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The NLRB and Alternative Situs Picketing: The Search for the Elusive Standard

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For over thirty years, the National Labor Relations Board has unsuccessfully attempted to establish a standard to resolve the conflict between a union's right to put pressure on the primary employer and a neutral employer's right not to be enmeshed in the disputes of others. The authors trace the history of the Board's and courts' response to this conflict in the context of picketing when the primary employer does business at more than one location. They propose an "alternative situs" standard based on the Moore Dry Dock criteria to evaluate the legality of a union's picketing and to provide all parties with a workable and predictable standard.

I

INTRODUCTION

The conflict between the right of a union to put pressure on the primary employer and the right of neutral employers to be protected from involvement in labor disputes not their own has always been one of the major areas of legal and philosophical dispute under the National Labor Relations Act. This is especially true in cases in which there is a question concerning the union's right to picket the primary employer at more than one geographical location, one of which is not the primary employer's permanent place of business. The National Labor Relations Board has decided these cases on the basis of general legal doctrines of common situs picketing. It is the premise of this article that these cases do not fit into the traditional legal doctrines which

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have developed, such as "reserved gate" or "ambulatory picketing." A new conceptual framework uniting the variety of cases is appropriate. This article proposes the use of an "alternative situs" picketing model. This will allow us to better evaluate past and present Board and court policies and to set forth recommendations concerning the criteria by which the legality of union picketing in these cases can be determined.

For purposes of this analysis, an "alternative situs" picketing case has three elements:

1) there is more than one situs at which the primary employer is engaged in its normal business, and which, on a prima facie basis, can become the situs of union pressure;

2) union picketing or pressure on one situs will have a greater potential impact on neutrals than picketing at another situs; and

3) the picketing at either situs, in the absence of an opportunity to picket at the other situs, will be lawful.

All cases with these characteristics should be treated similarly.

The distinctions which have been made between the various groups of cases do not rest on any sound statutory basis and do not serve to balance, in any consistent manner, the two major interests, i.e., the union's interest in applying economic pressure and the interest of the neutral employer in freedom from becoming enmeshed in the primary dispute.

The differences in interests and analysis under the traditional categories are characterized by the recent decision of the National Labor Relations Board (hereinafter Board) in Teamsters Local 83 (Allied Concrete),\(^1\) and the Ninth Circuit's reversal of that decision in Allied Concrete, Inc. v. NLRB.\(^2\)

Allied supplied ready-mixed concrete to construction sites. The controversy arose when Allied attempted to deliver concrete while its union employees were on strike. To immunize the employees of neutral contractors at the construction site, Allied had posted signs leading to the job site designating one entrance for its trucks and workers and two other entrances for neutral firms and their work force. On two occasions, the striking union followed Allied's trucks beyond the reserved gate to the pour site, and picketed the trucks while they remained at the common situs. Consequently, neutral employees walked off the job site.

The issue in Allied Concrete was whether a union which engaged in otherwise legal ambulatory picketing around the primary employer's truck at a construction site on the premises of a neutral employer was

\(^1\) 231 N.L.R.B. 1097 (1977), rev'd, 607 F.2d 827 (9th Cir. 1979).

\(^2\) 607 F.2d 827 (9th Cir. 1979).
nevertheless in violation of section 8(b)(4)(B) because the picketers ignored a reserved gate where the union could have picketed with, ostensibly, less impact on the neutral employer's workers. In effect, does the existence of a reserved gate at a common situs limit the scope of otherwise primary picketing in which a union may engage?

The Board, in a 3 to 2 decision, ruled that the union did not violate the Act by picketing at the pour site. The majority found that the picketing satisfied the four criteria of Moore Dry Dock, which created a presumption of legality. Thus the majority applied what it saw as the Board's established policy of finding picketing presumptively legal if:

(a) the picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing, the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Furthermore, relying on its 1949 decision in Schultz Refrigerated Service, the Board noted that a striking union has a general right to communicate its dispute to the public. This objective can be achieved

3. Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B) (1976). All sections not otherwise identified are from the National Labor Relations Act (hereinafter Act) which is codified beginning at 29 U.S.C. § 151 (1976). Section 8(b)(4)(B) is the "secondary boycott" provision. It makes it an unfair labor practice for a union or its agents to induce or encourage a strike where "an object thereof" (hence the so-called illegal or secondary object) is to force a neutral employer to cease doing business with another employer. The text in pertinent part is as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—. . . .

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—. . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 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; . . .

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. . . .

Prior to 1959, what is now the first portion of subparagraph (B) was found in subparagraph (A); accordingly, many of the pre-1959 cases refer to § 8(b)(4)(A), while more recent references are to § 8(b)(4)(B).

5. 231 N.L.R.B. at 1097 (quoting Moore Dry Dock, 92 N.L.R.B. at 549).
by picketing the primary employer at the terminal or even at a common situs when a substantial number of transactions occur at its customers' locations. Additionally, the legality of the picketing was not affected by its effectiveness. The fact that neutral employees walked off the job upon seeing Allied pickets did not render the picketing illegal. Thus, "picketing, if otherwise lawful, may not be rendered unlawful merely because neutral employees elect to respect the picket line."7

Finally, the Board stressed that primary picketing does not become unlawful because of the existence of other locations where it could be engaged in with potentially less effect or impact on neutrals. Since picketing at the pour site itself was primary, the union was under no obligation to restrict its picketing efforts to the reserved gate, an area several hundred yards from the pour site and further removed from neutral employees.

The minority, relying on Denver Building Trades,8 argued that the union could not legally ignore the reserved gate and proceed to the pour site. Underlying the dissent was a concern that the majority had overlooked the statutory obligation to balance the legitimate rights of a union to place pressure on the primary employer against the legitimate rights of a neutral employer to be free from secondary pressure. In order to effectuate this accommodation it was necessary that the picketing be conducted to minimize the impact on neutral employers, with the qualification that the effectiveness of the union's primary picketing not be substantially impaired.

This result could have been achieved by limiting the picketing to Allied's reserved gate, where the picketers would not have come into direct contact with neutral employees. This would have afforded the neutral employer greater insulation from a secondary stoppage by its own workers. For the dissent, the union's failure to limit picketing to the reserved gate, and thereby minimize the impact of its action, indicated an intent to enmesh the neutral employer and its workers in the dispute, thus constituting illegal secondary activity in violation of section 8. The minority distinguished Schultz on the grounds that no reserved gate had been established at the premises.

It is this difference in the interpretation of Schultz that is one of the main issues in this article. The majority read Schultz as an ambulatory situs picketing case and argued that it stood for the proposition that ambulatory situs picketing was legal. The minority argued that Schultz, unlike Allied Concrete, was not a reserved gate case and therefore the holding on ambulatory situs picketing should not be control-

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7. 231 N.L.R.B. at 1098.
When *Allied Concrete* was appealed to the Ninth Circuit, the court adopted the dissent's interpretation of *Schultz*, as well as the union's duty to minimize the impact of its picketing on neutral employees and employers.9

The primary hypothesis of this article is that both *Schultz* and *Allied Concrete* belong in a broader classification of cases, that of "alternative situs" cases. They were neither strictly "reserved gate" nor "ambulatory situs picking" cases, although these factors were important to the disposition of the cases. Rather, in both cases the union had two alternative sites at which it could legally put pressure on the primary employer. By looking at the case law from *Schultz* to *Allied Concrete* within a broader "alternative situs" framework, rather than the narrower "ambulatory picketing," *Moore Dry Dock*, or "reserved gate" frameworks, the conflict between the rights of the primary union and rights of neutrals is illustrated. This conflict and not the presence of separate gates, moving trucks, or a permanent place of business, is what must be balanced in such cases. Moreover, the survey of NLRB case law will allow us to engage in a study of the shifting and contradictory efforts of the Board to establish standards for determining the legality of one variant of common situs picketing.

