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Labor Law—Where Disputing General Contractor at Common Situs in Construction Industry Reserves Gate for Exclusive Use of His Employees, Union May Picket That Gate Only

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of attorney fees, where as in the case of "insured" arbitration rather than trial is the mode of recovery, would tend to bring the MVAIC law directly in line with the legislative intent that motivated its creation. A fixed fee schedule would return less than the customary 33 1/3 per cent to the attorney whose services were required for arbitration but could be computed in such a way as to fairly compensate him for the time involved in such a proceeding. That such an amendment would eliminate the inequalities now present in the MVAIC law and the need for complex reasoning to offset them is without question. The only factor mitigating against such an amendment is the increased cost to MVAIC which would result if MVAIC were required to reimburse the compensation carrier for its prior award to claimant. Such an increase in cost, although eventually passed on to the liability insurance policy holder, in the form of increased premiums, would seem a small price to pay considering the limited claims against MVAIC involving workmen's compensation, when balanced against the reduction in the cost of funding workmen's compensation and the improvements in the operational ease of MVAIC law.

FREDERICK A. WOLF

LABOR LAW—WHERE DISPUTING GENERAL CONTRACTOR AT COMMON SITUS IN CONSTRUCTION INDUSTRY RESERVES GATE FOR EXCLUSIVE USE OF HIS EMPLOYEES, UNION MAY PICKET THAT GATE ONLY.

Markwell & Hartz, Inc. (hereinafter designated as M & H) was the general contractor on a project being conducted for and on the premises of the East Jefferson Water Works, of Jefferson Parish, Louisiana. As general contractor M & H subcontracted the work which it decided not to perform itself. Consequently, all electrical work was awarded to subcontractor Barnes, while all the pile-driving operations were awarded to subcontractor Binnings. M & H was involved in a labor dispute with the Building and Construction Trades Council of New Orleans, AFL-CIO (hereinafter designated Respondent). Both subcontractors employed members of craft unions affiliated with Respondent. The premises of the Water Works were completely surrounded by a chain-link fence, so that all ingoing and outgoing traffic had to pass through the four gates provided. Two of the gates (hereinafter designated as A and B), were located on the northern boundary of the Works and the remaining two (hereinafter designated as C and D), were located on the eastern boundary of the premises. Respondent union commenced picketing all four gates during normal working hours, bearing signs informing the public and those persons who used the

gates that M & H had no collective bargaining agreement with the union.[1] Approximately five days after the picketing commenced, M & H posted notices on all gates to the effect that Gates A, B, and C were thereafter for the use of subcontractors' employees in addition to *all* plant deliveries. M & H employees were forbidden to use such gates, and were instructed to use Gate D only, it being exclusively reserved for their use. Respondent's picket, upon encountering the change, proceeded temporarily to Gate D. The subcontractors' employees, who had previously honored the picket line and refused to cross it, now readily entered the premises and proceeded to their respective tasks. Thereafter, the picket returned to Gate B, whereupon all the union employees again honored the picket line by walking off the job. M & H, in an effort to have the work of the subcontractors completed, ordered its men off the premises in the hope that the union would then cease its activity.[2] Realizing its efforts were of no avail, as Respondent continued its picketing, M & H recalled its workers in order to complete the work of subcontractor Binnings. Three weeks later M & H instituted another change in gate policy, to wit: that *only* subcontractors were to utilize Gates A, B, and C, whereas Gate D was *reserved exclusively* for both M & H employees, and all carriers and suppliers making deliveries to M & H, as opposed to previous policy whereby M & H deliveries were allowed at all gates. Respondent union maintained its pickets at the *neutral* gates (A, B, and C), with the result that the neutral employees refused again to cross the picket line and proceed to work. M & H thereupon filed a charge[3] with the National Labor Relations Board (hereinafter designated NLRB), charging the union with an unfair labor practice, as set forth in sections 8(b)(4)(i) and (ii)(B) of the Labor Management Relations Act, as amended,[4] to the effect that the union engaged in prohibited activity by seeking to embroil the *neutral* employees of a third-party employer in its dispute with M & H. *Held,* where a

