In the Matter of SAILORS' UNION OF THE PACIFIC, AFL *and* MOORE DRY DOCK COMPANY

Case No. 20–CC–55.—Decided December 8, 1950

DECISION AND ORDER

On May 26, 1950, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and Moore Dry Dock Company, the charging party, filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[1] The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following clarification.

Section 8 (b) (4) (A) is aimed at secondary boycotts and secondary strike activities. It was not intended to proscribe primary action by

[1] At the oral argument before the Trial Examiner, the charging party, Moore Dry Dock Company, moved to amend the complaint to allege a violation of Section 8 (b) (4) (B). The Trial Examiner denied the motion when the General Counsel refused to join in the move to amend. The charging party has renewed its motion before the Board.

Section 8 (a) and (b) of the Labor Management Relations Act create public and not private rights (*Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U. S. 177). The protection of those rights is entrusted to public officials and not to private parties. The General Counsel of the Board has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board. . . ." Thus, the decision whether to issue a complaint, the contents of the complaint, and the management of the prosecution before the Board is entrusted to the sole discretion of the General Counsel (see *Haleston Drug Stores, Inc.*, 86 NLRB 1166). It follows that only the General Counsel may move to amend a complaint to allege an additional violation of the Act. Otherwise the management of the cause would *pro tanto* be taken from the General Counsel and entrusted to a private party, which is contrary to the scheme of the statute and the specific provision of Section 3 (d). As the General Counsel has declined to join in the charging party's motion, it is hereby denied. The similar ruling of the Trial Examiner is also affirmed.

a union having a legitimate labor dispute with an employer.[2] Picketing at the premises of a primary employer is traditionally recognized as primary action even though it is "necessarily designed to induce and encourage third persons to cease doing business with the picketed employer."[3] As we said in 1949,

> [Section 8 (b) (4) (A)] . . . was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary Employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called "secondary" even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. . . . It follows . . . that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus*, did not lose its character and become "secondary" at the so-called Ryan gate because Ryan employees [employees of the secondary employer] were the only persons regularly entering Bucyrus premises at that gate.[4]

Hence, if Samsoc, the owner of the S. S. *Phopho*, had had a dock of its own in California to which the *Phopho* had been tied up while undergoing conversion by Moore Dry Dock employees, picketing by the Respondent at the dock site would unquestionably have constituted *primary* action, even though the Respondent might have expected that the picketing would be more effective in persuading Moore employees not to work on the ship than to persuade the seamen aboard the *Phopho* to quit that vessel. The difficulty in the present case arises therefore, not because of any difference in picketing objectives,[5] but from the fact that the *Phopho* was not tied up at its own

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[2] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Truck Drivers and Chauffeurs, Local Union No. 807, (Schultz Refrigerated Service, Inc.,)* 87 NLRB 502; *United Electrical, Radio and Machine Workers of America, et al., (Ryan Construction Corporation)*, 85 NLRB 417; *Oil Workers International Union, Local Union 346 (CIO) (The Pure Oil Company)*, 84 NLRB 315; *Denver Building Trades Council* v. *N. L. R. B.*, 186 F. 2d 326 (C. A., D. C.) setting aside 82 NLRB 1195. But see *International Rice Milling Co., Inc.* v. *N. L. R. B.*, 183 F. 2d 21 (C. A. 5), setting aside and remanding 84 NLRB 47.

[3] *Oil Workers International Union, Local Union 346 (CIO) (The Pure Oil Co.), supra,* at p. 318.

[4] *United Electrical, Radio and Machine Workers of America, et al. (Ryan Construction Corporation), supra,* at p. 418. *International Brotherhood of Teamsters, etc. (Schultz Refrigerated Service, Inc.), supra.*

[5] "Plainly, the object of all picketing at all times is to influence third persons to withhold their business or services from the struck employer. In this respect there is no distinction between lawful primary picketing and unlawful secondary picketing proscribed by Section 8 (b) (4) (A)." *International Brotherhood of Teamsters, etc. (Schultz Refrigerated Service, Inc.), supra.*

dock,[6] but at that of Moore, while the picketing was going on in front of the Moore premises.

In the usual case, the *situs* of a labor dispute is the premises of the primary employer. Picketing of the premises is also picketing of the *situs;* the test of legality of picketing is that enunciated by the Board in the *Pure Oil* [7] and *Ryan Construction* [8] cases. But in some cases the *situs* of the dispute may not be limited to a fixed location; it may be ambulatory. Thus in the *Schultz* [9] case, a majority of the Board held that the truck upon which a truck driver worked was the *situs* of a labor dispute between him and the owner of the truck. Similarly, we hold in the present case that, as the *Phopho* was the place of employment of the seamen, it was the *situs* of the dispute between Samsoc and the Respondent over working conditions aboard that vessel.

When the *situs* is ambulatory, it may come to rest temporarily at the premises of another employer. The perplexing question is: Does the right to picket follow the *situs* while it is stationed at the premises of a secondary employer, when the only way to picket that *situs* is in front of the secondary employer's premises? Admittedly, no easy answer is possible. Essentially the problem is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved.

When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights.[10] In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises;[11] (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* [12] (c) the picketting 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. All these conditions were met in the present case.

[6] Samsoc did not have a dock of its own in any part of the United States.

[7] Footnote 2, *supra.*

[8] Footnote 2, *supra.*

[9] Footnote 2, *supra.*

[10] See *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 181 F. 2d 34 (C. A. 2).

[11] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Drivers Local Union No. 807, AFL (Sterling Beverages, Inc.)*, 90 NLRB 401, emphasizes the importance of this factor.

[12] *International Brotherhood of Teamsters, etc. (Schultz Refrigerated Service Inc.)*, *supra.*

(a) During the entire period of the picketing the *Phopho* was tied up at a dock in the Moore shipyard.

(b) Under its contract with Samsoc, Moore agreed to permit the former to put a crew on board the *Phopho* for training purposes during the last 2 weeks before the vessel's delivery to Samsoc. At the time the picketing started on February 17, 1950, 90 percent of the conversion job had been completed, practically the entire crew had been hired,[13] the ship's oil bunkers had been filled, and other stores were shortly to be put aboard. The various members of the crew commenced work as soon as they reported aboard the *Phopho*. Those in the deck department did painting and cleaning up; those in the steward's department, cooking and cleaning up; and those in the engine department, oiling and cleaning up. The crew were thus getting the ship ready for sea. They were on board to serve the purposes of Samsoc, the *Phopho's* owners, and not Moore. The normal business of a ship does not only begin with its departure on a scheduled voyage. The multitudinous steps of preparation, including hiring and training a crew and putting stores aboard, are as much a part of the normal business of a ship as the voyage itself.[14] We find, therefore, that during the entire period of the picketing, the *Phopho* was engaged in its normal business.[15]

(c) Before placing its pickets outside the entrance to the Moore shipyard, the Respondent Union asked, but was refused, permission to place its pickets at the dock where the *Phopho* was tied up. The Respondent therefore posted its pickets at the yard entrance which, as the parties stipulated, was as close to the *Phopho* as they could get under the circumstances.

(d) Finally, by its picketing and other conduct the Respondent was scrupulously careful to indicate that its dispute was solely with the primary employer, the owners of the *Phopho*. Thus the signs carried by the pickets said only that the *Phopho* was unfair to the Respondent. The *Phopho* and not Moore was declared "hot." Similarly, in asking cooperation of other unions, the Respondent clearly

[13] Unlicensed crew members were hired in New York. They reported on board ship within 3 days of hiring.

[14] Cf. 46 U. S. C. A. § 1303.

