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LABOR LAW

GERALD E. BERENDT* **

This article will discuss three cases dealing with labor law in which the United States Court of Appeals for the Seventh Circuit issued important decisions during the past year. Two of these cases[1] involve the question of when parties who have not exhausted administrative procedures may seek judicial review. The third case[2] deals with the distinction between lawful primary picketing and prohibited secondary activity.

JUDICIAL REVIEW: THE EXHAUSTION DOCTRINE

The two cases decided by the Seventh Circuit during the past year on the exhaustion of remedies issue considered the availability of judicial review of National Labor Relations Board[3] decisions by the federal district courts. In both cases, the court of appeals concluded that such review was not available until the respective parties had exhausted the Board's administrative process.

In the first of these cases, *Grutka v. Barbour*,[4] a union filed a representation petition in which it sought an election in a unit consisting of lay teachers working in grammar and high schools operated by the Roman Catholic Diocese of Gary, Indiana. Thereafter, the National Labor Relations Board's regional director scheduled and conducted an election. The president of the union also filed an unfair labor practice charge alleging that the Bishop of the Catholic Diocese had discharged a union official in violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[5] The

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1. Grutka v. Barbour, 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977); Squillacote v. Int'l Bhd. of Teamsters, Local 344, 561 F.2d 31 (7th Cir. 1977).
2. Helgesen v. Ironworkers, Local Union 498, 548 F.2d 175 (7th Cir. 1977).
3. Hereinafter referred to in the text and footnotes as the Board.
4. 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977).
5. National Labor Relations Act §§ 8(a)(1), 8(a)(3), 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1970). These sections provide:

(a) It shall be an unfair labor practice for an employer
(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title [29 U.S.C. § 157];
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

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general counsel of the NLRB issued a complaint on the basis of this charge, and at the time the instant case was before the court of appeals, the general counsel had presented his case-in-chief before an administrative law judge.

During the aforementioned proceedings, the Bishop entered the federal district court, seeking to enjoin the Board from holding the election, from continuing the unfair labor practice proceeding, and from asserting jurisdiction over the Bishop. The Bishop further sought a declaration that the National Labor Relations Act was unconstitutional as applied to lay teachers in parochial schools.

Following the Bishop's request for a temporary restraining order, the district court issued a memorandum decision[6] in which it enjoined the counting of the ballots in the election and any further proceedings in the representation and unfair labor practice cases pending a court of appeals decision in a related case.[7] The district court held that it had jurisdiction in the case because the Bishop had challenged the Board's action on the basis of a first amendment[8] claim which was "not clearly frivolous."[9] Thereafter, the Board and the union, which had intervened as a defendant in the proceedings, appealed to the court of appeals.

In deciding that it had jurisdiction to grant the injunction, the district court relied heavily on the United States Supreme Court's decision in *Leedom v. Kyne*.[10] In that case, the Supreme Court held that a district court

> organization: Provided, That nothing in this subchapter [29 U.S.C.S. §§ 151-158, 159-168], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 U.S.C.S. § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) [29 U.S.C.S. § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Id.

6. *See* 549 F.2d at 7 for a dicussion of the district court decision.
7. The district court enjoined further proceedings on this issue pending the Seventh Circuit's decision in *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977).
8. U.S. CONST. amend. I.
9. 549 F.2d at 7.
10. 358 U.S. 184 (1958).

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had jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the act."[11] The Court reasoned that although Board orders in representation proceedings are not subject to direct judicial review, the Board's action in *Kyne* was not authorized by the statute, and thus, the suit in the district court was not one to "review" a decision of the Board made within its jurisdiction. Rather, the suit was brought to correct an order made "in excess of [the Board's] delegated power and contrary to a specific prohibition in the act."[12] This portion of the Supreme Court's rationale has drawn considerable criticism.[13] Nevertheless, the *Kyne* case has survived as an exception to the ordinary procedural routes for obtaining judicial review of Board action.[14] Subsequent cases have described the exception as "a narrow one"[15] which is available "only under highly exceptional circumstances."[16]