The bulk of the analysis will be organized chronologically, since only through an evolutionary framework do the ambiguities in these cases become obvious. Three time periods will be examined: 1949-53, when the Board was just beginning to confront the many problems of common situs picketing; 1953-64, when the Board adopted new standards to decide "alternative situs" cases; and 1964-77, when the Board came full circle back to the standards it advocated before 1953.

It will be argued that a return to the *Moore Dry Dock* standards for all "alternative situs" cases will best balance the conflicting interests of the union wishing to pressure its primary employer through picketing and the neutral employer's desire to remain free from this pressure. Such a standard will also serve other goals, namely, simplicity, fairness, and an avoidance of review by the Board of the effectiveness or lack of effectiveness of any particular tactic as a factor in whether or not an unfair labor practice has occurred.

II

THE PERIOD 1949-1953

The principal alternative situs cases in this period were *Schultz* and *Moore Dry Dock*. In *Allied Concrete*, as discussed above, the Board relied on both.

9. 607 F.2d 827, 831 (9th Cir. 1979).
The earlier case, *Schultz*, decided that striking employees of a trucking firm could picket a truck while it was being unloaded at a delivery site without violating section 8(b)(4)(A) (since 1959, section 8(b)(4)(B)). The tactic was for pickets to follow the trucks and to begin walking around the trucks on the customers' premises as soon as the replacement drivers began unloading the customers' shipments. The picket signs clearly stated that the dispute was only with Schultz and not with Schultz's customers. Picketing occurred at the customers' premises only when Schultz's replacement truck drivers were on the customers' premises making deliveries.

In its decision, the Board noted that all primary picketing has a secondary object if "secondary object" is defined as an intention to induce third parties not to do business with the primary employer. The key, the majority observed, is whether or not the primary employer is engaged in its normal business at the situs of the dispute. In this case the union had a choice of situses since the employer carried on its business at both its main terminal in New Jersey and at its customers' premises in New York City. The majority found that "in view of the roving nature of its business, the only effective means of bringing direct pressure on Schultz was the type of picketing engaged in by the [union]." \(^\text{10}\) The majority also referred to "the paramount right of a labor organization to engage in a primary strike for lawful objectives." \(^\text{11}\) Therefore, there was no requirement that the union "limit its appeal to the public in so drastic a manner." \(^\text{12}\) Finally, the majority favorably cited the trial examiner's finding that there was "no other place in New York City where the [union] could give adequate notice of its dispute with Schultz." \(^\text{13}\)

The inference to be drawn is that the majority believed the focus of the inquiry was on the primary employer. The union had the right to put pressure on the primary employer in as effective a manner as possible, provided the primary employer was engaged in its normal business at the situs of the picketing and provided that the union's activity was in no other way violative of the Act, *i.e.*, there was no independent evidence of a secondary object.

The minority directed its attention not to the primary employer but to the union and employees. The question for the dissent was where are the employees employed? The answer was, obviously, at the primary employer's place of business, and that was where the employ-

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10. 87 N.L.R.B. at 506.
11. *Id.* at 504 (emphasis in original).
12. *Id.* at 506.
13. *Id.* at 507 (emphasis added).
ees were to limit their picketing. Picketing elsewhere could have no other objective than to enmesh neutrals in labor disputes not their own.

The minority in *Schultz*, however, was less concerned with the union’s actions than with the long run implications of the majority’s opinion. The first concern was for the potential impact on neutrals from such a broadened definition of “place of employment.” To the minority, the *Schultz* doctrine removed from the protection of Section 8(b)(4)(A) all employers doing business with truckers, for it is their premises that become the primary premises of the trucker at least while his trucks are loading or unloading there. This we consider to be an unwarranted limitation of the intent of Congress to protect neutral third party employers at their own places of business. . . .

Additionally, the minority was concerned about the development of a “criterion of effectiveness,” observing that “[t]he right to strike is not equivalent to the right to conduct an effective strike.” They expanded on this as follows:

We are confounded by the application of the test of effectiveness to the legality of the [union’s] activities. We find no mandate upon us to guarantee a labor organization the right to conduct an effective strike as opposed to an abortive one. The sole test which we are deputized to apply is whether or not the activity in question is conducted within the rules for legality as set down by Congress. Based on both of these factors, the minority would have found a violation of section 8(b)(4).

In response to the question of the effectiveness criterion, the *Schultz* majority observed that:

Nowhere in our decision do we find that the right to strike encompasses all forms of effective picketing. We had thought it clear that our decision rests squarely on the proposition that [the union], by picketing Schultz’s business at the situs of the labor dispute, had engaged in primary, rather than secondary activity. It would seem self-evident that effective primary picketing is a common incident of a lawful strike. . . .

The majority, rather than directly confront the subjective issue of a minimum level of effectiveness, based their reasoning on an examination of the ambulatory picketing and the primary nature of that picketing. Since the employer was engaged in its normal business at the situs of the picketing and that picketing was otherwise legal, there was no violation.

*Schultz* was the Board’s first ambulatory picketing case and was

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14. *Id.* at 511.
15. *Id.* at 512.
16. *Id.* at 512-13.
17. *Id.* at 508 n.15 (emphasis in original).
one of the bases for the subsequent *Moore Dry Dock* decision. While *Schultz* required that common situs picketing be limited to the times the primary employer is located on the neutral site and engaged in its normal business, *Moore Dry Dock* added the restraints that picketing be close to the situs of the dispute and clearly identify that the dispute is with the primary employer. With these two decisions, the Board had established specific standards for determining the legality of common situs picketing. Curiously, while an objective standard had been set, the subjective ingredient of picketing "effectiveness" would later be used alternatively by Board liberals and conservatives to justify both legalization and proscription of alternative situs picketing.

III

**WASHINGTON COCA COLA**

A. The Establishment of the *WASHINGTON COCA COLA* Rule

In 1953, in *Brewery and Beverage Drivers and Workers Local 67 (Washington Coca Cola)*, the NLRB did an about face on the "place of employment" issue addressed in *Schultz*. The union represented the driver-salesmen of a soft drink distributor in the Washington, D.C. area. The driver-salesmen reported to the main bottling plant at the start and end of the work day and during the day, depending on the volume of business they were doing. The bulk of the work of these employees, however, was done from their trucks and on the premises of the retail outlet.

The union struck and began picketing at the firm's bottling plant. Picket crews of between four and six persons followed the soft-drink trucks on their routes. When a truck arrived at a store, one of the pickets followed the driver into the store, while the rest of the pickets patrolled near the truck. Later, when the driver-salesmen began parking away from the store in an attempt to insulate the retailers from the pickets, the pickets continued the picketing around the trucks. In addition, one picket followed the driver-salesman to the store and patrolled in front of the store, while the driver-salesman was inside.

The Board found the union's picketing of the driver-salesmen a violation of section 8(b)(4)(A). The Board based its ruling on the "fundamental principle" that the Act "proscribes picketing at the separate premises of employers who are not a party to the picketing union's primary labor dispute," and that there was sufficient evidence to indicate that the object of the picketing was to force the retail customers to sever

18. See text at note 5 supra.
19. 92 N.L.R.B. at 549.
their business relationship with Washington Coca Cola.\textsuperscript{22}

In order to make this ruling, however, the Board had to distinguish \textit{Washington Coca Cola} from \textit{Schultz} and \textit{Moore Dry Dock}. \textit{Schultz} was distinguished on the ground that the primary employer "had no permanent establishment where the trucks could be picketed \textit{within the State} where the labor dispute arose."\textsuperscript{23} \textit{Moore Dry Dock} was held inapposite as the primary employer there had no permanent situs where the union could publicize its dispute. The Board observed that the employer had a permanent place of business where the employees reported and where picketing took place and, therefore, the picketing of the employer's truck was not governed by \textit{Moore Dry Dock}.

