THE THIRTY YEARS WAR WITH *DENVER BUILDING*

by
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I.

In 1947 the Congress enacted the Taft-Hartley Act[1] over the veto of President Harry S. Truman. This Act substantially amended the National Labor Relations Act (NLRA) passed in 1935.[2] Among the amendments was a provision prohibiting labor activity similar to the secondary boycott under common law;[3] section 8(b)(4)(A) did not contain the words "secondary boycott" or "primary activity," but that it was intended as a prohibition against secondary activities is supported by the legislative history.[4] Taft-Hartley also added a provision to the NLRA that allowed suits for money damages[5] to be brought by any party injured be-

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1. Ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151-166 (1976)).

2. 29 U.S.C. §§ 151-166 (1976).

3. 93 CONG. REC. 4198 (1947). Senator Taft, a chief sponsor of the Taft-Hartley Act, stated:

> The Senator will find a great many decisions written by my father which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.

Id.

4. *Id.* Senator Taft stated: "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." *Id. See also* NLRB v. International Rice Milling Co., 341 U.S. 665, 666 n.1 (1951).

5. Taft Hartley Act, ch. 120, 61 Stat. 158 (1947) (codified at 29 U.S.C. § 187 (1976)). The provision presently reads:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
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> (b) Whoever shall be injured in his business or property by reason of any

cause of prohibited activities under paragraph 8(b)(4).

The Landrum-Griffin Act of 1959[6] amended the "secondary boycott provision"[7] to close some of the loopholes discovered in the intervening twelve years.[8] A proviso was added to section 8(b)(4)(B)[9] that the prohibited activity did not include primary picketing.[10] Section 8(b)(4) has not been amended since 1959.[11]

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violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Id.

6. Pub. L. No. 86-257, 73 Stat. 541 (1959) (current version at 29 U.S.C. §§ 153, 158-160, 164, 186-187, 401-402, 411-415, 431-440, 461-466, 481-483, 501-504, 521-531 (1976)).

7. Pub. L. No. 86-257, 73 Stat. 542-43 (1959) (amending 29 U.S.C. § 158 (1976)).

8. NLRB v. Servette, Inc., 377 U.S. 46, 51 (1964).

9. Taft-Hartley Act, ch. 120, § 8(b)(4)(A), 61 Stat. 141 (1947) (current version at 29 U.S.C. § 158 (1976)), added to the National Labor Relations Act in Taft-Hartley, was redesignated in the Landrum-Griffin Act of 1959, Pub. L. No. 86-257, § 8(b)(4)(B), 73 Stat. 542-43 (1959) (codified at 29 U.S.C. § 158 (1976)), and is hereinafter cited as § 8(b)(4)(B).

10. 29 U.S.C. § 158(b)(4)(B) (1976). The proviso states "[t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ." *Id.*

11. 29 U.S.C. § 158(b)(4) (1976), which presently reads:

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—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

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

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of

Of the original provision in Taft-Hartley, Senator Taft, a chief sponsor, said:

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.[12]

Section 8(b)(4)(B) cannot be read literally.[13] Further the Supreme Court has stated:

> Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of "secondary boycotts" and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in Section 8(b)(4)(A).[14] The section does not speak generally of secondary

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such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection 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 subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution

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29 U.S.C. § 158(b)(4) (1976) (The basic provision is language from the Taft-Hartley amendments of 1947. The underscored portions are those added by the Landrum-Griffin Act of 1959.).

12. 93 CONG. REC. 4198 (1947).
13. Local 761, IUE v. NLRB, 366 U.S. 667, 672 (1961).
14. *See* note 9 *supra.*

> boycotts. It describes and condemns specific union conduct directed to specific objectives.[15]

Determining the specific means directed toward the specific ends which are prohibited, demands an exercise of judicial judgment,[16] judicial interpretation (what is the congressional will), and judicial construction (what type of conduct shall in fact be condemned). The Supreme Court undertook the assay in a series of four decisions in 1951,[17] most noteworthy of which were *NLRB v. Denver Building & Construction Trades Council*[18] and *NLRB v. International Rice Milling Co.*[19]

The *Rice Milling* decision highlighted several deficiencies in the secondary boycott provision and provided momentum for legislative changes to close the loopholes.[20] The 1959 changes overruled parts of *Rice Milling*, but did not expand the "isolated evils" that section 8(b)(4)(A), redesignated section 8(b)(4)(B), condemned.[21]

For thirty years *Denver Building* has survived the onslaught of the construction trade unions to overturn it and has grown in meaning and significance. The issues decided by the Court were controversial even before the decision was rendered, and after the Court's pronouncement, many agreed with the dissent of Justice

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15. Local 1976, United Bhd. of Carpenters & Joiners v. NLRB, 357 U.S. 93, 98 (1958).

16. *Id.* at 100. The text accompanying notes 12-16 *supra* points out the special responsibility of the National Labor Relations Board and courts to develop a coherent body of law on the secondary boycott based upon the statutory provisions, legislative history, and where there are gaps, the common law.

17. NLRB v. International Rice Milling Co., 341 U.S. 665 (1951); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); Local 74, United Bhd. of Carpenters & Joiners, 341 U.S. 707 (1951); IBEW Local 501 v. NLRB, 341 U.S. 694 (1951).

18. 341 U.S. 675 (1951).

19. 341 U.S. 665 (1951).

20. Landrum-Griffin amended § 8(b)(4)(A) by inserting the words "any individual" and deleting the words "employee of any employer" and "concerted" from the text. *See* note 11 *supra*. A proviso was also added to expressly protect primary picketing and primary strikes. *See* notes 10 & 11 *supra*. *NLRB v. International Rice Milling Co.* points out the deficiencies in the original text. 341 U.S. at 671-73.

21. After the 1959 amendments, Justice Brennan, for a unanimous court in NLRB v. Servette, Inc., 377 U.S. 46 (1964), wrote:

> The 1959 amendments were designed to close certain loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and court decisions . . . [b]ut these changes did not expand the type of conduct which § 8(b)(4)(A) condemned, that is, union pressures calculated to induce the employees of a secondary employer to withhold their services in order to force their employer to cease dealing with the primary employer.

Id. at 51-53 (footnote omitted).

Douglas. Ten years after *Denver Building,* in a decision which some would claim modified it, Justice Frankfurter, in discussing the primary-secondary distinction and the secondary boycott, stated: "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer."[22] So, how well have the courts[23] accomplished their task of evolving a rational formula in the thirty years since the initial decisions, especially in regard to the picketing of a common situs?

Picketing and strikes carried out by labor unions to promote legitimate interests have been granted constitutional[24] and statutory protection.[25] A presumption under the NLRA controlling this type of labor activity is that picketing and striking will be allowed unless specifically prohibited by the Act.[26] Engaging in picketing or striking, or inducing or encouraging a picket or strike for the purpose of secondary boycott[27] is such a specific prohibition and the

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22. Local 761, IUE v. NLRB, 366 U.S. 667, 674 (1961).

23. In the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-166 (1976), Congress delegated the authority for making initial judgments and determining policy to the National Labor Relations Board. The Act gives the courts of appeals the responsibility for reviewing Board decisions. Ultimately, the courts of appeals are responsible for assuring that neutral principles are applied in accordance with the Constitution and the legislative will. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The emphasis in this article shall be on the courts and their attempt to develop a coherent and logical body of law based on the principles laid down in *Denver Building.*

24. Thornhill v. Alabama, 310 U.S. 88 (1940). The Supreme Court recognized that picketing includes aspects of free speech. *Id.* at 102-03. A blanket ban against picketing could not be tolerated because of the first amendment. *Id.* at 104-05. Justice Douglas, concurring in Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942), acknowledged that picketing includes something more than speech and that something more is not protected by the first amendment and can be controlled. *Id.* at 776-77. Justice Brennan, in NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964), writing for himself and four Justices, and Justice Black in concurring recognized the imprimatur of the first amendment on picketing. *Id.* at 63, 76-77, 79.

25. 29 U.S.C. §§ 157, 163 (1976).

26. NLRB v. International Rice Milling Co., 341 U.S. 665, 673 (1951).

27. The definition of secondary boycott is set out in the NLRA in 29 U.S.C. § 158(b)(4) (1976):

> It shall be an unfair labor practice for a labor organization or its agents— . . .
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person . . . 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 per-

focus of regulation under section 8(b)(4)(B).

Congress had a dual purpose in enacting section 8(b)(4)(B). The section is meant to preserve the union's right to primary picketing and striking as well as to shield unconcerned parties (employers and employees) against being drawn into controversies not their own.[28] Another reason for enacting the provision, which may be implicit in the dual purposes reiterated by the courts but is important enough to demand explicit mention, is to contain the spread of labor disputes and to prevent organized sympathy actions.[29] Satisfying these purposes has forced the National Labor Relations Board (NLRB) and courts to draw nice lines between protected primary activity and unlawful secondary activity.[30] Distinguishing between what is protected and what is condemned has been a slippery assignment, and sometimes the lines drawn have been little more than vague, arbitrary determinations.[31] Propounding definitive guidelines has not been accomplished with great success, nor have the guidelines that exist been easily applied.

