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THE GRAVAMEN OF THE SECONDARY BOYCOTT

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"The gravamen of a secondary boycott," Judge Learned Hand has told us, "is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands."¹ That is the Law, from the pen of one of its major prophets; what follows is an attempt at commentary.

Federal regulation of secondary pressure is embodied in Section 8(b)(4)-(B) of the National Labor Relations Act,² a section aptly described as "surely

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1. *International Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950).

2. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1958), as amended, 29 U.S.C. § 158(b)(4)(B) (Supp. III, 1962), amending 49 Stat. 452 (1935). The relevant portions of § 8, as amended by 73 Stat. 542 (1959), presently read as follows:

(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 a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, 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 strike or primary picketing;

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this act

In addition, §§ 8(b)(4)(A) and 8(e) contain provisions relevant to areas of secondary pressure not the concern of this article. See note 7 *infra*.

Prior to 1959, what is now the first portion of subparagraph (B) was found in subparagraph (A); accordingly, many of the pre-1959 cases refer to § 8(b)(4)(A), while more recent references are to § 8(b)(4)(B). To avoid confusion I have referred, except in quotations, simply to § 8(b)(4): it will of course be understood that I am only encompassing thereby the secondary boycott provisions of that paragraph.

one of the most labyrinthine provisions ever included in a federal labor statute."³ The text of the statute condemns refusals to perform any services, or the inducement of such refusals, when an object thereof is forcing one employer to cease doing business with another. Although the focus of congressional attention was on the secondary strike—"a strike against employer A for the purpose of forcing that employer to cease doing business with employer B . . . (with whom the union has a dispute)"⁴—the language reaches picketing, which is typically calculated to "induce or encourage" such a strike, as well. While the act does not use the term, it has been more or less generally recognized since its passage that boycott action⁵ must be "secondary" in character to fall within the bar of Section 8(b)(4), and since 1959 this limitation has been explicit in the proviso declaring section 8(b)(4)(B) inapplicable to "any primary strike or primary picketing." The content of the dichotomy thus made relevant, between primary and secondary picketing—"unquestionably the area of greatest difficulty and importance in the administration of the statute"⁶—is the subject of this article.⁷

3. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959* (pt. 2), 73 HARV. L. REV. 1086, 1113 (1960).

4. S. REP. NO. 105, 80th Cong., 1st Sess. 22 (1947), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 428 (1948) [hereinafter cited as LMRA LEG. HIST.]. The employer with whom the union has a dispute is typically, and will be here, referred to as "the primary employer"; the other, with whom he does business and who is the object of the boycott pressure, is "the secondary employer."

5. One may, I believe, accurately differentiate the following terms: A "boycott" is a refusal to deal, whether by an employee or a customer (or, more rarely, a seller); a "strike"—a refusal to work—is then a variety of boycott; "picketing" is ordinarily an attempt, by means of patrolling at a site with a message of some kind on the picket sign, to instigate a boycott on the part of those seeing the picket.

6. Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 129 (1959).

Although Congress has devoted much attention to secondary boycotts and generally exhibited little reticence in expressing its feelings about them, one can hardly say that the legislators have demonstrated even general agreement on the identity of the creature in question. See, e.g., Senator Ellender's definition:

A secondary boycott, as all of us know, is a concerted attempt on the part of a strong union to compel employers to deal with them, even though the employees of that employer desire to be represented by other unions, or not to be represented at all.

93 CONG. REC. 4255 (daily ed. April 28, 1947), in 2 LMRA LEG. HIST. 1056.

7. Significant issues involving this dichotomy, and the extent to which the statute (particularly § 8(e)) respects it, are raised in cases not involving picketing, principally those in which the dispute itself concerns the business relationship between the employer of the employees in question and another employer. E.g., *International Longshoremen's Ass'n (Board of Harbor Comm'rs)*, 137 N.L.R.B. No. 117 (July 3, 1962); *Local 5, United Ass'n of Journeymen (Arthur Venneri Co.)*, 137 N.L.R.B. No. 100 (June 26, 1962); *Glaziers Union (E. Frank Muzny)*, 137 N.L.R.B. No. 25 (June 4, 1962); *Local 19, Longshoremen Union (J. Duane Vance)*, 137 N.L.R.B. No. 13 (May 15, 1962); *Local 1066, Int'l Longshoremen's Ass'n (Wiggin Terminals, Inc.)*, 137 N.L.R.B. No. 3 (May 2, 1962); *Milk Drivers Union (Minnesota Milk Co.)*, 133 N.L.R.B. 1314 (1961); *Highway Truck Drivers (E. A. Gallagher & Sons)*, 131 N.L.R.B. 925 (1961), *enforced*, 302 F.2d 897 (D.C. Cir. 1962); *Retail Clerks Ass'n (Food Employers Council, Inc.)*, 127 N.L.R.B. 1522 (1960), *modified*, 296 F.2d 368 (D.C. Cir. 1961); *Washington-Oregon Shingle Weavers (Sound Shingle Co.)*, 101 N.L.R.B. 1159 (1952), *enforced*, 211 F.2d 149 (9th Cir. 1954). These issues are not considered here.

The primary-secondary dichotomy is similarly drawn in question in cases in which

The setting of the problem can be no more succinctly provided than by borrowing the words of Professor, now Solicitor General, Archibald Cox:

Historically, a boycott is a refusal to have dealings with an offending person. To induce customers not to buy from an offending grocery store is to organize a primary boycott. To persuade grocery stores not to buy Swift products is also a primary boycott. In each case the only economic pressure is levelled at the offending person—in terms of labor cases, at the employer involved in the labor dispute.

The element of "secondary activity" is introduced when there is a refusal to have dealings with one who has dealings with the offending person. For example, there is a secondary boycott when housewives refuse to buy at any grocery store which deals with Swift & Co. For members of the Plumbers Union to refuse to work for any contractor who buys pipe from the United States Pipe Co. is, strictly speaking, a secondary strike but is called a secondary boycott and is, of course, the only kind of secondary activity which was prohibited under the Taft-Hartley Act [prior to the 1959 amendments]. Thus, there are two employers in every secondary boycott resulting from a labor dispute.

Picketing at the scene of a labor dispute often requires the drawing of fine distinctions between primary and secondary activities. NLR section 8(b)(4)(A) obviously makes it unlawful for the Teamsters Union to induce the employees of the ABC Express Co. to refuse to transport furniture delivered at the ABC terminal by the Modern Furniture Co., some of whose employees are on strike, for one of the Teamsters Union's objectives would be to force the express company to cease doing business with the furniture company. Suppose, however, a second case, where the furniture company telephones the express company to pick up the furniture at the factory, but the strikers dissuade the express company's drivers from entering. The refusal to cross the picket line, not the strike, applies the economic pressure. The words of section 8(b)(4)(A) are equally as applicable as in the first case⁸

Whether the act bars the conduct described in the prototype case put by Cox, or in more complex variations of it, is a problem that the Board and courts—including, on two occasions, the Supreme Court—have struggled with for more than a dozen years. Time, however, has not yielded a growing agreement on an approach to the problem. Through the many shifts of emphasis and approach manifested by the precedents, perhaps the most stable element has been discord; whatever the result, one can ordinarily expect Board decisions in this field to be divided. In these pages I will endeavor, after describing the experience with the problem,⁹ to analyze the contending ap-

the union, having a dispute with the primary employer, asserts that it also has a dispute with the allegedly secondary employer, so that the taking of strike action against it is primary and lawful. Such cases merely raise issues of fact. See, *e.g.*, Roanoke Bldg. Trades Council (Kroger Co.), 117 N.L.R.B. 977 (1957); Chauffeurs Union (Reilly Cartage Co.), 110 N.L.R.B. 1742 (1954).

8. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959).

9. The reader who is familiar with the litigation in this area, or who is reluctant to

proaches to the primary-secondary dichotomy as applied to picketing, and to offer a suggested rationale.

I. THE SHIFTING CURRENTS OF BOARD DOCTRINE, 1949-1962

A. *Picketing at the Primary Employer's Place of Business*

The Board first seriously considered the effect of section 8(b)(4) on assertedly primary activity in *Oil Workers (Pure Oil Co.)*.¹⁰ The respondent union, engaged in a contract-renewal dispute with Standard Oil Company, picketed a dock leased to Standard for loading oil. Pure Oil had the right to use the dock for the same purpose, and when the strike made the Standard employees who ordinarily loaded Pure as well as Standard Oil products unavailable, Pure Oil sought to have its own employees do the loading work. They refused to cross the picket line at the dock. In addition, the respondent advised the National Maritime Union's local port agent by letter that Pure Oil's cargo was "hot" at the Standard Oil dock but that it was nonetheless "cleared" for loading by Standard foremen.

The Board, in dismissing the complaint, held that, because the picketing was carried on at the primary employer's premises, and the appeal to boycott contained in the National Maritime Union's letter referred only to services to be performed at those premises, the union's actions were "primary" rather than "secondary." The Board stated that "the appeals contained in the letters, no less than the appeals inherent in the picketing of the dock and in the signs which were posted adjacent to the picket line, thus amounted to nothing more than a request to respect a primary picket line *at the Employer's premises*. This is traditional primary strike action."¹¹ This being so, the fact that it induced secondary employees to refuse to handle Pure Oil products, in order to force Pure Oil to cease doing business with Standard Oil, was not decisive. "A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed by Section 8(b)(4)(A) of the Act."¹² Senator Taft had made it clear, the Board reasoned, that the section applied to secondary activity only, and that primary strikes were not condemned. "'All this provision of the bill does,'" the Senator had said, "'is

read a substantial number of essentially descriptive pages, is urged to skip at least to the discussion of the Supreme Court's *General Electric* decision, see text accompanying notes 110-36 *infra*, and perhaps to the end of Part I. A detailed description of the course of the precedents is included because I found it impossible to come to grips with the substantive issues until I had carefully worked through the cases.

10. 84 N.L.R.B. 315 (1949).

11. *Id.* at 319.

12. *Id.* at 318.

to reverse the effect of the law [the Norris-LaGuardia Act] as to secondary boycotts.'"¹³

The Board thus squarely adopted the view—often described as the “primary situs” doctrine—that the act does not bar primary, but only secondary, activity, and that inducement of secondary employees to refuse to work at the primary employer’s premises is primary activity. The Board, however, was apparently not content to stop there, but attempted to accommodate its decision to the language of the statute:

Moreover, on the facts of this case we would be compelled to dismiss the complaint on yet another ground, because we are not persuaded that *an object* of the Union’s activity was forcing or requiring Pure Oil to cease doing business with Standard Oil The fact that the Union’s primary pressure on Standard Oil may have also had a secondary effect, namely inducing and encouraging employees of other employers to cease doing business on Standard Oil premises, does not, in our opinion, convert lawful primary action into [unlawful] . . . secondary action within the meaning of Section 8(b)(4)(A).¹⁴

This alternative holding, foreshadowing similar statements in future cases, trails a full portion of problems. Apparently the terms “secondary effect” and “consequence” were meant to suggest an unintended result, as contrasted with an “object.” But such a view hardly seems consistent with the evidence¹⁵ or, more broadly, with the earlier statement that picketing is “necessarily designed” to cause third persons to boycott the primary.

For a time the uncertainties regarding the rationale and scope of the alternative ground in *Pure Oil* remained latent. In several cases decided in 1949 and 1950, the Board relied entirely on the idea that, regardless of its language, the act did not apply to primary activity, and that activity at the primary site was perforce primary.¹⁶ In one of these—*United Elec. Workers*

13. *Ibid.*, quoting 93 CONG. REC. 4323 (daily ed. April 29, 1947), in 2 LMRA LEG. HIST. 1106.

14. 84 N.L.R.B. at 319-20.

15. For example, when Pure Oil’s superintendent sought to obtain union approval of use of Pure Oil employees to load at the dock, the international representative “commented that Pure had no employees who operated the facilities of the pipe lines and the dock used in loading cargo, and that no provision for such employees was included in the current contract between the Union and Pure. He suggested that the easiest way for Pure to get the desired results was for Frank [the superintendent] to help get the strike with Standard settled.” *Id.* at 325 (intermediate report).

16. See Lumber Workers (Santa Ana Lumber Co.), 87 N.L.R.B. 937 (1949); International Bhd. of Teamsters (Di Giorgio Wine Co.), 87 N.L.R.B. 720 (1949), *aff’d sub nom.* Di Giorgio Fruit Corp. v. NLRB, 191 F.2d 642 (D.C. Cir.), *cert. denied*, 342 U.S. 869 (1951); Deena Artware, Inc., 86 N.L.R.B. 732 (1949), *modified*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953); United Elec. Workers (Ryan Constr. Corp.), 85 N.L.R.B. 417 (1949); International Bhd. of Teamsters (International Rice Milling Co.), 84 N.L.R.B. 360 (1949), *rev’d*, 183 F.2d 21 (5th Cir. 1950), *rev’d*, 341 U.S. 665 (1951).

In Newspaper Deliverers’ Union (Interborough News Co.), 90 N.L.R.B. 2135 (1950), the Board, following *Pure Oil*, held that inducement of secondary employees to refuse to deliver newspapers to the primary’s newstand was primary, because the action induced was to take place at the primary site.

(*Ryan Constr. Corp.*)—the facts made the union's object unusually clear. Ryan, a general contractor engaged for a four-month period in constructing an addition to the Bucyrus-Erie Company plant, had access to the site through a special gate used only by Ryan personnel and suppliers. When the respondent union called a strike against Bucyrus it picketed the entire plant, including the "Ryan gate." The contractors refused to cross the line, and construction work stopped. The resulting section 8(b)(4) complaint was dismissed by the Board:

Section 8(b)(4)(A) was not intended by Congress, as the legislative history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary Employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called "secondary" even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons.¹⁷

Despite the relative ease with which the Board in these cases transcended the statutory language, the Court of Appeals for the Fifth Circuit balked at the result. In reviewing the dismissal, in *International Rice Milling Co. v. NLRB*,¹⁸ of a section 8(b)(4) complaint against union picket line conduct designed to turn railroad cars operated by secondary employees away from the primary premises, the court viewed with skepticism the Board's "fine distinction" between primary and secondary activity. Confessing that it knew of "no accurate definition for the term 'secondary boycott,'" the court rested its reversal on the language of the act:

The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true "secondary boycott" under the old common law or under any of the modern and popular theories.¹⁹

The rejection by the Fifth Circuit of so central a principle in the administration of section 8(b)(4), particularly in light of its acceptance by the

17. 85 N.L.R.B. 417, 418 (1949).

18. 183 F.2d 21 (5th Cir. 1950), *rev'd*, 341 U.S. 665 (1951), *reversing* 85 N.L.R.B. 360 (1949).

19. 183 F.2d at 26. The court went on, however, to merge its literal construction with at least the skeleton of the doctrine that the act forbids only secondary activity: [I]t is apparent to us that the union was attempting to induce and encourage the employees of the [neutral] . . . to refuse to transport or otherwise handle the goods and commodities of the rice mills. . . . It seems to us that these activities became secondary when the strikers attempted to induce and encourage the employees of this neutral employer

Ibid.

Court of Appeals for the District of Columbia,²⁰ made the question appropriate for Supreme Court resolution. Although the issue was clearly drawn, and fully briefed,²¹ the Supreme Court sidestepped the problem by upholding the dismissal on the dubious ground²² that the inducement was not to "concerted" refusals to work, as then was required by the statute. Language in the Court's opinion, however, tended to support the Board's view²³ and perhaps offset the doubts that would otherwise have been generated by the Court's refusal to adopt the Board's analysis.

The erosion of the primary-situs doctrine is familiar history.²⁴ Although some cases continued to treat primary site picketing as primary,²⁵ several important decisions found violations in picketing at the primary's place of business. In *Local 55, Carpenters Council (Professional & Business Men's Life Ins. Co.)*,²⁶ the union picketed a construction site in support of a dispute with the landowner, who was acting as his own general contractor. Although the picketing was at the primary site, and the instances of direct secondary pressure against several subcontractors did not constitute violations of the act as then written,²⁷ the Board held that the picketing was secondary because "directed beyond PBM" at the neutral subcontractors.²⁸

In *Retail Fruit Clerks' Union (Crystal Palace Market)*,²⁹ the primary dispute was with the owner of a building that housed retail fruit and vegetable stands, most of which were leased to secondary employers. The primary employer offered to permit the union to enter the market and picket each

20. See *Denver Bldg. Trades Council v. NLRB*, 186 F.2d 326, 332-34 (D.C. Cir. 1950), *rev'd*, 341 U.S. 675 (1951).

21. For a summary of the Board's argument to the Court see Koretz, *Federal Regulation of Secondary Strikes and Boycotts—A New Chapter*, 37 CORNELL L.Q. 235, 245-48 (1952).

22. See *id.* at 250-52.

23. There were no inducements or encouragements applied elsewhere than on the picket line. The limitation of the complaint to an incident in the geographically restricted area near the mill is significant, although not necessarily conclusive. The picketing was directed at the [primary] . . . employees and at their employer in a manner traditional in labor disputes. Clearly, that, in itself, was not proscribed by § 8(b)(4). Insofar as the union's efforts were directed beyond that and toward the [secondary] employees . . . there is no suggestion that the union sought concerted conduct by such other employees. Such efforts also fall short of the proscriptions in § 8(b)(4).
NLRB v. International Rice Milling Co., 341 U.S. 665, 671 (1951).

The Court also referred with approval to the idea that § 8(b)(4) did not "seek . . . to interfere with the ordinary strike," *id.* at 672, citing, *inter alia*, *Pure Oil* and *Ryan*, and to the concern of the provision with "secondary boycotts." It also relied on § 13, although only for its insistence that there be inducement of "concerted" action. *Id.* at 672-73.

24. See Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 136-41 (1959); Note, 45 GEO. L.J. 614 (1957).

25. See District 50, UMW (Marion Machine Works), 112 N.L.R.B. 348 (1955); General Teamsters Union (Crump, Inc.), 112 N.L.R.B. 311 (1955); *cf.* United Ass'n of Journeymen (Columbia-So. Chem. Corp.), 110 N.L.R.B. 206 (1954).

26. 108 N.L.R.B. 363, *enforced*, 218 F.2d 226 (10th Cir. 1954) (*PBM*).

27. Clause (ii) of § 8(b)(4) was added to the statute in 1959. For the prior law see *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 98-99 (1958).

28. 108 N.L.R.B. at 367-70.

29. 116 N.L.R.B. 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957).

stand involved in the dispute, but the union picketed the entrances to the market proper. A divided majority of the Board found a violation of the act. Two members held that the rules governing "common situs" picketing³⁰ should apply even though the picketed premises were owned by the primary employer; under those rules, the union was obliged to picket at the primary stands (where the impact on secondary employers would be greatly minimized) if, as was true here, access to them was possible. The concurring member relied simply upon his affirmative answer to the question whether the union's object was to appeal to the lessees' employees to refuse to work.

Finally, in *Local 618, Automotive Employees Union (Incorporated Oil Co.)*,³¹ the primary's operations similarly were closed, but under somewhat different circumstances. When a contract-renewal dispute at Site Oil's gasoline stations led to a strike, Site Oil replaced the strikers and continued operations. For two years intermittent picketing continued; when Site Oil engaged a building contractor to rebuild one of its stations, the union picketed that location, and construction work ceased. Thereafter, Site Oil closed the station, withdrew the employees and removed its signs, and had the contractor's employees return. The union resumed picketing, and this latter picketing the Board held unlawful, on reasoning similar to the concurring opinion in *Crystal Palace*.

These cases might have been merely a response to the "accumulating experience" of "unfolding variant situations."³² The language of the opinions, however, suggests a rejection of the primary situs doctrine. *Crystal Palace*, citing *PBM* as precedent, describes as "common situs" picketing all picketing of premises "jointly occupied by primary and secondary employers."³³ Earlier cases had regarded the common situs rules as conditions for permissible secondary site picketing, rather than as restrictions on picketing at all jointly occupied premises.³⁴ *Crystal Palace* concerned lessees of the primary, with a regular place of business at the primary site, who might therefore be thought to stand in a different position. If secondary employers whose connection with the premises was less enduring than that of a lessee would be considered as joint occupiers with the primary, the principle expressed in the opinion would go far to subject most primary site picketing to the restrictions

30. These rules, discussed in the next section, see text accompanying notes 62-70 *infra*, were originally evolved to regulate picketing at the *secondary* site at a time when *primary* employees were present. In *Crystal Palace*, they were applied to the reverse situation.

31. 116 N.L.R.B. 1844 (1956), *rev'd*, 249 F.2d 332 (8th Cir. 1957).

32. *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 674 (1961) (Frankfurter, J.). *PBM* perhaps might have rested, as the court of appeals' decision granting enforcement may have rested, see *NLRB v. Local 55, Carpenters Council*, 218 F.2d 226, 231 (10th Cir. 1954), on a factual finding that the union was seeking to induce a boycott of the subcontractors by an appeal not limited to their employees working at the primary site. See 108 N.L.R.B. at 367.

33. 116 N.L.R.B. at 858.

34. See *id.* at 870-71 (dissenting opinion).

of the common situs rules. *Incorporated Oil* goes even further, as does the concurring opinion in *Crystal Palace*, and limits even the common situs situation to instances when primary and secondary employees are behind the picket line; primary site picketing at a time when only secondary employees are present is unlawful without regard to compliance with the common situs rules.³⁵ The rationale is apparent from the Board's discussion:

The essence of the relevant proscription embodied in the language of Section 8(b)(4)(A) of the Act is to outlaw any inducement of employees to cease work where an object of such conduct is to interrupt the business carried on between their employer and any other company. In simple terms, therefore, the burden of the complaint is sustained if it is shown that (1) the picketing . . . induced [the contractor's] . . . employees to cease work, and (2) an object of the inducement was to compel [the contractor] . . . to cease doing business with Site.³⁶

This test embodies a wholly literal approach to the statutory provision, not substantially different from that taken by the Fifth Circuit in *International Rice Milling*,³⁷ and is a root-and-branch rejection of the primary situs doctrine. Despite the court of appeals' sharply worded reversal of *Incorporated Oil*,³⁸ there was no retreat. It became increasingly clear that the Board appraised union action challenged under section 8(b)(4) against the dual criteria found in the statutory language: Did the picketing induce secondary employees to refuse to perform services? Was an object of the picketing to force the disruption of business between the secondary and primary (or between two secondary) employers?³⁹ This became the theory on which subsequent cases were litigated. *Local 761, Int'l Union of Elec. Workers (General Elec. Co.)*,⁴⁰ which was to become the vehicle for further Supreme Court consideration of the primary-secondary dichotomy, presented essentially the same situation as *Ryan*—a picket line at all entrances to the struck premises, including a gate reserved for the exclusive use of contractors and their employees and suppliers. The Board, without referring to *Ryan* or its progeny, found the picketing unlawful on reasoning resting four-square on the literal construction of the act made explicit in *Incorporated Oil*.⁴¹

35. 116 N.L.R.B. at 1847-48.

36. *Id.* at 1845-46.

37. See text accompanying notes 18-19 *supra*.

38. Local 618, *Automotive Employees Union v. NLRB*, 249 F.2d 332 (8th Cir. 1957).

39. A footnote in *Crystal Palace* purported to recognize the need for "more latitude" for picketing at premises "occupied *solely* by the primary employer . . . than at premises occupied in part (or entirely) by secondary employers." The cases cited for this proposition involved primary site picketing which turned away deliverymen. 116 N.L.R.B. at 860 n.10.

40. 123 N.L.R.B. 1547 (1959), *rev'd*, 366 U.S. 667 (1961).

41. 123 N.L.R.B. at 1550-51. Member Fanning concurred, but on the ground that the rules governing common situs picketing should be applied to primary site picketing at a gate reserved for the use of secondary employees, and that those rules had not been complied with. *Id.* at 1552-53.

When, as in *Incorporated Oil* and *General Electric*,⁴² no primary employees worked behind the picket line in question, the inference that the picketing was designed to appeal to neutrals followed inevitably.⁴³ But the potential reach of a literal approach is of course not limited to such cases, and two cases decided in August 1960, indicated that the Board was prepared to follow the implications of that approach a good bit further. In *Union de Trabajadores (Gonzalez Chem. Indus.)*,⁴⁴ the striking union picketed the sole gate and orally appealed to all persons, including employees of a construction contractor, Lummus, not to enter. A majority of the Board held that the rules governing common situs picketing were applicable, although the premises were owned by the primary employer, because the secondary was "engaged in work for a relatively extended period of time at the premises" of the primary.⁴⁵ This was a significant extension of *Crystal Palace*, which concerned a lessee of the primary. While a construction contractor like Lummus may have had no more "regular" a place of business than the Gonzalez site, it becomes difficult, unless construction men are to be put in a class apart, to draw a line between "relatively extended" connections with the primary site, entitling the neutral to the protection of the act, and relatively transitory visits.

