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INTERMITTENT AND CONSTANT COMMON SITUS PICKETING

In 1947 Congress amended the National Labor Relations Act by inserting, along with other provisions, section 8(b)(4)(A).[1] Under this section it is an unfair labor practice for a union to encourage employees to strike, if one of the objectives is to force any employer to cease doing business with any other person. Congressional debates[2] indicate that the purpose of this provision is to prohibit "secondary boycotts."[3] The 1947 amendments, however, do not use the terms "primary" and "secondary." Rather, the prohibition against secondary activity in 8(b)(4)(A) was sought to be achieved through a formula of proscribed activity and proscribed objectives including the forcing of an interruption of trade relations. Although boycott originally meant a concerted withdrawal of all intercourse,[4] the objective here proscribed is the unilateral suspension of trading with another. What is "secondary" depends upon the viewpoint of the observer. A refusal by one employer, R2, to deal with R1, is primary from his viewpoint, but it might be considered a secondary pressure from the viewpoint of other employers, R3, R4, . . . if they, for example, were fair trading competitors of R1, a price-cutter, and R2 was the common supplier. For the purposes of this paper, R1 will be identified as an employer from whom concessions are sought with respect to conditions of work or recognition of bargaining representative. R2 is an employer or self-employed per-

1. Labor Management Relations Act (Taft-Hartley Act) § 8(b)(4)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158 (b)(4)(A) (1958).

Sec. 8 . . .

(b) It shall be an unfair labor practice for a labor organization or its agents— . . .

(4) to engage in, or to induce or encourage 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.

2. Senator Taft stated that 8(b)(4) was aimed at secondary not primary action. "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is unconcerned in the disagreement between the employer and his employees. . . ." 93 Cong. Rec. 4198 (1947).

3. For a history of secondary boycotts see: Lloyd & Wescel, *Public Policy and Secondary Boycotts*, 23 U. CINC. L. REV. 31 (1954).

4. II ENCYC. SOC. SCI. 662 (1930).

son other than an ultimate consumer from whom concessions are sought with respect to his dealings with R1, unless the employer or self-employed person is identified with R1, as an "ally."[5] Pressure against R2 is to be described as secondary, because its purpose is to elicit pressure for concessions from R1, described as primary.

To distinguish primary from secondary pressure in the form of picketing may be difficult. In the classic primary picketing situation the union will exert pressure against R1 by picketing the premises immediately adjacent to the business of R1. The premises immediately adjacent to the business of R1 are commonly known as the "situs of the dispute." Thus, when the union pickets the situs of the dispute and R1 is the only one located thereon, this picketing is clearly protected by the National Labor Relations Act as primary since the object of the union is to exert pressure on R1.[6]

In the classic case of secondary picketing pressure the union seeking concessions from R1, might induce E2 (the employees of R2) to get R2 to cease doing business with R1, and this inducement might take the form of enlisting pickets at the premises of R2 or the same form of inducement might manifest itself in a plan to appeal directly to R2 on behalf of E1 to cease doing business with R1, without involving E2. In either of these two situations the picketing takes place not at the situs of the dispute, but rather at the premises of R2, and is considered secondary. The Board and courts, then, are able to determine the union's objectives under 8(b)(4)(A) by seeing where the picketing takes place. If confined to the situs of the dispute, where R1 is located, it is primary; but if extended to the premises of R2, thus exerting pressure on R2, it is secondary.

A third situation might be imagined, however, where both R1 and R2 occupy the same premises. In this case the fact that the picketing is limited to the situs of the dispute is not helpful in ascertaining the union's purpose in picketing. Those cases where R1 and R2 occupy the same premises are termed common situs cases. This common situs situation

5. When an employer allies himself with R1 he is no longer a secondary employer and thus not under the provision of (8)(b)(4)(A). The doctrine was started in NLRB v. Business Mach. Mechanics Conference Bd., 228 F.2d 553, 559 (2d Cir. 1955), *Cert. denied,* 351 U.S. 962 (1956), where the court said: ". . . [A]n employer is not within the protection of § 8(b)(4)(A) when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations. The result must be the same whether or not the primary makes any direct arrangement with the employers providing the services."

