



1955

The Secondary Boycott as an Unfair Labor Practice

George B. Sandel

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

George B. Sandel, *The Secondary Boycott as an Unfair Labor Practice*, 9 Sw L.J. 300 (1955)
<https://scholar.smu.edu/smulr/vol9/iss3/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE SECONDARY BOYCOTT AS AN UNFAIR
LABOR PRACTICE

*George B. Sandel**

THE so-called "secondary boycott" section, numbered 8 (b) (4) of the amended National Labor Relations Act, is probably the most difficult section of the Act to understand. It is therefore with some hesitancy that I venture to add my small contribution to the haze that surrounds this topic. Another reason for my hesitancy is that after this article had been very nearly completed, it came to my attention, almost by chance, that the Fourth Circuit, a few weeks ago, reversed a Board ruling which I had pointed out as being highly significant. In the words of Mr. Justice Roberts, you are warned that the opinions discussed herein are "subject to change without notice" and are good for "this day and train only."

Throughout the years Congress has from time to time passed legislation which legalized or immunized certain types of secondary boycotts theretofore proscribed by the courts. For instance, Section 20 of the Clayton Act provides that it is not unlawful for a union which has a dispute with the employer of its members, to persuade other persons by peaceful and lawful means to cease patronizing the employer. This had the effect of overruling earlier decisions by the Supreme Court condemning certain secondary boycotts which violated the Sherman Anti-Trust Act.¹ In the famous case of *U. S. v. Hutcheson*² the union had instituted a secondary boycott by means of statements in circulars and union newspapers requesting affiliated union members and the public to stop buying from the employer with whom the union had a dispute. This was held to be protected activity because of Section 20 of the Clayton Act.

The Norris-LaGuardia Anti-Injunction Act, which as a practical matter deprived the Federal courts of jurisdiction to enjoin labor

*Attorney, Service Pipe Line Company, Tulsa, Oklahoma.

¹ *Loewe v. Lawlor*, 208 U. S. 274 (1908); *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418 (1911).

² 312 U. S. 219 (1941).

activity, paved the way for the indiscriminate use by unions of secondary boycotts and picketing as a potent economic weapon. Congress recognized that the pendulum had swung too far the other way and thus among the 1947 amendments to the NLRA, we find Section 8 (b) (4). Senator Taft explains it this way: “. . . under the provisions of the Norris-LaGuardia Act it became impossible to stop a secondary boycott . . . no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.”

Section 8 (b) (4) forbids certain types of conduct on the part of a union or its agents, where the conduct is directed toward specified ends. This section reads as follows:

It shall be an unfair labor practice for a labor organization or its agents . . . 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 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 any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employee under the provisions of Section 9 . . .

We shall now examine the decisions of the NLRB and of the courts in order to see what rules have been established for the enforcement of the Act.

Among the first secondary boycott cases to reach the U. S. Supreme Court after passage of the Taft-Hartley Act was that of *NLRB v. Denver Building and Construction Trades Council*.³ In that case the union called a strike and picketed the site of a construction project to induce the general contractor, who employed union labor, to terminate contractual relations with a subcontractor who employed only non-union labor. Charges were brought, a hearing was had, and the NLRB adopted the Trial Examiner's

³ 341 U. S. 675 (1951).

findings and recommendations to the effect that the union was guilty of violating Section 8 (b) (4) (A) of the Act. The U. S. Court of Appeals for the District of Columbia, in a split decision, set aside the Board's cease and desist order on the ground that the activity complained of was primary and not secondary. The Supreme Court granted certiorari in this case, in *International Brotherhood of Electrical Workers v. Labor Board*,⁴ and *Labor Board v. United Brotherhood of Carpenters*⁵ because of conflict in those decisions.

Mr. Justice Jackson wrote the majority opinion (three justices dissenting) which held the strike to be an unfair labor practice within the meaning of Section 8 (b) (4) (A). In arriving at this decision the court quoted statements from Senator Taft and from the Conference Report of the House Committee. These quotations pointed out that the purpose of Section 8 (b) (4) was to make secondary boycotts an unfair labor practice.