[15] Compare *LeBus* v. *Pacific Coast Maritime Assn., etc.*, 23 LRRM 2027 (D. C. La.), in which a Federal district court granted an injunction against seamen's unions which were picketing shipyards where owners against whom the seamen were on strike had delivered ships for repair, preparatory to their return to the Maritime Commission from which the ships had been chartered. There was no attempt to put crews aboard the ships during their stay in the shipyards. A Trial Examiner subsequently found that the unions had violated Section 8 (b) (4) (A) by their picketing of the shipyards. No exceptions to the Intermediate Report were filed, and the Board therefore under Section 10 (c) of the amended Act adopted the Intermediate Report without comment (Cases Nos. 15–CC–10, etc. Board Order isued April 26, 1949).

revealed that its dispute was with the *Phopho*. Finally, Moore's own witnesses admitted that no attempt was made to interfere with other work in progress in the Moore yard.

We believe that our dissenting colleagues' expressions of alarm are based on a misunderstanding of our decision. We are not holding, as the dissenters seem to think, that a union which has a dispute with a shipowner over working conditions of seamen aboard a ship may lawfully picket the premises of an independent shipyard to which the shipowner has delivered his vessel for overhaul and repair. We are only holding that, if a shipyard permits the owner of a vessel to use its dock for the purpose of readying the ship for its regular voyage by hiring and training a crew and putting stores aboard ship, a union representing seamen may then, within the careful limitations laid down in this decision, lawfully picket in front of the shipyard premises to advertise its dispute with the shipowner.

It is true, of course, that the *Phopho* was delivered to the Moore yard for conversion into a bulk gypsum carrier. But Moore in its contract agreed that "During the last two weeks, . . . [the *Phopho's*] Owner shall have the right to put a crew on board the vessel for training purposes, provided, however, that such crew shall not interfere in any way with the work of conversion." Samsoc (the *Phopho's* owner) availed itself of this contract privilege. When it did, Moore and Samsoc were simultaneously engaged in their separate businesses in the Moore yard.

The dissent finds it "logically" difficult to believe in this duality. We find no such difficulty. Nor did Moore, apparently, when it included the above clause in its contract. Indeed, from a practical standpoint, there was a strong reason why Samsoc should ready the ship for sea while the conversion work was still going on. A laid-up ship does not earn money. By completing training and preparation for sea while the ship was still undergoing conversion, the lay-up time was reduced, with a consequent money saving to owner Samsoc.

Under the circumstances of this case, we therefore find that the picketing practice followed by the Respondent was primary and not secondary and therefore did not violate Section 8 (b) (4) (A) of the Act.

We agree with the Trial Examiner that the Respondent's other activities, its "hot" letters and appeals for cooperation to Moore employees and other unions, invited action only at the *situs* of dispute. Therefore under the holding in the *Pure Oil* case,[16] they must be con-

[16] Footnote 2, *supra*. *Newspaper and Mail Deliverers' Union of New York and Vicinity (Interborough News Company)*, 90 NLRB 2135.

sidered as primary action.[17] Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein against Sailors' Union of the Pacific, AFL, be, and it hereby is, dismissed.

MEMBERS REYNOLDS and MURDOCK, dissenting:

We cannot agree with the conclusion of our colleagues in this case that the Respondent Union has engaged only in "primary" picketing at the premises of the Moore Dry Dock Company.

The Board has heretofore held, and we believe justifiably so, that a union may lawfully picket a dock owned and normally operated by an employer with which the union has a legitimate labor dispute, despite the incidental interference with the business of the secondary employer.[18] Similarly, the Board has held that picketing the premises of a primary employer could not be called "secondary," even though such picketing may have affected the operations of a neutral contractor, temporarily located on those premises.[19] In the recent *Schultz* case [20] the Board was confronted, for the first time, with a primary employer whose business operations moved on wheels from one location to another. The union in that case was careful to identify its picketing in *time* and *place* with the actual functioning of the primary employer's trucking operations by limiting such picketing to the immediate vicinity of Schultz' trucks, the *situs* of the labor dispute. After most careful deliberations, a majority of the Board held on the narrow facts there present that the union's picketing activities were so closely identified with the primary employer's normal business of transportation to warrant the conclusion that the picketing was primary. The majority reached this conclusion despite the contiguity of Schultz' trucks to a secondary employer's premises because the picketing occurred immediately about the trucks, which were on a public street rather than on the secondary employer's premises.

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[17] No exceptions were filed to the Trial Examiner's rejection of the Respondent's second defense, viz., that Samsoc was not an "employer" or a "person" within the meaning of Section 8 (b) (4) (A). In view of the fact that no exceptions have been filed, we adopt the Trial Examiner's disposition of this argument without considering its merits.

[18] *Oil Workers International Union, Local Union 346 (CIO) (The Pure Oil Company)*, 84 NLRB 315.

[19] *United Electrical, Radio and Machine Workers of America, et al. (Ryan Construction Corporation)*, 85 NLRB 417.

[20] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Truck Drivers and Chauffeurs, Local Union No. 807 (Schultz Refrigerated Service, Inc.)*, 87 NLRB 502.

To go further than the majority's decision in that case, as our colleagues do here, strikes us as a serious divergence from the Board's previous decisions interpreting Section 8 (b) (4) (A) and the legislative history upon which they are largely predicated. The Board has elsewhere made clear that that legislative history reveals a congressional intent to protect neutral employers from the effects of labor disputes in which they are not directly involved. Obviously, as the cases cited above indicate, a neutral employer may be subjected to a certain amount of *incidental* interference during the course of a union's lawful picketing of a primary employer with which the neutral employer does business. But we cannot stretch the applicable provisions of the Act to the extent necessary to find that the interference with Moore's drydock business in this case by the picketing of its premises is merely an incident to the dispute between the Respondent Union and Samsoc, the owner of the *Phopho*.

In the *Sterling Beverages* case [21] the majority, finding picketing at a secondary employer's premises to be secondary conduct, said: "The line must be drawn somewhere, and this is where we draw it." In that case the union had picketed in front of a secondary employer's premises at times when the trucks of the primary employer were absent from those premises. Moreover, and as Board Member Murdock indicated in a footnote, equally important, the picket parading before the neutral employer's business premises did so without any visible connection between that intrinsic sign of a labor dispute and its *situs*, thus identifying the picketing not with a mobile truck of the primary employer, which had passed through a gate and may or may not have been located somewhere in the interior of the secondary employer's premises, but rather with the actual functioning of the *secondary* employer's business. The *Schultz* decision emphasized that the picketing on Schultz' trucks was deemed primary because, among other reasons, it was "strictly limited in time and area" to those trucks. The importance of this dual criterion of primary picketing was further emphasized by the finding of the majority in that case that the picketing occurred "*within the immediate vicinity*" of Schultz' trucks. It was on the basis of this emphatic language that the distinction between primary and secondary picketing in the transportation industry was made in the *Sterling Beverages* case.