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son . . . where in either case an object thereof is— . . .

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(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause . . . shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

Secondary boycott is hereinafter used with this definition.

28. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951). The Supreme Court identified the dual congressional objectives as "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *See also* Linbeck Constr. Corp. v. NLRB, 550 F.2d 311 (5th Cir. 1977); Helgesen v. International Ass'n of Bridge, Structural & Ornamental Ironworkers Local 498, 548 F.2d 175 (7th Cir. 1977); NLRB v. Northern Cal. Dist. Council of Hod Carriers & Common Laborers, Local No. 185, 389 F.2d 721 (9th Cir. 1968).

29. 93 CONG. REC. 4198 (1947).

30. *See, e.g.,* NLRB v. Local 825, Int'l Union of Operating Eng'rs, 400 U.S. 297, 303 (1971); Local 761, IUE v. NLRB, 366 U.S. 667, 673 (1961); NLRB v. Northern Cal. Dist. Council of Hod Carriers & Common Laborers, Local No. 185, 389 F.2d 721, 725 (9th Cir. 1968). The emphasis in the decisions has been on the words "primary" or "secondary" or "neutral"; none of these terms had been used in the original text of section 8(b)(4). *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 686 (1951). The 1959 amendments added a proviso using "primary." *See* note 10 *supra.*

31. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 386 (1969).

Determining who is the primary party and who is secondary is only the first step in the analysis toward deciding overall if the activity is protected or prohibited conduct. In *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*,[32] the Court stated:

> The protected primary strike "is aimed at applying economic pressure by halting the day-to-day operations of the struck employer," . . . and protected primary picketing "has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt," . . . including other employers and their employees. "The gravamen of a secondary boycott," on the other hand, "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."[33]

In the context of section 8(e) cases,[34] which also depend upon the primary-secondary dichotomy to find a violation,[35] the Court indicated that subsections 8(b)(4)(B) and 8(e) barred secondary boycott activity "directed against a neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere."[36] The test used to make the primary-secondary distinction was "whether the union's concern is with the labor relations of the employer against whom its pressures are directed vis-à-vis its own employees (protected 'primary' activity) or whether the activity is 'tactically calculated to satisfy union objectives elsewhere.' "[37]

Legitimate activity to stop the primary employer's business in-

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32. 394 U.S. 369 (1969).

33. *Id.* at 388.

34. Cases under § 8(e) are not really within the scope of this article, but see note 101 *infra*, regarding the pertinence of the construction proviso. Oftentimes § 8(e) and § 8(b)(4)(B) or 8(b)(4)(A) are involved in the same case.

35. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967).

36. *Id.* at 632.

37. Baldovin v. International Longshoremen's Ass'n, 626 F.2d 445, 449 (5th Cir. 1980) (paraphrasing National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 644-45 (1967)). *See also* NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters, Local No. 638, 429 U.S. 507, 511 (1977).

cludes activity that may have incidental secondary effects,[38] which traditionally could encompass all those "selling, delivering or otherwise contributing to the operations"[39] at the business site of the primary employer. It is not the secondary effects of the activity that determines whether it is prohibited but the purposeful object or intent of the activity.[40] Secondary effect could be a factor that sheds light on the true object;[41] however, even opening the door in this regard is dangerous because it could be misleading. The intent of the activity is "divined"[42] by taking all factors into account. What makes discerning the true intent of union activity difficult is that any picketing has inherent in it "a desire to influence others from withholding from the employer their services or trade . . . . [W]hen a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line . . . ."[43] The meaning of intent and its use in this context is more abstruse than in other areas of the law because foreseeable effect cannot be a determining consideration.[44] Sham picketing, that is, picketing to uphold area standards or claiming that substandard wages are being paid without investigating whether such charges are true in fact, can be a factor in discerning intent

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38. NLRB v. International Rice Milling Co., 341 U.S. 665, 671 (1951).

39. United Steelworkers v. NLRB, 376 U.S. 492, 499 (1964).

40. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 390 (1969); IBEW Local 480 v. NLRB, 413 F.2d 1085, 1090-91 (D.C. Cir. 1969); Superior Derrick Corp. v. NLRB, 273 F.2d 891, 893-94 (5th Cir.), *cert. denied*, 364 U.S. 816 (1960).

41. IBEW Local 480 v. NLRB, 413 F.2d 1085, 1090 (D.C. Cir. 1969).

42. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. at 386-87:

> No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities.

43. Seafarers Int'l Union v. NLRB, 265 F.2d 585, 590-91 (D.C. Cir. 1959). *See also* Local 761, IUE v. NLRB, 366 U.S. 667, 673-74 (1961): "But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer."

44. IBEW Local 480 v. NLRB, 413 F.2d 1085, 1090 (D.C. Cir. 1969). It is an established premise of the law that a man intends the known and probable consequences of his actions. "If this principle were applied in determining [s]ection 8(b)(4)(i) and (ii)(B) violations, the Act's attempt to distinguish between primary and secondary activity would abort." *Id.* at 1091.

and thereby the true object of the picket.[45]

Section 8(b)(4)(B) prohibits secondary activity, but not all secondary activity,[46] only when the union employs illegal means toward a proscribed object.[47] To "engage in" a work stoppage for an unlawful object is not the equivalent of inducing or encouraging others to stop work for their employers for an unlawful object, but the significance of this difference has not been made the basis for a different theory in the opinions of the courts.[48] Although the results have varied, the courts appear more prone to find a violation in cases where an "engaging in" operation is underway. This may be because the intent of the union is more obvious.[49]

"Induce" and "encourage" have been defined in their broadest sense to "include in them every form of influence and persuasion."[50] Courts have held that the words cover "coercion with force and violence."[51] Asking an employee to withhold his or her services as an employee with an unlawful object in mind is forbidden conduct. It makes no difference if the request is successful or the employee refuses to accede to the request; the asking violates the section.[52] On the other hand, asking management or someone in a

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45. Pickens-Bond Constr. Co. v. Brotherhood of Carpenters & Joiners, Local 690, 586 F.2d 1234, 1241 (8th Cir. 1978); Helgesen v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local Union 498, 548 F.2d 175 (7th Cir. 1977); Lawhon Constr. Co. v. Carpet, Linoleum & Resilient Floor Decorators, Local 1179, 513 F.2d 723 (8th Cir. 1975); *See also* Lawhon Constr. Co. v. Carpet, Linoleum & Resilient Floor Decorators Local 1179, 394 F. Supp. 520 (W.D. Mo. 1973).

46. Local 761, IUE v. NLRB, 366 U.S. 667, 672 (1961).

47. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 687 (1951). The publicity proviso to § 8(b)(4) provides that although certain inducements might have a clear secondary object, they are protected. Note 11 *supra.*

48. *Compare* IBEW Local 501 v. NLRB, 341 U.S. 694 (1951), *with* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). See especially IBEW Local 501 v. NLRB, 341 U.S. 694, 700, 704 (1951).

49. *See* NLRB v. Local 825, Int'l Union of Operating Eng'rs (Burns & Roe), 400 U.S. 297, 304 (1971); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

50. IBEW Local 501 v. NLRB, 341 U.S. 694, 701-02 (1951).

51. *See* Clark Eng'r & Constr. Co. v. United Bhd. of Carpenters & Joiners, 510 F.2d 1075, 1080-81 (6th Cir. 1975); UMW v. Osborne Mining Co., 279 F.2d 716, 723 (6th Cir.), *cert. denied,* 364 U.S. 881 (1960).

52. Local Union No. 505, Int'l Bhd. of Teamsters (Carolina Lumber Co.), 130 N.L.R.B. 1438 (1961). In *Carolina Lumber,* the union went on strike against Carolina Lumber, the primary employer. *Id.* at 1438-39. A union member approached an employee at a construction site owned and controlled by a secondary employer and asked the employee not to handle any Carolina lumber. *Id.* The employee of the secondary ignored the request and continued handling the lumber. The Board held that just the asking, even if unsuccessful, was a violation of the Act. *Id.* at 1440. In the same case, a union member out on strike

managerial capacity not to handle a product (technically not requesting any individual to withhold services from the secondary employer), as a matter of policy, does not violate the prohibition even if the request is honored.[53] In order for managerial decision-making to violate section 8(b)(4)(B), a threat, coercion, or force must be used.[54] These distinctions were clarified by the 1959 amendments and given overall support by the Supreme Court's decision in *NLRB v. Servette, Inc.*[55] A signal picket would satisfy the "induce or encourage" standard; however, only under unique circumstances would such a picket satisfy the "threat or coercion" standard.[56] Thus in most instances, in order to violate the section, employees must actually be working on the site.[57] Violence can be an illegal means (threat or coerce) to an unlawful object, but does not convert an activity into one prohibited by section 8(b)(4)(B) if it does not have the proscribed object.[58] Violence in a labor dispute is prohibited by section 8(b)(1)(A).[59]

To find the meaning of "proscribed object," the key terminology to be analyzed is "forcing . . . any person . . . to cease doing business with any other person . . . ."[60] Doing business with any other person does not include allies or businesses that are separate

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approached a construction superintendent at another construction site and asked that the superintendent not allow Carolina lumber on the premises; the superintendent agreed. *Id.* at 1439. This action was not a violation of the Act since the superintendent was considered a managerial employee and was being asked to make a policy decision and no threat or coercion was involved. *Id.* at 1443-44. Some of the reasoning in *Carolina Lumber* over when "inducement or encouragement" is enough as opposed to when "threat or coercion" is required, however, has not been accepted by the Supreme Court. *See* NLRB v. Servette, Inc., 377 U.S. 46, 50 n.4 (1964) (distinguishing the basis for the Court's decision from the incorrect basis used by the Board).