Two weeks before, a substantially longer step had been taken in *Chauffeurs Union (McJunkin Corp.)*.⁴⁶ The acts in question involved union inducement of employees of carriers not to make their scheduled pickups or deliveries at the picketed primary premises. The Board had previously regarded such acts as permissible primary action, whether the inducement was actually made by the pickets themselves at the primary premises, or by letter or telephone prior to the planned pickup or delivery.⁴⁷ The Board, without purporting to overrule any prior cases, held that the record established that the union's "whole course of conduct" was aimed at inducing employees of neutrals not to handle McJunkin's goods, with the "immediate object" of forcing a cessation of business between them and the primary. This factual finding

42. In a subsequent case much like *General Electric* on its facts, the Board gave expression to what was already apparent—*i.e.*, that *Ryan* was overruled. *Local 36, Int'l Chem. Workers (Virginia-Carolina Chem. Corp.)*, 126 N.L.R.B. 905 (1960).

43. See *United Steelworkers (United States Steel Corp.)*, 127 N.L.R.B. 823, 824-27 (1960), *enforced as modified*, 294 F.2d 256 (D.C. Cir. 1961); *Radio Broadcast Technicians (Rollins Broadcasting, Inc.)*, 117 N.L.R.B. 1491 (1957).

44. 128 N.L.R.B. 1352 (1960), *rev'd sub nom.* *Teamsters Union v. NLRB*, 293 F.2d 881 (D.C. Cir. 1961).

45. 128 N.L.R.B. at 1354. Applying the common situs rules, the Board found that the oral appeals to secondary employees demonstrated that the dispute extended beyond the primary, and rendered the picketing unlawful. For a case applying the common situs rules to a lessee of a company jointly owned with the primary see *Highway Truck-drivers Union (Riss & Co.)*, 130 N.L.R.B. 943 (1961), *enforced*, 300 F.2d 317 (3d Cir. 1962).

46. 128 N.L.R.B. 522 (1960), *rev'd per curiam*, 294 F.2d 261 (D.C. Cir. 1961).

47. See the discussion of the *Pure Oil* case at text accompanying note 11 *supra*; *cf.* *Chauffeurs Union (Milwaukee Plywood Co.)*, 126 N.L.R.B. 650, *aff'd*, 285 F.2d 325 (7th Cir. 1960).

was based on the nature of the primary picketing—confined to McJunkin's trucking entrance, and found to be for the "immediate, principal purpose" of appealing to employees of neutrals—and on the union's acts in advising common carriers with whom it had "hot cargo" agreements that its members would refuse to handle McJunkin's goods. (In addition, there was one instance of such refusal at a secondary employer's premises, which was found to violate the act, and may well have contributed to the finding as to the object of other acts; the Board, however, did not specifically refer to this incident in making the inference.) In light of such an overall object, the Board held, all acts of inducement were unlawful. "If the totality of the union's effort is intended to accomplish a proscribed objective by inducements of secondary employees, then each particular inducement, being a component part of that total effort, must be adjudged as unlawful."⁴⁸ Apparently—although this was not made explicit—all picketing was to end.⁴⁹

Unless the Board's analysis were to be applied only to cases where, as in *McJunkin*, the specific acts of inducement did not actually take place on the picket line itself,⁵⁰ it cast a threatening shadow over virtually every primary picket line.⁵¹ *McJunkin* and *Gonzales*, however, marked high water for the literal approach. Before considering the present state of the law as to primary

48. 128 N.L.R.B. at 525.

49. The Board's order did not make this clear, and only specific acts of inducement were alleged in the complaint to have violated the act. But the Board's reasoning seems to apply to the picket line itself. See *id.* at 530 n.17 (dissenting opinion); *cf.* International Bhd. of Teamsters (Alexander Warehouse & Sales Co.), 128 N.L.R.B. 916, 922 n.13 (1960).

50. One trial examiner did limit the case to such a situation. Teamsters Union (Chas. S. Wood & Co.), 132 N.L.R.B. 117 (1961), *enforced*, 303 F.2d 444 (3d Cir. 1962). No exceptions were taken to the portion of his recommended order resting on that holding, and it was adopted by the Board pro forma. 132 N.L.R.B. at 117 n.1. On principle, it is difficult to support such a distinction, as the Board itself recognized in Chauffeurs Union (Milwaukee Plywood Co.), 126 N.L.R.B. 650, *aff'd*, 285 F.2d 325 (7th Cir. 1960), at least when, as in *McJunkin*, the inducements were made in response to telephone calls by secondary employees rather than by a union official's visit to the secondary site. *But cf.* International Bhd. of Teamsters (Alexander Warehouse & Sales Co.), *supra* note 49, at 917-18, a case in which the trial examiner ruled that, where a union maintaining a picket line at the primary site followed neutral vehicles from that site to secondary premises, and there induced employee refusals to handle goods, an inference of unlawful object could be made as to the primary site picket line. The Board, in a decision rendered two weeks after *McJunkin* by a three-man panel (including the two dissenters), reversed this finding, and held that the picket line was lawful. *McJunkin* was not cited.

51. Member Fanning reminded the majority in his dissenting opinion:

The majority approach to 8(b)(4) in this case is that the paramount consideration in determining the lawfulness of the Union's conduct is its object. Having found that the object was not restricted solely to the inducement of McJunkin's employees, the majority is satisfied that a violation of Section 8(b)(4)(A) has been established by conduct otherwise lawful. . . . If [the majority is not mistaken] . . . then virtually all picketing must be forbidden under this section Ten years ago the Board said in *Schultz Refrigerated Service, Inc.*, . . . : "Plainly, the object of all picketing at all times is to influence third persons to withhold their business or services from the struck employer. In this respect there is no difference between lawful primary picketing and unlawful secondary picketing proscribed by Section 8(b)(4)(A)."

128 N.L.R.B. at 531.

site picketing, the development of Board regulation of picketing at the secondary employer's premises must be examined.

B. *Picketing Away From the Primary Site*

Picketing the premises of a secondary is of course a prototype secondary boycott, forbidden by the act.⁵² When, in *International Bhd. of Teamsters (Schultz Refrigerated Serv., Inc.)*,⁵³ the Board first came to consider the effect of section 8(b)(4) on picketing of a secondary site at a time when primary employees were present, it had already embraced the idea that the section barred secondary, but not primary, action.⁵⁴ "Within the area of primary conduct," the Board reiterated in *Schultz*, "a union may lawfully persuade all persons, including in this case the employees of Schultz's customers and consignees, to cease doing business with the struck employer."⁵⁵ Schultz had relocated its terminal from New York City to New Jersey, refused to renew a collective bargaining agreement with respondent, and discharged its drivers who formerly worked out of the New York terminal; it hired new drivers in New Jersey, and recognized another Teamsters local there. Members of respondent union followed Schultz's trucks making deliveries in New York, and picketed around them while (but only while) they were stopped to make pickups and deliveries. As in *Ryan* and *Pure Oil*, decided only shortly before, the Board emphasized the pervasiveness of a literal

52. One possible exception should be noted, although the point is apparently unsettled. The second half of § 8(b)(4)(B) condemns secondary pressure to achieve recognition, except by a certified union. This clause is largely or entirely redundant, in view of the initial portion of paragraph (B). However, the question arises whether the permission impliedly given secondary recognition efforts on behalf of a certified union operates to legalize them entirely, that is, whether the exception applies to the initial "cease doing business" clause (which, until 1959, was in subparagraph (A)) as well. There is legislative history mildly in support of such a view, see S. REP. No. 105, 80th Cong., 1st Sess. 22 (1947), in 1 LMRA LEG. HIST. 428, but the Board has apparently not ruled on the point. Cf. *General Drivers (Stephens Co.)*, 133 N.L.R.B. 1393 (1961); *Chauffeurs Union (Light Co.)*, 121 N.L.R.B. 221, 233 (1958), *enforced*, 274 F.2d 19 (7th Cir. 1960); *International Bhd. of Teamsters (Di Giorgio Wine Co.)*, 87 N.L.R.B. 720, 748-49 (1949) (intermediate report), *aff'd sub nom. Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (D.C. Cir.), *cert. denied*, 342 U.S. 869 (1951); Koretz, *Federal Regulation of Secondary Strikes and Boycotts—A New Chapter*, 37 CORNELL L.Q. 235, 239 n.25 (1952). *But cf.* *Retail Clerks Union v. NLRB*, 296 F.2d 368, 375 (D.C. Cir. 1961) (by implication).

53. 87 N.L.R.B. 502 (1949).

54. Prior to the *Pure Oil* decision, the Board had found violation of § 8(b)(4), without discussion of any primary-secondary dichotomy, in several instances of picketing the site of a construction project where an "unfair" subcontractor was employed. See, e.g., *Denver Bldg. Trades Council (Gould & Preisner)*, 82 N.L.R.B. 1195 (1949), *rev'd*, 186 F.2d 326 (D.C. Cir. 1950), *rev'd*, 341 U.S. 675 (1951); *International Bhd. of Elec. Workers (Samuel Langer)*, 82 N.L.R.B. 1028 (1949), *enforced*, 181 F.2d 60 (10th Cir. 1950), *aff'd*, 341 U.S. 694 (1951). Although the early decisions evidenced no uneasiness over a literal construction, see, e.g., the analysis in *United Bhd. of Carpenters (Wadsworth Bldg. Co.)*, 81 N.L.R.B. 802, 805-08 (1949), the Board easily fit the results in these cases into the subsequently developed primary-secondary dichotomy. See Brief for the NLRB as Petitioner, pp. 35-41, *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675 (1951).

55. 87 N.L.R.B. at 504.

construction. "Plainly, the object of all picketing at all times is to influence third persons to withhold their business or services from the struck employer. In this respect there is no distinction between lawful primary and [un]lawful secondary picketing . . ." ⁵⁶ The Board, in holding the picketing to be primary even though carried on at the secondary site, relied on two considerations. It was impressed first by the fact that, although in the "ordinary" case the primary employer carried on business at a fixed geographical location, here its only premises was a New Jersey terminal, "removed from all contact with its customers and consignees." The Board continued:

[I]n view of the roving nature of its business, the only effective means of bringing direct pressure on Schultz was the type of picketing engaged in by the Respondent. It would have been pointless, indeed, of the Respondent to establish a picket line at the New Jersey terminal and yet allow Schultz to carry on its extensive business activities in New York City, unhampered by the Respondent's protesting voice at the very scene of their labor dispute. Section 8(b)-(4)(A) does not, in our opinion, require that the Respondent limit its appeal to the public in so drastic a manner. ⁵⁷

The second factor was the limited nature of the pickets' activities. The Board deemed it "most important" that the picketing was limited strictly to the area of the primary's trucks and to the time that they were at the secondary site, ⁵⁸ that the employees involved in the primary dispute had worked for Schultz in New York, and that Schultz was engaged there in his normal business of transportation. To the Board, the picketing did not go beyond the immediate vicinity of the operations in dispute, and the interference with the business of the neutral was regarded as "incidental."

Both the rationale and the scope of the *Schultz* principle permitting some picketing at the secondary site were further expounded in the landmark case of *Sailors' Union (Moore Dry Dock Co.)*. ⁵⁹ The S.S. Phopho, with whose owner respondent was engaged in a representation dispute, had been sent to Moore for conversion by its employees; the crew of the Phopho, however, was aboard the vessel undergoing training for the voyage. Respondent, which had unsuccessfully sought permission from Moore to picket alongside the ship, did so at the entrance to the dry dock. The Board, as in *Schultz*, did not question that the picketing was in part aimed at Moore's employees, and regarded the issue as whether, and to what extent, the principle of the primary

56. *Id.* at 505. A union official admitted that "of course, we hoped that the men . . . wouldn't unload the trucks in front of the picket line." *Id.* at 510 (dissenting opinion).

57. *Id.* at 506.

58. Compare International Bhd. of Teamsters (Sterling Beverages, Inc.), 90 N.L.R.B. 401 (1950), decided shortly after *Schultz*, and in which the picketing began before the primary's trucks arrived and continued for fifteen minutes after they left, and the loading platform was inside the plant gates, preventing the pickets from getting any closer to the trucks than the entrance to the plant proper. The Board held the picketing unlawful.

59. 92 N.L.R.B. 547 (1950).

situs cases was applicable.⁶⁰ The problem was to determine the location of the situs of the primary dispute. In the usual case it was the primary premises, and in such a case "picketing of the premises is also picketing of the situs," and is governed by *Pure Oil* and *Ryan*. Where the employer's operations are not stationary, the situs too is ambulatory: the truck in *Schultz*, the ship in *Moore Dry Dock*. The situs may "come to rest" at the premises of a neutral, intended by the act to be free of secondary pressure. But if "the only way to picket that *situs* is in front of the secondary employer's premises," the union's right to picket the primary situs must be accommodated: "the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute."⁶¹

In *Moore Dry Dock* the Board further articulated and somewhat modified the conditions under which secondary site—or, as it came to be called, common situs—picketing would be permitted:

In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of 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.⁶²

Thus were launched the *Moore Dry Dock* rules. The Board did not elaborate on the reasons underlying each "rule," but the requirements as to the limits of time and place, and disclosure of the identity of the offending employer, were evidently thought necessary to create conditions analogous, in their impact on the secondary, to primary site picketing.⁶³ The "normal business" requirement doubtless drew on the discussion in *Schultz* of the pickets' interest in the operations of the primary being carried on at the secondary site. Comparing, however, the seeming content of the rules as formulated with the arguments in *Schultz* and *Moore Dry Dock* for permitting some secondary site picketing, three areas of possible difficulty could be seen. First, what is the relation between the requirement—in the fourth test in *Moore Dry Dock*—that the picketing clearly show that the dispute is with the primary alone, and the oft-repeated observation that an object of all picketing is to appeal to secondary employees to refuse to work behind the picket line? A clear case of noncompliance with this rule, for example, was

60. *Id.* at 548-49.

61. *Id.* at 549.

62. *Id.* at 549.

63. Note the permission given to picketing outside the secondary premises proper where closer access to the primary's employer is not possible. *Cf.* International Bhd. of Teamsters (Sterling Beverages, Inc.), 90 N.L.R.B. 401 (1950), discussed in note 58 *supra*.

International Bhd. of Boiler Makers (Richfield Oil Co.),⁶⁴ in which the pickets indirectly suggested to the employees of third parties, seeking to enter the secondary site on business unrelated to the presence of the primary's operations, that they should not cross the line. This is secondary pressure in its purest form.⁶⁵ But would a union meet the demands of the fourth test if it appealed, openly or tacitly, to (but only to) those secondary employees who were due to unload the primary's truck, or work on the primary's ship?⁶⁶ Second, the idea of the primary dispute having a "situs" that "roves" and "comes to rest" has such a large ingredient of metaphor that uncertainty over its meaning was inevitable. In particular, is the "situs of the dispute" found anywhere that primary employees are at work⁶⁷ or is it necessary that the employees in question be themselves involved in the primary dispute, as was true in *Moore Dry Dock*, and heavily emphasized in *Schultz*?⁶⁸ Finally, and somewhat related to the preceding problem, a major support of the *Schultz* opinion seemed to be the futility of picketing the primary anywhere but at the secondary site. But unless a "necessity" requirement was embodied in the concept of the "situs of the dispute" being at the secondary site, the *Moore Dry Dock* rules seemed to look only to the minimization of pressure on the secondary, following the idea that, so minimized, the pressure was "incidental" and not secondary. In the 1951 *Richfield Oil* case, the Board, having found the picketing to be secondary on other grounds,⁶⁹ referred in a footnote to an "additional" fact "which, though not controlling, is significant": the presence of a regular place of business where the primary could be picketed.⁷⁰ This principle, so prominent in the *Schultz* opinion, possibly discarded in the language of the *Moore Dry Dock* rules, and rather timidly advanced in *Richfield Oil*, was to emerge, full-blown and significantly modified in rationale, as the most strenuously litigated doctrine in the area of common situs picketing.

The case in which this principle was first made the ground of decision, *Brewery Drivers (Washington Coca-Cola Bottling Works, Inc.)*,⁷¹ was a routine example of "roving situs" picketing—following the primary's trucks to customer's places of business and picketing near them while deliveries were being made—except that, as in *Richfield Oil*, there was evidence of use of the

64. 95 N.L.R.B. 1191 (1951).

65. See also *Teamsters Union (U & Me Transfer)*, 119 N.L.R.B. 852 (1957), where the facts were not so clear.

66. For an early recognition of the possibility of a negative answer see Torbert, *Section 8(b) (4) (A) of the Taft-Hartley Law: A Study in Statutory Interpretation*, 8 *RUTGERS L. REV.* 344, 375 (1954).

67. This much is clearly required. See *United Marine Division (New York Shipping Ass'n)*, 107 N.L.R.B. 686, 706-07 (1954) (intermediate report).

68. At least one case, decided not long after *Moore Dry Dock*, rests in part on such a requirement. *United Constr. Workers (Kanawha Coal Operator's Ass'n)*, 94 N.L.R.B. 1731, 1733 n.6 (1951), *enforced*, 198 F.2d 319 (4th Cir. 1952).

69. See text accompanying note 64 *supra*.

70. 95 N.L.R.B. at 1193 n.4.

71. 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955).

picket line to cause the boycotting of Coca-Cola's customers. In holding the picketing unlawful in reliance on such evidence, the Board found *Moore Dry Dock* and *Schultz* not "apposite" on the ground that in those cases the primary employer had no permanent place of business as did Coca-Cola in the case before it, "where the union could publicize the facts concerning its dispute."⁷² The opinion thus did not seek to accommodate the result to the *Moore Dry Dock* rules themselves, but seemed simply to hold those rules applicable only to cases where primary site picketing was not feasible.⁷³ Very shortly thereafter, however, an attempt at amalgamation was made.

*General Drivers (Otis Massey Co.)*⁷⁴ involved a dispute between a company and its drivers and warehousemen employed at the company's warehouse. The picketing activity embraced several construction sites where various craftsmen, employed by the primary and represented by another union, were at work. Because the employees involved in the primary dispute were not employed at the construction sites and only rarely were present there, the Board held that the situs of the dispute was not at the construction sites but was at the warehouse, which the union could adequately picket. Thus the first *Moore Dry Dock* rule—requiring the situs of the dispute to be on the secondary employer's premises—was not satisfied.⁷⁵ Although the idea of an adequate opportunity to picket was relied on, with an appropriate citation to *Washington Coca-Cola*, the heart of the finding of violation was the concept that secondary site picketing is allowable only when the primary employees personally involved in the dispute are at that site. Only if such a requirement is met do questions of the adequacy of the opportunity to picket elsewhere arise.⁷⁶ *Brotherhood of Painters (Pittsburgh Plate Glass Co.)*,⁷⁷ however, coming shortly after *Otis Massey*, seemed to say that when the first *Moore Dry Dock* rule was complied with, the existence of an adequate opportunity to picket the primary site was irrelevant. There, a union representing Pittsburgh glaziers, some of whom worked at the company plant and some at "outside" construction sites where other crafts were also working, picketed both the plant and the sites in support of a strike. The Board upheld the

72. 107 N.L.R.B. at 303. The Cola-Cola plant which was being picketed was in the center of town, and the drivers entered and left at least four times daily. With *Schultz* in mind, the Board referred to a permanent place of business "within the State in which the labor dispute arose." *Ibid.*

73. Indeed, the two recently named appointees, Chairman Farmer and Member Rodgers, declined to express a view as to the validity of *Moore Dry Dock* and *Schultz*. *Id.* at 303 n.6.

74. 109 N.L.R.B. 275 (1954), *enforcement denied*, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955).

75. See also *Associated Musicians (Gotham Broadcasting Corp.)*, 110 N.L.R.B. 2166 (1954), *enforced*, 226 F.2d 900 (2d Cir. 1955), *cert. denied*, 351 U.S. 949 (1956); 20 NLRB ANN. REP. 110-11 (1955).

76. If there is not an adequate opportunity to picket the primary employees involved in the dispute at the primary site, picketing may be permissible at the site where they are regularly present, but not at the site occupied by other primary employees.

77. 110 N.L.R.B. 455 (1954).

picketing, distinguishing *Washington Coca-Cola* on the grounds that the opportunity to appeal to the "outside" glaziers (and to the public at large) by picketing the primary site was insufficient,⁷⁸ and that the primary employees involved spent nearly the entire working day at the construction sites, so that the sites could be said to be the situs of the dispute. *Otis Massey* was read to have held the *Washington Coca-Cola* doctrine inapplicable when this condition—the first of the *Moore Dry Dock* rules—was met.

As thus stated, the requirements of *Washington Coca-Cola* and the first *Moore Dry Dock* rule appear to be wholly interdependent; a single factor—the degree of involvement of the affected primary employees with the secondary site—determines the compliance status of the picketing under both. There is, on this analysis, no separate "fifth rule." However, it is plain that no such general relationship in fact exists. Employees can enter and depart from their employer's main establishment several times daily, providing an opportunity to picket them there, and still spend nearly the entire work day at the secondary site, thereby constituting it the "situs of the dispute."⁷⁹ Inquiry into the nexus between the primary employees and the secondary site is thus insufficient to limit *Moore Dry Dock* to cases in which secondary site picketing is necessary if primary employees are to be reached; there is, for such a purpose, a need for a true "fifth rule."

A true "fifth rule" the *Washington Coca-Cola* doctrine soon became, and with none of the tentativeness of the early cases. A series of cases made clear the Board's view that secondary site picketing was lawful only if no adequate opportunity to picket at the primary site were present.⁸⁰ Indeed, the Board in clarifying its position went so far as to modify trial examiners' conclusions in cases that based a finding of violation on noncompliance with the *Moore Dry Dock* rules, in order to rest the findings on *Washington Coca-Cola*.⁸¹ The rationale of this stance was not, however, simply what had been intimated earlier; the reasoning in these cases does not rest on the principle, seemingly the basis of the *Moore Dry Dock* decision, that secondary site picketing is primary when carried on in such a manner that the impact on neutrals is

78. *Id.* at 457.

79. See, e.g., *Sheet Metal Workers (W. H. Arthur Co.)*, 115 N.L.R.B. 1137 (1956); *Sales Drivers Union (Campbell Coal Co.)*, 110 N.L.R.B. 2192 (1954), *order set aside*, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956).

80. See *Local 657, Int'l Bhd. of Teamsters (Southwestern Motor Transport, Inc.)*, 115 N.L.R.B. 981 (1956); *Seattle Dist. Council of Carpenters (Cisco Constr. Co.)*, 114 N.L.R.B. 27 (1955); *Local 612, Int'l Bhd. of Teamsters (Goodyear Tire & Rubber Co.)*, 112 N.L.R.B. 30 (1955); *Truck Drivers Union (National Trucking Co.)*, 111 N.L.R.B. 483 (1955), *enforced*, 228 F.2d 791 (5th Cir. 1956); *Sales Drivers Union (Campbell Coal Co.)*, *supra* note 79.

81. See *Commission House Drivers Union (Euclid Foods, Inc.)*, 118 N.L.R.B. 130 (1957); *Local 117, United Glass Workers (Mason & Dixon Lines, Inc.)*, 117 N.L.R.B. 622 (1957); *United Steelworkers (Barry Controls, Inc.)*, 116 N.L.R.B. 1470 (1956), *enforced*, 250 F.2d 184 (1st Cir. 1957); *Sheet Metal Workers (W. H. Arthur Co.)*, 115 N.L.R.B. 1137 (1956). *But cf.* *Local 313, Int'l Bhd. of Elec. Workers (Furness Elec. Co.)*, 117 N.L.R.B. 437, 460 n.23 (1957), *enforced*, 254 F.2d 221 (3d Cir. 1958) (intermediate report).

minimized. Nor does it purport to draw on the idea, suggested by the opinion in *Schultz*, that secondary site picketing should be permitted when appeals to primary employees are otherwise not possible, as an "exception of necessity." Rather, the Board's application of the "fifth rule" proceeds from the same literal construction of the act that came to the fore in the primary site cases discussed earlier.⁸² The "exception," permitting secondary site picketing when no other means of putting pressure on the primary exists, is an exception to the generally made *factual* inference that secondary site picketing is aimed, at least in part, at employees of neutrals, and for that reason is generally unlawful. When primary site appeals are not feasible, such an inference is no more warranted than in the case of routine primary site picketing.⁸³ Of course, the Board had previously—and as late as *Moore Dry Dock* itself⁸⁴—reiterated the view that, if its task were solely to infer the objects of the picketing, the inference of a secondary object was always warranted. As with the primary site cases, the Board in the mid-1950's gave no direct consideration to the accuracy of this contention or its implications. Thanks, however, to a curious turn of events, subsequent cases, while continuing to ignore the point, gave testimony to its truth. The impetus was two decisions of the courts of appeals.

