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Labor Law--Boycotts and Strikes--Picketing--The Picketing of an Independent Warehouse I Which a Primary Employer's Goods Are Stored-- *Steelworkers, Local 6991 (Auburndale Freezer Corp.)*

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RECENT DEVELOPMENTS

LABOR LAW—BOYCOTTS AND STRIKES—PICKETING—The Picketing of an Independent Warehouse in Which a Primary Employer's Goods Are Stored—*Steelworkers, Local 6991 (Auburndale Freezer Corp.)**

Cypress Gardens Citrus Products, Inc. (Cypress or primary employer) leased ten per cent of the cold-storage warehouse of Auburndale Freezer Corporation (Auburndale) in Eloise, Florida, for the storage of its frozen orange-juice concentrate. Except for those employees who delivered concentrate to the warehouse by truck, no Cypress employees performed any work there; the warehouse was maintained by three Auburndale employees and thirty employees from Minute Maid Company. During contract negotiations between Cypress and the representative of its employees, Local 6991 of the United Steelworkers of America (union), an impasse was reached and the union went on strike. Subsequent to the calling of the strike, the union picketed the truck entrances to Auburndale's warehouse and the railroad spur track adjacent to it. Although the picket signs emphasized that the dispute was only with Cypress,[1] at the time of the picketing no Cypress employees were making deliveries of concentrate, picking up goods of Cypress, or engaging in any other business at the warehouse. In response to the union's picketing, Auburndale and Minute Maid filed unfair labor practice complaints with the National Labor Relations Board (Board or NLRB);[2] and the trial examiner found[3] that the union's activity at the warehouse constituted secondary picketing in violation of sections 8(b)(4)(i)-(ii)(B) of the National Labor Relations Act (NLRA).[4]

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* 177 N.L.R.B. No. 108, 71 L.R.R.M. 1503 (June 30, 1969).

1. The signs read:
Employees of Cypress Gardens Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO.
Steelworkers, Local 6991 (Auburndale Freezer Corp.), 177 N.L.R.B. No. 108, 71 L.R.R.M. 1503 (1969).

2. In general, an unfair labor practice is one of those activities by either an employer or a union which are specifically prohibited by § 8 of the National Labor Relations Act [hereinafter NLRA], 29 U.S.C. § 158 (1964). *See* note 4 *infra*.

3. United Steelworkers of America & Auburndale Freezer Corp., Case No. 12—CC—513—1, TXD-102-68 (1969) (Trial Examiner's Decision).

4. 29 U.S.C. §§ 158(b)(4)(i)-(ii)(B) (1964). These sections provide in part:
(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 in an industry affecting commerce to engage in, a strike or 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

Moreover, the trial examiner found that even if the warehouse presented a common-situs situation,[5] the picketing did not take place at a time when the primary employer was engaged in normal business at the situs, and therefore did not meet the criteria for permissible common-situs picketing, which were set down by the Board in *Sailor's Union of the Pacific (Moore Dry Dock Co.)*.[6] The Board, however, disagreed with the trial examiner and, in a three-to-two decision, concluded that the Auburndale warehouse was a common situs and that the union's picketing was primary and therefore protected.[7] Thus, the Board rejected the trial examiner's recommended cease-and-desist order and dismissed the complaint.[8] The case is now on appeal to the Fifth Circuit.[9]

Section 8(b)(4) of the NLRA was passed to protect neutral employers from becoming involved in disputes between other employers and employees of such other employers and from being harmed by the activity of the striking employees.[10] Congress sought

person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

. . .

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

5. 177 N.L.R.B. No. 108, at 3, 71 L.R.R.M. at 1504. For discussion of the common-situs doctrine, see text accompanying notes 20-51 *infra*.

6. 92 N.L.R.B. 547 (1950). In that case the union picketed outside an entrance to a dockyard, owned by a secondary employer, where the primary employer's ship was tied up. These were the only premises on which picketing could take place effectively. The Board held that under such circumstances picketing is permitted so long as (1) the picketing is limited to times at which the situs of the dispute is located on the secondary employer's premises, (2) at the time of the picketing the primary employer is engaged in normal business at the situs, (3) the picketing is limited to places that are reasonably close to the location of the situs, and (4) the picket signs clearly disclose that the dispute is only with the primary employer. 92 N.L.R.B. at 549.

7. The Board found that even if the pickets' appeal was to common carriers who might pick up Cypress' goods, such picketing was permissible under the doctrine of United Steelworkers v. NLRB, 376 U.S. 492 (1964) [Carrier Corporation], in which the Supreme Court validated picketing which is aimed at railroad employees and which takes place on a spur track immediately adjacent to the primary employer's premises.

8. 177 N.L.R.B. No. 108, at 7, 71 L.R.R.M. at 1505.

9. *Appeal docketed*, No. 28522, 5th Cir., Sept. 29, 1969.

