

General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Local No. 315, affiliated with International Brotherhood of Teamsters, AFL-CIO¹ and The Atchison, Topeka and Santa Fe Railway Company. Cases 32-CC-1302 and 32-CC-1306

March 6, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On August 7, 1991, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

¹ The name of the Respondent has been changed to reflect the new official name of the International Union.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the reserved gate system was not tainted during the Respondent's picketing and handbilling, we have considered the testimony of Picket Captain Milo Peyovich that various companies made deliveries to the primary, Piggyback, at gates 2, 3, and 5 during the picketing. The record does not establish that these deliveries were "goods for the direct use" of Piggyback, so as to render the companies "suppliers" of the primary employer, see *Iron Workers Local 433 (Chris Crane)*, 294 NLRB 182, 183 (1989), nor does it establish that these deliveries occurred before the picketing and handbilling was extended to these gates. Moreover, Peyovich testified that he did not report the claimed breaches of neutrality to Santa Fe at the times they are alleged to have occurred. Accordingly, the Respondent has not demonstrated that picketing of the neutral gates was at any time in response to deliveries by neutral employers. See *San Francisco Building Trades Council (Goold Electric)*, 297 NLRB 1050, 1055-1057 (1990).

³ We have modified the judge's recommended Order because a broad remedial order is unwarranted in view of our finding that the Respondent discontinued its unlawful picketing and handbilling 2 days after the issuance of a temporary restraining order and the absence of record evidence that the Respondent has engaged in previous similar violations. See *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 (1989); *Iron Workers Local 378 (McDevitt & Street)*, 298 NLRB 955 fn. 5 (1990). The judge's notice is consistent with this narrow Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Local No. 315, affiliated with International Brotherhood of Teamsters, AFL-CIO, Richmond, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 1(b).

"(b) Threatening, coercing, or restraining Santa Fe or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Santa Fe or any other person engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Piggyback."

Patricia M. Milowicki, for the General Counsel.

Duane B. Beeson (Beeson, Tayer, Silbert, Bodine & Livingston), for the Respondent.

Ronald W. Novotny (Hill, Farrer & Burrill), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which I conducted a hearing on March 13-14, 1991, is based on unfair labor practice charges filed by The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), in Cases 32-CC-1302 and 32-CC-1306, on July 13, 1990 and August 25, 1990, respectively, and on a consolidated complaint issued on November 20, 1990, by a Regional Director of the National Labor Relations Board (Board), on behalf of the Board's General Counsel. The consolidated complaint, which was amended on February 26, 1991, and at the start of the hearing, alleges in substance that during July and August 1990, Piggyback Services, Inc. (Piggyback) was under contract with Santa Fe to provide ramping and deramping services for Santa Fe at Santa Fe's Richmond, California terminal and that Teamsters Local No. 315 (Respondent) at this time was engaged in a primary labor dispute with Piggyback. The amended consolidated complaint further alleges in substance that Respondent during July and August 1990, picketed and distributed handbills at Santa Fe's Richmond, California terminal and picketed a dropoff site established by Santa Fe in the vicinity of the terminal and that, in violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (Act), an object of the aforesaid picketing and handbilling was to force or require Santa Fe and other persons to cease doing business with Piggyback.

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE RESPONDENT'S STATUS AS A LABOR ORGANIZATION

Santa Fe, a Delaware corporation, owns and operates an interstate railroad, including an intermodal rail and truck terminal in Richmond, California. During a 12-month period material to this case, Santa Fe derived revenues in excess of \$50,000 from the interstate transportation of freight.

Piggyback, an Ohio corporation with facilities and/or operations located throughout the United States, is in the business of providing ramping and deramping services for railway companies. During the time material, Piggyback had a contract with Santa Fe to provide ramping and deramping services to the latter at its Richmond, California intermodal terminal. During a 12-month period material to this case, Piggyback in the course and conduct of its business operations at Santa Fe's Richmond, California intermodal terminal provided services valued in excess of \$50,000 to Santa Fe.

During the time material herein, Santa Fe had a contract with United Parcel Service (UPS), to transport UPS's van by rail to and from Santa Fe's Richmond, California terminal.

Santa Fe and UPS are now, and have been at all times material, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Piggyback is now, and has been at all times material, a person and an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act.

Respondent is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

1. The setting

Santa Fe operates a rail terminal in Richmond, California, where it employs approximately 205 employees, including engineers, switching crews, mechanical employees, track maintenance employees, and clerical employees, all of whom are represented by seven different railroad craft unions. These employees perform all of the work connected with Santa Fe's operations at the Richmond terminal except, as described *infra*, that part of the operation which concerns the ramping and deramping of the terminal's intermodal freight. Santa Fe contracts this work to Piggyback, which is in the business of providing ramping and deramping services for railroad companies and maintains facilities throughout the United States. Piggyback's employees employed at the Richmond terminal are represented by Respondent.

Santa Fe's Richmond terminal handles two kinds of rail freight relevant to this case. Approximately 40 percent of the rail freight traffic is "intermodal"; the transportation of freight in trailers and containers. The trailers and containers, sometimes referred to herein collectively as vans, are transported by Santa Fe on railroad flatcars. The other kind of freight transported by Santa Fe, which is relevant to this case, has been referred to during the hearing as simply "intermodal-intermodal," and includes the transportation of

freight in boxcars, auto transport cars, gondolas, and tank cars.

All of the Richmond terminal's incoming and outgoing rail traffic uses a single "main line" track at the east end of the terminal which crosses a road a few hundred yards from the terminal, known as Indian Crossing. Approaching the rail yard from Indian Crossing, the main track branches into multiple tracks within the yard. Four of these tracks lead to an area on the north side of the yard known as the intermodal or ramp area where vans are loaded onto and off of railroad flatcars. The four tracks dedicated to the intermodal work are numbered 160 through 163. Additional tracks within the yard are used for other traffic, and for switching purposes.

At the west end of the rail yard, crossed by a freeway overpass, there are two spur tracks relevant to the events in this case. One is called the West Switching Lead, which proceeds in a fairly straight line through a tunnel and into an area known as Point Richmond. The other spur curves to the south, proceeds along Cutting Boulevard, and then to an industrial area at the Port of Richmond, about 2 miles from the rail yard; it is designated as the Zone 3 Industries spur. A third spur at the east end of the yard leads to the Chevron Oil Refinery.

Approximately 60 freight trains enter and exit the Richmond terminal each day. Some of the trains are used exclusively to transport intermodal freight, and are directed to the tracks leading into the intermodal area of the rail yard. Other trains include a mixture of flatcars carrying intermodal freight and cars carrying intermodal intermodal freight. Although less than a majority of all freight entering and leaving the rail yard is intermodal, the majority of the trains carry at least some intermodal freight. If there are a substantial number of flatcars carrying intermodal freight in a train, the train proceeds directly to the intermodal area of the rail yard, and its intermodal-intermodal railroad cars are switched onto other tracks. If there are only a few flatcars carrying intermodal freight in the train, the train goes to the main switching area, and the intermodal cars are switched onto tracks 160-163, the tracks leading to the yard's intermodal area. The West Switching Lead and the Zone 3 Industries spur, as well as the tracks at Indian Crossing, are used for this purpose. However, during the normal course of business, the Zone 3 Industries spur is used very infrequently as a switching spur for intermodal freight traffic, because the Zone 3 Industries spur's very tight turns make it dangerous to use for switching the 89-foot flatcars used to transport the intermodal freight.

The south boundary of the Richmond terminal is bordered by South Garrard Boulevard, along which there are entrances to the rail yard. A fenced area, referred to at the hearing as gate 1, just to the west of a freeway overpass, provides access to the rail yard generally. It appears that this entrance, which was used during the events material to this case, is not used during the normal course of business. To the east of gate 1, and on the other side of the freeway overpass, Santa Fe and Piggyback occupy an office building at 303 South Garrard Boulevard. There is walk-in and vehicle traffic from South Garrard Boulevard to this building and its adjacent parking lot, but this entrance does not provide access to the terminal's rail yard; this entrance is referred to in the record as gate 2. Further east on South Garrard Boulevard is gate 3, the entrance used by the trucks of Santa Fe's customers

which haul the containers and trailers (vans). Approximately 600 vans are transported in and out of this entrance daily. Several hundred yards further east on South Garrard Boulevard is a building, where Santa Fe maintains additional offices. There are two entrances to the rail yard in this area, referred to as gates 4 and 4(b) respectively, used principally by Santa Fe's employees, including train crews, maintenance of way crews and other craft employees. Finally the motor road which intersects with the main railroad line at Indian Crossing also leads to an access road into the terminal's rail yard, and is used by Santa Fe's employees, as well as by suppliers of Piggyback.