Otis Massey was reversed by the Fifth Circuit, in part on the ground that a union could appeal to all employees of the primary—some of whom could not have been reached at the primary site—not merely those involved in the dispute.⁸⁵ However, the court devoted some space to the thought that the statute required a finding, "based upon substantial evidence, that the unlawful objective denounced by the statute actually existed,"⁸⁶ and that such a finding could not be grounded simply on the presence of what the Board considered an "adequate" opportunity to picket elsewhere. This reasoning, and indeed the very language, was approved by the District of Columbia Circuit in *Sales Drivers Union v. NLRB (Campbell Coal)*.⁸⁷ There it was conceded that *Moore Dry Dock*, if applicable, was complied with: the employees in question spent one-half of their time at the secondary site and twenty-five per cent of their time at the primary site. The court found no statutory basis for the per se rule, making the existence of an alternative site conclusive; it paid but slight attention to the claim—if indeed one was made⁸⁸—that that factor

82. See text accompanying notes 36-51 *supra*.

83. For the Board's fullest explanation of its reasoning see Local 657, Int'l Bhd. of Teamsters (Southwestern Motor Transport, Inc.), 115 N.L.R.B. 981, 983-84 (1956). See also Drivers Union (Dixie Janitor Supply Co.), 120 N.L.R.B. 486, 492 (1958) (intermediate report).

84. 92 N.L.R.B. at 548.

85. NLRB v. General Drivers Union, 225 F.2d 205, 210-11 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955).

86. 225 F.2d at 209.

87. 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956).

88. The case was decided before Local 657, Int'l Bhd. of Teamsters (Southwestern Motor Transport, Inc.), 115 N.L.R.B. 981 (1956), was announced, and the Board's

proved the existence of the forbidden object, but its approval of the *Otis Massey* analysis suggested that such a claim would not have met with judicial favor.

If specific evidence of a secondary object was required in each case the Board readily provided it. In a number of cases, secondary site picketing was found unlawful, first, by application of the *Washington Coca-Cola* doctrine and, second, on a recital of the particular facts—including (but not limited to) the existence of an opportunity for primary site picketing—leading the Board to infer the unlawful object.⁸⁹ A variety of acts have been held to imply this object,⁹⁰ but the more significant fact seems to be that in no case found did the Board fail to discern grounds for concluding that the picketing was designed, at least in part, to appeal to a neutral's employees. This development suggests the weakness of trying, as the courts of appeals did, to dispute the "rigidity" of *Washington Coca-Cola* by viewing the *Moore Dry Dock* rules as guides to the union's object. The search for "an object" is destined to succeed, and the "flexibility" is apparent only. In point of fact, the catalogue of evidence in these cases was solely a safeguard against reversal,⁹¹ for the Board continued to follow its own view.⁹²

It was to be expected that the reformulation of the basis of *Moore Dry Dock*, articulated in response to attacks on *Washington Coca-Cola*, but reflecting changing views as to the meaning of the act, would affect application of

position, as stated by the court of appeals, does not clearly make the factual argument. See 229 F.2d at 517.

89. *Campbell Coal* itself yielded to this approach in a second decision. *Sales Drivers Union (Associated Gen. Contractors of America, Inc.)*, 116 N.L.R.B. 1020 (1956), *enforced sub nom. Truck Drivers Union v. NLRB*, 249 F.2d 512 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 958 (1958). See *Dallas Gen. Drivers Union (Macatee, Inc.)*, 124 N.L.R.B. 696 (1959), *modified on denial of rehearing*, 281 F.2d 593 (5th Cir. 1960), *cert. denied*, 365 U.S. 826 (1961); *Amarillo Gen. Drivers Union (Crowe-Gulde Cement Co.)*, 122 N.L.R.B. 1275, *aff'd*, 273 F.2d 519 (D.C. Cir. 1959); *Drivers Union (District Distribs., Inc.)*, 122 N.L.R.B. 1259 (1959); *Chauffeurs Union (Babcock & Lee Petroleum Transporters, Inc.)*, 117 N.L.R.B. 1344 (1957); *International Bhd. of Teamsters (Ready Mixed Concrete Co.)*, 117 N.L.R.B. 1266 (1957); *General Truck Drivers Union (Diaz Drayage Co.)*, 117 N.L.R.B. 885 (1957), *enforced*, 252 F.2d 619 (D.C. Cir.), *cert. denied*, 356 U.S. 931 (1958); *General Drivers Union (Caradine Co.)*, 116 N.L.R.B. 1559 (1956), *enforced*, 251 F.2d 494 (6th Cir. 1958); *International Bhd. of Teamsters (Ready Mixed Concrete Co.)*, 116 N.L.R.B. 461 (1956); *Sheet Metal Workers (W. H. Arthur Co.)*, 115 N.L.R.B. 1137 (1956).

90. See Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 141 & nn.83-88 (1959), for a listing of some of them.

91. For the success of this tactic see, in addition to the second *Campbell Coal* decision, *Sales Drivers Union*, 116 N.L.R.B. 1020 (1956), *enforced sub nom. Truck Drivers Union v. NLRB*, 249 F.2d 512 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 958 (1958), the following cases: *NLRB v. Dallas Gen. Drivers Union*, 281 F.2d 593 (5th Cir. 1960), *cert. denied*, 365 U.S. 826 (1961), *enforcing as modified* 124 N.L.R.B. 696 (1959); *Amarillo Gen. Drivers Union v. NLRB*, 273 F.2d 519 (D.C. Cir.), *enforcing* 122 N.L.R.B. 1275 (1959); *General Truck Drivers Union v. NLRB*, 252 F.2d 619 (D.C. Cir.), *cert. denied*, 356 U.S. 931 (1958), *enforcing* 117 N.L.R.B. 885 (1957); *NLRB v. General Drivers Union*, 251 F.2d 494 (6th Cir. 1958), *enforcing* 116 N.L.R.B. 1559 (1956).

92. After a time, whether from a renewal of boldness or for other reasons, opinions came once again to rely solely on the *Washington Coca-Cola* doctrine, expressed as what amounted to an inevitable inference of fact. See *Local 560, Int'l Bhd. of Teamsters (Pennsylvania R.R.)*, 127 N.L.R.B. 1327, 1329 (1960); *Teamsters Union (California Ass'n of Employers)*, 120 N.L.R.B. 1161, 1163 (1958).

the *Moore Dry Dock* rules in cases in which the *Washington Coca-Cola* principle was plainly not called into play. Those rules, as justified and announced in the *Moore Dry Dock* decision, seemed to have as their purpose the minimization of the impact of the challenged picketing on secondary employers. They proved sufficiently flexible, however, so that, with the words unchanged, they could be used as a means of determining the object of the picketing. At the outset, the rules in effect demanded simply that the pickets refrain from seeking to boycott the secondary by, for example, urging employees of third persons, coming to the secondary site on business unrelated to the primary, not to enter.⁹³ The Board shrank from inquiring into the actual object of secondary site picketing that met these objective requirements.⁹⁴ As the Board, however, came to embrace a literal approach to the statute the rule came to require a finding that the picketing was not in fact aimed at secondary employees, and when the context would lead those employees to understand that the pickets wanted them to observe the line, the requisite inducement and object existed and the act was held violated.⁹⁵ In practice, the search for the picketing's object was central, its status vis-à-vis the *Moore Dry Dock* rules almost an afterthought. This approach, manifested in several contexts,⁹⁶ took its potentially most far-reaching form in *Seafarers' Int'l Union (Superior Derrick)*,⁹⁷ in which the Board indicated that if prior acts made it apparent that the pickets, regardless of the content of the picket signs, could "reasonably anticipate" that secondary employees would not cross the line, they were

93. See, e.g., *United Ass'n of Journeymen (Columbia-So. Chem. Corp.)*, 110 N.L.R.B. 206 (1954); *Chauffeurs Union (Hoosier Petroleum Co.)*, 106 N.L.R.B. 629 (1953); *International Bhd. of Boiler Makers (Richfield Oil Co.)*, 95 N.L.R.B. 1191 (1951), discussed at text accompanying note 64 *supra*; *International Bhd. of Teamsters (Sterling Beverages, Inc.)*, 90 N.L.R.B. 401 (1950), discussed in note 58 *supra*. *But cf.* *Torbert*, *supra* note 66, at 375. Recent instances of union conduct violating such a requirement are *Building Trades Council (Apartment Bldg. Realty Trust)*, 136 N.L.R.B. No. 104 (April 17, 1962); *Local 20, Sheet Metal Workers (Bergen Drug Co.)*, 132 N.L.R.B. 73 (1961); *International Hod Carriers Union (Gilmore Constr. Co.)*, 127 N.L.R.B. 541, *enforced as modified*, 285 F.2d 397 (8th Cir. 1960), *cert. denied*, 336 U.S. 903 (1961); *Wilmington Bldg. Trades Council (James H. Wood)*, 126 N.L.R.B. 621 (1960).

94. See text accompanying note 60 *supra*; *Baltimore Bldg. Trades Council (Stover Steel Serv.)*, 108 N.L.R.B. 1575 (1954), *rev'd sub nom. Piezonki v. NLRB*, 219 F.2d 879 (4th Cir. 1955).

95. See *United Ass'n of Journeymen (Bishop Plumbing & Elec. Co.)*, 126 N.L.R.B. 1142, 1148-49 (1960) (intermediate report); *Journeymen Barbers Union (Chicago & Ill. Hairdressers Ass'n)*, 120 N.L.R.B. 936, 939-40 (1958) (alternative holding).

96. If "roving situs" pickets entered a store and spoke directly to secondary employees about to accept a delivery from the picketed truck, the requisite object was proved; *Moore Dry Dock's* third requirement, that picketing be reasonably close to the primary's vehicle, was not met. See *International Union of United Brewery Workers (Adolph Coors Co.)*, 121 N.L.R.B. 271, 273 (1958), *rev'd*, 272 F.2d 817 (10th Cir. 1959). Similarly, if picketing of the primary's ship at a repair dry dock continued after the primary's nonsupervisory employees were temporarily removed from the vessel, an object was necessarily to appeal to secondary employees; the primary being deemed no longer engaged in its normal business at the drydock, the second *Moore Dry Dock* rule was violated. See *Seafarer's Union (Salt Dome Prod. Co.)*, 119 N.L.R.B. 1638, 1641 (1958), *rev'd*, 265 F.2d 585 (D.C. Cir. 1959).

97. 122 N.L.R.B. 52 (1958), 273 F.2d 891 (5th Cir.), *cert. denied*, 364 U.S. 816 (1960).

required, in order to avoid a finding of the forbidden object, to "make clear" to approaching secondary employees that they were not being solicited to refuse to cross; otherwise, the picketing would not clearly disclose that the dispute was with the primary, as the fourth *Moore Dry Dock* rule requires.⁹⁸ But, if the material issue is the union's object, as demonstrated by its activity in the light of reasonable expectations as to the response of secondary employees to the picket line, there are no logical grounds for limiting this reasoning to cases in which the specific appraisal by past experience comes, as in *Superior Derrick*, from the particular dispute in question; the experience that has taught the Board that "the mere appearance of a picket is frequently akin to a strike signal"⁹⁹ is not foreign to picketing unions. The Fifth Circuit, in enforcing the Board's order in *Superior Derrick*,¹⁰⁰ accepted the Board's reasoning with such vigor that hardly any room for qualification appeared left:

It is not, as the Moore Drydock doctrine phrased it, merely a question of negating the existence of a *dispute* with the secondary employer. The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line is overcome. It must be done so that all secondary employees will know that the primary union does not seek what the law forbids—pressure on the primary employer through pressure from the secondary employer because of concerted pressure of secondary employees on that secondary employer.¹⁰¹

The reaction of the District of Columbia Circuit to these views was a pole apart. In reversing *Seafarers Union (Salt Dome Prod. Co.)*,¹⁰² the court first brushed aside the Board's attempt to fit its finding within the skeleton of the *Moore Dry Dock* rules.¹⁰³ Curiously regarding the issue as separate from the question of compliance with *Moore Dry Dock*, it then considered the Board's finding of inducement of secondary employees with the forbidden object. The court stated the problem in terms that sounded consistent with the Board's approach to the statute,¹⁰⁴ but its analysis of the statutory issue showed a deep disagreement with the Board's then current

98. 122 N.L.R.B. at 55-56, see *Brotherhood of Painters (Paint & Decorating Contractors)*, 109 N.L.R.B. 1163 (1954).

99. 122 N.L.R.B. at 55-56.

100. *Superior Derrick Corp. v. NLRB*, 273 F.2d 891 (5th Cir.), *cert. denied*, 364 U.S. 816 (1960).

101. 273 F.2d at 897.

102. 119 N.L.R.B. 1638 (1958), *rev'd*, 265 F.2d 585 (D.C. Cir. 1959).

103. *Id.* at 589-90; see note 96 *supra*.

104. In the case at bar, if the objective of the strike encompassed Salt Dome [the primary] only, it was legal. If its objective was partly Todd or its employees, it was illegal. The difference is in whether the effect on Todd's workers was an objective of the strike or was merely an incident of it. 265 F.2d at 590. This statement of the issue suggests that a reversal would rest on a mere factual disagreement with the Board. See Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 140-41 (1959). For reasons immediately to be given, I regard the suggestion as misleading.

view of the basis of *Moore Dry Dock*. Indeed, one would have to go back to the *Moore Dry Dock* decision itself for a similar approach.¹⁰⁵ The court said:

In this case Todd [the secondary] was under economic pressure, because one of its drydocks was unusable and it could not go forward with one piece of business. . . . The mere fact that Todd felt some pressure from the picketing of the Pelican [the primary's vessel] is not dispositive of the problem under Section 8(b)(4). The critical consideration is that the pressure thus put upon Todd was not different from that felt by servicers or suppliers under the most ordinary circumstances when a customer of theirs is picketed.

The question which remains is: Did the Union intend a more direct effect on Todd? The statute makes the "object thereof" the critical factor. Did the Union intend to place a boycott on Salt Dome [the primary] alone, with only an incidental economic effect on Todd and Gulf, or did it intend to place a boycott on Todd and Gulf along with Salt Dome? . . . All the concrete evidence negatives an objective on the part of the Seafarers Union to force or require Todd to do anything. . . . We do not view the acts of the Union as evidencing an objective to affect Todd any more than any picket line might affect a servicer or supplier of the picketed employer.¹⁰⁶

The "object" the court is speaking of is not any appeal directed toward secondary employees, but a union-induced boycott of the secondary, broader in scope than its work on the primary's ship. This rationale is, as the court is aware and so fully explains, a reflection and an application of the primary situs doctrine, as first expounded by the Board a decade earlier.¹⁰⁷ It is absolutely at odds with the later Board's approach to section 8(b)(4).

As has been true in the primary site area, since 1959 the strength—or at least the rigor—of the literal approach has waned. For a time, the Board pursued a somewhat unsteady path,¹⁰⁸ although the dominant tone was as before.¹⁰⁹ Today, however, the tone is far different, by reason of developments now to be examined.

105. See text accompanying notes 59-62 *supra*.

106. 265 F.2d at 591-92.

107. See text accompanying notes 10-17 *supra*.

108. Compare International Organization of Masters (Chicago Calumet Stevedoring Co.), 125 N.L.R.B. 113 (1959), in which the Board found *Moore Dry Dock* complied with despite evidence of appeals to secondary employees, *id.* at 114 n.1, the trial examiner relying specifically, *id.* at 126 n.7, on the *Salt Dome* reversal, *with* Local 299, Sheet Metal Workers (S. M. Kisner & Sons), 131 N.L.R.B. 1196, 1200-01 (1961) (alternative holding), requiring disclaimers of any desire to have secondary employees respect the picket line, and Highway Truckdrivers Union (Riss & Co.), 130 N.L.R.B. 943, 949-50 (1961), *enforced*, 300 F.2d 317 (3d Cir. 1962), in which employees of secondary employers that carried the primary's freight from premises jointly occupied by them were held insulated by *Moore Dry Dock* from direct appeals not to enter or leave the premises while carrying such freight. See also Teamsters Union (Chas. S. Wood & Co.), 132 N.L.R.B. 117, 124-25 (1961), *enforced*, 303 F.2d 444 (3d Cir. 1962) (intermediate report).

109. See Plumbers Union (Piggly-Wiggly), 133 N.L.R.B. 307 (1961), in which it was said that the trial examiner could conclude that *Moore Dry Dock* was inapplicable when the union's "demonstrated objective" was to force the secondary to cease doing business with the primary. *Id.* at 314 n.5. The Board found *Moore Dry Dock* not complied with, and did not pass on the point. *Id.* at 308.

C. *The General Electric Decision*

When the Supreme Court agreed to review the *General Electric* decision, the opportunity was presented for definitive settlement of many of the questions that had been vexing Board members and circuit court judges for a decade. The respondent union "freely admitted" that its picketing of the reserved gate¹¹⁰ was intended to appeal to employees of neutral contractors to stay away from the struck plant; it rested its case on the validity of this fundamental proposition: "it is a permissible object of primary picketing in a labor dispute to induce employees of customers, suppliers and others who perform services of benefit to the primary employer at his place of business to refrain during the labor dispute from rendering such services to him."¹¹¹ This principle was justified largely on arguments drawn from the legislative history of the Taft-Hartley Act and from certain factual assertions as to the role and nature of primary and secondary activity.¹¹² The aim of the legislators, the union argued, was to outlaw "secondary boycotts," and although Congress rejected defenses of certain kinds of secondary pressure,¹¹³ a "common understanding" at common law was that appeals to neutral employees to respect a picket line at the primary site were primary in character, designed to bring about a "sympathetic primary boycott," and not a "secondary boycott." Congress desired to do "nothing to outlaw" primary strikes, and therefore "not merely the right to cease work, but all of the traditional means by which strikers exert primary economic pressure" were to remain unimpaired by the restrictions of section 8(b)(4). Picketing the primary employer's business, the "most traditional" of these means, is, the union contended, essential to the right to engage in primary strikes. In applying these principles, the guiding consideration is whether the secondary employees, the object of the pickets' appeal, are performing work of benefit to the primary employer. If so, as in the case of all primary site picketing (except that which seeks to induce secondary employers to refuse to do *any* work for their employer) and of secondary site picketing limited as originally contemplated by the *Moore Dry Dock* rules,¹¹⁴ the picketing is primary and lawful.

The brief submitted on behalf of the NLRB was, at the least, a significant reformulation of the Board's approach to section 8(b)(4); at most, it was an outright abandonment. The Board admitted the limitation of the

110. For a discussion of the facts of the case see text accompanying note 40 *supra*.

111. Brief for the International Union of Elec. Workers as Petitioner, p. 20, Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961).

112. The following description of the union's argument is based on pp. 22-37 of its brief, *supra* note 111.

113. The defenses, grounded on an asserted "unity of interest" between primary and secondary employers or employees, were said to have been accepted by some courts. The reference was principally to boycotts of struck goods, as in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 479 (1921) (Brandeis, J., dissenting), and construction site boycotts seeking to remove a nonunion contractor from the job.

114. See text accompanying note 60 *supra*.

section to "secondary" activity, but noted the uncertain content of that term at common law, and emphasized the congressional concern with "classic cases" of secondary activity when the primary and secondary employers' work sites were separated. The legislative history did not, the Board asserted, explain "where the line between primary and secondary activity is to be drawn in the situation here, where both employers are at work on the same premises."¹¹⁵ But "the Board recognizes," it was stated, "that a picket line may legitimately appeal to the employees of neutral employers." The criteria for determining in what cases such an appeal was permissible were, however, not those advanced by the union, which were said to be inconsistent with the congressional ban on partial, as well as total, refusals to work; rather a test framed in terms of the need of the secondary for protection was put forward:

The important consideration, in the Board's view, is whether a neutral employer uses the premises, along with the primary employer, in a substantial and continuous manner as a regular work place; if he does, his interests are entitled to protection there, no less than those of the primary employer.¹¹⁶

In such "shared-work" situations, the Board asserted, picketing must be confined "to the primary employer's business"; if there is a "direct and substantial" extension of the dispute to the neutral's employees that does "nothing to facilitate" the appeal to the primary employees, the picketing is unlawful. Such a situation can be shown by the existence of an adequate opportunity to reach the primary employees at the primary site, as in *Washington Coca-Cola*; of a separate gate, as in the present case; or, in the absence of a separate gate, by the existence of different reporting times and identifying markings separating primary and secondary employees, as in *Gonzalez*. The facts in *General Electric* were said to establish the secondary employers' sufficiently enduring and intimate connection with the primary site to entitle them to the protection of the *Moore Dry Dock* rules; for in such circumstances, unlike those involving deliverymen or maintenance personnel appearing briefly at the site, the picketing could be expected to have a substantial impact on the contractor's employees.¹¹⁷

It is apparent that this approach was not that on which the Board had been proceeding since 1955.¹¹⁸ It fell to the charging party to speak up in

115. Brief for the NLRB as Respondent, pp. 14-15 n.3, *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961).

116. Brief for the NLRB as Respondent, *supra* note 115, at 19.

117. *Id.* at 32-33.

118. For example, it does not explain the result in *McJunkin*, see text accompanying notes 46-49 *supra*, nor is it consistent with the rationale of *Local 657, Int'l Bhd. of Teamsters (Southwestern Motor Transport, Inc.)*, 115 N.L.R.B. 981 (1956), see notes 80-83 *supra* and accompanying text, or *Incorporated Oil*, discussed at text accompanying notes 31-39 *supra*. It is closest to the *Gonzalez* case in approach, see text accompanying notes 44-45 *supra*, and is an extension of what may be thought to be the theory of *Crystal Palace*, see text accompanying notes 33-35 *supra*.

defense of the literal approach. Its brief emphasized the lack of any consensus among the legislators as to just what a secondary boycott was,¹¹⁹ argued that the 1959 proviso specifically protecting "primary" strikes and picketing does not provide a criterion for defining that term, and rested its case squarely on the statutory language.¹²⁰

With three well-defined and sharply divergent analyses, the Supreme Court was in an unusually good position to clarify the proper application of section 8(b)(4). The Court's opinion, a curious blend of reticence and assertion, hardly does that—at least not on its face. It begins by accepting the primary-secondary dichotomy and the proposition that section 8(b)(4) "could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity";¹²¹ but just what is embraced by the condemned literal construction, or what strikes are historically considered primary, we are not told. The general theme of the primary-secondary dichotomy is developed through a series of oft-quoted but only slightly helpful excerpts from several Board and court decisions.¹²² In recounting the Board's developing criteria, the Court impliedly criticizes the *Ryan* decision¹²³ for applying the situs test "regardless of the special circumstances involved,"¹²⁴ without saying what those circumstances were, or how they were relevantly "special."

In approving the *PBM* and *Crystal Palace* decisions,¹²⁵ the Court does give a rationale, but a very different one from that employed by the Board, either in those or later decisions or in argument before the Court:

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.¹²⁶

The focus seems to be not on the union's object, but on the kind of "pressure" felt by the secondary; and the assertion is that the relation of the work done by the secondary to the primary's operations affects that pressure. Such a pronouncement fairly demands exposition and justification, but none is provided. When the Court, unexplainedly suspending its historical survey with

119. Brief for the General Elec. Co. as Respondent, pp. 28-31, *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961), quoting, *inter alia*, Senator Ellender's definition of the term. See note 6 *supra*.

120. Brief for the General Elec. Co., as Respondent, *supra* note 119, at 15.

121. *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 672 (1961).

122. The Court does assert, as the early Board cases so often emphasized, that "the objectives of any picketing include a desire to influence others from withholding from the employer their service or trade," *id.* at 673, but the setting of the statement indicates that reliance on it to infer general agreement with the primary situs doctrine is unwarranted.

123. See text accompanying note 17 *supra*.

124. 366 U.S. at 676.

125. See text accompanying notes 26-30 *supra*.

126. 366 U.S. at 679.

the 1956 *Crystal Palace* case, elaborates its approach, attention is shifted from the impact on the neutral to that on the picketing union's dispute with the primary. Posing the question as whether the *Moore Dry Dock* rules could be applied to reserved-gate picketing at the primary site,¹²⁷ the Court turned aside union contentions that an affirmative answer would permit the primary employer to insulate himself from picketing. First, it invoked the court of appeals' reversal of *Incorporated Oil*¹²⁸—a case which, we have seen, was an important prop of the Board's rationale in *General Electric*¹²⁹—for the proposition that withdrawal of all primary employees from the site could not render previously lawful picketing unlawful.¹³⁰ Second, it denied the applicability of a reserved-gate doctrine to suppliers and customers of the struck plant:

The key to the problem is found in the type of work that is being performed by those who use the separate gate. . . . [I]f a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations.¹³¹

Summing up, the Court adopted, as "controlling considerations," the criteria for application of *Moore Dry Dock* in cases like *General Electric* laid down only shortly before by Chief Judge Lumbard for the Second Circuit:

There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.¹³²

127. Thus the Board's holding that the picketing was unlawful without regard to *Moore Dry Dock* because no primary employees used the gate, see note 41 and text accompanying notes 41-43 *supra*, was impliedly rejected without discussion. *But cf.* note 266 *infra*.