It is surprising that the Board did not deal with whether the picketing restricted to the primary employer's site would have been effective. The closest the Board came to dealing with the issue of effectiveness was its observation that Washington Coca Cola's employees entered and left its main plant at least four times per day.\textsuperscript{24} As the Board and courts developed doctrine on the alternative situs issues during the 1950's, however, most of the cases cited \textit{Washington Coca Cola} as giving the union the right to put at least adequate pressure on the primary employer and as also limiting any further rights to picket once the adequate level of effectiveness had been met.

The most attractive attribute of \textit{Washington Coca Cola} was its objectivity. The Board's sole duty was to examine the facts to see if (1) the primary employer had a permanent place of business where its employees reported and which could be picketed and (2) if picketing occurred away from those premises with a potential impact on neutrals. If both of these objective conditions were satisfied, a violation of section 8(b)(4) would be found without an independent finding of the proscribed object. The presence of the proscribed object would be inferred from the picketing at the common situs, away from the primary employer's permanent place of business. In effect the Board had accepted the dissent's definition of "place of employment" in \textit{Schultz}.

Like \textit{Moore Dry Dock}, \textit{Washington Coca Cola}, as originally developed, did not deal with the effectiveness of the picketing. \textit{Moore Dry Dock} only looked at the four factors and then if satisfied, allowed the

\textsuperscript{22} Id. at 302-03.

\textsuperscript{23} Id. at 303 (emphasis added). Most interesting is the fact that the Board in distinguishing \textit{Schultz} used a criterion that was irrelevant to the \textit{Schultz} decision and probably irrelevant to the Act. The national scope of the Act makes the "within the state" argument difficult to comprehend. If this were a relevant consideration, the only picketing that would be a violation of the Act would be that which occurred within the city limits of Washington, D.C., while all picketing in the Washington suburbs in Maryland and Virginia would be legal. In addition, the Board made no finding as to whether all the ambulatory picketing indeed did take place within the city limits. It would appear that such a finding of fact would be essential in a ruling based on political subdivision.

\textsuperscript{24} Id.
picketing. *Washington Coca Cola* asked whether the employees could picket at their permanent “place of employment” away from neutrals. While *Moore Dry Dock* seems to tip in favor of the union and section 7 and *Washington Coca Cola* tips more towards the interest of the neutral employer, both provided the parties with objective standards for determining the legality of picketing in alternative situs cases. The problems developed when varying Board majorities tried to find a middle ground. They failed to define the allowable scope of picketing and thus deprived the parties of certainty and predictability.

**B. The Modification, Reestablishment and Decline of the *Washington Coca Cola* Rule**

Whatever advantages might have been inherent in a per se application of the rigid *Washington Coca Cola* rule evaporated when the Board and courts began to interpret and apply it to new cases. In *Teamsters Local 968 (Otis Massey)*, the Board qualified *Washington Coca Cola* by adding an “adequacy” requirement to its inquiry. During a strike warehouse workers picketed both the warehouse and various construction sites where Otis Massey employees, not represented by Local 968, were working.

The Board found the construction site picketing a violation of section 8(b)(4) for basically two reasons. First, the employees involved in the dispute were employed at the warehouse and not at the construction sites. Secondly, the Board noted that “the situs of the Union’s dispute with Otis Massey was the Otis Massey warehouse, and . . . the union could adequately publicize that dispute by limiting its picketing activities to that location.” *Washington Coca Cola* was cited as the authority for this reasoning.

The Court of Appeals for the Fifth Circuit reversed. The court first noted that nothing in the statute or the cases cited permitted the Board to establish the situs of the dispute at only one of the locations where the primary employer carried on its normal business activities. To permit the Board to do this, the court observed, would prevent other employees of the primary employer “from exercising their statutory right under Section 7 . . . to engage in mutual aid and protection and make common cause with their co-workers.” The court could have

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26. *Id.* at 279 (emphasis added).
27. *Id.* at 279 n.6.
29. 225 F.2d at 210. This distinction by the court between alternative situs cases involving fellow-employees of the same employer and those involving only employees of third-party employers may be an important one. Unlike the distinctions based on “effectiveness,” this distinction
simply concluded the opinion with this rejection of the *Washington Coca Cola* reasoning and reversed the Board on these grounds. This would have left the law of alternative situs picketing as it would have been under *Schultz*, *i.e.*, with an examination of the nature of picketing at the common situs. Although the result would be precisely opposite from the ruling in *Washington Coca Cola*, there would have been a *rule* established.

The court went on, however, to make an independent finding based on effectiveness.

Unless the truck drivers and warehousemen, only four in number, could persuade the other employees of Otis Massey to decline to do their employer’s installation work until the strike was settled, it is obvious that the strike was foredoomed to failure from its inception, for picketing only at the warehouse ‘situs’ where such other employees almost never came was but a useless and futile gesture.\(^{30}\)

The court seemed willing to guarantee the union some measure of success, a guarantee that the dissent in *Schultz* criticized and that the majority in *Schultz* declined to defend.

The Board independently moved toward an “effectiveness” doctrine and away from a per se “alternative situs” rule in *Painters Local 193 (Pittsburgh Plate Glass)*,\(^{31}\) decided just three months after its *Otis Massey* decision. In *Pittsburgh Plate Glass*, the General Counsel argued that picketing at construction sites where Pittsburgh’s employees were working violated section 8(b)(4) because Pittsburgh had a permanent place of business that could be picketed “effectively.”\(^{32}\)

The trial examiner accepted the General Counsel’s argument and relying on *Washington Coca Cola* observed that, “the Board, with Court approval, has permitted [secondary] picketing to a limited extent in cases where, if it was entirely prohibited, the unions involved would have had no other effective means of publicizing their disputes or grievances against the primary employers.”\(^{33}\)

Although the Board did not find the union in violation of the Act, it agreed with the interpretation of *Washington Coca Cola*, that the union had a right to picket effectively. Indeed, in *Washington Coca Cola*, the Board had “endeavored to make clear that the doctrine

\(^{30}\) Id.

\(^{31}\) Id at 455 (1954).

\(^{32}\) Id at 456.

\(^{33}\) Id at 461.
therein enunciated was being applied with due regard for the right of the Respondent Union to picket effectively, both from the standpoint of the general public and the particular employees involved in the labor dispute.\textsuperscript{34}

Thus on the basis of Washington Coca Cola, the union not only had the right to picket, but to effectively picket. Effectiveness was to mean more than adequacy as the Board had implied in Otis Massey. The Board implied that the union had a right to make some minimal level of contact with the primary employees and the public in order to have a sufficient opportunity to convey its message. And how much contact was to be sufficient? It would depend on the facts of the case, with the Board as the arbiter. Retrospectively, the Board apparently concluded that in Washington Coca Cola, contact with the primary employees four times per day at a minimum was sufficient for the union to picket effectively. In Pittsburgh Plate Glass, however, contact of twice a day, at a maximum, was insufficient to meet the test of effectiveness.\textsuperscript{35} Alternatively, in a later case, effectiveness was satisfied when the union’s picketing could reach most or all of the primary employees.\textsuperscript{36}

The Board had engrafted a subjective criterion of “effectiveness” onto the objective criteria provided by Moore Dry Dock and Washington Coca Cola. The danger of this approach was that the Board would become involved in regulating the tactics of the parties by passing judgments on “effectiveness.” The implicit advantage of Washington Coca Cola, as it was pronounced rather than as it was interpreted, was that it established an objective criterion for determining when picketing was unlawful in alternative situs cases. If the employer had a permanent place of business where the employees reported, picketing elsewhere would be an unfair labor practice. The Board in Pittsburgh Plate Glass, however, was making a ruling on legality based at least partially on its own subjective opinion of when the union’s picketing at the primary employer’s permanent place of business was “effective.” Whether or not the union’s picketing at the alternative situs was legal within Moore

\textsuperscript{34} Id. at 457.