2. The work performed by Piggyback's employees

Santa Fe has a contract with Piggyback pursuant to which Piggyback performs ramping, deramping and related services in connection with Santa Fe's intermodal freight operations at the Richmond, California rail terminal. Piggyback performs this service on a fee-per-lift basis and, by the terms of its agreement with Santa Fe, is obligated to operate "as an independent contractor to [Santa Fe]."

As described in more detail below, Piggyback uses heavy equipment furnished by Santa Fe to place vans on railway flatcars and to remove vans from railway flatcars in the intermodal area of the terminal's rail yard, moves these vans to and from the area in the yard where the truckdrivers have deposited them, does repair and maintenance work on the equipment used for these purposes, inspects and weighs the vans as they move in and out of the rail yard, and performs other tasks in connection with Santa Fe's intermodal freight operation.

All of the vans used to transport intermodal freight handled at Santa Fe's Richmond, California terminal are transported to and from the terminal's rail yard through gate 3. They are transported in trucks, owned and operated by Santa Fe's customers or independent truckers whom Santa Fe's customers employ. Neither Santa Fe's customers nor the independent truckers have a contractual relationship with Piggyback. Each truck, as it enters and exits the rail yard through gate 3, must stop at a checkpoint near the gate manned by Piggyback's employees. There, all loaded vans are weighed and all vans are inspected for damage by Piggyback's employees. A form generated by a Santa Fe computer is used by Piggyback's checkpoint employees to indicate the condition of the van, and is signed by the truckdriver and by a Piggyback employee. The Piggyback employee then inputs this information into the main computer frame of Santa Fe. In those instances when a truckdriver leaves the rail yard with a loaded or empty van, the driver must again go through the above-described checkpoint procedure upon exiting the yard.

As part of the usual checkpoint procedure concerning intermodal freight, the following additional business contacts between the truckdrivers and Piggyback's employees occur: if a truckdriver does not know where, in the rail yard, to take the van he is carrying, the driver is furnished with this information at the checkpoint by a Piggyback employee; if a fully loaded van is to be transported to a railroad flatcar, rather than to the area in the rail yard where the vans are usually left by the truckdriver, the truckdriver is given this instruction by a Piggyback employee, either at the checkpoint or in the rail yard; if a truckdriver is instructed

by his employer to return with an empty trailer, the truckdriver is informed at the checkpoint by a Piggyback employee where, in the rail yard, the trucker will find an empty trailer to hook up to his tractor; and, truckdrivers occasionally ask one of Piggyback's hostler's for assistance in hooking up trailers to their tractors and/or for assistance in "flipping" a van from one truck chassis to another.

The person in charge of Piggyback's day-to-day operations at the Richmond terminal is its terminal manager. The terminal manager, along with several employees of Piggyback classified as coordinators, and one or two clericals employed by Piggyback, occupy an office in the building adjacent to gate 2, which also contains the offices of Santa Fe's director of intermodal services and Santa Fe's clerical employees. Piggyback's terminal manager spends approximately 60 percent of his time in his office regularly conferring and communicating with various Santa Fe employees, including the assistant train masters and others, in order to facilitate the intermodal operation and to resolve problems which his subordinates encounter in the performance of their job duties. The terminal manager makes daily visits to the checkpoint, the ramping and deramping areas, and the maintenance area, and during those visits speaks to various employees of Santa Fe, including the assistant train masters and mechanical department personnel, in order to effectively discharge his managerial duties, which include resolving those problems which prevent Piggyback's employees from effectively performing their jobs at the terminal.

Piggyback's coordinators are in continuous communication with Santa Fe's assistant train masters. The coordinators, who are on duty 24 hours a day, are responsible for making sure the right railroad flatcars and vans are on the right railroad tracks at the right time, so they may be handled by Piggyback's ramping and deramping employees as scheduled. In order to perform their duties the coordinators communicate constantly with Santa Fe's assistant train masters and with other Santa Fe personnel, in order to get the track assignment of trains, information about the spotting of flatcars, and other information indispensable for Piggyback to perform its ramping and deramping work at the terminal. It is undisputed that the coordinators would not be able to perform their duties, which are essential to Piggyback's operation, without the information furnished to them by Santa Fe's personnel.

Piggyback's employees also work together with Santa Fe's mechanical department's repair personnel to repair the locking mechanism on a flatcar when it malfunctions, and because of this prevents Piggyback's employees from either loading or unloading a van from the flatcar. This occurs approximately 10 times weekly. In addition, Piggyback's and Santa Fe's employees work together to make sure that each van is securely locked onto its flatcar, before it leaves the ramping area or the rail yard. Piggyback's employees are initially responsible for securing the van to the flatcar. Each locking device is then doubled checked by a Santa Fe employee, who, if he is not satisfied, will direct a Piggyback employee to resecure the van to the flatcar or otherwise to correct the problem.

Piggyback's and Santa Fe's employees must also coordinate their work in connection with "switching" of railroad cars. An important safety procedure calls for both groups of employees to be responsible for opening and closing safety

gates which swing up and down at either end of tracks where work is being performed, or to admit trains into or out of areas where work is to be performed. For example, whenever switching of cars occurs in or out of the intermodal area of the rail yard, "flag" protection is the responsibility of the craft or employee group requiring protection against an unauthorized entry into the area by an engine. Piggyback's employees have authority to release cars to Santa Fe's operating employees for switching purposes. In order to coordinate this procedure there is frequent communication between Piggyback personnel and Santa Fe's personnel. Similarly, Piggyback's yard supervisors coordinate car movements with Santa Fe's assistant train masters to create a "split" in a train—to open a gap between two cars by uncoupling them—in order to permit Piggyback's hostlers access between the staging area where the vans are kept and the tracks, without having to drive completely around a long freight train.

The movement of trains into or out of the rail yard's intermodal area is not permitted until the gate is opened, and then closed behind the train, by a Piggyback employee. In this regard, each incoming intermodal train, for example, requires a Santa Fe assistant train master to notify a Piggyback employee of its arrival, whereupon the Piggyback employee drives to the area where the intermodal spur leaves the main line, opens the gate, and shuts it after the train has moved through.

3. Respondent's picketing and handbilling activity

Respondent admits that throughout the events material to this case it was engaged in a primary labor dispute with Piggyback and did not have a labor dispute with Santa Fe. The nature of Respondent's dispute with Piggyback was not the subject of testimony, but this much can be gleaned from the record concerning the dispute. Prior to the events in this case, Respondent had a long-time collective-bargaining relationship with Santa Fe Terminal Services, Inc. (Terminal Services), a wholly owned subsidiary of Santa Fe, which performed the same ramping and deramping services for Santa Fe at Santa Fe's Richmond railroad terminal, as described in detail supra. Santa Fe discontinued the use of Terminal Services on June 30, 1990,¹ and awarded a contract to Piggyback for the same work. Piggyback began its operations in Santa Fe's Richmond terminal on July 1. Respondent began its picketing and its other actions described hereinafter, when, as it asserted, Piggyback reneged on a promise to hire the former Terminal Services' employees, who had been represented by the Respondent, to perform the work.

Picketing activity was commenced by Respondent at the Richmond terminal on July 2 at gate 1, the second day after Piggyback began performing under its contract with Santa Fe. As of that time Santa Fe had posted a sign at gate 1 which stated, in substance, that the gate was reserved exclusively for the use of Piggyback's employees, visitors, customers, and suppliers, and that Santa Fe's employees, visitors, customers and suppliers should enter the terminal

through gates 2 and 3. The pickets stationed at gate 1 carried signs with the following legend:²

PIGGYBACK SERVICES LOCK OUT
UNFAIR TO TEAMSTERS LOCAL 315

Respondent continuously picketed at this gate with the above-described picket sign until August 29, when its dispute with Piggyback ended.

Gates numbered 2, 3, 4, and 5, which have been described supra, were subsequently picketed by Respondent at various times in July and August. These gates, at the times of Respondent's picketing, had been posted with signs which stated, in substance, that the gates were reserved for the exclusive use of Santa Fe's employees, visitors, customers and suppliers and that Piggyback's employees, customers, visitors and suppliers should enter the terminal through gate 1 and gave the location of gate 1.

On July 12 the Respondent expanded its picketing to gate 3 and distributed handbills to the truckdrivers entering at this location, reading:

TO DRIVERS ENTERING
THIS RAIL YARD

Teamsters Local 315 is asking you to respect our picket line against Piggy Back Services, Inc.

If you are here to pick up or drop a trailer, you will be dealing directly with employees of Piggy Back Services, Inc. We are asking you not to do that.

