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Labor Law - NLRA - "Roving Situs" Picketing as Violation of Section 8(b)(4)(A)

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LABOR LAW—NLRA—"ROVING SITUS" PICKETING AS VIOLATION OF SECTION 8 (b) (4) (A)—Respondent union sought to organize the crane and dragline operators of a manufacturer of ready-mixed cement and posted pickets about the local manufacturing plant. During the working day each of the employer's delivery trucks crossed the picket line at least twice. In addition, the union established a roving picket line which circulated about the manufacturer's trucks while they were making deliveries to customers at local construction sites. The roving picketing lasted only so long as the workers of the primary employer remained on the customer's premises. The pickets at all times stayed within six hundred feet of the trucks. The legend on their picket signs was explicit in stating that the dispute was only with the primary employer, and the picketers distributed handbills which set out with accuracy the nature of the strike. The regional director of the NLRB sought an injunction under section 10 (*l*),[1] alleging a violation of section 8 (b) (4) (A),[2] which proscribes secondary picketing. He adduced evidence to show that seven of the primary employer's customers had ceased their purchases of cement from the manufacturer after the picketing had begun. Moreover, the union had made requests to customers to buy cement from other sources during the strike. *Held,* injunction granted. There were reasonable grounds for finding that one objective of the picketing was the encouragement of the neutral employees at the site to cease their work so long as the primary employer transacted business on the premises. *Le Bus v. Locals 406, 406A, 406B and 406C, International Union of Operating Engineers,* (E.D. La. 1956) 145 F. Supp. 316.

Under the sweeping language of section 8 (b) (4) (A),[3] any picketing having secondary effects is an unfair labor practice unless (1) it is not in-

1 61 Stat. 149 (1947), 29 U.S.C. (1952) §160 (*l*).

2 61 Stat. 141 (1947), 29 U.S.C. (1952) §158 (b) (4) (A).

3 It is an unfair labor practice for "a labor organization or its agents (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

tended to have secondary effects,[4] or (2) even if secondary effects are intended, it is done under certain "exonerating conditions."[5] By secondary effects is meant the inducement of secondary employees in the course of their employment to boycott the primary employer. The Board early recognized that picketing of the permanent, separate premises of the primary employer is exonerated, "even though necessarily designed to induce and encourage third persons to cease doing business with the picketed employer."[6] The privilege was fundamental to the "right of a labor organization to bring pressure to bear on the primary employer."[7] Some businesses, however, are not confined to specific locations and present a special problem. Their work sites extend intermittently to the premises of neutral employers. For example, a delivery truck is the roving situs of the business of its owner. The Board decided in *Schultz Refrigeration Service, Inc.*,[8] that, under certain limited conditions, picketing of the primary employer's mobile property, when it is situated at the premises of a secondary employer, was privileged, despite the fact that at the time of the picketing the union "had as an objective the inducement and encouragement of the employees of the secondary employers to refuse to perform their duties in order to force the secondary employers to cease doing business with" the picketed company.[9] One year after *Schultz*, the Board, in *Moore Dry Dock*,[10] set forth the "exonerating conditions" within which roving situs picketing would not be regarded as a violation of section 8 (b) (4) (A). Briefly stated, discreet and timely picketing at the "situs of dispute" was permitted.[11] Four courts of appeals accorded these conditions their approval.[12] Subsequently, the Board in two decisions limited the meaning of the term "situs of dispute" in the following ways. First, situs

4 Sales Drivers v. NLRB, (D.C. Cir. 1955) 229 F. (2d) 514.

5 NINETEENTH ANNUAL REPORT OF THE NLRB 108 (1954).

6 SIXTEENTH ANNUAL REPORT OF THE NLRB 226 (1951), citing Moore Dry Dock, 92 N.L.R.B. 547 (1950) and Oil Workers International Union (Pure Oil Co.), 84 N.L.R.B. 315 (1949).

7 Teamsters, Chauffeurs, AFL-CIO (Southwestern Motor Transport, Inc.), 115 N.L.R.B. 981 at 983 (1956).

8 87 N.L.R.B. 502 (1949).