We had thought that the line drawn there, limiting the picketing of a mobile *situs* to the facts of the *Schultz* case, represented the very limit of interference with a secondary employer's operations lawfully permissible under Section 8 (b) (4) (A). We do not be-

[21] *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Drivers Local Union No. 807, AFL (Sterling Beverages, Inc.)*, 90 NLRB 401.

lieve that this Board should interpret Section 8 (b) (4) (A) so as to make virtually ineffective in the transportation industry the prohibition contained in that Section against secondary boycotts. For it now appears that our colleagues are drawing another line, one which goes far beyond the moving *situs* theory of the *Schultz* decision. No longer is it necessary that a union picket within the *immediate* vicinity of the movable *situs*. It is enough, say the majority here, if the picketing occurs "reasonably close" to the *situs* of the labor dispute. But what does that term mean on the facts in this case? First, it clearly means in the majority's view that it is immaterial that the premises of the Moore Drydock Company directly intervene between the picket and the *Phopho*, the alleged object of the picketing. Second, it apparently does not mean a reasonably close geographical location which one would think was its normal meaning. The pickets were "reasonably close" to the *situs* in this case because, the majority explain, the Union was not given permission to picket the *Phopho* at its dock and the pickets were therefore as close to the *situs* as they could get under the circumstances. Assuming, *arguendo*, the Union had been given permission to picket the *Phopho* at its dock, but nonetheless picketed in front of Moore's premises, would that factor make its picketing secondary rather than primary? If it would, then the present criterion of primary picketing under Section 8 (b) (4) (A) rests indeed upon an infirm basis capable of the most loose application. For it would mean that employers and labor organizations by juggling property or other rights could convert the very picketing that would otherwise be held lawful into unlawful conduct. It would mean that the definition of primary picketing had shifted from an exact analysis of the means used and the location of the pickets to reliance upon "if and but for" circumstances that should not rightly affect our decision. In our view this Board would be following a far safer and wiser course by adhering to rules of sufficient certainty so that employers, labor organizations, and employees would be aware of the boundaries of primary picketing, regardless of the attitudes and positions of the parties involved.

Our colleagues rely in part upon the *Pure Oil* and *Ryan Construction* cases, discussed above. Even a cursory examination of those cases, however, reveals that the facts there present are totally dissimilar from those in the instant case. In both of those cases the premises picketed by the union were owned and operated by the *primary* employer. The Board even there was faced with a difficult question of interpreting Section 8 (b) (4) (A) because a secondary employer had somehow become enmeshed with the business of the struck employer and was to be found on the latter's premises. Nevertheless, as the

Union was unquestionably picketing the premises of the employer with which it had a legitimate labor dispute, the Board held that the picketing was primary and that the incidental interference with the operations of the secondary employer could not convert lawful activity into unlawful conduct. But certainly those cases cannot be used to support the reverse factual situation present in this case. Moore, the secondary employer, is the owner and operator of the premises in front of which the union picket walks. Here, unlike the *Pure Oil* and *Ryan Construction* cases, it is the primary employer (assuming, without conceding, that the latter is engaged in its normal business of transportation) which by the location of its ship in drydock is temporarily on the secondary employer's (Moore's) premises. Despite the reverse factual situations, however, the majority by a curious commingling of these cases and the *Schultz* case reaches the conclusion that the picketing of a secondary employer's premises is lawful, primary conduct. But no amount of rationalization can becloud the inescapable fact that Moore, the secondary employer, is being subject to direct and immediate pressure of picketing not because it has sought out and enmeshed itself in the operations of a struck employer, not because its premises are geographically merged for business purposes with an employer involved in a labor dispute, but merely because it is engaged on its own premises in its normal business of repairing a ship belonging to the struck employer. We should think the most flexible imagination would be taxed to call such interference with Moore's business "incidental."

The majority find that the *Phopho* was engaged in its normal business of transportation during the entire period of the picketing. In support of this finding they recite the facts that the conversion job was 90 percent completed and seamen, employed by Samsoc, the owner of the *Phopho*, were already on board the ship. Nevertheless, the record is clear that the *Phopho* was on Moore's premises for the sole purpose of undergoing major reconstruction work, including certain fundamental changes in the basic design and character of the ship. Obviously, a repair job of this nature is not the normal type of repair to which every ship must be subjected as an incident to the business of transportation. It is not one of the "multitudinous steps of preparation" that ordinarily precede a voyage by sea. In our opinion, while the *Phopho* was on Moore's premises for this purpose, which, the majority concede, was not completed at the time of the picketing, it must be considered as an integral part of Moore's drydock business rather than an independent transportation enterprise of Samsoc. We do not believe it can logically be said to be both. We therefore regard as immaterial the fact that certain employees of

Samsoc were on board the ship for training purposes in accordance with the agreement between Moore and Samsoc. This provision of the agreement does not negative the undisputed control and authority over the ship which the contract otherwise reposed in Moore.

The majority hold, however, that Moore in granting Samsoc permission to train a crew aboard the *Phopho* in the last stages of that ship's conversion thereby forfeited all right to protection under Section 8 (b) (4) (A). We think such an interpretation of that section of the amended Act puts a severe and unreasonable restraint upon the operations of a secondary employer whenever that employer, as a gesture of cooperation, extends the slightest contract privilege to a primary employer with which it does business at a time when neither is engaged in a labor dispute. By extending the above small courtesy to Samsoc, Moore made unnecessary an additional loss of time in readying the ship for its voyage that would be entailed if the work were postponed until after the *Phopho* left Moore's drydock. An earlier voyage for the *Phopho*, made possible by Moore's action, actually facilitated the free flow of commerce which this Act is designed to protect and encourage; but the effect of the decision of the majority will be to hamper the achievement of such objectives. The insignificance of the right gained by Samsoc through the permissive clause, insofar as its effect on the conversion project is concerned, is emphasized by the further provision immediately following that the presence of the crew on the *Phopho* could not *in any way* interfere with the work of the conversion. Thus, it is clear to us that Moore did not relinquish a scintilla of control over the ship, as a corollary, that Samsoc was not engaged in its normal business of transportation.

For these reasons we conclude that the picketing of Moore's premises by the Respondent Union for the purpose of inducing or encouraging the employees of Moore to refuse to work, with an object, among others, to force Moore to cease doing business with Samsoc, is secondary conduct proscribed by Section 8 (b) (4) (A).[22]

INTERMEDIATE REPORT

Mr. Clayton O. Rost, for the General Counsel.

Roos & Jennings, of San Francisco, Calif., by *Mr. John Paul Jennings*, for the Respondent.

Brobeck, Phleger & Harrison, of San Francisco, Calif., by *Mr. Richard Ernst*, for the Charging Party.

STATEMENT OF THE CASE

Upon an amended charge, filed March 2, 1950, by Moore Dry Dock Company, herein called Moore, the General Counsel of the National Labor Relations Board,

[22] We reserve judgment on the issue disposed of in footnote 1 of the majority opinion concerning the power of the Board to permit amendments to the complaint on motion of parties other than the General Counsel.

by the Regional Director for the Twentieth Region (San Francisco, California), issued his complaint dated March 13, 1950, against Sailors' Union of the Pacific, AFL, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) and Section 2 (6) and (7) of the National Labor Relations Act, as amended June 23, 1947 (61 Stat. 136 *et seq.*), herein called Act.

With respect to the unfair labor practices, the complaint alleged in substance that since on or about February 17, 1950, the Respondent induced and encouraged employees of Moore to engage in a strike or concerted refusal in the course of their employment to perform services for Moore in connection with the conversion into a bulk gypsum carrier of the S. S. *Phopho*, a vessel owned by Compania Maritima Samsoc, Limitada, S. A., herein called Samsoc, an object thereof being to force or require Moore to cease doing business with Samsoc.

Copies of the complaint accompanied by a notice of hearing thereon were duly served upon the Respondent.

On April 3, 1950, the Respondent served and filed its answer in which it denied all allegations of the complaint attributing to it the commission of unfair labor practices.

After the filing of the amended charge, but before issuance of the complaint, the Regional Director filed in the United States District Court for the Northern District of California, Southern Division, a petition for injunction pursuant to the provisions of Section 10 (1) of the Act.[1] Following a hearing, the court on March 14, 1950, issued an order enjoining and restraining the Respondent, pending the final adjudication of this matter by the Board, from engaging in the conduct which is alleged in the complaint to constitute an unfair labor practice.