If you are a Teamster, you have a right under your Union contract not to do business with this unfair employer. If you are not a Union member, you still have legal rights. Call the National Labor Relations Board (273-7200).

TEAMSTERS LOCAL NO. 315

Respondent picketed and handbilled at this gate continuously until August 29, when its dispute with Piggyback ended.

On July 12, the day it extended its picketing to gate 3, Respondent wrote United Parcel Service (UPS), Santa Fe's largest customer for intermodal freight at the Richmond rail terminal,³ explaining its dispute with Piggyback and stating the reasons for picketing gate 3. In this last respect, the letter reads as follows:

[T]he picketing is presently being relocated at the gate where UPS drivers normally enter the rail yard to pick up and deliver trailers. The pickets will be appealing to all drivers entering the premises who do business directly with Piggy Back Services, Inc., to refuse to perform any work directly related to the Piggy Back Services, Inc., operation.

The present work operation . . . requires drivers entering the premises to deal directly with the employer performing the ramping and deramping services (now Piggy Back Services, Inc.) as a part of the pick up

¹ Unless otherwise specified all dates hereinafter refer to the year 1990.

² The same picket sign language was used by Respondent for all of the picketing described hereinafter.

³ UPS accounts for 25 percent of Santa Fe's intermodal business, and is the single largest trucker using the Richmond rail terminal.

and/or delivery of trailers. Piggy Back Services, Inc. is the primary employer involved in this labor dispute, and Local 315 is entitled to request other employees to honor our picket line against this Employer by refusing to work directly with its personnel.

As a consequence of the picketing at gate 3, the union-represented truckdrivers, including the drivers employed by UPS, refused to cross the picket line. To maintain the flow of intermodal business, Santa Fe established a "drop off" point on a public street near gate 3 for the use of UPS and the other union truckers. Santa Fe arranged for the services of outside trucking companies to pick up the trucks at this location, drive them through gate 3, through the check point, and into the staging area assigned to Piggyback for the ramping and deramping of intermodal freight. These trucks were then returned to the dropoff point, perhaps with a loaded or empty trailer, where the regular drivers picked them up and drove them away. In the case of the UPS trucks, the ferrying of vans into and out of the rail terminal was performed by UPS supervisors.

On August 10 the Respondent further extended its picketing and handbilling to gate 5, the entrance to the rail yard at Indian Crossing. Respondent picketed with the same signs it was using at gates 1 and 3, but the handbills distributed at this location were addressed, "TO EMPLOYEES WORKING IN SANTA FE RAILWAY YARD," and after describing Respondent's labor dispute with Piggyback, the handbills read as follows:

We are asking you to refuse to deliver railcars to Piggy Back employees to work on, refuse to work with Piggy Back employees, and refuse to perform switching services to enable Piggy Back employees to do their work. We are not asking you to cease any work unrelated to Piggy Back's day-to-day operations.

This is your fight as well as ours, because YOU COULD BE NEXT.

The picketing and handbilling continued at this location for the duration of Respondent's dispute with Piggyback.

Prior to the establishment of the picket line at gate 5, Santa Fe's hub manager at the Richmond terminal, Wildon Thibeaux, a subordinate of Ray Applebaugh, Santa Fe's director of intermodal services at the Richmond terminal, received a letter dated July 30 from Respondent's secretary-treasurer, George Sveum, which reads as follows:

Dear Mr. Thibeaux:

I am writing to request that Teamsters Local 315 be given access to Railway property in order to further its labor dispute with Piggy Back Services, Inc.

Under existing practices, one or more employees of Piggy Back Services is responsible for unlocking and opening, and subsequently locking three gates at the east end of the yard to provide rail trains with connecting lines to tracks 160, 161 and 163 in making pickups and deliveries of trailers. Local 315 wishes to place pickets at these gates whenever a Piggy Back Services employee is performing the work involved. The gates, however, are located well inside the boundaries of Railway property, and our pickets cannot patrol

in that area absent Railway permission. We are accordingly asking that the Railway allow pickets to come onto its property for this limited purpose.

Local 315 will be happy to discuss with Railway representatives the arrangements and conditions for such picketing to take place so that there will be no disruption of activities of any employer other than those which might be incidental to lawful picketing against Piggy Back Services, and also to assure compliance with all appropriate security rules and regulations. Please call to schedule a meeting for this purpose. It is our intent to engage in this activity at the earliest possible time, and I am accordingly requesting a prompt response to this letter.

Applebaugh testified Santa Fe received this letter on or about July 30, that to his knowledge Santa Fe did not answer the letter, and further testified that he would have known if Santa Fe had answered the letter.⁴ On the subject of whether it would have been feasible for Santa Fe to have invited Respondent's pickets onto Santa Fe's premises to picket, as requested in Sveum's July 30 letter to Thibeaux, Applebaugh testified:

The facility [referring to Santa Fe's Richmond railway terminal] is a totally integrated facility. We cannot invite the unions into the facility because there is not room for them to picket safely. Also there would not be a way to segregate the unions from the railroad's craft employees.

Jerry Fraizer, Santa Fe's relief assistant superintendent during the time material, also testified it would have been unsafe for the pickets to have picketed inside the rail yard. Applebaugh's and Fraizer's testimony was not denied or otherwise contradicted by the record as a whole.

Also prior to the start of the picketing at gate 5, which gate is used by various employees employed by Santa Fe to enter the railway yard, on August 8 Respondent sent letters to the presidents of the seven unions that represent Santa Fe's employees employed at the Richmond terminal. These letters, identical in content, informed the unions about Respondent's labor dispute with Piggyback and described the nature of the dispute and the importance of the dispute to the several unions which represent the railroad's employees, and with respect to Respondent's picketing in connection with the dispute, stated:

We have been sanctioned by the International Brotherhood of Teamsters to picket Piggyback Services and

⁴There is a dispute as to whether or not Santa Fe answered Sveum's July 30 letter. The parties stipulated that L. C. Jenkins, Santa Fe's assistant vice president for Intermodal Terminal Operations and Services, whose office is in Chicago, Illinois, if called to testify would have testified that he had caused to be sent to Sveum a letter dated August 6, acknowledging Sveum's July 30 letter, and stating, in pertinent part, that Santa Fe declined to allow Respondent's pickets to come onto Santa Fe's property for the purpose of picketing Piggyback, "because of safety, security and liability concerns, among others, Santa Fe Railway's policy is not to allow individuals on its property except when their presence is related to Santa Fe's business." Sveum credibly testified that Respondent received no such letter (C.P. Exh. 5).

we are picketing some of the entrances to the Richmond Yard. Road crews (trains) have been going through our lines both when entering and exiting the Piggyback Services, Inc. facility. We have handed out fliers (see enclosures) informing Railroad employees of our labor dispute with Piggyback Services and asking for their support and to please recognize our sanctioned picket line.

Our members have talked to some of the Railroad Union employees and have been told that they have received no instructions regarding our picket lines. In order for us to be able to resolve this problem and to put our members back to work, we need the support and respect of our lines by other Local Unions. If you can notify your Santa Fe Railroad members, Northern California Division, that the Teamsters Union members at Richmond, California are engaged in a lawful and sanctioned strike and that each person has the right to honor a picket line without jeopardizing their jobs, it would be of great benefit towards a settlement with Piggyback Services, Inc.

The reason for this letter is two-fold: first . . . ; second, to seek your assistance and cooperation in informing your members in this area that we are on strike and to please honor our picket lines if they come in contact with our picketers.

As I have indicated previously, while a substantial number of the trains entering and exiting the Richmond terminal carry some intermodal freight, some of these trains carry no intermodal freight whatsoever. In connection with Respondent's picketing at Indian Crossing, its picket captains Milo Peyovich and Charles Russell Jr., instructed the persons who picketed on behalf of Respondent that they were to picket only trains made up, in whole or in part, of intermodal flatcars, and not to interfere with trains comprised exclusively of intermodal-intermodal freight.⁵ Also, when Peyovich and Russell were at Indian Crossing during the picketing, they observed that their instructions were being obeyed; that exclusively intermodal-intermodal freight trains were not being picketed. However, Peyovich and Russell were present at Indian Crossing during the picketing for only a few hours each day, during the 24 hours each day that the pickets were stationed at this location, and Russell was not present after August 25, when he was hospitalized.⁶

During the period when Peyovich and/or Russell were not present to supervise the picketing at Indian Crossing, the record reveals that on certain occasions the pickets ignored their instructions and picketed trains which carried exclusively intermodal-intermodal freight. In this regard, it is undisputed that when the pickets stationed at Indian Crossing observed a train approach with one or more cars carrying intermodal freight, their procedure was to leave the gate and approach the tracks with their picket signs and to hold up or

⁵Based on the credible testimony of Peyovich and Russell and picket John Krebs.