In the *Grutka* case, the court of appeals addressed the issue of whether the district court had jurisdiction to enjoin the Board's actions through the extraordinary procedural route initially fashioned in the *Kyne* case. The court of appeals held that it did not.[17] In reaching its holding, the Seventh Circuit noted that section 10 of the National Labor Relations Act[18] provides for judicial review of Board rulings in the federal courts of appeals. The court emphasized that exhaustion of administrative remedies before the National Labor Relations Board is normally a prerequisite to federal court jurisdiction. According to the court, this exhaustion requirement serves a variety of purposes, including prevention of litigious interruptions of the administrative process as well as deference to the agency's fact-finding mission and administrative expertise. The court conceded that these policy considerations and the doctrine of exhaustion would not prevent the invocation of the extraordinary route fashioned in *Kyne* if the Board has clearly exceeded its authority as a matter of law.[19]

The court of appeals concluded that in the *Grutka* case there was "no patent disregard by the Board of the bounds of its statutory jurisdiction."[20] The court recognized that a district court has authority to enjoin an exercise

11. *Id.* at 188.
12. *Id.*
13. *See* Goldberg, *District Court Review of NLRB Representation Proceedings*, 42 IND. L.J. 455, 472 (1967) [hereinafter cited as Goldberg].
14. *See, e.g.*, 549 F.2d at 7-8. This exception will hereinafter be referred to as the *Kyne* exception.
15. Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964).
16. McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916, 917 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).
17. 549 F.2d at 8.
18. National Labor Relations Act § 10, 29 U.S.C. § 160 (1970).
19. 549 F.2d at 8.
20. *Id.*

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of Board jurisdiction which is unconstitutional as a matter of law. In the *Grutka* case, however, the first amendment issue of state entanglement and interference with the free exercise of religious belief could not be resolved without "a factual record delineating the character of entanglement which assertedly arises from the state intrusion."[21] Thus, the court of appeals reasoned, application of the exhaustion doctrine under these circumstances would facilitate the resolution of the constitutional issue and avoid a premature review in the district court.

In the concluding portion of its decision, the court of appeals rejected the Bishop's remaining arguments that the Board is not suited to judge the constitutionality of the National Labor Relations Act and that the requirement of exhaustion of the Board's processes will result in a "chilling effect" on the free exercise of religious belief. With respect to the first argument, the court reiterated that the issue of church-state entanglement could not be properly assessed without a developed factual background and that the Board is best equipped to develop a factual record for this purpose.[22] The court rejected the Bishop's second argument on the ground that there was no unavoidable chill created by requiring the parties to utilize the traditional forums for judicial review following the exhaustion of the Board's processes.[23]

There is little question that the court of appeals correctly concluded that the employer in *Grutka* should exhaust the Board's administrative process prior to obtaining judicial review. The court's decision is supported by a well-reasoned opinion which convincingly argues that no extraordinary route for judicial review should be afforded under the circumstances presented. In light of the acknowledged judicial interest in avoiding unnecessary interruptions of the administrative process, no exception to the statutory route for judicial review should be permitted unless that route is unavailable to the party seeking review or would otherwise come too late to protect that party's interests or rights. Neither of these circumstances existed in *Grutka* where the court found that section 10 of the National Labor Relations Act provided a method of review which the employer could eventually invoke without an interim chilling effect on the exercise of religious beliefs.

The court's opinion in *Grutka* is open to criticism on one narrow point. The court acknowledged that a district court could enjoin an exercise of Board jurisdiction which is unconstitutional as a matter of law. Since the issue of church-state entanglement could not be resolved without a factual

21. *Id.*
22. *Id.* at 9.
23. *Id.* at 9-10.

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record, this could not be determined without exhaustion of the Board's administrative process. Accordingly, the court applied the exhaustion doctrine.