9 Id. at 510. The passage is quoted from the dissent, but facts were admitted by majority. See p. 505.

10 92 N.L.R.B. 547 (1950).

11 The conditions are: (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. The same criteria ultimately have been applied to all common situs situations. See Hoosier Petroleum Co., Inc., 106 N.L.R.B. 629 at 633 (1953).

12 NLRB v. Service Trade Chauffeurs, (2d Cir. 1951) 191 F. (2d) 65 at 68, enf. granted (2d Cir. 1953) 199 F. (2d) 709 (the Howland case); NLRB v. Chauffeurs, Teamsters, (7th Cir. 1954) 212 F. (2d) 216 at 219 (the Hoosier Petroleum case); John A. Piezonski d/b/a Stover Steel Service v. NLRB, (4th Cir. 1955) 219 F. (2d) 879 at 883 (the Stover Steel Service Co. case); NLRB v. Local No. 55, (10th Cir. 1954) 218 F. (2d) 226 at 231 (Professional and Business Men's Life Ins. Co. case).

of dispute meant the premises at which the primary employees who were the controversial subjects of the picketing union's dispute worked (the *Massey*[13] condition). Second, it meant the comparatively more permanent and more separate of the picketed employer's local business premises at which picketing could be conducted "effectively"[14] (the *Coca-Cola*[15] condition). As a consequence of these new definitions, roving situs picketing of a business which had a fixed establishment in a local area,[16] to give one example, would not be at the situs of dispute and would not be exonerated. The Board inclined to treat the privilege of roving situs picketing narrowly, as "an exception . . . when there is no other way in which the union can picket the primary employer's employees."[17]

Even if some roving situs picketing situations fell outside the *Moore* immunity, it was not necessarily unlawful unless the union intended secondary effects. In several cases, however, the Board began to infer conclusively that roving situs picketing which does not fall within the criteria of privilege is "in fact directed at the employees of the secondary employers,"[18] and therefore is intended to produce unlawful secondary effects. The two circuits which have discussed the validity of this conclusive presumption have rejected it, however.[19] They required the Board to establish with factual evidence the secondary intent of the union which pickets a roving situs. They reasserted that the "objective . . . and not the quality of the means employed to accomplish that objective" is the gravamen of a section 8 (b) (4) (A) violation.[20] The Board, according to these courts, cannot presume conclusively the illegality of the union's purpose from purely objective tests. Despite judicial rejection of its position, the Board persistently has maintained that any roving situs picketing not within its exonerating conditions is unlawful.[21] Until there is resolution

[13] General Drivers, Local 968 (Otis Massey Co., Ltd.), 109 N.L.R.B. 275 at 278 (1954); enf. denied NLRB v. General Drivers, (5th Cir. 1955) 225 F. (2d) 205.

[14] In Pittsburgh Plate Glass Co. (Brotherhood of Painters, Local 193), 110 N.L.R.B. 445 at 457 (1954), picketing a warehouse to which few primary employees ever came and which was in an unpopulated warehouse area withdrawn from the center of town was deemed ineffective.

[15] Washington Coca-Cola Bottling Works, Inc. (Brewery and Beverage Drivers, Local 67), 107 N.L.R.B. 299 at 303 (1953), order enforced, Brewery and Beverage Drivers and Workers Local 67 v. NLRB, 95 U.S. App. D.C. 117, 220 F. (2d) 380 (1955).

[16] Situs ninety miles apart are in one local area. See Goodyear Tire and Rubber Co., 112 N.L.R.B. 30 (1955).

[17] Southwest Motor Transport, Inc. (Teamsters, Chauffeurs, AFL-CIO), 115 N.L.R.B. 981 at 983 (1956).

[18] Id. at 984.

[19] The Massey condition was rejected in NLRB v. General Drivers, (5th Cir. 1955) 225 F. (2d) 205, cert. den. 350 U.S. 914 (1955). The Coca-Cola condition was rejected in Sales Drivers v. NLRB, note 4 supra, denying order in Campbell Coal Co., 112 N.L.R.B. 941 (1955).