\textsuperscript{35} Id. Indeed, the Board saw itself as narrowing the applicability of Washington Coca Cola. In distinguishing Pittsburgh Plate Glass from its very recent decision in Otis Massey, the Board observed that in the latter case it had applied Washington Coca Cola because the premises where the picketing occurred did not harbor the situs of the dispute between the union and the primary employer. Implicit in that decision was our view that the Washington Coca Cola doctrine would not be applied where the premises of the secondary employer harbor the situs of the dispute \ldots as in the instant matter.

\textsuperscript{36} NLRB v. Associated Musicians Local 802, 226 F.2d 900 (2d Cir. 1955), enforcing 110 N.L.R.B. 2166 (1954), \textit{cert. denied}, 351 U.S. 962 (1956). To enforce the Board’s decision, the court had to distinguish Otis Massey which had allowed common situs picketing, on the basis that a prohibition of the picketing in Otis Massey would have doomed the strike to failure.
Dry Dock was only a threshold question. Compliance with Moore Dry Dock would only imply legality if the union's appeals to employees at the permanent primary premises were "ineffective." There was a potential in the Board opinion for Board scrutiny and regulation of union tactics, and for uncertainty in application of the Act.

The "effectiveness" approach has several problems. It is unpredictable for all of the parties. This can lead to increases in Board litigation and a "chilling effect" on the use of section 7 rights. In addition, there is little statutory basis for "effectiveness" as a standard in either section 7 or section 8(b). Finally, the standard of "effectiveness" seems divorced from reality. If the picketing at the primary employer's permanent place of business is "effective," i.e., it discourages the primary employer's employees from reporting to work, then picketing at the alternative situs is unnecessary. Furthermore, if picketing at the alternative situs occurs, and if the primary employer's employees are absent from the alternative situs, such picketing can only have the proscribed object. Conversely, the union's picketing at the alternative situs when the primary employer's employees are present implicitly demonstrates the inability of the union to shut down the primary employer by picketing only at the primary employer's permanent place of business. Hence, from an economic standpoint, the alternative situs picketing occurs only when picketing at the primary situs has been "ineffective," thereby creating the need to extend the appeal to the primary employer's employees at the alternative situs.

A further erosion of the objective rule of Washington Coca Cola occurred in Sales Drivers Local 859 v. NLRB (Campbell Coal). In overturning a Board decision made on the basis of the "rigid rule" of Washington Coca Cola, the Circuit Court for the District of Columbia observed that use of such a rigid rule would unduly invade the application of the union's section 13 right to strike. The court said that evaluations should be made on a case-by-case basis.

The court's discussion of the Washington Coca Cola doctrine exemplifies the problems associated with the application and interpretation of the doctrine. There was doubt among all the parties in Campbell Coal as to precisely what the Washington Coca Cola doctrine meant. The union contended that its picketing had met the appropriate legal standard contained in the Moore Dry Dock criteria, but through Washington Coca Cola the Board had incorrectly added "another and abso-

37. See notes 114 to 116 infra and accompanying text.
39. 229 F.2d at 519. On remand from the Second Circuit, however, the Board found that the union had made direct appeals to neutral employees and picketed only when neutral employees were at the common site. Truck Drivers & Helpers Local 728, 116 N.L.R.B. 1022 (1956), enforced, 249 F.2d 512 (D.C. Cir. 1957), cert. denied, 355 U.S. 958 (1958).
lute prerequisite that no situs for effective picketing other than the common one be available.” The court noted that in a previous case, however, the Board had held that picketing at a common situs was unlawful when there exists “a primary place of business in the locality which can be picketed by the labor organization.” There was no mention of effectiveness. Yet in its Campbell Coal brief, the Board argued that the question was “whether Campbell, the primary employer, had separate premises in the area which provided the union with a fixed and adequate base for carrying on its primary activity.” Finally, the court cited the “adequate publicity” rule used by the Board in its Otis Massey decision.

Thus, the District of Columbia Circuit saw the Board’s application of Washington Coca Cola as a rigid “adequate publicity” rule. For the Board, this rule was not based on an analysis of some criterion of adequacy, but rather on the mere existence of a permanent place of business where the union could carry on its picketing. As the court observed, the Board’s decision below had rested “solely upon the fact that Campbell had other places of business, not common with a neutral employer, which could be and were being picketed.” The court then observed that it was incorrect to infer that concerted activity had the proscribed object merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another, even where the activity could be carried on at a place where the primary employer alone does business. The existence of a common site, of such incidental effect, and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive.

The District of Columbia Circuit, therefore, took the debate into a new area. To the court, the presence of a permanent place of business where the primary employer could be picketed was not to be conclusive evidence that picketing elsewhere was illegal. Neither, however, was it to be ignored. The Board would be directed to search for the proscribed object, based on all of the evidence. The presence of a primary employer’s permanent place of business, where the picketing could “effectively” occur with less impact on neutrals than picketing at the common situs, was one factor to be considered by the Board in its search for the proscribed object.

40. 229 F.2d at 516 (emphasis added).
41. Id at 516, citing Albert Evans, Trustee of Local 391, 110 N.L.R.B. 748 (1954).
42. Id at 517 (emphasis added).
43. Id at 518.
44. Id.
45. Id at 517.
46. Id.
The court’s decision dramatically highlighted the uncertainty that had been attached to the Board’s Washington Coca Cola doctrine. Was it a per se “alternative situs” rule or did it require some other independent finding of a minimal level of adequacy or effectiveness? The court implied that a rigid application of a Washington Coca Cola doctrine, however defined, was unacceptable. The doctrine absolved the Board from making an inquiry to determine whether the picketing’s objective was primary or secondary and could conceivably interfere with the union’s section 13 right to strike.\textsuperscript{47}

\textit{NLRB v. Truck Drivers & Helpers Local 728 (National Trucking)}\textsuperscript{48} gave the Fifth Circuit an opportunity to isolate a situation where the failure to limit picketing to the primary employer’s permanent place of business was conclusive evidence of the illegal nature of the common situs picketing. The union established picket lines at National’s terminal, which National’s employees crossed approximately forty times each day. The union also established a picket line at the Ford Motor Company plant where National’s employees picked up vehicles for transport. The union’s picket line at Ford was only thirty feet from the Ford employees’ entrance.

The court found that all\textsuperscript{49} of the primary employees could be reached by the picket line established at National’s terminal. The logical inference of the picketing at the common situs was to encourage Ford employees to cease work since “the establishment of a picket line at Ford was plainly superfluous if intended only to publicize its dispute with National among National employees.”\textsuperscript{50}

The Fifth Circuit was retreating from the spirit, if not the wording, of the effectiveness criterion implicit in the “useless and futile gesture” basis for its decision in \textit{Otis Massey}.\textsuperscript{51} In order to do this, however, the court had to distinguish \textit{National Trucking} from \textit{Otis Massey}. In \textit{Otis Massey}, the court said, “the union was permitted merely to picket the common premises in order to reach other employees of the primary employer who . . . never came to the primary employer’s . . .”\textsuperscript{52} permanent place of business. In \textit{National Trucking}, however, all National’s employees could be reached at National’s terminal.