This rationale implies that where no factual record is necessary, the district court could review an exercise of Board jurisdiction to determine whether said exercise of jurisdiction is unconstitutional on its face. Such an unqualified policy would invite interruptions of the Board's process with every such allegation and would ignore the expertise of the Board in a matter involving the application or interpretation of the statute it administers. Before the *Kyne* exception is made available to a party asserting that the Board's exercise of jurisdiction is unconstitutional as a matter of law, the party should establish that the ordinary statutory route is unavailable or would be ineffective as a method for protecting that party's interests.

The Seventh Circuit also considered the issue of district court review of Labor Board action in *Squillacote v. International Brotherhood of Teamsters, Local 344*.[24] In that case, the union filed a representation petition seeking an election in a unit of employees of Purolator Security, Inc. The regional director dismissed the petition relying on section 9(b)(3) of the National Labor Relations Act[25] which provides, in relevant part, that:

> [T]he Board shall not (3) decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard. . .; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.[26]

The Board agreed with its regional director that the petition must be dismissed since the employees in question were "guards" and the petitioner was a labor organization which "admits to membership" and was "affiliated. . . with an organization which admits to membership, employees other than guards."[27]

Following the dismissal of the union's representation petition, the general counsel of the NLRB issued a complaint alleging that the union was violating section 8(b)(7)(C) of the Act[28] by engaging in recognitional picket-

24. 561 F.2d 31 (7th Cir. 1977).
25. National Labor Relations Act § 9(b)(3), 29 U.S.C. § 159(b)(3) (1970).
26. *Id.*
27. 561 F.2d at 33.
28. National Labor Relations Act § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C) (1970). This section provides, in part:

> It shall be an unfair labor practice for a labor organization or its agent to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . where

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ing of Purolator. The regional director subsequently petitioned the federal district court under section 10(1) of the Act[29] to enjoin the picketing pending the Board's resolution of the unfair labor practice case. The union counterclaimed alleging that section 8(b)(7)(C) was unconstitutional as applied in this case, that section 9(b)(3) was unconstitutional on its face, and that the Board exceeded its statutory authority when it dismissed the representation petition.[30] The district court rejected these contentions and granted the regional director the requested injunction.[31] Thereafter, the union appealed to the court of appeals.

The court of appeals affirmed the judgment of the district court, holding that injunctive relief under section 10(1) was appropriate under the circumstances in this case.[32] Citing its earlier decisions regarding section 10(1), the court of appeals stated that a district court's inquiry in such cases "must be narrowly confined" to a determination of "whether the Board has

such picketing has been conducted without a petition under section 9(c) [29 U.S.C. § 159(c)].

Id.

29. National Labor Relations Act § 10(1), 29 U.S.C. § 160(1) (1970). This section provides, in part:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any persons involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

Id.

30. 561 F.2d at 33.
31. *Id.*
32. *Id.*

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reasonable cause to believe the Defendant has violated . . . the Act.''[33] The court further stated that the district court need only determine ''that the legal theory underlying the unfair labor practice charge is 'substantial and not frivolous.' ''[34] According to the court of appeals, the regional director's legal theory satisfied this test since the Board could not certify the union as bargaining representative for the Purolator guards and, therefore, the union's petition did not insulate it from the provisions of section 8(b)(7)(C). The court noted that similar theories have been offered in other cases.[35]

Having concluded that ''reasonable cause'' was established and that the injunctive relief granted by the district court was proper, the court of appeals considered the union's counterclaim. The union contended that the district court should have assumed jurisdiction with respect to the counterclaim since, according to the union, the Board violated a statutory mandate,[36] and the *Kyne* exception[37] should be applied. But, the court of appeals repeated that it was satisfied that the Board's position was a reasonable one and, therefore, the narrow *Kyne* exception to the exhaustion requirement was not appropriate. Quoting one of its earlier decisions, the court of appeals reasoned that ''a district court's jurisdiction 'must rest on more than a mere allegation of unauthorized Board action.' ''[38]