The court distinguished this decision from that rendered in the *Rice Milling* case⁶ decided the same day. In that case the union sought to obtain recognition by the mill operator, and the union's pickets near the mill sought to influence two employees of a customer of the mill not to cross the picket line. The court decided that the Board was correct in holding this to be protected activity, saying that "It did not encourage concerted action by the customer's employees to force the customer to boycott the mill."

The *United Brotherhood of Carpenters* case decided at the same time, presented a somewhat different fact situation. The union ordered its members, who were renovating a dwelling, to strike for the purpose of forcing the owner of the dwelling to cancel a contract for the installation of wall and floor coverings. The union had been attempting to force the Watson Company, who was to install the floor and wall coverings, to enter into a closed shop agreement, recognizing the union as the bargaining agent for the company's installation employees, and Watson refused to sign. The union had been picketing the store for some time before

⁴ 181 F. 2d 34 (2d Cir. 1950), *aff'd*, 341 U. S. 694 (1951).

⁵ 181 F. 2d 126 (6th Cir. 1950), *aff'd*, 341 U. S. 707 (1951).

⁶ *NLRB v. Internat'l Rice Milling Co.*, 341 U. S. 665 (1951), *reversing* 183 F. 2d 21 (5th Cir. 1950).

the strike occurred at the dwelling project. The peculiar thing about this case is the timing. Title I of the Labor-Management Relations Act, which contains Section 8 (b) (4) (A), took effect on August 22, 1947, and the strike was called on August 21. Although the union workers finished out that day, they did not return for work on the 22nd or thereafter. The Regional Director of the Board had petitioned for an injunction pursuant to Section 10 (1), but relief was denied on the ground that the conduct complained of took place before August 22 and was therefore lawful. The Board then proceeded on the unfair labor practice issue and found against the union. The order was upheld by the Sixth Circuit Court of Appeals.

The Supreme Court affirmed (5 to 4) on the ground that the complaint was not against the picketing at Watson's store but was directed at the extension of these activities with an unlawful object in view. Therefore, regardless of when the strike was called, the continuation of it beyond August 22 was an unfair labor practice. The court struck down the union's argument that the purpose of the strike was to enforce its rule that union members would not work on the same job with non-union workers. That may have been one of the purposes, the court said, but another purpose was to force the cancellation of Watson's contract which was unlawful.

The NLRB has rather consistently followed the rules laid down in the foregoing cases. In the matter of *Acousti Engineering Company*⁷ the Board held it to be an unfair labor practice for a union to induce employees of contractors on construction jobs to strike in order to force contractors to cease doing business with the primary employer and to force the primary employer to recognize the union as the bargaining agent while it was without proper certification. Notwithstanding the fact that the employees refused to work on specific jobs only and did not strike in the traditional sense, the Board found activities in violation of the Act. In so holding, the Board stated that the case fell squarely within the holdings of the Supreme Court in the secondary boycott cases decided shortly before, particularly the *Denver Building* case.

⁷ 97 N.L.R.B. 574 (1951).

The Board has been rather severely criticized in certain quarters for its "roving situs" and "hot cargo" doctrine as announced in *Schultz Refrigerated Service*⁸ and *Conway's Express*.⁹ In those cases the unions picketed or otherwise interfered with the primary contractors' trucks at the premises of their customers. This activity was held to be lawful under the aforementioned doctrines.

The facts in the *Schultz* case were as follows: Shultz was a trucker who engaged in interstate transportation of perishable goods and who also made deliveries and pickups within the City of New York. The dispute with the teamsters union arose when he moved his headquarters from New York to New Jersey and refused to negotiate a new closed shop contract with the union. He continued to operate his business within New York City, but he employed members of the New Jersey local. At several locations, as soon as the new drivers started to load or unload their produce, pickets would appear with signs and walk around Schultz's trucks. There was no violence or other picketing of the premises.

The Board reasoned that the trucks could be identified with the actual functioning of the primary employer's business at the situs of the labor dispute. In other words, this was not secondary picketing because there was no other place of business available for "effective" picketing.

In the *Conway* case the union called a strike as the result of failure of the employer to live up to an agreement to employ only union drivers. At several places of business served by Conway's trucks union agents called on the telephone and talked to supervisory or management employees, demanding that the establishment not handle Conway's freight. At other places of business where the union had a "hot cargo" clause in its contract with the particular employer, the shop steward was told a strike was on. Thereafter the employees at each of these places refused to handle the freight.