10. As stated by Senator Taft, "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees . . . ." 93 CONG. REC. 4198, in 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1106 (1948). *See also* Local 761, Elec. Workers v. NLRB, 366 U.S. 667 (1961) [General Electric]; Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 133 (1959); Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1411 (1962); Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 740 (1951).

to attain these objectives by classifying secondary activity by unions as an unfair labor practice. Secondary activity is activity which is directed against persons other than the employer of the employees directly involved in the dispute, and which is intended to persuade those persons to cease doing business with the primary employer.[11] It is clear from the proviso to sections 8(b)(4)(i)-(ii)(B),[12] however, that Congress did not intend to curtail or interfere with activity directed at the employer of the employees directly involved in the dispute—"primary activity"—even if there are incidental effects on others.[13] Nevertheless, the distinction between primary and secondary activity, or more particularly between primary and secondary picketing, is not always clear.[14]

When a group of employees strike against their own employer —the primary employer—their purpose usually is to disrupt his operations in the hope that economic pressure will persuade or coerce him to meet their demands. They may picket the primary employer's premises in order to publicize the strike or to try to persuade fellow employees to join it; and even if the picketing induces third persons not to deal with the primary, the employees' activity constitutes protected primary picketing.[15] If the goal of the striking employees is in fact to publicize the strike and to persuade their co-workers, they will naturally picket where they will reach the public or those employees. If, however, the striking employees should decide that such tactics do not sufficiently influence their employer, they might elect to picket the premises of a secondary employer who deals with the primary employer, in an attempt to persuade the secondary's employees to refuse to handle the primary's product. If those secondary employees cooperate with the striking union, the secondary employer may be compelled either to pressure the primary into accepting the union's demands or to cease

11. National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 624 (1967).

12. *See* note 4 *supra.*

13. 386 U.S. at 627. The report of the conference committee for the Landrum-Griffin amendments emphasized that the purpose of the proviso was "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 a primary labor dispute." H.R. CONF. REP. No. 1147, 86th Cong., 1st Sess. 38 (1959), in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 942.

14. Justice Frankfurter referred to the line between primary and secondary activity as "more nice than obvious." Local 761, Elec. Workers v. NLRB, 366 U.S. 667, 674 (1961).

15. Local 761, Elec. Workers v. NLRB, 366 U.S. 667, 672 (1961). *See also* NLRB v. International Rice Milling Co., 341 U.S. 665, 672 (1951); NLRB v. Local 294, Teamsters, 284 F.2d 887, 889 (2d Cir. 1960). St. Antoine, *What Makes Secondary Boycotts Secondary?*, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS—PROCEEDINGS OF ELEVENTH ANNUAL INSTITUTE ON LABOR LAW 5, 30-31 (1965), discusses the objectives of an "ordinary strike."

doing business with the primary. This prototype of the secondary boycott is prohibited by section 8(b)(4)(ii)(B),[16] and it demonstrates that the usual purpose and effect of picketing on secondary premises is to disturb the operations of a party not directly involved in the dispute beforehand.

The essence of the distinction between primary and secondary picketing is normally whether the business operations of the primary employer take place at the site picketed. This issue may be complicated, however, by the possibility that elements of both primary and secondary operations may be present at one location. The *Auburndale* case involves such a situation, because the primary employer's product is located on the picketed premises, which are owned by a secondary employer.

The developing case law has recognized that sometimes when the primary employer is engaged in some business on the premises of a secondary, picketing on those secondary premises is permissible despite the general ban in section 8(b)(4) against secondary picketing. Only two of these exceptions, the common-situs doctrine[17] and the related-work doctrine,[18] are reasonably applicable to the circumstances presented in *Auburndale*.[19] In fact, the common-situs doc-

16. *See* note 4 *supra*. *See also* Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 VA. L. REV. 189, 204-06 (1966).

17. The common-situs doctrine is usually applied to picketing on neutral or secondary premises. However, a common-situs situation can arise on primary premises. For example, in Retail Clerks, Local 1017 v. NLRB, 249 F.2d 591 (9th Cir. 1957) [Crystal Palace Market], the primary employer owned a large common market with shops inside, some of which he operated and others of which were operated by independent contractors. The union picketed outside the entire market. The court held that this activity constituted illegal picketing of a common situs, because of the union's failure to minimize the effect on the secondaries.

18. The related-work doctrine is discussed at notes 52-73 *infra* and accompanying text.

19. Two of the exceptions which are not pertinent to the *Auburndale* case comprise variations of the "ally doctrine." First, when there exist common ownership and control of the businesses of the primary and secondary employers, the secondary is considered to be merely an extension of the primary, so that picketing of the secondary constitutes protected primary picketing. *See, e.g.*, Miami Newspaper Pressman's Local No. 46 v. NLRB, 322 F.2d 405 (D.C. Cir. 1963). Second, when the secondary employer "knowingly does work which would otherwise be done by the striking employees or the primary employer," that is, when the secondary performs struck work, picketing of that secondary employer is considered to be primary picketing. NLRB v. Local 459, Radio & Mach. Workers, 228 F.2d 553, 559 (D.C. Cir. 1955) [Royal Typewriter]. For a concise summary of the ally doctrine, see Engel, *supra* note 16, at 204-06. Neither variation of the ally doctrine exists in the principal case. In *Auburndale* there was no evidence of common ownership and control of the primary and secondary employers, and the Board pointed out that the struck-work theory has been rejected several times in the setting of warehouse picketing. 177 N.L.R.B. No. 108, at 3-4, 71 L.R.R.M. at 1504. *See* Local 868, Teamsters (Mercer Storage Co.), 156 N.L.R.B. 67 (1965). Warehouse Union Local 6 (Hershey Chocolate Corp.), 153 N.L.R.B. 1051 (1965); Regional Council No. 3, Intl. Woodworkers (Priest Logging, Inc.), 137 N.L.R.B. 352 (1962) *aff'd.*, 319 F.2d 65 (9th Cir. 1963).