1. The sign read:

MARKWELL AND HARTZ
GENERAL CONTRACTOR
DOES NOT HAVE A SIGNED AGREEMENT WITH THE
BUILDING AND CONSTRUCTION TRADES COUNCIL
OF NEW ORLEANS
AFL-CIO

In addition the sign listed the union rates that *should be* paid on the job. The relevancy of this lies in the fact that the picketing was informational in nature and protected by the publicity proviso at the end of § 8(b)(4) of the Labor Management Relations Act, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1958), as amended 29 U.S.C. § 158(b)(4)(B) (Supp. III, 1962), amending 49 Stat. 452 (1935) (hereinafter designated as Act).

2. See Local 618, Automotive Union, AFL-CIO v. National Labor Relations Board, 249 F.2d 332 (8th Cir. 1957)—such action will not operate to force the union to cease its picketing.

3. The National Labor Relations Board (hereinafter designated as NLRB) has no power of its own to initiate an action against a party committing an unfair labor practice under §§ 8(a) and 8(b) of the Act. It must await the filing of a charge before it may pursue any course of action. § 10(b) As to who may file a charge see §§ 102.1 and 102.9 in NLRB, Rules and Regulations and Statements of Procedure, Series 8 (1962).

4. Act, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1958), as amended 29 U.S.C. § 158(b)(4)(B) (Supp. III, 1962), amending 49 Stat. 452 (1935). Commonly called the Taft-Hartley Act.

union pickets gates used *exclusively* by *neutral* employees working at a "*common situs*"[5] in the construction industry, it is engaging in an unfair labor practice, to wit: a secondary boycott. *Markwell & Hartz, Inc. v. Building & Construction Trades Council of New Orleans, AFL-CIO*, 155 N.L.R.B. No. 42 (1965).

Boycotts have traditionally been divided into two types, primary and secondary. The term "secondary boycott" describes a situation wherein a union brings pressure to bear upon a *neutral* party, through its employees or otherwise, so that this party will in turn bring pressure upon the employer with whom the union has its dispute. This indirect method of applying pressure on an adversary is to be distinguished from the "primary boycott"—a direct *modus operandi*, wherein the pressure is applied upon the actual disputant. When a union in its attempt to realize a lawful objective, such as higher wages, chooses to apply pressure on a secondary basis, it may be proscribed from continuing its activity merely because secondary measures are unlawful. The relevant factor in determining lawfulness of an otherwise lawful objective therefore, is that point where the union chooses to apply its pressure. The courts hold secondary boycotts[6] illegal, but it appears that certain activity on its face logically secondary, may be held lawful.[7] The ultimate issue is whether or not "secondary boycott" is conclusory terminology or merely a term describing a step in reaching a conclusion.[8] The Taft-Hartley Act of 1947[9] is of prime importance. Section 8(b)(4) of the Act provides: [it] shall be an unfair labor practice for a labor organization . . .

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods . . . or to perform any services; or (ii) to threaten, coerce, or restrain any person . . . where . . . an object thereof is—
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> > . . . (B) forcing or requiring any person to cease . . . doing business with any other person . . . Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

Although this section does not mention the term "secondary boycott," it is often referred to as one of the "Act's secondary boycott sections."[10] The thrust of

5. A "common situs" is that situation in which several employers are working on one site, belonging to a third party. See notes 40-44 *infra* and accompanying text.

6. *E.g.*, NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). For further discussions of secondary boycotts see: Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363 (1962); Koretz, *Federal Regulation of Secondary Picketing*, 59 Colum. L. Rev. 125 (1959).

7. See Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 98 (1958). See also United Bhd. of Carpenters (Wadsworth Bldg. Co.), 81 N.L.R.B. 802, 805 (1949).

8. Wollett & Aaron, *Labor Relations and the Law*, 294-95 (2d ed. 1960).

9. 29 U.S.C. § 141 and others (1947).

10. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 674, 686 (1951). Other sections in which "secondary boycotts" are alluded to are § 10(k) and § 10(l) and § 303 of the Act. These however are not relevant to the instant case. Section 10(k) refers to voluntary adjustment of the dispute between the parties; § 10(l) refers to order of priority

the section is to condemn certain secondary boycotts, where specific elements are present. Thus, union activity is proscribed *only* where the employees are induced, with the specific object to strike, to force their employer or other person to cease doing business with the party with whom the union has a dispute. The distinction between primary and secondary activity unfortunately, is not one which "present[s] a glaringly bright line."[11] The fact is "that, when 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, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises."[12] However, there is a difference between picketing which induces respect for a picket line and picketing which induces neutral employees "to engage in concerted[13] conduct against their employer . . . to force him to refuse to deal with the struck employer."[14]

The early NLRB decisions under this section involved activity taking place about the secondary employer's premises. Where a union set up its picket line around the premises of a builder-contractor, who had entered into a contract with the primary disputant, the NLRB found this to be proscribed secondary activity.[15] On the other hand, when the activity took place about the premises of the primary employer, the NLRB found this to be lawful primary activity. So where Company A had used the dock and the employees of Company B (the disputant) for loading its ships and where the two had entered an agreement whereby A's employees would do the work of B in the event of a strike, the NLRB upheld the union's picketing the dock, although the result was that the employees of A refused to cross the picket line.[16] As aptly put by the NLRB:

> A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed by Section 8(b)(4)(A) of the Act.[17]

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among unfair labor practices; and § 303 provides for money damages in a civil action based on § 8(b)(4).

11. Local 671, IUE, AFL-CIO v. NLRB, 366 U.S. 667, 673 (1961) (hereinafter designated as *G-E*).

12. Seafarer's Int'l Union v. NLRB, 265 F.2d 585, 591 (D.C. Cir. 1959).

13. The term "concerted" was deleted from the statute in 1959, when the proviso protecting primary picketing and strikes was added (see note 35 *infra*). The reason for the addition was to quell the fear that by removing the former term from the statute the Act may be interpreted so that "the picketing at the factory violates § 8(b)(4)(A) because pickets induce truck drivers employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike." G-E, 366 U.S. 667, 681 (1961) citing an analysis of the bill by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589 (1959).

14. G-E, 366 U.S. 667, 673 (1961).

15. United Bhd. of Carpenters (Wadsworth Bldg. Co.), 81 N.L.R.B. 802 (1949). See also Printing Specialties Union, AFL (Sealbright Pacific), 82 N.L.R.B. 271 (1949).

16. Oil Workers Int'l Union (Pure Oil Co.), 84 N.L.R.B. 315 (1949).

17. *Id.* at 318. See also Newspaper & Mail Deliverers' Union (Interborough News Co.), 90 N.L.R.B. 2135 (1950); IBT (Di Giorgio Wine Co.), 87 N.L.R.B. 720 (1949).

In another case[18] a construction company, Ryan, entered into a contract to do the construction work on a building adjacent to a plant, but inside the plant fence. A separate gate was cut through the fence for the Ryan workers. In holding that the union in its dispute with the plant could picket the premises by placing pickets at the Ryan gate, the NLRB *temporarily*[19] eliminated any possibility of proscription of picketing taking place around the situs of the struck employer. "However, the impact of the new situations made the Board conscious of the complexity of the problem by reason of the protean forms in which it appeared."[20] Illustrative of the newly emerging forms was that of the "common situs." The "common situs" is to be distinguished from those situations previously dealt with, in that it involves several employers performing distinct tasks on the premises of a *third party*. The NLRB's landmark "common situs" decision was handed down in *Moore Dry Dock*,[21] wherein the union had picketed an entrance to a dock where a ship, belonging to the struck employer, was being outfitted. Here the NLRB concluded that there must be a balance struck between the right of the union to engage in its picketing activity in pursuit of its lawful objectives and the interest of either neutral or secondary employers to be free from becoming enmeshed in the dispute. The NLRB set out standards which had to be fulfilled in such circumstances, in order that the picketing be found lawful. These requisites, approved by reviewing federal courts,[22] were as follows: 1) that the picketing be limited to times when the situs of the dispute was at the premises of the secondary employer, 2) that the primary employer be engaged in his normal business at the site, 3) that the picketing take place reasonably close to the dispute, and 4) that the picketing clearly disclose with whom the dispute exists. Upon application of these standards, the mere failure of a picket sign to designate the prime disputant was held violative of the Act.[23] This test, moreover, was applied to situations where the common situs was owned by the struck employer. In one case,[24] the owner of a food market operated some of the shops within his premises and leased out the remaining concessions to third parties. In its dispute with the owner, the union, instead of picketing only the disputant's shops, proceeded to picket the entire market area, and thereby affected all the lessees as well. The NLRB held this activity proscribed by the Act, in that picketing did not take place reasonably close to the situs of the