Finally, the court of appeals rejected the union's argument that the *Kyne* exception applies to permit the district court to consider the union's claim that section 9(b)(3) is unconstitutional on its face. The court of appeals noted that the Supreme Court has never endorsed an exception to the exhaustion requirement where there is a claim of facial unconstitutionality of the statute. Further, to the extent that this exception has been recognized in the Seventh Circuit, it only applies if the party invoking district court jurisdiction asserts ''a vested property right with respect to a collective bargaining agreement where he has no way of ultimately obtaining judicial review.''[39] The court of appeals concluded that the proper test for the application of the exception was not that the constitutional claim is ''not transparently frivolous.''[40] Rather, the *Kyne* exception to the exhaustion

33. *Id.*

34. *Id.* at 34. *See* Squillacote v. Graphic Arts Int'l Union, 540 F.2d 853, 858 (7th Cir. 1976).

35. 561 F.2d at 34. *See* Wells Fargo Armored Serv. Corp., 221 N.L.R.B. 1240 (1975), *enforced*, Drivers, Chauffeurs, Warehousemen & Helpers Local 71 v. N.L.R.B. 553 F.2d 1368 (D.C. Cir. 1977); Dunbar Armored Express, Inc., 211 N.L.R.B. 687 (1974).

36. National Labor Relations Act § 9(c), 29 U.S.C. § 159(c) (1970).

37. *See* text accompanying notes 10-16 *supra*.

38. 561 F.2d at 36 (quoting Scrap Iron Employees Local 714 v. Madden, 343 F.2d 497, 499 (7th Cir.), *cert. denied*, 382 U.S. 822 (1965)).

39. 561 F.2d at 38 (quoting Grutka v. Barbour, 549 F.2d 5, 8 (7th Cir. 1977)).

40. 561 F.2d at 38-39 (quoting Fay v. Douds, 172 F.2d 720, 723 (2d Cir. 1949)).

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requirement is only available where there is a *plain* violation of a constitutional or statutory right. In the instant case, according to the court of appeals, the union's claim failed to state a clear violation of right since it was not certain that the Supreme Court would find section 9(b) invalid in its entirety.[41]

For the foregoing reasons, the court of appeals rejected the union's claim that the district court erred in dismissing the union's counterclaim. The court of appeals concluded that an exception to the exhaustion requirement was unavailable in this case and that the district court properly declined to interfere in the ongoing proceedings of the Board.[42]

The decision in *Squillacote* is open to serious criticism. Unlike the employer in the *Grutka* case, the union, the party seeking review of the Labor Board's exercise of authority, may not have an effective method of obtaining judicial review outside of the *Kyne* exception. However, it may be argued that the union's contentions could be raised by way of defense to the unfair practice complaint alleging the violation of section 8(b)(7)(C) and that any Board decision regarding these contentions would thereafter be subject to statutory review available under section 10 of the Act. Although the court intimates that this is the case, it has never been established that Congress intended to provide such a statutory route for review when it added section 8(b)(7) to the Act in 1959.[43] The invocation of such a method would require labor picketing of sufficient disruptive effect to cause the employer to file the requisite unfair labor practice charge, a procedure Congress would not have designed in light of congressional policy to avoid labor disputes and the resulting interference with the flow of commerce.[44]

In addition, the court's distinction between constitutional claims which are not transparently frivolous and plain violations of vested property rights appears to be meaningless. A characterization of the issue as one or the other would require a considerable inspection by the district court of the merits of the claim, thus making a sham of the *Kyne* exception and defeating the purpose of the exhaustion doctrine. The courts should consider developing a test which focuses on the nonavailability of meaningful statutory review which would not require a premature consideration of the merits and, therefore, would be preferable to the attenuated distinctions set forth by the court of appeals in *Squillacote*.

41. 561 F.2d at 36.
42. *Id.* at 37.
43. *See* Goldberg, *supra* note 13, at 503-05.
44. *See* 29 U.S.C. § 141 (1970).