Thus the court moved away from examining the effectiveness of the picketing and toward a rigid \textit{Washington Coca Cola} rule of “per se alternative situs.” The picketing away from the primary employer’s permanent place of business would be unlawful if all the employees of

\textsuperscript{47} \textit{Id.}
\textsuperscript{48} 228 F.2d 791 (5th Cir. 1956), enforcing 111 N.L.R.B. 483 (1955).
\textsuperscript{49} \textit{Id.} at 796 (emphasis in original).
\textsuperscript{50} \textit{Id.} at 795.
\textsuperscript{52} 228 F.2d at 796 (emphasis in original).
the primary employer could be reached at the primary employer's permanent place of business. The legal basis for the per se approach was the inference that picketing conducted at an alternative situs when all employees could be reached at the employer's primary place of business must have as one of its objectives a purpose prohibited by section 8(b).\(^{53}\)

The Fifth Circuit's decision in *National Trucking* laid the foundation for a series of Board decisions which would become the basis for the per se rule of *Washington Coca Cola*. In several cases, all decided within one year after *National Trucking*, the Board found unlawful common situs picketing where the primary employer had a permanent place of business where the union could publicize its dispute.\(^{54}\) It is noteworthy that in these cases, the Board found that all of the primary employees could be reached via picketing at the primary site with workers crossing the picket line at the beginning and end of the work day. In this context, the *Moore Dry Dock* standards were irrelevant.

Although the Board was certain of itself on the *Washington Coca Cola* rule, there was some inconsistency within the courts of appeals. Two cases had been enforced by the First and District of Columbia Circuits.\(^{55}\) In *NLRB v. Local 294, International Brotherhood of Teamsters (K-C Refrigeration Transport Co.)*,\(^{56}\) however, the Second Circuit criticized the *Washington Coca Cola* doctrine.

The Second Circuit's criticism of *Washington Coca Cola* was not based on the section 7 right to strike, nor was it based on the implicit criticism of the use of *Washington Coca Cola* as a per se rule, as the District of Columbia Circuit had done in *Campbell Coal*. Rather, the Second Circuit questioned the Board's automatic drawing of an inference of the prohibited object based on "the mere availability of a 'permanent establishment that may be picketed effectively.'"\(^{57}\) While the court recognized that picketing away from the primary employer's permanent establishment might have an object other than the persuasion of the primary employer's employees, this did not necessarily mean that the object of the union's picketing was prohibited by section

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\(^{53}\) *Id.*

\(^{54}\) Teamsters Local 657 (Southwestern Motor Transport), 115 N.L.R.B. 981 (1956); Sheetmetal Workers Local 51 (W.H. Arthur), 115 N.L.R.B. 1137 (1956); Teamsters Local 659 (Associated General Contractors of Omaha), 116 N.L.R.B. 461 (1956); United Steelworkers Local 5246 (Barry Controls), 116 N.L.R.B. 1470 (1956); aff'd, 250 F.2d 184 (1st Cir. 1957); General Truck Drivers Local 270 (Diaz Drayage Co.), 117 N.L.R.B. 885 (1957), aff'd, 252 F.2d 619 (D.C. Cir.), cert. denied, 356 U.S. 931 (1958).

\(^{55}\) General Truck Drivers Local 270 v. NLRB, 252 F.2d 619 (D.C. Cir.), cert. denied, 356 U.S. 931 (1958); United Steelworkers Local 5246 v. NLRB, 250 F.2d 184 (1st Cir. 1957).

\(^{56}\) 284 F.2d 887 (2d Cir. 1960), enforcing 124 N.L.R.B. 1245 (1959). Despite its criticism of the *Washington Coca Cola* doctrine, the court enforced the Board's order on the basis of the union appeals to a shop steward for cooperation.

\(^{57}\) 284 F.2d at 891.
The court speculated that the purpose of the ambulatory picketing may have been to appeal to secondary employers who never came to K-C's premises, an objective that was not necessarily unlawful under the Act.\(^5\)

Given the uncertainty involving alternative situs picketing, it is not surprising that in 1962 a newly reconstructed Board overruled Washington Coca Cola in IBEW Local 861 (Plauche Electric).\(^59\) In rejecting the Washington Coca Cola rule, the majority defined it as having been "construed by the Board as imposing a rigid rule that picketing at the common situs is unlawful when the primary employer has a regular place of business in the locality which can be picketed."\(^60\) No mention was made of effectiveness.\(^61\) Rather, the Board determined that the presence of a permanent place of business for the primary employer was one factor to be considered in ascertaining the union's object. The implication, then, was that the Board should not get involved in regulating the tactics the union used in a labor dispute. The only relevant inquiry was to be the union's purpose, and that purpose was to be discerned from all the relevant facts in the case. Thus, in Plauche Electric, the majority, finding no independent evidence of unlawful purpose, placed the common situs picketing up against the Moore Dry Dock criteria. Since the picketing met these criteria, no unlawful purpose could be inferred.\(^62\)

The minority attempted to turn back to the subjective "effectiveness" criterion. Because the record indicated that Plauche's employees reported to its permanent premises at least twice a day, the minority found that the union "could have effectively picketed at Plauche's place of business in order to put pressure on Plauche through Plauche's own employees."\(^63\) Indeed, the minority observed:

[T]he majority did not say that the [union] could not have effectively picketed at Plauche's place of business. If they disagree with our conclusion on that question, that would be a reason for disagreeing with our ultimate conclusion . . . ; It is not, however, a reason for abandoning those principles.\(^64\)

Despite the Board's wording in Plauche Electric that it would consider the presence of a primary employer's permanent place of business which could be picketed "effectively" as one factor in ascertaining the object of the picketing, in four alternative situs cases decided within twelve months of Plauche Electric, the new Board majority did not find

\(^{58}\) Id.
\(^{59}\) Id. at 250 (1962).
\(^{60}\) Id. at 252.
\(^{61}\) Id. at 252-53.
\(^{62}\) Id. at 255.
\(^{63}\) Id. at 259.
\(^{64}\) Id. at 259 n.14.
such a presence to be of sufficient weight to support a finding of a violation of section 8(b)(4).\textsuperscript{65} The inference to be drawn was that despite its opinion in \textit{Plauche Electric}, the Board was eliminating the presence of a permanent place of business for the primary employer and the attendant “effectiveness” issue as a factor to be considered at all in determining illegality.\textsuperscript{66}

This was a concern of the Fifth Circuit in \textit{Brown Transport Corp. v. NLRB}.\textsuperscript{67} The court, in overturning a finding that no violation of section 8(b) had occurred, admonished the Board to play by its own rules. It held that the Board had given no weight to the presence of a permanent place of business away from the picketed site, despite its rules as outlined in \textit{Plauche Electric}.\textsuperscript{68}

\section*{IV}

\textbf{A CONTRARY TREND: MINIMIZATION OF IMPACT}

One line of cases developed the counterbalance to a union’s right to “effectively” picket by developing a union duty to minimize the impact of its picketing on neutrals. Apparently, a union could picket enough to achieve “effectiveness” but it would also have a positive duty to see it went no further.