A third type of secondary picketing which has been permitted is picketing that is addressed only to consumers of a retailer and that urges them merely to refuse to buy the particular product manufactured by the primary. NLRB v. Fruit & Vegetable

trine was expressly relied on by the Board in *Auburndale*. The term "situs" has generally been defined as "the place of performance of the work involved in the basic dispute."[20] Thus, in the classic primary-picketing situation in which the union pickets the primary employer's factory, that factory is the situs of the dispute. A common situs is, therefore, a location at which both the primary and the secondary employers are performing work. Indeed, in *Local 761, Electrical Workers v. NLRB (General Electric)*,[21] the Supreme Court defined the common-situs situation as one in which "two employers [are] performing separate tasks on common premises."[22] More recently, the Court reaffirmed this definition when it referred to a common situs as "a place . . . where both the struck employer and 'secondary' or 'neutral' employers are carrying on business activities."[23] Both of these Supreme Court formulations of the common-situs concept imply positive action on the part of the employers or their agents at the place at which the picketing occurs.

As a test of whether a common-situs situation exists, the statement in *General Electric* has the virtue of being easy to apply. If the primary employer has one or more employees working on the premises of another employer, a common situs is established. The union may then proceed to demonstrate its compliance with the limitations placed on common-situs picketing in *Moore Dry Dock*.[24] Moreover, it is appropriate that any definition in the area of labor relations be articulated in terms of work performed.[25] The policy of section 8(b)(4) is twofold: to protect neutral parties from becom-

Packers Local 760, 377 U.S. 58 (1964) [Tree Fruits]. In that case, the Supreme Court upheld picketing which was aimed solely at a particular type of apple being sold at the picketed supermarket. Since the principal case involves neither retail consumers nor union appeals to customers, this doctrine is not applicable.

20. Johns, *Picketing and Secondary Boycotts Under the Taft-Hartley Act*, 2 LAB. L.J. 257, 266 (1951). In *Moore Dry Dock* the Board stated that because the ship "was the place of employment of the seamen, it was the *situs* of the dispute." 92 N.L.R.B. at 549. *See also* Engel, *supra* note 16, at 201, in which the "common site" cases are described as those "where employees of the primary employer were engaged in work activity on the premises of a secondary employer," and Lesnick, *supra* note 10, at 1423, which states that "the 'situs of the dispute' is located wherever any primary employees are working."

21. 366 U.S. 667 (1961).

22. 366 U.S. at 676-77, 679.

23. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 388-89 (1969).

24. 92 N.L.R.B. 547, 549. *See* note 6 *supra*.

25. One interesting problem that might arise is whether the presence on the premises of a secondary employer of a computer or vending machine is a common situs. One would assume that it is not; but literally, in these situations, the primary is performing tasks just as much as when he stations a bookkeeper or sales clerk on the premises. Such an approach, however, ignores the obvious fact that picketing employees want to appeal to people rather than to machines; consequently the absence or presence of machines should not be relevant. In any event, the primary employer in *Auburndale* did not leave on secondary premises any machines that perform tasks; rather it left only inanimate orange juice.

ing embroiled in labor disputes which do not concern them and, at the same time, to preserve the pickets' right to appeal directly to primary employees or to the public. If picketing occurs at a situs, such as a warehouse, at which the primary employer is not engaged in activity and at which an appeal to the public is not the objective, no primary employees will be present and thus none will be exposed to the picketing. Hence, such picketing must be suspect as secondary, rather than primary, picketing. Significantly, the United States courts of appeals have long defined common situs in terms of work performed by the primary employer.[26]

In *Auburndale,* the Board decided that the Auburndale warehouse was a common situs despite the absence of primary employees. It reached this conclusion by applying a flexible, but vague, test:

> In determining whether or not the Auburndale warehouse is a common situs the question is whether or not there is *sufficient "presence* of the primary" at the secondary site, or, to put the matter another way, whether the evidence is sufficient to establish ". . . that direct and immediate relationship between the picketing and the object picketed necessary to a finding of purely primary picketing."[27]

Applying this standard, the Board determined that "the Auburndale warehouse constituted a common situs because of the continuous 'presence' of the Cypress operation at that location."[28] The business operation of Cypress was apparently present at the warehouse because Cypress trucks regularly delivered concentrate to the warehouse,[29] because cold storage "constitutes an integral part of the Cypress production process,"[30] and because Cypress maintained control over the concentrate insofar as it could determine who could pick up the concentrate.[31]

If the only problem with the Board's "sufficient presence" test

26. *See, e.g.,* NLRB v. General Drivers, 225 F.2d 205, 209 (5th Cir. 1955) [Otis Massey Co.] ("where both primary and neutral employers occupy a common work site"); NLRB v. International Hod Carriers, 285 F.2d 397, 400 (8th Cir. 1960) ("where a neutral employer is engaged, along with a primary employer, in different activities on the same premises"); Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79, 81 (5th Cir. 1967) ("where employees of the primary and of the secondary employers work side by side").

27. 177 N.L.R.B. No. 108, at 4, 71 L.R.R.M. at 1504, quoting from Teamsters, Local 807 (Sterling Beverages, Inc.), 90 N.L.R.B. 401 (1950) (emphasis added).

28. 177 N.L.R.B. No. 108, at 6, 71 L.R.R.M. at 1505.

29. Relying on Local 3, Elec. Workers (New Power Wire & Elec. Corp.), 144 N.L.R.B. 1089 (1963), *affd.,* 340 F.2d 71 (2d Cir. 1965), the Board concluded that the absence of Cypress employees from the warehouse during the actual time of the picketing was of no consequence because their absence was due to the strike. *See* text accompanying notes 56-59 *infra.*

30. 177 N.L.R.B. No. 108, at 5, 71 L.R.R.M. at 1504.