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SECONDARY PRESSURE: COMMON SITUS PICKETING

Section 8(b)(4)(B) of the National Labor Relations Act[45] outlaws the use of pressure against parties not directly involved in a labor dispute by stating, in part, that it shall be an unfair labor practice for a labor organization to induce any individual to engage in a strike or to threaten, coerce, or restrain any person with the purpose of forcing or requiring anyone to cease doing business with any other person.[46] Primary picketing[47] which is not otherwise unlawful is excepted from this prohibition against secondary pressure. However, the distinction between pressure which is primary and that which is secondary is often unclear, particularly when the employer with whom the union has its primary dispute is doing business in a location also inhabited by parties not involved in the dispute. Justice Frankfurter commented on this difficulty in *Local 761, International Union of Electrical, Radio & Machine Workers v. NLRB*,[48] conceding that:

> [I]mportant as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade. '[I]ntended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers.' 'It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises.' 'Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success.' But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer.[49]

In *Helgesen v. Ironworkers, Local Union 498*,[50] the Court of Appeals for the Seventh Circuit had occasion to grapple with the distinction between lawful primary activity and prohibited secondary activity at a common situs in the construction industry. In that case, the union's primary dispute was with Helgesen, a nonunion subcontractor engaged in the erection of steel frames, roofs and siding.

45. National Labor Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970).
46. *Id.*
47. Primary picketing is union picketing of an employer with whom it has a dispute.
48. 366 U.S. 667 (1961).
49. *Id.* at 673-74.
50. 548 F.2d 175 (7th Cir. 1977).

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In 1974, Rath Manufacturing, a general contractor in the construction industry, contracted with Helgesen to complete the steel work at a certain project under construction in Janesville, Wisconsin. Helgesen was to erect the steel on a concrete foundation laid by another subcontractor, Bob Kimball, Inc. On June 19, 1974, after Helgesen's employees began erecting the steel work at the construction site, the union commenced picketing at the junction of a highway and a recently dedicated gravel road bordering the job site. The union picketed whenever Helgesen employees were present. The picket signs stated: "T.W. Helgesen, Inc. is working on this job with labor receiving less than prevailing Ironworkers Local Union 498, AFL-CIO rates. This sign is not directed at the Employees of this company or the Employees of any other Employer servicing this job, but solely at the public."[51] The union had not actually investigated Helgesen's wages, benefits and other conditions of employment to determine whether Helgesen did indeed pay substandard wages.[52]

The picketing was authorized by the union business agent who gave the chief picket the following instructions:

> Picket only when the employees of the contractor are working. Picket as close to the job site as possible without trespassing. Do not block any entrances. Avoid conversation with anyone. Keep moving at all times. Refer all questions by pointing to the sign. Refer any problems to the business agent.[53]

On June 20, 1974, the day following the initiation of the picketing, Rath established a separate entrance to the job site for Helgesen's employees and suppliers. A separate entrance was set aside for employees and suppliers of the other employers. After it was formally notified of the separate entrances, the union continued to picket in the area of the intersection rather than confine its picketing to the entrance designated for Helgesen's use. On June 25, 1974, an unemployed member of the union, Campbell, told Kimball's foreman that union men should honor picket lines. Thereafter, the foreman pulled the Kimball workers off the job. That same day, Campbell and some other union members entered the job site and injured two Helgesen employees in a fight. One of the authorized union pickets, Koebler, followed Campbell and the others onto the site and allegedly threatened Mr. Rath, the general contractor, with bodily harm. Koebler also purportedly broke a window in one of Helgesen's trucks in order to break up the fight between Campbell and the others.

With the help of city officials, the union and Helgesen agreed that the

51. *Id.* at 178 n.2.
52. *Id.* at 178.
53. *Id.* at 178 n.3.

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picket line should be moved to an area near the Helgesen entrance, but Kimball employees remained off the job on June 25, 1974. Late that same day, Rath and Kimball agreed that Helgesen could leave the job site until Kimball completed the concrete work. After Helgesen left, the union withdrew its picket line.

