S. 184 (1921). Chief Justice Taft writing the majority opinion held that peaceful picketing had to do (1) with the number of picketers, "one representative for each point of ingress and egress," *id.* at 206, (2) with the place of picketing, specifying that the employer should not be obstructed in access to his place of business, *ibid.*, and (3) with the behavior of the picketers, "persistence . . . or dogging" condemned as well as "abusive, libelous or threatening" language, *id.* at 207.

[9] Section 4 (e), 47 Stat. 71 (1932), 29 U.S.C. § 104 (1958). Injunctions were prohibited issuance against "Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by . . . patrolling, or any other method not involving fraud or violence. . . ."

[10] 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958).

that one of the aims of picketing was communication,[11] and three years later, Justice Murphy incorporated picketing into the communication of ideas constitutionally protected by the first and fourteenth amendments.[12] States were almost wholly denied rights of regulation over peaceful picketing regardless of its effects on third parties.[13] However, when *Carpenters Union v. Ritter's Cafe*[14] came before the Court in 1942 it was made clear that picketing, even though peaceful, could have adverse "secondary" effects on innocent third parties and that such picketing should not be protected against state regulation. In *Bakery Drivers Union v. Wohl*,[15] a companion case to *Ritter's Cafe*, Justice Douglas' concurring opinion affirmed the constitutional protection of picketing and also proclaimed the type of picketing which was to be regulated, now called "secondary picketing."[16] The Taft-Hartley Act, an amendment to the National Labor Relations Act, passed in 1947,[17] set out unfair labor practices and made certain types of picketing enjoinable.[18] Thus, a problem was forged in striking a balance between constitutionally protected picketing which inherently possessed the salient purpose of inducing employees and the public to take sides with the picketers[19] and the right of innocent businessmen who are economically affected to be protected.[20]

Senator Taft stated that one of the purposes of the Taft-Hartley Act was to return, via Section 8(b)(4), to the common law gov-

[11] Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).

[12] Thornhill v. Alabama, 310 U.S. 88 (1940).

[13] AFL v. Swing, 312 U.S. 321, 326 (1941). Here the Court allowed a union representing none of the employees to picket the employer due to "the interdependence of economic interests of all engaged in the same industry. . . ."

[14] 315 U.S. 722 (1942). Here the picketers patrolled the cafe of Ritter over a dispute concerning construction work being done for Ritter on a building unconnected with his restaurant.

[15] 315 U.S. 769 (1942). The union picketed wholesale bakeries which sold goods to non-union, self-employed peddlers, and retail grocers who bought from them. The purpose was to compel the peddlers, who had seriously undermined union standards, to observe union hours and to hire union relief drivers. The Supreme Court reversed a New York injunction and found the union had a legitimate interest.

[16] *Id.* at 776:

> Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

[17] Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 151—66 (1958).

[18] Section 8(b)(4), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(4) (1958).

[19] International Bhd. of Teamsters, AFL (Schultz Refrig. Service, Inc.), 87 N.L.R.B. 502, 25 L.R.R.M. 1122 (1949).

[20] *Supra* note 17. The caption of the Act read, 61 Stat. 136 (1947):

> An Act to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

erning secondary boycotts and picketing.[21] Nowhere did Section 8(b)(4) make reference to primary or secondary activity.[22] However, those concerned with the Act alluded to "secondary" boycotts and picketing as an expression covering a multitude of union practices invoked against neutral employers.[23] Yet, while it seems plain that "secondary" was not a geographical reference, there developed a line of cases under the Act that considered the place of activity in distinguishing between primary and secondary activity. Picketing at the premises of a secondary employer who was a purchaser from the primary employer involved in the dispute was held to be illegal picketing from either the secondary relation of the picketed party to the dispute or from the geographical restriction of the secondary situs.[24] The view of "primary" as physical was evidenced in *Oil Workers Int'l Union, CIO (Pure Oil Co.)*[25] where the National Labor Relations Board found that secondary effects from picketing at the primary employer's immediate premises did not make the picketing illegal or secondary.[26] This physical aspect of "primary" was followed in *United Electrical Workers (Ryan Constr. Corp.)*,[27] a common situs case, *i.e.*, where the primary and secondary employers occupy a common work place. There, as in the principal case, a separate gate for the ingress and egress of the employees of the secondary employer was picketed by employees of the primary employer. The Board found that this picketing of the separate gate did not enlarge the area of dispute and did not violate Section 8(b)(4)(A)[28] although the picketing had a secondary effect. The premises in the *Ryan* case were owned by the struck employer, but