18. United Electrical Workers (Ryan Constr. Co.), 85 N.L.R.B. 417 (1949).

19. This generalization was later modified because of Moore Dry Dock, 92 N.L.R.B. 547 (1950), and G-E, 366 U.S. 667 (1961). See notes 21-25 *infra* and accompanying text.

20. G-E, 366 U.S. 667, 676 (1961).

21. 92 N.L.R.B. 547 (1950).

22. *E.g.*, Piezonki v. NLRB, 219 F.2d 879 (4th Cir. 1955); NLRB v. Teamsters Union, 212 F.2d 216 (7th Cir. 1954); NLRB v. Local 55, 218 F.2d 226 (10th Cir. 1954); NLRB v. Service Trade Chauffeurs, Local 145, 191 F.2d 65 (2d Cir. 1951).

23. *E.g.*, Superior Derrick Corp. v. NLRB, 273 F.2d 891 (5th Cir. 1960); Truck Drivers, Local 728 v. NLRB, 249 F.2d 512 (D.C. Cir. 1957).

24. Retail Fruit & Vegetable Clerks Union, AFL-CIO (Crystal Palace Mkt.), 116 N.L.R.B. 856 (1956).

dispute, under the applicable test. To the extent that any case implied the contrary, such as the *Ryan* case,[25] it was overruled. The test as fashioned thereby maintained the proper balance required by the "dual congressional objectives of preserving the right of labor organizations to bring pressure on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not of their own."[26] Among the questions then unanswered was whether the NLRB could apply these standards "so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises."[27] This question was answered in the affirmative[28] by the Supreme Court, which found that the key to the problem was the *type of work done* on the premises of the struck employer-manufacturer. Citing a previous case,[29] and noting previous NLRB decisions,[30] the Court concluded that in order for such picketing to be found lawful, the work done must be *related* to the normal operations of the employer.[31] The case in which the test was fashioned involved a strike at the *premises of a struck manufacturer*, whereas in the instant case the NLRB was faced with a common situs situation, where the dispute was with a general contractor, who was operating on the *neutral employer's premises* along with other neutral parties.

The issue, according to the majority[32] was to "decide whether a union, in furtherance of a primary dispute with a general contractor in the construction industry, may lawfully engage in jobsite picketing at gates reserved and set apart for exclusive use of neutral subcontractors."[33] Specifically, the thrust of their analysis was to decide whether it was the intention of the picketing union to "enmesh secondary employers in its dispute" as the General Counsel contended,[34] or whether as Respondent would have it, that their activity was "at all times in furtherance of its primary dispute with M & H and protected by the 'primary strike and picketing proviso.'[35]"[36] Citing *Local 761, IUE v. NLRB*[37]

25. See note 18 *supra* and accompanying text.
26. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).
27. G-E, 366 U.S. at 680 (1961). See Zimmerman, *Secondary Picketing and the Reserved Gate—The General Electric Doctrine*, 47 Va. L. Rev. 1164 (1961).
28. G-E, 366 U.S. 667 (1961).
29. United Steelworkers of America, AFL-CIO v. NLRB, 289 F.2d 591, 595 (2d Cir. 1961).
30. United Steelworkers of America, AFL-CIO (Phelps Dodge), 126 N.L.R.B. 1367 (1960); International Chemical Workers, AFL-CIO (Va.-Carolina Chemical Corp.), 126 N.L.R.B. 905 (1960).
31. G-E, 366 U.S. 667, 681 (1961).
32. Members McCulloch (Chairman), Brown and Zagoria.
33. Instant case at 5 (the page citations to the instant case will differ in this paper from the pagination in the official report, since the author is using an official NLRB copy of the case, the official report being unavailable at present).
34. *Ibid.*
35. Section 8(b)(4)(B): ". . . Provided, that nothing contained in clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."
36. Instant case at 5.
37. 366 U.S. 667 (1961).

