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The New Orleans Building and Construction Trades Council, an association of craft unions, was engaged in a labor dispute with Markwell & Hartz, the general contractor on a construction project. In support of its dispute with the general contractor (primary employer), the Council picketed all gates leading to the job site, although some gates had been specifically reserved for the exclusive use of those subcontractors (secondary employers) with whom the union had no dispute. Employees of the subcontractors refused to cross the picket line to perform work pursuant to their employers' contracts with the general contractor. Markwell & Hartz filed a complaint with the National Labor Relations Board (NLRB) alleging that the Council's activities constituted a violation of section 8(b)(4)(B) of the National Labor Relations Act.[1] The Board held, two

* 1965 CCH NLRB ¶ 9787.

1. 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(B) (1964). Section 8(b)(4)(B) presently reads as follows:

> 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 . . . to engage in, a strike or a refusal in the course

members dissenting, that the Council had committed an unfair labor practice.[2] The picketing of gates reserved for the exclusive use of employees of subcontractors at a construction site is an illegal appeal to such employees.[3]

Although unions admittedly have an interest in bringing economic pressure to bear on employers with whom they have a labor dispute, neutral employers also have an interest in being free from "pressures in controversies not their own."[4] Since the two interests frequently collide,[5] Congress has attempted to provide the NLRB and the courts with guidelines for balancing these interests. Thus, sections 7 and 13 generally protect the right of employees to strike and engage in other concerted activities,[6] while section 8(b)(4)(B) specifically prohibits union refusals (or inducements of refusals) to perform any services when an object of the refusal is to force one employer to stop doing business with another.[7]

It is clear that by enacting section 8(b)(4) Congress intended to

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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 . . . 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, or 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 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 picketing.

2. Building & Constr. Trades Council (Markwell & Hartz), 1965 CCH NLRB ¶ 9787 [hereinafter cited as principal case]. The order of the Board in the case is not included in the report of the decision.

3. The Board regarded the picketing of the reserved gate as lawful during the period that deliverymen were permitted to use it. The Board stated:

Although a common situs problem is presented where a gate is reserved for both neutral subcontractors and persons making deliveries to a struck contractor, a balance of the competing interests underlying 8(b)(4)(B) requires our respecting the traditional right of labor organizations to appeal to such deliverymen as lawful incident of legitimate strike actions against the primary employer.

Principal case ¶ 9787, at 16623 n.22.

4. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951); see Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667, 679 (1961); Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547, 549 (1950).

5. See Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667, 673 (1961). See generally Bartley, *The Carrier Corporation Case and the Related Work Doctrine: Appeals to Neutral Employees as Protected Picketing*, 16 LAB. L.J. 294, 295 (1965).

6. Section 7 provides that "employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964). Section 13 states that "nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151 (1947), 29 U.S.C. § 163 (1964).

7. See text of statute quoted note 1 *supra*.

restrict sharply the use of secondary boycotts[8]—classically defined as a "combination to influence A by exerting some sort of economic or social pressure against persons who deal with A."[9] The original statutory provision, however, did not provide any rigid rules for distinguishing condemned secondary activity from traditionally approved "primary" activity.[10] Furthermore, the 1959 addition of a proviso to section 8(b)(4)(B), which expressly excepts "primary" activity from the prohibition,[11] serves only as evidence of a congressional approval of the "primary-secondary dichotomy."[12] The Board and the courts have thus had the responsibility of determining when union pressure on secondary employers ceases to be an "intrinsic element of an 'ordinary strike.' "[13] This question generally arises when the picketing which results from a union's dispute with an employer extends beyond that employer's workforce,[14] his premises,[15] or both.[16]

Initially, the NLRB took what has been described as a "geographical approach" to the problem.[17] All picketing at the premises of the principal or primary employer was permissible even though directed at employees of secondary employers,[18] since "traditional primary strike action" has always included efforts "to induce and encourage third persons to cease doing business with the picketed employer" and "to respect a primary picket line *at the employer's premises.*"[19] Section 8(b)(4), according to the Board, "was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground *beyond the premises* of the primary employer."[20] Thus, only appeals to secondary employees

8. See, *e.g.*, Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667, 671 (1961); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 686 (1951); Bartley, *supra* note 5; Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

9. FRANKFURTER & GREENE, THE LABOR INJUNCTION 43 (1930).

10. See Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667, 674 (1961).

11. Labor-Management Reporting and Disclosure Act of 1959 § 704(a), 73 Stat. 543, 29 U.S.C. § 158(b)(4)(B) (1964).

12. See generally United Steelworkers v. NLRB, 376 U.S. 492 (1964); Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961).