Helgesen brought an action in the federal district court under section 303 of the National Labor Relations Act,[54] seeking to recover damages it allegedly sustained as a result of the union's alleged unfair labor practice in violation of section 8(b)(4)(B). The district court concluded that the union's object was clearly a primary one, that the union acted without secondary object, and accordingly, it held that the union was not liable to Helgesen under section 303.[55] Thereafter, Helgesen appealed to the court of appeals arguing that the district court did not give proper weight to findings of fact which evidenced a secondary object by the union.

The court of appeals noted that the purpose of section 8(b)(4)(B) is stated by the United States Supreme Court in *NLRB v. Local 825, Operating Engineers*.[56] In that case the Court stated:

> Congressional concern over the involvement of third parties in labor disputes not their own prompted § 8 (b)(4)(B). This concern was focused on . . . pressure brought to bear, 'not upon some third party who has no concern with it' with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands.
>
> Section 8(b)(4)(B) is, however, the product of legislative compromise and also reflects a concern with protecting labor organizations' right to exert legitimate pressure aimed at the employer with whom there is a primary dispute.[57]

Although the line between lawful primary activity and prohibited secondary activity is often difficult to ascertain, the court of appeals acknowledged that the Labor Board has announced certain objective standards to aid in that inquiry in common situs situations. The Board's criteria were set out in 1950 in the celebrated *Moore Dry Dock* case.[58] There, the Board

54. National Labor Relations Act § 303, 29 U.S.C. § 187(a), (b) (1970). This section provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Id.

55. *See* 548 F.2d at 179 for a discussion of the district court decision.
56. 400 U.S. 297 (1971).
57. *Id.* at 302-03.
58. 92 N.L.R.B. 547 (1950).

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reasoned that the legitimate interests of a union and those of a neutral may be accommodated without a violation if (1) the union's picketing is limited to those times when the situs of the dispute is on the secondary's premises; (2) the primary is engaged in its normal business at the situs; (3) the picketing is reasonably proximate to the situs; and (4) the picketing clearly indicates that the union's dispute is solely with the primary employer.[59]

In the *Helgesen* case, the court of appeals cautioned that the *Moore Dry Dock* standards "would not be applied mechanically."[60] It is "the totality of the union's conduct,"[61] according to the court, which will reveal whether the union sought the forbidden secondary object. The Seventh Circuit agreed with the district court that the facts do not demonstrate that the union had a secondary objective.[62]

The court of appeals rejected Helgesen's contention that secondary intent was disclosed because the union picketed ostensibly to publicize below-area-standard wages without investigating Helgesen's wage rates, fringes, and conditions of employment. The court noted that the union's business agent testified that he believed Helgesen paid below-area-standard wages because of "feedback" from other contractors who bid on the same job. The court concluded that this was "not an insubstantial basis" for the union's belief and that Helgesen failed to rebut it.[63]

Helgesen also argued that a secondary object is indicated by the union's failure to confine its picketing to the entrance designated for the use of Helgesen's employees and suppliers. The court of appeals agreed with the lower court that the failure to so confine the picketing was not indicative of a secondary object. The court reasoned that the union satisfied three of the *Moore Dry Dock* standards[64] and that its instructions to the pickets further indicated that it sought to direct its picketing at Helgesen. The court also noted that there was considerable confusion and uncertainty as to whether the road near the job site was a dedicated public road available to the union for picketing. After it was established that the road was dedicated, the union moved the picketing closer to the entrance used by Helgesen. Thus, the court concluded, the union's failure to confine the picketing did not indicate a secondary object.[65]

59. *Id.* at 549.
60. 548 F.2d at 181.
61. *Id.*
62. *Id.* at 182.
63. *Id.*
64. *See* text accompanying note 59 *supra* for the *Moore Dry Dock* standards. In *Hegelson*, the court found that the defendant union only picketed when plaintiff's employees were on the job site; that plaintiff's employees were engaged in normal business; and that the picket signs clearly indicated that the union's dispute was with the plaintiff. 548 F.2d at 182.
65. 548 F.2d at 183.