[20] International Brotherhood of Electrical Workers, Local 501 v. NLRB, 341 U.S. 694 at 704 (1951).

[21] See NLRB's footnotes in Southwest Motor Transport, Inc., note 7 supra, at 985, and in W. H. Arthur Co. (Sheet Metal Workers), 115 N.L.R.B. 1137 at 1139 (1956).

of the conflict by the Supreme Court, the disagreement over the use of the conclusive presumption seems permanent.

Still another question is unresolved, viz., whether the courts will adopt the Board's limited definition of the meaning of "situs of dispute." Recently Judge Wyzanski, in a case whose facts were indistinguishable from those of the principal case, rejected both the *Massey* and *Coca-Cola* limitations.[22] In the case before him, despite a showing that the primary employer had a local permanent situs, he refused to grant a preliminary injunction against picketing by the primary union, even though he found an intent to encourage secondary employees to cease their work while the primary employees remained on the secondary employer's premises. He found the picketing "subtle," not "coercive." The legend on the placards made it clear the dispute involved only the primary employer. There was no molestation of either primary or secondary employees, and the pickets had scrupulously abstained from approaching areas where secondary employees alone worked. Since Judge Wyzanski found that the union intended secondary effects,[23] he must have decided that the union was immune from violation under *Moore Dry Dock*. That would mean that he considered the roving situs to be the "situs of dispute," despite the availability of local separate premises where the primary employer could have been picketed. The decision of the court in the principal case, on the other hand, adopts the Board's definition of "situs of dispute" as limited by *Coca-Cola*. Because the union could and did picket effectively the fixed, separate premises of the primary employer, the court held that the roving situs picketing was not covered by *Moore Dry Dock* since it was not at the situs of dispute.

The divergence in approach by the courts leads to strikingly different remedial orders. Under a view adopting *Coca-Cola,* the roving situs picketing in the principal case would wholly fail to come under the cover of immunity bestowed by *Moore*. With a scintilla of proof that the union intended secondary effects at the roving situs, all further picketing at the common situs would be forbidden.[24] Under the Wyzanski view, however, since the roving premises are the "situs of dispute," only those objective aspects of the picketing which were outside the four pristine *Moore* criteria would be enjoined, e.g., a picket whose legend did not clearly identify the controversial primary employer. A union could still maintain a picket line that was conducted within the limits of immunity, secondary effects notwithstanding.[25]

In the final analysis, Judge Wyzanski would permit picketing of the primary employer wherever and whenever he transacts business, so long as

[22] Alpert v. United Steelworkers of America, (D.C. Mass. 1956) 141 F. Supp. 447.

[23] Id. at 452.

[24] W. H. Arthur Co. (Sheet Metal Workers), note 21 supra, at 1139.

[25] Professional and Business Men's Life Ins. Co. (Local 55 and Carpenters' District Council of Denver), 108 N.L.R.B. 363 at 374 (1954).

the picketing is reasonably discreet. The Board, on the other hand, would allow only that picketing of the primary employer which is necessary to the effectiveness of the strike and which is fair in providing the aggrieved worker the chance to give public expression to his discontent. In view of the fact that abridgements of the right to picket and strike as provided in the NLRA are to be narrowly applied[26] and in view of the guarantees of the right to picket under the First and Fourteenth Amendments, insofar as the courts still recognize them, the Board should tread warily when it attempts to intrude "effectiveness" and "fairness" as tests of the legality of picketing. At what point does picketing become so effective that any further picketing is unnecessary? What aspects of the primary employer's business are to be saved harmless, protected from even the most restrained expression of grievance? These are the difficult questions raised by the approach of the Board and of the court in the principal case. The better view is Judge Wyzanski's, for it continues the right of a union to picket his employer at all times and places so long as there prevails a moderation and respect for the interests of neutral employers.

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[26] 61 Stat. 151 (1947), 29 U.S.C. (1952) §163.