53. Local Union No. 505, Int'l Bhd. of Teamsters (Carolina Lumber Co.), 130 N.L.R.B. 1438, 1443-44 (1961).

54. NLRB v. Servette, Inc., 377 U.S. 46, 54 (1964).

55. 377 U.S. 46, 54 (1964).

56. *See, e.g.*, IBEW Local 501 v. NLRB, 341 U.S. 694 (1951); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

57. *In re* Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950).

58. NLRB v. International Rice Milling Co., 341 U.S. 665, 672 (1951). "In the instant case the violence on the picket line is not material . . . . The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained of conduct into conflict with § 8(b)(4)." *Id.* The 1959 amendments could make violence a factor vis-à-vis an employer or manager. *See* NLRB v. Servette, Inc., 377 U.S. 46, 54 (1964).

59. Section 8(b)(1)(A) reads: "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . . ."

60. *See* note 27 *supra*.

but interrelated, which constitute a single employer.[61] The ally doctrine, rooted in the common law[62] and applied to the secondary boycott provision of the NLRA, is based upon a principle that an employer who is separate and distinct from the struck employer and who agrees to perform the struck work of the primary is a fair target.[63] The union may extend its picket line around the business of the employer doing the struck work.[64] The *Doud* decision of 1948 establishing the ally doctrine has been cited favorably by the United States Congress[65] in the legislative history and by the Supreme Court.[66] The gravamen of its holding is that business form (the independent contractor relationship) should not dictate result.[67] Other single employers who do not satisfy the statutory criteria of "any person" or "any other person" are those separate and distinct businesses that are inter-associated by a straight line operation[68] in which common ownership and control are exercised.[69]

"Cease doing business" cannot be taken literally;[70] an unlawful object is any attempt to modify a business relationship,[71] and the fact that there has been little or no business between the primary employer and the secondary employer has not been a successful defense. Disruption of the business relationship, unless compara-

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61. *See, e.g.*, National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); NLRB v. Milk Drivers & Dairy Employees Local 584, 341 F.2d 29, 32-33 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); Drivers & Chauffeurs Local Union No. 816 v. NLRB, 292 F.2d 329, 331 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962); NLRB v. Business Mach. & Office Appliance Mechanics Conference Bd., Local 459, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

62. Iron Molders' Union No. 125 v. Allis-Chalmers Co., 166 F. 45, 51 (7th Cir. 1908).

63. Douds v. Metropolitan Fed'n of Architects, Eng'rs, Chemists & Technicians, Local 231, 75 F. Supp. 672, 676-77 (S.D.N.Y. 1948).

64. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 627 (1967).

65. *See* 95 CONG. REC. 8709 (1949) (Sen. Taft refers to *Doud* as the "Project Engineering Co. case.").

66. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 627 (1967).

67. Douds v. Metropolitan Fed'n of Architects, Eng'rs, Chemists & Technicians, Local 231, 75 F. Supp. 672, 676 (S.D.N.Y. 1948).

68. *In re* National Union of Marine Cooks & Stewards (Irwin-Lyons Lumber Co.), 87 N.L.R.B. 54 (1949). *See also* Truck Drivers & Helpers Local Union No. 728 v. Empire State Express, Inc., 293 F.2d 414, 423 (5th Cir.), *cert. denied*, 368 U.S. 931 (1961).

69. *See, e.g.*, Sheet Metal Workers Int'l Ass'n, Local Union No. 223 v. Atlas Sheet Metal Co., 384 F.2d 101, 105 (5th Cir. 1967); Miami Newspaper Pressmens' Local No. 46 v. NLRB, 322 F.2d 405, 410 (D.C. Cir. 1963); J.G. Roy & Sons Co. v. NLRB, 251 F.2d 771, 772-73 (1st Cir. 1958).

70. NLRB v. Local 825, Int'l Union of Operating Eng'rs, 400 U.S. 297 (1971); NLRB v. Carpenters Dist. Council, 407 F.2d 804, 806 (5th Cir. 1969).

71. NLRB v. Carpenters Dist. Council, 407 F.2d 804 (5th Cir. 1969).

tively slight, is protected against.[72]

Following the lead of the straight line operation theory issued by the Board in 1949,[73] a number of courts have advanced the theory of ally and single employer by emphasizing neutral, disinterested, or wholly unconcerned parties.[74] The independent contractor relationship is not dispositive.[75] What must be done is to "apply intent of the statute to the facts in the case."[76] If the would-be secondary is too entangled, interrelated, or interested (making a profit) in the operation of the primary and this interest is at the heart of the labor dispute, the status of neutral has not been preserved, and the protection of section 8(b)(4)(B) is not available. There is no requirement that the would-be secondary be doing struck work or that there be common ownership and control. The reasoning can hardly withstand analysis unless *Denver Building* has been modified.[77] The logic of the "*Sears* Rule," to the ex-

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72. NLRB v. Local 825, Int'l Union of Operating Eng'rs, 400 U.S. 297, 304 (1971). "Likewise, secondary activity could have such a limited goal and the foreseeable result of the conduct could be, while disruptive, so slight that the 'cease doing business' requirement is not met." *Id.* at 305.

73. *In re* National Union of Marine Cooks & Stewards (Irwin-Lyons Lumber Co.), 87 N.L.R.B. 54 (1949).

74. Carpet Layers, Local Union No. 419 v. NLRB (Sears), 429 F.2d 747, 752 (D.C. Cir. 1970); Local 24, Int'l Bhd. of Teamsters v. NLRB, 266 F.2d 675 (D.C. Cir. 1959). *See also* Truck Drivers & Helpers Local Union No. 728 v. Empire State Express, Inc., 293 F.2d 414, 422-23 (5th Cir.), *cert. denied*, 368 U.S. 931 (1961).

75. Carpet Layers, Local Union No. 419 v. NLRB (Sears), 429 F.2d 747, 752 (D.C. Cir. 1970).

76. Local 24, Int'l Bhd. of Teamsters v. NLRB, 266 F.2d 675, 680 (D.C. Cir. 1959). *See also* National Maritime Union v. NLRB, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965).

77. Carpet Layers, Local Union No. 419 v. NLRB (Sears), 429 F.2d 747 (D.C. Cir. 1970). In *Carpet Layers*, Sears, Roebuck and Company had an arrangement with approximately 60 independent contractors to install carpet that Sears sold. *Id.* at 748-49. Sears would negotiate the sale and installation of the carpet with the customer and then issue a work order to a contractor to install it. The contractor was responsible for the installation and would be required to make good on any complaints about the installation. Sears charged the customer for the installation plus a markup and then paid the installer at a previously negotiated fixed rate. One of the independent contractors (non-unionized) was being picketed by the union for paying substandard wages. *Id.* at 749. The union extended the picket line to Sears. *Id.* The Board found a violation of § 8(b)(4)(B). *Id.* The court distinguished *Denver Building*, and although it agreed that these carpet layers were independent contractors, it held that being an independent contractor did not decide the issue. *Id.* at 751. The Court held that this case was not like those involving a single employer and different from those based upon the ally doctrine, but nonetheless, found that Sears was very likely not a neutral employer and consequently remanded so the Board could consider whether Sears really deserved the protection of the secondary boycott provision. *Id.* at 752-

tent that an independent contractor relationship is not dispositive and is only one of the factors considered in determining which employers are wholly unconcerned parties,[78] is sound.

II.

Although the law dealing with the secondary boycott may be labeled a "morass of the Law,"[79] there are many secondary boycotts that can be easily identified. For analysis sake only, there are three basic fact patterns or configurations underlying the development of the secondary boycott law.