On April 10, 1950, all parties to this proceeding entered into a written stipulation for the submission of the issues to a Trial Examiner, without a hearing for the taking of testimony. The parties agreed that competent witnesses, if called before the Trial Examiner, would testify to certain facts and identify certain exhibits as set out in the stipulation; that such agreed facts and exhibits, together with the testimony of witnesses contained in the official reporter's transcript of the hearing before the court in the Section 10 (1) injunction proceeding, were to constitute the entire record in this case; and that on the basis of the record as stipulated, a duly designated Trial Examiner was to issue his Intermediate Report making his findings of fact, conclusions of law, and recommended order, pursuant to the provisions of Section 203.45 of the Board's Rules and Regulations, in the same manner and with the same force and effect as if he had heard the evidence. It was further agreed that all proceedings following the issuance of the Trial Examiner's Intermediate Report based upon the stipulated record were to be controlled by the provisions of the Board's Rules and Regulations, Section 203.45 to 203.51, inclusive. The right to argue the relevancy, materiality, or competency of any of the evidence agreed to in the stipulation, either in writing or during oral argument before the Trial Examiner or the Board, was expressly reserved by the parties.

Pursuant to notice a hearing was held at San Francisco, California, on May 4, 1950, before Arthur Leff, the undersigned Trial Examiner duly designated by the Chief Trial Examiner, for the purpose of affording all parties an opportunity to present oral argument before the Trial Examiner in support of their respective positions. All parties were represented by counsel and participated at the oral argument. During oral argument a motion made by Moore, but not joined in

[1] The petition was docketed in the court as Case No. 29539, and was entitled *Gerald C. Brown, Petitioner* vs. *Sailors' Union of the Pacific, AFL, Respondent.*

by the General Counsel to amend the complaint, by alleging that the Respondent violated Section 8 (b) (4) (B) in addition to Section 8 (b) (4) (A) was denied. Opportunity was afforded all parties to file briefs and/or proposed findings and conclusions of law with the Trial Examiner. Briefs were filed by the General Counsel, the Respondent, and the charging party, and proposed findings of fact and conclusions were submitted by Moore.

Upon the entire record in the case, I make the following:

FINDINGS OF FACT

I. COMMERCE: THE BUSINESS OF MOORE

Moore Dry Dock Company is a California corporation with its principal office and place of business in Oakland, California, where it is engaged in the business of repairing, constructing, and converting ships, steel erection work, and the manufacture and repair of industrial machinery. In the course of its business, Moore annually uses materials shipped to it from outside the State of California, having a value in excess of $300,000. The value of its work in constructing ships exceeds $1,000,000 annually. The ships repaired, converted, and constructed by Moore are instrumentalities of commerce to, from, and between the United States and foreign countries and among various States in the United States. It is found that Moore is engaged in commerce, and that its operations affect commerce, within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Sailors' Union of the Pacific, affiliated with the American Federation of Labor, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Samsoc is a corporation organized under the laws of the Republic of Panama. A majority of its stock is owned by Greek nationals and over a third by two United States citizens. Samsoc is engaged in operating tramp ships in world-wide trade. Among its vessels is the Panamanian registered S. S. *Phopho*, with which we are alone concerned in this proceeding. Samsoc has no office, pier, or other place of business in the State of California, nor, so far as the record discloses, elsewhere in the United States, but is represented in the State of California by an agent, Hermes Steamship Agency, Inc.

In 1949, Samsoc entered into a 6-year contract with the Kaiser Gypsum Company for the carriage of gypsum from the San Marcos Island, Mexico, to Kaiser plants at Redwood City and Long Beach, California. The carriage of gypsum between San Marcos Islands and California ports had traditionally been handled by American ships employing American crews with American wage rates and conditions. Since 1946 the gypsum run had been handled for Kaiser by the vessel *Permanente Silverbow*, which was operated by Permanente Steamship Company, a subsidiary of Henry Kaiser Enterprises. Permanente is a party to a collective bargaining contract with the Respondent covering wages, hours, and working conditions on that vessel. The contract between Kaiser and Samsoc contemplated that the *Permanente Silverbow* would be taken off the gypsum run and replaced on that run by the *Phopho* which would carry all, or substantially all, the gypsum for Kaiser.

The S. S. *Phopho* was at that time an ordinary liberty cargo vessel. To make it usable for the gypsum trade, it became necessary to convert the ship into

a self-unloading bulk gypsum carrier. For that purpose Samsoc entered into a contract with Moore on November 21, 1949. The conversion contract called for Moore to perform major reconstruction work on the ship, including certain fundamental changes in the basic design and character of the ship within the framework of its existing hull and propulsion equipment; elimination of ordinary cargo handling equipment; and the installation of special equipment for the discharge of gypsum. The agreement called upon Moore to turn the converted ship back to Samsoc not later than February 15, 1950, but that time limit was subsequently extended to February 28, 1950. The agreement also provided, *inter alia*, that during the last 2 weeks before delivery, Samsoc was to have the right to place a crew on board the vessel for training purposes.

The S. S. *Phopho* entered San Francisco Bay under her own power in November 1949, and moved to the Moore yard where it was "delivered" to Moore to undergo the conversion described above. When the *Phopho* arrived at the Moore yard, all officers and crew members left the vessel with the exception of the second officer and steward, who remained with the vessel to represent Samsoc and protect its property, and two crew members who were obliged to remain on the ship because of orders from the United States Immigration Service. At the Moore yard, the *Phopho* was tied to a pier jutting out into the estuary. While work progressed on the conversion contract the vessel remained afloat, with workmen boarding the ship over gangplanks leading from the Moore premises. By February 17, 1950, when picketing began, the conversion work on the *Phopho* was more than 90 percent completed, less than 10 days work remaining. On that particular date the condition of the *Phopho* was such that it could not have been used either for carrying gypsum or for carrying other cargo. This was because the conversion work had not been completed but had been carried on so far as to make the ship of no use in its former capacity. Nor could the *Phopho* on that particular date have moved under its own power. The reason for that was that certain essential engine parts had been removed on February 10, 1950, to enable Moore to perform work on them, and these parts were not actually returned to the ship until after the granting of the court injunction. It appears, however, that the members of the *Phopho's* crew could have placed the engine in working order if the parts had been returned.

Before picketing began on February 17, Samsoc had started preparations for its initial journey as a gypsum carrier. Samsoc began hiring a new crew in January 1950, and by February 17 a substantial portion of the crew had already been employed. All unlicensed crew members were hired in New York and all were nationals of Greece with the exception of one oiler who was a national of Columbia. The dates of hiring were as follows:

December 6, 1949	Master purser.
January 16, 1950	Chief engineer, first assistant engineer.
January 20, 1950	Third officer.
January 30, 1950	Second assistant engineer, one oiler, one galleyman.
February 3, 1950	Boatswain.
February 10, 1950	Third assistant engineer.
February 15, 1950	Three oilers, one fireman.
February 16, 1950	One fireman.
February 17, 1950	Chief engineer, one cook, one messman, seven seamen.
February 21, 1950	One messman.

Each of the crew members so hired reported on board the *Phopho* within 3 days of the date of his hiring, and thereafter remained on board that vessel. From the time the various crew members reported, they began working on the ship. Those in the deck department did painting and cleaning up; those in the steward's department, cooking and cleaning up; and those in the engine department, oiling and cleaning up. In further preparation for its voyage, bunkers of oil were received aboard the *Phopho* on February 15, 1950.

The wage scale for crew members hired on the *Phopho* was substantially less than half that provided for under the contract between the Permanente Steamship Company and the Respondent covering seamen on the *Permanente Silverbow.* Thus, for example, able-bodied seamen on the *Silverbow* were paid $261.50 a month; on the *Phopho*, $110 a month. The boatswain on the *Silverbow* was paid $317.50 a month; on the *Phopho*, $120 a month. Overtime rates on the *Silverbow* were from $1.52 to $1.90 an hour; on the *Phopho* 50 cents an hour over 44 hours a week.