In the former instances the Board majority excused the conduct as not coming within the ban of the statute because the request or demand was not made to employees but to management. In

⁸ 87 N.L.R.B. 502 (1949).

⁹ 87 N.L.R.B. 972 (1949).

the latter instances the Board held that the employees were not striking in the literal sense, but were exercising their contractual privilege. The Board rejected the General Counsel's contention that the "hot cargo" clause was repugnant to the policy of the amended Act and was therefore invalid. In this connection the Board said:

This section [8(b) (4) (A)] does not proscribe other means by which unions may induce employers to aid them in effectuating secondary boycotts; much less does it prohibit employers from refusing to deal with other persons, whether because they desire to assist a labor organization in the protection of its working standards, or for any other reason. An employer remains free, under that section of the amended Act, as always, to deal with whatever firms, union or nonunion, he chooses. And by the same token, there is nothing in the express provisions or underlying policy of Section 8 (b) (4) (A) which prohibits an employer and a union from voluntarily including 'hot cargo' or 'struck work' provisions in their collective bargaining contracts, or from honoring these provisions. That is all that happened in this case.

No less an authority than former NLRB Chairman Paul Herzog has testified before a Congressional Committee that the *Conway* case is the bench mark for the "hot cargo" clause. He also pointed out that these clauses are now common in teamster contracts. They read as follows:

The union reserves the right to refuse to accept freight from, or to make pick ups from or deliveries to establishments where picket lines, strikes, walkouts, and lockouts exist.

The Board recently began taking a closer look at this "hot cargo" clause. In *Jak-K Independent Lumber Corporation v. Teamsters Union*,¹⁰ the Board evidenced a changed attitude toward these clauses. The union used the "hot cargo" clause in this case as a defense against a charge of unlawful secondary boycott activity. The union had set up a picket line at the employer's premises for the purpose of organizing the employees. Certain pickets followed the employer's trucks when they made deliveries to customers. On one occasion a truck from the Blount Lumber Company, which was located in a nearby city, made a delivery

¹⁰ 108 N.L.R.B. No. 189 (June 15, 1954), *enforcement ordered sub nom.* NLRB v. Teamsters, 219 F. 2d 394 (2nd Cir. 1955).

at the struck plant, ignoring the picket line. The truck was followed by two pickets to its next delivery point, the Sunset Lumber Company. There one of the pickets informed the shop steward that the Blount truck had crossed a picket line and therefore could not be unloaded. The steward reported this to the yard foreman and he decided to let the truck leave without being unloaded. The steward had also told other employees that they were not to unload the truck.

The Board decided, Murdock dissenting, that the object of such conduct was to force the Blount Lumber Company to cease doing business with Jak-K and to force Jak-K in turn to recognize and bargain with the teamsters. The teamsters' contract with Sunset Lumber Company contained a "hot cargo" clause, but the Board decided it was not applicable in this case.

In the latest case, *McAllister Transfer, Inc. v. General Drivers and Helpers Local Affiliated With The Teamsters Union*,¹¹ the Board not only refused to recognize a "hot cargo" clause as being a valid defense to a charge of unlawful secondary boycott, but also specifically reversed the holding in the *Conway* case and held such clauses to be against public policy and, therefore, illegal. McAllister was an interstate and intrastate trucker located in Nebraska. The teamsters presented a contract for signature and told the company that if it did not sign within an allotted time, the company would no longer be permitted to "interline" freight with other carriers. The company failed to comply, and the union carried out its threat by notifying connecting carriers that McAllister was being shut off from interlining freight. These other carriers had contracts with the teamsters, each of which contained a "hot cargo" clause. The result was that these carriers stopped receiving through freight for transportation by McAllister.

A majority of the Board (Murdock and Peterson dissenting) held that public policy demanded the outlawing of "hot cargo" clauses and that employers would not be permitted to waive the protection afforded by Section 8 (b) (4) of the Act, saying:

Moreover, if anything is clear from the Congressional expression, it is the patent desire of the legislature to eliminate secondary boycotts

¹¹ 110 N.L.R.B. No. 224 (December 16, 1954).

as they manifested themselves at the time. A thorough and painstaking examination of the entire problem leads us to the conclusion that if we are to carry out the mandate under which we act, we must face the issue squarely and resolve this problem without equivocation, and in the public interest which at all times remains paramount. Our duty, as we see it, requires that we reverse the *Conway* doctrine, and hold that contract clauses of the character here in issue do not constitute a valid defense to a complaint alleging a violation of Section 8 (b) (4) (A) and (B) of the Act.