In configuration one, the primary employer is engaging in a normal business operation on his own premises, and the primary's employees go out on strike. Unless there are other considerations, the striking employees may picket the entire premises and their picket line would be protected primary activity. These employees can and most likely will try every means of inducement (except those prohibited by section 8(b)(1)(A)) at the site to keep others from crossing the picket line. This activity may have devastating consequences for a secondary employer, but it is legal. If the secondary employer cannot persuade his employees to cross the picket line, there is nothing for the secondary to do but take his business elsewhere. (A violation of the secondary boycott provision can occur within this configuration under circumstances outlined under the discussion of configuration two.)

Configuration two is the prohibited secondary boycott. Em-

54.

78. In Carpet Layers, Local Union No. 419 v. NLRB (Sears), 429 F.2d 747 (D.C. Cir. 1970), the court stated:

> [T]he *Denver* case did not involve an economic dependence of the subcontractor upon the prime contractor such as the installers' dependence upon their arrangements with Sears.
>
> It is not clear that Sears and the installers are "merely doing business" with each other . . . construed to be the relation of the two independent contractors in the *Denver* case.

Id. at 751-52.

This attempt to distinguish *Denver Building* is simply not in accord with the facts when the relationship of the general contractor and the subcontractor in *Denver Building* is compared to the relationship between Sears and its independent "subcontractor." There is a stronger argument that Sears should be protected since it involves a configuration two fact pattern, *see* text between notes 79 and 80 *infra*, and does not fall within any of the exceptions. Only if *Denver Building* is limited in application to construction-common-situs fact patterns could the court escape the impact of its logic upon the *Sears* facts.

79. RESTATEMENT OF TORTS §§ 799-808 (1939).

ployees go out on strike because of a labor dispute with employer *A*. The employees picket the premises of employer *A* (configuration one). The employees extend the picket line to the premises of employer *B*, who has no interest in the dispute between employer *A* and the employees out on strike. (For a violation under configuration one, it would not be necessary to extend the picket line; inducement is enough. All that is necessary to violate the provision is for the union to ask the employees of employer *B* to stop working for *B* or stop handling products of *A* for *B* at the secondary site.) If employer *B* is allowing his employees to do struck work; if *A* and *B* are under the active influence of common ownership and control; or if, under the expansive "*Sears* Rule," the secondary has a financial interest and business control over the primary's normal business operation and that becomes the basis for the dispute, the secondary loses its status as a wholly unconcerned party, and the union may picket *B*'s premises. The union may also picket a secondary site that retains its protection as a secondary employer when the union is following a struck product.[80]

Configuration three is the most difficult to analyze because of the many variations in the basic theme. Essentially, this configuration involves two or more separate unrelated employers with employees working on a site owned and controlled by any one of the employers or a third party. Classically, in its purest forms, this fact pattern involves employers of substantially equal status on the premises who are wholly unconcerned in each other's normal business operations. The gradations away from the relatively equal and unconcerned status is what tries analytical prowess. As long as the employers are substantially equal, unrelated, and unconcerned, neither configuration one nor configuration two pressures have any influence, and the *Moore Dry Dock* principles[81] would, and should, presumptively dictate the outcome in any challenge to the picket line. Clouding the analysis of configuration three, however, are the pressures that a configuration one (picketing the primary situs) or

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80. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964). For a limitation on pursuit of the struck product, see NLRB v. Retail Store Employees Union, Local 1001, 100 S. Ct. 2372, 2377-78 n.11 (1980): "The critical question would be whether, by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss."

81. *In re* Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1949). *See* text accompanying notes 88-89 *infra*.

a configuration two (picketing the secondary situs) fact pattern exert on configuration three questions. The reserved gate doctrine (due to a remand to determine the facts) has been approved by the Supreme Court[82] in regard to configuration one, and it has been applied, and by virtue of the *Moore Dry Dock* principles has a use, in configuration three fact patterns.

Picketing a common situs (configuration three) has posed the greatest problem in ascertaining the extent of secondary boycott protection.[83] A common situs is when two or more employers, not related to one another, work on the same premises.[84] Since ownership of the premises is not a critical factor, the premises might be owned by one or the other of the employers or by a third party.[85] It is not a common situs if it is the primary situs of the struck employer and neutral employees are not present at the time of the picketing[86] or when all the work of the would-be neutral is in support of the normal day-to-day operations of the primary on the primary situs.[87]

In 1949 the NLRB issued guidelines that a union picketing a common situs should follow in order to diminish the effect of picketing on unconcerned parties working at the site.[88] These guidelines are as follows: (a) that the picketing be limited to times when the situs of dispute is located on the secondary employer's premises; (b) that at the time of the picketing the primary employer be engaged in its normal business at the situs; (c) that the picketing take place reasonably close to the situs; and (d) that the picketing disclose clearly that the dispute is with the primary employer.[89] Picketing the common situs in accordance with these guidelines would presumptively make the picketing legal primary activity with only secondary effects.[90] Other factors can be taken into ac-

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82. *See* text accompanying note 108 *infra*.

83. J.F. Hoff Elec. Co. v. NLRB, 642 F.2d 1266, 1269 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 1997 (1981); Ramey Constr. Co. v. Local 544, Painters, Decorators & Paperhangers, 472 F.2d 1127, 1130-31 (5th Cir. 1973); NLRB v. Local 307, Plumbers, United Ass'n of Journeymen & Apprentices, 469 F.2d 403, 407 (7th Cir. 1972).

84. Local 761, IUE v. NLRB, 366 U.S. 667, 676-77 (1961).

85. *Id.* at 679.

86. Anchortank, Inc. v. NLRB, 601 F.2d 233, 238 (5th Cir. 1979).

87. Local 761, IUE v. NLRB, 366 U.S. 667, 682 (1961).

88. *In re* Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1949).

89. *Id.* at 549. Hereinafter these principles will be referred to as the *Moore Dry Dock* principles.

90. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 433 v.

count to rebut the presumption; therefore, the NLRB and the courts will go beyond the *Moore Dry Dock* principles and take into account the totality of circumstances to determine a secondary object.[91] It is also true that not following these guidelines does not necessarily make the picketing illegal secondary picketing.[92] The courts of appeals have imposed additional duties on unions picketing a common situs. Unions are to picket with restraint.[93] They must take reasonable actions not to mislead or coerce; however, this does not mean the union must ask secondary employees not to cross the picket line.[94] Eventually the NLRB started applying the *Moore Dry Dock* principles when picketing was being carried out at the site of the primary employer and employees of a secondary were working on the site.[95]

Two years after the *Moore Dry Dock* principles were set down, the Supreme Court considered the cases of *NLRB v. Denver Building & Construction Trades Council*[96] and *IBEW Local 501 v. NLRB*,[97] both involving common situs fact situations. In *Denver Building* the tactics of the union were to employ a means whereby the unions engaged in a strike for an unlawful object, whereas in *IBEW Local 501* the union used a picket to induce or encourage the employees of another employer for an unlawful object.[98]

NLRB, 598 F.2d 1154, 1157 (9th Cir. 1979); Ramey Constr. Co. v. Local 544, Painters, Decorators & Paperhangers, 472 F.2d 1127, 1132 (5th Cir. 1973).

91. Millwrights Local 1102, 155 N.L.R.B. 1305, 1309 (1965): "[T]he totality of a union's conduct in a given situation may well disclose a real purpose to enmesh neutrals in a dispute, despite literal compliance with the *Moore Dry Dock* standards." *See also* Carpenters Dist. Council v. NLRB, 560 F.2d 1015, 1018-19 (10th Cir. 1977); NLRB v. Local 307, Plumbers, United Ass'n of Journeymen & Apprentices, 469 F.2d 403, 408 (7th Cir. 1972).

92. Helgesen v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 498, 548 F.2d 175, 182-83 (7th Cir. 1977). *See also* Local 519, Journeymen & Apprentices of the Plumbing & Pipefitters Indus., 416 F.2d 1120, 1124-26 (D.C. Cir. 1969).

93. Pickens-Bond Constr. Co. v. United Bhd. of Carpenters & Joiners, Local 690, 586 F.2d 1234, 1240 (8th Cir. 1978); Carpenters Local 470 v. NLRB, 564 F.2d 1360, 1363 (9th Cir. 1977).

94. Ramey Constr. Co. v. Local 544, Painters, Decorators & Paperhangers, 472 F.2d 1127, 1131 (5th Cir. 1973).

95. Local 761, IUE v. NLRB, 366 U.S. 667, 678 (1961); Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market), 116 N.L.R.B. 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957); Local Union No. 55 (PBM), 108 N.L.R.B. 363, *enforced*, 218 F.2d 226 (10th Cir. 1954).

96. 341 U.S. 675 (1951).

97. 341 U.S. 694 (1951).

98. *Id.* at 700.