13. St. Antoine, *What Makes Secondary Boycotts Secondary?*, in SOUTHWESTERN LEGAL FOUNDATION, 11TH INSTITUTE ON LABOR LAW 5, 17 (1964).

14. See, *e.g.*, Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961).

15. See, *e.g.*, Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950).

16. See, *e.g.*, NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). See generally Bartley, *supra* note 5; St. Antoine, *supra* note 13.

17. St. Antoine, *supra* note 13, at 17.

18. See Oil Workers Int'l Union (Pure Oil Co.), 84 N.L.R.B. 315 (1949) (picketing at primary's dock; secondary employees refused to cross picket line); United Elec. Radio & Mach. Workers (Ryan Constr. Corp.), 85 N.L.R.B. 417 (1949) (picketing gate reserved by primary employer for exclusive use by employees of contractor constructing addition to primary's plant).

19. Oil Workers Int'l Union (Pure Oil Co.), *supra* note 18, at 318-19.

20. United Elec., Radio & Mach. Workers (Ryan Constr. Corp.), 85 N.L.R.B. 417, 418 (1949). (Emphasis added.)

which sought to induce a work stoppage at *their* employer's premises were thought to be prohibited by 8(b)(4).

Despite the appropriateness of a geographical approach in situations involving a location occupied by a single employer, such an approach has proved to be an unsatisfactory vehicle for analyzing the legality of so-called common-situs picketing. Such picketing may occur in any one of the following three situations: (1) the employees of the primary employer may be temporarily working at the premises of the secondary employer;[21] (2) the employees of the secondary employer may be temporarily working at the premises of the primary employer;[22] or (3) the employees of both the primary and secondary employers may be temporarily working at a site which is not the permanent place of business of either employer (as in the principal case).[23] In determining the legality of common-situs picketing, the Board and the courts have consistently commenced their analysis with the NLRB's decision in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*,[24] a case involving a ship owned by the primary employer which was being unloaded and repaired at the dock of the secondary employer. The issue framed by the Board was whether the right of the union to picket followed the situs of the dispute (in this case the ship on which the employees of the primary employer worked) to the premises of a secondary employer.[25] Although the Board concluded that the right to picket follows the situs of the dispute, it held that the enmeshing of the situs of the dispute with the premises of the secondary employer limited the scope of permissible primary picketing. The picketing would be considered lawful so long as all of the following criteria were satisfied:

(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.[26]

In formulating these tests, the Board's basic aim seemed to be the protection of secondary employers from effects greater than those

21. See, *e.g.*, Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950).
22. See, *e.g.*, Retail Fruit & Vegetable Clerks' Union (Crystal Palace Mkt.), 116 N.L.R.B. 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957).
23. See, *e.g.*, Local 55, Carpenters Council (Professional & Business Men's Life Ins. Co.), 108 N.L.R.B. 363, *enforced*, 218 F.2d 226 (10th Cir. 1954).
24. 92 N.L.R.B. 547 (1950).
25. *Id.* at 549.
26. *Ibid.*

they would have experienced had their employees been induced to refuse to work on the ship at the primary's own place of business. The rights that the union would have had if the ship had been moored at the primary's own dock followed the ship, provided that the consequences of the picketing were similarly limited.[27] Thus, insofar as the appeal to secondary employees was limited to inducements to refuse to work on the primary's ship, the picketing was clearly lawful.