(hereinafter designated as *G-E*) and *United Steelworkers of America, AFL-CIO v. NLRB*[38] (hereinafter designated as *Carrier*), the NLRB resolved the issue in favor of the Charging Party, M & H. In the former case the Court ruled that:

> picketing "at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises" is lawful primary activity *unless* the following conditions exist:
>
> > There [is] a separate gate, marked and set apart from other gates: the work done by the men who use the gate [is] unrelated to the normal operations of the employer: and the work [is] of a kind that would not, if done when the employer were engaged in its regular operations, necessitate curtailing those operations.[39]

Applying the above criteria subsequently in *Carrier*, the NLRB permitted picketing of a gate, owned by a railroad, which was cut through a fence surrounding the employer's premises. The gate was maintained for the exclusive use of *neutral* employees making deliveries *related* to the normal operations of the employer. The majority then proceeded to distinguish these two decisions from the instant case. A distinction was drawn between picketing at the site of a struck manufacturer—"primary situs" picketing, and picketing at a "common situs,"[40] where the struck employer was one of a few employers performing his tasks on the same premises, which were owned by a third party, here the Water Works. A distinction between the two had emerged over the years to serve the "dual congressional objectives" underlying the boycott provisions of the Act.[41] To effectuate these objectives, stricter rules of conduct were placed on "common situs" situations, which had as their purpose the "[minimization of] impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees."[42] Traditionally the limitations set forth in the case of *Moore Dry Dock*[43] have been applied to *all* "common situs" situations as opposed to such other "primary situs" situations. The Supreme Court approved of the test of *Moore Dry Dock*, when it observed that *G-E* did not present such a situation as does the instant case, where the test would apply.[44] The Court's decisions in *G-E* and *Carrier*, "merely represent," the NLRB concluded, "an implementation of the concomitant policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer."[45]

38. 376 U.S. 492 (1964) (hereinafter designated as *Carrier*).
39. Instant case at 5 citing G-E, 366 U.S. 667, 681 (1961).
40. *E.g.*, Hermandad de Trabajadores de la Construccion (Levitt Corp.), 127 N.L.R.B. 900 (1960); Eau Claire and Vicinity Bldg. & Constr. Trades Council (St. Bridget's Catholic Congregation), 122 N.L.R.B. 1341 (1959); Local 55, 108 N.L.R.B. 363 (1954), *enfd.* 218 F.2d 226 (10th Cir. 1954).
41. See note 26 *supra* and accompanying text.
42. Instant case at 7 citing Retail Fruit & Vegetable Clerks Union (Crystal Palace Mkt.), 116 N.L.R.B. 856 at 859 (1956).
43. Sailors' Union of the Pacific, 92 N.L.R.B. 547 (1950).
44. Carrier, 376 U.S. 492 (1964).
45. Instant case at 8.

The majority then proceeded to apply those standards set out in *Moore Dry Dock*, and centered its attention on the requirement that the picketing must take place reasonably close to the situs of the dispute. Citing *Local 55*,[46] wherein the failure to name on the picket sign, the party with whom the dispute existed was held sufficient evidence as to unlawful secondary intent, the majority reasoned that *a fortiori* it was unlawful to directly induce neutral employees at a reserved gate. The fact that the subcontractor had some relationship with the general contractor, "did not," continued the majority, "make the former's employees fair game in connection with a union's dispute with the latter."[47] Furthermore, picketing the neutral gate, after the final changes had been instituted, was failure to comply with the requisite that the activity take place *reasonably close* to the site of the actual dispute. The notion that the close relationship between the general and sub-contractor is sufficient to render the union's activity lawful, or that the two were "allies," was specifically rejected in the case of *Denver Building Trades*,[48] by the Supreme Court. On the basis of the above analysis the NLRB issued a "cease and desist" order,[49] and an order requiring the union to "take certain affirmative action that [it found] necessary to effectuate the policies of the Act."[50] Respondent was ordered to discontinue "inducing . . . threatening, restraining, or coercing . . ."[51] the employees of the subcontractor as well as the subcontracting companies themselves with the object to enmesh them in its dispute with M & H, the general contractor.