⁶I also note that picket John Krebs, a picket for Respondent at Indian Crossing who credibly testified that while he was there the pickets did not picket the trains which contained no intermodal freight, was able only to picket intermittently, albeit on a daily basis, due to a leg injury.

wave the signs so that the train's engineer's could see that they were picketing. The testimony of Jerry Fraizer and John Herndon establishes that the pickets stationed at Indian Crossing on several occasions acted in this manner when trains approached the crossing hauling only intermodal-intermodal freight. Santa Fe Relief Superintendent Fraizer testified he observed the pickets wave their signs and stop a intermodal-intermodal freight train on the afternoon of August 10,⁷ and testified he regularly observed the Indian Crossing pickets picket trains which exited from the intermodal-intermodal section of the rail yard.⁸ Fraizer further testified he observed the Indian Crossing pickets approached the railroad tracks and wave their signs at completely intermodal-intermodal freight trains as they approached the crossing, as follows:⁹ one train on August 23; one train on August 18; two trains on August 16; two trains on August 15; and, on several occasions between August 24 and 27, observed the pickets waive their picket signs toward a switch engine moving oil tankers into the Chevron Oil facility which is accessed off of the Indian Crossing track. Santa Fe's general supervisor of train handling, Herndon, testified that during the 6-day period commencing on or about August 10, that whenever a train approached Indian Crossing at night, which was when he was on duty, that the Indian Crossing pickets took their picket signs, went to within 6 to 10 feet of the railroad tracks, and stood on both sides of the tracks with their signs and did this regardless of the type of train involved; whether the train carried intermodal freight or was a completely intermodal-intermodal freight train.¹⁰

In concluding that Respondent specifically instructed its pickets that they were to picket only freight trains which carried at least one or more intermodal freight cars and not to interfere with trains comprised exclusively of intermodal-intermodal freight cars, I considered the testimony of Jim Fitzgerald and Robert Golden that they were informed by pickets, in effect, that they had been instructed to stop trains carrying only intermodal-intermodal freight, as well as trains carrying intermodal freight.

Fitzgerald, Santa Fe's hub manager, testified that on about August 24 while at Indian Crossing with Santa Fe Mechanical Foreman Charles Hunter, for the purpose of moving an

⁷I note that when Fraizer was shown Santa Fe's records which identified the intermodal-intermodal freight trains which entered and exited the terminal on August 10, he testified he was not able to recall whether he observed any one of those trains stopped at Indian Crossing due to the pickets' conduct.

⁸Fraizer did not testify that those trains were completely intermodal-intermodal freight trains.

⁹I note that the credible testimony of picket captain Peyovich, which was corroborated by Santa Fe's general supervisor of train handling, John Herndon, establishes it was very difficult for the pickets to determine whether a train approaching Indian Crossing was a completely intermodal-intermodal freight train, especially during the nighttime hours and especially if the train was a long one, inasmuch as somewhere near the end or the middle of the train there might be one or more flatcars carrying a van which would not be visible to the pickets until the train's engines had already passed through Indian Crossing.

¹⁰As I have indicated supra, Herndon testified that it was difficult for the pickets to determine whether trains approaching Indian Crossing were completely intermodal-intermodal, except for the case of one very short train which exited from the rail yard, with only 10 to 12 boxcars.

inbound train across Indian Crossing comprised of 10 tank cars, which they had been notified had stopped there on account of the picketing, that Foreman Hunter pointed out to picket John Krebs that this train was not carrying intermodal freight and asked Krebs whether it was the subject of the picketing, and that Krebs replied by telling Hunter, "I don't know . . . I'm doing what I've been told to do," or used words to that effect. Foreman Hunter did not testify. Krebs denied having this conversation and further testified he never had a conversation with Foreman Hunter.

Santa Fe Relief Train Master Golden testified that, on a date he does not remember, during the picketing at Indian Crossing, he was called to the crossing to move a switch engine which was not hauling any cars, and which he had been notified had stopped at the crossing due to the picket line. Golden further testified that before moving the switch engine he spoke to two of the pickets, a man and a woman, who were standing near the switch engine, and asked them to move out of the way of the switch engine. According to Golden, the pickets, whose names he testified he does not know, but whom he described in detail physically, responded by not moving and stating, "No, we're stopping all the trains," or used words to that effect.¹¹ Respondent's picket captain, Peyovich, who personally knew all of the Respondent's pickets, testified that no one picketed for Respondent who fitted the descriptions given by Golden of the two pickets whom he attributed the above-conduct.¹²

I rejected Fitzgerald's and Golden's above testimony because their testimonial demeanor was not good and because Krebs's and Peyovich's testimonial demeanor was good when Krebs denied having the conversation with Foreman Hunter and when Peyovich testified that the persons described by Golden did not picket for Respondent.

On August 10, and continuing thereafter until August 29, when Respondent's dispute with Piggyback ended, Respondent engaged in intermittent picketing at the railroad spurs identified as the West Switching Lead and Zone 3 Industries. Picketing occurred in those areas only when traffic moved on those spur tracks. The pickets stationed at gate 1 could observe rail traffic on the West Switching Lead and when this occurred hurried over to that location. The pickets, when at either gate 1 or the West Switching Lead, were able to observe rail traffic when it moved on the Zone 3 Industries spur, and when that occurred hurried over to that location.

Picket captains Peyovich and Russell issued the same instructions for picketing to the pickets stationed at the rail yard's west end as were issued to those stationed at the rail yard's east end; the pickets were instructed that only trains which hauled one or more intermodal freight cars were to be picketed, when involving in the switching operations for

¹¹ During the picketing herein Santa Fe's supervisors, including Golden, were instructed to report anything of significance that occurred in connection with the picketing, yet Golden made no note of this incident and did not mention it to anyone because, he testified, he did not believe that what occurred was important. Golden reluctantly admitted that he first mentioned this occurrence to Respondent's attorney the night before he testified.

¹² In his initial testimony and at times during his later testimony about this episode, Golden, in describing what was said, attributed the above remarks to both of the pickets. However, when questioned specifically about this he testified that only one of the pickets, the man, spoke.

which these spur tracks were used, and that trains with only intermodal-intermodal freight cars should not be picketed. Peyovich and Russell credibly testified that during the times they were present at the West Switching Lead and the Zone 3 Industries spur, during the period of the picketing, that their instructions were obeyed; that they observed the pickets picket only trains which were hauling one or more intermodal freight cars. But, as was the case with their presence at the east end of the yard, Indian Crossing, they were not present for the vast majority of the time encompassed by the picketing in this case.

In contending that the picketing instructions issued by Peyovich and Russell were not observed at the rail yard's west end, the General Counsel and Charging Party cite the testimony of Santa Fe's Relief Assistant Superintendent Fraizer. During the period of the picketing, Fraizer toured the rail yard in a car every 2 to 3 hours during his shift, which resulted in his driving by the areas encompassed by the West Switching Lead and the Zone 3 Industries rail spur approximately six times daily.

Fraizer testified that when he drove by the West Switching Lead he observed pickets waving their picket signs at "all trains" and that he observed the trains all stop, and that the trains which stopped had intermodal-intermodal freight traffic on them. He did not testify, however, that the picketed trains he was referring to, consisted of solely intermodal-intermodal freight cars. In view of the fact that the record reveals that a substantial number of intermodal freight cars, perhaps a majority of the cars switched on the West Switching Lead, are flatcars carrying intermodal freight, it would be impermissible for me to infer that Fraizer was referring to trains consisting entirely of intermodal-intermodal freight cars.¹³

Regarding the picketing at the Zone 3 Industries spur, Fraizer's testimony consists of the following question and answer: "With respect to Zone 3 Industries, did you observe any picketing going on in the Zone 3 Industries track?" answer, "yes." He did not testify that he observed the pickets at this location picket wholly intermodal-intermodal freight trains. I have considered the record reveals, as I have found supra, that normally intermodal freight cars do not move on the Zone 3 Industries spur because of the configuration of the track, but, as I have also found, the record establishes that occasionally when the West Switching Lead is unable to accommodate the switching of flatcars carrying intermodal freight, that the Zone 3 Industries spur is used for this purpose. Moreover, Peyovich and Russell credibly testified that during the period of the picketing herein, they observed the Zone 3 Industries spur being used to switch cars involving trains which contained intermodal freight cars.

In view of the foregoing circumstances, I find that the record fails to establish that Respondent, during the time material, picketed trains which consisted entirely of intermodal-intermodal freight cars at either the West Switching Lead or the Zone 3 Industries spur.