31. This is generally the situation when a warehouseman issues negotiable warehouse receipts to a person leaving goods with him. *See* UNIFORM COMMERCIAL CODE §§ 7-104(1)(a), 7-403.

were its vagueness, it would not necessarily be unworkable. The jargon of the law is full of terms such as "reasonable," "good faith," and "unconscionable," which are just as inherently vague, yet which are applied by courts every day. But those terms have acquired viability because they have a long case-law development and because there are no more precise terms which can adequately convey their particular meanings. The Board, however, was unable to cite another case in which secondary premises had been held to be a common situs simply because there was "sufficient presence of the primary." Moreover, it could have applied the *General Electric* test which the Supreme Court had reaffirmed only three months earlier.[32] Although the Board in *Auburndale* twice cited *General Electric*,[33] it ignored both the reasons behind the common-situs doctrine and the Court's definition of a common situs. Had the NLRB followed the traditional common-situs test, it would have framed the essential issue of the case in terms of whether Cypress was performing any tasks at the warehouse. That question is properly answered in the negative.

An employer usually operates through his employees, yet Cypress employees never performed any tasks on the premises of the warehouse other than driving trucks up to the loading dock for Minute Maid employees to unload. A Cypress truck may be considered a roving or ambulatory situs, and it is true that *Moore Dry Dock* also involved such a movable situs. In that case the union picketed outside an entrance to a secondary employer's dockyard, in which the primary employer's ship (the roving situs) was located. The Board held that under such circumstances picketing can be permitted only at times when the roving situs is actually located on the secondary's premises.[34] But in *Auburndale*, since no Cypress truck even approached the warehouse during the picketing, no common situs can be said to have existed at that time under the roving-situs doctrine.

The Board apparently recognized that the roving-situs concept would not support a finding that there was a common situs in *Auburndale*. Consequently, the Board's conclusion that the warehouse itself was the common situs of the dispute by virtue of the primary employer's continuing "presence" was based primarily on the combination of two factors: the storage of concentrate in the warehouse and the regular deliveries of concentrate by primary employees in the period preceding the strike.[35] It is obvious, however, that the mere presence of the primary's product on secondary

32. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), was decided March 25, 1969, while *Auburndale* was decided June 30, 1969.

33. 177 N.L.R.B. No. 108, at 4, 6, 71 L.R.R.M. at 1504-05.

34. 92 N.L.R.B. at 549. *See* note 6 *supra*.

35. 177 N.L.R.B. No. 108, at 5, 71 L.R.R.M. at 1504.

premises does not satisfy the traditional *General Electric* requirement that the primary employer perform tasks on secondary premises in order for those premises to be classified as a common situs. Picket signs appeal to people, not to orange juice; in this case the signs did not appeal to primary employees because none were present, or were even likely to be present, during the picketing. Furthermore, it is difficult to understand how regular visits by a roving situs to a particular location can render that location itself a common situs, even when it harbors the primary's product. The Board's opinion pointed out that the truck drivers never actually handled the concentrate at the warehouse, and in fact did nothing outside of their cabs while at the warehouse other than sign receipts.[36] The drivers' work took place solely on trucks, each of which is a roving situs; and under *Moore Dry Dock*, picketing addressed to such workers is permissible only when the roving situs is present. Therefore, the Board has combined two factors which individually would not satisfy the accepted *General Electric* performance-of-tasks test. One might expect some explanation in the Board's opinion of why such a combination should satisfy this test, especially in view of the expansion of the common-situs doctrine that results from the Board's conclusion that the warehouse is a common situs. Yet no such explanation appears.

A consideration of the policies involved supports the conclusion that this expansion of the common-situs doctrine is not justified. The objective of both the common-situs doctrine and the proviso to sections 8(b)(4)(i)-(ii)(B) is to protect and enhance the effectiveness of primary activity, even if there are incidental effects on neutral employees and their employers.[37] In order to accomplish that goal, the common-situs doctrine permits "the union to follow the employees of the primary to make its employee-directed picketing activity most effective."[38] Effects on secondary employees working at the common situs are tolerated only to the extent that such impact is merely incidental to the legitimate primary objective of appealing to primary employees.[39]

The *Auburndale* decision is unnecessary to the accomplishment of that objective, however, because it permits picketing of secondary premises without regard to the presence or absence of primary employees. At the same time, the Board's holding creates a substantial

36. 177 N.L.R.B. No. 108, at 5, 71 L.R.R.M. at 1504.

37. With respect to the proviso to §§ 8(b)(4)(i)-(ii)(B), see National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 627 (1967); NLRB v. International Rice Milling Co., 341 U.S. 665, 671 (1951). With respect to the common-situs doctrine, see Engel, *supra* note 16, at 207.

38. *See* International Rice Milling Co. v. NLRB, 341 U.S. 665, 671 (1951); NLRB v. General Drivers, 225 F.2d 205, 210 (5th Cir. 1955) [Otis Massey Co.].

39. Engel, *supra* note 16, at 207.

danger that relatively minor, isolated labor disputes may be allowed to expand into substantial tie-ups of commerce.[40] For example, in *Auburndale*, a strike against Cypress was broadened to affect Auburndale, Minute Maid, Cypress' customers, and any carriers or boxcars that approached Auburndale's warehouse.

At least one court has expressly rejected the *Auburndale* Board's common-situs theory in a factual setting similar to that in *Auburndale*. In *McLeod v. United Auto Workers, Local 365*,[41] the UAW was involved in a dispute with Intertype. The UAW picketed the premises of Intertype and also picketed a warehouse, owned by Eagle, in which Intertype stored nine machines destined for shipment to purchasers. In a brief paragraph, the federal district court concluded:

> [T]here is no sharing of a common situs by Intertype and Eagle. Intertype has a permanent place of business which is being effectively picketed and one of the objectives of the picketing against Eagle is pressure upon the secondary employer. Under the circumstances the situs of the nine (9) finished machines crated and stored for shipment in a neutral warehouse cannot be considered as a partial situs of this labor dispute.[42]

The United States Court of Appeals for the Second Circuit affirmed that decision without specifically discussing the common-situs issue.[43] *McLeod* cannot be considered conclusive of the issue, because it represents an expression by only one set of lower federal courts and because the discussion of the common-situs problem by the district court was extremely brief. Yet the decision appears to reflect a sound approach to factual situations such as those presented in *McLeod* and *Auburndale*.

