

of employees of privately owned companies to strike for legitimate labor objectives, even where the consequences may be an interruption of a vital utility service necessary to the public's health and welfare. However, this does not preclude the state from limiting the right to strike of employees of truly state-owned instrumentalities.

NELSON G. ROSS

Labor Law—Secondary Boycotts—Picketing Railroad Right-of-way.—*Carrier Corp. v. NLRB.*¹—A complaint was filed by the National Labor Relations Board against Local 5895, United Steel Workers Union, whose members went on strike against Carrier Corporation on March 2, 1960. Picket lines had been established and maintained at numerous entrances to the plant, including an entrance to a railroad spur line on a right-of-way owned by the New York Central Railroad adjacent to Carrier's property. The spur line was used to provide rail service to Carrier and other companies. The railroad tracks were enclosed by a fence, part of which was a railroad gate through which the trains entered and left the spur. The Railroad's operations were not disturbed until March 11 when, pursuant to arrangements made by Carrier, the Railroad attempted to "spot" empty box cars at Carrier's siding and to pick up loaded box cars. This operation required several passages through the railroad gate. During this time union pickets at the railroad gate forcibly sought to prevent the Railroad from servicing Carrier Corporation. The Trial Examiner found the Union's actions to be in violation of Sections 8(b)(4)(i) and 8(b)(4)(ii)(B) of the National Labor Relations Act,² but the Board reversed this finding.³ The Court of Appeals for the Second Circuit HELD: picketing of the Railroad's right-of-way where the manifest objective was to prevent employees of the Railroad from handling goods of the struck employer in the course of regular delivery and removal operations was a violation of the NLRA. The Union was not furthering its legitimate objective of publicizing its dispute in picketing the Railroad, nor were the actions of the Union incidental to legitimate objectives of the dispute.

A review of the history of the interpretation of section 8(b)(4) shows that the cases can be grouped into those involving disputes at the premises of the primary employer and those taking place at the premises of a neutral employer. In the situation of picketing the primary employer's premises many activities coming within the literal terms of the statute have been found to be

¹ 311 F.2d 135 (2d Cir. 1962), cert. granted, 83 S. Ct. 1298 (1963).

² 49 Stat. 449 (1935), as amended by 73 Stat. 519 (1959), 29 U.S.C. § 158(b)(4) (1958), as amended by Pub. L. 86-257, § 704(b). Section 8(b)(4) provides that it is an unfair labor practice for a union:

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

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in products of 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. . . .

³ 132 N.L.R.B. 127, 48 L.R.R.M. 1319 (1961).

outside the proscriptions of section 8(b)(4).⁴ In cases where the picketing occurred at the premises of the neutral employer, referred to as a "common situs,"⁵ within certain limitations it could be found to be primary activity and therefore lawful.⁶

In reversing the Board's decision, which was based on *Local 761, Int'l Union of Elec. Workers v. NLRB*,⁷ the court stated that ownership of the picketed premises was not critical. In effect, however, the court's decision can only be interpreted as a finding that ownership is the crucial factor. This appears to completely disregard the Supreme Court's express statement that geography is not crucial in these situations.⁸

The purpose of section 8(b)(4), when enacted, and when amended, was to preclude striking unions from using secondary boycotts which had the effect of enlarging labor controversies to involve persons who had no concern in the dispute.⁹ The language of the statute has not been construed literally since to do so would result in outlawing most strikes, primary in character, which have been traditionally considered lawful.¹⁰ Many problems have arisen in an attempt to avoid a literal interpretation of the statute, perhaps the basic problem being an attempt to distinguish between lawful primary, and unlawful secondary, strike activity. The *Carrier* case is but another facet of this basic question.

The Supreme Court established the basic rationale in approaching section 8(b)(4) cases in 1951 when it held that section 8(b)(4) proscribes unlawful objectives of union encouragement where union activity involves neutral parties.¹¹ Subsequent Board and court decisions undertook to determine what were lawful and unlawful objectives. To refrain from interfering in any manner with the neutral employer was not intended since a traditional objective of picketing was to inform employees and, incidentally, all others dealing with the primary employer. While publicizing a dispute may incidentally interfere with people dealing with the struck employer, such would not be violative of section 8(b)(4). This was the ruling of the Second Circuit in *NLRB v. Service Trade Chauffeurs, Salesmen & Helpers, Local 145*¹² where the court stated:

... a union may lawfully inflict harm on a neutral employer, without violating § 8(b)(4), so long as the harm is merely incidental to a traditionally lawful primary strike, conducted at the place where the primary employer does business.¹³

⁴ *Milwaukee Plywood Co. v. NLRB*, 285 F.2d 325 (7th Cir. 1960); *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (D.C. Cir. 1951); *United Elec., Radio and Mach. Workers*, 85 N.L.R.B. 417, 24 L.R.R.M. 1424 (1949).

⁵ The term "common situs" refers to the situation where two employers are doing separate work on the same premises. A familiar example is in the construction industry where general contractors and subcontractors are working on the same job site.