On August 24 Respondent extended its picketing and handbilling at Santa Fe's Richmond rail terminal to gates 2

¹³ I reject Counsel for the General Counsel's contention that Respondent picketed a daily boxcar run which moved through the West Switching Lead to a Ford Motor Parts Warehouse, inasmuch as Fraizer testified he did not personally observe the pickets conduct themselves in this fashion, but was informed of this by other Santa Fe supervisors.

and 4,¹⁴ and continued to engage in that activity at those gates until August 29, when Respondent's dispute with Piggyback ended. The handbills distributed by the pickets at these gates were titled, "TO EMPLOYEES WORKING IN SANTA FE RAILWAY YARD," and after stating Respondent had a labor dispute with Piggyback and describing the nature of the dispute, further stated:¹⁵

We are asking you to refuse to deliver railcars to Piggy Back employees to work on, refuse to work with Piggy Back employees, and refuse to perform switching services to enable Piggy Back employees to do their work. We are not asking you to cease any work unrelated to Piggy Back's day-to-day operations.

This is your fight as well as ours, because YOU COULD BE NEXT.

TEAMSTERS LOCAL 315

As indicated previously, gate 2 is located at an office building, and its adjacent parking lot, where both Piggyback and Santa Fe employees worked. The record reveals that after gate 2 was posted with a sign reserving it exclusively for the employees, suppliers, etc. of Santa Fe, that Respondent's Picket Captain Peyovich observed that the posted instructions were violated on two occasions: once he observed a UPS deliveryperson use gate 2 to make a delivery to Piggyback's office; and, once he observed another delivery service use gate 2 to make a delivery to Piggyback's office. Respondent never reported those violations of Santa Fe's posted instructions to either Santa Fe or Piggyback.

As described supra, when, on July 12, Respondent commenced its picketing at gate 3, the union represented truckdrivers employed by Santa Fe's customers, who transported the vans used for carrying intermodal freight into and out of gate 3, refused to cross the picket line. This caused Santa Fe to establish a dropoff point on a public street near gate 3, where an exchange of equipment took place between the union truckdrivers and their supervisors (or other intermodal-union truckdrivers), who drove the vans through gate 3 to Piggyback's intermodal work area in the rail yard, and then made the return trip to the dropoff point where the regular truckdrivers took over. Subsequently, on about August 14, Santa Fe moved this dropoff point to a vacant lot located approximately 1-1/2 miles from the rail yard, which is referred to in the record as the UPS dropoff point. The activity at the UPS dropoff point was the same as at the previous dropoff area; the exchange of equipment between the union truckdrivers and their supervisors (or other intermodal-union truckdrivers), who drove the vans through gate 3 to Piggyback's intermodal work area, and then returned to the

¹⁴ On August 24, Santa Fe opened a gate adjacent to gate 4, identified in the record as gate 4(b), which Santa Fe's employees used to enter and exit the rail yard. This gate was not posted and when Respondent observed it was being used, commenced to picket and handbill at that location. On August 25 Santa Fe closed gate 4(b).

¹⁵ In its answer to the consolidated complaint Respondent admitted that the handbill distributed by the pickets at gates 2 and 4 was worded differently than the handbill described herein. However, at the start of the hearing, all the parties to this proceeding stipulated that the handbill described herein, not the one pleaded in the complaint, was the one handed out by Respondent's pickets at gates 2 and 4.

UPS dropoff point with a loaded or empty van, for the union driver to transport back to his employer's facility.

Prior to August 28, Respondent did not picket or handbill at the above-described dropoff points. On the evening of August 28 Respondent commenced to picket and handbill at the UPS dropoff point, and engaged in this conduct until on August 29 its dispute with Piggyback ended. Respondent's pickets stationed at the UPS dropoff point distributed the identical handbill at this location on August 28-29 as were being distributed at gate 3.

Beginning on August 24, in the evening, and continuing through August 27, Santa Fe's employees, all of whom are represented by unions, refused to cross the Respondent's picket lines located at gates 2, 4, 4(b) and 5,¹⁶ to report for work. This significantly interfered with the operation of Santa Fe's Richmond rail terminal. In order to continue to operate the rail terminal during this period, Santa Fe used its supervisory personnel, some of whom came to the terminal from other Santa Fe rail terminals.

On August 25, Santa Fe's attorney sent a mailgram to Respondent's attorney stating, in substance, that Respondent's picketing at gate 4 as well as its picketing at the Indian road crossing tracks, the West Switching Lead and Zone 3 Industries was unlawful and had the intended effect of shutting down the rail yard and stopping the movement of goods and materials which were completely unrelated to Santa Fe's intermodal operations, and that because of this conduct Santa Fe had filed unfair labor practice charges against Respondent and a Section 303 suit for damages in the U.S. District Court. Respondent's attorney replied by mailgram, dated August 27, denying the illegality of Respondent's activity and stating, in substance, that Respondent's picketing was confined to entrances through which employees entered the rail yard to perform services directly related to the work of Piggyback and that Respondent was not asking Santa Fe's employees to refrain from entering the yard or from doing work unrelated to Piggyback, but was "requesting employees not to perform work directly involved in the day-to-day operations of Piggyback Services." The mailgram ended with this offer:

I am authorized . . . to offer to place the Union's pickets inside the rail yard directly adjacent to the work performed by Piggyback Services. If this offer is accepted, the Union will cease picketing at entrances to the yard used by employees who work with Piggyback Services in its day to day operations.

There was no response to this offer.

On August 27, at 6:30 p.m., Santa Fe obtained a temporary restraining order against the several craft railroad unions, who represent Santa Fe's employees, enjoining those unions from respecting Respondent's picket lines and directing those unions to instruct the employees they represent to cross the Respondent's picket lines or face union discipline. As a result, all of the Santa Fe employees returned to work that evening. Two days later, August 29, Respondent settled its dispute with Piggyback and all picketing and handbilling ceased.

¹⁶ The remaining gate posted for neutral employers' employees, gate 3, was not used by Santa Fe's employees to enter or exit the facility.

B. Discussion

1. Introduction and applicable principles

The amended consolidated complaint alleges, in substance, that Respondent's above-described picketing and handbilling, except for that which occurred at gate 1, violated Section 8(b)(4)(i) and (ii)(B) of the Act, because an object of the picketing and handbilling, which accompanied the picketing, was to force and require Santa Fe and other neutral employers to cease doing business with Piggyback, the primary employer herein. The principal question litigated was whether the legality of the Respondent's picketing should be evaluated under the Board's *Moore Dry Dock*¹⁷ criteria, as contended by the General Counsel and the Charging Party, or, as contended by Respondent, under the standards set forth by the Supreme Court's decisions in *Electrical Workers IUE Local 761 (General Electric) v. NLRB*, 366 U.S. 667 (1961), and *Steelworkers (Carrier Corp.) v. NLRB*, 376 U.S. 492 (1964), herein for the sake of convenience referred to as *General Electric* and *Carrier Corp.* I am of the opinion that the Board's *Moore Dry Dock* rules govern the legality of the Respondent's picketing.

Section 8(b)(4) of the Act makes it an unfair labor practice for a union:

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

(B) forcing or requiring any person . . . to cease doing business with any other person, Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of labor organizations, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

These provisions reflect "the dual congressional objective of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v.*

¹⁷ *Sailor's Union (Moore Dry Dock)*, 92 NLRB 547 (1950).

Denver Building & Constructions Trades Council, 341 U.S. 675, 692 (1951). As explained in *NLRB v. Operating Engineers Local 825 (Burns & Roe)*, 400 U.S. 297, 302-303 (1971):

Congressional concern over the involvement of third parties in labor disputes not their own prompted Section 8(b)(4)(B). This concern was focused on . . . pressure brought to bear, not "upon the employer who alone is a party [be a dispute], but 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. [Footnotes omitted.]

Thus, Section 8(b)(4)(B) requires that disputed union conduct be classified either as legitimate "primary" activity directed against the offending employer or as unlawful "secondary" activity directed against the neutral employer with whom the union has no dispute.¹⁸ *General Electric*, 366 U.S. at 672-673 (1961).

Where the primary employer and the neutral employer occupy separate work sites, the necessary line-drawing is relatively easy. Generally speaking, union picketing occurring at the primary employer's premises and seeking only the disruption of his normal operations is considered primary and thus protected activity, whereas picketing extending beyond the premises of the primary employer to those of the neutral employer and designed to disrupt the latter's operations is secondary and prohibited. Compare, *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672 (1951), with *NLRB v. United Brotherhood of Carpenters*, 184 F.2d 60 (10th Cir. 1950).