But even if the Board were correct in holding that the warehouse was a common situs in *Auburndale*, its subsequent conclusion that the picketing complied with the *Moore Dry Dock* standards cannot be sustained. As previously discussed,[44] that case dealt with a particular species of the common situs, a roving situs. However, the

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40. In Local 1976, Bhd. of Carpenters v. NLRB, 357 U.S. 93, 100 (1958) [Sand Door], the Supreme Court stated that § 8(b)(4)

> aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting . . . the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods.

For a general discussion of policy arguments against secondary boycotts, see Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 740 (1951).

41. 200 F. Supp. 778 (E.D.N.Y. 1962).

42. 200 F. Supp. at 781.

43. 299 F.2d 654 (2d Cir. 1962). As recognized in the Board's decision in *Auburndale*, several other cases have, under similar circumstances, found violations of § 8(b)(4) without considering the common-situs question. *See* note 19 *supra*.

44. *See* text accompanying note 34 *supra*.

Supreme Court's opinion in *General Electric* indicates that the *Moore Dry Dock* criteria have been generally applied to all forms of common-situs picketing.[45] In *Auburndale*, the Board was concerned only with the requirement that at the time of picketing the primary employer be engaged in normal business at the situs.[46] The Board, in determining that this requirement was met even though Cypress had no employees working at the warehouse, relied on *New Power Wire and Electric Corporation*,[47] in which the Board had held that the absence of primary employees from a common situs is not relevant if attributable to the employees' participation in a strike. That case, however, involved construction sites at which primary employees, before the strike, regularly installed electrical wiring. Moreover, the primary employees spent all their time at the building sites and would never have seen pickets at the primary employer's premises. In *Auburndale*, on the other hand, the only primary employees who ever came to the warehouse were truck drivers who did not perform any services after the trucks were parked. It is clear that, since "the whole Cypress plant was on strike,"[48] and since "during the picketing . . . no Cypress trucks came to Auburndale,"[49] the truck drivers were effectively contacted at the home factory. In any event, each Cypress truck would be a roving situs and, as noted earlier,[50] any picketing would have to comply with the aforementioned *Moore Dry Dock* requirement that the roving situs be present when premises are picketed.[51]

Despite these flaws in the *Auburndale* rationale, the Board's conclusion in that case that the picketing constituted protected primary activity was subsequently confirmed by a federal district court on a different legal theory. In *Samoff v. Oil, Chemical, and Atomic Workers, Local 8-732*[52] the products of the primary employer, Avinsun Corporation (Avinsun), occupied about eighty-five per cent of the warehouse space of Industrial Warehousing Corporation (Industrial), an independent corporation. A dispute over contract negotiations developed between Avinsun and its employees, and the employees began picketing the Industrial warehouse. Industrial sought to have these activities temporarily enjoined pending the NLRB's

45. The Court quoted with approval the Board's statement in Retail Clerks, Local 1017 (Crystal Palace Market), 116 N.L.R.B. 856, 859 (1956): "We believe . . . that the [*Moore Dry Dock*] principles should apply to all common situs picketing . . . ." 366 U.S. at 678-79.

46. 92 N.L.R.B. at 549. *See* note 6 *supra*.

47. Local 3, Elec. Workers, 144 N.L.R.B. 1089 (1963), *aff'd.*, 340 F.2d 71 (2d Cir. 1965).

48. 177 N.L.R.B. No. 108, at 6, 71 L.R.R.M. at 1505.

49. 177 N.L.R.B. No. 108, at 3, 71 L.R.R.M. at 1504.

50. *See* text accompanying note 34 *supra*.

51. *See* note 6 *supra* and text accompanying note 34 *supra*.

52. 307 F. Supp. 434 (D. Del. 1969).

final adjudication of the issue. The United States District Court for the District of Delaware refused to grant the injunction on the ground that the *Auburndale* decision was directly applicable and that therefore there did "not appear to be a reasonable probability that the petitioner will be entitled to final relief before the Board."[53]

In applying the *Auburndale* decision, the district court emphasized the Board's statement that the storage of the concentrate at the warehouse constituted "an integral part of the Cypress production process."[54] Accordingly, the court concluded that the "related-work" doctrine, as developed by the Supreme Court in *General Electric* and *United Steelworkers of America v. NLRB (Carrier Corporation)*,[55] was applicable to cases involving the storage of the primary's goods on secondary premises. The related-work doctrine provides that picketing directed at employees other than those of the struck employer, but who are "furnishing day-to-day service essential to the [primary] plant's regular operations," constitutes protected primary activity.[56] The Supreme Court felt that this rule was necessary in order to permit striking unions to implement "the traditional goal of primary pressures" aimed at halting the operations of the primary employer by appealing to "all those approaching the situs whose mission is selling, delivering or otherwise contributing" to those operations.[57]

There are two problems with applying the related-work doctrine to either *Auburndale* or *Samoff*. First, it is not clear that storing goods is related work within the meaning of that doctrine. *Carrier Corporation* emphasized that related work consists of "day-to-day services *essential* to the [primary] *plant's* regular operations."[58] Certainly, it is difficult to understand how warehousing is essential to plant operations, but it is also unclear how strictly this test should be confined to the plant setting. In the sense that the term "operations" connotes activity which contributes to production, warehousing appears not to constitute related work. Moreover, since *General Electric* and *Carrier Corporation* considered only deliveries to, and maintenance performed at, the primary's plant by secondary employees, it is unlikely that those cases envisioned warehousing of the primary's product at a remote secondary site as being within the

53. 307 F. Supp. at 437. Two factual distinctions between the two cases make *Samoff* a stronger case for the union than is *Auburndale*. First, Industrial's warehouse was filled to 85% capacity with Avinsun goods, as compared to the 10% used by Cypress. Second, and of greater significance, Avinsun employees regularly inspected its stored product at the warehouse. Thus, it can be argued that in *Samoff* the primary performed tasks at the picketed premises.

