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Labor Law-Picketing-Per Se Application of Washington Coca Cola Doctrine Overruled by the NLRB

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LABOR LAW—PICKETING—PER SE APPLICATION OF WASHINGTON COCA COLA DOCTRINE OVERRULED BY THE NLRB—During a labor dispute with an electrical contractor, a union picketed the job site, the premises of a neutral employer, rather than the office of the primary employer where the contractor's employees reported for a few minutes at the beginning

and end of each work day. The picket signs stated that the union's dispute was only with the contractor, and the picketing was limited to the times when the contractor's employees were present (except that it did not stop when the contractor's employees left for lunch and coffee breaks). The neutral employer filed a complaint with the National Labor Relations Board alleging unfair labor practices[1] on the part of the union and the trial examiner ruled, in reliance on the *Washington Coca Cola* doctrine, that the picketing was unlawful since the contractor had a regular place of business which the union could adequately picket. Moreover, under the tests laid down by the *Moore Dry Dock Co.* case,[2] the picketing was unlawful since it was done at times when contractor's employees were away from the job site. On review by the Board, *held,* the picketing was permissible.[3] The *Washington Coca Cola* doctrine is overruled as a per se requirement of ambulatory situs picketing, and the *Moore Dry Dock* standards are not to be applied on an indiscriminate per se basis. *Local 861, Int'l Bhd. of Elec. Workers,* 135 N.L.R.B. No. 41 (Jan. 12, 1962).

Under section 8 (b) (4) of the National Labor Relations Act it is an unfair labor practice for a union to strike or picket with the objective of forcing any person to cease doing business with any other person.[4] Since it is arguable that an object of every strike is to dissuade all persons from entering the premises for business reasons, a literal application of the statute might outlaw all strike-connected picketing. However, congressional recognition of the right to strike and to engage in other concerted activities[5] shows that no such sweeping prohibition was ever contemplated.[6] Rather, section 8 (b) (4) (i) (B) was designed to modify the right to picket to accord with the congressional feeling that neutral employers and employees deserve protection from direct and purposeful efforts to involve them in the labor disputes of others.[7] Accordingly, even before the recent amendments to the act,[8] the Board had drawn a line

1 Brought under NLRA § 8(b)(4)(i)(B), as amended, 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4)(i)(B) (Supp. III, 1962).

2 Sailors Union of the Pacific (Moore Drydock Co.), 92 N.L.R.B. 547 (1950).

3 Members Leedom and Rogers dissented.

4 NLRA § 8(b)(4)(i)(B), as amended, 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4)(i)(B) (Supp. III, 1962).

5 NLRA §§ 7, 13, as amended, 61 Stat. 140, 151 (1947), 29 U.S.C. §§ 157, 163 (1958).

6 See S. REP. No. 105, 80th Cong., 1st Sess. 22 (1947).

7 Note, 45 GEO. L. J. 614, 641 (1957).

8 In 1959, the following proviso was added to § 8(b)(4)(i)(B): "*Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The purpose of the proviso was to make it clear that the 1959 amendments to § 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of the primary labor dispute. In this connection, the *Washington Coca Cola* case was cited as existing law by the Conference Report. See H.R. REP. No. 1147, 86th Cong., 1st Sess. 38 (1959). The Board, however, did not feel it was precluded from a re-examination of *Washington Coca Cola.* See principal case, 2 LAB. REL. REP. (49 L.R.R.M.) 1446, 1449 (Jan. 12, 1962).

between primary (permissible) pressures and secondary (proscribed) action. Where the place of business of the employer party to the dispute was stationary and geographically removed from the premises of any other employer, the Board initially based its determination upon whether the pressures were geographically confined to the situs of the dispute.[9] Thus, if the union pressures extended to the place of business of a neutral employer, they were secondary.[10] Drawing the line was more difficult when there was no geographical separation between the premises of the primary employer and those of the neutral employer.[11] In such common-situs situations where the business operations of a primary employer were ambulatory and took place temporarily at the premises of a neutral, an ambulatory situs picketing doctrine was developed: under certain conditions, picketing at the neutral employer's premises would be privileged when the situs of the dispute with the primary employer was carried, through the movement of his employees, to the premises of such neutral employer.[12] In the *Moore Dry Dock Co.* case, the Board stated that this privilege would apply if the following conditions were met: (a) The picketing is strictly limited to times when the situs of dispute is located on the neutral 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.[13] The courts have accepted these criteria to exonerate this ambulatory situs picketing at the neutral premises,[14] and even have extended their application to cases where the primary and neutral employers occupied a common work site at the primary premises.[15] However, subsequent to *Moore Dry Dock*, the Board commenced a process of refinement which indicated a substantial modification of its earlier approach. In the *Washington Coca Cola* case[16] the *Moore Dry Dock* cri-

9 International Bhd. of Teamsters, 84 N.L.R.B. 360 (1949), *order dismissing complaint set aside sub nom.* International Rice Milling Co. v. NLRB, 183 F.2d 21 (5th Cir. 1950), *rev'd*, 341 U.S. 665 (1951); Oil Workers Union, 84 N.L.R.B. 315 (1949).