128. *Local 618, Automotive Employees Union v. NLRB*, 249 F.2d 332 (8th Cir. 1957).

129. See text accompanying notes 37-41 *supra*.

130. One may therefore wonder how the Court could say that "the basis of the Board's decision in this case [*General Electric*] would not remotely have that effect," 366 U.S. at 680, having just cited the reversal of a Board decision with precisely that effect. Surely the "basis" of the Board decision in *General Electric* was not that of the Eighth Circuit's reversal in *Incorporated Oil*! Although the Court was clearly modifying significantly the permissible basis of *General Electric*, it for some reason seems to pretend that no change was being worked.

131. 366 U.S. at 680-81. The Court supported this view by referring to the proviso, added in 1959, protecting a "primary strike or primary picketing":

The proviso was directed against the fear that the removal of "concerted" from the statute might be interpreted so that "the picketing at the factory violates section 8(b)(4)(A) because the pickets induce the truck drivers employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike." Analysis of the bill prepared by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589.

Id. at 681.

132. *United Steelworkers v. NLRB*, 289 F.2d 591, 595 (2d Cir. 1961).

The case was ordered remanded to the Board for consideration of the nature of the work done by General Electric's contractors; if a substantial amount of work were found to be "conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar"¹³³ of the statute. Otherwise, the order to cease and desist was entitled to be enforced.

The reaction of a reader of the *General Electric* opinion might well be like that of a visitor to Delphi who suddenly realizes that the Oracle has disclosed all it will, and the portion already dispensed, so almost-illuminating and perplexing, is the entire message. The Court, by holding that it is primary to appeal to neutral employees "whose tasks aid the employer's everyday operations," squarely rejected the view that only appeals to primary employees are primary. But on what rationale? Was it nothing more than the legislative history of the 1959 proviso?¹³⁴ If so, was that enactment to be taken to have narrowed the reach of section 8(b)(4)? And why then is the union's position, permitting appeals to *all* secondary employees whose activities aid the primary's operation, also rejected? Why may only aids to "everyday" activities be aimed at? Why is the nature of the work crucial? Is it because of its significance to the secondary, the primary, or the picketing union? Finally, given a test framed in terms of the nature of the work done, of what possible relevance is a separate gate? If the *Moore Dry Dock* rules are to be applied, they can do service at a "mingled" gate as well; indeed, they were originally designed for such a case. Of course, their impact will vary. Some picketing of the gate will be permitted, but it must be limited in time and manner to appeal to certain primary and secondary employees only. But the seeming promulgation of an independent requirement that there be a separate gate suggests that *Moore Dry Dock* would be inapplicable merely because of mingled use of the gate. Was such a position in fact taken by the Court?¹³⁵ If so, on what ground?

I do not mean to suggest that these questions, or any of them, can not be satisfactorily answered.¹³⁶ However, unless they are answered, unless the seeming ipse dixit of *General Electric* is integrated with the issues of the primary-secondary dichotomy, the scope and meaning of that case can not be understood, and it may well unsettle more than it clarifies.

133. 366 U.S. at 682.

134. See note 131 *supra*.

135. There is some ground for believing that "the decision is predicated upon the fact that there is a reserved gate, rather than establishing the criterion that there must be one." Zimmerman, *Secondary Picketing and the Reserved Gate: The General Electric Doctrine*, 47 VA. L. REV. 1164, 1179 (1961). However, the manner in which the court stated the three "controlling considerations," and its characterization of a "mingled gate" at the primary site as "outside the bar of § 8(b)(4)(A)," 366 U.S. at 682, suggest that there is indeed a requirement of a separate gate. Cf. *Teamsters Union v. NLRB*, 293 F.2d 881 (D.C. Cir. 1961).

136. Indeed, I essay a rationale, within the framework of *General Electric's* pronouncements, in Parts III and IV *infra*.

D. *The Approach of the "Kennedy Board"*

Although the Board has had few occasions to consider the impact of the Supreme Court's ruling on primary site picketing, those occasions indicate that tribunal's willing acceptance of *General Electric's* limitations on a literal approach. In *Local 5895, United Steelworkers (Carrier Corp.)*, the respondent union, by picketing and by physical obstruction and threats, induced employees of a railroad, whose track ran onto the plant premises at a gate used solely by the road, not to handle the primary's products.¹³⁷ There was, of course, no doubt as to the union's object, but the Board held the picketing primary and lawful on the ground that, as the services rendered by the railroad were provided "in connection with the normal operations" of the primary, *General Electric* was controlling. The majority refused to distinguish the case on the ground that the right-of-way on which the pickets stood, having been conveyed to the railroad, was not actually owned by the primary.¹³⁸

Carrier raised no substantial question as to the content of the idea of work being done "in connection with the normal operations" of the primary. That issue was at the heart of the *General Electric* litigation, as it once again came before the Board; the new decision, however, hardly suggests that an uncertain question was being settled. Noting that work done by secondary employees (sufficient in magnitude to take it out of the "*de minimus*" category) was identical or substantially similar to that customarily performed by primary employees, the Board in the second *General Electric* case simply deduced its conclusion:

Since this work . . . had previously been performed by GE employees, we find that such work was part of GE's normal operations. It follows therefore that this work . . . was necessarily related to GE's normal operations.¹³⁹

Neither a substantive exposition or defense of these asserted implications was provided, nor any treatment of the function of the rules laid down by the Court in distinguishing primary and secondary activity.

The shift away from a literal approach has been more markedly mani-

137. 132 N.L.R.B. 127 (1961). The acts of violence were found to violate § 8(b)(1)(A), 61 Stat. 41 (1947), 29 U.S.C. § 158(b)(1)(A) (1958).

138. The court of appeals reversed the decision on this ground. *Carrier Corp. v. NLRB*, 51 L.R.R.M. 2338 (2d Cir. Oct. 18, 1962). There was no opinion of the court; the principal opinion, per Judge Waterman, deemed *General Electric's* limitations on a literal approach to reflect only a "special policy of greater latitude" for primary site picketing. *Id.* at 2348. As Chief Judge Lumbard demonstrated in dissent, such a narrow reading of the Supreme Court's rationale seems difficult to square with its opinion. *Id.* at 2352-53. A petition for rehearing en banc is presently pending.

139. *Local 761, Int'l Union of Elec. Workers (General Elec. Co.)*, 138 N.L.R.B. No. 38, 1962 CCH NLRB DEC. ¶ 11556, at 17953 (Aug. 28, 1962).

fested in the area of secondary site picketing. Although the parties, when the *General Electric* case first was before the Board, sought to frame their arguments in terms that would affect the *Washington Coca-Cola* doctrine, the Court's *General Electric* opinion made no reference to it. Even the *Moore Dry Dock* rules themselves were only briefly described, with very little indication given as to their true rationale and virtually none as to their proper scope. The recent erosion of *Washington Coca-Cola* has resulted, however, more from changes in Board membership than from any implications spun out from the Supreme Court's opinion in *General Electric*. After several decisions foreshadowed its abandonment,¹⁴⁰ the actual step was taken in *Local 861, Int'l Bhd. of Elec. Workers (Plauché Elec., Inc.)*.¹⁴¹ The facts were a common variant of common situs picketing: electrical workers spending nearly the entire work day at the secondary site, but who reported to the primary's regular place of business in the morning before leaving for the job site. In overruling *Washington Coca-Cola* as a "rigid" requirement, the Board purported to rest wholly on the rejection of that doctrine by three circuit courts¹⁴² and on the Supreme Court's "recent criticism of the Board's reliance on 'per se' doctrines in lieu of analysis of the particular facts of each case."¹⁴³ No answer on the merits was given to the dissent's assertion of the soundness of the reasoning underlying *Washington Coca-Cola*, as elaborated in the opinion in *Local 657, Int'l Bhd. of Teamsters (Southwestern Motor Transport, Inc.)*.¹⁴⁴ Nor was any attempt made to say, if "rigidity" only was being abandoned, when, if ever, the existence of an opportunity for primary site picketing would bar such action at the secondary site. The Board simply held, for no stated reason, that "in the instant case," the primary site was not the sole permissible one, and that the secondary site picketing was governed by the *Moore Dry Dock* rules.¹⁴⁵ Cases following *Plauché* have done like-

140. Member Fanning had for some time opposed resort to a fixed "fifth rule," see, e.g., *Teamsters Union (California Ass'n of Employers)*, 120 N.L.R.B. 1161, 1171-72 (1958); cases cited in *Local 861, Int'l Bhd. of Elec. Workers (Plauché Elec., Inc.)*, 135 N.L.R.B. No. 41, 1962 CCH NLRB Dec. ¶ 10830, at 16840 n.5 (Jan. 12, 1962), and he and Member Brown several times pointedly avoided relying on the *Washington Coca-Cola* principle in cases in which union picketing failed to comply with *Moore Dry Dock* itself. See *Local 861, Int'l Bhd. of Elec. Workers (Cleveland Constr. Corp.)*, 134 N.L.R.B. No. 62 (Nov. 22, 1961); *Local 3, Sheet Metal Workers (Siebler Heating & Air Conditioning, Inc.)*, 133 N.L.R.B. 650 (1961); *Teamsters Union (Chas. S. Wood & Co.)*, 132 N.L.R.B. 117 (1961), enforced, 303 F.2d 444 (3d Cir. 1962). See also *Local 662, Radio Eng'rs (Middle So. Broadcasting Co.)*, 133 N.L.R.B. 1698 (1961), in which a McCulloch-Fanning-Brown majority, finding the *Washington Coca-Cola* principle inapplicable, expressly declined to pass on its validity. *Id.* at 1702 n.5.

141. 135 N.L.R.B. No. 41. 1962 CCH NLRB Dec. ¶ 10830 (Jan. 12, 1962).

142. These were the *Otis Massey* and *Campbell Coal* decisions, see text accompanying notes 85-88 *supra*, and *NLRB v. Local 294, Int'l Bhd. of Teamsters*, 284 F.2d 887 (2d Cir. 1960).

143. 1962 CCH NLRB Dec. at 16841. The reference was to *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 671 (1961), the reversal of the *Mountain Pacific* doctrine regulating exclusive union hiring halls. See *NLRB v. Associated Gen'l Contractors, Inc.*, 270 F.2d 425 (9th Cir. 1959) (*Mountain Pacific*).

144. 115 N.L.R.B. 981 (1956); see text accompanying note 83 *supra*.

145. 1962 CCH NLRB Dec. at 16842-43.

wise.¹⁴⁶ To date, the cases applying *Moore Dry Dock* have involved employees who spent most of their work day at the secondary site; unless the line is to be drawn at that point,¹⁴⁷ *Washington Coca-Cola* is entirely gone.

That the overruling of the *Washington Coca-Cola* doctrine was not solely a result of deference to the views of the courts of appeals may be seen from the recent substantial (albeit tacit) revision of the demands of the *Moore Dry Dock* rules. The Board has begun to return to the original application of those criteria. Rather than asking whether the union sought to appeal to neutrals, and using *Moore Dry Dock* "as a guide or tool to facilitate a determination of the objective of the picketing,"¹⁴⁸ the Board is apparently once again employing the four rules as objective limitations on secondary site picketing, finding picketing that meets its requirements lawful without regard to its actual object.¹⁴⁹ For the first time in many years, even picketing of a construction site by a union having a dispute with a subcontractor has been found to comply with *Moore Dry Dock*.¹⁵⁰ As with the first metamorphosis, no change was announced, and the verbal form of *Moore Dry Dock* remained inviolate; in application, however, the test was once again what it had been at the outset.¹⁵¹ How the courts of appeals will react remains to be seen.

II. THE MERITS OF A MODIFIED LITERAL APPROACH

"Statutory construction in doubtful cases, in the last analysis, is a choice among competing policies as starting points for reasoning."¹⁵² In such words did Frankfurter and Greene offer the "real explanation" of the division within the Supreme Court in *Duplex Printing Press Co. v. Deering*.¹⁵³ And so might one explain the continuing conflict in the Board decisions construing section

146. *E.g.*, International Bhd. of Elec. Workers (Anderson Co. Elec. Serv.), 135 N.L.R.B. No. 55 (Jan. 24, 1962); Plumbers Union (Wyckoff Plumbing), 133 N.L.R.B. 547 (1962); see United Plant Guard Workers (Houston Armored Car Co.), 136 N.L.R.B. No. 9 (March 5, 1962).

147. This fact was emphasized in Plumbers Union (Wyckoff Plumbing), *supra* note 146, but the Board did not state that its existence was a requisite for applying *Moore Dry Dock*.

148. Local 662, Radio Eng'rs (Middle So. Broadcasting Co.), 133 N.L.R.B. 1698, 1707-08 (1961) (Member Rodgers, dissenting).

149. See cases cited in note 146 *supra*. In Local 662, Radio Eng'rs (Middle So. Broadcasting Co.), 133 N.L.R.B. 1698 (1961), the Board said:

Obviously, where, as here, a union is engaged in picketing a primary nonunion employer, it necessarily has an object of inducing other employers and persons not to do business with, or work for, the primary employer. Such an object, however, is not unlawful provided the means used, i.e., picketing and other publicity are conducted in a manner not proscribed by the statute, in this case lawful "common situs" picketing.

Id. at 1704 n.10. *But cf.* Local 730, Teamsters Union (C. R. Sheaffer & Sons), 136 N.L.R.B. No. 88 (April 10, 1962).

150. See International Bhd. of Elec. Workers (Anderson Elec. Serv. Co.), 135 N.L.R.B. No. 55 (Jan. 24, 1962); Plumbers Union (Wyckoff Plumbing), 135 N.L.R.B. No. 49 (Jan. 18, 1962). In *Anderson* there was an actual work stoppage by the employees of a unionized subcontractor.

151. See Administrative Decisions of the General Counsel, Case No. SR-1862, 50 L.R.R.M. 1077 (Feb. 28, 1962).

152. FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 169 (1930).

153. 254 U.S. 443 (1921).

§(b)(4). One comes away from an examination of the decisions dealing with the primary-secondary dichotomy with the impression that the attempt made to subject the contending approaches to section 8(b)(4) to critical analysis has been too half-hearted. The marshalling of argument in support of one view or another has more of the tone of debate, with points submitted to buttress a position already arrived at, than of an evaluation of the factors that ought to persuade a tribunal charged with effectuating the legislative purpose. There is often an undue haste to find, on perusal of the statutory text and explicit statements made in committee reports or in debate, that Congress has left the matter at large or has manifested contradictory views, and has mandated the Board to discharge the task of "accommodation" or "balancing the interests" as it sees fit; thereupon the choice is made with reference to personal views.¹⁵⁴ Yet if that resolution of complex and controversial contests between "competing policies" that most faithfully reflects the values of Congress is to be made, the inquiry must be carried on in a spirit of maximum vigor and detachment.¹⁵⁵

154. This is only rarely, if ever, made the expressed process of decision, but most observers would, I believe, regard it as an accurate description, and there is on record at last one post hoc acknowledgment of its truth. Speaking with reference to the "Eisenhower Board's" ill-fated *Curtis* doctrine, which held minority union picketing for recognition a violation of § 8(b)(1)(A), Local 639, Drivers Union (*Curtis Bros.*), 119 N.L.R.B. 232 (1957), *enforcement denied*, 274 F.2d 551 (D.C. Cir. 1959), *aff'd*, 362 U.S. 274 (1960), Member Jenkins described his approach to the statutory construction issue presented:

[I]t was [not] the function of the Board to decide what the law ought to be . . . but . . . when there were two equally valid competing legal theories in any field and when one of them appealed to my sense of justice and the other one did not . . . I was going to decide in favor of that theory which to my mind appealed to my sense of justice.

Hearings Before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor, 87th Cong., 1st Sess., pt. 2 at 1019 (1961).

155. Of course, if in fact two competing views are "equally valid," one can quarrel with the Board if it lets its own views break the impasse. The rub is that equal validity is an extremely rare condition. The viewpoint manifested by Member Jenkins' statement, *supra* note 154, tends to sap the will to search diligently for legislative direction, and often "failure to glean any indication of the legislative choice from the available materials may result from the absence of adequate and sustained inquiry, even more readily than from the incapacity of the material to yield such indication." MISHKIN & MORRIS, ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW 270 (tent. ed. 1962) (unpublished). Thus, while the Jenkins statement is unobjectionable if narrowly confined to those cases in which it is literally applicable, the very act of subscribing to it as an approach to statutory construction tends to cause its application in practice to broaden impermissibly. *Curtis* itself, *supra* note 154, as the analysis contained in the Supreme Court's reversal of the Board, *NLRB v. Drivers Union*, 362 U.S. 274 (1960), so ably demonstrates, see text accompanying notes 187-97 *infra*, provides an ironically appropriate illustration of this tendency. The Board's theory was hardly "equally valid," in light of the history of the 1947 act.

The remedy is not, of course, to refuse to recognize that there will be cases in which personal preferences will have to be consulted, or that in any case those preferences are likely to exert their influence. But the former should be treated as a rare bird indeed, and the latter as a threat to be guarded against. While the problem is certainly not one of "will" alone, one will far more often find meaningful evidence of congressional choice among competing values if he approaches the inquiry in the spirit manifested by the words of Judge Learned Hand, contained in a letter read at the presentation of a portrait bust of Mr. Justice Frankfurter at the Harvard Law School in 1960:

Legal interpretation involves an imaginative projection upon the occasion that has arisen of what would have been the choice of the lawmakers. There is

A. *A Modified Literal Approach*

I propose first to consider the strength of the objections to the literal approach, a view that is at present a minority one on the Board, but one that has not yet been effectively put to rest, neither on the basis of reason nor—no matter how often union counsel will quote *General Electric's* flat assertion that the section "could not be literally construed"¹⁵⁶—on the basis of authority.¹⁵⁷ A reading of the act resting on the words used by the legislature is surely the proper place to begin inquiry.

The statutory language reaches so far as to cover the act of causing or attempting to cause primary employees ("any individual employed by any person engaged in commerce") to strike in order to force or require the primary ("any person") to cease doing business with secondary employers ("any other person"). Such a reading would of course be absurd, for every strike has the aim of shutting the primary's business by depriving him of labor. In a sense, then, the proponents of a literal approach, as that term is ordinarily used (and is used in this article), can agree that the statute "could not be literally construed"; for they assert only that all appeals to secondary employees having the proscribed object are condemned by section 8(b)(4). Why may not such a view be accepted? The reason given by Board members rejecting the literal approach—first by the majority in *Pure Oil, Ryan, Schultz, and Moore Dry Dock*,¹⁵⁸ later by dissenters in cases like *Crystal Palace, Superior Derrick, and McJunkin*,¹⁵⁹ and most recently in *Local 662, Radio Eng'rs (Middle So. Broadcasting Co.)*¹⁶⁰ by a majority again—is that such a reading would not narrow the statute at all, because all picketing is "necessarily designed" to appeal to secondary employees,¹⁶¹ and because "the object of all picketing at all times is to influence third persons to withhold their business" from the primary.¹⁶² The proper point of departure for a defense of a literal approach is to subject this sweeping assertion of the facts of industrial life to a skeptical appraisal. Of course, any strike leader or picket captain very much wants his picket signs to have the same effect as

no certain guidance for this in the words themselves and it is impossible to know how nearly the judge has rightly guessed the lawmakers' putative preferences. Would you agree that of all the factors that enter into his art the most important is that he shall abstain from substituting his personal choice? He is called upon to ascribe to others a decision that they never actually forecast by fabricating factitious appraisals. Ordinarily the best we can hope for is that his guess shall be made only after his best effort to reconstitute the gamut of values current at the time when the words were uttered.

156. *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 672 (1961).

157. The dissenting opinions in *Plauche*, see text accompanying notes 141-44 *supra*, and *Carrier*, see text accompanying notes 137-38 *supra*, prove no less than that *General Electric* has worked no change in the viewpoint of the adherents of a literal approach.

158. See text accompanying notes 10-13, 17, 53-62 *supra*.

159. See, *e.g.*, note 51 *supra*.

160. 133 N.L.R.B. 1698 (1961); see note 149 *supra*.

161. *Oil Workers (Pure Oil Co.)*, 84 N.L.R.B. 315, 318 (1949).

162. *International Bhd. of Teamsters (Schultz Refrigerated Serv.)*, 87 N.L.R.B. 502, 505 (1949).

Board of Health quarantines. And he may be well aware that his chances of bringing effective pressure on the primary through the (often unionized) employees of his suppliers and customers are far better than is the likelihood of inducing so-far-unwilling primary employees to make common cause with the union, or—worse yet—of causing striker replacements to mend their erring ways.¹⁶³ But one may question whether so wholly factual and subjective a condition is what Congress described as the forbidden “object.”¹⁶⁴ So long as the picketing, viewed objectively, is aptly set up to serve the purpose of appealing to primary employees as well as secondary, may not instances of the latter appeal be thought “so unavoidable and so entangled with the legitimate activities of the pickets that the Board and the courts are justified in finding that evidence of the proscribed objective is lacking”¹⁶⁵ After all, Congress was presumably concerned with deterring practices it thought undesirable, not with reforming the state of mind of union officials. Only appeals to secondary employees that do not arise out of acts reasonably appropriate (whatever their actual motive) to facilitate appeals to primary employees should, on this analysis, constitute sufficient evidence of the prescribed object.

Such a view, a “modified literal approach,” seeking to implement the language of the statute while avoiding a patently over-broad reach, deserves careful examination. Its asserted incompatibility with other provisions of the NLRA, and with the legislative history, needs to be calmly and fully explored.

B. *The “Primary Picketing” Proviso*

At least since 1959, one can not state a case for a modified literal approach without soon coming to grips with the significance of the inapplicability of section 8(b)(4) to “primary” activity. For the proviso added to the secondary boycott section in that year makes its inapplicability express.¹⁶⁶ The difficulty, of course, is that the term “primary” is not defined, and it has been clear since the court of appeals’ decision in *International Rice Milling*, if not earlier, that the problem is not merely one of stating, but of giving content to, the primary-secondary dichotomy.¹⁶⁷

163. An experienced union lawyer has said: “[E]xcept in the mass production industries, it is the struck employer’s inability to get raw materials and to market finished goods, rather than any difficulty in replacing his striking employees, which provides the economic inducement necessary to a settlement of the dispute.” Previant, *Boycotts Under the 1959 Amendments*, in NYU INSTITUTE OF LABOR RELATIONS & SOCIAL SECURITY, PROCEEDINGS OF THE THIRTEENTH ANNUAL CONFERENCE ON LABOR 141, 145 (1960).

164. Cf. Note, 45 GEO. L.J. 614, 642 (1957): “No one has yet suggested that the test of a . . . violation should be what the union would have intended to accomplish by its picketing if Taft-Hartley had never been passed.”

165. Brief for the General Elec. Co. as Respondent, p. 15, *Local 761, Int’l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961).

166. “[N]othing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing” Added by 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. III, 1962).

167. See note 19 *supra* and accompanying text. See also *United Steelworkers v. NLRB*, 289 F.2d 591, 594-95 (2d Cir. 1961).

The proviso was inserted by the Conference Committee appointed to reconcile the House-passed Landrum-Griffin Bill¹⁶⁸ with the Kennedy-Ervin Bill passed by the Senate.¹⁶⁹ The Conference Report stated:

The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. [citing, *inter alia*, *Moore Dry Dock*, *Washington Coca-Cola*, and *Pittsburgh Plate Glass*]¹⁷⁰

The particular change referred to was the elimination by the Landrum-Griffin Bill of section 8(b)(4)'s applicability to inducements of "concerted" refusals to work only. This was surely one of the most inconsequential loopholes ever to engage the serious attention of the national legislature,¹⁷¹ but its "closing" might have been taken to pull out the keystone of the entire primary-secondary dichotomy. The genesis of attention to the requirement of concert was, of course, the Supreme Court's *International Rice Milling* decision,¹⁷² which approved the result of the Board's primary situs doctrine on that ground.¹⁷³ The fear was that the legislative overruling of that decision might be taken as reinstating the view that section 8(b)(4) condemned certain conduct "without resort to any distinction between primary and secondary activities."¹⁷⁴

There is some evidence that the Senate conferees, at whose instance the proviso was added, sought to preserve the *International Rice Milling* result on a rationale very much like that underlying the primary situs doctrine. The Kennedy-Thompson memorandum, in explaining the primary character of typical primary site picketing, said:

Now suppose that the Carpenters Union puts a picket line around the factory [of an employer with whom it has a primary dispute] which has the effect of turning back the drivers of independent trucking concerns. This kind of picketing has never been treated as a secondary boycott. It occurs at the factory of the employer primarily engaged in the labor dispute. It aims at halting commercial intercourse with him (a primary boycott), not at halting intercourse with persons who have intercourse with him (a secondary boycott).¹⁷⁵

168. H.R. 8400, 86th Cong., 1st Sess. (1959), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 619 (1959) [hereinafter cited as LMRDA LEG. HIST.].