In *Denver Building* a general contractor was under contract to construct a building. The general contractor subcontracted the electrical work to a company that employed electricians who were not members of a trade union. Denver Building and Construction Trades Council, an association of trade unions in the Denver region, as a matter of policy, did not want its skilled workmen to work beside the non-union electricians.[99] The council pulled all the union workers on this job, whether employed by the general contractor or other unionized subcontractors, and set up a signal picket. For a time, only the non-union electricians were working, but eventually the general contractor ordered the electrical company and its employees off the premises so that overall construction work at the site could continue. The Court found the strike activity of the union to be a violation of the secondary boycott provision since its object was to force the general contractor to cease doing business with the electrical subcontractor.

Trade unions have been trying to overturn the decision in *Denver Building* for thirty years. In 1959 when the Landrum-Griffin Act was passed, bills were introduced into both houses of Congress to reverse the decision.[100] The bills themselves failed, but as a compromise a construction industry proviso was attached to section 8(e).[101] This proviso was viewed as a "partial substitute" for an attempt to overrule *Denver Building*.[102]

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99. Non-unionized employees working side by side with union members is the source of many disputes in the common situs cases. *See, e.g.*, NLRB v. IBEW Local 903, 574 F.2d 1302 (5th Cir. 1978); Linbeck Constr. Corp. v. NLRB, 550 F.2d 311 (5th Cir. 1977); Potter v. Houston Gulf Coast Bldg. Trades Council, 482 F.2d 837 (5th Cir. 1973); NLRB v. Local 307, Plumbers, United Ass'n of Journeymen & Apprentices, 469 F.2d 403 (7th Cir. 1972); NLRB v. Northern Cal. Dist. Council of Hod Carriers & Common Laborers, Local No. 185, 389 F.2d 721 (9th Cir. 1968). The rights of non-unionized workers were among the major arguments against enactment of the Common Situs Picketing Bill of 1975, H.R. 5900, 94th Cong., 1st Sess.

100. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 628 n.8 (1975).

101. 29 U.S.C. § 158(e) (1976) provides in part "[t]hat nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . ."

102. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975); Associated Builders & Contractors, Inc. v. NLRB, 609 F.2d 1341 (9th Cir. 1979). *See also* NLRB v. Northern Cal. Dist. Council of Hod Carriers & Common Laborers Local No. 185, 389 F.2d 721 (9th Cir. 1968) (subcontracting clause legal under 29 U.S.C. § 158(e)(1976)); NLRB v. Muskegon Bricklayers Union No. 5, 378 F.2d 859 (6th Cir. 1967) (subcontracting clause illegal under § 158(e)).

In 1975 both houses of Congress passed what was popularly called the Common Situs Picketing Bill,[103] which was vetoed by

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103. H.R. 5900, 94th Cong., 1st Sess. (1975). This Bill would have amended section 8(b)(4) of the National Labor Relations Act, inserting before the semicolon at the end thereof the following:

provided further, That nothing contained in clause (B) of this paragraph (4) shall be construed to prohibit any strike or refusal to perform services or any inducement of any individual employed by any person to strike or refuse to perform services at the site of the construction, alteration, painting, or repair of a building, structure, or other work and directed at any of several employers who are in the construction industry and are jointly engaged as joint venturers or in the relationship of contractors and subcontractors in such construction, alteration, painting, or repair at such site, and there is a labor dispute, not unlawful under this Act or in violation of an existing collective-bargaining contract, relating to the wages, hours, or other working conditions of employees employed at such site by any of such employers and the issues in the dispute do not involve a labor organization which is representing the employees of an employer at the site who is not engaged primarily in the construction industry: Provided further, Except as provided in the above proviso nothing herein shall be construed to permit any act or conduct which was or may have been an unfair labor practice under this subsection: Provided further, That nothing in the above provisos shall be construed to prohibit any act which was not an unfair labor practice under the provisions of this subsection existing prior to the enactment of such provisos: Provided further, That nothing in the above provisos shall be construed to authorize picketing, threatening to picket, or causing to be picketed, any employer where an object thereof is the removal or exclusion from the site of any employee on the ground of sex, race, creed, color, or national origin: Provided further, That nothing in the above provisos shall be construed to permit any attempt by a labor organization to require an employer to recognize or bargain with any labor organization if another labor organization is lawfully recognized as the representative of his employees: Provided further, That a labor organization before engaging in activity permitted by the above provisos shall provide prior written notice of intent to strike or to refuse to perform services, of not less than ten days to all unions and the employer and the general contractor at the site and to any national or international labor organization of which the labor organization involved is an affiliate and to the Collective Bargaining Committee in Construction: Provided further, That at any time after the expiration of ten days from the transmittal of such notice, the labor organization may engage in activities permitted by the above provisos if the national or international labor organization of which the labor organization involved is an affiliate gives notice in writing authorizing such action: Provided further, That authorization of such action by the national or international labor organization shall not render it subject to any criminal or civil liability arising from activities notice of which was given pursuant to the above provisos: Provided further, That in the case of any such site which is located at any military facility or installation of the Army, Navy, or Air Force, or which is located at a facility or installation of any other department or agency of the Government if a major purpose of such facility or installation is or will be, the development, production, testing, firing, or launching of munitions, weapons, missiles, or space vehicles, prior written notice of intent to strike or to refuse to perform services, of not less than ten days shall be given by

President Gerald Ford. Two years later the House of Representatives failed to pass a bill that would have required application of the *General Electric* relatedness test to construction sites.[104] The express purpose of these bills was to eliminate *Denver Building.* The 1975 Bill was the legislation, with some compromises, that the labor organizations wanted, but it proved to be too much. The most vociferous argument against the legislation as written was that it would force non-unionized building contractors out of the construction business and force all construction workers to join labor unions in order to be employed in the industry.[105] At the time the Bill was proposed, the construction industry was already depressed, and the argument that the Common Situs Picketing Bill would further aggravate the conditions prevailed. The failure or success of this legislation, though relevant, does not lessen the responsibility of the courts to evolve a coherent body of law on secondary boycotts.

In *Denver Building* the NLRB's decision was affirmed despite union arguments that (1) all the independent contractors on a construction site are so interrelated that there is a single entity[106] to which the secondary boycott provision should not apply and (2) a primary site existed because the action involved a labor dispute with the general contractor who was in control of the premises. The labor dispute was over the general contractor's action in bringing a non-unionized subcontractor onto the site.

The first argument was rejected by the Court and was the basis for the theory incorporated in the Common Situs Picketing Bill

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the labor organization involved to the Federal Mediation and Conciliation Service, to any State or territorial agency established to mediate and conciliate disputes within the State or territory where such site is located, to the several employers who are jointly engaged at such site, to the Army, Navy, or Air Force or other department or agency of the Government concerned with the particular facility or installation, and to any national or international labor organization of which the labor organization involved is an affiliate. The notice requirements of the preceding proviso are in addition to, and not in lieu of the notice requirements prescribed by section 8(d) of the Act. In determining whether several employers who are in the construction industry are jointly engaged as joint venturers at any site, ownership or control of such site by a single person shall not be controlling.

Id.

104. 123 CONG. REC. 8685-87 (1977).

105. *Ford Vetoes Common-Site Picketing Bill,* 31 CONG. Q. ALMANAC 481 (1975).

106. *Taft Act's Boycott Plan Before Supreme Court,* [1951] 1 LAB. REL. REP. (BNA) 183, 184 (Mar. 5, 1951) (not published in bound volume of 27 L.R.R.M.).

of 1975. The net result of this supposition would have been that independent contractors on a construction site would never be eligible for secondary protection. Taking into account the goals of the NLRA and the purposes of the secondary boycott provision, this tack could be overborne. After being disadvantaged for thirty years, the pendulum would swing too far, giving construction unions the advantage over their counterparts in other industries. Balance of power is an important consideration in construing the NLRA, and if one side or the other in industrial conflict becomes too powerful by virtue of the Statute, it can hurt both of them. Practical considerations mark a point of diminishing returns about how far the union can extend the effect of its picket line without hurting itself and the entire union effort.

The rejection of the second argument is more controversial. Was the general contractor, who brought a non-unionized subcontractor onto the premises he controlled, a wholly unconcerned party? The union unsuccessfully argued that engaging a non-unionized subcontractor (especially one who is paying substandard wages and benefits) could work to the financial benefit of the general contractor. If "wholly unconcerned party" or even "unconcerned party" is the test for protection, then it could well be that this part of the Court's opinion, decided by accepting the NLRB's finding of fact, is wrong. However, this does not mean that *Denver Building* should be overruled. The outcome of the case in respect to this second theory would depend upon the status of the general contractor. Where is the arbitrary line to be drawn regarding the protection accorded? If the general contractor is only an "unprotected secondary," the dispute with him would not be converted into a primary one, and drawing all the other subcontractors on the site into the dispute (as the "engaging in" operation did) would not be warranted. If, however, the general contractor is designated a primary (by his involvement becomes the kith and kin of the subcontractor), then an argument that the entire site could be closed down is plausible; all the subcontractors are providing support, and there is a domino effect. The former is probably the better interpretation, considering legislative history and the purposes of section 8(b)(4)(B).[107] The other subcontractors (employers) on

107. In order to achieve the dual purpose that has been firmly established as the congressional will in these matters, when an "induce or encourage" picketing case is brought

the site are still "unconcerned parties," as far as the offending subcontractor and his employees not being unionized, and operate, to that extent, as a limit on the spread of the labor strife. The pressure to "cease doing business" is one step removed from the collaboration that precipitated the dispute.