The two dissenting members[52] of the Board reached an opposite result, by analyzing the same cases in a different light. Their major contention was that the majority "inferred that Respondent's picketing was for an unlawful object simply from the fact that the reserved gates were used only by secondary employees, without inquiry into the question of whether the appeals to such employees were, in the circumstances of this case, permissible primary activity, *an inquiry which we believe is required by the Supreme Court's decisions in General Electric and Carrier* . . . ."[53] In other words, the thrust of the dissent's analysis was to the effect that the distinction between primary and common situs picketing was to be disregarded in this context since the Court intended the *G-E* test to apply to *all* picketing situations. Although there is a distinction between the two degrees of picketing the dissent thought the distinction "more nice than obvious."[54] The fact is that "almost all picketing . . . hopes to

46. 108 N.L.R.B. 363 (1954), *enfd.* 218 F.2d 226 (10th Cir. 1954).
47. Instant case at 9.
48. 341 U.S. 675 (1951). See also NLRB v. Business Machine Mechanics, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956). See Note, 5 Buffalo L. Rev. 318 (1956).
49. Pursuant to § 10(c) of the Act.
50. Instant case at 11.
51. *Id.* at 12-13.
52. Members Fanning and Jenkins.
53. Instant case at 14 (emphasis added).
54. *Id.* at 16.

achieve the forbidden objective, whatever other motives there may be and however small the chances of success."[55] The issue then was not as the majority saw it, but rather whether or not the object of the picketing union was to enmesh the neutral employees into prohibited secondary action. *G-E* and *Carrier* merely sought to point out that finding an unlawful objective cannot be based wholly upon the fact that a neutral gate was picketed. Proceeding from this point the dissent noted that in *Denver Building* the dispute was with a subcontractor, whereas here the general contractor was the disputant. In *Denver Building*, the union sought to have the general contractor cease doing business with a non-union subcontractor with whom it was engaged in a dispute. The picketing, moreover, was accompanied by a failure to disclose the party with whom the union had its dispute. Thus *Denver Building* was distinguishable on its facts, and therefore commanded a different result than the instant case. Under this analysis therefore *G-E* is not to be limited to such cases as claimed by the majority, but is to be applied in *all* cases. Thereafter the dissent applied the *G-E* test to the instant case and found that the union had complied with its requirement. *G-E*, as the minority would have it, is designed to aid in the determination of whether a union has the right to appeal directly to the secondary employees at a reserved gate, whereas *Moore Dry Dock* is used in the determination of whether or not certain kinds of activity constitute unlawful secondary activity. Upon applying *G-E* and finding the work of the subcontractor *closely related* to that of the general contractor, and factually distinguishing the *Denver Building* "ally" doctrine[56] the dissent applied *Moore Dry Dock* and concluded that the picketing at the reserved gate *was* "reasonably close" to the situs of the dispute. Hence, the union's activity was primary, and thus protected.

The immediate result of the NLRB's decision in the instant case is that stricter standards are to be applied in "common situs" reserved gate situations in the construction industry, than in reserved gate situations at the premises of a struck manufacturer. Union picketing in the industry may now be easily limited by a general contractor setting up a series of neutral gates for all employees other than those involved in the dispute, in this case his own.[57] The union contends that this result is inequitable, in that its picketing, although spawned by good faith primary intentions, may be easily frustrated. On the other hand, the results may not seem so inequitable when viewed in terms of what may be avoided. A union, for example, if permitted to picket the entire premises, could tie up an entire construction project over an insignificant dispute with a minor subcontractor. Under the analysis of the majority, *G-E*, because it presented a situation in which the premises of a