This decision, if upheld, will have a terrific impact upon those labor unions, particularly the teamsters, who have been using the "hot cargo" clause as a device for escaping the ban on secondary boycotts.

The "hot cargo" clause being disposed of, at least for the moment, there remains still the difficult problem of ascertaining general rules of conduct which must be followed by unions when picketing a secondary employer at a place which is not the situs of the primary dispute.

One of the landmark decisions is the case of *Pure Oil Company*.¹² Pure Oil Company and Standard Oil Company both operated refineries in the vicinity of Toledo, Ohio. Standard also owned a dock located on the Maumee River about three miles from the refinery. Standard permitted Pure to use its pipe line and dock facilities for shipping purposes; first Pure's own employees were used as operators, but thereafter Standard's employees were used on a share-the-expense basis. The Oil Workers International Union had contracts with both companies. When in April, 1948, negotiations for a new contract with Standard broke down, the union served a 60-day strike notice. Anticipating the strike, Standard made an agreement with Pure for the latter to take over the dock operations temporarily. Pure then asked its union employees to approve this arrangement, but no agreement was reached. When the strike began on July 8, pickets were placed at Standard's dock and refinery, and Pure's non-supervisory employees refused to cross the picket lines. The National Maritime Union also got into the picture when the ship crews refused at first to accept Pure's cargoes unless the loading was done by Standard foremen. On

¹² 84 N.L.R.B. 315 (1949).

July 27 and 28 the Standard union group wrote letters to the N.M.U. stating in substance that the Standard dock was "hot" and that Pure cargoes, although not "hot" at the Pure Oil refinery, were "hot" when they reached the dock, but that the dock was cleared for loading by Standard's foremen. A couple of cargoes were loaded under these conditions, but then Standard pulled its foremen off the dock and operations closed down because of these "hot cargo" letters. There was no evidence of violence or threat of violence.

Complaint was filed on the ground that the union had violated Section 8 (b) (4) (A) by advocating strike action by employees of both Pure and the steamship company in order to force Pure to cease doing business with Standard and to force Great Lakes, the shipowner, to cease doing business with Pure. The Board did not see it this way. They said that the "hot cargo" letters amounted to no more than a request to honor a primary picket line and that the Act was not intended to curb traditional primary action by labor organizations. The fact that the union's primary pressure on Standard may have also had a secondary effect, namely, inducing and encouraging employees of other employers to cease doing business on Standard's premises, does not convert lawful primary action into unlawful secondary action within the meaning of Section 8 (b) (4) (A). To hold otherwise, the Board said, might well outlaw virtually every effective strike, for a consequence of all strikes is some interference with business relationships between the struck employer and others.

In the *Moore Dry Dock* case¹⁸ the Board was more explicit in defining the circumstances in which picketing of a secondary employer is primary and therefore lawful. The Board used the following language:

When the situs is ambulatory, it may come to rest temporarily at the premises of another employer. The perplexing question is: Does the right to picket follow the situs while it is stationed at the premises of a secondary employer, when the only way to picket that situs is in front of the secondary employer's premises? Admittedly, no easy answer is possible. . . . [W]e believe that picketing of the premises

¹⁸ 92 N.L.R.B. 547 (1950).

of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of 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.

In this case the union had a dispute with a ship owner, a foreign corporation which had no place of business in the United States, whose vessel was placed in drydock for overhauling and repair. About 90 per cent of the work had been completed and practically the entire ship's crew had been hired when the union started picketing the entrance to the Moore shipyard. The union asked, but was refused, permission to place its pickets at the particular dock where the ship was tied up, which was as close to the ship as they could get under the circumstances. Apparently no attempt was made to interfere with other work in progress in the shipyard.