However, where the primary and neutral employers perform separate work on the same premises, more difficult problems frequently arise. In such "common situs" situations, the union's right to direct legitimate pressure against the primary employer, despite the proximity of other neutral parties, must be accommodated with the neutral's intended immunity from the full impact of the labor dispute. Accordingly, in such cases, it is necessary to draw a line frequently "more nice than obvious" (*General Electric*, supra at 674) between union activity which is properly limited to the primary employer and union activity designed to take advantage of the common situs by using neutral parties as a wedge against the primary employer.

As an aid in drawing this line, the Board, in *Moore Dry Dock*, supra, 92 NLRB at 549, developed certain criteria which were held to be "presumptive" of valid primary activity. These criteria were summarized by the Supreme Court in *General Electric*, as follows (366 U.S. at 677):

(1) that the picketing be limited to times when the situs of dispute was located on the secondary premises; (2) that the primary employer be engaged in his normal

¹⁸ It is unnecessary to find that the sole object of picketing is unlawful; an unlawful object is enough. *NLRB v. Denver Building & Constructions Trades Council*, supra at 688-689.

business at the situs; (3) that the picketing take place reasonably close to the situs; and (4) that the picketing clearly disclose that the dispute was only with the primary employer.

The *Moore Dry Dock* criteria were not meant to establish a rigid formula for determining the legality of common situs picketing. Rather, the doctrine “simply establishes an evidentiary aid for the Board to determine the object of picketing, where the other evidence is equivocal.” *NLRB v. Northern California District Council of Hod Carriers*, 389 F.2d 721, 725 (9th Cir. 1968). Therefore, mere compliance with the four requirements of the *Moore Dry Dock* case does not immunize a union’s picketing, for a union may, by its other conduct, reveal that its objective is secondary. *General Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 253 (1972).

In *General Electric*, the union picketed the premises of General Electric, with whom it was engaged in a labor dispute, at a gate used by the primary employer and also at a gate reserved exclusively for independent contractors and their employees, who were regularly working on those premises. In deciding *General Electric*, the Supreme Court reviewed the origins of the *Moore Dry Dock* standards and noted that they were first developed to govern situations in which the primary employer was working at premises not his own. The Court also noted, however, that the Board had subsequently applied the standards to cases in which the picketing took place at the premises owned and operated by the primary employer. 366 U.S. at 676–679. In general, the Court approved such application where the work done by the secondary employers was “unconnected to the normal operations of the struck employer—usually construction work on his buildings.” 366 U.S. at 680. In such a case, the Court held, the primary employer may erect a “gate” and direct that the secondary employers enter the primary employer’s premises only through the gate reserved for this purpose, and if the union pickets at the gate reserved for the secondary employers, it has failed to comply with the third *Moore Dry Dock* standard that picketing be conducted as close as possible to the situs of the primary employer’s operations, and the picketing is accordingly unlawful. 366 U.S. at 681. On the other hand, if the work of the secondary employer’s employees is related to that of the normal operations of the primary employer, the Court ruled that the secondary employer’s employees may be freely picketed at the primary employer’s premises no matter which gate they enter.¹⁹ 366 U.S. at 680, 681.

In *General Electric* the Supreme Court remanded the case to the Board for consideration of the nature of the work done by General Electric’s independent contractors; the Court ruled that if a substantial amount of the work were found to be “conventional maintenance work necessary to the normal operations of *General Electric*, the use of the gate would

¹⁹In so holding, the Court reasoned that employees who perform routine maintenance jobs for the primary employer are very much akin to those who make “regular plant deliveries” and that under those circumstances, “the barring of picketing . . . would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the [primary] employer’s everyday operations.” 366 U.S. at 681.

have been a mingled one outside the bar” of the statute emphasis in the original 366 U.S. at 682.

Subsequently, in *Carrier Corp.*, the Supreme Court approved the Board’s application of the rule which the Supreme Court formulated in *General Electric*, so as to permit as legitimate primary action, picketing of a gate owned by a railroad, but cut through a fence surrounding the struck employer’s premises. This gate was used exclusively by neutral railroad employees entering the struck employer’s premises to perform delivery activities relating to the normal operations of the struck employer. In applying its *General Electric* decision to the facts of *Carrier Corp.*, the Supreme Court explained (376 U.S. at 498–499):

We think *General Electric*’s construction of the proviso to Sec. 8(b)(4)(B) is sound and we will not disturb it. The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved “primary picketing” from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations, which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant’s regular operations. [Citation omitted.]

In *Building & Construction Trades Council (Markwell & Hartz)* 155 NLRB 319, 323–326 (1965), enf.d., 387 F.2d 79, 83 (5th Cir. 1967), the Board held, inter alia, that the *General Electric* “related work” test was limited to picketing at the premises of the primary employer, and that picketing which occurs at a situs not owned or customarily occupied by the primary employer is to be tested solely by the original *Moore Dry Dock* criteria. The Board concluded that the Supreme Court’s decisions in *General Electric* and *Carrier Corp.* were not intended to “override[e] this historic distinction” based on the location of the picketing. The Board also concluded that the “related work” test as formulated in *General Electric*, and applied in *Carrier Corp.*, is simply an additional qualification imposed in such a case because of the Act’s “policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer.” Since there is no such policy in the case of picketing occurring at premises not owned or occupied by the primary employer, the Board concluded that there is no necessity in that instance for a “related work” test. Judge Rives added in his concurring opinion in *Markwell & Hartz v. NLRB*, supra, 387 F.2d at 84:

[Even] when the work done by the secondary employees is related to the normal operations of the primary employer there remains a distinction between picketing at the situs of the primary employer and picketing at a common situs where two or more employers are performing separate tasks on common premises. It seems to me that the opinion in *General Electric* clearly recognizes that distinction and approves the four *Moore*

Dry Dock standards as applicable to common situs picketing.

In the more than 29 years that have passed since the Supreme Court's decision in *General Electric*, neither the Board or a court of appeals have applied *General Electric's* related work test, rather than the *Moore Dry Dock* criteria, to a case involving picketing at the premises of the neutral employer. To the contrary, the Board in *Dalton Schools*,²⁰ specifically indicated it will not apply the related work test formulated in *General Electric*, rather than the *Moore Dry Dock* test, in cases involving picketing at the premises of the neutral employer.

In *Dalton Schools* a union picketed a school, including entrances reserved for the school's employees and persons making deliveries to the school. The union was picketing because of its labor dispute with a maintenance contractor whose employees worked in the school. The union relied upon the *General Electric* case to justify its blanket picketing of the neutral employer's premises. In evaluating the union's picketing by the *Moore Dry Dock* criteria, rather than by the test set forth in *General Electric*, as urged by the union, the administrative law judge, reasoned (248 NLRB at 1069):

Respondent's reliance on the *General Electric* theory supra is misplaced as such doctrine is inapplicable in the present circumstances where the primary dispute is against the independent contractor supplier of services and not the separate employer occupier of the premises to whom the services were supplied. To follow Respondent's view would be to grossly distort the purposes of the *General Electric* doctrine by permitting secondary picketing based merely upon similarity or relatedness in the work of the primary struck supplier and a portion of the work done by its customer. By twisting logic, Respondent suggests that primary strikes against independent contractors could lawfully be spread to enmesh all customers of such contractors who under existing law are otherwise neutrals in the dispute. Such a view is patently without merit.

In adopting the judge's conclusion that the union's picketing violated Section 8(b)(4)(B), the Board specifically rejected the union's argument that under the theory enunciated in *General Electric* the union's picketing was not proscribed by Section 8(b)(4)(B). In rejecting this argument, the Board relied on the judge's above-described reasoning. 248 NLRB at 1067 fn. 2.

The Court of Appeals for the Fourth Circuit in *Kinty v. United Mine Workers of America*, 544 F.2d 706 (4th Cir. 1976), has also indicated it will not apply the related work test enunciated in *General Electric* and *Carrier Corp.* to picketing at the premises of a neutral employer. *Kinty* was a suit for damages brought by several employers against the United Mine Workers (UMW) under Sections 301 and 303 of the Act, for allegedly picketing those employers in violation of the Act's secondary boycott provisions. The UMW urged, among other things, that its picketing was "traditional primary picketing," when viewed in the light of *General Electric* and *Carrier Corp.*, 544 F.2d at 713. In rejecting this

argument the court (544 F.2d at 713-715), found that factually both *General Electric* and *Carrier Corp.* concerned picketing at the premises of the employer with whom the primary labor dispute existed, whereas the case before the court did not concern that type of picketing, and therefore the court rejected the UMW's argument that the Supreme Court's decisions in *General Electric* and *Carrier Corp.* were applicable to the UMW's picketing, because (544 F.2d at 715):

What the Court was seeking to do in [*General Electric* and *Carrier Corp.*] was to establish a rule for determining when picketing of employees entering the struck facility by a gate leading into the facility [sic], reserved for the exclusive use of third party employees of third parties, becomes primary picketing. It was only in that context that the Court used the type of work being performed by the employees of the third parties entering the struck facility as the criterion for determining whether the picketing was primary or secondary (footnote omitted). It follows that these cases can in no way be deemed authority for defendant's position.