169. S. 1555, 86th Cong., 1st Sess. (1959), in 1 LMRDA LEG. HIST. 516.

170. H.R. REP. No. 1147, 86th Cong., 1st Sess. 38 (1959) (Conference Report), in 1 LMRDA LEG. HIST. 942. The report also cited *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675 (1951).

171. See *Previant*, *supra* note 163, at 146.

172. *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

173. See text accompanying note 22 *supra*.

174. *International Rice Milling Co. v. NLRB*, 183 F.2d 21, 26 (5th Cir. 1950), *rev'd*, 341 U.S. 665 (1951); see text accompanying note 19 *supra*. See also the Kennedy-Thompson memorandum analyzing the differences between the House and Senate treatment of secondary boycotts. 105 CONG. REC. 15221 (1959), in 2 LMRDA LEG. HIST. 1707.

175. 105 CONG. REC. 15221 (1951), in 2 LMRDA LEG. HIST. 1707. Some supporting

Although this reasoning is very similar to that offered by the union in *General Electric*, the Board or a court should hesitate to find, from this statement, congressional embodiment in section 8(b)(4) of the views it suggests. As we have seen, there are several grounds on which one can hold picketing of the kind described outside the statute. One can rely on the focus of pressure, as the quoted passage does, or on the nature of the service performed by the secondary, as Mr. Justice Frankfurter's *General Electric* opinion suggests,¹⁷⁶ or, finally, on the idea that the forbidden object should not be inferred from picketing "so unavoidable and so entangled" with the primary strike, as even a modified literal approach would recognize. To seek to find—either in particular statements of individual congressmen or in extrapolations from them, or in specific Board or court decisions assertedly known to Congress in August 1959, and thereby constituting "existing law"¹⁷⁷—firm ground for freezing, through the primary picketing proviso, any specific definition of the term "primary," is to misuse legislative history. In light of what Congress was doing, it places an unrealistic burden on that body to require it, when addressing itself to a comparatively trivial point, to choose—on pain of being taken to have chosen—among competing views of this larger and long-perplexing, but very particularistic, issue. All that Congress wanted to accomplish was to broaden the statute to include inducements of nonconcerted refusals to work; the proviso sought simply to insure that the change would have no effect on the primary-secondary dichotomy. Efforts to grapple with the problem were to continue as before.¹⁷⁸ To be sure, Congress was agreed

indicia of legislative understanding should be mentioned. The House Labor Committee, reporting out the Elliott Bill, which was very similar in approach to the Kennedy-Ervin Bill, flatly said: "'Primary activities' is a term used to describe a strike or picketing at a plant of the employer engaged in the labor dispute. It is settled law that the . . . Act does not require a truckdriver to cross a primary picket line and that the 'pickets may request him not to enter the strike-bound plant.'" H.R. REP. NO. 741, 86th Cong., 1st Sess. 21 (1959), in 1 LMRDA LEG. HIST. 779 (quoting *International Rice Milling*). See Representative Griffin's summary tabulation of the conference agreement, describing the proviso as a "clarification that picketing at primary site is not secondary boycott." 105 CONG. REC. 16539 (1959), in 2 LMRDA LEG. HIST. 1712.

176. See text accompanying note 126 *supra*.

177. See Zimmerman, *supra* note 135, at 1178 & n.42.

178. This situation may be usefully contrasted with the legislative treatment of the so-called "struck work" exception. According to case law, one who performed work previously done by strikers, whether by agreement with the primary or otherwise, thereby "allied" himself with the primary and became amenable to union pressure similar to that which was permitted against the primary. See *NLRB v. Business Mach. Mechanics Conference*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956) (*Royal Typewriter*); *Shopmen's Union (Oliver Whyte Co.)*, 120 N.L.R.B. 856 (1958). Under the guise of codifying this doctrine, the Landrum-Griffin Bill would have narrowed it to cases in which the secondary employer had contracted with the primary to do the struck work, and to permit only inducements limited to refusals to work on the struck goods. H.R. 8400, 80th Cong., 1st Sess. § 705(a) (1947), in 1 LMRDA LEG. HIST. 680, 682-83. The Senate conferees objected, see 105 CONG. REC. 15222-23, in 2 LMRDA LEG. HIST. 1708-09 (Kennedy-Thompson memorandum), and the conference deleted the provision "because the committee . . . did not wish to change the existing law . . ." H.R. REP. NO. 1147, 86th Cong., 1st Sess. 38, in 1 LMRDA LEG. HIST. 942 (Conference Report). Here there is good ground for saying that future judicial or administrative reconsideration is barred. In the type of case dealt with in text, congressional

that, although *International Rice Milling's* rationale was to be overruled, its result was correct, and it must therefore be deemed to have regarded the act of turning away truck drivers approaching the primary site as "primary." But the Board and the courts must indicate on which of competing rationales, and with what particular radiations to other fact patterns, the indicated result is to be grounded; and they must defend their choice on the merits, on its consonance with the purposes of the 1947 act, not on the basis of any approach thought to have been newly laid down by the legislature in 1959.

C. *The Impact of Sections 7 and 13*

The major supports, in the statute as enacted in 1947, for a rejection of a literal approach to section 8(b)(4) have been sections 7 and 13.¹⁷⁹ Section 7 purports to guarantee labor the right to engage in concerted activities, including strikes and picketing, for the purpose of mutual aid or protection,¹⁸⁰ and section 13 permits inroads on that right only as specifically provided for in the act.¹⁸¹ It has been asserted that section 8(b)(4), as construed by a literal approach, is so pervasive that it "does violence" to sections 7 and 13, and an alternative approach to the section must therefore be adopted.¹⁸²

desire not to "change" the law was merely a purpose not to *affect* it (while modifying the rules in a different area); in the struck work area, Congress refused to *alter* the very rules that were the subject of attention.

179. Reliance is sometimes also put on § 2(3), 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1958), defining an "employee" as not limited "to the employees of a particular employer," but the point is hardly worth serious attention.

180. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

181. 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958). Although the section refers only to the "right to strike," it has been applied to other activity, such as picketing, within the scope of § 7. See *NLRB v. Drivers Union*, 362 U.S. 274, 281 n.9 (1960); *cf. International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 259-60 (1949).

182. *Chauffeurs Union (McJunkin Corp.)*, 128 N.L.R.B. 522, 530 (1960) (dissenting opinion), *rev'd per curiam*, 294 F.2d 261 (D.C. Cir. 1961). A variant on this view would, if adopted generally, deny the Board power to elaborate rules limiting picketing, on the ground that no "specific" warrant for them appears in the statute. For example, the influential first *Campbell Coal* decision of the District of Columbia Circuit, see note 87 *supra* and accompanying text, rejected the *Washington Coca-Cola* doctrine on this ground:

No rigid rule which would make [the existence of an opportunity to picket at the primary site] . . . conclusive is contained in or deducible from the statute.

To read it into the statute by implication would unduly invade the application of section 13 which preserves the right to strike "except as specifically provided" in other provisions of the Act. It is not specifically provided that picketing at a common site, with an incidental effect upon employees of a neutral employer, is unlawful in every case where picketing could also be conducted against the primary employer at another of its places of business.

Sales Drivers Union v. NLRB, 229 F.2d 514, 517-18 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956). This reasoning, which could as well be adapted against the *Moore Dry Dock* or *General Electric* decisions, wholly begs the question. The "specific" provision in question is § 8(b)(4), which does bar inducement of neutral employees by picketing having the designated object. If the literal approach is accepted—and *Campbell Coal* seems to accept it—so that the critical issue is the union's object, the question is whether picketing at a secondary site is proved to be for the forbidden object by the fact that primary employees could have been reached at the primary site. *Campbell Coal* apparently rejects that contention summarily; once it is rejected, the Board's own basis for *Washington Coca-Cola* is undermined and resort to § 13 adds nothing. But if it is accepted, § 13 has been given its due, for there is a specific provision involved: § 8(b)(4)

This contention rests on more than a literal reading of section 13;¹⁸³ it finds in that section a mandate, not only to avoid resort to general statements and policies, expressed or implicit in the act, to restrict labor's use of its traditional weapons, but also to shrink from accepting on its face the directions of an articulated prohibition when to do so would seem to go "too far." But, how far is "too far" is, of course, for the legislature to say, and if the setting of a provision's enactment shows no design to make as deep an inroad as a literal approach would assertedly make, the Board, on any sensible view of statutory construction, would be bound to give effect to that fact, section 13 apart. Section 13, then, if it is to have any independent force, would go further: it would in effect erect a presumption against finding such a strongly restrictive purpose. That is, unless the legislative record affirmatively persuaded one that the congressional design was to go as far as its language, a narrower construction would have to be adopted.

Initially, of course, section 13 had no such purpose. The Wagner Act contained no prohibitions on union conduct,¹⁸⁴ and section 13 could not have been designed to affect the construction of nonexistent provisions. Its function was simply to prevent resort to the principles of the act—*e.g.*, majority rule and peaceful settlement of disputes—to justify judicial imposition of restraints on union activity thought to be inconsistent with those principles.¹⁸⁵ The addition of section 8(b) by the Taft-Hartley Act significantly changed the

is most specifically addressed to the very conduct in issue. Indeed, when *Campbell Coal* again came to the court of appeals after the remand, the court recognized as much. *Truck Drivers Union v. NLRB*, 249 F.2d 512 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 958 (1958).

183. I shall not specifically refer further to § 7. Obviously, all of § 8(b) is "inconsistent" with that provision, in the sense that it restricts activity which otherwise would (for the most part) be protected. Congress can give with one hand, and take with another (or, a dozen years later, take with the same). Of course, one should not find too quickly that Congress has done that, but any such argument entirely duplicates that drawn from § 13, discussed below.

184. Closed- or union-shop agreements between employers and minority unions were outlawed by § 8(3), 49 Stat. 452 (1935), but the prohibition of the statute fell only on the employer party to such an agreement.

185. The Wagner Act simply took in the substance of the section from that short-lived way-station between the Blue Eagle and the NLRA—Public Resolution No. 44, 48 Stat. 1183 (1934). See, on the inclusion of § 13 in the NLRA, S. REP. NO. 573, 74th Cong., 1st Sess. 15 (1935). Section 6 of that resolution, the progenitor of § 13, was added out of what was conceded to be an excess of caution, to insure that the investigative and election machinery authorized by the resolution would not be taken as grounds for restricting strikes. See 78 CONG. REC. 12044-45 (1934) (remarks of Senator LaFollette). An appropriate case for use of § 13 would have been *Fur Workers Union v. Fur Workers Union*, 105 F.2d 1 (D.C. Cir.), *aff'd per curiam*, 308 U.S. 522 (1939), in which the court refused, without resorting to § 13, to rely on the policies of the NLRA to hold the Norris-LaGuardia Act inapplicable to picketing which sought to unseat a lawfully recognized rival union.

Section 6 of the resolution read as follows: "Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities." 48 Stat. 1183 (1934). NLRA § 13 said: "Nothing in this Act shall be construed so as to interfere with or diminish in any way the right to strike." 49 Stat. 457 (1935). Assuming, as there is no reason not to do so, that the later version was not designed to be of narrower scope than the former, § 6 provides a textual basis for applying § 13 to concerted activities generally, and not solely to strikes. *Cf.* note 181 *supra*.

potential impact of section 13. Once affirmative restraints on concerted activities were imposed, section 13 might well operate to condition the construction of those restraints. The preservation of the section would suggest that the existing rule against the implication of restraints from the general goals of the statute was to be preserved.¹⁸⁶ But the only textual basis for giving the provision a broader reach, and thus an impact on the construction of the section 8(b) restraints, is that the exception that had to be written into section 13 to accommodate it to section 8(b) refers to restraints "specifically" provided. The most straightforward reading of this term is that it was designed only to ensure the preservation of the existing rule, despite the changed orientation of the NLRA. On such a view, the "specific" provisions are the restrictions described in section 8(b), and while implication of restraints from the general policies of the act would remain barred unless found to have been given effect in section 8(b), the construction of that section would be unaffected. Is there warrant for giving section 13 an importantly broader impact?

The recent Supreme Court decision in *NLRB v. Drivers Union (Curtis)*¹⁸⁷ provides a useful vehicle for exploration of the problem.¹⁸⁸ The Board had construed section 8(b)(1)(A) to prohibit minority union picketing for recognition. That section forbids unions to "restrain or coerce" employees in the exercise of their right, protected by section 7, not to be represented by a union which lacks majority support;¹⁸⁹ picketing for recognition, through the threat of economic injury to the employer's business, may place employees in jeopardy of loss of work, and is therefore, the Board reasoned, within the statutory proscription. The Board was also impressed by the fact that, since an employer may not lawfully recognize a minority union, picketing for recognition has the "unlawful direct purpose of forcing the commission of an unfair labor practice by the employer . . ." ¹⁹⁰ Administrative or judicial proscription of minority recognition picketing on this latter ground would, no doubt, run afoul of section 13, for it does not rest on any statutory prohibition of union action, but on an administrative judgment that the action is

186. The Senate Committee Report said that the "specifically provided" clause "makes clear that the Wagner Act has diminished the right to strike only to the extent specifically provided by the new amendments to the act . . ." S. REP. No. 105, 80th Cong., 1st Sess. 28 (1947), in 1 LMRA LEG. HIST. 434.

187. 362 U.S. 274 (1960), *affirming* 274 F.2d 551 (D.C. Cir. 1959), *denying enforcement* in 119 N.L.R.B. 232 (1957).

188. Despite assertions sometimes made to the contrary, the Supreme Court's *International Rice Milling* decision did not give § 13 a broader impact. The Court first found the challenged activity outside the language of § 8(b)(4), by reason of the lack of inducement of "concerted" action, see text accompanying note 22 *supra*, and only then invoked the "specifically provided" language of § 13, saying: "No such specific provision in § 8(b)(4) reaches the incident here." 341 U.S. 665, 673 (1951).

189. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958).

190. *Drivers Union (Curtis Bros.)*, 119 N.L.R.B. 232, 239 (1957), *enforcement denied*, 274 F.2d 551 (D.C. Cir. 1959), *aff'd*, 362 U.S. 274 (1960). On the unlawfulness of recognition of a minority union see *International Metal Prods. Co.*, 104 N.L.R.B. 1076 (1953); *cf. ILGWU v. NLRB*, 366 U.S. 731 (1961).

inconsistent with policies discernible in the congressional scheme. The former ground, however, has a firmer base, and the more difficult question is whether section 13 has an inhibitory role to play in the construction of the limitation on concerted action embodied in section 8(b)(1)(A).

The Supreme Court, reversing the Board's view, placed substantial weight on section 13, which it examined at the very outset of its consideration of the problem. Mr. Justice Brennan, for the Court, said:

[S]ince the Board's order in this case against peaceful picketing would obviously "impede" the right to strike, it can only be sustained if such power is "specifically provided for" in § 8(b)(1)(A), as added by the Taft-Hartley Act. To be sure, § 13 does not require that the authority for the Board action be spelled out in so many words. Rather . . . § 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, § 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of § 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act.¹⁹¹

This is strong talk. If the last sentence in particular is taken as a general description of the impact of section 13 on any problem under section 8(b),¹⁹² there would be little doubt that a literal approach to section 8(b)(4) would be barred by it, for "doubts and ambiguities" there certainly are. *Curtis*, however, should be considered in context. The Supreme Court assuredly did not rely simply on the quoted passage and a view that the legislative debates on section 8(b)(1)(A) were "ambiguous." It based its holding on far firmer foundations. First, it referred to the "very general standard" of section 8(b)(1)(A), and noted the large degree of overlap with the much narrower section 8(b)(4)(C), which specifically outlaws picketing for recognition when a rival union is certified.¹⁹³ Second, repeating an earlier dictum that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions,"¹⁹⁴ it made this conditioning observation: "In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing."¹⁹⁵ It was as a consequence of these factors that the Court

191. 362 U.S. at 282.

192. Member Fanning has so applied it to the secondary boycott problem. See *Chauffeurs Union (McJunkin Corp.)*, 128 N.L.R.B. 522, 531 n.21 (1960) (dissenting opinion), *enforced as modified per curiam*, 294 F.2d 261 (D.C. Cir. 1961).

193. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4)(C) (1958). The Court also referred to the prohibitions on secondary pressure to gain recognition, embodied in § 8(b)(4)(B), and on attempts to compel self-employers to join unions, in § 8(b)(4)(A). 362 U.S. at 285.

194. 362 U.S. at 282-83, quoting *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 498 (1960).

195. 362 U.S. at 284.

approached the legislative history in an avowedly skeptical mood, insisting on the "clearest indication" of support for the Board's position as the condition of its assent. What it found there was not merely inconclusive colloquy dealing (or not dealing) with the issue at bar, but a vastly more meaningful evolution of the act. Specifically, the Hartley Bill would have expressly banned picketing for recognition by an uncertified union, and any picketing seeking to compel an employer to violate the act;¹⁹⁶ these provisions were abandoned in conference in favor of section 8(b)(1)(A).

"This history makes pertinent," the Court concluded, the fundamental insight expressed in Mr. Justice Frankfurter's *Sand Door* opinion:

It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law.¹⁹⁷

This principle, and indeed the entire process of decision that it suggests, and which *Curtis* illustrates, is importantly different from the quoted excerpt construing section 13, a dictum specifically acknowledged by the Court to have been unnecessary to the result.¹⁹⁸ Certainly, if the Court's reference to an "expansive reading" is meant to suggest an "over-expansive reading," no one can quarrel with the principle, although reliance on section 13 hardly seems a requisite to its acceptance.¹⁹⁹ But if, as the last sentence of Justice Brennan's passage suggests, the meaning is that section 13 enjoins one to accord section 8(b) a relatively cold reception, uniformly construing it as narrowly as the limits of "doubts and ambiguities" permit, it goes too far. The question in every case should be whether—in light of the degree of generality of the provision in question, the significance of the particular

196. H.R. 3020, 80th Cong., 1st Sess. § 12(a)(3)(C)(i) and (iii) (1947), in 1 LMRA LEG. HIST. 79; see 362 U.S. at 289.

197. 362 U.S. at 289-90, quoting *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 99-100 (1958) (*Sand Door*).

198. 362 U.S. at 290.

199. See text accompanying note 183 *supra*. Of course, the Board (as distinguished from a court) will never issue a cease-and-desist order without tying its theory of illegality to one or another clause of § 8. The Supreme Court has refused to permit several attempts at over-expansive reading, in areas other than minority recognition picketing. See *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961) (union security); *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960) (duty to bargain); *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958) ("hot cargo" agreements); *cf. Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960) (statute of limitations). When the particular context calls for it, such decisions might appropriately draw support from the thought expressed in the quotation from *Sand Door*, see text accompanying note 197 *supra*, and perhaps Justice Brennan meant to find no more in § 13.

restraint sought to be imposed to labor-management power relationships, the controversiality of the issue in the legislators' experience (an experience which relevantly goes back, on the federal level, to 1890), and the extent to which the evolution of legislative policy dealing with the question evidences a congressional sense of caution, restraint, and compromise—the assertion that a particular restriction is embodied in a section 8(b) provision should or should not be skeptically received. The Court's performance in *Curtis* belies any impression that might arise from some of the words uttered regarding section 13; it is not sufficient merely to dredge up ambiguous (almost necessarily ambiguous) excerpts from legislative debates, and then ascribe to section 13 the effect of compelling a choice in favor of the less restrictive view. There is danger in such an attitude of erecting a personal prejudice into a rule of construction of a major regulatory enactment.

The problem of the *Curtis* case was, in my view, soundly handled by the Court, for its opinion dealt with the above factors fully, and found them persuasively suggestive of a narrow interpretation of section 8(b)(1)(A). When one comes to examine, however, the area of primary and secondary boycotts, one finds a greater ambivalence. The statutory test is highly particular, and specifically addressed to the type of conduct in question. Moreover, to speak very generally, Congress has acted with far less restraint in the secondary boycott field than it has with regard to minority union picketing.²⁰⁰ At the same time, enforcement of a prohibition on secondary boycotts, even if designed to protect neutral employers, can operate powerfully to alter the power relationships between the immediately contending parties to labor disputes.²⁰¹ To find the resultant of these forces, a more penetrating examination of the legislative response to secondary pressures is called for.

D. *The (Properly) Neglected "Picket Line Crossing" Proviso*

It has been argued that section 8(b)(4) contains, in the proviso permitting refusals to cross picket lines in certain circumstances,²⁰² express recognition of the reluctance of Congress to outlaw all picketing in support of a primary dispute, and that the refusal to read the statute literally therefore

200. This general difference in tone is discernible in the 1959 as well as the 1947 debates. See, regarding the former, COX, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 262-74 (1959). On the latter, Senator Taft's oft-quoted profession of inability to distinguish between "good and bad" secondary boycotts, 93 CONG. REC. 4323 (daily ed. April 29, 1947), in 2 LMRA LEG. HIST. 1106, is not atypical of the Congressional attitude toward secondary strikes. See also COX, *LAW AND THE NATIONAL LABOR POLICY* 35 (1960).

201. See 93 CONG. REC. 321-23 (daily ed. April 29, 1947), in 2 LMRA LEG. HIST. 1104-06 (colloquy between Senators Pepper and Taft).

202. *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this act
61 Stat. 142 (1947), 29 U.S.C. § 158(b)(4) (1958).

can not be justified on the ground of an otherwise too-pervasive effect. The assertions are that the proviso "is designed, though awkwardly drafted, to immunize the inducement of a refusal to cross a picket line" in cases when its conditions are met and, this being so, that "the very existence of the proviso indicates that Congress was aware of the far-reaching character of section 8(b)(4)(A), because in the absence of such awareness it would not have deemed it necessary expressly to provide an exception in favor of refusals to cross primary picket lines."²⁰³ This construction would save the legality of primary site picketing only when carried on in connection with a strike called or authorized by a majority union, and would not apply to secondary site picketing at all. This argument, and indeed the entire question of the scope and function of the proviso, has been steadily ignored by the Board.²⁰⁴ If the premise is right the conclusion should be accepted, for the proviso would then evidence an advertent congressional recognition, and resolution, of the very problem giving rise to the reluctance to take the body of the statute at its word. The difficulty, however, is in accepting the premise that the proviso in fact was "designed" to restrict the reach of section 8(b)(4).

If the proviso is read as a limitation on section 8(b)(4), legalizing boycott action by the secondary employees' union, its language would presumably be expanded to legalize inducements of such action on the part of the primary union, which is usually the respondent in secondary boycott cases.²⁰⁵ The proviso would otherwise make no sense at all; the most routine case of primary site picketing would remain unaffected by the proviso. The real difficulty, however, is not in choosing this approach over its alternatives, but in accepting the premise that the proviso in fact manifests a congressional judgment as to the proper reach of the secondary boycott ban. The difficulties in accommodating the language of the proviso to that of the body of section 8(b)(4) provide some ground for doubt.²⁰⁶ The limitation of the proviso

203. Comment, "*Primary*" and "*Secondary*" Labor Action: The Case of the Neglected Proviso, 1 LAB. L.J. 339, 341 (1950); see Newspaper Deliverers' Union (Interborough News Co.), 90 N.L.R.B. 2135, 2148-49 (1950) (intermediate report).

204. See Newspaper Deliverers' Union (Interborough News Co.), *supra* note 203 at 2135-36, expressly refusing to consider the trial examiner's reliance on the proviso to exempt the union action from the statute, and resting the decision on *Pure Oil*.

205. See International Bhd. of Teamsters (Conway's Express), 87 N.L.R.B. 972, 1021 n.20 (1949), *aff'd sub nom.* Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952) (intermediate report); International Bhd. of Teamsters (Di Giorgio Wine Co.), 87 N.L.R.B. 720, 746 nn.40-41 (1949), *aff'd sub nom.* Di Giorgio Fruit Corp. v. NLRB, 191 F.2d 642 (D.C. Cir.), *cert. denied*, 342 U.S. 869 (1951) (intermediate report). *But cf.* Oil Workers (Pure Oil Co.), 84 N.L.R.B. 315, 321 (1949) (dissenting opinion); Tower, *The Puzzling Proviso*, 1 LAB. L.J. 1019, 1022-23 (1950).