6. National Labor Relations Act (Wagner Act) § 13, 49 Stat. 449 (1935), 29 U.S.C. § 163 (1958).

may occur in one of two ways. First, R1's normal business operations may take him onto the premises of R2; or, secondly, R2's business may take him onto the premises of R1, for a constant and extended period of time. This second situation is to be differentiated from the situation where pickets are stationed at the premises of R1, but pressure is felt by R2 employees seeking entry to those premises.[7] This is not a common situs situation since R2's employees enter the premises only sporadically and for a short period of time. This is really a case of primary picketing as mentioned in the first instance since there is no common situs and the picketing is confined to the situs of the dispute.

When R1's normal business operations do take him onto the premises of R2 and picketing occurs, the descriptive term applied by the Board and courts is ambulatory or roving situs picketing, and when R2's business takes him onto the premises of R1 regularly and for a constant period and picketing occurs, it is known as stationary common situs picketing. Another term which could be used to describe the former type of activity would be intermittent situs picketing since the picketing only takes place when R1 is on the premises of R2. More descriptive, perhaps, to describe the latter condition is constant situs picketing. That is, the picketing is constant at the situs of the dispute and the real question arises when R2 enters onto the premises of R1.

It will be the focal point of this discussion to see how the Board and courts determine the union's objectives in these situations. First, it is necessary to discuss how the problem was viewed before 1959; and, secondly, what is the effect of the Labor-Management Reporting and Disclosure Act of 1959.[8]

In order to gain insight into the pre-1959 cases it seems that the best breakdown would be to discuss, first, roving or intermittent situs picketing cases; and secondly, the constant or stationary common situs

7. In NLRB v. International Rice Milling Co. 341 U.S. 665 (1951) the pickets were stationed at the situs of the dispute, but the pressure of picketing was felt by individual members of E2 seeking entry onto the premises of R1. E2 were employees sent by R2 to merely pick up certain materials, and except for these sporadic individual entrances on the premises of R1 the employees of R2 could not be termed to have a common working situs with R1. In this case the Court, under the existing version of 8(b)(4), did not reach the question of whether the pressure of members on E2 was secondary, rather the holding was on the ground that this was not concerted action by E2. Had the question been reached the results should have been that this was not secondary activity. Since it was confined to the situs of the dispute and was not a common situs situation, it was primary picketing. Thus, the Rice Milling case is in reality not a common situs picketing situation at all. Not all courts have made this distinction, however, and some have applied Rice Milling to the common situs situation.

8. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin) 73 Stat. 519-41 (1959), 29 U.S.C.A. §§ 401-531 (Supp. 1959).

picketing. Although these are both facets of the same problem the courts have approached them in a different manner.

In intermittent picketing situations the "land-mark" decision in this whole area is the *Moore Dry Dock* case.[9] In this case the *S. S. Propho,* a ship belonging to Samsoc put into dry dock for repairs. The Sailor's Union of the Pacific had a dispute with Samsoc, who had no dock in California which the seamen could picket. When the Moore Dry Dock Company refused to allow the union to enter the premises and picket alongside the ship, the union picketed Moore's premises. In finding this picket line lawful the Board laid down definite conditions that must be met, as they were here, before the union's objectives would be considered lawful. The Board said:

> . . . [P]icketing of the premises of a secondary employer is primary if it meets the following conditions: (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.[10]