The Board was careful to point out that they were not holding that a union which has a dispute with a ship owner over working conditions of seamen aboard a ship, may lawfully picket the premises of an independent shipyard at which the ship owner has delivered his vessel for overhauling and repair. The Board said it was only holding that if a shipyard permits the owner of a vessel to use its dock for the purpose of readying the ship for its regular voyage by hiring and training a crew and putting stores aboard ship, a union representing seamen may then, within the careful limitations laid down in this decision, lawfully picket in front of the shipyard premises to advertise its dispute with the ship owner. Under the circumstances, the Board found that the picketing practice followed by the union was primary and not secondary and, therefore, did not violate Section 8 (b) (4) (A) of the Act. In so holding the Board relied heavily upon its decisions in the *Schultz* and *Pure Oil* cases.

Board members Reynolds and Murdock wrote a strong dissenting opinion in which they protested that the Board had gone too far in extending the "situs doctrine" to apply in a fact situation such as this, using the following language:

We cannot agree with the conclusion of our colleagues in this case that the Respondent Union has engaged only in "primary" picketing at the premises of the Moore Dry Dock Company.

To go further than the majority's decision in that case, as our colleagues do here, strikes us as a serious divergence from the Board's previous decisions interpreting Section 8 (b) (4) (A) and the legislative history upon which they are largely predicated.

The criteria announced in the *Moore Dry Dock* case were quoted with approval in *NLRB v. Service Trade Chauffeurs, Salesmen and Helpers, AFL*.¹⁴ The court said it regarded these criteria as a sound interpretation of the Act. Since then, a number of the other Circuit Courts have expressed approval of them.

In reading all these cases one is impressed by the extreme thinness of the line which separates lawful primary activity from unlawful secondary activity. Indeed, that line approaches the vanishing point in some instances. The Board's decision in the recent *Western, Inc.*¹⁵ case turned on the point that the union talked to certain employees at the wrong time and in the wrong place. It seems that if the union had not telephoned the employees at work, their conversations would have been within the law. The facts are as follows:

Western is a meat packing company located at Miami, Oklahoma. The Amalgamated Meat Cutters Union had tried unsuccessfully to organize the company's employees. It lost an election in 1948 and thereafter refused to consent to another, although continuing to press the company for recognition. At last the union told Western it would be placed on the "unfair" or "we do not patronize" list if recognition was not forthcoming by November 23, 1949. Among other things, the union members were told by their leaders that they would be fined \$100 if they handled Western's products. On January 22, 1950, the plant was struck and a picket line was set up. Western's trucks were followed as they made deliveries and were picketed at the various delivery points. Also, the various store owners and employees were informed of the strike and they were requested not to buy or handle

¹⁴ 191 F. 2d 65 (2nd Cir. 1951).

¹⁵ 93 N.L.R.B. 336 (1951).

Western's products. On at least two occasions the trucks were road-blocked and missiles were thrown at them.

The Board held that putting Western's name on the "unfair" list did not constitute such "inducement" or "encouragement" as is forbidden by the Act, but that the union went too far when it made telephone calls and wrote letters to employees of Western's customers. The Board said this obviously constituted inducement and encouragement of such employees to engage in a concerted refusal to handle, work on or perform any services relating to Western's products.

The truck picketing presented the most difficult question in this case. In discussing it the Trial Examiner reviewed the Board's holdings in previous cases, including the *Schultz* case. However, he distinguished the fact situation present in the *Schultz* case from that of the *Western* case and refused to apply the "roving situs" doctrine mainly because Western had a plant with a fixed location, and this constituted the area of lawful primary strike activity. Also, the union was out of line in talking to employees at the various places where the trucks were being picketed.

The Board excused the union's conduct in its union meetings as being primary, but condemned its outside secondary activities, using the following language:

As we indicated in the *Grauman* case, it is traditional primary action for a union, within its own councils, to classify a primary employer as unfair, whereas conveying the same information to a secondary employer's employee at his place of work assumes the aspect of unlawful secondary inducement tantamount to a specific direction to cease work.

The criteria established in the *Moore* case for picketing where secondary employees are involved did not settle the question by any means. No two fact situations are ever exactly the same and the Board has been called upon to apply the *Moore* criteria in a variety of cases. The *Washington Coca-Cola Bottling* case¹⁶ presented a somewhat unusual problem. The teamsters union struck the Coca-Cola Company for recognition and the plant was picketed. The pickets also followed company trucks making deliveries and went into the stores to request the proprietors to refrain from

¹⁶ 107 N.L.R.B. 299 (1953).

purchasing Coca-Cola. Other pickets would patrol the premises, carrying signs requesting the stores' customers not to purchase Coca-Cola. This also happened at times when no Coca-Cola trucks were at the stores. The result was that in some instances, deliveries of other merchandise were interrupted.