54. 177 N.L.R.B. No. 108, at 5, 71 L.R.R.M. at 1504.

55. 376 U.S. 492 (1964).

56. 376 U.S. at 499.

57. 376 U.S. at 499.

58. 376 U.S. at 499 (emphasis added).

scope of related work. Perhaps the most that can be said is that the vague concept of related work is not, by itself, very helpful in determining whether or not warehousing activities fall within that category. Consequently, it becomes necessary to rely on other factors in deciding whether related work should encompass warehousing activities so as to permit direct appeals to secondary warehouse employees in the course of a labor dispute with a primary employer who is storing goods in the warehouse.

The most significant factor is the location of the picketing.[59] It should be recognized that the related-work doctrine was developed in, and has generally been confined to, cases involving collective activity at the premises of the primary employer.[60] As early as 1949, the Board rejected an argument that a boycott carried out against a secondary employer who performed related work on secondary premises was protected primary activity. In *Metal Polishers Local 171 (Climax Machinery Company)*[61] a primary employer with limited productive capacity found it necessary to have a secondary do the metal-plating work which it normally performed itself. Even though that work was integral to the primary employer's production operations, the Board held that the union violated former section 8(b)(4)(A)—now sections 8(b)(4)(i)-(ii)(B)—by inducing the secondary employees to cease performing the contracted work.[62]

This approach was followed by the Board in *Office and Professional Employees, Local 3 (American President Lines)*,[63] decided after *General Electric* and *Carrier Corporation*. In that case a dispute arose between Paredes, a customhouse broker, and his employees. One of Paredes' employees walked onto a pier owned by

59. 376 U.S. at 499.

60. *General Electric* involved the picketing of a separate gate which was on the primary's premises, although it was used only by employees of an independent contractor (366 U.S. at 668-69); and *Carrier Corporation* dealt with the picketing of a spur track which was immediately adjacent to the primary employer's premises (376 U.S. at 494). *See also* Building & Constr. Trades Council of New Orleans (Markwell & Hartz, Inc.), 155 N.L.R.B. 319 (1965), *enforced*, 387 F.2d 79 (5th Cir. 1967) (picketing on construction premises owned by neither the primary nor the secondary, but on which employees of each were regularly working; United Steelworkers v. NLRB (Phelps Dodge Ref. Co.), 126 N.L.R.B. 1367, *enforced*, 289 F.2d 591 (2d Cir. 1961); United Elec. Workers Local 813 (Ryan Constr. Co.), 85 N.L.R.B. 417 (1949).

61. 86 N.L.R.B. 1243 (1949).

62. Professor Lesnick finds this result to be compelling:

> When no primary employees are present at the secondary site, the Act plainly condemns inducement of secondary employees to refuse to work on materials coming there from the primary, even though the inducement be only "partial," that is, limited to those materials.

Lesnick, *supra* note 10, at 1414. While that writer has suggested that a secondary boycott should be considered legitimate so long as the union does not intend "to subject the secondary to pressure different in kind from that generated against him by a primary strike," (*id.* at 1412), he has stated as a caveat that "only the effect of loss of the primary's *employees* may be considered" (*id.* at 1414).

63. 156 N.L.R.B. 1342 (1966).

American President Lines (APL) and picketed a shipment of wine which the primary employer was processing through customs for an importer.[64] Noting that the employee "picketed at the terminal not only at times when Paredes' employees were not present, but also in a circumstance where there was no indication that Paredes' normal business would require the presence of an employee at that location,"[65] both the trial examiner and the Board held that the pier was not a common situs and that the picketing was therefore illegal. Although the work of the APL employees in unloading the wine and removing it from the pier was essential to the broker's normal business of expediting the flow of imported goods through customs, the Board did not apply the related-work doctrine in this case. Thus, despite the fact that the related-work doctrine may not have been raised in argument, *American President Lines* does reflect the Board's strong policy of not permitting picketing on secondary premises when there are no primary employees working or likely to be working at the site.[66]

In *Building and Construction Trades Council of New Orleans (Markwell and Hartz)*,[67] the Board explicitly held that the related-work doctrine should not be extended to protect picketing on secondary premises. In that case, the primary employer, a general contractor on a construction site owned by a third party, set up reserved gates for the exclusive use of employees of neutral subcontractors, in order to insulate them from the effects of its dispute with the Building Trades Council. The Council nevertheless picketed those separate gates. In holding that this activity violated section 8(b)(4), the Board emphasized that

> the mere fact that picketing of a neutral gate *at premises of a struck employer*, may in proper circumstances be lawful primary action, does not require a like finding when a labor organization applies *direct* pressure upon secondary employers engaged on a common situs. . . . [T]he Court's decisions in *General Electric* and *Carrier Corp.*, merely

64. The services of a customhouse broker involve the signing of receipts, the paying of fees, and so on, and not the actual physical handling of the goods.

65. 156 N.L.R.B. at 1348.