The law on secondary boycotts as it applies to picketing a common situs was a central issue in the case of *Local 761, IUE v. NLRB (General Electric)*.[108] The NLRB had treated the case as one concerning a common situs and had held the union in violation for not picketing a primary situs with independent contractors on it in accordance with the *Moore Dry Dock* guidelines. The labor dispute was between the manufacturer of electrical appliances and union members at the plant, who were on strike. The employer had set up several reserve gates to separate the employees going to work at the manufacturing facility from the employees of various independent contractors going to work on the site. The use of reserve gates to minimize the secondary effects of a primary strike was approved, but the Court held that the primary employer could insulate himself only from those independent contractors who did not support the day-to-day operations of the primary. The Court imposed a three-fold test:

> "[1] There must be a separate gate marked and set apart from the other gates; [2] the work done by the men who use the gate must be unrelated to the normal operations of the employer[;] and [3] 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."[109]

The Court supported the use of the *Moore Dry Dock* criteria,[110] but because of lack of information, remanded the case to deter-

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forward, two questions require an answer: What is the intent of the union in its activities and what is the status of the secondary? When the case involves a union engaging in a strike or refusing to handle goods of a party eligible for secondary protection, the intent of the union is clear so that the only question is the status of the secondary as an unconcerned party. This analysis in no way abrogates *Denver Building*, but it does conflict with the reasoning of *IBEW Local 501 v. NLRB* insofar as the Court states that there is little difference between the "engaging in" activity of *Denver Building* wherein interest was self-evident and the "induce or encourage" activity of the IBEW. *See* note 98 *supra*, and accompanying text.

108. 366 U.S. 667 (1961).

109. *Id.* at 681.

110. *Id.* at 680-82.

mine whether the use of the reserved gate had been a mixed one.[111] The thrust of the opinion could logically be read: If independent contractors are unrelated to the normal operations of the primary employer, a common situs exists and the *Moore Dry Dock* principles should be applied. Less likely but more literally, the conclusion reads: This is a primary situs, and using reserved gates for various unrelated independent contractors working on the premises is approved; however, mingled use of the gates among the parties will render the designated gates ineffective as insulators among the parties.

The practical difference in these two readings is not obvious. The distinction has theoretical force in that it could be decisive in answering whether *General Electric* overruled or significantly modified *Denver Building.* Most likely *Denver Building* had its influence on *General Electric,* and the latter decision was an attempt by the Court to develop the law consonantly with *Denver Building.* What *General Electric* does point out is that the independent contractor relationship does have a bearing upon picketing at an established primary situs conforming to a configuration one fact pattern and could convert the fact pattern into one more closely akin to configuration three and therefore more like the common situs in *Denver Building.* And more significantly for the future reading of *Denver Building* and its reach, the Court does not appear to make a distinction between suppliers feeding the primary's operation and other support and services that could give the primary an advantage. The decision in *United Steelworkers v. NLRB (Carrier Corp.)*[112] reinforced the holding of *General Electric* and reemphasized that ownership of the premises is not a determining factor in protection accorded by the secondary boycott provision.

Common situs secondary boycott cases have always had an elusive quality about them, and adding the reserved gate doctrine makes them even more complex.[113] When a true common situs ex-

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111. *Id.* at 682. The remand was necessary to determine whether the reserved gate, after applying the relatedness tests, had been subjected to mixed use. *Id.* If the gate had had a mixed use (those protected and those not protected), then the union could legally picket it. *Id.* On remand the NLRB decided the gate could be picketed. Local 761, IUE, 138 N.L.R.B. 342, 346 (1962).

112. 376 U.S. 492 (1964).

113. J.F. Hoff Elec. Co. v. NLRB, 642 F.2d 1266 (D.C. Cir. 1980), *cert. denied,* 101 S. Ct. 1997 (1981).

ists,[114] the *Moore Dry Dock* principles and compliance with them becomes the heart of any decision.[115] Reserved gates may be used to reduce the secondary effects of primary picketing. The purpose of these gates would be to separate the employees, suppliers, customers, and others contributing to the operation of the primary from the employees, suppliers, and customers of the neutrals working on the site.[116] The *Carrier* and *General Electric* opinions make it clear that reserved gates could not be used to protect the primary from the economic weapons of the union, and this would include, if possible, keeping suppliers and deliverymen from rendering any services to the primary.[117]

The NLRB, through a series of decisions, began to develop criteria on the use of reserved gates. Notice of the gate must be given to the union,[118] the gates must be clearly marked,[119] and all primary uses must be kept separate and apart from the gate set aside for neutrals.[120] *Daniels Construction Co.*[121] comes closest to holding that if the gate reserved for the secondary violates any of these principles or is used in any way by the primary or his suppliers or anyone contributing to the operation, the gate loses its protection per se and the union may picket the gate without violating section 8(b)(4)(B).

Application of these principles led to a number of court decisions that give insight into when the reserved gate of the secondary has been used improperly and can be picketed at will. The legal title of the goods passing through the gate is not important; the real test for deciding whether they are in support of the primary is who uses the goods.[122] Distinguishing between raw materials and

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114. Anchortank, Inc. v. NLRB, 601 F.2d 233, 238-39 (5th Cir. 1979). This would be the first step in a probable configuration three analysis. In *Anchortank* the court found that a common situs did not exist and therefore *Moore Dry Dock* principles were not applicable. *Id.* at 239.

115. Carpenters Local 470 v. NLRB, 564 F.2d 1360, 1362 (9th Cir. 1977); NLRB v. Lafayette Bldg. & Constr. Trades Council, 445 F.2d 495, 497 (5th Cir. 1971); IBEW Local 480 v. NLRB, 413 F.2d 1085 (D.C. Cir. 1969).

116. Local 761, IUE v. NLRB, 366 U.S. 667, 680 (1961).

117. *Id. See also* United Steelworkers v. NLRB, 376 U.S. 492, 498 (1964).

118. Walters Foundation, 195 N.L.R.B. 370, 371 (1972).

119. Timber Bldgs., Inc., 176 N.L.R.B. 150, 151 (1969).

120. O'Brien Elec. Co., 158 N.L.R.B. 549, 552 (1966); Center Plumbing & Heating Corp., 145 N.L.R.B. 215, 223 (1963).

121. 192 N.L.R.B. 272 (1971).

122. Linbeck Constr. Corp. v. NLRB, 550 F.2d 311, 318 (5th Cir. 1977).

finished goods, in conjunction with legal title, is not a valid consideration.[123] Incidental mislabeling or misuse of the gate will not cause it to lose its protection.[124]

In *IUE, Local 861 (Plauche Electric, Inc.),*[125] the NLRB set aside the rule in *Brewery & Beverage Driver & Workers, Local No. 67 (Washington Coca Cola),*[126] which had stated that it is unlawful for a union to picket a common situs when the primary has a regular place of business in the area. Although having a place of business nearby could be a factor in determining unlawful object, it should not be determinative if picketing is otherwise in accordance with *Moore Dry Dock* principles.

What has happened in this series of cases is that in common situs fact patterns, status of the situs has become less important. Whether it is a primary situs or secondary situs or whether there is another picketable site in the area is only a factor to be considered in determining the intent and thereby the object of the picketing. Under configuration one there is no secondary boycott issue unless another employer is carrying on a normal business operation on the site and reserved gates are properly designated and used. Separate gates could convert the pattern into one to which the configuration three rules apply. Unless the union can give a reasonable explanation that falls within the exceptions of configuration two, its picketing or other inducement at the secondary site will be considered a secondary boycott. Violation of the secondary boycott provision in respect to the third fact pattern (common situs) does not depend on whether it is a primary or secondary situs, but rather, whether the picketing is carried out according to the prescribed guidelines and whether according to the totality of circumstances a discernable intent to involve an unconcerned party is evident.

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123. J.F. Hoff Elec. Co. v. NLRB, 642 F.2d 1266, 1275 (D.C. Cir. 1980), *cert. denied,* 101 S. Ct. 1997 (1981).

124. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 433 v. NLRB, 598 F.2d 1154, 1156-57 (9th Cir. 1979).

> While we agree with the Union that the failure to include suppliers in the signs is important to the status of the gates, we do not believe that this failure necessarily is dispositive of the issue. It is important to remember that the focus of our inquiry is the "object" of the Union's actions. Thus, we conclude that a per se rule is neither wise nor necessary.

Id. Cf. Linbeck Constr. Corp. v. NLRB, 550 F.2d 311, 317 (5th Cir. 1977).

125. 135 N.L.R.B. 250 (1962).