[21] 93 Cong. Rec. 4198 (1947):

> [U]nder the provisions of the Norris-LaGuardia Act it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is reverse the effect of the law as to secondary boycotts.

[22] See note 18 *supra*.

[23] See the remarks of Senators Pepper and Taft, 93 Cong. Rec. 4322-23 (1947); remarks of Senator Ellender, 93 Cong. Rec. 4255 (1947); and remarks of Senator Ball, 93 Cong. Rec. 4138 (1947).

[24] United Bhd. of Carpenters (Wadsworth Bldg. Co.), 81 N.L.R.B. 802, 23 L.R.R.M. 1403 (1949).

[25] 84 N.L.R.B. 315, 24 L.R.R.M. 1239 (1949).

[26] *Id.* at 318:

> A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed by Section 8(b)(4)(A) of the Act.

[27] 85 N.L.R.B. 417, 24 L.R.R.M. 1424 (1949).

[28] At this point in time the discussion concerns Section 8(b)(4)(A) as it read before the 1959 amendment, discussed *infra* note 41, which changed the wording but is the result of the judicial and legislative history developed from the pre-1959 Section 8(b)(4)(A).

in *Sailors' Union, AFL (Moore Dry Dock)*,[29] also a common situs case like *Ryan*, the premises were owned by the secondary employer. The *Moore Dry Dock* case did not follow the secondary situs rule of the *Wadsworth Bldg. Co.* case[30] as the *Ryan* case followed the primary situs rule of *Pure Oil Co.* However, certain definite standards were set forth in *Moore Dry Dock* which had to be met to avoid the *Wadsworth* decision and rule.[31] The standards set out were strictly applied and the courts found picketing at common, secondary premises automatically illegal if any one of the standards was lacking.[32] Subsequently, the *Moore Dry Dock* standards were applied to a primary, common situs case,[33] thus unifying secondary and primary, common situs situations into the same criteria of consideration.

Prior to that decision by the Board, the interest of the Supreme Court in the location of the picketing had decreased as their concern with the secondary *effect* of the picketing grew,[34] and their language in the *Rice Milling* case indicated that the mere location of the picketing was not conclusive as to its legality.[35] This attitude toward the effect of the picketing was paramount in the *Retail Fruit Dealers* decision handed down by the Board in 1956.[36] That decision added another standard to the *Moore Dry Dock* test: the requirement that picketers make a "bona fide effort to minimize the secondary effect of picketing."[37] Due to the legal necessity of all

[29] 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950). The *Moore Dry Dock* Case is sometimes referred to as a "roving situs" case in reference to the fact that the picketing involved therein was mobile and followed the struck employer's jobs to various sites.

[30] United Bhd. of Carpenters (Wadsworth Bldg. Co.), 81 N.L.R.B. 802, 23 L.R.R.M. 1403 (1949).

[31] Sailors' Union, AFL (Moore Dry Dock), 92 N.L.R.B. 547, 549, 27 L.R.R.M. 1108 (1950):

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

[32] See, *e.g.*, Superior Derrick Corp., 122 N.L.R.B. No. 6, 43 L.R.R.M. 1063 (1958), *enforced in part and rev'd in part*, 273 F.2d 891 (5th Cir. 1960); Local 728, Teamsters Union, 111 N.L.R.B. No. 68, 35 L.R.R.M. 1501 (1955), *enforced*, 228 F.2d 791 (5th Cir. 1956).