The argument of the defendant, if sustained, would mean that the location of the picketing would be of no significance in determining whether the picketing was allowable primary picketing or forbidden secondary picketing. So long as the neutral employer rendered services relating to the primary employer's "day-to-day operations," picketing of his employees anywhere, would under this theory, be primary picketing. . . . This contention, which would . . . make practically all picketing primary, would render the statute powerless to protect against conduct Congress clearly intended to prohibit.

I conclude, as did the Board in *Dalton Schools* and the court in *Kinty*, that the Supreme Court's "related work" test, as formulated in *General Electric* and applied in *Carrier Corp.*, was not meant to apply to a union's picketing at the premises of a neutral employer. In my opinion, based upon the reasoning of the Board's decisions in *Dalton Schools* and *Markwell & Hartz* and the court's decision in *Kinty*, the legality of Respondent's picketing of the neutrals herein, must be determined by the *Moore Dry Dock* criteria and without regard to whether the work of Santa Fe or the other neutral employers doing business with Santa Fe was "related" to the normal operations of Piggyback, for the applicability of the "related work" principle depends on whether the picketing takes place at the primary employer's premises, whereas here it took place at the premises of the neutral employer.

2. The application of the *Moore Dry Dock* criteria to the picketing

The only one of the four criteria set forth in *Moore Dry Dock* which the Respondent is accused of not complying with is the third criteria; that the picketing take place reasonably close to the situs. In applying the "reasonably close to the situs" criteria, the Board, with court approval, has long held that employers may "by the use of separate gates for the purpose of [the primary employer's] ingress to and egress from the job site, lawfully force the union to picket only those 'separate gates.'" *Plumbers Local 519 v. NLRB*, 416 F.2d 1120, 1125 (D.C. Cir. 1969). When such separate re-

²⁰*Service Employees International Union Local 32B-32J (Dalton Schools)*, 248 NLRB 1067 (1980).

served gates are properly established, the union, as part of its obligation to minimize the secondary effects of common situs picketing, must act with restraint to avoid extending its appeal to those jobsite access points used only by neutral employers and their employees. *Ironworkers Local 433 v. NLRB*, 598 F.2d 1154, 1156 (9th Cir. 1979). Under the *Moore Dry Dock* criteria, picketing that extends beyond the gate established for the primary employer and its employees and suppliers is “strongly indicative of a secondary, proscribed object.” *Ramey Construction Co. v. Painters Local 544*, 472 F.2d 1127, 1131 (5th Cir. 1973). It creates the inference that the union is pursuing unlawful, secondary objectives. See *Carpenters Local 470 v. NLRB*, 564 F.2d 1360, 1363 (9th Cir. 1977).

In the instant case, in an effort to insulate itself from the Respondent’s labor dispute with Piggyback, Santa Fe posted a sign at gate 1 of its Richmond rail terminal designating that gate as the exclusive entrance for the employees, visitors, customers, and suppliers of Piggyback, and posted signs at gates 2, 3, 4, and 5 stating that those gates were reserved for the exclusive use of Santa Fe’s employees, visitors, customers, and suppliers, and that Piggyback’s employees, customers, visitors, and suppliers, should enter the terminal through gate 1. Respondent was well aware of the above-described reserved gate system. Nonetheless, as described in detail supra, Respondent extended its picketing well beyond gate 1, the gate established for Piggyback’s employees and suppliers, and picketed at several access points to the terminal used by the employees of neutral employers, as follows: From July 12 through August 29 it picketed gate 3, the entrance to the terminal used by the truckdrivers of Santa Fe’s customers and by the truckdrivers of Santa Fe’s customers truckers; from August 10 through 29 it picketed gate 5, an entrance to the terminal used by Santa Fe’s employees; from August 24 through 29, it picketed gates 2 and 4, entrances to the terminal used by Santa Fe’s employees;²¹ on August 24 and 25 it picketed gate 4(b), an entrance to the terminal used by Santa Fe’s employees; on August 28 and 29, it picketed the UPS dropoff point, the vacant lot used by Santa Fe’s unionized customers to deliver their intermodal freight to the rail yard through gate 3; and, from August 10 through 29 it picketed trains operated by Santa Fe’s employees at Indian Crossing, the West Switching Lead and the Zone 3 Industries spur. The aforesaid picketing, when viewed in the context of the valid reserve gate system in effect at the rail terminal during the time of the picketing, warrants the inference that Respondent engaged in the picketing with an object proscribed by Section 8(b)(4)(B) of the Act, thereby violating Section 8(b)(4)(i) and (ii)(B) of the Act.

The unlawful secondary object of Respondent’s picketing herein is further demonstrated by the content of the handbills which Respondent’s pickets distributed at the gates reserved for the neutral employers and by the content of Respondent’s August 8 letters to the unions which represent Santa Fe’s employees: the handbills distributed by the pickets at gate 3 and at the UPS dropoff point to the truckdrivers of Santa Fe’s intermodal freight customers, asked them “to respect

²¹ I note that Respondent does not contend that the neutrality of gate 2 was breached during the picketing by the two isolated occasions on which delivery services delivered packages to Piggyback’s office through that gate.

our picket line against [Piggyback]” and not to pick up and deliver intermodal freight because, as the handbill explained, in doing so they would be dealing directly with Piggyback’s employees; the handbills distributed by the pickets to Santa Fe’s employees at gate 5, asked them to refuse to deliver intermodal freight to Piggyback’s employees and to otherwise refuse to work with Piggyback’s employees or to perform any work which would enable Piggyback’s employees to perform their work; the handbills distributed by the pickets to Santa Fe’s employees at gates 2, 4 and 4(b), asked them “to refuse to deliver rail cars to Piggyback employees to work on, refuse to work with Piggyback employees, and refuse to perform switching services to enable Piggyback employees to do their work;” and, the Respondent’s August 8 letters to the unions which represent Santa Fe’s employees, asked that those unions notify Santa Fe’s employees that, “we are on strike and to please honor our picket lines if they come in contact with our pickets.” Thus, it is evident from the wording of the Respondent’s August 8 letters to the unions which represent Santa Fe’s employees and from the wording of the handbills which Respondent’s pickets distributed at the gates reserved for the neutral employers’ employees, that Respondent’s intent in picketing at these gates was to attempt to enmesh the neutral employers in its dispute with Piggyback by appealing to the neutrals’ employees to respect its picket line and, in the case of Santa Fe’s employees, by further appealing to them to refuse to do that part of their daily work which involved Santa Fe’s intermodal freight operation, if they chose to disregard Respondent’s picket line and go to work.²²

In concluding that Respondent’s picketing herein had an unlawful secondary objective, I considered that on August 27 Respondent’s lawyer notified Santa Fe’s lawyer that he was authorized:²³

to offer to place the Union’s pickets inside the railyard directly adjacent to the work performed by Piggyback Services. If this offer is accepted, the Union will cease picketing at entrances to the yard used by employees who work with Piggyback Services in its day to day operations.

²² I did not consider the Charging Party’s and the General Counsel’s further contention that the unlawful secondary objective of Respondent’s picketing was further demonstrated by the following factors: the way in which Respondent escalated its picketing to all of the entrances reserved for neutral employers; by the alleged testimonial admission of picket captain Milo Peyovich that Respondent picketed for an unlawful secondary objective; and, by Respondent’s picketing of trains which carried no intermodal freight. Whether there is merit to this contention, in whole or in part, would not affect my ultimate conclusions.

²³ I note that Respondent’s prior request to Santa Fe that it be allowed to enter the rail yard to picket, its request of July 30, was a request that it be allowed to picket at the east end of the rail yard in the vicinity of the safety gates to tracks 160–163, whenever Piggyback’s employees opened and closed those safety gates. In making this request Respondent did not offer to discontinue its picketing of the neutral truckers at gate 3, nor did Respondent indicate it would not picket at gate 5 or picket the trains at Indian Crossing, if its request was granted.