In holding this activity to be unlawful, the Board distinguished this fact situation from that present in the *Schultz* and *Moore* cases. The Board pointed out that in those cases the primary employer did not have a permanent establishment available for picketing while in the present case, the bottling company had such an establishment.

The Board applied the *Moore Dry Dock* criteria in *Local Union No. 55 et al v. Professional and Business Men's Life Insurance Company*,¹⁷ and found that the union had failed to identify the employer against whom picketing was directed. The pickets carried signs saying "Working Conditions on This Job Unfair to Carpenter's District Council," as they picketed a large construction site in Denver where non-union and union employees were both working. The Board said that employees of neutral subcontractors working on the job could not tell that the dispute was with the insurance company which was the owner of the building being constructed.

In the case of *Piezonki d/b/a Stover Steel Service v. Baltimore Building and Construction Trades Council*,¹⁸ the Board refused to adopt the Trial Examiner's report to the effect that the union had violated Section 8 (b) (4) (A). The conduct complained of was picketing of building projects for the purpose of organizing all employees not already unionized. The pickets carried signs which stated that the job was being picketed for the purpose of organization and invited employees to join the union. The effect of this was that most of the already organized employees refused to cross the picket lines.

The Trial Examiner thought that the union should have taken affirmative action by ordering its members back to work. The Board disagreed. They held that under previous rulings in the

¹⁷ 108 N.L.R.B. No. 29 (April 22, 1954), *aff'd*, 218 F. 2d 226 (10th Cir. 1954).

¹⁸ 108 N.L.R.B. No. 221 (June 28, 1954), *order of dismissal reversed*, 219 F. 2d 879 (4th Cir. 1955).

Denver Trades and *Moore Dry Dock* cases they were bound to recognize the traditional right of a union to picket at the location of a labor dispute and to balance this right against that of a neutral employer to be free from picketing in a controversy in which it is not directly involved. The Board also held that in a case where the signs carried indicated the union's disagreement was with the primary employer only, its conduct was lawful even though employees of neutral employers might of their own volition refuse to cross the picket line, and that these secondary effects of legitimate primary picketing must be regarded as incidental. The Board went on to say that in the present case, the picket signs indicated clearly that the picketing was for the purpose of persuading the non-union men on the project to join the union. The conduct of the pickets was consistent with the legends on the signs they carried. They made no attempt to persuade employees not to go to work, but handed out authorization cards when asked for the same and responded to inquiries by stating that the Council was engaged in an organizing campaign. There was no evidence that the union was engaging in secondary picketing under the guise of conducting an organizational campaign. There was also lacking any substantial evidence that away from the picket line the unions instructed or attempted to persuade the unionized employees of secondary employers to respect the picket line.

On appeal the Court of Appeals endorsed the recommendations of the Trial Examiner which had been rejected by the Board. The opinion stated that calling the picketing "organizational" does not alter the fact that the basic nature of it was illegal.

Looking at the object of the picketing rather than the form it took, the court says a clear violation exists of Section 8 (b) (4). In arriving at its decision, the court applied the *Moore Dry Dock* criteria and found that the union had failed to meet the fourth criterion which is that pickets must disclose clearly which employer is being picketed.

A slightly different factual situation produced a different result in *Otis Massey Company Ltd. v. Teamsters Union*.¹⁹ The union had a contract covering truck drivers but none covering construc-

¹⁹ 109 N.L.R.B. No. 61 (July 22, 1954).

tion workers. A dispute arose over the contract and the union picketed various construction projects where very few of the truck drivers ever visited, but where the company's construction workers were employed.

The union claimed its conduct was primary within the meaning of the *Moore Dry Dock* criteria, but the Board did not agree. They said the first condition of that criteria was not met, that is, the secondary employer was not harboring the situs of a dispute between the union and a primary employer. Also, they said that the employer's warehouse was the real situs of the dispute and that picketing should be confined to that location.