[33] Local 55 (PBM), 108 N.L.R.B. 363, 34 L.R.R.M. 1010, *enforced*, 218 F.2d 226 (10th Cir. 1954).

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

[35] *Id.* at 671.

[36] Local 1017, Retail Clerks Union, AFL-CIO (Retail Fruit Dealers), 116 N.L.R.B. 856, 38 L.R.R.M. 1323 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957).

[37] 116 N.L.R.B. at 859. This additional condition enunciated in *Retail Fruit Dealers* is not to be confused with the so-called "fifth condition" added to the *Moore Dry Dock* test by Brewery Drivers, AFL (Washington Coca-Cola Co.), 107 N.L.R.B. 299, 33 L.R.R.M. 1122 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955). The latter condition resulted from another objective consideration by the court of the physical aspects of the picketing.

the *Moore Dry Dock* standards being fulfilled[38] this addition of subjectiveness which was inherent in the "bona fide effort" standard accorded much importance to the determination of whether the secondary effects were controllable and whether the picketing had an *object* legitimately connected with the primary dispute[39] (with that object being ascertained from the circumstances surrounding the picketing).[40] The statutory recognition of the "object" determination is exhibited by the amended Section 8(b)(4) of the National Labor Relations Act[41] which now begins with operative language describing the kinds of union action prohibited if "an object" is one of the purposes set forth in clauses (A), (B), (C), or (D). Therefore, although the word "primary" is given statutory dignity for the first time by the 1959 Amendment, it seems that its meaning has not been changed and that the same standards should be applied in common situs picketing as were applied under, and derived from, Section 8(b)(4) of Taft-Hartley.[42]

The reserved gate cases have been decided by applying the "object" test to the picketing,[43] as these cases did not seem to present any

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Picketing of the primary employer at a secondary employer's premises was permissible if the primary employer had no permanent place of business. That condition has met with varying acceptance. *Accord, e.g.*, NLRB v. Local 182, Teamsters Union, 272 F.2d 85 (2d Cir. 1959); NLRB v. United Steel Workers, 250 F.2d 184 (1st Cir. 1959); NLRB v. General Drivers Union, 251 F.2d 494 (6th Cir. 1958). *But see* Truck Drivers & Helpers v. NLRB, 249 F.2d 512 (D.C. Cir. 1957); Sales Drivers Union v. NLRB, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956); NLRB v. General Drivers, 225 F.2d 205 (5th Cir. 1955).

[38] See text accompanying note 32 *supra*.

[39] Local 618, Automotive Union, AFL-CIO (Incorporated Oil Co.), 116 N.L.R.B. 1844, 1847, 39 L.R.R.M. 1106 (1956), *enforcement denied*, 249 F.2d 332 (8th Cir. 1957) (decided about the same time as *Retail Fruit Dealers*):

> [T]he General Counsel need only prove an object of the picketing activity was to compel the neutral . . . to cease doing business with the struck employer. . . .

[40] Superior Derrick Corp., 122 N.L.R.B. No. 6, 43 L.R.R.M. 1063 (1958), *enforced in part and rev'd in part*, 273 F.2d 891 (5th Cir. 1960); Seafarers' International Union, 119 N.L.R.B. 1638, 41 L.R.R.M. 1363 (1958), *order set aside*, 265 F.2d 585 (D.C. Cir. 1959); Local 1017, Retail Clerks Union, AFL-CIO (Retail Fruit Dealers), 116 N.L.R.B. 856, 38 L.R.R.M. 1323 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957).

[41] Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (Supp. 1959). This is the point in time at which the wording of this section was changed as anticipated in note 28 *supra*, and as set out in note 1 *supra*. Noticeable is the added provision to the effect that "nothing contained in [the] clause . . . shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

[42] *Ibid.*; Conf. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959):

> The purpose of this provision is to make it clear that the changes in 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of the primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of the primary labor dispute that are in existing law. See for example . . . Moore Dry Dock . . . .