10 *E.g.*, United Bhd. of Carpenters, 81 N.L.R.B. 802 (1949), *enforced*, 184 F.2d 60 (10th Cir. 1950), *cert. denied*, 341 U.S. 947 (1951).

11 See generally Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125 (1959).

12 See International Bhd. of Teamsters, 87 N.L.R.B. 502 (1949).

13 See Sailors Union of the Pacific (Moore Drydock Co.), 92 N.L.R.B. 547 (1950).

14 See, *e.g.*, NLRB v. Truck Drivers Union, 228 F.2d 791 (5th Cir. 1956); NLRB v. Service Trade Chauffeurs Union, 191 F.2d 65 (2d Cir. 1951).

15 See Piezonki v. NLRB, 219 F.2d 879 (4th Cir. 1955); NLRB v. Local 55, Carpenters Council, 218 F.2d 226 (10th Cir. 1954); NLRB v. Chauffeurs Union, 212 F.2d 216 (7th Cir. 1954).

16 Brewery & Beverage Drivers (Washington Coca Cola Bottling Works), 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955); see also Albert Evans, 110 N.L.R.B. 748 (1954).

teria were qualified by the fact that the primary employer had a permanent place of business at which a union could adequately publicize its dispute; picketing at the premises of the secondary employer was conclusively presumed to be unlawful. The Board reasoned that if a union can reach the employees of the primary employer at the employer's premises, then it cannot accomplish more by appealing to those same employees again at a secondary employer's premises. In that situation, it was stated, the only reasonable inference was that the picketing is directed at the employees of the secondary employer.[17]

Judicial reaction to the *Washington Coca Cola* decision was divided. While some courts supported it,[18] others, refusing to enforce the Board's orders, objected to the rigid application of *Washington Coca Cola* without an analysis of the entire factual context to determine if the proscribed object was present.[19] Judicial hostility gave impetus to the Board's approach, in subsequent cases of this type, to rely not only on *Washington Coca Cola*, but alternatively upon a consideration of the totality of circumstances in finding the proscribed objective set forth in section 8 (b) (4) (i) (B).[20]

In the principal case, the Board, in overruling the *Washington Coca Cola* doctrine, has shifted its position with respect to ambulatory situs picketing. [21] Henceforth, a determination as to whether such picketing is privileged will be dependent upon the presence or absence of the proscribed object as determined by an examination of the totality of the evidence. This position is further manifested in the Board's declaration that picketing is permissible during lunch and coffee breaks, the Board stating that the *Moore Dry Dock* standards "are not to be applied on an indiscriminate 'per se' basis, but are to be regarded merely as aids in determining the underlying question of statutory violation."[22] The deci-

17 Local 657, Int'l Bhd. of Teamsters, 115 N.L.R.B. 981, 984 (1956).

18 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 Steelworkers, 250 F.2d 184 (1st Cir. 1957).

19 Sales Drivers, 110 N.L.R.B. 2192 (1954), *enforcement denied*, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956); General Drivers, 109 N.L.R.B. 275 (1954), *enforcement denied*, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955); *cf.* NLRB v. Local 294, Int'l Bhd. of Teamsters, 284 F.2d 887, 890-91 (2d Cir. 1960); NLRB v. Business Mach. Workers, 228 F.2d 553 (2d Cir.), *cert. denied*, 351 U.S. 962 (1956).

20 See, *e.g.*, Local 522, Lumber Drivers, 126 N.L.R.B. 297 (1960); Local 294, Int'l Bhd. of Teamsters, 124 N.L.R.B. 1245 (1959); Commission House Drivers, 118 N.L.R.B. 130 (1957); Chauffeurs Union, 117 N.L.R.B. 1344 (1957).