126. 107 N.L.R.B. 299 (1953), *enforced,* 220 F.2d 380 (D.C. Cir. 1955).

III.

The issue, developed in the lower courts, was whether *General Electric* had overruled *Denver Building* sub silentio or significantly modified it. Another approach was that *General Electric* applied to one set of circumstances and *Denver Building* applied to another.

The case of *Markwell & Hartz, Inc. v. NLRB*[127] is a good illustration of the tension between the two decisions. The NLRB delivered a split decision, 3-2,[128] declaring the picketing by unions of the common situs to be a violation of section 8(b)(4)(B). At the court of appeals level, in enforcing the Board's order, each judge wrote an opinion evincing three theories and resulting in a 2-1 decision. The facts of the case brought together the concepts from *Denver Building* and *General Electric.*

Markwell and Hartz (M & H) were general contractors for a construction project. Binnings and Barnes were subcontractors engaged to do the pile driving and electrical work. A labor dispute arose between M & H and the union, and the union started picketing the construction site. M & H established four gates and, after some juggling of gate designations, clearly delineated use of the gates; one was to be used by M & H and its employees and suppliers, and the other three were to be used by Binnings and Barnes. The union continued to picket all the gates so that the employees of Binnings and Barnes stayed off the site. The NLRB and the court of appeals decided that the actions of the union violated the secondary boycott provisions.

Markwell & Hartz, like *Denver Building,* arose out of a construction site dispute. There was no doubt in this case that the primary was the general contractor in control of the premises for the benefit of the owner, as opposed to the subcontractor as was the case in *Denver Building.* After the dispute arose, the general contractor and primary set up reserved gates to insulate his employees and suppliers from the employees of the subcontractors. This was akin to *General Electric* except that in that case the gates had been designated before the dispute and the primary was not only in control of the premises but was the owner as well. The

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127. 387 F.2d 79 (5th Cir. 1967).

128. Building & Constr. Trades Council (Markwell & Hartz, Inc.), 155 N.L.R.B. 319 (1965), *enforced sub nom.* Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79 (5th Cir. 1967).

Court in *General Electric* allowed the employer to convert a configuration one fact pattern into a common situs if the independent contractors were unrelated and used a separate gate according to the rules for special gates (no mingled use).[129] Setting up reserved gates to diminish secondary effects at a situs already designated a common situs does not work the same conversion; therefore, it could be argued that unrelatedness does not need to be demonstrated for protection. However, putting the potential common situs of *General Electric* into this special category makes ownership and control determinative, a possibility seemingly negated by *General Electric* and *Carrier*.

In *Markwell & Hartz* a strained interpretation of the relatedness test[130] and either a mechanical application of *Denver Building* or discredited ownership and control[131] determined the outcome of the case. Other courts of appeals followed suit; these later decisions more clearly and mechanically determined that *Denver Building* bears upon construction common situs whereas *General Electric* pertains to struck manufacturers.[132]

The dissenter in *Markwell & Hartz* recognized that the approach of the majority leads to an application of more rigid rules

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129. *General Electric*, in its more pristine sense, is a configuration one case. The union would normally (and even after the decision by the Supreme Court, remand and result of remand) be able to picket the entire premises. Setting up a valid reserved gate system changes the fact pattern to one more closely resembling configuration three. Other arrangements present similar factual questions. For example, one union organized two plants on the same premises with one road leading to them. One of the plants was sold and shortly thereafter the workers in that plant went out on strike. Two gates were erected. Since the management of the two plants had not been entirely separated, was this to be handled like a simple employer or more like a common situs? The court held that the union had violated the Act by its action against both employers. Vulcan Materials Co. v. United States Steel Workers, Local 2176, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).

This is all related to the question whether a common situs exists; *see* note 114 *supra*. The three-fold possibility is that it is nothing more than a configuration one (*General Electric* itself), or the single employer doctrine makes it like a configuration one (Newspaper Prod. Co. v. NLRB, 503 F.2d 821 (5th Cir. 1974)), or as in *Vulcan* it is a common situs and the *Moore Dry Dock* principles should be followed. The relationship of two separate premises to each other also makes a difference. *See* United Steelworkers v. NLRB (Carrier Corp.), 376 U.S. 492 (1964).

130. Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79, 82 (5th Cir. 1967).

131. *Id.* at 82, 85.

132. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 433 v. NLRB, 598 F.2d 1154, 1156 n.3 (9th Cir. 1979); Carpenters Local 470 v. NLRB, 564 F.2d 1360, 1362 (9th Cir. 1977); Linbeck Constr. Co. v. NLRB, 550 F.2d 311, 316 (5th Cir. 1977); NLRB v. Nashville Bldg. & Constr. Trades Council, 383 F.2d 562, 565-66 (6th Cir. 1967).

to the construction industry than to manufacturing.[133] This could be justified only by a legislative history on the point, which does not exist, or some real differences between construction and manufacturing supporting the need for different rules like those that brought about the enactment of section 8(f).[134]

An example of the more rigid rules is the argument that *Markwell & Hartz* was a different case than *Denver Building* because in the latter the subcontractor was the primary, whereas in *Markwell & Hartz* the primary was a general contractor in control of the premises. This argument lost, but the question is more appropriately whether a general contractor producing a structure should be treated differently than an employer producing an appliance. A general contractor may himself be the owner of the premises where the construction is taking place, or the general contractor may be the alter ego of the owner by having control of the premises while the construction is in process. Some general contractors do not employ any construction workers; they are businessmen-developers who provide a service to the owner by organizing and coordinating subcontractors to do the work. There are a multitude of business forms that arrangements among the owner, general contractor, and subcontractors can take. Business form should not be allowed to dictate result as far as a violation of section 8(b)(4)(B).[135] This is not a matter of bringing ownership or control back into the formula for determining the lawfulness of common situs picketing. In *General Electric* the employer produced electrical appliances, and his workers struck and set up a picket line. The Court held that the picket could lawfully keep out the employees of suppliers and independent contractors who were involved in support of the normal business operations of the primary employer. Binnings and Barnes, in the case of *Markwell &*

133. 387 F.2d at 89.

134. S. REP. No. 187, 86th Cong., 1st Sess., *reprinted in* BNA, THE LABOR REFORM LAW 150, 176 (1959).

135. Business forms or hidden contracts not within the knowledge of the picketing union should not be decisive in so important a matter as whether a violation has occurred and money damages should be awarded. This is an important weakness of the dissenting opinion in J.F. Hoff Elec. Co. v. NLRB, 642 F.2d 1266, 1277 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 1997 (1981). If the relatedness test pertained to construction, the test would become whether the independent contractor's employees are contributing to the normal operation of the primary, and the questions could be decided by factors open to the view of the striking workers so that they could justifiably be held responsible if their assessment was wrong.

Hartz, regardless of whether doing specialized work (a criteria not mentioned in *General Electric* and a criteria of doubtful relevance), contributed to the normal operations of the general contractor who was commissioned to expand the filtration plant. Why should not the employees of M & H by their picket line be able to keep out the employees of the subcontractors using the same standards as the employees of General Electric. There is probably a better argument for applying the relatedness test in this way to the construction site rather than to the typical manufacturing establishment. The owner-general-contractor-developer-entrepreneur still has an advantage over his counterparts in manufacturing because he can partially insulate himself against the strike and picket by not having any employees on the construction site and being simply the organizer-coordinator, who subcontracts all the work. The general contractor, but not the subcontractors, has the privilege, like General Electric, of setting up reserved gates and may do so after the labor dispute arises. The employers should be treated the same unless some real distinctions between construction and manufacturing can be brought to bear.

Another incongruity in the *Markwell & Hartz* decision is that the employees of direct suppliers of the primary can be stopped by the picket line at this site, which is only a secondary effect of primary activity, but those employees providing support services (like those working for Binnings and Barnes) cannot be stopped because Binnings and Barnes are independent contractors. The independent contractor concept, as developed under the common law and used in the context of the construction industry, is not for these purposes much different from that of the individual businessman as a supplier or provider of service in the sense used in *General Electric.* They are both, for the most part, businesses separate and apart from the primary; they are "unconcerned parties." Due to coordination efforts, the independent contractor on a construction site does relinquish some control but, by definition, not enough that the subcontractor is no longer an independent contractor. The present state of the law by use of the relatedness test resolves this issue under one set of circumstances, but does not allow the same result in the other.