[43] The evolution of the reserved gate treatment by the Board and the courts is exemplified by the chronological sequence following: (1) Atomic Projects & Prod. Workers, 120

peculiar situation warranting other considerations. Thus, where the only object of picketing at the reserved gate was "to induce employees of any employer"[44] to cause a ceasing of business with the struck employer the picketing was found illegal.[45] The principal case, however, has carved out an exception or qualification to that test to be applied to separate gate cases.[46] The nature of the work done by the secondary employees will decide whether or not the object test should be applied.[47] Therefore, the "object" test will apply only where the work of secondary employees is "unrelated to the normal operations of the employer and the work [is] of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations."[48] The Court in effect treated those employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric as primary employees.[49] This consideration was drawn on by the Court because the Board's rationale in reserved gate cases[50] had been applied "only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings."[51] The *Moore Dry Dock* requirements are still good law[52] but the

N.L.R.B. 400, 41 L.R.R.M. 1508 (1958), *enforced sub nom.*, Office Employees Int'l Union v. NLRB, 262 F.2d 931 (D.C. Cir. 1959); (2) General Elec. Co., 123 N.L.R.B. 1547, 44 L.R.R.M. 1173 (1959), *enforced sub nom.*, Local 761, IUEW v. NLRB, 278 F.2d 282 (D.C. Cir. 1960), *rev'd and remanded*, 366 U.S. 667 (1961); (3) Virginia-Carolina Chem. Corp., 126 N.L.R.B. 905, 45 L.R.R.M. 1407 (1960).

[44] *Supra* note 41.

[45] Atomic Projects & Prod. Workers, 120 N.L.R.B. 400, 41 L.R.R.M. 1508 (1958), *enforced sub nom.*, Office Employees Int'l Union v. NLRB, 262 F.2d 931 (D.C. Cir. 1959). In Gonzales Chem. Indus. Inc., 128 N.L.R.B. 1352, 46 L.R.R.M. 1423 (1960), *rev'd sub nom.*, Local 901, Teamsters Union v. NLRB, 293 F.2d 881 (D.C. Cir. 1961), the Board found an illegal object where there was no separate gate and picketing occurred at the single gate used by employees of both the struck employer and neutral contractors at times when only the employees of neutrals were entering the premises. However, the court of appeals reversed on the ground that a reserved gate was *necessary* to insulate neutrals under the decision of the principal case. Query whether this necessity is proclaimed in the instant case to protect neutrals, *i.e.*, those persons doing work "unrelated to the normal operations" of the struck employer.

[46] 366 U.S. at 681.

[47] *Ibid.*

[48] *Ibid.*

[49] 366 U.S. at 682:

> [I]f Gate 3-A was in fact used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been *a mingled* one outside the bar of § 8(b)(4)(A). [Emphasis added.]

[50] *Infra* note 64.

[51] 366 U.S. at 680.

[52] *Ibid.*:

> With due regard to the relation between the Board's function and the scope of judicial review of its rulings, the question is whether the Board may apply the *Dry Dock* criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises.

principal case qualifies their scope of operation.[53] The object test is still good law[54] but its operation is also limited by this new consideration of the nature of the secondary employees' work.[55] The test in the instant case was first set forth in *United Steelworkers of America v. NLRB*.[56] The language in that case, "the work done by the men who use the gate must be unrelated to the normal operations of the employer,"[57] was predicated on the fact that the secondary employees being picketed were "neutral and were not the alter ego of the employer, taking over its ordinary business and benefiting from the strike."[58] This language relates that test, adopted by the Court in the principal case,[59] to a line of cases involving picketing of strikebreakers working under the guise of employees of independent contractors.[60] However, the Court in the principal case makes no such inferred limitation of their language.[61] Consequently, the Supreme Court in the instant case has expressly adopted the language of the test without expressly adopting the limitation under which it was posed, *i.e.*, "*taking over* [of] ordinary business and benefiting from the strike."[62]