A short time later, almost as a corollary to these rules, the court held in the *Washington Coca Cola* case[11] that a "fifth" condition was necessary to the four already set forth in *Moore Dry Dock.* In the *Washington Coca Cola* case the union, after calling a strike for recognition against the Coca Cola Bottling Works, picketed not only the plant but the company's delivery trucks at the premises of its customers. The NLRB held that the picketing of the trucks violated 8(b)(4)(A), distinguishing the *Moore Dry Dock* line of cases largely on the ground that in the present case the primary employer had a permanent place of business which the union could and did picket. This ruling has developed into the *Washington Coca Cola* doctrine. The substance of this rule has been expressed by the Board as follows:

> Where a primary employer has a permanent place of business at which a union can adequately publicize its labor dispute, . . . the fact that picketing is conducted at the premises of a

9. Sailors' Union, AFL, 92 N.L.R.B. 547 (1950).
10. *Id.* at 549.
11. Brewery Drivers, AFL, 107 N.L.R.B. 299 (1953), *enforcement granted,* 220 F.2d 380 (D.C. Cir. 1955).

> secondary employer plainly reveals that it was designed, at least in part, to induce and encourage the employees of the secondary employer to engage in a concerted refusal in the course of their employment, to handle goods for the primary employer, with an object of forcing the secondary employer to discontinue doing business with the primary employer, thereby violating 8(b)(4)(A) of the act.[12]

Thus, unless there is external conformity with these five conditions the Board will impute an unlawful objective to the union's picketing. However, the Board has consistently held that when these five conditions are met, the picketing is lawful.[13] What the Board has attempted to do in these cases is to lay down certain definite standards that will enable a union to know exactly what it must do in roving situs situations that will insure them the protection of lawful picketing.

Certain courts of appeal, unlike the Board, have not been as prone to limit themselves to viewing only whether these five conditions have been fulfilled. In the *Campbell Coal Company* case,[14] for example, a union, which had a dispute with a ready-mix concrete manufacturer, picketed a manufacturer's plants. It also picketed the company's trucks as they made deliveries to construction projects where secondary contractors were working, thus causing employees of these secondary employers to cease work. Relying exclusively on the *Washington Coca Cola* doctrine the NLRB found a violation of 8(b)(4)(A). The District of Columbia Circuit disagreed.[15] Although admitting they had affirmed the *Washington Coca Cola* case, the court stated they agreed only to the decision which the Board reached, which rested in considerable part upon additional findings. The court did not agree with the rule relied on by the Board in the *Campbell* case.[16] The court agreed that the factual basis of the rule is a factor to consider in determining whether a violation had occurred, but it also held that this was not conclusive. Thus, the federal courts are divided as to the validity of the "fifth condition." Some seem to support it;[17] others, although willing to

12. Local 386, Teamsters Union, 120 N.L.R.B. 1161 (1958).
13. The latest Board cases which require the five conditions to be met are: Local 294, Teamsters Union, 124 N.L.R.B. 1245 (1959); Local 522, Teamsters Union, 45 L.R.R.M. 1313 (1960); Teamsters Union, 45 L.R.R.M. 1328 (1960).
14. Sales Drivers Union, AFL, 110 N.L.R.B. 2192 (1954).
15. Sales Drivers Union v. NLRB, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956).
16. *Id.* at 516.
17. 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 Steel Workers, AFL-CIO, 250 F.2d 184 (1st Cir. 1957).

accept its factual basis as evidence to support a finding based on the entire record, do not accept the Board's doctrine as conclusive.[18] What then is the status of roving situs picketing? In writing the opinion in the *Campbell* case the court quotes with approval from the *Massey* case.[19] From this it would seem that in the Fifth and District of Columbia Circuits the "fifth" condition of *Washington Coca Cola* may or may not be of value in determining the lawfulness of a strike. Both of these courts hold that a secondary strike must be intentionally sought after, and not merely follow as an incidental result of primary activity, before there is a violation of 8(b)(4)(A). The "fifth" condition of *Washington Coca Cola* cannot be read into the statute by implication and depending on the circumstances may or may not serve as an evidentiary test. With the exception of the Fifth and District of Columbia Circuits, however, the courts and Board have attempted to set down certain definite, concrete rules that, when met, will impute to the union a lawful objective; and when not complied with will impute to the union an unlawful objective. The District of Columbia and Fifth Circuits, on the other hand, will look at all the surrounding evidence to see if the union's purpose is one proscribed by 8(b)(4)(A).