206. The most readily apparent problem is the literal terms of the proviso itself. It speaks of not making "unlawful" the refusal of "any person" to cross a picket line, while § 8(b)(4) of course makes it an "unfair labor practice" for "a labor organization or its agents" to induce, *inter alia*, refusals to cross a picket line. There is good evidence that the Senate Committee equated "unlawful" with "unfair labor practice" in this context. See S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947), in 1 LMRA LEG. HIST. 429. Although the contention that the proviso only affirms the lawfulness of individual employee refusals to enter picketed premises is somewhat more troublesome, see the General Coun-

to strikes called or authorized by a majority union, seemingly in response to considerations not reflected in the statute as a whole, greatly strengthens the doubt. Minority union strikes and picketing were not restricted by the Taft-Hartley Act, except in the case of attempts to secure recognition in the face of a rival union certification,²⁰⁷ and the majority status of the union is no indication—or at the most a very rough indication—of the primary or secondary character of the picketing.²⁰⁸ The Eightieth Congress was under strong pressure to enact a prohibition of minority picketing, but it did not, although the point was not authoritatively settled until the Supreme Court's *Curtis* decision. To one who regards the Board's now rejected *Curtis* doctrine as sound policy, the proviso seems to draw a sensible line.²⁰⁹ However, it should be clear that, whatever the merits of a legislative ban on minority recognitional efforts, unless the Taft-Hartley Act in fact enacted such a proscription, the proviso responds to no policy actually reflected therein.²¹⁰

The origin of the proviso confirms these doubts. As has been pointed

sel's contention to this effect in *Newspaper Deliverers Union (Interborough News Co.)*, 90 N.L.R.B. 2135, 2146-47 (1950), there are several reasons for rejecting this literal reading of the proviso. First, and most obvious, it is unnecessary, since individual acts, done by employees not acting as agents for a union, can not violate § 8(b), and there is no particular reason to regard the proviso as merely precautionary. Second, effect can not be given to the limitations on the proviso so long as the proviso itself is regarded as merely precautionary. A similar argument, reading "unlawful" as "unprotected," so that the proviso would make the conduct it describes not only not forbidden but affirmatively protected under § 7, may meet these objections, but it is inconsistent with the location of the proviso, the bit of legislative history discussing its effect, see S. REP. No. 105, *supra*, and with the prevailing interpretation of § 7. See *Redwing Carriers, Inc.*, 137 N.L.R.B. No. 162 (July 20, 1962), in which the Board recently held that § 7 protects the refusal to cross a picket line at another company's premises, and that the employer may not discharge an employee for such refusal, although he may do so in order to replace him with another willing to do the work in question. On such a view, the proviso is unnecessary, and, indeed, its limitations are inoperative. Earlier cases had held, purporting not to decide that the activity was unprotected, that retaliatory discharges were not unlawful. *Auto Parts Co.*, 107 N.L.R.B. 242 (1953); see *NLRB v. Rockaway News Supply Co.*, 197 F.2d 111, 114-15 (2d Cir. 1952), *aff'd on other grounds*, 345 U.S. 71 (1953). Such a position necessarily rejects the construction of the proviso referred to above. It seems, then, that the proviso, if given any operative effect, should be read as a limitation on § 8(b)(4).

207. See the discussion of the *Curtis* case at text accompanying notes 191-96 *supra*.

208. It must be conceded that in the minds of many, both in Congress, see Senator Ellender's definition, *supra* note 6, and elsewhere, see Dennis, *The Supreme Court and the Taft-Hartley Boycott Provisions*, in NYU INSTITUTE OF LABOR RELATIONS & SOCIAL SECURITY, PROCEEDINGS OF THE FIFTH ANNUAL CONFERENCE ON LABOR 287, 288-90 (1952); Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 740 (1951), the secondary boycott ban was designed to thwart efforts of unions to gain recognition without first succeeding to organize the employees in question. And, as a matter of a priori reasoning, resort to secondary pressures will more often be thought necessary when the union lacks strong employee support. The fact remains, however, that the enacted ban is on *secondary* pressure, whether by a minority union or not, and many of the decided cases discussed in Part I, *supra*, arose out of primary disputes at organized companies.

209. See, Petro, *The Enlightening Proviso*, 1 LAB. L.J. 1075 (1950).

210. It is, of course, possible that the proviso was a compromise—that an outright ban on primary minority union picketing for recognition could not be gained, but that when it came to protecting primary picketing generally from the secondary boycott provisions, its opponents were able to prevent minority recognition picketing from receiving the benefit of the proviso. The difficulty with this contention is that, as I try to show, see text following this note, the legislative history demonstrates that this was not in fact what happened.

out,²¹¹ it first appeared in the Ball Bill; it there formed a consistent part of an integrated expression of policy.²¹² It was taken unchanged into the Taft Bill, as reported by the Senate Labor Committee, where its language and policy are out of place.²¹³ It seems clear, for otherwise the inconsistency in language would doubtless have been removed, that the proviso was taken in without any substantive reconsideration of its function and purpose at all. It is highly unlikely, in light of the importance and controversial character of the minority recognition issue, that had the committee advertently used the proviso as a compromise no mention of that decision would have been made by anyone, particularly since use of the proviso for these purposes can hardly be called a compromise. Combined with a literal reading of the body of section 8(b)(4), it would have achieved all or nearly all that *Curtis* sought to achieve.²¹⁴

If, then, the proviso is inconsistent with the statutory scheme as enacted, and seems in fact to have been preserved through inertia,²¹⁵ the only real

211. See Tower, *The Puzzling Proviso*, 1 LAB. L.J. 1019, 1021 (1950).

212. The Ball Bill would have made it "unlawful," subject to civil and criminal proceedings in a district court, "to make any contract, or to engage in any combination or conspiracy" restraining or impeding commerce, if a purpose was, by strikes or violence, or threats thereof, or by concerted refusal to handle goods: (1) to bring about a secondary boycott; or (2) in the case of a minority union, to gain recognition or compliance with its demands. S. 55, 80th Cong., 1st Sess. § 204(a) (1947). The secondary boycott clause of the section was expressly limited by a provision embodying language identical in its operative portions with the § 8(b)(4) proviso. In the Senate Labor Committee hearings, Senator Ball explained that the limitation was designed to exempt "the refusal of employees to cross a legitimate strike picket line. We felt that was a legitimate manifestation of the sympathy of one group of workers for another engaged in a dispute with their employer, but the exemption would apply only if the striking union represented a majority of the employees of the employer being picketed." *Hearings on S. 55 and S.J. Res. 22 Before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess., pt. 1, at 15 (1947). The picket line itself, it is apparent, was regarded as outside the ban of the proposed section. As to the other employees' refusal to cross, though in a sense secondary, it was regarded as "legitimate." The limitation of the exemption to majority strikes obviously follows from the total ban, in the second clause, on any concerted strike activity by a minority union; there is no recognition given sympathy with an illegitimate picket line.

213. The Committee Bill, S. 1126, though taking in the language of the picket-line clause, provided for administrative, rather than judicial, redress, and applied only to unions and their agents. S. 1126, 80th Cong., 1st Sess. § 8(b) (1947), in 1 LMRA LEG. HIST. 112-14. Thus, the inconsistency of language. More important, S. 1126 did not contain a ban on minority recognition efforts, except in the face of a rival certification. Even § 8(b)(1)(A), which became the basis for the Board's attempt to ban minority picketing for recognition under the 1947 act, was added to the bill after it was reported out of committee. 93 CONG. REC. 4568 (daily ed. May 2, 1947), in 2 LMRA LEG. HIST. 1216-17.

214. This point is ably demonstrated in the Board's brief before the Supreme Court in *International Rice Milling*. Brief for the NLRB as Petitioner, pp. 68-78, NLRB v. *International Rice Milling Co.*, 341 U.S. 665 (1951). Indeed, although such speculation is fruitless, one can not help wondering what the outcome would have been had the Board in 1957, rather than attempting to reinterpret § 8(b)(1)(A), chosen to resurrect the dormant proviso, and combined it with its then increasingly literal reading of § 8(b)(4), as a means of restricting minority picketing.

215. Surely a court should not give effect to any suggestion that the proviso was a "sleeper." Cf. Petro, *supra* note 209, at 1144 n.12, quoting Representative Hartley's statement: "There's more to this bill than meets the eye." The courts are entitled to rely on, and accordingly to presume, "the candor of Congress." *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 508 (1945).

objection to a frank decision to ignore its existence is the idea expressed in the maxim enjoining one construing a statute to take care to give effect to every word—a fortiori every sentence—contained therein. This maxim expresses our experience that legislators, garrulous though they may be in other media, generally do not, in a solemn and formal enactment, run on purposelessly. The maxim surely can not mean, however, that, even though the particular history of a specific provision (and I refer to the history of record, not to any revelations from behind the scenes) persuades one that its inclusion was not a purposive act, we must assume the contrary to be the case. Such use of a maxim would make it, not a sensible generalization supported by fact, but a perverse insistence that particular facts in specific cases can not, if contrary to the generalization, be heeded.

The major significance of the proviso, and particularly of Senator Ball's explanation of its rationale,²¹⁶ is that it demonstrates the assumption of the Senator that a picket line in support of a primary dispute at the primary site is not within the secondary boycott ban at all. In fact, pains are taken to ensure that secondary employees will be permitted to respond to the appeal of such a picket line. In this respect, it is somewhat like the determination of the Eighty-sixth Congress to preserve the *International Rice Milling* result: whatever the rationale, and whatever the precise breadth of the act, picketing of this general type is not what was aimed at.²¹⁷

E. *The Administration of a Modified Literal Approach*

The major difficulty with a modified literal approach lies not in the area of doctrine, but of administration. Under it, the focus of inquiry, as a substantive matter, is on whether the union is appealing to secondary employees, but that inquiry is not pressed too far in cases when any such appeal would be "enmeshed" with appeals to primary employees. Such an approach is bound, I believe, to break down in operation. An administrator convinced that the proper question is the object of the pickets' appeal will find it difficult to refrain from pursuing that question in all cases, and the easy a priori assertions of the "inextricable entanglement" of permitted and prohibited appeals are likely to prove false in the light of the particularization of the context provided by adjudicatory proceedings in a specific case. Moreover, if one Board member is determined to give effect to section 8(b)(4), leaving section 7 activities unimpaired when that can be done without impeding the other aim, and another is determined to apply the secondary boycott ban so as not to restrain primary activity protected by section 7 (expressing what to him is the core of the legislative policy), they will very differently apply a

216. See note 212 *supra*.

217. Cf. text accompanying notes 174-78 *supra*. Indeed, Senator Ball's statement—and his statute—would apparently have made the situs, rather than the type of work or the object, the explicit criterion.

modified literal approach, both as to the instances in which they will find primary and secondary activity to be "inextricably enmeshed"²¹⁸ and as to their reactions to the existence of such a situation.²¹⁹

The application of the *Washington Coca-Cola* doctrine well illustrates the problem. The crucial issue, under that principle, is whether the union has an "adequate" opportunity to appeal to primary employees at the primary site. If so, the Board will infer that the picketing was designed to appeal to secondary employees, and is thus, under a literal approach, unlawful. But, how much of an opportunity is "adequate" to cause one to disbelieve the union's assertion that it is still trying to reach primary employees? The Board has found the principle applicable in cases where the opportunity was rather fleeting,²²⁰ but the more important point is that this is a very slippery concept to apply. A union might well point out that, even when it has had prolonged opportunities at the primary site to induce primary employees to join its cause, it might still press the effort at secondary premises, where the isolation of the employee from his employer's plant and from his fellow non-strikers, and his association with often unionized secondary employees, might strongly increase the likelihood that he will decide to join the strike. I suspect that the reaction of the "Eisenhower Board" to such an assertion would have been that much of the pressure thus generated would violate section 8(b)(1)-(A), or would come close to it, and was in any event not the kind of activity that should be encouraged. An earlier—or later—Board might say that section 8(b)(1)(A) violations should be proceeded against under that provision, and that lawful conduct is protected by section 7 and should not be hampered by abuse of section 8(b)(4). Such a view might lead one to reject *Washington Coca-Cola* entirely, even on its own premises; at the least, it would greatly restrict its operative force. Inevitably then, the reach of the act depends, under a modified literal approach, on the order of priorities of the incumbent members.

There are those who would respond that this is as it should be, that the Board should properly reflect, to some degree, the views of the Administration, and that an issue such as the one here involved is most appropriately the kind that must yield to the variations in tone and attitude which personnel

218. *Cf.*, the majority and dissenting opinions in *Local 618, Automotive Employees Union (Incorporated Oil Co.)*, 116 N.L.R.B. 1844 (1956), *rev'd*, 249 F.2d 332 (8th Cir. 1957); the General Counsel's contention in *International Bhd. of Teamsters (Alexander Warehouse & Sales Co.)*, 128 N.L.R.B. 916, 932 (1960) (intermediate report).

219. Compare the alternative holding in *Pure Oil*, see text accompanying note 14 *supra*, with the majority opinion in *McJunkin*, see text accompanying notes 46-49 *supra*.

220. See, e.g., *Sheet Metal Workers (W. H. Arthur Co.)*, 115 N.L.R.B. 1137 (1956) (employees reported to employer's premises at beginning and close of work day); *Local 612, Int'l Bhd. of Teamsters (Goodyear Tire & Rubber Co.)*, 112 N.L.R.B. 30 (1955) (over-the-road drivers reported to primary site "several times a week"). *But cf.* the *Pittsburgh Plate Glass* case, see text accompanying notes 77-78 *supra*, in which a twice-daily contact was found "inadequate."

changes inevitably produce. This is a very important and complex question,²²¹ but one which is not fairly raised here.²²² For an essential truth, too often lost sight of, is that the day-to-day administration of the prohibition on secondary boycotts is carried out not by the Board, but by the regional directors and the district judges. I refer, of course, to the impact of section 10(l), the mandatory injunction provision.²²³ Although Board and court precedents provide the over-all doctrinal framework for administration of the statute, the crucial actions in any particular case are not the Board's decision to issue a cease-and-desist order or to dismiss the complaint, but the regional director's decision whether there is "reasonable cause to believe . . . that a complaint should issue," in which event a temporary injunction must be immediately sought, and the district court's conclusion whether injunctive relief is "just and proper," in which event it is to be granted.²²⁴ To the parties, the case is largely won or lost at this stage. Erroneous dismissal of a charge, or refusal to issue a temporary injunction, will subject the affected employers to continued secondary picketing, while erroneous issuance of an injunction will force the union to discontinue primary picketing, for the extended period needed to obtain a Board decision; on both sides "time is usually of the essence in these matters."²²⁵ It seems unwise and unworkable to commit to these officials—one a subordinate administrative officer, the other an article III judge—the execution of so flexible and subjective a standard as that provided by a modified literal approach.

The problem is not merely one of restraining the influence of personal predilections. As administered, a modified literal approach would inevitably gravitate to the restrictive extreme of the spectrum. The regional director is enjoined to commence proceedings so long as there is "reasonable cause" to believe that section 8(b)(4) is being violated. Moreover, as the enforcing official, he will naturally lean toward going ahead in borderline cases, leaving the final decision to the Board; indeed, he should do no less, for his refusal

221. The best general discussion I have seen is Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954). The problem has (inevitably) arisen again, under the regime of the "Kennedy Board." See Address by Member Brown in NLRB Press Release, Feb. 10, 1962 commented on by Representative Griffin in 108 CONG. REC. 5699-5700 (daily ed., April 10, 1962).

222. Note, however, the implications of such an attitude for judicial review. If Board inferences of union object are properly conditioned by the order of priorities attached by incumbent members to § 7 and § 8(b)(4), the role of the judiciary should be minimal. *But see, e.g., Sales Drivers Union v. NLRB*, 229 F.2d 514 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956); *Piezonki v. NLRB*, 219 F.2d 879 (4th Cir. 1955).

223. 61 Stat. 149 (1947), 29 U.S.C. § 160(e) (1958).

224. Quoting § 10(l), *supra* note 223.

225. S. REP. No. 105, 80th Cong., 1st Sess. 8 (1947), in 1 LMRA LEG. HIST. 414. For a succinct statement, unsurpassed in three decades, of the difficulties attending "temporary" relief in labor disputes see FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 200-02 (1930). For some supporting data from the Board's experience see McCulloch, *New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction*, 16 Sw. L.J. 82, 93 (1962).

to proceed is not reviewable by the Board or a court.²²⁶ The district courts, hampered by the need for speed and by a relative unfamiliarity with this complex statute,²²⁷ and often bemused by the half-truth that they are not rendering adjudications "on the merits," tend to go along with the regional director's position.²²⁸ The result of this combination of factors is that whatever moderation is in theory provided by a modified literal approach, as viewed from Board decisions, would in fact be unavailing to the respondent in any particular case during the crucial period prior to the issuance of that decision.

These structural and institutional factors are, I believe, appropriately to be considered in evaluating the merits of a "substantive" doctrine. The duty of the Board and of the courts is to choose that elaboration of section 8(b)(4) that best effectuates its purposes, taken as a whole and in light of the entire statutory structure. In articulating a standard in the absence of clear legislative direction, the Board should avoid an approach which may appear sound, but "on paper" only. The modified literal approach is too subjective, both in its focus on the union's "state of mind" and in what it asks of the Board members and others implementing the act; if otherwise acceptable, a more objective test, better calculated to retain in practice the moderating elements necessary to respect the limitations suggested by the legislative history, would be far preferable.²²⁹

226. See, *e.g.*, *Foreman v. NLRB*, Civil No. 15009, 6th Cir., July 16, 1962 (court of appeals review); *Robert P. Scott, Inc. v. Rothman*, 46 L.R.R.M. 2793 (D.D.C. 1960) (district court action).

227. With the primary-secondary dichotomy specifically in mind, Chairman McCulloch has referred to "the complexity of the legal issues, the fact that the 10(1) injunction petition may well be the first 'labor' case brought before the particular federal district judge, and [to the fact that] he is obligated to make a decision under a terrific time pressure." McCulloch, *supra* note 225, at 93.

228. *Schauffler v. Local 1291, Int'l Longshoremens' Ass'n*, 292 F.2d 182, 187 (3d Cir. 1961):

[I]t must be borne in mind that a Section 10(1) injunction is interlocutory in nature and only remains in force pending the final adjudication of the Board with respect to the unfair labor practice charge. . . . The Board need not show that an unfair labor practice has been committed, but need only demonstrate that there is reasonable cause to believe that the elements of an unfair labor practice are present. Nor need the Board conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous.

Cf. FRANKFURTER & GREENE, *op. cit. supra* note 225, at 202: "We ease his [the judge's] difficulty and his conscience by telling him that his decision is only tentative."

In light of the realities as to the significance of a "temporary" injunction, and the fact that the regional director has no discretion to decline to seek an injunction, it seems obvious that the district court, in deciding whether to grant relief, should take into account, as equity traditionally has in weighing requests for relief *pendente lite*, the likelihood that petitioner's assertions will ultimately prevail, and whether the charge is founded on well-settled principles or is seeking to break new ground. Perhaps the recent decisions of the Court of Appeals for the Second Circuit in *McLeod ex rel. NLRB v. Business Mach. Mechanics Conference*, 300 F.2d 237 (2. Cir. 1962), will influence the district courts to do so. In the area of our concern, however, such a development would work little change, because of the difficulty of forecasting the Board's reaction to the highly subjective question put to it under a modified literal approach.

229. *Cf.* Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (pt. 1), 75 HARV. L. REV. 863, 882 n.92 (1962).

III. A RATIONALE OF CONGRESSIONAL ACTION

One might profitably approach the question, what makes a secondary boycott secondary, by considering the extent to which Congress has expressed a desire to shield third persons from the effects of labor disputes. In general, Congress has proceeded very gingerly in this direction. Section 8(b)(4) apart, the only protection the Labor Management Relations Act affords secondary employers—or “the public” generally, of which they are a part—from the repercussions of labor-management controversy is in those relatively rare cases of “national emergency” when the President may invoke the eighty-day injunction procedure and the accompanying dispute-settling procedures.²³⁰ In all other cases—those presenting emergencies less than national in scope, and those not serious enough to imperil health or safety—Congress has chosen to permit the parties to bring pressure on each other through actions that often injure third parties.²³¹

This preference for free collective bargaining, a cornerstone of the national labor policy, has been thought by some to be equally applicable to secondary pressure.²³² Congress rejected these views and enacted a broad prohibition on secondary boycotts.²³³ In seeking to lay bare the rationale of the congressional action, we must accommodate any hypothesis to the wide latitude given the right to strike. Obviously, harm to the secondary employer per se was not the evil sought to be met. One commentator has put the thought well:

Congress was concerned with the injury suffered by neutral employers, but only where the injury resulted from the use of a secondary boycott. Almost every strike causes economic loss to one or more employers who are unconcerned with the labor dispute. A coal distributor may go bankrupt because of a coal strike. A small steel fabricator may be forced to close his doors because of a major steel

230. Labor Management Relations Act § 206, 61 Stat. 155 (1947), 29 U.S.C. § 176 (1958). In addition to the “national emergencies” provisions, the Act also seeks to minimize the impact of strikes by encouraging mediation and conciliation. Labor Management Relations Act §§ 201-205, 61 Stat. 152 (1947), 29 U.S.C. §§ 171-175 (1958). But these provisions do not exert formal coercive pressure against union concerted action.

231. See the oft-quoted statement of Senator Taft, made in opening debate on the Taft Bill, 93 CONG. REC. 3951-52 (daily ed. April 23, 1947), in LMRA LEG. HIST. 1007-08; *Amalgamated Ass'n of St. Ry. Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951) (act bars state attempts to proscribe strikes thought by state to create “local emergencies”). *But cf.* *State v. Local 8-6, Oil Workers*, 317 S.W.2d 309 (Mo. Sup. Ct. 1958), *vacated as moot*, 361 U.S. 363 (1960).

232. See Note, *Labor's Use of Secondary Boycotts*, 15 GEO. WASH. L. REV. 327, 345 (1947). This was essentially President Truman's position in 1947. See S. REP. NO. 105, 80th Cong., 1st Sess., pt. 2, at 20 (1947), in 1 LMRA LEG. HIST. 482 (minority report).

233. For a short statement of the need to consider more closely whether its breadth is too indiscriminating see COX, *LAW AND THE NATIONAL LABOR POLICY* 35-38 (1960); *cf.* Cushman, *Secondary Boycotts and the Taft-Hartley Law*, 6 SYRACUSE L. REV. 109, 122-23 (1954); Kovarsky, *A Social and Legal Analysis of the Secondary Boycott*, 35 ORE. L. REV. 223, 284-288 (1956); Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 732-34 (1951). For present purposes, however, the need is not to evaluate, but to discern, the basis of the statutory proscription.

strike. Such economic losses as these far outweigh the losses caused by secondary boycotts. Yet Congress has not sought to aid these neutrals. . . . This point is significant—and sometimes overlooked—because it shows that, while harm to a neutral is an essential ingredient of a secondary boycott, such injury is not by itself objectionable in the eyes of the legislature.²³⁴

Nor is it satisfactory to say that harm which is “an avoidable and unnecessary consequence”²³⁵ of a primary strike is that at which section 8(b)(4) is aimed. To say that certain conduct is an “avoidable” concomitant of a protected activity is not to give an affirmative reason for prohibiting it.²³⁶ It has often been asserted that it is the “intentional” infliction of harm which was the object of legislative disapprobation.²³⁷ In evaluating this view, one must recognize the high degree of ambiguity in looking to the union’s “intent,” or in use of somewhat similar terms like “purpose,” “motive,” “object,” or “objective.”²³⁸ If what is meant, for example, by saying that the union “intended” to harm the neutral is that the motive for undertaking strike action was the union’s belief that, although the primary’s own business might prove able to withstand its effect longer than the strikers, a customer or supplier of the primary would be harder hit and would pressure him to come to terms quickly, I would disagree with any assertion that “intentional” infliction of harm on the neutral renders a strike secondary. Doubtless many strikes are undertaken on just such reasoning, and won or lost on its accuracy, but Congress can hardly have been concerned by the indifference or malevolence (if it be that) borne by union leaders toward secondary employers.

The “intent” that is significant, in my view, is the intent to subject the secondary to pressure different in kind from that generated against him by a primary strike. I say different “in kind” because, depending on economic relationships, the pressure of a secondary boycott may be no more severe than that felt as a result of a strike against one with whom the secondary does business. Yet a difference in kind there is. Judge Prettyman’s *Salt Dome* opinion came to the heart of the matter when he wrote:

No matter how great the pressure on a neutral employer may be when somebody else’s place of business is picketed, it is essentially

234. Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 732 (1951).

235. *United Steelworkers v. NLRB*, 289 F.2d 591, 595 (2d Cir. 1961).

236. Perhaps, once it is established that the conduct is of the type thought wrongful by the legislature, it might be held nonetheless permissible when—but only when—it is unavoidably bound up with protected acts. *But cf.* text accompanying note 220 *supra*, suggesting some difficulties inherent in the application of any such test.

237. *Cf. Note*, 45 GEO. L.J. 614 (1957), positing, as a “reasonable interpretation,” an objective “to save the neutral employer from *all purposeful* efforts on the part of unions to involve him in a dispute not his own . . .” A similar analysis was the basis for the Second Circuit’s reversal of the Board in *Carrier Corp. v. NLRB*, 51 L.R.R.M. 2338, 2348 (2d Cir. Oct. 18, 1962).