In 1956, in \textit{Retail Fruit & Vegetable Clerks Local 1017 (Crystal Palace Market)},\textsuperscript{69} this standard was announced. The key question in the case was whether the picketing had been conducted so as “to minimize its impact on neutral employees. . . without substantial impairment of the

\begin{itemize}
\item\textsuperscript{65} Plumbers & Pipefitters Local 471 (Wyckoff Plumbing), 135 N.L.R.B. 329 (1962); IBEW Local 59 (Andersen Electrical Service Co.), 135 N.L.R.B. 504 (1962); United Plant Guard Workers (Houston Armored Car Co.), 136 N.L.R.B. 110 (1962); Teamsters Local 279 (Wilson Teaming Co.), 140 N.L.R.B. 164 (1962).
\item\textsuperscript{66} Interestingly, in \textit{United Marine Div. Local 333 (Sea-Land Service, Inc.)}, 148 N.L.R.B. 331 (1964), the Board did give the presence of a permanent place of business for the primary employer some weight in a finding of violation. Here, however, the union’s common-situs picketing did not comply with the \textit{Moore Dry Dock} criteria. Thus, the Board was apparently not inclined to give weight to the presence of a permanent place of business for the primary employer in cases where such a factor might be the only support for a finding of a violation, but was inclined to give it weight in \textit{Sea-Land Service} where such a finding was superfluous.
\item\textsuperscript{67} \textit{Id.} at 39. In \textit{Warehousemen & Helpers Local 287 (Buck's Butane-Propane Serv., Inc.)} 186 N.L.R.B. 187 (1970), the Board, in a case in part involving alternative-situs picketing, accepted a trial examiner’s recommendation which gave no weight to the presence of a situs owned by the primary employer which could have been picketed. Apparently, this refusal was due to the confused state of the law at the time. The trial examiner noted:

\begin{itemize}
\item[a] among possible positions are that the existence of a principal situs is (1) irrelevant or (2) relevant but not decisive or (3) decisive. Either of the latter positions would currently appear to be contra to the current \textit{Moore Dry Dock} criteria as to proper ambulatory picketing . . . . I do not consider that I should directly attempt to reevaluate the elements and matters leading thereto but will seek to consider matters not covered thereby.
\item\textsuperscript{68} 116 N.L.R.B. 856, \textit{aff'd}, 249 F.2d 591 (9th Cir. 1957).
\end{itemize}
effectiveness of the picketing in reaching the primary employees." In Crystal Palace Market, the union picketed outside a building owned by the employer which had locked them out. The building contained sixty-four retail food stands and shops, of which only four were directly operated by the employer. The Board found a section 8(b)(4) violation based on the union’s failure to accept the employer’s offer to limit the picketing to patrolling inside the market in front of only the employer’s individual stands.

The dissent criticized the majority for venturing too far into the regulation of union tactics. To the dissent, the opinion’s “minimization of impact rule” was looking not only at what a union did and did not do, but what it could and should have done.71

This doctrine remained dormant from 1956 until the early 1970’s. The unique facts of Crystal Palace Market did not fit well into the earlier documented categories. In addition, the action of the employer inviting the union to picket inside the building was quite unusual.

The implementation of the Crystal Palace Market “minimization of impact” rule began in 1970 with voluntary union efforts in Truck Drivers & Helpers 592 (Estes Express),72 in which the Board found that a union’s ambulatory picketing at the premises of neutral employers was in compliance with Moore Dry Dock. Most interesting, however, was that in Estes Express the union had, on its own initiative, sent letters to secondary employers informing them of its intention to engage in Moore Dry Dock style ambulatory picketing at their terminals whenever Estes trucks might be present. The union requested permission to enter the secondary premises in order to picket as closely as possible to the Estes trucks. The letter further informed the secondary employers that if permission to enter their premises was denied, the union would picket outside their gates. The Board considered this action by the union a legitimate attempt to ensure that the ambulatory picketing would conform to the Moore Dry Dock standards, and not an attempt to coerce the secondary employers to stop doing business with Estes.73

The second in this line of cases was Teamsters Local No. 200, (Reilly Cartage, Inc.).74 The union there also sent letters to secondary employers informing them that it would picket Reilly’s trucks “where found.”75 The union further told the secondary employers that the picketing would be conducted around Reilly’s trucks, but that if the secondary employer did not give the union written permission to enter

70. Id. at 859 (emphasis in original).
71. Id. at 871-72.
73. Id. at 791.
75. Id. at 309.
the secondary premises, the picketing would take place at the entrances while the Reilly trucks were present.

In ruling that the union's picketing did not violate section 8(b)(4), the Board found that the union's unanswered letter to the secondary employers requesting permission to enter their premises "resulted in a fair assumption . . . [by the union] that access . . . would be denied." Therefore, picketing at the entrances to the secondary premises conformed to the third Moore Dry Dock criterion, and had not "otherwise evidenced a secondary object." Moreover, the Board added "it is also true that neutrals seeking to minimize the effects of the dispute could easily have invited the pickets to the immediate vicinity of Reilly trucks when pickets first appeared at their entrances."

In Estes Express and Reilly Cartage, the union on its own initiative sent letters to the neutral employers requesting permission to picket. In Teamsters Local 612 (AAA Motor Lines, Inc.), the Board appeared to take the position that such a request was required in order for picketing outside the neutral's premises to be legal. In AAA Motor Lines, the union ordered its pickets to remain outside the neutral employer's premises while picketing the AAA's trucks. They were only to enter the neutral's premises if requested to do so by the neutral. The Board accepted the administrative law judge's recommendation that the union be found in violation of section 8(b)(4). The administrative law judge had ruled that the initiative to make the request in such cases lies with the picketing union.

Crystal Palace Market and the rule of AAA Motor Lines came together in Wire Service Guild Local 222. There, the union struck United Press International (UPI), which maintained its Miami offices in the Miami Herald Building. The union set up picket lines outside the Herald Building which UPI bargaining unit personnel passed when going to and from work.

The day the strike began, the union received a letter from the Herald's counsel indicating that picketing could only occur in the corridor outside the UPI office. The union informed the Herald's general manager that the pickets would be removed from around the Herald Building if UPI employees left the building. The Herald's general manager declined to ask UPI to leave. Unfair labor practice charges were subsequently filed alleging that the union failed to picket reason-

76. Id. at 305.
77. Id.
78. Id.
80. Id. at 610.
81. 218 N.L.R.B. 1234 (1975).
82. Id.
ably close to the situs of the dispute in violation of the third *Moore Dry Dock* criterion.

The administrative law judge found the union in violation of the Act, basing his decision primarily on *Crystal Palace Market* and *AAA Motor Lines*. He found that by refusing to respond to the Herald's request that picketing be limited to the hallway outside the UPI offices, the union had not attempted to minimize the impact on neutral employees and, therefore, the picketing evinced the forbidden secondary objective. In order to demonstrate its legal objective the union was required to accept the neutral employer's invitation.

The Board declined to adopt the administrative law judge's recommendations, saying that neither *Crystal Palace Market* nor *AAA Motor Lines* was relevant. In *Crystal Palace Market*, the Board observed that neutral employees had been induced by the striking union not to cross its picket line. Furthermore, the picketing in *Crystal Palace Market* had not been in all instances conducted in the "immediate vicinity of any business operated by the primary employer." In addition, the Board observed that in *Crystal Palace Market*, "there was enough physical space inside the area to which the picketing union was invited to effectively picket." The Board found none of these circumstances present in *Wire Service Guild Local 222*.

*AAA Motor Lines* was distinguishable because unlike *Wire Service Guild Local 222*, it involved picketing at the neutral employer's premises, and not at the "primary employer's normal place of business. . . ."