Turning now to the constant situs cases (where R2's business takes him onto the premises of R1 regularly and for a constant period) the Board and courts have dealt with this situation in a different manner.

For a time after the *Moore Dry Dock* case the Board and courts made no distinction between constant and intermittent situs picketing. Rather they applied the *Moore Dry Dock* rules in any common situs situation. This may be seen in the *Hoosier Petroleum* case.[20] In this case R1, a truck owner-lessor, maintained a regular place of business at the premises of R2, a service station operator. The employees of R1 picketed the service station in a manner contrary to the standards set up in the Board's *Moore Dry Dock* decision, and the Board thus held that this was a violation of 8(b)(4)(A). In this decision the court found that the requirement for picketing R1 was the same whether R1's business had a common situs with that of R2 or was ambulatory as in

18. Sales Drivers Union v. NLRB, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied,* 351 U.S. 972 (1956); Truck Drivers and Helpers v. NLRB, 249 F.2d 512 (D.C. Cir. 1957); NLRB v. General Drivers, 225 F.2d 205 (5th Cir. 1955).

19. NLRB v. General Drivers, 225 F.2d 205 (5th Cir. 1955), *cert. denied,* 350 U.S. 914 (1955).

20. Chauffeurs Union, 106 N.L.R.B. 629 (1953), *enforced,* 212 F.2d 216 (7th Cir. 1954).

the earlier *Moore Dry Dock* case.[21]

Until 1957 the Board and courts were consistent in applying the *Moore Dry Dock* rules to all common situs situations. In that year, however, the *Retail Fruit Dealers* case,[22] did not, in fact, follow the rules of *Moore Dry Dock*. In this case R1, owner of a general market housing sixty-four retail shops, became involved in a bargaining dispute with the union. All but four shops in the market were leased to other retailers, and the union's dispute with R1 involved only one of the four shops operated by him. Nevertheless, the union placed pickets at the seven street entrances to the market, expressly declining on invitation to enter the market and picket only those specific shops involved in the dispute. Although the placards displayed by the pickets indicated the retailers with whom the union had a dispute, employees of R2 in the market refused to cross the line. The picketing was held to be illegal. The Board's opinion first stated that if the *Moore Dry Dock* standards were fulfilled the picketing would be lawful, and in this respect the Board was consistent with the prior cases. The Board then added, however, that the "controlling consideration" in developing the conditions laid down in *Moore Dry Dock* had been "to require that the picketing be so conducted as to minimize its impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching primary employees."[23]

Thus, simply because the unions meet the requirements of *Moore Dry Dock* is not enough; the union must now make a "bona fide" effort to minimize the harmful effects of picketing on the operations of R2. As the Board said: "In view of all the foregoing circumstances, we are satisfied that Local 648 did not make any bona fide effort to minimize the impact of its picketing upon the the operations of the neutral employees in the market. . . ."[24]

In order for the Board to determine if there had been a "bona fide effort" it would look at all the surrounding evidence in order to ascertain the legality of the picketing, and would not limit itself to seeing only if the four rules of *Moore Dry Dock* were met. As the dissent in *Retail Fruit Dealers* correctly pointed out, the requirements of *Moore Dry Dock* had been satisfied; but even though they were fulfilled this

21. In Local 55, Carpenters, AFL, 108 N.L.R.B. 363 (1953), the Board pointed out that the fact the picketing takes place at the situs of the primary employer's regular place of business rather than the ambulatory situs is not controlling.

22. Retail Fruit Clerk's Union, 116 N.L.R.B. 856 (1956), *enforced,* 249 F.2d 591 (9th Cir. 1957).

23. *Id.* at 859.