238. Compare my reading of the court of appeals’s analysis of the union’s “object” in the *Salt Dome* case at text accompanying notes 102-07 *supra* with that of Professor Koretz, in *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 140-41 (1959), note 104 *supra*.

different from the pressure such a neutral feels when his own business is being picketed. This difference in pressure . . . is the rationale which must govern the interpretation of Section 8(b) (4).²³⁹

If a company finds that one of its customers or suppliers has been shut by a strike,²⁴⁰ normal business relations between the two employers automatically cease; employees of the company seeking to enter the struck plant will find it closed, and the strikers will, of course, not be performing whatever work has been necessary to the doing of business with the secondary. The extent of injury to that company will depend on the particular economic relationships. It may or may not feel compelled to seek to induce the other employer to settle the dispute. In either event, the pressure generated flows entirely from the disruption of the struck employer's business. If, now, the struck employer is continuing to operate, but the employees of the secondary refuse to enter, the effect on the company is no different. In the one case, the gates are physically locked; in the other, though literally open, they are in effect impassable. The legislative policy, for the most part protecting successful strike activity despite the described effect on secondary employers, suggests the inapplicability of a policy designed to protect secondary and not primary employers from identical effects flowing from wholly or partially unsuccessful strike activity.²⁴¹

Suppose, however, that a picket induces one of the company's drivers, not only to turn away from the struck plant, but to refuse to make deliveries to any other company, so long as his employer continues to attempt to deal with the struck company. Such pressure, whatever its strength, is "essentially different" in that it does not grow out of the interference with the primary's business threatened by the strike against it. It seeks to jump that hurdle and conscript the neutral by subjecting it to independent, directly applied loss of service that would not otherwise be suffered even were the struck plant to cease operations entirely. Here, I submit, the protection afforded to secondary employers by section 8(b) (4) is called into play, and that afforded the strike by the act is not at stake.

A similar analysis can be made as to secondary site picketing. An employer who processes materials manufactured by another will feel significantly the loss of trade flowing from the shutting by a strike of the manufacturer's operations. If the strike fails to close the primary's doors, but "roving situs" pickets induce secondary employees to refuse to unload goods delivered by the primary's nonstriking employees, the effect on the secondary is largely

239. *Seafarers Union v. NLRB*, 265 F.2d 585, 591 (D.C. Cir. 1959), *reversing* 119 N.L.R.B. 1638 (1958).

240. I am here, of course, using the term "strike" to include picketing which seeks to induce strike action.

241. See *Local 1976, United Bd. of Carpenters v. NLRB*, 357 U.S. 93, 99 (1958). By "successful" strike, I refer, of course, to one that succeeds in closing the primary's plant, not one that wins its bargaining objectives.

the same as if the delivery, by reason of the success of the strike, could not have been attempted. But if the pickets induce secondary employees to quit all work, whether connected with the primary or not, or induce employees of third persons to refuse to enter the secondary premises, pressure wholly apart from that which could attend the disruption of the primary's business is felt.

In considering the applicability of this analysis to secondary site activities, however, complicating considerations arise. 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.²⁴² Yet it is clear that the strike, if successful in closing down the primary employer's business, would deprive the secondary of the opportunity to work on such "hot goods."²⁴³ The suggested rationale, then, can not encompass all secondary employee refusals to work that are no broader than those which would "automatically" be occasioned by the disruption of the primary's operation through a wholly successful strike. Only the effect of loss of the primary's *employees* may be considered. The crucial question, thus modified, is: does the picketing union intend to subject the secondary employer to a loss of the services of his employees broader in impact than would be directly caused by the unavailability, as a result of the complete success of the strike, of the services of the primary employees? If so, the picketing is secondary; otherwise, it is primary.

It remains to be considered whether the adoption of such a limitation is consistent with the underlying rationale, or—to put the same question another way—whether a Congress which sought to protect secondary employers only from harm different in kind from that associated with strikes against other employers would nonetheless refuse to permit the striking union to "follow

242. The language of the act makes this clear. See *Metal Polishers Union (Climax Mach. Co.)*, 86 N.L.R.B. 1243 (1949); 93 CONG. REC. 4323 (daily ed. April 29, 1947), in 2 LMRA LEG. HIST. 1107 (remarks of Sen. Taft); cf. *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958). The act would presumably apply even to a boycott limited to goods arriving subsequent to the start of the strike.

243. It is the failure to consider the implications of these facts that is the chief weakness of the rationale underlying the primary situs doctrine.

Mention might be made here of one argument in support of that doctrine. Union counsel asserted in *General Electric*, see text accompanying note 113 *supra*, that the common law uniformly recognized that primary site picketing was not secondary despite its appeal to secondary employees. There is evidence that this is so. See *Missouri Pac. R.R. v. United Brick Workers*, 218 Ark. 707, 238 S.W.2d 945 (1951); *Ex parte Henry*, 147 Tex. 315, 215 S.W.2d 588 (1948); *Schivera v. Long Island Lighting Co.*, 296 N.Y. 26, 32, 69 N.E.2d 233, 235 (1946) (concurring opinion); 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 145, at 456 (1940); Barnard & Graham, *Labor and the Secondary Boycott*, 15 WASH. L. REV. 137, 141 (1940). A well-known statement made by Senator Taft in debate, partially quoted at text accompanying note 13 *supra*, supports the view that § 8(b)(4) reinstated the common law ban on secondary boycotts made ineffective by the Norris-LaGuardia Act. For the full quote see 93 CONG. REC. 4323 (daily ed. April 29, 1947), in 2 LMRA LEG. HIST. 1106. However, this reasoning has two serious defects: First, it makes relevant one of the most confused and opaque areas of common law development; and second, it fails to provide a rationale sufficient to account for the application by the Board of the primary-secondary dichotomy to secondary site picketing.

the product" in the manner just described. While one might well not draw the line at that point, I think there are grounds, evidently at the forefront of congressional concern, for doing so. A major asserted basis for restricting secondary activity was the legislative desire to discourage what may be called the metastasis of labor disputes: the fanning out of unrest from the struck plant to those doing business with it.²⁴⁴ This danger is not met by forbidding only total refusals to work, and their inducement, but is held within bounds when appeals to secondary employees are entirely forbidden in cases when such employees are not carrying on work directly dependent on the availability of primary employees.

In thus reconstructing what is ambiguously called the "legislative intent," I am not purporting to describe the actual reasoning process of Senator Taft, the Senate Committee on Labor, or any other legislator or group of legislators. Legislative history will often prove unhelpful if it is viewed as merely the explicit statements of Congressmen seemingly addressed to the case at hand. The task of the interpreter of a statute, especially a complex and important regulatory enactment like section 8(b)(4), is "that of fitting the particular problem case within the larger framework of the legislature's own values and goals"²⁴⁵—as Judge Learned Hand succinctly put it, "to reconstitute the gamut of values . . ."²⁴⁶ Congress often acts on a principle without expressing it, or describing with precision its range of impact. The judge or administrator must, from the action taken, deduce the underlying principle, and—since a multiplicity of principles and policies typically interact in regulatory legislation—discern the resultant of several often inconsistent principles and policies.²⁴⁷

IV. APPLICATION OF THE SUGGESTED RATIONALE

A. *Primary Site Picketing*

It will be a rare case in which picketing at the primary site will be held secondary under the principles just discussed. The classic case of pickets

244. See, in particular, 93 CONG. REC. 4323 (daily ed. April 29, 1947), in 2 LMRA LEG. HIST. 1107 (remarks of Senator Taft).

245. See Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 IND. L.J. 414, 418 (1961).

246. See letter quoted in note 155 *supra*.

247. The attribution of a policy or principle will sometimes be based on statements made by a committee or a congressman, as in the case of the primary character of the act of turning deliverymen away from the primary site; sometimes from the narrowness of statutory language, as with the statute's original concern only with secondary pressure manifested through inducements of employees; sometimes from legislative treatment of closely related matters, as in the case of the wide latitude given free collective bargaining and strikes; sometimes from the failure of those supporting a more restrictive principle to secure legislative adoption of their views, as in the case of minority union attempts to gain recognition; and sometimes from the need to accommodate an inferred principle to a particularized enacted proscription, as in the case of the prohibition on partial as well as total refusals to work. All of these sources are part of the "legislative history." Of course, inferences from many of them do not have the self-evident character of reliance on a statement culled from a committee report, but that is only to say that statutory construction is a legal art of which judgement is a major component.

turning truckdrivers away from a struck plant is primary because the impact on the secondary is exactly that which would be caused by the closing of the plant by the strike; to the driver deterred by the picket line, the plant is, in a sense which is metaphorical but relevantly accurate here, closed. And it is, of course, irrelevant that the union "intended" that the drivers not cross.²⁴⁸ Other variants on primary site appeals are typically likewise primary, because they may be similarly characterized.

When, however, this characterization is inapt, primary site picketing may become secondary. *Crystal Palace*, in which the secondary employer was a lessee of the primary,²⁴⁹ is an important illustration. The business relation between lessor and lessee is, in the ordinary case, not related to the operations of the lessor carried on at the site. As Justice Frankfurter observed, in a slightly different context, in *General Electric*: "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 . . . is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer."²⁵⁰ This is so because a strike shutting down the primary's business will not interfere with that of the other. Accordingly, appeals to the employees of the lessees to refrain from entering the jointly-occupied building seek to subject the secondary to pressures beyond those attributable to the disruption of the primary's business, and are properly deemed secondary. The requirement of compliance with the *Moore Dry Dock* rules to bar such appeals is accordingly proper. The contrary case occurs when the secondary (lessee) does have an interest in the primary dispute. A strike of elevator operators employed by the owner of a building partially leased to another is an example of this; here the secondary would be affected by loss of elevator service, and is not entitled to the immunity sought to be furnished by such an application of the *Moore Dry Dock* rules. The same would be true when there is a substantial vertical relationship between the two employers, as in the case of a lessee who buys commodities from the lessor for resale.²⁵¹

Certainly, on such an analysis, the mere fact that a secondary employer is present on the primary premises, even for an extended period, does not make

248. Cf. note 131 *supra* (Kennedy-Thompson memorandum); *Chauffeurs Union v. NLRB*, 294 F.2d 261 (D.C. Cir. 1961), *reversing per curiam* 128 N.L.R.B. 522 (1960) (*McJunkin*); *International Bhd. of Teamsters (Alexander Warehouse & Sales Co.)*, 128 N.L.R.B. 916 (1960).

249. See discussion of *Crystal Palace* at text accompanying notes 29-30 *supra*.

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

251. Such was argued to be the case in *Crystal Palace*, but the Board found to the contrary. 116 N.L.R.B. at 857-58.

Obviously, matters of degree arise. I would say that the purchases from the lessor must be a significant portion of the lessee's business before appeals to his employees become primary, but total or near-total dedication to the lessor's line should not be required.

Crystal Palace applicable.²⁵² It is not the relative permanence of the lessee's association with the primary site alone, but the freedom of his business from involvement with that of the primary, that brings him within the protection of section 8(b)(4).

The problem raised by the *General Electric* litigation is but another variation of the general question, and yields to the same approach. In the *General Electric* situation, an employer, whose work (typically maintenance or construction work) calls for him to carry on operations at the primary site, is ordinarily not merely present there, as is a lessee, but is engaged in work dependent on the continued operation of the primary employer's business. If the plant ceases to run, janitorial duties are not needed (or are much less needed), machinery-repair service is largely suspended, and so on. As *General Electric* recognizes—and here the extent to which the Supreme Court's decision was a rejection of the "Eisenhower Board's" approach becomes apparent—a union picketing the primary site is free to appeal to employees of such employers to stay away.²⁵³ When, however (in the words of the second of the three "*General Electric* rules"), "the work done by the men who use the gate [is] . . . unrelated to the normal operations of the [primary] employer,"²⁵⁴ disruption of those operations by a successful strike against the primary will not cause the suspension of business with the secondary. Accordingly, to attempt to cause such a suspension by an appeal to secondary employees is to subject the secondary to pressure beyond that generated by a primary strike; such an attempt is properly deemed secondary.²⁵⁵

The Supreme Court in *General Electric* prescribed a test with virtually

252. Cf. the reliance on the *Crystal Palace* decision in the very different situation presented by the *Gonzales* case, *supra* notes 44-45.

253. "[I]f [the gate] . . . was in fact used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar of § 8(b)(4)(A)." 366 U.S. at 682. This was said even though no primary employees used the gate in question. As Chief Judge Lumbard aptly put it, dissenting in *Carrier Corp. v. NLRB*, 51 L.R.R.M. 2338, 2349 (2d Cir. Oct. 18, 1962): "The legitimate objectives of picketing include publicizing a dispute to employees of neutral employers who are performing part of the everyday operations of the struck employer."

It has been asserted that there are "persuasive indications" that the relevance of the nature of the work done in *General Electric* rests wholly on the fact that both primary and secondary employees performed "conventional maintenance work," and that the Court's principle is nothing more than an expansion of the "struck work" principle. Zimmerman, *Secondary Picketing and the Reserved Gate: The General Electric Doctrine*, 47 VA. L. REV. 1164, 1173-74 (1961). The Court's opinion hardly leaves room for such a narrow reading, which does not explain the primary character of appeals to deliverymen and other "neutral employees whose tasks aid the employer's everyday operations." 366 U.S. at 681; see text accompanying note 131 *supra*; cf. Koretz, *Federal Regulation of Secondary Strikes and Boycotts—A Third Chapter*, 13 SYRACUSE L. REV. 1, 10-11 (1961).

254. 366 U.S. at 681.

255. Local 618, Petroleum Employees Union (Incorporated Oil, Co.), 116 N.L.R.B. 1844, 1845 (1956), *rev'd*, 249 F.2d 332 (8th Cir. 1957), in which the secondary employer was engaged to "rebuild completely" a service station, was probably such a case, although the Board's rationale was quite different. See text accompanying note 36 *supra*. On the suggested rationale, the picketing, designed to appeal to secondary employees, is properly held secondary regardless of the presence or absence of the primary employees.

no discussion of its substantive underpinning. Lacking an underlying rationale, application of a "nature of the work" criterion might well become unduly abstract; one can visualize disputes over whether certain operations are or are not "conventional maintenance work."²⁵⁶ I believe the test is a sound one, as a corollary of the rationale suggested in this article. If applied on that basis, it should not prove unduly slippery in the individual case. The inquiry into the nature of the work in each instance would be made to determine whether the shutdown of the primary's operations would subject the secondary to loss of business. If so, the work is not "unrelated to the normal operations" of the primary, and picketing is permissible. This is a relatively straightforward factual question. Unfortunately, the Board's decision on remand in *General Electric* proceeds to apply the Court's test as if no thoughts about its function were called for. Work of the kind done by primary employees is "part of [the primary's] . . . normal operations"; that which is "part of" those operations is "necessarily related" to them.²⁵⁷ To say that *A* (when done by *P*) is *part of B* may well carry the implication that *A* (when done by *S*) is *related to B*, but the pertinent question is the relevance of the stated relation to the matter at issue. Plainly, that can not be dealt with in a vacuum; attention to the purpose of the "related work" requirement is essential if its application is to be more than a word-game.²⁵⁸

The other prongs of the *General Electric* rules—that the secondary be doing work that could be performed without necessitating the curtailment of the regular operations of the primary, and that the secondary employees in question enter the primary site through a "reserved gate"—respond to different considerations. At least since Judge Rifkind's landmark opinion in *Douds v. Metropolitan Fed'n of Architects (Ebasco)*,²⁵⁹ it has been recognized that the secondary boycott prohibition should not be administered so as to enable the primary employer to avoid the impact of the strike on his own

256. 366 U.S. at 682.

257. Local 761, Int'l Union of Elec. Workers (General Elec. Co.), 138 N.L.R.B. No. 38, 1962 CCH NLRB DEC. ¶ 11556, at 17952-53 (Aug. 28, 1962); see text accompanying note 139 *supra*.

258. On the rationale proposed herein, the mere fact that primary employees have done work like that performed by secondary employees would not suffice to deprive the secondary employer of the protection of § 8(b)(4). The result might be otherwise if the secondary employees were in competition with the primary employees for the very work in question. *But cf.* United Steelworkers (United States Steel Corp.), 127 N.L.R.B. 823, 826-27 (1960), *enforced as modified*, 294 F.2d 256 (D.C. Cir. 1961) (the *TCI* case). The Board's decision does not rest on such a finding or principle.

The trial examiner based his characterization of the picketing as primary on the finding that some secondary employees worked on the conveyor system in several manufacturing departments; since rearrangement of the conveyor system was "an essential step in resuming . . . production," the conveyor work was held "related to" General Electric's operation. Again, as an abstraction, this is true enough. But is it relevant that the primary was dependent on the completion of the secondary's work? One can not say, except by express or implicit resort to an underlying rationale. The rationale I have advanced would deny the relevance of the relation relied on by the examiner, although the contrary would be the case were the dependency relations reversed.

259. 75 F. Supp. 672 (S.D.N.Y. 1948).

business. There, as is well known, the court held outside the ban of section 8(b)(4) union appeals to secondary employees working on "farmed-out struck work," that is, on work previously performed by primary employees unavailable because of the strike, and contracted by the primary to another employer.²⁶⁰ The reasoning of the court was as follows:

The economic effect upon Ebasco's [the primary's] employees was precisely that which would flow from Ebasco's hiring strike-breakers to work on its own premises. The conduct of the union in inducing Project's [the secondary's] employees to strike is not different in kind from its conduct in inducing Ebasco's employees to strike.²⁶¹

When a struck employer utilizes the consequent interruption of his normal operations to do work that could not have been performed without such an interruption, he is to that extent neutralizing the impact of the strike. When he does that by hiring replacements, they may, of course, be picketed. *Ebasco* and its progeny teach that when he accomplishes the same thing through employees of a secondary employer, those employees become amenable to picketing. This principle is directly applicable to an attempt to utilize secondary employees to do work which "replaces" the strikers in a different, but wholly analogous, sense.²⁶²

What, though, of the requirement—assuming it is that²⁶³—of a separate gate? The condition of a separate gate, laid down by the Court without supporting reasons, hardly seems responsive to any substantive considerations.²⁶⁴ It may, however, be justified, as an exercise (albeit by a court) of Board rule-making based on considerations of practicality. When both primary employees who may be the object of pickets' appeal, and secondary employees who may not, use a "mingled" gate, the issue to be litigated is very troublesome. The pickets will, of course, want secondary as well as primary employees to respect the line, and if they do nothing to give away their secret (secret to no one) hopes, they may succeed in lawfully bringing about what the law says they may not try to bring about. The proceedings, both on the picket

260. The *Royal Typewriter* decision broadened the principle to apply to cases in which the secondary employer took on the work independently, without any agreement with the primary. *NLRB v. Business Mach. Mechanics Conference*, 228 F.2d 533 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

261. 75 F. Supp. at 677.

262. Even if the relationship between the two employers were crucial to the applicability of this principle (*but see note 260 supra*), there would seem to be as close a nexus in the contractor situation as there was in *Ebasco*.

263. *Cf.* note 135 *supra*.

264. After *General Electric*, the *Gonzalez* decision, see text accompanying notes 44-45 *supra*, was reversed for want of a separate gate, the court of appeals writing:

The Board had argued to us that there should be no difference in effect between (1) separate gates and (2) distinct uniforms and times of starting and stopping work. This may or may not be true as an economic matter. As a legal matter, we cannot deny that a separate gate is a controlling consideration when the Supreme Court has just said it is a controlling consideration.

Teamsters Union v. NLRB, 293 F.2d 881, 882 (D.C. Cir. 1961), *reversing* 128 N.L.R.B. 1352 (1960).

line and at Board hearings, take on the characteristics of a grand game, with a premium on skill in avoiding, on the one hand, and ferreting out, on the other, actions which betray the forbidden aim. The charade reaches its pinnacle in litigation over the duty affirmatively to make clear the pickets' nonobjection to line crossing by secondary employees.²⁶⁵ When there are separate gates, the problem is simplified; the pickets can ply their craft freely at the one, and must stay entirely away from the other.²⁶⁶ Given the absurdity of the issue raised by many of the cases under *Moore Dry Dock* as presently administered, and assuming that the requirement can in fact be readily complied with without great burden to the affected companies,²⁶⁷ one can not object to such a rule of administration.²⁶⁸

B. *Secondary Site Picketing*

1. *Picketing permitted to appeal to neutral employees.* In almost every case, picketing the premises of the secondary employer subjects him to pressure beyond that brought to bear against him by the disruption of the business of the primary with whom he deals. The secondary's entire operations are potentially affected by picketing at his door. Typically, many of his employees work on matters unrelated to the primary, and hence are unaffected by that employer's labor troubles. In addition, he often depends on the services of employees of his customers and suppliers—other than the primary—coming to his premises. On the rationale I have suggested, section 8(b)(4) is designed to protect the secondary employer from the pressure of boycott appeals directed to those employees. It is also applicable to appeals to those of his employees who work on materials received from, or to be shipped to, the primary, but who do not require the presence of primary employees to do that work.²⁶⁹

Some secondary site picketing, however, is not of this order, and is "no

265. See *Superior Derrick*, discussed at text accompanying notes 97-101 *supra*. For a suggested solution to these problems see text accompanying notes 302-14 *infra*.

266. The Court in *General Electric* spoke of applying *Moore Dry Dock* to the reserved gate. 366 U.S. at 680. However, since it is impossible to picket a gate at which no primary employees appear, in compliance with the *Moore Dry Dock* rules, the effect is as stated in the text.

267. Such an assumption may be unwarranted in the case of a completed office building, when the possibility of altering—even informally—the entrance arrangements are limited.

268. There seems to be no justification, however, for insisting on a separate gate in a case in which the union has decided not to call a strike of primary employees, nor to induce them to refrain from crossing the picket line. Cf. *United Steelworkers (United States Steel Corp.)*, 127 N.L.R.B. 823 (1960), *enforced as modified*, 294 F.2d 256 (D.C. Cir. 1961) (*TCI*). The reason for this distinction is not, of course, that the failure to call out primary employees proves that the picketing was deliberately aimed at secondary employees; the question whether secondary employees may be appealed to depends on the application of the two other *General Electric* tests. The reason is simply that, when primary employees are not being appealed to, the fact that they, as well as the secondary employees, are using the gate in question loses its relevance. For the purposes of a reserved gate test as stated above, the gate is in effect "separate."

269. See text accompanying notes 242-43 *supra*.

more aimed at the employees of the secondary employer" than is permissible primary site picketing.²⁷⁰ The *Moore Dry Dock* rules were designed to express the conditions under which this could be said to be the case. As has been discussed,²⁷¹ the rules have been given varying content. Since they have repeatedly received judicial approval,²⁷² a tribunal will feel under some pressure to express its views within the words of the *Moore Dry Dock* formulation.

The bulk of the litigation has involved the fourth rule, enjoining the picketing union to "disclose clearly that the dispute is with the primary employer." As we have seen, the "Eisenhower Board," interpreting this requirement in light of its literal approach to section 8(b)(4), administered it to require that the union refrain entirely from appeals to secondary employees.²⁷³ Earlier, and again most recently, the Board has used a different approach, giving the rule an objective content, and tacitly permitting appeals to neutral employees carried out within the *Moore Dry Dock* framework, either as a substantive decision²⁷⁴ or merely by shutting its eyes to what is happening.²⁷⁵ These varying approaches share one failing: they fail to distinguish explicitly two very different questions. First, in what cases, if any, may a union appeal to secondary employees at the secondary site? Second, if in a given case or class of cases a union may not so appeal, under what conditions, if any, may it picket the site? The *Moore Dry Dock* rules were originally designed to express the answer to the first question; the Board later adopted a view of the act under which the answer to the first question is "never," and adapted *Moore Dry Dock* to embody its answer to the second. The Supreme Court's *General Electric* decision establishes—if it was not clear before—that some appeals to secondary employees are primary and lawful, and I have attempted to formulate a rationale by which the primary or secondary character of such appeals may be discerned. Under it, some secondary site appeals would be permissible (although, as will appear, I believe the range is quite narrow). If, for example, a union may appeal to a secondary employer's driver not to make a delivery to the primary, it should likewise be able, under proper safeguards, to make a similar appeal to a

270. *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 677 (1961). This was one of two grounds stated by Justice Frankfurter for permitting some secondary site picketing. The other—that that site is "the only place where picketing could take place"—is considered at text accompanying notes 293-303 *infra*.

271. See text accompanying notes 63-70, 93-107 *supra*.

272. See the reference in the *General Electric* case, 366 U.S. at 677 & cases cited therein; the Conference Report on the 1959 amendment to § 8(b)(4) at text accompanying note 170 *supra*.