B. *The Respondent's dispute with Samsoc*

In the early part of 1950, Harry E. Lundeberg, the Respondent's secretary-treasurer, learned of the proposed removal of the *Permanente Silverbow* from the gypsum run, and of its replacement by the *Phopho.* He also learned of the 6-year contract between Samsoc and Kaiser and of the manning of the *Phopho* with a crew brought in from New York. On February 3, 1950, Lundeberg wrote to John Cosmas, Samsoc's president and the president also of Hermes Steamship Agency, Inc., Samsoc's San Francisco port representative and the operator of all Samsoc owned ships. Lundeberg in his letter called attention to the fact that in the past gypsum had been carried to American ports in American bottoms. He pointed out that if the *Phopho* moved into this run, it would have the effect of laying off American seamen who had depended on this work for years. Lundeberg requested Cosmas to meet with the Respondent for the purpose of negotiating an agreement covering the deck, engine, and steward's departments of the *Phopho.*

On February 16, 1950, a meeting was held between representatives of Samsoc and the Respondent. Samsoc declined to accede to the Respondent's request that it recognize and bargain with the Respondent as the exclusive representative of the unlicensed employees on the *Phopho.* Thereupon, the Respondent—in the words of Lundeberg—"proceeded by declaring the S. S. *Phopho* unfair to the American seamen affiliated with the American Federation of Labor." And on the following day, the Respondent began its picketing activities, more fully described below.

The record does not reveal whether the Respondent had been actually designated to represent any members of the *Phopho* crew on the date the bargaining demand was made. It appears, however, that sometime during the month of February 1950—presumably after the picketing began—a majority of the seamen employed on the *Phopho* petitioned the Respondent to bargain for them collectively. On February 24, 1950, the Respondent filed with the Twentieth Regional Office of the Board a petition to be certified as the representative of the unlicensed employees aboard the *Phopho* (Case No. 20–RC–809). In support of its petition, the Respondent presented designations bearing the signatures of 13 of the unlicensed crew members of the *Phopho.* The petition was administratively dismissed by the Board's Regional Director on April 3, 1950. The reason assigned was that further proceedings were not warranted "inasmuch as the internal economy of a vessel of foreign registry and ownership is involved."

Upon appeal, the Board sustained the action of the Regional Director upon the ground that "upon the facts presently existing in this case, it does not appear that the Board has jurisdiction over the Employer [Samsoc]."

C. *The specific conduct of the Respondent claimed to be violative of Section 8 (b) (4) (A)*

On the morning of February 17, 1950, six pickets arrived at the entrance to the Moore shipyard and began to picket in front of the main gate. They carried placards reading, "S. S. *Phopho* unfair to the Sailors' Union of the Pacific, A. F. L." The selection of that site for the purposes of picketing was not a matter of the Respondent's choice. It is conceded that the Respondent requested Moore both orally and in writing for permission to place its pickets at the particular dock in the Moore yard where the *Phopho* was being converted. Moore, however, refused access to its premises for the requested purpose. And the picketing before the gate at the Moore yard was as close to the *Phopho* as the Respondent's pickets could approach under the circumstances. The picketing, which was admittedly instituted, directed, and authorized by the Respondent, continued from February 17 to March 14, 1950. On the latter date, it was discontinued in compliance with the court injunction order adverted to above. According to the testimony of Lundeberg,

> The purpose of the picket line [was] to get an agreement with the operators of the *Phopho* to establish American wages and conditions on that particular ship when she goes on that run between Marcos and here, due to the fact that it is an exclusive American run, and we can't afford, as an American trade union, to allow people to use other flags on a run to beat the conditions that we took so many years to gain, and it not only puts our people out of work, it cuts wages about two-thirds of what we have.

The Respondent did not confine its appeal to picketing. The employees of Moore are represented for the purposes of collective bargaining by East Bay Union of Machinists, CIO, Local 1304, and by Bay Cities Metal Trades Council, A. F. of L., an organization of various local ship repair and construction craft unions, including, among others, local unions of pipe fitters, welders, boilermakers, stage riggers, shipwrights, and shipfitters. On February 16, when the Respondent determined to declare the *Phopho* unfair, it addressed letters identical in substance to the secretary of the Metal Trades Council, the secretary of the local Boilermakers Union affiliated with the Council, and the secretary of the East Bay Machinists Union. The letters read:

> DEAR SIR AND BROTHER:
>
> This is to advise you that as of 8 a. m. Friday, February 17, 1950 the Sailors' Union of the Pacific declares the S. S. *Phopho*, which is now in Moore's shipyard and being converted to carry gypsum between San Marcos Island and Long Beach, California, *hot* for the following reasons:
>
> This particular trade has been taken care of, ever since it has been developed, in American-Bottom vessels which were under contract to the Sailors Union of the Pacific. At the present time, the Permanente Steamship Company, which is a subsidiary of Henry Kaiser Enterprises, is carrying on this trade. This company has a contract with the Sailors Union.
>
> About 6 months ago, they chartered the S. S. *Santa Cruz Cement*, which is also under contract to this organization, to take care of the cement trade between San Francisco and Honolulu, and the *Permanente Silverbow* was in the Gypsum run between San Marcos Island and Long Beach.

Now that this S. S. *Phopho* is practically ready to leave the shipyard and enter this trade, the Permanente people have turned the S. S. *Santa Cruz Cement* back to that company and they intend to put on the S. S. *Phopho* which is owned by a Greek who is a naturalized American citizen, whose name is John Cosmas, and he has his vessel registered under the Panamanian flag and a Greek crew aboard.

Wages and conditions are far below the American standard and we have tried several times to persuade Mr. Cosmas to make a contract with us for this vessel. He has refused to do so, giving us a lot of double talk, stating that in due time he expects to get some American ships and only then will he deal with us in American contracts. This is a lot of baloney as it is our opinion that he has no intention whatsoever of ever dealing with us and that he intends to operate this vessel with whoever he can pick up and operate as a non-union vessel.

This vessel has been at Moore's for the past 2 months or more, being converted for this particular trade, and she is about ready now to leave the yard, so you can understand our position in this situation. Under the circumstances, we have no other alternative than to declare this vessel *hot*. Your cooperation in this matter will, therefore, be greatly appreciated.

Fraternally yours,

HARRY JOHNSON,
Assistant Secretary.

On February 17, 1950, Harry Johnson and Ed Turner, representing the Respondent, visited the Moore yard, and advised the business agents of the union locals representing shipfitters, welders, boilermakers, and shipwrights that the *Phopho* had been declared "hot" by the Respondent because of its dispute with the operator. The cooperation of these locals was requested. Their efforts met with some success. There is evidence that on February 17, 1950, the business agent of the Welders' local advised members of his union to remove their gear from the *Phopho* and to perform no work on the "hot" ship. There is evidence that a group of welders who had been sent to the *Phopho* left the yard soon after the whistle blew on the first day of the picketing. When asked why, they said, "Well, our business agent told us we couldn't work on the ship." And there is also evidence that on February 20, the same business agent "pulled" from their jobs members of his local who were still willing to work aboard the vessel. Between February 17 and February 20, there was a partial cessation of work by Moore employees assigned to work tasks on the *Phopho*. Some employees, however, continued with their work.

On February 20, representatives of the Respondent appeared at a meeting of the Bay Cities Metal Trades Council. Describing the dispute between the Respondent and the operator of the *Phopho*, they requested the Council's cooperation. By unanimous vote, the Council went on record as supporting the Respondent in its dispute with the *Phopho*. The action of the Council was reported in the February 22 issue of a publication called the "Labor Review." At various times after its issuance, while the picketing was in progress, copies of this publication were distributed by the Respondent's representatives to employees of Moore who were entering the yard for the purpose of performing their work.