21 See Local 59, Int'l Bhd. of Elec. Workers, 49 L.R.R.M. 1527 (Jan. 24, 1962), where the principal case was followed and reaffirmed. As a prelude to the principal case, see Local 662, Radio Workers, 133 N.L.R.B. No. 165 (1961), where *Washington Coca Cola* was distinguished on the grounds that the radio station, by using mobile broadcasting units during a strike, moved its regular place of business to a neutral employer's situs when a mobile unit parked in front of the neutral employer's store and broadcast from there.

22 Principal case, 2 LAB. REL. REP. (49 L.R.R.M.) 1446, 1449 (Jan. 12, 1962).

sion made clear, however, that the opportunity to picket the primary employer's principal place of business still remains a factor to be considered, along with the *Moore Dry Dock* criteria, in determining whether particular ambulatory situs picketing is permissible.

This change in attitude toward the nature of the primary-secondary distinction is also manifested in recent Board and Supreme Court decisions dealing with picketing that occurs on the premises of the primary employer, for it may be said that there, too, the original "physical situs" approach has been replaced by one focusing on the union objective as found from the totality of facts.[23] In broader context, the decision is representative of the Board's general dissatisfaction with per se rule making, and a return to the traditional exercise of the Board's expertise on the whole record on an *ad hoc* basis.[24] Admittedly, in the area of strike picketing the *in toto* approach may be more difficult to apply since all picketing would seem to seek attainment of the proscribed object. As a result, greater weight will probably be placed upon the actual effect of the picketing on neutral employers and employees, though ostensibly the Board's newly adopted approach provides the union greater freedom since the burden of proving the presence of the proscribed object falls on the Board's general counsel.[25] Although much can be said for the utility of objective criteria as providing fixed guides for conduct, labor law—more specifically picketing—seems to be an area unsuitable for the application of per se criteria. The variety of factual settings and industries affected makes any such approach undesirable since inevitably there will be some cases where such an approach would serve to nullify the statutory right to picket. For example, under the *Washington Coca Cola* doctrine, to find unlawful all picketing at the situs where the employees of the primary employer spend practically their entire working day simply because, as here, they may report for a few minutes at the beginning and end of each day to the regular place of business of the employer, seems an indefensible position.[26] Instead, the better approach, as expressed in the principal case, would appear to be an inquiry directed toward determining whether the union's purpose, with

23 See Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961); Retail Fruit & Vegetable Clerks' Union, 116 N.L.R.B. 856 (1956). *But see* Teamsters Union v. NLRB, 293 F.2d 881 (D.C. Cir. 1961). See generally Note, 45 GEO. L.J. 614 (1957); Note, 36 IND. L.J. 203 (1961).

24 See address by Member Brown, Institute on Labor Law, Duke University Law School, Feb. 9, 1962. 1 LAB. REL. REP. (49 L.R.R.) 364, 370.

25 NLRA § 10, as amended, 61 Stat. 146 (1947), 29 U.S.C. § 160 (1958).

26 Although the Board chose not to, the *Washington Coca Cola* rule can be distinguished, since ostensibly the union could not picket the primary employer effectively. Brotherhood of Painters, 110 N.L.R.B. 455 (1954). *But see* Albert Evans, 110 N.L.R.B. 748 (1954). See also General Drivers, 109 N.L.R.B. 275 (1954), where the Board suggested that in construction cases the actual situs of the dispute may be decisive. *But see* NLRB v. Truck Drivers Union, 228 F.2d 791 (5th Cir. 1956).

due regard to all the circumstances, is to accomplish the proscribed object of involving neutral employers and employees in the subject labor dispute.[27] This will, of course, give rise to a Board-imposed responsibility on the part of the union to shield neutral employers and others from controversies not their own. Though *Moore Dry Dock* offers broad guidelines, the precise nature and extent of this responsibility can best be determined as each case arises—insuring flexibility and a proper balance of all the rights involved.[28]

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27 See Upholsterers Union, 132 N.L.R.B. No. 2 (1961), where the Board held that union intent is to be resolved in light of all the evidence in the particular case, thus overruling United Wholesale Employees, 129 N.L.R.B. 1014 (1960), which applied a "foreseeable consequence" test. *Cf.* NLRB v. Business Mach. Workers, 228 F.2d 553 (2d Cir. 1955).

28 See Superior Derrick Corp. v. NLRB, 273 F.2d 891 (5th Cir. 1960), where the court declared that common situs picketing put an affirmative duty on the primary union to inform all secondary employees that the primary union does not seek the proscribed object. See also Seafarers Int'l Union, 119 N.L.R.B. 1638 (1958), where the Board declared that it was the union's duty to answer questions asked by the neutral firm's employees and to assure them that the union had no intent to disrupt their employer's business.