273. See text accompanying notes 93-99 *supra*.

274. See the discussion in the *Moore Dry Dock* case itself at text accompanying note 60 *supra*.

275. See, e.g., *International Bhd. of Elec. Workers (Anderson Elec. Serv. Co.)*, 135 N.L.R.B. No. 55 (Jan. 24, 1962); *Plumbers Union (Wyckoff Plumbing)*, 135 N.L.R.B. No. 49 (Jan. 18, 1962); *Baltimore Bldg. Trades Council (Stover Steel Serv.)*, 108 N.L.R.B. 1575 (1954), *rev'd sub nom. Piezonki v. NLRB*, 219 F.2d 879 (4th Cir. 1955).

secondary employee at the secondary's loading platform not to work with a primary employee driver coming there to pick up goods; the latter is "no more aimed at the employees of the secondary" than the former,²⁷⁶ and both intend to subject the secondary to no greater pressure than would be felt by the shutdown of the primary's business. Just as, in the former case, the secondary employer in effect finds the plant "closed," so in the latter the primary employee and his truck are *de facto* unavailable to him. There is obviously a far greater danger here that forbidden secondary appeals will be made at the same time, and the minimization of this danger should be a primary function of the administration of the *Moore Dry Dock* rules; but some appeals are clearly primary.²⁷⁷

Viewed as expressing the conditions under which appeals to secondary employees may be lawfully made, the fourth rule should require, first, that the picket signs make it clear to secondary employees that the offending employer is the primary and not the secondary, and, second, pickets should refrain from appealing to employees of third persons not to enter the secondary site, or to secondary employees not working with the primary employees to engage in any refusal to work. Strict enforcement of this rule is essential if the secondary is to have the protection he is entitled to under the act. If these conditions—and the other requisites to be discussed—are met, the pickets should not be required to pretend that they do not want the secondary employees who ordinarily work with the primary employees coming to the site to refrain from doing so. Only when these conditions are not met does the further question arise whether any picketing is to be permitted, and under what conditions; much of the confusion in the precedents is attributable to a commingling of these critically different issues. By first facing squarely the merits of the literal approach, and the scope of permitted appeals to secondary employees, that confusion can be largely avoided.

The first requirement laid down in *Moore Dry Dock*, that the picketing take place only when "the situs of the dispute is located" at the secondary site, needs to be divested of its metaphorical quality, and of its resulting

276. The expression is Mr. Justice Frankfurter's in *General Electric*, 266 U.S. at 677.

277. One consequence of recognition that *Moore Dry Dock* permits appeals to secondary employees should be mentioned. The Board has typically banned all secondary site picketing when it has found noncompliance with *Moore Dry Dock*; this follows logically from its use of the rules of that case as guides to the "object" of the picketing. However, if the literal approach is rejected, as the text argues, it will be seen that the proper order is to enjoin only continued secondary site picketing not in compliance with *Moore Dry Dock* (except perhaps when repeated violations make a broad order proper). This is especially important in § 10(1) proceedings.

I do not agree, however, with the view, see, e.g., *Local 660, Int'l Bhd. of Elec. Workers* (George Sabo), 125 N.L.R.B. 537, 541 (1959) (Member Bean, dissenting), that noncompliance with *Moore Dry Dock* does not render secondary site picketing unlawful. Again, if the rules are only evidentiary guides, one might conceivably refuse to draw the inference on which illegality turns, despite the fact of noncompliance. But if the rules are conditions of the primary character of secondary site picketing, they must (when applicable) be complied with. *But see* the curious dictum of Mr. Justice Frankfurter in *General Electric*, seeming to lament such an automatic finding of violation. 366 U.S. at 677.

ambiguity. Does it refer to cases in which materials owned, worked on, or to be worked on, by the primary are present; to cases in which any employees of the primary are present; or to cases in which primary employees actually involved in the dispute are present?²⁷⁸ In view of the statutory prohibition of partial as well as total refusals to work by secondary employees, the first answer is too broad. The Fifth Circuit's *Otis Massey* decision²⁷⁹ has made it sufficiently clear that the third answer is too narrow. Since the employees actually involved in the dispute may appeal to all primary employees to refuse to work, secondary employers dependent on the services of any primary employees are subject to the risk of loss occasioned by the success of such appeals. Accordingly, on the rationale I have suggested, attempts to isolate such employees from the secondary are primary. Thus, the "situs of the dispute" is located wherever any primary employees are working.²⁸⁰

The third requirement, that the picketing take place "reasonably close to the location of the situs," presents little problem once the "location" is factually understood. It is obviously designed to minimize the danger that the picketing will reach a broader audience than is permissible. In light of the great danger of this, it should be vigilantly enforced.

The second *Moore Dry Dock* rule requires that the primary be engaged in its "normal business" at the secondary site when the picketing takes place. Its function has never, to my knowledge, been fully explained. It arose to implement the idea that the Board would have held the picketing in *Moore Dry Dock* barred had the primary not been using its ship, while in dry dock, to train personnel for the coming voyage.²⁸¹ In the Board's *Salt Dome* decision²⁸² it was adapted, as the mold through which a literal construction of the act was enforced, to render *Moore Dry Dock* inapplicable to a case in which the primary employees were removed from the ship after the picketing commenced. The Court of Appeals for the District of Columbia disagreed, partly out of distaste for the idea that the primary employer could render lawful picketing unlawful merely by removing his employees from the site,²⁸³ but in part on the ground, going beyond *Moore Dry Dock*, that periodic overhaul and repair was in fact an integral part of the normal operation of a ship.²⁸⁴ Without an underlying rationale by which the function

278. Cf. the discussion of the *Otis Massey* decision at text accompanying notes 85-88 *supra*.

279. *NLRB v. General Drivers*, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955), *denying enforcement in* 109 N.L.R.B. 275 (1954), discussed at text accompanying note 85 *supra*.

280. *But see* *NLRB v. Associated Musicians*, 226 F.2d 900, 905-06 (2d Cir. 1955), *cert. denied*, 351 U.S. 949 (1956), which apparently denies this, at least in an extreme case. The result in that case may, I believe, be supported on another ground. See text accompanying note 288 *infra*.

281. 92 N.L.R.B. at 551.

282. See note 96 *supra*.

283. 265 F.2d 585, 590 (D.C. Cir. 1959) (Prettyman, C. J.).

284. *Id.* at 589.

of the "normal business" requirement can be discerned, the issue is an exercise in abstraction. The importance the Board gave to the presence of the primary employees is entirely proper if a literal approach to section 8(b) (4) is proper, and all appeals to the secondary employees are forbidden. On the rationale I have advanced, the legality of appeals to secondary employees is unaffected by the presence or absence of primary employees. When the work done by the secondary is not itself dependent on the availability of the primary employees, the relation between the secondary employer and the primary strike—his dependence on, or independence of, it—is not affected by that factor. In such a circumstance, the presence of primary employees is for our purposes merely fortuitous, and it makes little sense to say that the pickets may appeal to secondary employees in the primary employee's presence, but not otherwise.

I find it difficult to square the grounds of the decision in *Salt Dome*, permitting appeals to dry dock employees working on the primary's ship, with the prohibition in the act on partial refusals to work, limited to "hot goods." That prohibition, as we have seen,²⁸⁵ is concededly a limitation on the general principle that only harm different in kind from that generated by the effect of a successful strike against the primary is regarded as "secondary" within the meaning of the act, but effect must be given to the plain implications of that limitation. Secondary employees are forbidden, for example, to refuse to do plating work on the primary product, contracted to their employer for that purpose,²⁸⁶ and primary employees are forbidden to induce such refusals. The principle behind that prohibition seems fully applicable to dry dock employees, working on a vessel owned by the primary, whose work is entirely independent of that performed by the crew of the vessel.²⁸⁷

The "normal business" requirement, whatever opportunity for expansion its ambiguity provides, is not aptly designed to embody the limitation on secondary site picketing necessary to respect the line between those pressures Congress has left the secondary employer to endure and those from which it has sought to shield him. As the facts of *Salt Dome* show, when the secondary employees are merely working in physical proximity to the primary employees, and are not doing work the continuation of which requires the availability of primary employees at the site, the withdrawal of the latter—whether at their own option or their employer's—exerts no direct restraint on the operations of the secondary. An appeal to secondary employees to suspend such operations therefore seeks to subject the secondary to pressure beyond that attributable to the strike.²⁸⁸ When, however, as in the case of an attempted delivery to a

285. See text accompanying notes 242-43 *supra*.

286. *Metal Polishers Union (Climax Mach. Co.)*, 86 N.L.R.B. 1243 (1949).

287. Judge Prettyman's reasoning in *Salt Dome*, 265 F.2d at 591-92, is substantially the same as that unsuccessfully employed by the union in *Climax Machinery*, *supra* note 286, at 1251 (intermediate report).

288. See *N.L.R.B. v. Associated Musicians*, 226 F.2d 900 (2d Cir. 1955), *cert. denied*, 351 U.S. 949 (1956) (radio station employees at baseball park). The results in *Moore*

secondary site, the secondary's unloading personnel could not do their assigned work without the presence of the primary's driver, the appeal to boycott injures the secondary no more than would the decision of the driver to join the strike, and is therefore primary.²⁸⁹

The limitation thus suggested on the application of the *Moore Dry Dock* rules, viewed as conditions for permissible secondary site appeals to secondary employees, is a significant one. In particular, it would bar such appeals in the bulk of construction site cases, in which *Moore Dry Dock* has consistently been applied and, recently, resulted in dismissal of a complaint.²⁹⁰ So long as *NLRB v. Denver Bldg. Trades Council* stands unreversed by Congress,²⁹¹ we are required, despite the realities, to regard the employers engaged in a construction project as we would several contractors each performing work of one kind or another for a factory owner. Such a view leads one, on the analysis put forward here, to regard appeals to employees of contractors other than the primary as secondary in nature.²⁹² While the general belief that *Denver* was wrongly decided might tempt the Board to afford relief through the back door, as it were, if we are to take that ruling as law it leads to a refusal to permit picketing to appeal to secondary employees at construction sites.

Finally, mention should be made of the relevance of an alternative place to picket, and the "fifth condition" of the *Washington Coca-Cola* doctrine. It will doubtless be already apparent that, on the analysis I have advanced,

Dry Dock and *Salt Dome* may nonetheless be proper on an application of the principle reflected in the third of the *General Electric* rules, see text at notes 259-62 *supra*, since the dry dock operations, to be carried on, would "necessitate curtailing" the normal operations of the ship. 366 U.S. at 681. Perhaps, however, this principle is properly in point only when the contractor was engaged at a time when the strike was already in progress or anticipated.

289. Cf. the *Carrier* case, discussed in text accompanying notes 137-38 *supra*, in which the analysis I have suggested would lead one to characterize the appeals as primary regardless of the ownership of the right-of-way. The dispute over whether *General Electric* "applies" when the land is owned by the secondary, see Zimmerman, *supra* note 253, at 1178, is beside the point if the underlying rationale governs the characterization of secondary site picketing as well. The failure of the court of appeals's majority in *Carrier* to seek a principled basis for *General Electric*, see note 138 *supra*, led it to lose sight of this point, although Chief Judge Lumbard's dissenting opinion makes it quite well. *Carrier Corp. v. NLRB*, 51 L.R.R.M. 2338, 2352-53 (2d Cir. Oct. 18, 1962).

290. See cases cited in note 146 *supra*.

291. 341 U.S. 675 (1951). This decision accorded construction contractors and subcontractors the protection of neutral employers under § 8(b) (4), and has been the object of repeated presidential and congressional attempts to overrule. These came within a hairbreadth of success in 1959, but foundered on parliamentary difficulties; a pledge to do the job at the next session has gone unredeemed by reason of the practical impossibility, in the labor area, of enacting an isolated measure at all controversial.

292. If, for example, plumbers engaged to work on a job were to refuse to do so because of a primary dispute, the brickwork contractor could nonetheless continue to have his men lay bricks. The two crafts work side-by-side, but not "together" in the sense relevant here. Of course, the unavailability of plumbers would eventually cause other operations to be suspended, but again the same may be said of a manufacturer dependent for continued operations on a steady source of raw materials. Given the congressional ban on inducement of boycotts of the product coming from the primary, the line must be drawn at work which is directly dependent on the immediate availability of the personnel, and not merely the product, of the primary.

its relevance is nil. When, as under a literal approach, the primary or secondary character of the picketing depends on whether the union's intent is to appeal to neutral employees, the question of adequate opportunity to picket elsewhere may—or may not—be probative.²⁹³ But it has no effect on the impact of strike action on employers with whom the primary does business. It has no role to play, then, in determining whether appeals to secondary employees, under the rationale here proposed, are primary or secondary; indeed, it proceeds from the conclusion, arrived at from other sources, that all such appeals are secondary. If that conclusion is rejected, *Washington Coca-Cola* is simply beside the point.²⁹⁴

The present Board has purported only to abandon the per se character of the prior reliance on an alternative place to picket, in favor of an inquiry into the particular facts of each case.²⁹⁵ But the Board has not yet told its dissenting members wherein it disagrees with their assertion that the *Washington Coca-Cola* rule should be decisive; nor has it said why, if the alternative place to picket is not controlling, it is relevant at all. Something more than the aura of flexibility and case-by-case factual inquiry is required. Per se rules are neither intrinsically good nor bad.²⁹⁶ They are sound if their substantive and administrative underpinnings are firm, and unsound if they are not. There is a need for greater attention to basic questions of statutory construction, and less opaque recitation of "all the facts and circumstances," followed by the announcement of a still unexplained conclusion.

2. *Picketing forbidden to appeal to neutral employees.* When the conditions discussed above are not met, appeals to neutral employees are properly regarded as "secondary" and unlawful. But, when there are primary employees present at the site, the further question arises whether picketing appealing to those employees may be carried on, and if so, under what conditions. One answer would be to hold all picketing barred, because of the great danger of forbidden harm to the secondary employer.²⁹⁷ In refusing to accept such a view, the Board has, since the *Schultz* decision, been impressed with the realization that there are cases in which no other place to picket the primary employees is available.²⁹⁸ The more troublesome question is whether, when

293. The Board at one time thought so; some courts of appeals have not. See text accompanying notes 83-88 *supra*.

294. Whether it is appropriately invoked in those cases in which appeals to secondary employees are properly held secondary is discussed in text accompanying notes 297-303 *infra*.

295. See Local 861, Int'l Bhd. of Elec. Workers (Plauche Elec., Inc.), 135 N.L.R.B. No. 41, 1962 CCH NLRB DEC. ¶ 10830 (Jan. 12, 1962).

296. Judge Friendly has recently made an impressive statement of the case for more of them. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (pts. 1-3), 75 HARV. L. REV. 863, 1055, 1263 (1962).

297. See *Developments in the Law—The Taft-Hartley Act*, 64 HARV. L. REV. 781, 802 (1951).

298. See text accompanying note 57 *supra*. This reason was given by Justice Frankfurter in *General Electric* as one of the grounds of the *Moore Dry Dock* rules. 366 U.S. at 677.

this is not the fact, all picketing should be barred. Again, the *Washington Coca-Cola* issue arises, but here in a context in which there is agreement that only appeals to primary employees are lawful. Nonetheless, I am not persuaded that the criterion it suggests is the proper one. The difficulties of administering an "adequate opportunity" test, already adverted to,²⁹⁹ are sufficient to counsel against its adoption in the absence of a compelling case for it. But the case is hardly of that character. One ground of support is that, when secondary site appeals to primary employees are "unnecessary," there is insufficient reason, when balanced against the potential harm to secondary employers, to permit them. Such a view frankly makes the Board the "arbiter of the sort of economic weapons the parties can use";³⁰⁰ for reasons previously elaborated,³⁰¹ I do not believe that the Board—a fortiori the regional directors and district judges—should appropriately take on the task of deciding when one party to a primary dispute has had a "sufficient" opportunity to put pressure on the other.

The other basis for applying *Washington Coca-Cola* as a limitation on secondary site picketing to bar appeals to secondary employees has—at least in form—firmer statutory supports. One is the evidential inference that secondary site picketing, "unnecessary" to an effective appeal to primary employees, is designed, at least in part, to appeal to secondary employees and therefore has the object forbidden by the act. The other is the doctrine that the actual conduct of the secondary employees is not relevant in determining whether the picket line constitutes an "inducement" of those employees. The former has been discussed earlier; it seems clear that it should not stand in the way of a more practical test, if one is available. The latter is an excellent example of a principle with a core of sense applied dogmatically beyond any reasonable demands of practicality. Of course, overt attempts to provoke the forbidden response do not remain beyond the reach of the act merely because they fail.³⁰² And certainly it is true that a picket sign "induces" a strike, in the sense that a cripple "induces" feelings of sympathy, or a beautiful woman "induces" thoughts of love, even though the response is not intended. Intended or not, the tendency is there. But is it not also clear that the only substantive concern of the act is the result itself and not the tendency alone, and that the danger of the disfavored result is greater when the result is intended and the intent is manifested by overt acts? To move from a rule encompassing attempts to one diverting attention entirely from the result to the "inducement"

299. See text following note 220 *supra*.

300. *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 497 (1960).

301. See text following note 217 *supra*.

302. The *Associated Musicians* case, often cited by the Board for its insistence on the irrelevancy of the pickets' effect, holds no more. *NLRB v. Associated Musicians*, 226 F.2d 900, 904-05 (2d Cir. 1955), *cert. denied*, 351 U.S. 949 (1956). *Cf.* *United Bhd. of Carpenters v. NLRB*, 286 F.2d 533, 535 (D.C. Cir. 1960).

is to exalt a concept beyond all necessity, and to abjure a simple, workable standard for a troublesome abstraction.³⁰³

The first, third, and fourth *Moore Dry Dock* rules, discussed above,³⁰⁴ operate to bar the picketing from actively seeking to involve employees of neutrals. Certainly observance of their requirements should be a requisite of lawful secondary site picketing. When these conditions are met, however, a simple additional condition is, in my view, both necessary and sufficient to bar forbidden pressures: an actual refusal of secondary employees to do any work must not follow or accompany the picketing. Thus, it would not be necessary for the pickets, on being asked whether secondary employees are to cross, to reply in the affirmative, but if the employees did not cross, the picketing would be held unlawful; if no refusal to work occurred, there would be no violation. The result would be decisive. Given the limitations on the "inducement" inherent in the picket line imposed by the three *Moore Dry Dock* rules, I simply do not see what interest is being served by insisting that, although no secondary employees in fact refuse to cross, they are nonetheless being "induced" to do so, and the picketing is thereby rendered unlawful. As a semantic abstraction, that may or may not be so, but in light of the purpose of the ban on inducement it seems entirely proper to say that the failure of the secondary employees to cross sufficiently evidences the absence of the prohibited "inducement."

The advantages of this approach seem obvious. For the Board (and for the regional director and district judge), it substitutes a simple, objective issue for the downright silly litigation over who hinted what to whom by what kind of silent signal; for the secondary employer, it protects him from conduct unlawfully injurious to him, disregarding (as he doubtless does) hostile attitudes which do not in fact cause such conduct; for the union, it removes the premium on skill in evasion, declines to demand unnatural conduct of its pickets, and permits it to know clearly what is and is not permitted. The Eighty-sixth Congress employed like criteria in the areas of pre-election recognition picketing and secondary consumer publicity,³⁰⁵ and the Board has recently moved away from the conceptualism of its former position in the related area of distinguishing secondary appeals to employees from those to customers.³⁰⁶ A similar approach can profitably be employed here.

303. See Koretz, *Federal Regulation of Secondary Strikes and Boycotts—A New Chapter*, 37 CORNELL L.Q. 235, 246 n.56 (1952), quoting from the NLRB brief as Petitioner in *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

304. See text following note 277 *supra*.

305. See the provisos to § 8(b)(7)(C), 73 Stat. 544 (1959), 29 U.S.C. § 158(b)-(7)(C) (Supp. III, 1962), and § 8(b)(4)(ii)(B), 73 Stat. 543 (1959), 29 U.S.C. § 158(b)(4)(ii)(B) (Supp. III, 1962); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 267 (1959).

306. See *United Wholesale Employees v. NLRB* (Perfection Mattress Co.), 282 F.2d 824 (D.C. Cir. 1960); *NLRB v. Local 50, Bakery Workers* (Arnold Bakers) 245 F.2d 542 (2d Cir. 1957); *Upholsterers Workers* (Minneapolis House Furnishing Co.), 132 N.L.R.B. 40 (1961).

The converse situation must also be dealt with. The Board has recently returned to the view that, when the *Moore Dry Dock* rules are satisfied, the picketing is lawful even though there is an actual refusal of secondary employees to cross the line.³⁰⁷ It is not clear whether this is so because the Board now regards *Moore Dry Dock* as expressing the conditions under which appeals to secondary employees are permitted, or whether the thought is that compliance with *Moore Dry Dock* warrants the inference of noninducement, despite the fact of secondary employee refusals to work.³⁰⁸ The fact that the Board holds the refusal to work, when attributable to the secondary employees' union, unlawful³⁰⁹ is—or should be—an indication that the former is not the case;³¹⁰ in any event, on the rationale I have proposed, the *Moore Dry Dock* rules are insufficient to winnow out all appeals to secondary employees that should be barred.³¹¹ The latter theory seems to be inconsistent with the realities in most cases, and encourages evasion of the act. The "Eisenhower Board" was surely correct in asserting that the pickets' experience would ordinarily lead them to expect secondary employees to be influenced by the picket line to refuse to work behind it,³¹² when the denouement is such a refusal, it is not inaccurate to say that the picketing "caused" or "induced" it, in an objective sense.³¹³ In this area, *post hoc, ergo propter hoc* expresses more fact than fallacy. Nor is it unjust. Such a rule would in practice leave it to the union to see to it that the prohibited result did not come to pass; the prevention of that result is the purpose of the statutory provision, and the picketing union is in an appropriate position effectively to prevent it. A defense can be recognized for isolated refusals, and for those rare cases in which the primary employees' union can show that it has made all reasonable efforts to avoid causing a secondary refusal to work.³¹⁴ With these possible limitations, the test here proposed would accomplish the substantive purpose of deterring forbidden secondary boycotts, and the administrative purposes of fostering compliance (while permitting picketing not having the prohibited result), making tactical record-making

307. See *International Bhd. of Elec. Workers (Anderson Co. Elec. Serv.)*, 135 N.L.R.B. No. 55 (1962).

308. See text accompanying notes 274-75 *supra*.

309. See, e.g., *Local 741, United Ass'n of Journeymen (Independent Contractors Ass'n)*, 137 N.L.R.B. No. 121 (June 29, 1962).

310. There should be an integration of the rules as they affect the primary employees' and the secondary employees' union. It makes little sense, given the exclusive concern of § 8(b)(4) with the protection of secondary employers, to hold that, although the former may appeal to secondary employees, identical inducement is unlawful when attributable to those employees' union. *Cf.* text accompanying note 205 *supra*.

311. See text accompanying notes 285-92 *supra*.

312. See text accompanying note 99 *supra*.

313. This conclusion is not rebutted by the view that the decision was an individual one on the part of each secondary employee to support the picketing union. See *Truck Drivers Union v. NLRB*, 249 F.2d 512, 515 (D.C. Cir. 1957) (Bazelon, J., dissenting), *cert. denied*, 355 U.S. 958 (1958). Even if this is so, it remains true that the picketing brought on the decision.

314. *Cf.* *Retail Clerks Union (Barker Bros.)*, 138 N.L.R.B. No. 54 (Sept. 7, 1962), permitting a potentially broader defense under the "publicity" proviso to § 8(b)(7)(c).

maneuvers irrelevant, and removing a troublesome and fruitless issue from litigation.

V. CONCLUSION

The rationale I have proposed tests the primary or secondary character of an appeal to secondary employees by asking whether the appeal seeks to subject the secondary employer to loss of the services of his employees broader than that which would flow from the unavailability of the services of primary employees were the strike to succeed in inducing them to quit work. In addition, because of considerations similar to those underlying the "struck work" doctrine, it must be asked whether the employment of the secondary employer enables the primary to avoid the impact of the loss of services of his own employees. Under this approach:

(1) Picketing at a primary site is primary and lawful, regardless of its appeal to secondary employees not to cross the picket line, unless:

(a) the work done by the secondary employees at the site is unrelated to the operations of the primary, in the sense that disruption of those operations by a successful strike against the primary would not cause it to suspend business with the secondary;

(b) the work done by the secondary employees can be carried on without necessitating curtailment of the primary's operations; and

(c) (if the Supreme Court insists) the secondary employees enter the premises through a separate gate.

(2) Picketing at a secondary site is secondary and unlawful if it appeals to secondary employees not to cross the picket line or to perform services, unless they are performing work that can not be carried on:

(a) without the presence of primary employees at the secondary site; or

(b) without necessitating curtailment of the primary's operations.

(3) Picketing at a secondary site contains an appeal to secondary employees unless:

(a) the picketing takes place only at times when primary employees are present;

(b) the picketing is carried on as close to those employees as is reasonably possible;

(c) the pickets, by their signs and conduct, make clear that the primary employer is the offending employer, and the secondary is not;

(d) there are no overt attempts to deter secondary employees from entering the premises or performing services; and

(e) no secondary employees actually refuse to enter the premises or perform services.