66. The statement in Seafarer's Union v. NLRB, 265 F.2d 585, 590 (D.C. Cir. 1959) [Salt Dome Prod.], that "the presence or absence of employees of the primary employer on the premises is not a critical factor in the legality of a picket line" does not represent an aberration from this policy. In that case the employer had temporarily removed nonstriking employees from their jobs, for the purpose of converting a lawful picket line into an unlawful one. *Climax Machinery, American President Lines*, and the warehouse cases are thus distinguishable on their facts, since in those cases no primary employees had ever worked on the situs. Indeed, in Local 519, Journeymen v. NLRB, 416 F.2d 1120 (D.C. Cir. 1969), a case decided by the same court that decided *Salt Dome*, with one of the same judges sitting, the court emphasized that *Salt Dome* should be construed in light of its facts. *See also* note 47 *supra* and accompanying text.

67. 155 N.L.R.B. 319 (1965).

> represent an implementation of the concomitant policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer.[68]

If the Board is unwilling to apply the related-work doctrine to a common situs, the argument is even more compelling for it not to invoke that doctrine in a case involving picketing at a remote secondary situs. Thus, the Delaware federal district court's attempt to justify the *Auburndale* decision on the related-work theory does not appear to be sound.

There are strong policy reasons which militate against *Samoff*'s extension of the related-work doctrine to warehouse situations. When related work is performed on primary premises, there is little danger that either the primary or secondary employer will be subjected to undue picketing or adverse publicity. Since the primary's employees are already on strike and presumably picketing his premises, the addition of pickets directed solely to secondary employees, even at "reserved gates," does not create measurable additional burdens on the primary employer. Moreover, since it is the primary premises that are being picketed, the secondary employer is affected only to the extent that the picketing causes his employees who are working at the premises of the primary to refuse to work. Although this effect could be substantial if a large proportion of the secondary's employees were employed on the primary premises and could not be assigned elsewhere during the dispute, such a situation does not occur frequently, particularly in cases in which the secondary employees make deliveries at a separate gate. In the absence of complex circumstances, then, the effects on the secondary employer of allowing direct appeals to his employees who are performing at the primary's premises work related to the ordinary operations of the

68. 155 N.L.R.B. at 325. The Board's order was enforced by the Fifth Circuit in Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79 (5th Cir. 1967). While Judge Connally's opinion announcing the court's judgment in that case appears to state that the related-work doctrine can be applied to a common situs (387 F.2d at 82), that case does not support a further extension to purely neutral premises. Indeed, the other two judges who heard the case rejected that argument. Judge Rives, concurring, stated:

> When the work done by the secondary employees is related to the normal operations of the primary employer there remains a distinction between picketing at a common situs where two or more employers are performing separate tasks on common premises. It seems to me that the opinion in *General Electric* clearly recognizes that distinction.

387 F.2d at 84. Although Judge Wisdom, dissenting, would have applied the related-work doctrine to a common situs because he felt that *General Electric* was itself a common-situs case (387 F.2d at 89), he did assert that

> [t]he line between primary and secondary activity is relatively easy to draw where the primary and secondary employers have separate work-sites . . . activity extending beyond the premises of the primary employer to those of another employer, and designed to disrupt the operations of the latter employer, is secondary and prohibited.

387 F.2d at 86.

primary may reasonably be said to be outweighed by the need for effective primary activity by the union during a labor dispute.[69]

The warehousing situation, however, is significantly different. A warehouse is often located at a considerable distance from the primary employer's premises.[70] While distance alone may not be the crucial test, the combination of the facts that the warehouse is separate from the primary's premises and that it is generally the location of the goods of a number of primary employers suggests that the related-work doctrine should not be extended to permit picketing at the warehouse when that picketing is directed at secondary employees. Since the warehouse is a separate facility, the striking union must picket the premises of the secondary employer in order to reach the employees of the warehouse. In some instances, the picketing of a warehouse by the employees of an employer who is storing goods in it may not differ in kind or effect from picketing directed at secondary employees on primary premises. But in the warehouse situation, the impact on the secondary's general operations differs in an important respect; and that difference can best be explained through illustration. *Carrier Corporation* holds that when one of the plants to which a common carrier regularly delivers has a labor dispute, striking plant employees may appeal to truck drivers who are employed by that neutral carrier and who approach a gate reserved for them. While this tactic prevents the carrier from carrying on business with that particular plant, the carrier's business relations with everyone else are not affected. Furthermore, it is a matter of indifference to him whether drivers employed by other carriers refuse to cross the picket line. Even if there is never a time when at least one of the plants with which he does business is not being picketed, the carrier can insulate himself from such activity by merely avoiding that plant. On the other hand, when one of the employers who stores goods at a warehouse experiences a strike, the warehouse owner's entire operation is, under the *Auburndale* and *Samoff* holdings, subject to disruption, because the picketing occurs on his premises. Everyone who approaches the warehouse—which

69. In support of the use of a balancing test to determine whether picketing is permissible secondary activity, see *Moore Dry Dock*, 92 N.L.R.B. at 549 ("the problem is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved"); NLRB v. Denver Bldg. Trades Council, 341 U.S. 675, 692 (1951) ("the dual congressional objectives of preserving the right of labor organizatoins to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own"), quoted with approval in National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 626 (1967).