24. *Id.* at 862.

was not enough, because the Board had adopted a new standard in the constant situs cases—the "bona fide effort" rule.[25]

Although the majority in *Retail Fruit Dealers* did start out with the premise that *Moore Dry Dock* was applicable, the concurring opinion stated that the issue was not whether the requirements of *Moore Dry Dock* had been fulfilled but instead that the standard to be applied by the Board should be whether all the evidence showed that the picketing was for a proscribed object.[26] On appeal the Ninth Circuit granted enforcement[27] of the Board's order which condemned the picketing as illegal. Although supporting the majority approach of the Board and seeming to approve the application of the *Moore Dry Dock* rules to this case, the court went on to say that upon all the evidence "the Board could properly infer that an object of the picketing was to involve neutrals in the dispute, which is a violation of 8(b)(4)(A)."[28]

In adopting the "bona fide effort" test as the controlling standard in constant situs cases the Board moved away from the approach based on the external physical criteria of *Moore Dry Dock* and entered an area of using all the various evidence to determine the union's purpose in picketing.

In the *Incorporated Oil* case[29] the "bona fide effort" rule was fully recognized by the Board, and in this case the Board found no need to ascertain whether the rules of *Moore Dry Dock* had been complied with, but instead only looked to the "bona fide effort" test as set forth in the *Retail Fruit Dealers* case. Again in *Incorporated Oil* the dissent correctly points out that the Board was ignoring precedent by failing to apply the *Moore Dry Dock* rules, and now had, in fact, adopted the position first set forth by the concurring opinion in the *Retail Fruit*

25. The dissenting opinion in Retail Fruit Clerk's Union, 116 N.L.R.B. 856, 871 (1956), said: "Indeed, . . . the majority obviously does not rely upon the above standards of Moore Dry Dock in finding that the picketing in this case violated Section 8(b)(4)(A). Rather it adopts a new criterion, ignoring the well-established and judicially approved standards of the Moore Dry Dock case. The new test, announced here for the first time in order to find conduct otherwise lawful to be unlawful, is a broad generalization that the picketing union must make a 'bona fide effort to minimize the impact of its picketing upon the operations of the neutral employees.' No specific standards are now afforded a union to guide its activities in picketing the premises occupied by two employees. Whatever a picketing union does it does at the peril of finding that this Board will regard it as evidence of bad faith and for that reason forbids all of the picketing."

26. The concurring opinion in Retail Fruit Clerk's Union, 116 N.L.R.B. 856, 865 (1956), stated: "We are not required to decide whether picketing of the general entrance of a market like the Crystal Palace . . . is *per se* a violation of 8(b)(4)(A). I believe instead, that the only issue is whether the picketing was for a proscribed object. . . ."

27. Retail Fruit Clerk's Union v. NLRB, 249 F.2d 591 (9th Cir. 1957).

28. *Id.* at 598.

29. Local 618, Automotive Union, AFL-CIO, 116 N.L.R.B. 1844 (1956).

Dealers case. On appeal the Eighth Circuit denied enforcement.[30] Although the court agreed to the application of the "bona fide effort" rule, it differed, however, on the ground that the evidentiary support for the Board's conclusion was lacking.[31]

The "bona fide effort" test is the new approach of the Board in constant situs cases. This new approach has found favor with the courts, for in two recent cases the court has adopted the "bona fide effort" criteria in constant situs cases.[32] The District of Columbia Circuit in the *Seafarer's Union* case clearly adopted this new approach. In this case the union, seeking recognition as bargaining agent of the crew of the *M/V Pelican,* formed a picket line at an independently owned shipyard where the vessel was undergoing repair. The picketing continued even after the employer removed the remaining crew members. Despite clear indications that the only dispute was with the vessel's operator, the shipyard's employees refused to service the ship although they continued their other work. The NLRB held, one member dissenting, that continued picketing after removal of the employees was an unfair practice on the ground that an object of the picketing was to induce the shipyard employees to cease work on the *Pelican.*[33] But on appeal the Board's order was set aside on the ground that the Board erred in its ruling because an employer cannot, by mere removal of employees, change legal picketing into illegal picketing. Although the Board's order was set aside, the court did agree that the prime determinent of legality is the objective of the union pressure. In a Fifth Circuit case[34] the court, although disagreeing with other aspects of the *Seafarer's* holding, did agree that the determinent of the lawfulness of constant situs picketing was a question of intent. The court said further that this intent is not something that may be evaluated mechanically.