55. Instant case at 15 citing G-E, 366 U.S. 667, 673 (1961).
56. See footnote 48 *supra* and accompanying text.
57. He may also insulate the rest of the employees in the contrary situation, where the subcontractor is the disputant, merely by setting up a separate gate for that group, exclusive of others.

struck manufacturer were involved and because it contained limiting language to this notion, was inapposite to the instant decision. This seems entirely plausible, in light of the factual and historical analyses the majority also presented. *Denver Building*, inadequately disposed of by the minority opinion,[58] when viewed in conjunction with the *Moore Dry Dock* requisites, restricts union picketing to a minimum. The union, it must be kept in mind, does have the right to publicize its dispute.[59] Picketing at a neutral gate, under the minority reasoning, need not be presumptive of secondary objectives. It is here that the dissenters contend the majority rationale failed, inasmuch as it dismissed the picketing as unlawful merely because it did not comply with the "reasonably close" requirement of *Moore Dry Dock*. We have then a situation in which G-E does not apply and in which *Moore Dry Dock* juxtaposed upon *Denver Building* operates restrictively on union rights. It is apparent therefore that a solution is needed—*not* for those reasons set forth by Respondent union, but because a general contractor, by setting up an *out-of-the-way* reserved gate, could remove from the ambit of union publicity the public pressure factor. The problem may be remedied through two major instrumentalities—the Supreme Court and/or Congress. Congress may take action on H.R. 10027,[60] which in effect would overrule *Denver Building* in its entirety, by exempting the building industry from section 8(b)(4)(B) coverage, as has already been achieved in the garment industry.[61] The need for such a measure has been purportedly recognized by leaders of both parties, as evidenced by the number of times such a legislative proposal has been introduced into both houses.[62] The Supreme Court, on the other hand, could remedy the problem by expanding the scope of *G-E* so as to encompass the instant case. Such an expansion would modify *Denver Building* inasmuch as the parties *would be considered "allies"* for the purposes of picketing. The legislative proposal seems the more practicable of the two, since by applying *G-E* ubiquitously, and having it modify *Denver Building*, it is apparent that all cases would lie outside the proscriptive area, given the highly integrated nature of the construction industry, and given the further qualification, that *Denver Building* would apply only where the business relationship between the contracting parties was not closely related. Under this interpretation therefore, the rights of innocent third party neutrals would be unduly affected. We have then a bewildering situation to which none of the traditional solutions seem either to apply or to deal equitably with the problem. Supreme Court action seems possible, although fashioning a new test would be difficult, and may in fact even lie within the

58. Query whether the dissent's analysis would have been the same had the prime disputant in *Denver Building* been the general contractor. The decision may not have been distinguishable.

59. Pursuant to the publicity proviso in § 8(b)(4).

60. 89th Congress, 1st Sess. (1965).

61. Pursuant to § 8(e).

62. See H. Report No. 1041, 89th Cong., 1st Sess. (1965), entitled *Situs Picketing*.

legislative province.[63] Unfortunately, H.R. 10027 in its present form, does not resolve the dilemma. In place of striking a balance between the "dual congressional objectives," it would force them further out of line. Presently the scales bear heavily in favor of the employer-contractor, and as the unions would have it, it *also* limits their rights of publicity and free speech. Passage of the bill would favor the unions and hence lessen the immunity of third party neutrals. The bill speaks broadly in terms of "any strike" and "any . . . employer," without any restrictions. Neither the majority nor the dissenting members of the NLRB in the instant case would seem to accept the proposed notion that *Denver Building* be overruled in its entirety. It seems apparent that the solution does not lie in overruling *Denver Building*. Where a union has a dispute with either a general or sub-contractor, any picketing other than at the designated location, under the instant holding, would affect innocent neutrals. The question remains however, whether or not the non-disputing parties are in reality "neutrals," especially in such a highly integrated industry. In *Moore Dry Dock* the NLRB was dealing with a shipbuilder and a shipper, and the former was indeed a "neutral" party to the dispute between the shipper and the union.[64] Perhaps the members of the NLRB would agree to a reversal to *Denver Building* insofar as the general contractor is concerned, as the argument can be advanced that he is, *in the eyes of the disputing union*, tantamount to the struck manufacturer, as in the *G-E* case. Possibly the problem should be approached in terms of power, weapons and bargaining position, rather than in terms of the rights of the parties involved. The passage of H.R. 10027 would then be the equivalent of a legislative policy choice as to where to place the power, rather than a choice as to whose rights to vindicate. Nevertheless, it seems more equitable to attempt to *balance* the positions of the parties to promote industrial peace, than to give the stronger party, as would be the case here, greater power and hence a more advantageous bargaining position than it already has or needs. The present holding may in fact balance the scales and achieve the "objectives" sought. If the general contractor is considered tantamount to the struck manufacturer however, it