Thus, in *Wire Service Guild Local 222*, the Board found that the hallway space offered by the Miami Herald was not sufficient for the "three or four pickets which the Respondent [union] felt necessary for effective picketing." Consequently, the majority concluded that if the union had confined its picketing to the hallway, its ability to reach UPI personnel working in other parts of the building "on a daily basis would have been severely impaired." Moreover, the Board found that the union would have been prevented from appealing to Herald employees who supplied UPI with information, photographs, and other services. Absent other evidence to indicate the forbidden secondary objective, the Board concluded that the picketing was lawful since it

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83. 116 N.L.R.B. 856, aff'd, 249 F.2d 591 (9th Cir. 1957).
84. 211 N.L.R.B. 608 (1974).
85. 218 N.L.R.B. at 1235.
86. *Id*.
87. *Id*.
88. *Id*.
89. *Id* at 1236.
90. *Id*.
had been conducted "reasonably close to the situs of the primary dispute and met all reasonable standards to minimize enmeshing neutral employers." 91

The dissent found the union had tried to enmesh neutrals in the dispute. By picketing outside the building, rather than in the hallway, the union had made "no effort whatsoever to limit the picketing so as to minimize its effect on neutral employers." 92 The fact that the picketing in AAA Motor Lines was at a secondary employer's premises did not make AAA Motor Lines inapposite. The important point for the dissent was that it occurred at a common situs. 93

The dissent also criticized the majority for relying wholly on the Moore Dry Dock standards. Moore Dry Dock, the dissent said, was not an end in itself, but merely an evidentiary guide to aid in determining if picketing had a secondary objective. Even assuming the picketing met all four Moore Dry Dock tests, it would not necessarily mean that the picketing outside the building did not have a secondary object. 94

Finally, the minority insisted that the hallway afforded sufficient space for the three or four pickets which the union felt were necessary. Further, the union had no legal right to reach any but primary employees, and the people who serviced UPI equipment in other parts of the building were not UPI primary employees at all. Therefore, the union could have reached all primary employees by picketing in the hallway. 95

The majority had made its decision based on a finding of effectiveness. The minority, however, had attempted to engraft the Crystal Palace Market "minimization of impact" criterion onto the three trucking cases to impose an additional burden on the union.

Allied Concrete, discussed above, 96 followed shortly after Wire Service Guild Local 222. Instead of basing their findings on the effectiveness of the picketing at the reserved gate or an analysis of the adequacy of union tactics, the Board majority reasserted the policy of

91. Id.
92. Id. at 1237.
93. The dissenting Board members considered it improper for the union to raise questions with regard to the effectiveness of picketing in the hallway in order to justify continued outside picketing, since no such question had been raised at the time of the picketing. Therefore, according to the minority, the alleged ineffectiveness of the inside picketing could not be relied upon to show that the union's "continuation of outside picketing did not evidence a secondary object." Id. at 1238.
94. Id.
95. Id.
96. 231 N.L.R.B. 1097 (1977), rev'd, 607 F.2d 827 (9th Cir. 1979). The earlier discussion of the case is in the text accompanying notes 1-7 supra.
Schultz and Moore Dry Dock. The Board held that if the ambulatory picketing met the four relevant criteria and if there was no other evidence of a secondary object, the picketing was lawful.

Thus, in the process of deciding Allied Concrete, the Board came full circle and attempted to lay aside twenty-five years of administrative and judicial debate on the proper standards to be used in judging the lawfulness of union picketing in alternative situs cases. The majority, at least, attempted to reject the use of "adequacy" or "effectiveness" as a standard. The Board, however, was frustrated in its attempt.

A vocal dissent continued to press for application of the "minimization of impact" standard. Use of such a standard was the only way the Board could accommodate the dual NLRB v. Denver Building & Construction Trades Council objectives of protecting the section 7 rights of the primary union and the section 8(b)(4) rights of neutrals. The minority would have required the union to restrict its picketing to the reserved gate despite the fact that the reserved gate was established by the primary employer.

On appeal, the Ninth Circuit, after a discussion of the 8(b)(4) obligation to ascertain the object of the picketing, and after noting that the union has a "duty to picket with restraint," adopted the dissenting opinion of members Penello and Walther. The court found that the "union's picketing must 'be so conducted as to minimize its impact on neutral employees [and employers] insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees [and employer].'"

As a result of this decision, the union must now do everything possible to minimize the impact of its picketing on neutrals. This could

97. 87 N.L.R.B. 502 (1949).
98. Id. at 1099.
100. 231 N.L.R.B. at 1099.
101. Id. at 1100. As the dissent observed:
[w]e attach no significance to the fact that the gates here were established by Allied, the primary employer. For, such was done only after full consultation and agreement between Allied and neutral employer. Moreover, while reserved gates are often set up at the initiative of secondary employers, it makes no legal or substantive difference who establishes them.
102. Allied Concrete, Inc. v. NLRB, 607 F.2d 827, 829-30 (9th Cir. 1979).
103. Id. at 830.
104. Id. at 831.
mean complying with all secondary employer requests to limit the picketing to a location other than that of the union's choice, even when the picketing at the location of the union's choice complies with the Moore Dry Dock criteria. The court's decision in Allied Concrete will once again force the Board to judge the union's tactics and their effectiveness. Such a subjective analysis will provide the parties with neither predictability nor stability. The Board will continue to make factual determinations without providing a consistent view of the appropriate balance between section 8(b)(4) and section 7.

V

CONCLUDING OBSERVATIONS

In Schultz106 and Moore Dry Dock,107 the Board created the legal foundation for the extension of picketing to an alternative situs. When the union's picketing conforms to the Moore Dry Dock guidelines and the union's conduct is not otherwise demonstrative of a secondary objective, the union may appeal to employees at the common situs. Indeed, such picketing is not unlawful even though it succeeds in inducing secondary employees to stop working with employees of the struck firm or succeeds in influencing other neutrals not to cross the picket line. Under Moore Dry Dock the Board considers the picketing at the common situs without necessarily giving attention to other possible locales for union picketing.

The modification of Moore Dry Dock in Washington Coca Cola reflected the Board's concern with its duty under NLRB v. Denver Bldg. & Const. Trades Council108 to balance "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in a primary labor dispute and of shielding unoffending employers and others from pressures in controversies not their own."109 As a result, common situs picketing was prohibited if the primary employer had a permanent place of business which could be picketed. Apparently, the union would retain its right to pressure the primary employer, and neutrals at the common situs would remain uninvolved. At its inception, although its effect on picketing was restrictive, Washington Coca Cola presented the union with clear guidelines as to what would be considered unlawful picketing. The difficulty with this approach commenced when Board and judicial opinions modifying the indicated picketing of the struck firm's primary situs would not be "effective" or "adequate."

106. 87 N.L.R.B. 502 (1949).
109. Id. at 692.
As a further complication, criteria for determining adequacy or efficacy were never identified. Was picketing that enabled the striking union to appeal to the primary employees twice daily adequate? Did it matter if the employees spent most of the day working elsewhere? In short, was it actual work time that primary employees spent at the struck premise or number of contact points that the striking union maintained with the primary employer's workers that was important, or a combination of the two approaches?

The effort to determine "effective" or "adequate" picketing was successful only in generating confusion and conflict between the Board and the courts. Ultimately, in an effort to objectify Washington Coca Cola, the Board dramatically simplified its policy by determining picketing "effective" if it could reach all of the employees of the struck firm. The number of contact points and the amount of work time spent at the struck situs were soon ignored as unimportant considerations. Board decisions made it clear that alternative situs picketing would be unlawful if there was at least one occasion when all primary employees entered the premises of the struck firm.