From the Board's decisions following the principal case it appears that the limitation on the "normal operations" consideration, *i.e.*, only to be considered in those cases where the secondary employees were in effect strikebreakers carrying on the struck employer's operation,[63] will not be implied from the Court's adoption of the test itself.[64] Thus it appears a major expansion for picketing has been affected by the decision in the principal case.[65] The reason given for the formulation and adoption of the test[66] is legally inadequate. Merely because the Board decisions in previous reserve gate situations

[53] The qualification can be stated as: The *Moore Dry Dock* test will be applied if it *should* be applied, *i.e.*, if the picketed employees are not performing work related to the normal operations of the struck employer's business.

[54] 366 U.S. at 679. The Court included the object test by inference in its reference to the *Moore Dry Dock* test even though this standard was added by *Retail Fruit Clerks* case.

[55] See text accompanying note 48 *supra*.

[56] 289 F.2d 591, 595 (2d Cir. 1961).

[57] 366 U.S. at 681. The Court used the same language.

[58] United Steelworkers of America v. NLRB, 289 F.2d 591, 595 (2d Cir. 1961).

[59] 366 U.S. at 681.

[60] IBEW v. NLRB, 181 F.2d 34 (2d Cir. 1950); NLRB v. Wine Workers, 178 F.2d 584 (2d Cir. 1949); Douds v. Metropolitan Fed'n of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948).

[61] 366 U.S. at 681.

[62] See text accompanying note 58 *supra*.

[63] *Ibid.*

[64] *E.g.*, Carrier Corp., 132 N.L.R.B. No. 17, 48 L.R.R.M. 1319 (1961); Steelworkers Union (Phelps Dodge Refining Corp.), 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (1960); Virginia-Carolina Chem. Corp., 126 N.L.R.B. 905, 45 L.R.R.M. 1407 (1960).

[65] See the language set out in note 49 *supra*. The reference to the nature of the work being performed is the springboard for expansion.

[66] See the language accompanying note 51 *supra*.

involved construction work unrelated to normal operations is no reason to treat this factor as if it had been the controlling point of the cases. To the contrary, this fact was never cited by the Board as controlling in any reserved gate case.[67] It is difficult to understand why the Court expanded the "nature-of-work consideration" in the face of the statutory language which refers to secondary picketing of "any employer." Therefore, it can reasonably be questioned whether the Court meant to create the extended exception being invoked by the Board in "following" the decision in the instant case. While the enunciation of the unlimited exception may be a puzzle, so the criteria of its application is indefinite. The test requires "exclusive use" of the gate by secondary employees,[68] yet the Court intimated that the few General Electric workers that were shown to have entered through Gate 3-A did not obviate the "exclusive use" by the secondary employees.[69] Therefore, the exact dimensions of exclusive use under the Court's test are unclear. More difficult, however, is the question of what is meant by "related to normal operations." The Court gave only two examples—both extreme—to guide a determination of what shall be related to the normal operations of the struck employer's business, *i.e.*, construction work is not, and pick up and delivery of products or material is, so related to be primary and subject to picketing.[70] It seems inevitable that litigation will be necessary to illuminate the gray area between construction unrelated to normal operations and the obviously related pick-up and delivery service. And overshadowing this problem remains the dual question whether this expanded exception was intended by the Court and, if so, whether it was warranted by the amended language of Section 8(b)(4)(A).

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[67] It should be noted that those Board decisions cited in note 64 *supra*, although previous to the principal case coming before the Supreme Court, were following the earlier decision by the Board in their treatment of the instant case. It would seem as though the Court would have viewed the basis of the Board's test and that of the lower court in the principal case rather than Board decisions merely following the instant case before the Supreme Court had rendered judgment as to its validity, legally and substantially.

[68] 366 U.S at 681.

[69] *Id.* at 682: "While the record shows *some* such mingled use, it sheds no light on its extent." [Emphasis added]

[70] *Id.* at 681.