Contrasted with the *Massey* decision is the later ruling in *Pittsburgh Plate Glass Company v. Painters Union*.²⁰ There the Board refused to adopt the Trial Examiner's finding that the union violated the law when it picketed a construction site away from the primary employer's plant. The Board excused the union's conduct on the ground that the construction project harbored the situs of the primary dispute because the workmen involved only reported to the main plant in the morning and worked all day at the construction project.

Another important rule which has been established as legalizing a secondary boycott was announced in *Douds v. Metropolitan Federation of Architects*.²¹ The court held that a person whose employees perform work for a strike-bound employer is an ally of such employer and is, therefore, subject to picketing. In this case the Ebasco Company actually exercised supervision over the secondary employer's handling of the work.

In the very recent case of *Royal Typewriter Company, Inc. v. Electrical Union*²² the Board split wide open on this issue. A Board majority, Chairman Farmer and Members Murdock and Rodgers, decided that the Electrical Union was guilty of secondary boycott picketing in a contract dispute with Royal Typewriter Company because the union picketed other typewriter maintenance companies when they picked up some of Royal's work during the strike.

²⁰ 110 N.L.R.B. No. 38 (October 25, 1954).

²¹ 75 F. Supp. 672 (1948).

²² 111 N.L.R.B. No. 57 (January 27, 1955).

Member Peterson disagreed with that part of the Board's order because in his mind the circumstances in the situation point to a business relationship between Royal and the maintenance companies which would remove the latter from protection of Section 8 (b) (4) (A) of the Act.

During the course of the strike Royal informed customers who held warranties for service that if they needed urgent repairs, they should call other maintenance companies to have the work done. The customers were advised to get receipts for the charges. As it turned out, Royal directly paid some of the maintenance companies for the work performed instead of reimbursing customers for payments they may have made.

In one instance Royal arranged with a maintenance company to take care of some of Royal's customers. However, this secondary firm did not file charges against the union, and did not enter into the issue at the Board.

According to the Board majority, it was up to the union to show an affirmative defense for its picketing of the maintenance companies — that is, to prove that there were special circumstances which would remove those concerns from protection of Section 8 (b) (4) (A).

Payments by Royal to those companies for work done, with no showing of prior arrangements between them and Royal for service to customers, was not considered by the majority to be sufficient ground for denying the secondary firms protection from the picketing.

The Board majority, in ruling against the union, did not feel it necessary to measure the situation with the yardstick of the *Ebasco* case. The Trial Examiner had used the *Ebasco* case to decide that the union did not show an "alliance" between Royal and the other maintenance companies. But Peterson held the view that, considering all the evidence, he was not convinced that General Counsel had established by any preponderance that the maintenance companies were in fact neutral.

Peterson went along with the remainder of the Board's finding that the union violated the Act in picketing customer entrances of Royal with signs that termed maintenance work done on Royal

machines as performed by "scab labor." The Board majority went along with the Trial Examiner on his finding that this picketing took place before entrances used by employees of the customer or other employers and as such constituted "illegal inducement and encouragement of employees."

CONCLUSIONS

My first conclusion, and the only one I am sure of, is that a Trial Examiner's lot is not an easy one.

The second conclusion, also fairly clear, is that "hot cargo" clauses are at present unlawful and, therefore, they no longer furnish protection for secondary boycotts which would be otherwise illegal. Just what the courts will say about this ruling is a matter for conjecture. The *Conway* decision was upheld by the Second Circuit Court of Appeals,²³ but the Board majority felt that the court "did not come to grips with the crucial problem as we have described it." If the *McAllister* decision stands, organized labor will no doubt push for amendment of the law to legalize "hot goods" provisions in contracts.

The third conclusion is that the so-called *Moore Dry Dock* criteria must be met wherever picketing is carried on away from the premises of the primary employer. These criteria have withstood the test of court scrutiny. As evidenced by the latest opinion of the Fourth Circuit, the courts will hold the Board to a rather strict application of the rules for proper picketing as set forth in those criteria.

The fourth and last conclusion is that secondary picketing may be legalized where the secondary employer is allied with the primary employer to the extent that he is actually doing "struck work" on a farm-out basis.

²³ *Rabouin d/b/a Conway's Express v. NLRB*, 195 F. 2d 906 (1952).