The logic of this approach was never clearly disclosed. Perhaps it reflected the view that the union was entitled to only a minimum level of "effectiveness" when there was a potential for injury to neutrals. Alternatively, it may have reflected the view that increasing the number of contact points in which the striking union could appeal to primary employees would not increase the effectiveness of the picketing. Thus, an employee of the primary employer who has crossed the picket line once would arguably do so again when confronted by the primary union a second or third time at a common situs. Consequently, the extension of picketing to the common situs with its potential for injury to neutrals was superfluous and therefore unnecessarily injurious to neutrals. This view leaves unanswered why a worker who crosses the picket line at the situs of the struck firm would not be less inclined to do so at a neutral site where she or he is (a) away from the direct scrutiny of the primary employer, and (b) under more pressure where the neutral employee work force may be unionized and may be reluctant to work with union violators.

With Plauche Electric,\textsuperscript{110} the Board, possibly in an attempt to avoid the thicket of determining "effectiveness" in a myriad of factual situations, reasserted the Moore Dry Dock criteria and moved to once again permit union picketing at a common situs even when the primary employer had a permanent place of business which could be picketed. The presence of such a permanent place of business was now to be used as one factor that would cause the Board to look beyond Moore Dry

\textsuperscript{110} 135 N.L.R.B. 250 (1962).
Dock. But despite the admonition of the Fifth Circuit, the Board was not inclined to give the primary employer's permanent place of business a great deal of weight. Implicitly, objectivity and the ease of administration of the Act were to take precedence over the Denver Building Trades duty to balance the competing interests of the primary union and neutrals on a case-by-case basis.

Recently, however, a vigorous Board minority has reasserted the balancing duty of the Board through a revitalization of the “minimization of impact” rule first pronounced over twenty years ago in Crystal Palace Market. The Ninth Circuit accepted the dissenting Board's resurrection of the “minimization of impact” rule in Allied Concrete. This minimization is to be accomplished through a union duty derived from three ambulatory situs picketing cases litigated in the early 1970's. As this duty has evolved in the alternative situs cases, there would be a substantial increase in the sources of constraints imposed on the union seeking to comply with its duty to “minimize the impact.”

The union's activities must be scrutinized not only in terms of what it did and did not do, but in terms of what it could and should have done. At times, there would be requirements that the union: (1) on its own, initiate ways to limit the scope of its picketing; (2) comply with the suggestion of neutrals to better insulate them from injury; and, if the minority’s opinion in Allied Concrete were taken to its logical conclusion, (3) comply with the dictates of the primary employer concerning the procedures the union should follow while picketing.

This anomalous result is not the sole by-product of the move away from objective standards. This move could also result in substantial limitations on the union's freedom to exercise its legal rights under the

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111. 116 N.L.R.B. 856, aff'd, 249 F.2d 591 (9th Cir. 1957).
112. 607 F.2d 827 (9th Cir. 1979).
113. The thrust of NLRB v. Insurance Agents, 361 U.S. 477 (1960), was that the Board should not regulate the tactics parties may use to pressure each other into agreement. In Insurance Agents, the union had engaged in what amounted to a work slowdown while collective bargaining was proceeding. The Board found this to be evidence of bad faith bargaining in violation of § 8(b)(3) of the Act. The Supreme Court reversed the Board and upheld the ruling of the court of appeals. The Court said:

   The Board's assertion of power under Section 8(b)(3) allows it to sit in judgment upon every economic weapon the parties to a labor contract negotiation employ . . . . We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.

   361 U.S. at 497-98.
114. The Board in Allied Concrete made a distinction between a reserved gate established by the site owner or general contractor, on the one hand, and Allied, the primary employer and subcontractor on the other. The Board seemed to be of the opinion that by establishing the reserved gate, Allied, the primary employer, would be able to make all decisions concerning placement of signs. This, the Board felt, gave Allied more control over the placement of the signs and, consequently, the location of the picketing, than was appropriate for a party with the status of a subcontractor. 231 N.L.R.B. at 1099.
Act. Section 10(1) of the Act requires the Board (in reality the regional director) to seek an injunction if it finds that there is reasonable cause to believe that a complaint should be issued on an 8(b)(4)(B) violation. If there are no standards to guide the union in these cases, the union may find itself subject to an injunction and a possible contempt citation on the basis of vague and shifting standards as to what constitutes permissible activity. Indeed, the “minimization of impact” standard may create a situation where the criteria for lawful picketing may be unknown to the union and the illegality of the picketing defined by the Board for the first time in the pending case.

Federal district courts routinely uphold the Board’s (i.e., the regional director’s) position. While the Board’s position may be challenged in a subsequent unfair labor practice proceeding, once issued, the injunction will force the union to curtail the alternative situs picketing despite the fact the picketing may not subsequently be found to be in violation of the Act. Only in rare circumstances will the economic dispute run the course of time required by Board or judicial disposition of the unfair labor practice case. Consequently, in cases in which the regional director’s section 8(b)(4)(B) complaint is not upheld, the union’s potential to legally picket is limited. In contrast to employers involved in section 8(a) unfair labor practice proceedings, the union may be unable to continue its potentially legal tactics while litigating the extent of its rights under the Act. Indeed, the outstanding injunction forcing the union to terminate alternative situs picketing may, by immunizing the primary employer from substantial economic pressure, compel the union to quickly settle the contractural dispute. In short, the “minimization of impact” rule may result in an arbitrary mechanism for restricting union bargaining power and the use of legal tactics by the union in economic disputes with primary employers.

Both the original Washington Coca Cola rule and Moore Dry Dock provide easily applicable rules. Washington Coca Cola, however, was never fully accepted in this form. It unreasonably limited the use of section 7 rights, since it prevented employees from taking concerted action with fellow employees working at different sites. The history of Washington Coca Cola also shows its unacceptability. The exceptions and limits placed on it were attempts to reduce its harshness. These limits only led to greater confusion and distinctions that were beyond prediction.

Moore Dry Dock, however, represents a reasonable and workable effort to accommodate the goal of objectivity in formulating standards and the flexibility required to protect neutrals. Moore Dry Dock presents the Board with accepted criteria, the violation of which demonstrates that the primary union has shifted its focus away from the
primary employer to that of the neutral, with the intention to shut the neutral down as if it were the primary employer. Conversely, adherence to the Moore Dry Dock guidelines indicates the union's desire not to enmesh the neutral employer in the dispute. Significantly, while providing the union with clear notice as to how picketing must proceed at the common situs, the Board is sufficiently cautious to consider other factors which might overcome the presumption of legality attached to union picketing conforming to the guidelines. Here, however, the proper approach in determining the nature of these other factors should require the Board to focus its inquiry upon union conduct which, like the violations of Moore Dry Dock, demonstrates a clear intent to enmesh the neutral employer. Such conduct would include direct appeals to secondary employees to quit work and threats of an unlawful work stoppage to the neutral employers who do not terminate their business relationship with the struck firm.

This approach would avoid any Board consideration of effectiveness or adequacy of union tactics. It should avoid the uncertainties of the prior Board efforts. Hopefully, it would also lead to an end to the constant fluctuations in Board policies that have characterized the entire period.

The approach also balances more equitably the neutral's right to be free from injury and the union's right to conduct primary picketing. Furthermore, it satisfies considerations of due process which mandate that notice be given to unions concerning the permissible scope of picketing at alternative situses. Moore Dry Dock, accompanied by Board scrutiny of the relevant objective of union conduct, provides a more satisfactory and definitive test than the "minimization of impact" rule. It also represents a standard that is readily understood by employers, unions, and regional directors and therefore provides a framework whereby decisions will be of precedential value to the parties. At a time of growing NLRB backlog, and ongoing concern about the fairness of NLRB remedies in unfair labor practice cases, these considerations are critical.