63. The author does not wish to imply that the Supreme Court may not take action here, as has already been done prior to this decision. The implication is that legislative action may be the better of the available methods.

64. The facts in *Moore Dry Dock* were as follows: S, a Greek-owned shipping company, made a contract with K to carry gypsum from Mexico in S's ship. The American crew then had to be replaced for the Greek ship with the Greek crew. The ship was placed in the shipyard of Moore Dry Dock Company to complete the conversion. The owner of the dock agreed to allow S to put its crew on board before completion, in order to train them. The union involved heard of the ship and the arrangement, and was refused bargaining rights onboard the ship. The result was that the union placed pickets outside the entire dock. Moore's employees continued working on all the other ships, and because of this and other reasons inapposite here the picketing was upheld. The fact remains that the Moore employees could have refused to work on the dock at all. In any case, the shipbuilder was entirely *neutral* to the dispute between S and the union, and could have been injured had the employees chosen not to enter the premises. In the instant case the parties were involved on the same project in the same industry, while in *Moore Dry Dock*, not only were the parties not working on the same project but they were in entirely different businesses.

might be feasible to require the general contractor to utilize a main entrance or an entrance reasonably close thereto, so as not to restrict union picketing and publicity to a rear gate where it would lose the benefit of public opinion and pressure. It does seem apparent nevertheless, that the remedy does not lie in the reversal of the "ally" doctrine of *Denver Building*, at least not in its entirety, simply because the result would not be industrial peace, but rather further unrest. The sole object of closing down a multi-employer project is to bring pressure upon the disputant to settle with the union as soon as possible. Such economic pressure unfortunately insures neither equitable nor reasonable settlements.

FREDRIC H. FISCHER

PRODUCTS LIABILITY—MANUFACTURER NOT LIABLE FOR ECONOMIC LOSSES OF CONSUMER UNDER THEORY OF STRICT LIABILITY

In October, 1959, plaintiff entered into a conditional sales contract with Southern Truck Sales for the purchase of a truck manufactured by defendant. After taking possession of the truck, plaintiff found that it bounced violently, an action known as "galloping." For eleven months after the purchase, Southern, with guidance from defendant's representatives, made many unsuccessful attempts to correct the defect. In July, 1960, the brakes failed when plaintiff slowed down for a curve and the truck overturned. Plaintiff, who was not personally injured, had the truck repaired for $5,466.09. In September, 1960, after having paid $11,659.44 of the purchase price of the truck, plaintiff served notice that he would make no more payments. Plaintiff brought action against Southern and defendant seeking damages for repair of the truck, for the money he had paid on the purchase price, and for profits lost in his business because he was unable to make normal use of the truck. During the trial, plaintiff dismissed his action against Southern without prejudice. The lower court found that defendant had breached its warranty to plaintiff and entered judgment for plaintiff for $20,899.84, consisting of $11,659.44 for the payments on the truck and $9,240.40 for lost profits. The court denied plaintiff's claim for $5,466.09 for the repair of the truck on the ground that plaintiff had not proved that the "galloping" had caused the accident. Both plaintiff and defendant appealed. The Supreme Court of California *held*, affirmed on the basis of breach of express warranty. One judge, concurring in the result, maintained that the award should have been made on the basis of the strict liability doctrine. *Seely v. White Motor Co.*, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

The earliest cases dealing with the liability of a manufacturer to a consumer were based on negligence and followed the rule that a contractor is