A new variation of constant situs picketing has emerged recently in what might be called "the special door doctrine." In a recent case,[35] which illustrates this doctrine, the union representing General Electric's employees called a strike against General Electric and began to picket the plant. At this plant not only were General Electric personnel employed but other employees of independent contractors as well worked

30. 249 F.2d 332 (8th Cir. 1957).
31. *Id.* at 336.
32. Seafarer's Int'l. Union v. NLRB, 265 F.2d 585 (D.C. Cir. 1959); Superior Derrick Corp. v. NLRB, 273 F.2d 891 (5th Cir. 1960).
33. Seafarer's Int'l. Union, 119 N.L.R.B. 1638 (1958).
34. Superior Derrick Corp. v. NLRB, 273 F.2d 891 (5th Cir. 1960).
35. Local 761, IUE v. NLRB, 278 F.2d 282 (D.C. Cir. 1960), *cert. granted,* 364 U.S. 869 (1960) (No. 321, 1960 Term).

within the plant. While picketing was in progress, the General Electric Company set aside one gate for the special use of the independent contractors' employees to enter and leave the plant, but expressly provided that none of General Electric's employees would be allowed to use this special gate. The union refused to stop picketing at this gate, however and in an unfair practice proceeding the NLRB held that the union violated 8(b)(4)(A) by inducing and encouraging the employees of an independent contractor to engage in a work stoppage with an object of forcing the independent contractor to cease doing business with General Electric.[36] Although this is an interesting variation this is still the constant situs problem; and the court, in agreeing with the Board, held that in any of these constant situs situations "the ultimate finding of whether the picketing is lawful turns on a determination of what are the union's objectives."[37] Here, by picketing this special door, it was found that the union's objectives were unlawful.

In summarizing the present position on constant situs picketing it may be seen that from the *Moore Dry Dock* decision until 1957 the Board and courts applied the *Moore Dry Dock* rules to all common situs situations. After the *Retail Fruit Dealers* case, however, the "bona fide effort" rule replaced the *Moore Dry Dock* standards in constant situs cases. Thus, from 1957 until the present the Board and courts have attempted to determine the lawfulness of constant situs picketing by merely asking, "Do the union's objectives include one prohibited by 8(b)(4)(A)"? To determine the objective they have looked to all the evidentiary facts present. This shows that the Board and courts in constant situs cases do not use mechanical rules in judging the union's objectives, but merely will view all the evidence and then determine if the union has complied with the "bona fide effort" test. This has not been the case, as was pointed out above, in respect to intermittent or roving situs cases. In the Board's approach, and in a majority of the circuits, the violation of 8(b)(4)(A) is to be determined in the roving situs case, by viewing the four rules laid down in *Moore Dry Dock* plus the "fifth" condition in the *Washington Coca Cola* case. If these criteria are met then no matter what other evidentiary facts are present a lawful objective will be imputed to the union, and if these five conditions are not met an unlawful objective will be imputed to the union. Because of this difference in approach it is necessary to distinguish ambulatory picketing from stationary common situs picketing to point up how in the latter area the "bona

36. Local 761, IUE, 123 N.L.R.B. 1547 (1959).
37. Local 761, IUE v. NLRB, 278 F.2d 282, 285 (D.C. Cir. 1960).

fide effort" test has emerged and seemed to predominate. The question remains whether the Board will adopt the same criteria in the roving or intermittent situs cases. So far it has not. By using all the evidence available in order to see if the union has complied with the "bona fide effort" rule, the Board and courts will do away with a strictly mechanical approach and allow the courts to take notice of all the facts in determining the "object" of the union's picketing. But resorting to the "bona fide effort" test as the criterion to determine the legality of picketing is resorting to no criterion at all, and it may become increasingly difficult for unions engaged in a strike at a common situs to determine what may be done without the Board formulating definite rules for guidance.