⁶ *Sailors' Union of the Pacific*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950). See text to note 14, *infra*.

⁷ 366 U.S. 667 (1961).

⁸ *Id.* at 679.

⁹ *International Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950).

¹⁰ *Supra* note 7, at 672.

¹¹ *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

¹² 191 F.2d 65 (2d Cir. 1951).

¹³ *Id.* at 67.

Shortly before this, the Board had established certain limitations upon picketing on the premises of a neutral employer to the effect that picketing could occur only at times when the dispute took place on the neutral premises, when the primary employer was engaged in usual business on the neutral premises, when the picketing was reasonably close to the situs of dispute, and when clear notice was displayed that the dispute was with the primary employer.¹⁴

As to the Union's objective, the court in the *Carrier* case found these principles relevant. Applying them, it found that picketing the railroad right-of-way was not furthering the objective of informing the Carrier employees of the dispute. This was especially so since Carrier employees were not allowed to use the right-of-way as an entrance to the plant, it being used exclusively by the Railroad.

The Union and the NLRB argue that the Railroad should be treated as any other shipper making pick-ups and deliveries to the plant, and, as the dissent in the *Carrier* case stated, "picketing was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished."¹⁵ Under this thesis the Union's objective would come within lawful primary activity. In the earliest "separate gate" case, *United Elec., Radio and Mach. Workers*,¹⁶ the Board found no violation of section 8(b)(4) when the Union picketed an entrance used exclusively by construction workers of the secondary employer, which entrance was located on the primary employer's property. The mere fact that picketing took place at the primary premises was sufficient to find it primary activity. A more explicit statement of the necessary conditions for finding unlawful picketing in "separate gate" situations was made in *United Steelworkers v. NLRB*:¹⁷

There must be a separate gate marked and set apart from other gates; *the work done by the men who use the gate must be unrelated to the normal operations of the employer* and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.¹⁸ (Emphasis supplied.)

The Supreme Court approved of these criteria in *Local 761*.¹⁹

It is apparent that the *Carrier* court does not feel that a railroad right-of-way is analogous to other delivery entrances that may exist on the primary employer's premises. Its rationale appears to be that since the right-of-way is owned by the Railroad and the primary employees have nothing to do with the Railroad or its entrance any picketing there would be aimed directly at secondary employees.

It would appear, however, that there is merit in the argument of the Union that the railroad entrance should be treated as a "separate gate"

¹⁴ Supra note 6, at 549.

¹⁵ Supra note 1, at 154.

¹⁶ Supra note 4.

¹⁷ 289 F.2d 591 (2d Cir. 1961).

¹⁸ Id. at 595.

¹⁹ Supra note 7.

CASE NOTES

situation, ownership of the land being irrelevant. As stated in *Retail Fruit and Vegetable Clerks' Union*²⁰ there is

... no logical reason why the legality of such picketing should depend on title to property. The impact on neutral employees of picketing which deviates from the standards outlined ... is the same whether the common premises are owned by their own employer or by the primary employer.²¹

It is easy to view the railroad entrance as analogous to a separate gate since it is but another way of reaching the primary employer's premises. More important, however, to allow the Railroad to be exempt from picketing because it owned the land that leads to the primary premises would immunize just that practice which the Supreme Court in *Local 761* stated could not be immunized:

[I]f a separate gate were devised for the regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations.²²

The Supreme Court clearly indicates that it is not the ownership of the picketed premises which is crucial; the "key" element is the type of work performed by the secondary employees.²³ The Court refuses to apply a mechanical test of ownership in preference to a more flexible test of determining whether the work done by the secondary employees is such as to be related "to the normal operations of the employer," recognizing that the secondary employer can be, and often is, lawfully enmeshed in the dispute with the primary employer. If such is found to be the case, picketing of the secondary premises is primary activity.

The court in the *Carrier* case not only does not follow this policy enunciated in *Local 761*, but also appears to have misunderstood it. The Second Circuit viewed *Local 761* as a narrow ruling and only binding in fact situations substantially similar to the one in that case. It felt that a determination of the kind of work performed by the neutral employees should only be made use of in assessing the legality of picketing which takes place at the *primary employer's premises*. The *Carrier* court stated that "[i]n so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing *at the premises of the primary employer*."²⁴

It is readily apparent that the *Carrier* court emphasizes the geographical factor, its interpretation of *Local 761* being that a union could picket neutral employees at the premises of the primary employer but not elsewhere. This view in no way takes into consideration union objectives but rather reverts to the mechanical, obsolete ownership test which was expressly repudiated by the Supreme Court.

EDWARD BOGRAD

²⁰ 116 N.L.R.B. 856, 38 L.R.R.M. 1323 (1956).

²¹ *Id.* at 859, 38 L.R.R.M. 1324.

²² *Supra* note 7, at 681.

²³ *Id.* at 680.

²⁴ *Supra* note 1, at 148.