70. The Auburndale warehouse was located five to six miles from the Cypress plant (Trial Examiner's Decision, *supra* note 3, at 3), and the Industrial warehouse was nine miles from the Avinsun plant (307 F. Supp. at 435).

probably includes everyone who deals with the warehouseman—sees the pickets. Thus, the neutral owner is unable to separate the disruption caused by a labor dispute between one of his customer's and that customer's employees from the rest of his business operations. Moreover, the warehouse owner might be subjected to adverse publicity because of his frequent involvement in labor disputes; and he is exposed to the possibility that his operations would be disrupted by work stoppages or carrier refusals to cross picket lines.[71] Again, it must be recognized that these effects could be multiplied by the picketing of his premises by various unions at different times. These risks appear to be considerably more severe than those to which a secondary employer is exposed when his employees perform related work at the primary's plant; and they suggest that the related-work doctrine should not, without substantial justification, be extended to the situation involving a separate warehouse.

Permitting picketing addressed to secondary employees who are performing related work at or near the primary's plant can be justified if it enables a union to carry out its legitimate strike objective of completely halting the primary employer's normal operations.[72] For example, if regular deliveries of supplies are made by a common carrier, the plant may be able to continue partial production through the use of supervisory employees and nonstriking employees, thus frustrating the effectiveness of the primary strike. But such a policy is not involved in picketing that is addressed to secondary employees at a remote warehouse owned by a secondary employer. Whether the warehouse is picketed or not, the primary's plant operations can be completely shut down by an effective boycott at the primary site;[73] and a boycott of the warehouse would not help to achieve a shutdown of the primary's plant. Therefore, since an extension of the related-work doctrine to a distant, secondary warehouse does not appear to contribute to the objectives which justify picketing at a separate gate on primary premises, and since

71. It might be argued that the consequences of picketing the warehouse are relatively limited because the scope of the pickets' appeal to the warehouse employees must be confined to asking them not to handle the goods of the particular employer involved in the dispute. But even if the permissible scope of the picketing is so restricted, it is nevertheless possible that carriers and even warehouse employees will fail to ascertain or recognize the limits of the appeal and will either refuse to cross the picket lines entirely or will refuse to handle all goods, regardless of whether or not the producer is involved in the current dispute.

Such a restriction was recognized in *Auburndale* (177 N.L.R.B. No. 108, at 6, 71 L.R.R.M. at 1505) and in *Samoff* (307 F. Supp. at 436 nn.1-2, 438-39), and it is consistent with the holding in NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 72 (1964) [Tree Fruits], that permissible consumer picketing must be "employed only to persuade customers not to buy the struck product."

72. *Carrier Corp.*, 376 U.S. at 499.

73. For example, in *Auburndale* the union succeeded in shutting down the entire Cypress plant before it began picketing the warehouse. 177 N.L.R.B. No. 108, at 6, 71 L.R.R.M. at 1505.

the warehouse situation does present substantial risks for the secondary employer, such an extension of the doctrine should not be allowed to stand.

In summary, the *Auburndale* decision appears to be contrary to the purposes and policies of the common-situs and related-work doctrines, the consistent trend of the case law, and a sensible application of *Moore Dry Dock.*[74] It is hoped that in the future the Board and the courts will restrict the application of the related-work doctrine to picketing on primary premises, and will adhere to the judicially established definition of common situs as a place at which both the primary employer and a neutral employer are performing separate tasks. By thus abandoning its vague "sufficient presence of the primary" test, the Board would provide a more certain standard to guide unions in planning their strategy, and yet it would not impair either the union's right to carry a strike to all primary employees or the neutral employer's right to be free of labor disputes which do not involve him.

74. Neither the Board nor the federal district court in *Samoff* addressed itself to the question whether an application of §§ 8(b)(4)(i)-(ii)(B) to prohibit the picketing of a warehouse under these circumstances would be an unconstitutional infringement of the pickets' first-amendment right to free speech. Apparently, the issue was not raised in either case because the facts and pleading foreclosed any such constitutional arguments. While Thornhill v. Alabama, 310 U.S. 88 (1940), established that peaceful picketing is an exercise of expression protected by the first amendment, it is equally well established that picketing or any other "speech or writing used as an integral part of conduct in violation of a valid criminal law statute" may constitutionally be prohibited. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949). The Supreme Court has also held that "[t]he prohibition of inducement or encouragement of secondary pressure by [§§ 8(b)(4)(i)-(ii)(B)] carries no unconstitutional abridgment of free speech." Electrical Workers, Local 50 v. NLRB, 341 U.S. 694, 705 (1951). Since in *Samoff* the district court found that the pickets had successfully induced common carriers to refuse to cross the warehouse picket line to pick up the primary's product (307 F. Supp. at 436), and since in *Auburndale* the union conceded that its appeal was aimed at the warehouse workers who handled the Cypress concentrate (Trial Examiner's Decision, *supra* note 3, at 4), it is clear that in both cases the unions used means which are prohibited by §§ 8(b)(4)(i)-(ii)(B), in an attempt to achieve an objective forbidden by that section. Although the Supreme Court has never squarely decided the issue, it appears to be well established that it is not necessary to show an actual work stoppage in order to prove a violation of § 8(b)(4), so long as the unlawful objective can otherwise be demonstrated. *See, e.g.*, Lescher Bldg. Serv., Inc. v. Local 133, Sheet Metal Workers, 310 F.2d 331, 336 (7th Cir. 1962); NLRB v. Associated Musicians, Local 802, 226 F.2d 900, 904-05 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

There is language in Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 314 (1968), which would support the broad proposition that "picketing can be subjected to a blanket prohibition" if it is "directed at an illegal end." Nevertheless, a factual situation could arise in which there is neither interference with the secondary's business nor other evidence of an illegal objective on the part of the pickets. In such a case the Board or the courts would have to face the question whether the picketing of a secondary's warehouse, by itself, justifies an application of §§ 8(b)(4)(i)-(ii)(B).