This was the development until 1959 when 8(b)(4) of the National Labor Relations Act was amended by the Labor-Management Reporting and Disclosure Act of 1959.[38] Under this new act (8)(b)(4) 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). It should be noted that the secondary boycott provision formerly found in 8(b)(4)(A) will now be found in 8(b)(4)(B). From the standpoint of viewing common situs picketing cases, however, the most important change came as the result of the proviso at the end of clause (B). This new proviso was apparently added to make sure that "primary picketing," having incidental secondary effects of inducing employees of secondary employers to refuse in the course of their employment to enter the establishment of the primary employer, is not prohibited solely because of such incidental effect. The use of the term "primary" for the first

38. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin) § 8(b)(4)(A) and (B), 73 Stat. 542-43, 29 U.S.C.A. § 158(b)(4) (Supp. 1959). Sec. 8 . . .

(b) It shall be an unfair labor practice for a labor organization or its agents . . . (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or an industry affecting commerce to engage in, a strike or a refusal in the course of his 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, or in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representatives of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful where not otherwise unlawful, any primary strike or primary picketing . . . ."

time in the act should not cause any real confusion, because the Board and courts have generally used the term primary when referring to lawful activity under 8(b)(4)(A) and secondary when referring to a proscribed activity. Thus, the courts and Board have, in fact, been using this label all the time.

In examining the legislative history[39] it seems that the draftsman did not intend to change the pre-existing limitations on common situs picketing, but, in fact, intended that they remain the same as they were under Taft-Hartley. As was stated in the Conference Report regarding the enactment of the proviso in 8(b)(4)(B):

> 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 Co.* . . . ; *Washington Coca Cola Bottling Works, Inc.* . . .[40]

It may be seen that the legislature did not intend to change the effect of the "secondary boycott" section, as regards common situs picketing; but it may be speculated that the court could in fact do so by merely saying that all picketing is primary if conducted at the site of the labor dispute. If the court then labels such picketing primary they could exempt all common situs picketing even though there are intended secondary effects. This would, of course, do away with the whole concept of common situs picketing; and would clearly be contrary to the legislative history.

The legislative history does not refer specifically to constant or roving situs cases, but rather reference is only made to the whole area of common situs picketing. Thus, it may be surmized, the intention of the legislature is that the same standards should be applied to common situs cases by the Board and courts under the 1959 amendment as they applied under Taft-Hartley.

Although it seems fairly clear that the legislature intended no change in the standards applied to common situs picketing still a change might occur under the new amendments. What could happen is that the two circuits that presently do not follow the *Washington Coca Cola* standard in the roving situs situation might now be compelled to follow it. The reason they might, perhaps, now feel obliged to change their position is the fact that the Conference Report specifically states that "this provision

39. See Conference Report No. 1147, 86th Cong., 1st Sess. 38 (1959).
40. *Ibid.*

does not eliminate . . . or modify the limitations on picketing at the site of a primary labor dispute that are now in existing law" and then cites *Moore Dry Dock* and *Washington Coca Cola* as examples. Perhaps the District of Columbia and Fifth Circuits will now feel compelled to adopt the reasoning of these cases as the legislative will of Congress. In summary, it seems fairly clear that the pre-1959 Board and court decisions regarding common situs picketing will continue to be the controlling precedent under the new Labor-Management Reporting and Disclosure Act of 1959.