On February 21, all work by Moore employees ceased on board the *Phopho*. On a number of occasions thereafter, Moore requested the local unions to furnish men to work on the *Phopho*. The requests were not complied with. However, the local unions continued to supply men to work on Moore's other yard opera-

tions. Except for the work on the *Phopho*, Moore employees continued at work in their regular manner throughout the course of the picketing.

While the picketing was in progress the seamen on the *Phopho* remained aboard the vessel. Under their shipping articles, the seamen were prohibited from taking action of any kind against the master of the ship. The shipping articles provide for the resolution of all disputes relating to wages or working conditions on the vessel by competent authorities of the Republic of Panama under Panama law. Lundeberg testified that the seamen were unable to leave the vessel, because the captain of the ship held their passports and because under Panamanian law they would have been subject to criminal penalties for quitting the vessel.

Picketing by the Respondent ceased on March 14, 1950, with the service upon the Respondent of a copy of the court injunction order. On March 15, employees of Moore assigned to the *Phopho* job resumed their work on that ship. During the following week, food supplies and machine stores necessary for its voyage were delivered on board the *Phopho*. On March 24, the conversion work having been completed, the *Phopho* was redelivered to Samsoc, and on the following day, it sailed from San Francisco Bay.

D. *Conclusions*

This case is concerned only with an alleged violation of Section 8 (b) (4) (A) by the Sailors' Union of the Pacific, alone named a party respondent. The unions representing Moore's employees, whose interest in the dispute was clearly secondary, have not been charged with a violation, and it is therefore unnecessary to consider whether their activities, as distinguished from those of the Respondent, fell within the statutory proscription. The General Counsel concedes, as I think he must, that at the times material herein, the Respondent was engaged in a direct labor dispute with Samsoc with regard to recognition, a contract, and wages and other conditions of employment for seamen aboard the *Phopho*.[2] But while not questioning in this proceeding the legality of the Respondent's primary demands upon Samsoc, the General Counsel contends that the *methods* the Respondent chose to press them were such as to reach outside the area of economic conflict that the law allows into a field of activity forbidden by Section 8 (b) (4) (A). More specifically, the General Counsel complains that the Respondent ran afoul of that section by picketing the Moore yard where work on the *Phopho* was being performed, by advising the collective bargaining representatives of Moore's employees that the *Phopho* was "hot" and requesting their cooperation, and by distributing to Moore's employees copies of the "Labor Review" reporting the Bay Cities Metal Trades Council's resolution in support of the Respondent. These activities, assert the General Counsel and Moore, constituted illegal inducement and encouragement of Moore's employees within the meaning of Section 8 (b) (4) (A).

The Respondent, on the other hand, defends its conduct on three fronts. It contends, first, that in picketing the *Phopho* at the situs of the primary labor dispute and in appealing to Moore's employees and others not to enter or work upon the picketed *Phopho*, it was doing no more than engaging in primary action against Samsoc with which it had its direct dispute. It asserts, secondly, that assuming, *arguendo*, that its activities were in the nature of a secondary boycott,

[2] Moore's position, that the primary labor dispute was between the Respondent and Kaiser Enterprises and that the Respondent's dispute with Samsoc was merely a secondary aspect thereof, is found to be based upon strained reasoning not supported by the record facts.

they would nevertheless be beyond the reach of Section 8 (b) (4) (A), because Samsoc may not in the posture of this particular case be considered another "employer" or a "person" within the meaning of the section of the Act claimed to have been violated. It argues, finally, that its peaceful picketing and other activities were in any event immunized from the thrust of Section 8 (b) (4) (A), because they constituted an exercise of the right of free speech protected by Section 8 (c) as well as the First Amendment to the Constitution.

The Respondent's final argument need not detain us now. The Board has already taken a position adverse to the Respondent on that precise contention in the *Wadsworth Building Company, Inc.* case, 81 NLRB 802, a decision to which I am constrained to adhere. The issues of law in this case principally revolve about the Respondent's other two defenses. They will be considered below in the order mentioned.

1. *Did the Respondent engage in permissive primary action by its picketing and other activities?*

It must by now be regarded as well settled that Section 8 (b) (4) (A) is not to be read as applying to every situation that may appear to fall within the scope of a broad literal construction of its terms. To give effect to Congress' intent, the section must be viewed limited to secondary union action and as excepting from its sweep "the primary means which unions traditionally use to press their demands upon employees." *The Pure Oil Company*, 84 NLRB 315. So long as a union confines its activities to the area of primary conduct it may lawfully persuade all persons, including employees of third persons, to withhold their business or services from the struck or picketed employer. Simply because picketing has the effect, or is even designed, to induce others to sympathetic action is not alone decisive on the question of whether it is primary or secondary; for that is a characteristic of all picketing, both primary and secondary. As the Board observed in the *Pure Oil* case, "any . . . 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 prescribed by Section 8 (b) (4) (A) of the Act." See also, *Ryan Construction Corporation*, 85 NLRB 417; *Schultz Refrigerated Service, Inc.*, 87 NLRB 502; *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672.

With the interpretations already placed by the Board on Section 8 (b) (4) (A), the General Counsel and the charging party do not quarrel, at least not at this stage of the proceeding. Where they and the Respondent differ sharply is on the question of whether the Respondent's particular activities here complained of fall beyond or within the borders of the area of permissible primary conduct that is unaffected by Section 8 (b) (4) (A).

Just where such borders are to be drawn has not to date been marked out by the Board by any rule of universal application. The Board has properly preferred to decide each case as it arose on the basis of its own relevant facts. But in doing so, it has laid down certain guideposts which I believe sufficiently clear to point the path to decision here. Thus in the *Pure Oil* case, the Board held it to be permissible primary action for a union not only to picket in the immediate vicinity of the premises of the employer principally involved in the labor dispute, but to implement its picketing by directly appealing to employees of unconcerned employers who did business with the disputant employer not to perform services at the picketed premises. In the *Ryan Construction Company* case, the Board held it to be primary action for a union to picket an entrance to a primary employer's premises that was built and used exclusively for a

construction project a general contractor was performing for the primary employer. The Board found the picketing primary because of its nexus with the primary employer's premises, even though the picketed entrance was not used by the primary employer's employees and the picketing at that particular point had the clearly calculated effect of dissuading the general contractor's employees from performing their usual services on the premises. The Board apparently considered it immaterial that the services being performed by the general contractor's employees were unrelated to the primary employer's normal business operations. In the *Schultz* case, involving an employer in the transportation industry, the Board made clear that the "employer's premises" test was not an inflexible determinant of primary picketing. What was important, the Board noted, was that the picketing be "local in point of contact" to the primary employer's operations directly involved in the labor dispute. In the case of a "paripatetic employer," whose business has no fixed geographical location, the decision indicates, picketing meets the test of primary action if it is identified "with the actual functioning of the primary employer's business at the *situs* of the labor dispute," and is "limited strictly in time and area" to the vicinity of the vehicles or other necessary instruments of the primary employer's roving operations.

The cases adverted to, and others noted in the margin,[3] establish by synthesis the principle that picketing and related appeals for aid will be deemed primary action, despite their effect, whether anticipated or not, upon employees of unconcerned employers, where the following elements combine: (a) The action is by the union directly interested in the dispute; (b) it is directed against the employer primarily involved, publicizing the primary dispute with that employer; and (c) it occurs (or appeals for aid at the location of) the physical premises of the primary employer, except where the primary employer's business has no fixed geographical location, in which event the picketing or other appeals for aid must be identified in time and place with the actual functioning of the primary employer's operations at the situs of the labor dispute. Analysis of the cases in which the Board has predicated a finding of illegal secondary action on the basis of picketing or related activities will show that in each of them one or more of the elements noted above was lacking.[4]

On the basis of the principles already declared by the Board, I am persuaded that the Respondent's picketing must be viewed as traditionally primary in character. The Respondent was engaged in a direct labor dispute with Samsoe

[3] *International Rice Milling Company,* 84 NLRB 360; *Santa Ana Lumber Co.,* 87 NLRB 937.