Although the Board's purpose in *Moore* was to determine when and how unions may picket secondary employees at a place other than the primary employer's premises, the change in the Board's personnel after 1952 resulted in the use of an entirely different approach. The new Board chose to interpret section 8(b)(4)(B) literally and consequently all appeals which encouraged secondary employees to refuse to work in any one of the common situs situations became illegal.[28] With this as the Board's point of departure, the *Moore* standards were no longer considered determinative of when and where secondary employees could be picketed; they could not be picketed at all. Rather than discarding *Moore* as irrelevant, however, the Board used the standards for determining the subjects at whom the picketing was aimed.[29] Any picketing which did not meet the four tests was thus deemed to be aimed at secondary employees and was, therefore, unlawful.

In 1961, the United States Supreme Court "stepped in to rechart the direction of the law."[30] In *General Electric*, the Board, pursuant to its literal approach to section 8(b)(4)(B), had held that the picketing of those gates to the primary employer's manufacturing plant

27. See St. Antoine, *supra* note 13, at 21.

28. See, *e.g.*, Retail Fruit & Vegetable Clerks' Union (Crystal Palace Mkt.), 116 N.L.R.B. 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957) (picketing at market place owned by primary and operated by primary and secondary lessees); Local 55, Carpenters Council (Professional & Business Men's Life Ins. Co.), 108 N.L.R.B. 363, *enforced*, 218 F.2d 226 (10th Cir. 1954) (picketing construction site owned by primary who acted as his own general contractor); Local 618, Automotive, Petroleum & Allied Indus. Employees Union (Incorporated Oil Co.), 116 N.L.R.B. 1844 (1956), *rev'd*, 249 F.2d 332 (8th Cir. 1957) (picketed primary's gas station when only persons present were construction employees rebuilding a structure on the premises); Union de Trabajadores da la Gonzales Chem. Indus., 128 N.L.R.B. 1352 (1960), *rev'd sub nom.* Teamsters Union v. NLRB, 293 F.2d 881 (D.C. Cir. 1961) (per curiam) (picketing at primary's plant directed at construction workers erecting an addition); Local 761, Int'l Union of Elec., Radio & Mach. Workers (General Electric Co.), 123 N.L.R.B. 1547 (1959), *rev'd*, 366 U.S. 667 (1961).

29. See cases cited note 28 *supra*. Compare Seafarers' Int'l Union (Salt Dome Prod. Co.), 119 N.L.R.B. 1638 (1958), *rev'd*, 265 F.2d 585 (D.C. Cir. 1959) in which the court seems to revert to an analysis much like that in *Moore* in that appeals directed to secondary employees were held not to be prohibited simply because they were so directed. Rather, they were prohibited only when they were aimed at a boycott of the secondary employer broader than its business relation with the primary employer. See Lesnick, *supra* note 8, at 1374-84.

30. St. Antoine, *supra* note 13, at 26.

which were reserved for the exclusive use of secondary employees was prohibited because such picketing was obviously a direct appeal to the secondary employees.[31] The Supreme Court reversed the Board's decision and expressly repudiated the theory that *all* appeals to secondary employees are illegal.[32] The Court held that picketing aimed at secondary employees who perform work that it related to the day-to-day operations of the primary employer is within the scope of protected primary activity.[33]

Notwithstanding the *General Electric* decision, the Board refused to make the related work inquiry in the principal case. As it had done in the past, the Board applied the *Moore* test, determined that the picketing was aimed at secondary employees, and concluded that such conduct was unlawful. In refusing to apply the related work doctrine, the Board indicated that the Supreme Court had intended the doctrine to be applicable only to picketing which occurs at the premises of the primary employer.[34] Although the Board's position does seem to be supported by the facts in *General Electric,* a second Supreme Court decision, *United Steelworkers v. NLRB (Carrier Corp.),*[35] casts doubt upon the Board's conclusion. As in *General Electric,* the picketing in *Carrier* occurred at a gate of a struck manufacturing plant, which gate was reserved for the exclusive use of the secondary employees. Although the gate was adjacent to the primary's plant (it had, in fact, been owned by the primary at one time), it was located on property owned by the secondary employer. In holding that the picketing was lawful, the Court referred to the 1959 proviso expressly excepting primary picketing from the prohibitions of section 8(b)(4), and stated that the scope of protected union activity must be determined by the

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31. Local 761, Int'l Union of Elec., Radio & Mach. Workers, 123 N.L.R.B. 1547 (1959).

32. Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961).

33. In the *General Electric* case, the Court stated:

> Where the work done by the secondary employees is *unrelated* to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer. The application of the Dry Dock tests to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the "dual congressional objectives of preserving the right of labor organizations 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."

Id. at 679 (quoting in part from NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951)). (Emphasis added.)

34. It is plain, therefore, that the Court did not seek to interfere with the Board's traditional approach to common situs problems . . . . [R]ather, the Court's decisions in General Electric and Carrier Corp., merely 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.

Principal case ¶ 9787, at 16623.

35. 376 U.S. 492 (1964).

interest of the union in "halting the day-to-day operations of the struck employer" through economic pressure.[36]

The Board's position that the related work doctrine applies only to picketing which occurs at the primary employer's premises may be supported by the Court's repeated reference in *Carrier* to the primary's plant.[37] However, there is also language in the opinion which suggests that location is significant only insofar as it aids the factual inquiry into whether the work of the secondary employees is related to the primary employer's *everyday* operations.[38] It would seem that the latter rather than the former interpretation is more in keeping with the Court's underlying position in *Carrier* and *General Electric* that neutral employers who contribute to the normal operations of the primary employer lose their neutrality, and that appeals may be made to such of their employees as do contribute to those operations.[39] The Court's theory is that if the work of the secondary employees and the daily operations of the primary employer are so interrelated that the cessation of the primary's operations renders the services or materials supplied by the secondary employees superfluous, the secondary employees are proper objects of primary picketing. By depriving the secondary employer of this outlet for his materials and services, the union accomplishes only that which would have occurred had there been a successful shut down of the primary employer. Clearly, this functional analysis transcends geographical considerations except to the extent that the place where the secondary employees render their services is evidence of the relationship between those services and the primary employer's normal operations.[40] Consequently, it appears that in any common-

36. *Id.* at 499.

37. *Id.* at 499-501.

38. The Court noted that the gate picketed was on property owned by the secondary employer and only adjacent to the struck employer's plant. It then stated:

> [T]he location of the picketing is an important but not decisive factor . . . [that] "the picketing was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished" . . . [and that] picketing at a situs so proximate and related to the employer's day-to-day operations is no more illegal than if it had occurred at a gate owned by Carrier.

Id. at 499-500.

39. In a series of cases originating and developing the so-called "ally" doctrine, the courts have recognized that a similar situation exists when one employer aids a struck employer by performing work that the struck employer would otherwise have done, in an attempt to break the strike. The secondary employer is regarded as an "ally" rather than a "neutral" and § 8(b)(4) is construed to protect only "neutral" secondary employees. See NLRB v. Business Mach. Mechanics, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956); Douds v. Metropolitan Fed'n of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948). See generally Asher, *Secondary Boycotts—Allied, Neutral and Single Employers*, 52 GEO. L.J. 406 (1964); Note, *The "Ally" Doctrine Under Section 8(b)(4)(B): A Functional Approach*, 37 N.Y.U.L. REV. 508 (1962).

40. The only effect on the secondary employer is that he loses a market for his goods or services. This result obtains from the very fact that a successful strike closes down his customer. In Seafarers Union v. NLRB, 265 F.2d 585 (D.C. Cir. 1959), the union picketed at a shipyard owned by a secondary employer because the primary

situs situation the *Moore* standards are only evidentiary aids for determining whether picketing is, in fact, directed at secondary employees.[41] If it is so directed, *General Electric* and *Carrier* seemingly require the additional inquiry of whether the aim of the appeals is to deprive the secondary employer of no more than the market for his goods or services that was supplied by the normal operations of the primary employer.

The second, but perhaps primary, reason why the Board refused to apply the related work doctrine in the principal case was its concern with the Supreme Court's decision in *NLRB v. Denver Bldg. & Constr. Trades Council.*[42] In *Denver* the union had picketed an entire construction site in aid of its dispute with a non-union subcontractor.[43] The employees of other subcontractors and of the general contractor refused to work on the project. The employees of the non-union subcontractor, however, continued to work until the general contractor terminated their employer's contract and replaced them with union workers. The Supreme Court affirmed the Board's determination[44] that the picketing was designed to force the general contractor to cease doing business with the non-union subcontractor, and thus was a violation of section 8(b)(4).