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The court next addressed the union's assertion that existence of an unlawful secondary object is evinced by union member Campbell's coercion of the neutral subcontractor, Kimball. Campbell had convinced Kimball's foreman, Gould, to withdraw Kimball's workers from the job site on June 25, 1974. The court of appeals acknowledged that Campbell's statements were not protected by the free speech provisions of section 8(c),[66] but the court expressed some doubt concerning the lower court's ruling that the union was responsible for Campbell's speech. Nevertheless, the court of appeals concluded that Campbell's statements to Gould did not evidence a secondary purpose. The court reasoned that Campbell merely told Gould that union people would honor a picket line. As the court stated, "Campbell did not threaten secondary pressure in order to force Gould into removing the Kimball crew."[67] Even though it could be said that Campbell's remarks "coerced" Gould, the court reasoned that "[s]ome disruption of business relationships is the necessary consequence of the purest form of primary activity."[68]

Finally, the court of appeals declined to find evidence of unlawful secondary object in the threat by union picket Koebler against general contractor Rath.[69] Koebler told Rath that the latter caused the trouble by hiring cheap labor, and Koebler further told him that the only reason he did not physically attack Rath was that he (Rath) was too old. The court conceded that these statements as well as the invasion of the job site, the physical violence and the damage to Helgesen's truck were acts of violence. However, the court concluded that they "were directed at the primary employer alone,"[70] and, thus, did not indicate a secondary object.

Although it is difficult to distinguish lawful primary picketing from unlawful secondary picketing, the district court and the court of appeals ignored compelling evidence that the union harbored the proscribed secondary object of forcing neutrals to cease doing business with the primary employer, Helgesen. As the court of appeals noted, the *Moore Dry Dock* standards should not be applied in a mechanical fashion, and the entire course of conduct by the union should be scrutinized to determine whether the union properly limited its picketing at the common situs to obtain the optimal primary impact or needlessly permitted the pressure of its patrol to spill over and embroil neutrals and their employees in the union's dispute with the primary. In *Helgesen*, the union unnecessarily allowed its picketing to extend to neutrals.

66. National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (1970).
67. 548 F.2d at 184.
68. *Id.* at 185.
69. *Id.* at 186.
70. *Id.*

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The court of appeals conceded that the union failed to confine its picketing to the gate assigned to the primary employer. The union asserted that it had declined to picket near the job site entrances on the gravel road since the road did not look like a dedicated public road. The union moved the picket line to the road near the Helgesen gate on June 25, 1974, after it learned that the road was dedicated. Under these circumstances, the court concluded there was no indication that the union acted with a proscribed secondary object.

Notwithstanding the confusion concerning the status of the gravel road, the facts indicate that the union made no effort to confine the impact of its picketing. In cases of ambulatory common situs picketing, the union is responsible for meeting the *Moore Dry Dock* standards, and it must take the initiative to ask permission to enter the neutral's property and picket reasonably close to the primary's job site.[71] In the *Helgesen* case, had the union truly believed that the gravel road was private rather than public property, it should have sought permission to approach the Helgesen gate. It did not seek this permission. Moreover, it persisted in picketing near the intersection even after the general contractor established a separate gate for Helgesen and formally notified the union of this. Having failed to picket reasonably close to the primary, the union needlessly increased the possibility of enmeshing neutrals, and for this reason, the court should have found the prohibited secondary object and reversed the district court.

CONCLUSION

The foregoing survey has focused on three recent decisions of the Court of Appeals for the Seventh Circuit. In two of these cases, the court of appeals declined to extend an extraordinary route of judicial review to parties who had not exhausted the administrative process of the National Labor Relations Board. These decisions reaffirm the court's position that judicial review of NLRB action in the federal district court should not be available absent rare circumstances. In the other case surveyed, the court of appeals declined to overturn a district court holding that a union was not liable for any damages to a nonunion subcontractor which it picketed at a construction site. Although the union failed to confine its picketing to a location proximate to the primary site, the court adopted the district court's conclusion that the union's object was primary rather than secondary.

71. *See* Local Union No. 612, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America (AAA Motor Lines, Inc.), 211 N.L.R.B. 608 (1974).

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