[4] No attempt will be made here to analyze all such cases. The cases relied upon by the General Counsel and Moore to support the proposition that the Board at times has found action at the primary employer's premises illegally secondary in character are not in conflict. Thus, in *Langer,* 82 NLRB 1028, the picketing was directed at a general contractor advertising the general contractor's job as unfair, though the dispute was with a subcontractor. In *Watson Company,* 80 NLRB 533, the union engaged in a direct strike against a neutral employer away from the premises of the primary employer where the *situs* of the dispute lay. In *Gould & Preisner (Denver),* 82 NLRB 1195, a building trades council which included unions not directly involved in the dispute picketed a general contractor's job, advertising the entire job as unfair, although the primary dispute was solely between one of its constituent locals and a subcontractor. In *Roanc-Anderson Co.,* 82 NLRB 696, direct strike action was undertaken against a contractor because he had subcontracted work to a nonunion subcontractor, while no action by picketing or otherwise was undertaken against the subcontractor. In *Montgomery Fair Co.,* 82 NLRB 211, picketing was conducted against a department store advertising the store as unfair, although the union's primary dispute was with another employer who was engaged in contracting work at the store.

concerning recognition, a contract, and substandard employment conditions aboard the *Phopho*. It had a legitimate economic interest in publicizing the facts of that dispute. Its picketing was in form directed toward that end. The picketing was at the entrance to Moore's grounds, true, but there was nothing in the pickets' placards or in the accompanying appeals to indicate that the Respondent was calling on others to cease doing business or performing services on Moore's property, save to the extent that such business or services might require the boarding of the picketed *Phopho*. Bearing in mind that the picketing of a vessel afloat on navigable waters necessarily must, and traditionally has been, conducted on the land side; that Moore had denied the Respondent access to its property for purposes of placing a picket line immediately adjacent to the vessel; and that the picketing was as close to the vessel as the circumstances permitted—the picketing here must, in fact and in law, be regarded as "local in point of contact" with the *Phopho*.

The *Phopho* was the physical instrumentality utilized by Samsoc to conduct its business operations, in much the same sense that a plant is the instrumentality of a manufacturing concern or a truck that of a transport company. For the seamen on the *Phopho* it was what an employer's plant or place of business is to those who work in or out of it; it was the focal point of their employment relationship, their headquarters, the place where they worked, received their instructions, and were paid.[5] It was on the *Phopho*, moreover, that the *situs* of the labor dispute was to be found. There were employed the men whom the Respondent was seeking to represent, there existed the "unfair" conditions which the Respondent was protesting, and it was with respect to the wages, hours, and working conditions on her that the Respondent was demanding bargaining and a contract. More than the only effective place where picketing could be conducted—a factor emphasized in the *Schultz* decision—picketing at the location of the *Phopho* was the *only* place where the Respondent could by such means publicize its dispute; for Samsoc had no office, pier, or other place of business that could have been reached by the Respondent for that purpose. Contrary to the contention that has been made, I am unable to find that picketing at that time and place could have served no purpose whatever other than to appeal to Moore's employees to cease their conversion work on the vessel. The picketing served also as a plea for support from Samsoc's employees who were already on the vessel performing Samsoc's work, as well as an appeal to suppliers of the *Phopho*, which had already commenced taking on provisions for its voyage, to withhold their business and services from the picketed ship. The Respondent's activities, to be sure, were aimed at preventing the *Phopho* from sailing. But, as has been observed, a stoppage or interruption of operations of a struck or picketed employer is a characteristic design of all picketing, and does not serve to convert otherwise lawful primary conduct into unlawful secondary action.

The real question here is whether the Respondent's picketing has met the third element of the test of primary picketing indicated above. I think it has. If, as I believe reasonable in the particular circumstances of this case, the *Phopho* is viewed as the "plant" or "premises" of Samsoc, picketing at the ship's location fulfilled the "employer's premises" standard of primary picketing applied in the *Pure Oil* and *Ryan* cases. But even if a different view be taken, and the *Schultz* standard applied, the result reached would be the same. Under the *Schultz* test, it is true, more need be shown than that the picketing occurred

[5] Cf. *Northland Greyhound Lines, Inc.*, 80 NLRB 288, relied on in the dissenting opinion in the *Schultz* case.

at the "*situs* of the labor dispute"; it must also appear that the picketing was "identified with the actual functioning of the primary employer's business" at that *situs*. I have weighed carefully the fact, principally stressed by the General Counsel and Moore, that at the time the picketing began, the *Phopho* was not yet in a condition to sail. But I find offsetting considerations, Samsoc was at the time actually engaged in preparations for the *Phopho's* voyage; it had already hired part of its crew and was in active process of hiring the balance; crew members were already at work aboard the ship, fitting it out for its sailing; and Samsoc had already begun to store on the ship fuel and supplies necessary for its sailing, which then appeared to be but a week or 10 days in the offing. I am unable to agree that the business of operating a ship is confined solely to the carriage of cargo along its trade route. In my view, the fitting out of a vessel for sailing—including painting, oiling, and cleaning up—the storing of supplies, and the training of a crew, are as essential, though perhaps not as profitable, to the operation of the ship and to the actual functioning of its business. My conclusion that the Respondent's picketing was identified with the actual functioning of Samsoc's business is mainly influenced by the fact that Samsoc's employees were then on board the vessel performing Samsoc's work. A different situation would have been presented, and a different conclusion reached, had the record here merely shown picketing of Samsoc's property at Moore's yard while *only* Moore's employees were at work on it.[6]

Other arguments advanced by the General Counsel and by Moore are not found compelling. It is urged that when picketing began, the main operations being conducted on the *Phopho* was Moore's conversion work and not Samsoc's sailing preparations. But merely because another and perhaps more important business may be functioning at the *situs* of a labor dispute does not deprive a union of its right to engage in otherwise appropriate primary activity. The test, as has been noted, is not whether others may be affected by the picketing, but whether it is confined to the *situs* of the primary economic battleground. To hold otherwise would mean that a ship could seldom if ever be picketed, for a ship in port almost always has some other business operation being conducted on or in conjunction with it. It is argued that the picketing of the *Phopho* at Moore's yard was different from other picketing, because the services being provided by Moore had nothing to do with the normal operation of the *Phopho*. The answer to that is to be found in the *Ryan Construction* case where the Board held that picketing at the gate of a primary employer did not lose its primary character because the gate was being used exclusively by construction workers engaged in a project unconnected with the normal operations of the primary employer's business. It is contended that the principles established by the *Pure Oil*, *Ryan*, and *Schultz* cases apply only to strikes or lockout situations, and have no application to labor disputes where, as here, the employees of the primary employer remain at work. I do not, however, construe these decisions so narrowly. Picketing for organizational purposes or to call attention to unfair conditions—where all other attributes of primary action are present—has never been considered to attain a secondary character, simply because no strike, strikebreakers, or replacements are to be found on the picketed premises.[7]

Having concluded that the Respondent's picketing was primary, there remains to be considered whether the Respondent's other activities complained of—its

[6] C. *Climax Machinery Company*, 86 NLRB 1243.