In the principal case, the Board argued that the application of the related work doctrine to construction site picketing would have the effect of reversing *Denver.*[45] Since the Supreme Court had not expressly overruled *Denver* in *General Electric* or *Carrier*, the Board was unwilling to do so in the principal case. It appears, however,

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employer's ship was docked there. In upholding the picketing, even though it resulted in the secondary employees' refusal to work on the ship, the Court of Appeals said:

> [T]his pressure was the same sort as that felt by an employer when one of his major suppliers or customers is being picketed, or that which a contractor feels when a subcontractor is struck at a crucial point in construction. . . . Here Todd, the unoffending employer, bore no more adverse effects than it would have suffered had it been working on the Pelican [the primary employer's ship] at a dock owned by Salt Dome [the primary employer] several miles away and had the picketing been at that dock.

Id. at 591-92.

41. Recent Board decisions recognize that the *Moore* tests are evidentiary guides rather than mechanical rules. See, *e.g.*, United Bhd. of Carpenters (Dobson Heavy Haul, Inc.), 1966 CCH NLRB ¶ 20059 (1965); Office & Professional Employees (American Presidents Lines, Ltd.), 1966 CCH NLRB ¶ 20190 (1966).

42. 341 U.S. 675 (1951).

43. Section 1 of article I-B of the Council's by-laws, as cited by the Court, 341 U.S. at 678 n.3, contained a self-imposed duty "to stand for absolute *closed shop* conditions on all jobs."

44. Denver Bldg. & Constr. Trades Council (Gould & Preisner), 82 N.L.R.B. 1195 (1949), *enforcement denied*, 186 F.2d 326 (D.C. Cir. 1950).

45. Principal case ¶ 9787, at 16624. The Board also argued that because the Supreme Court rejected the union's contention in *Denver* that the contractor and subcontractor were "allies," *Denver* was support for the Board's refusal now to apply the related work doctrine. The fallacy in the Board's reasoning lies in the premise that the "ally" doctrine and the related work doctrine apply to the same factual situations. See authorities cited note 39 *supra* and accompanying text.

that the facts in *Denver* are distinguishable from those in the principal case, and consequently the Board need not have felt bound by the *Denver* precedent. In *Denver*, the union's dispute was with a subcontractor on the construction project, not with a general contractor. A subcontractor's normal operations are limited to a specific part of the project, and the union's interest is correspondingly limited to the closing down of that particular operation. Nevertheless, the union had directed its picketing at all secondary employees, including employees of the general contractor, without regard to the relationship between the work of the subcontractor and the work of the general contractor. Since this picketing was designed to deprive the secondary employers of any work by their employees and to force these employers to refuse to deal with the primary employer, it is distinguishable from the questioned activity in the principal case where the union's dispute was with the general contractor and the work of the subcontractors who were the objects of the picketing was clearly related to the general contractor's daily operations. The picketing in the principal case was thus aimed at depriving the secondary employers only of that which they would have been deprived of had the union been successful in forcing the general contractor to halt its operations.

These comments are not intended to imply that the principal case and *Denver* are to be distinguished simply by the fact that the primary employer was a general contractor in one case and a subcontractor in the other. Instead, the distinction is and must be based on a functional analysis of the relationship between the work of the secondary employees and the daily operations of the primary employer. Thus, if the union in *Denver* had picketed only those employees of the general contractor who specifically aided the primary's employees, the related work doctrine would have operated to sustain the union's appeal to such employees.[46] On the other hand, an application of the related work doctrine may result in a decision that picketing of a subcontractor's employees is illegal in a union dispute with the general contractor. For example, in *Local Union No. 55 (Professional and Business Men's Life Ins. Co.)*,[47] the union picketed an entire construction project in a dispute with the landowner (an insurance company) who was acting as its own general contractor. The Board held that the picketing was unlawful because it was directed at secondary employees (neutral subcontractors). In discussing this case in *General Electric*, the Supreme Court approved the result, although it rested its decision on a finding that "the work done by the secondary amployees is unrelated to the

46. See St. Antoine, *supra* note 13, at 35.

47. 108 N.L.R.B. 363, *enforced*, 218 F.2d 226 (10th Cir. 1954).

normal operations of the primary employer."[48] Thus, the Court implied that the related work inquiry must be made in each case, although in the majority of construction cases the subcontractor's work will be sufficiently related to the normal operations of the general contractor.