Another variation of the problem created by this bifurcated resolution of the issue, depending on whether it is common situs construction or struck manufacturer, is presented in *J.F. Hoff*

Electric Co. v. NLRB.[136] Did a reserved gate lose its protected status when used by a subcontractor delivering light fixtures? The legal title for the fixtures, a finished product, was in the owner of the premises, but they were to be hung by the primary. Since it was a common situs construction project, was the subcontractor delivering the light fixtures an independent contractor with *Denver Building* protection or was he a supplier whose employees could be stopped by the union picket line? The majority concluded he was a supplier of the primary; therefore, the gate lost its protected status and the union could picket it.[137]

The dissenter outlined the complex interrelationships that exist on a construction site and charged that the majority, in its holding, was undermining *Denver Building.*[138] The way *Denver Building* has developed, the dissenter may be correct. The illogicalness is that decisions like *J.F. Hoff* and *Carpet Layers, Local Union No. 419 v. NLRB (Sears)*[139] are out of step and are doubtful considering the present interpretation of the law, but are more congruent with the general purposes of the law as Congress intended it.

Denver Building is used in configuration three (common situs) fact situations as if it were the end of the analysis rather than the beginning. Courts have held that *Denver Building* dictates application of the *Moore Dry Dock* principles, though those principles were not mentioned in the original opinion, and that reserved gates may be used to reduce the secondary effects, though gates were not in issue in *Denver Building.* Yet, no requirements are imposed to demonstrate status as unconcerned parties or relatedness.

CONCLUSION

Whether *Denver Building* has been overruled or modified by *General Electric* is beside the point, and any analysis should aim toward placing the decisions into their proper perspective and assessing the opportunities available to unify the law as it deals with factual variations under section 8(b)(4)(B). Mechanical application of the *Moore Dry Dock* principles was disparaged in *General Elec-*

136. 642 F.2d 1266 (D.C. Cir. 1980), *cert. denied,* 101 S. Ct. 1997 (1981).
137. *Id.* at 1276.
138. *Id.* at 1278.
139. 429 F.2d 747 (D.C. Cir. 1970).

tric,[140] and mechanical application should fare no better in this context, especially when fickle intent is so decisive in determining the true object of the picketing.

A case and decision goes only as far as its facts carry it. *Denver Building* decided the threshold question that independent contractors are in fact separate employers and should be eligible for protection from secondary pressures. The Court's conclusion that the general contractor in that case was not involved in the dispute was based upon acceptance of the NLRB's findings of fact and a most literal application of legal terms to the facts; the Court was showing deference to what it labeled "the findings of fact" of the agency.

Had the Common Situs Picketing Bill of 1975 passed, it would have overruled *Denver Building* by declaring all contractors on a construction site to be joint venturers.[141] This Bill would have gone too far. The 1977 Bill to apply *General Electric* to the construction industry, although technically unnecessary because it is self-evident that it should apply, would be preferable because it would not swing the pendulum too far in the direction of labor's interest at the cost of the construction industry and the public interest. To allow the most insignificant subcontractor to shut down a multi-million dollar construction project because of a labor dispute would create an imbalance of power at major construction sites.[142]

Neither the reserved gate doctrine nor the *Moore Dry Dock* principles were applicable or applied in *Denver Building;* based upon changed concepts and developments since the decision, these two developments in themselves would justify a relaxation in the rigidity of the *Denver Building* rule as administered by the lower courts. Such a progression would be analagous to the evolution of the presumption of reviewability in administrative law. Once the courts recognized the availability of a limited scope of review, the presumption against reviewability changed. The reserved gate doctrine has far greater potential for application in common situs construction cases than in the manufacturing industry. To allow a general contractor this insulator to diminish secondary effects and not provide the same protections for the union as were outlined in

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140. Local 761, IUE v. NLRB, 366 U.S. 667, 677 (1961).

141. *See* note 103 *supra*, and accompanying text.

142. One of the reasons in the legislative history of § 8(b)(4)(B) for its enactment was to contain labor disputes. 93 CONG. REC. 4198 (1947).

General Electric does not give full effect to both purposes[143] to be served by the enactment of section 8(b)(4)(B).

Two important questions require answers in any case where picketing is carried out in the presence of employees other than those of the primary: (1) What is the intent of the picketing? (2) Are the other employers unconcerned parties? Unions have the right to have these questions answered when they arise at a construction site just as much as they do when legitimate labor issues are in dispute at any other place.

Intent is not as important when the activities of the union are "engage in" operations like in *Denver Building* or *NLRB v. Local 825, International Union of Operating Engineers (Burns & Roe).*[144] Intent is not a key when the union asks the employees of a secondary to stop working for their employer; this is an inducement, but the activity is so direct that the only issue is the evidence of the asking. Intent is most significant when the union is picketing within the visual range of primary and secondary employees. Often the picket is executed in a manner to disguise the true intent, which must be distinguished from the hope of the union in its actions. It is in this situation that the *Moore Dry Dock* principles are used as guidelines, but not to decide the issue.

There is a series of cases beginning with *Doud* and those dealing with the emerging single employer doctrine that approach the problem on the basis of not the form but the congressional will manifested in the phrase "unconcerned parties." Adoption of this mode of analysis overall would unify and rationalize the law of secondary boycott. "Unconcerned party" need not be interpreted any broader than it is in *Doud,* the single employer cases, or under the "*Sears* Rule."

The principles of law applying to suppliers of materials should pertain equally to the suppliers of services in support of the primary operations. They are both employers and independent businessmen, and their employees can be lawfully stopped with all the secondary effects if they refuse to cross the picket line and the em-

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143. Text accompanying notes 28 & 29 *supra.* The present state of the law emphasizes protecting the unoffending employer, but does not give sufficient importance to the concept "wholly unconcerned party," which is necessary to protect the rights of unions in pursuing their primary interests.

144. 400 U.S. 297 (1971).

ployer cannot convince them otherwise.[145]

Regarding the common situs construction sites, if the labor dispute is with the general contractor who is in control of the premises and the alter ego of the owner on the premises and who is unified with the owner in a productive venture for profit, picketing at the construction site should be controlled by the same rules set out in *General Electric*. Whenever the general contractor becomes an interested party in the labor dispute of a subcontractor, he should no longer be considered an unconcerned party and entitled to the protection of section 8(b)(4)(B), but this would not allow other subcontractors to be drawn into the strife. The general contractor is no longer an unconcerned party when he contracts with a subcontractor having a labor dispute, the basis of which could inure to the benefit of the general contractor.[146] A general contractor

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145. Applying relatedness to the construction industry is in no way open-ended nor an easy task. There is a distinction between *A* contracting with *B* to put up a beam so that *A* can hang a light fixture on it, and *C* contracting with *B* to put up the beam and then contracting with *A* to hang a light fixture on it. In example one, *B* is related to *A*, but *A* is not related to *B*. *A* providing *B* with a job opportunity is not the same as contributing to *B*'s normal business operation in the sense that it was used in *General Electric*. No one would qualify for unrelatedness if that were the case. In example two, *A* is related to *C*, and *B* is related to *C*, but *A* and *B* are not related nor is *C* related to *A* or *B*. (This is all in accordance with the way "related" is used in *General Electric*, *Carrier*, and *National Woodwork*).

146. The argument that there is no labor dispute with the general contractor when he contracts with a non-unionized subcontractor and thereby asks union members to work side by side with non-union workers is unrealistic. Balancing the respective interests is harder. The general contractor should be able to award the work to the lowest bidder. Non-union workers should be able to find work in their trade without being forced to join a union, and subcontractors, in order to get contracts, should not be put into the untenable position of pressuring workers to join a union. The union has an interest in organizing new shops and a very strong interest if substandard wages are being paid. Since low bids by non-unionized subcontractors are often based on the payment of substandard wages, the subcontractor's policy works for the benefit of the general contractor who hires him by way of the lower bid. This is what makes the general contractor a concerned party; he is making a greater profit by bringing non-union workers onto the site. The balance is struck in favor of the union because the general contractor who reaps the benefit should also bear some of the responsibility. Any dispute in this regard between the general contractor and his employees should be handled through the collective bargaining process in accordance with § 8(e) and the construction industry proviso. Protecting the interests of the non-union worker should be accomplished on the basis of § 7 and possibly an expansion of the meaning of organizational picketing under § 8(b)(7). *See* Houston Bldg. & Constr. Trades Council, 136 N.L.R.B. 321 (1962), which may need to give way to International Hod Carriers, Bldg. & Common Laborers' Union, Local No. 41 (Calumet I), 130 N.L.R.B. 78, *rev'd*, 133 N.L.R.B. 512 (1961). The bottom line is that the general contractor should not be allowed to take the financial advantage of a low bid contract in a manner that hurts the union and then use the secondary

who knowingly brings a non-unionized subcontractor onto the site would presumptively be an interested party. When the subcontractor has a labor dispute over wages, hours, and working conditions after the subcontract has been signed or after the subcontractor has begun work on the site, the general contractor would presumptively not be a party in interest.

Denver Building interpreted correctly can stand with *General Electric*. The only controversial aspect was not finding the general contractor to be an unprotected secondary. *General Electric* is potentially of greater benefit to the construction industry than to manufacturing. Reserved gates are a good way to assure the fulfillment of the dual purposes of section 8(b)(4)(B).

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boycott provision for money damages to hurt the union even more. The general contractor, like the rest of us, should reap what he has sown.