[7] *International Rice Milling Co.*, 84 NLRB 816. And see, *A. F. L.* v. *Swing*, 312 U. S. 321; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293; I. Teller, *Labor Disputes and Collective Bargaining*, 456 (1940).

direct appeals to Moore's employees and their unions by letters and otherwise, declaring the *Phopho* "hot" and requesting their cooperation—fell within the proscription of 8 (b) (4) (A). This aspect of the case is clearly governed by the Board's *Pure Oil* decision. In that case, the Board held that a "hot cargo" letter addressed by a striking union to another union which represented employees of an unconcerned employer, successfully appealing to the other union to respect the striking union's picket lines at the picketed premises, was not violative of 8 (b) (4) (A). The Board emphasized that "the appeals contained in the letters, no less than the appeals inherent in the [primary] picketing—amounted to nothing more than a request to respect a primary picket line at the employer's premises," and concluded that this was traditional primary action outside the purview of 8 (b) (4) (A). On principle, I am unable to distinguish the oral and written appeals in the instant case from the appeal in *Pure Oil*. For here, as in *Pure Oil*, the employees of the other employer (Moore) were urged to do no more than to refuse to perform services *only* at the location involved in the primary dispute which, as has been found, was being legally picketed. I find that the Respondent's oral and written appeals, like its picketing, were not violative of the Act.

2. *What of the Respondent's defense that Samsoc is not an "employer" and therefore not a "person" within the meaning of Section 8 (b) (4) (A)?*

The finding made above that the Respondent's activities were primary in character is, of course, dispositive of the case. But though determination of the Respondent's added defense is no longer strictly essential, the issue has been carefully briefed and argued, and warrants I believe at least some consideration.

This defense is predicated upon the administrative dismissal of the Respondent's petition for certification, filed about a week after the picketing began and supported by an apparent majority of the unlicensed seamen on the *Phopho*. In sustaining the Regional Director's dismissal upon the ground that the Board had no "jurisdiction over the Employer," the Board left somewhat obscure the precise legal basis of its ruling. The Respondent argues that since Samsoc is clearly engaged in commerce, the basis for the Board's ruling must have been that the Board did not consider Samsoc an "employer" within the meaning of the Act. If it is not an "employer" subject to the Act's restrictions—asserts the Respondent—it may not be deemed a "person" as that term is used in Section 8 (b) (4) (A). And since secondary pressure is unlawful only where an object is to force an employer to cease doing business with another "person," the Respondent would have the Board conclude that the Respondent's activities, although viewed as secondary in character, are beyond the reach of 8 (b) (4) (A). Cf. *Al J. Schneider, Inc.*, 87 NLRB 99, 89 NLRB 221. Taking issue with the Respondent's contention the General Counsel stresses that Samsoc, although a foreign corporation, is both an "employer" within the literal meaning of that term and a corporate "person" within the definition of Section 2 (1) of the Act. In the absence of any express statutory exception, he argues, there is no warrant under the law for holding Samsoc not to be a "person" under 8 (b) (4) (A).

There is much to commend the Respondent's position, though perhaps not precisely for the reasons assigned by it. The record makes clear that the Respondent's ultimate goal was to force or require Samsoc to recognize and bargain with it. In determining the lawfulness of a boycott having as an object "forcing or requiring any other employer to recognize or bargain with a labor organization," Section 8 (b) (4) (A), if it is to be read correctly, is not to be read alone, but as specifically qualified by Section 8 (b) (4) (B). Unless that is done subsection (A) would destroy subsection (B) and render it meaningless in any proceeding

in which, as here, the complaint confines itself to an alleged 8 (b) (4) (A) violation. It would also fly in the teeth of the clear congressional intent, reflected not only by the legislative history,[8] but by the physical structure of Section 8 (b) (4) and the relationship, physical and logical, between subsections (A) and (B) thereof. Construing subsection (B) as a qualification upon subsection (A) means in practical effect that where the object is recognition by another employer, the validity of boycott action is to be tested by the provisions of subsection (B) rather than (A), even where (A) alone is expressly alleged to have been violated.[9] The difference is an important one, because under 8 (b) (4) (B), unlike 8 (b) (4) (A), secondary boycott activities are not illegal under all circumstances, but are expressly permitted where the labor organization on whose behalf they are conducted is a certified representative. Moreover, in referring to the one at whom the pressure is ultimately aimed, 8 (b) (4) (B) speaks of "any other employer" rather than "any other person." [10]

The thinking underlying 8 (b) (4) (B) seems to be that Congress considered it indefensible for a union with the democratic election machinery of the Act available to it to resort to secondary pressure to force recognition, but at the same time considered entirely justifiable the utilization of such an economic weapon against an employer who himself refused to abide by the results of the Board's processes, regardless of the injurious effect it might have on the business of a neutral.[11] But what of an employer, such as Samsoc, against whom the peaceful representation processes of the Board are not available and no certification can be obtained? Is he to be regarded as an "employer" within the intent of Section 8 (b) (4) (B)? Compelling reasons appear for answering the last question in the negative. If one is not an "employer" against whom a labor organization may proceed in a representation or an unfair labor practice proceeding, it seems unreasonable to hold him an "employer" when it is the labor organization that is being proceeded against. Moreover, it seems inequitable to enjoin to a more rigorous standard of conduct a union denied the opportunity to come within the area of immunity permitted by 8 (b) (4) (B) than is required of other labor organizations. In the instant case, the effect of saying that Samsoc is not an "employer" when the proceeding is against it, but is an "employer" when the proceeding is aimed at least in part to protect its interest, is to accord Samsoc, because it is a foreign shipping concern, greater rights than are given to American companies.

Were it not for the Board's decision in the *Di Giorgio Wine Company* case, 87 NLRB 720, I would have been inclined to view with favor the Respondent's position. But the Board in that case found that two labor unions had committed a violation of Section 8 (b) (4) (A), although their activities were engaged in to support recognition claims of two other unions that had been denied an opportunity to achieve Board certification. It is true that in the *Di Giorgio* case, the unions held responsible were not the unions that were unable to secure certification, but that does not to me appear to be a distinguishing factor, because the

[8] H. Rep. No. 510, 80th Cong. 1st Sess., p. 43; Sen. Rep. No. 510, 80th Cong. 1st Sess., p. 22.

[9] That is not to suggest that the complaint would fail because of the absence of an 8 (b) (4) (B) allegation; for a violation of 8 (b) (4) (B) would also establish an 8 (b) (4) (A) violation. It is to suggest, however, that if 8 (b) (4) (B) is found not to have been breached, no violation of 8 (b) (4) (A) can be found either.

[10] The reason for that is, of course, obvious. Only an employer could be a person from whom recognition or bargaining is sought.

[11] See, e. g., Senator Morse's remarks, 93 Cong. Rec. 1910; see also colloquy between Senator Pepper and Senator Taft at 93 Cong. Rec. 1107.

immunity to engage in secondary activities allowed by 8 (b) (4) (B) under the special circumstances there indicated is not restricted to the unions that are directly seeking recognition. It is true, too, that in the *Di Giorgio* case, the Board did not expressly consider whether Di Giorgio was an "employer" or a "person" within the meaning of Section 8 (b) (4), but arrived at its conclusion principally on the basis of considerations other than those which have been indicated above. Yet on the facts that were before it, the Board's ruling in *Di Giorgio* stands as a *subsilentio* holding inconsistent with the hypothesis suggested above for finding Samsoc not to be an "employer" or a "person" within the contemplation of Section 8 (b) (4) (A). Since I regard the *Di Giorgio* case as a precedent binding upon me, I am constrained to overrule the Respondent's contention just discussed.

Having found, however, that the Respondent's activities which are the subject of this complaint were primary in character, I conclude upon the record as a whole that the Respondent has not violated Section 8 (b) (4) (A) of the Act. It will accordingly be recommended that the complaint herein be dismissed in its entirety.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Sailors Union of the Pacific, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.
2. Moore Drydock Company is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
3. Sailors' Union of the Pacific, AFL, the Respondent herein, has not engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

[Recommended Order omitted from publication in this volume.]