Although it seems clear that the related work doctrine should have been applied in the principal case, it is not clear that the application of the doctrine will, as a practical matter, consistently prevent the evil that the statute was designed to eliminate. Even if a union's appeal at a common situs complies with the *Moore* standards or is properly encompassed by the related work theory, it is still possible that the mere presence of a picket at the project, wherever located, will result in a refusal to work by employees of all of the employers at the site. As Mr. Justice Douglas has said:

> Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.[49]

Thus, although the language of section 8(b)(4) is phrased in terms of a forbidden "object," it is questionable whether the related work doctrine, which delineates the scope of objects properly appealed to, is an adequate protection to secondary employers if pickets do, in fact, evoke responses from a secondary employee who is not properly an object of the picketing.

There are at least three possible ways of dealing with the actual effects of picketing which otherwise complies with the *Moore* or related work standards: (1) all picketing could be forbidden when there is an immediate danger that it will bring about the unlawful result, irrespective of the objects of the picketing; (2) all picketing which actually accomplishes a forbidden result could be declared an unfair labor practice whether or not the union claims to have a lawful object; or (3) all picketing limited to primary employees or secondary employees who perform related work could be allowed regardless of the actual result of such picketing. It is believed that the second proposal is the best solution. The first would probably run afoul of the statutory language; if it did not, it would force the Board to engage in subjective conjecture of the highest order and such a rule may consequently result in the prohibiting of picketing which neither aims at nor accomplishes the unlawful result. The third proposal possesses the merit of certainty, but, unfortunately, is de-

48. Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667, 679 (1961). (Emphasis added.)

49. Bakery Drivers v. Wohl, 315 U.S. 769, 776 (1942) (Douglas, J., concurring, joined by Black, J. and Murphy, J.).

tached from reality. To allow all picketing which is addressed to primary employees or secondary employees who perform related work without considering the actual effect of the picketing on other secondary employees is to contravene the policies underlying the statute—the protection of secondary employers from pressures which infringe upon their neutral status.[50] The simple, workable standard is the second proposal which would place on the union the burden of insuring that the forbidden result does not occur, a burden which the union is uniquely able to carry. The union's responsibility would be to utilize internal controls to encourage union members to disregard picket lines which are not properly directed at them, just as the unions have, in the past, exerted internal controls to promote a member's respect for such picket lines. Lawful picketing would not be directly curtailed, but the picketing union could no longer condone a secondary employee's refusal to cross a picket line when the picket line does not properly appeal to the employee.

Thus, it appears that the *Moore* tests should be used as evidentiary guides in determining at which employees the picketing is directed and in setting the limits of an appeal to those employees who are deemed primary employees. The related work test should be applied to determine to which secondary employees, if any, a union may lawfully appeal for support in a dispute with the primary employer. Finally, picketing which fulfills the *Moore* or the related work test, but which nevertheless results in refusals to work by other secondary employees should be deemed to have an unlawful objective and should therefore be condemned.

50. See generally Lesnick, *supra* note 8. The objections in the text to the third proposal are based on the present statutory language. However, a recent congressional bill, H.R. 10027, would add a proviso to § 8(b)(4)(B) that would except from its prohibitions any picketing at a construction site aimed at construction workers regardless of the effect the picketing has on neutral employees. The bill, in effect, proposes that picketing at a construction project of the employees of general contractors and of subconcontractors be treated just as picketing at a manufacturing plant of employees who work in different departments of the plant. The House Committee of Education and Labor reported a "clean" bill on H.R. 10027. H.R. REP. No. 1041, 89th Cong., 1st Sess. (1965).