The belatedness of this offer,²⁴ the failure of the offer to include an offer to stop all picketing directed against neutrals,²⁵ and the Respondent's failure to show that it could not effectively accomplish its legitimate objective of communicating its dispute with Piggyback to Piggyback's employees and suppliers by picketing at the entrance reserved for Piggyback's employees and suppliers, have persuaded me that Respondent's August 27 offer was not sufficient to rebut the evidence which, I have found supra, establishes that Respondent's picketing herein was conducted for an illegal secondary objective.²⁶

In concluding that Respondent's picketing herein violated Section 8(b)(4)(B), I also considered whether the neutrality of gates 2, 3, 4, 4(b), and 5 had been breached and whether the neutrality of the Santa Fe employees operating the picketed trains at Indian Crossing, the West Switching Lead and the Zone 3 Industries spur had been compromised because Piggyback's suppliers used those gates and the picketed trains were delivering supplies to Piggyback. In resolving this issue I considered by the Board and court decisions in *Electrical Workers Local 323 (J. H. Hoff Electric)*, 241 NLRB 694 (1979), enfd. sub nom. *J. F. Hoff Electric v. NLRB*, 642 F.2d 1266 (D.C. Cir. 1980), and *Operating Engineers Local 450 (Linbeck Construction)*, 219 NLRB 997 (1976), enfd. sub nom. *Linbeck Construction v. NLRB*, 550 F.2d 311 (5th Cir. 1977), and *Electrical Workers IBEW Local 211 (Atlantic County Authority)*, 277 NLRB 1041 (1985).

In *Linbeck*, general contractor Linbeck served as a special supplier to the primary employer, one of Linbeck's subcontractors on a construction site; Linbeck delivered the crushed stone that Luckie used in performing its paving and sewer subcontract. Linbeck delivered the crushed stone

through the Linbeck gate for Luckie's use. In holding that the union's picketing of the gate through which the general contractor provided these materials was lawful, the Board stated (219 NLRB at 997):

What is important is that, in bringing in such materials, Linbeck was acting as a supplier of Luckie and was therefore required to use the same reserve gate as any other supplier of Luckie that which had been set aside and reserved for Luckie. By failing to do so and by delivering the materials instead through the Linbeck gate, Linbeck subjected itself to the same pressures by the Union, that the Union could use against any supplier of the primary.

The Board offered no further legal reasoning in support of this conclusion.

The court, in enforcing the Board's *Linbeck* decision, observed that suppliers of primary employers "occupy a middle ground in the spectrum of permissible activity under 8(b)(4)(B)": although direct appeals to them not to deliver to the primary employer are unlawful secondary activity, such suppliers are not immune from the "influence of a valid primary picket itself." 550 F.2d at 316-317. The court based this conclusion on the Supreme Court's holding that Congress intended the proviso to Section 8(b)(4)(B) to permit the traditional primary activity of picketing "a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the [primary employer's] regular operations." 550 F.2d at 317, quoting *Carrier Corp.*, 376 U.S. at 499. The court then went on to articulate the following test for determining whether a union may picket a supplier providing materials to the primary employer at a common situs construction site: "[A]ny gate used to deliver materials essential to the primary employer's normal operations is subject to lawful picketing." 550 F.2d at 318. Under this test, the crushed stone that the general contractor delivered to the primary employer was material essential to the primary's normal operations since the primary's subcontract required it to perform paving work, and the crushed stone was material that the primary was required to use in such work.

In *Hoff Electric*, the general contractor on a residential construction project, engaged Hoff, the primary employer, to install the electrical system throughout the project. A small part of the contract between the general contractor and Hoff provided for the installation of electrical fixtures. These electrical fixtures were the property of the project's owner who ordered them from Consolidated Electrical Supply Co., who regularly delivered the electrical fixtures once or twice weekly to a trailer on the jobsite. The deliveries of the fixtures to the jobsite were always made through the gate which had been reserved exclusively for the use of the employees and suppliers of the neutral employers doing business on the site. Hoff's employees picked up the fixtures at the trailer and installed them in the new buildings.

In concluding that the union's picketing of the reserved neutral gate in *Hoff Electric* did not violate Section 8(b)(4)(B) of the Act because the neutrality of that gate had been breached by the delivery of the electrical fixtures through that gate for Hoff's use, the Board relied on its decision in *Linbeck* as enforced by the court. 241 NLRB at 694 fn. 1. In rejecting dissenting Board Member Murphy's con-

²⁴The August 27 offer was made only after Respondent had been picketing neutral employers, as follows: gate 3, since July 12; gate 5, since August 10; gates 2 and 4, since August 24. Moreover, the offer was made only after Santa Fe's attorney had notified Respondent that Respondent's picketing was unlawful and that Santa Fe had filed additional unfair labor practice charges with the Board and a suit for damages caused by the picketing.

²⁵The August 27 offer did not include a cessation of Respondent's picketing of the neutral truckers using gate 3 or of the Santa Fe employees operating the trains at Indian Crossing, the West Switching Lead and the Zone 3 Industries spur, inasmuch as the offer was worded in terms of ceasing to picket "at entrances to the yard used by employees who work with Piggyback Services in its day to day operations," whereas the truckers who used gate 3 and the Santa Fe employees who operate the trains which entered and exited the rail yard through Indian Crossing did not "work with Piggyback Services in its day to day operations," nor did the picketing of the trains at Indian Crossing, the West Switching Lead and Zone 3 Industries spur involve picketing "at entrances to the yard."

²⁶*Teamsters General Local 200 (Reilly Cartage)*, 183 NLRB 305 (1970), and similar cases, differ significantly from the instant case because, among other things, they involve ambulatory picketing and because there was no showing in those cases, as in the instant case, that it would have been unsafe for the union to conduct its picketing inside of the employer's place of business. In this last regard, it is undisputed that because of the continuous movement of trains and other equipment within the rail yard, it would not have been safe for Respondent's pickets to have conducted their picketing, as requested by Respondent, in those areas of the rail yard where Piggyback's employees worked.

tention that *Hoff Electric* was distinguishable from *Linbeck* because, “the supplies delivered in *Linbeck* through the neutral gate (crushed stone) were ‘raw material,’ but the material moved through the neutral gate here (electrical fixtures) is a finished product and . . . not ‘material used’ by Hoff in its work,” the Board majority reasoned (241 NLRB at 694 fn. 1):

As the court of appeals pointed out in enforcing the Board’s order in *Linbeck*, “any gate used to deliver materials *essential* to the primary employer’s normal operations is subject to lawful picketing.” . . . The contention that delivery of electrical fixtures is not “essential” to the operations of an electrical contractor charged, as here, with installation of an electrical system for the general contractor is a contention that fails of its own weight. [Emphasis added by Board.]

The court in *Hoff Electric* applied the *Linbeck* test in affirming the Board’s decision, but in applying that test, the court was careful to note that “[t]his test, while based on the same principles, is not as broad as the *General Electric* ‘work-relatedness’ test developed for industrial plants where the struck employer is the owner of the plant.” 642 F.2d at 1273. The court also found it significant that the electrical fixtures which Consolidated Electrical supplied were used solely by the primary employer (Hoff) and no other subcontractors. Therefore, the court reasoned, “any disruption caused if the Union should be successful in its appeal to Consolidated’s deliveries would not spread to anyone but the primary employer.” 642 F.2d at 1275. The court also provided the following definition of “supplier”: “the common sense notion of a supplier is a party which delivers goods for the direct use of the primary employer in the normal course of its business.”²⁷ 642 F.2d at 1274. The court also specifically noted that the materials that Consolidated supplied were to be “used and installed” by the primary employer. 642 F.2d at 1273.

In *Atlantic County Authority* supra, the Board applied the *Linbeck* and *Hoff Electric* test in holding that the union lawfully picketed the neutral gate through which the general contractor provided a standby generator for installation by the primary employer.²⁸ The Board observed that the primary employer’s contract obligated it to install the generator and that although only a relatively few hours were required to be expended by the primary employer to perform that part of its contract, that the generator was an indispensable integral part of the electrical system which the primary employer had contracted to install, and therefore constituted a substantial part of that contract and that the generator was supplied in order that the primary employer could pursue its normal course of business. 277 NLRB at 1044.

More recently, in *Iron Workers Local 433 (Chris Crane)*, 294 NLRB 182, 183 (1989), the Board explained that in its

²⁷The court further noted that its above definition of supplier was “a far narrower concept than the *General Electric* ‘work-relatedness’ test.” 642 F.2d at 1274.

²⁸The construction project’s general contractor, The Atlantic County Authority, contracted with an electrical company to manufacture the standby generator and this contractor hired a trucker to deliver the generator to the project for the primary employer, an electrical contractor, to install.

decisions in *Linbeck*, *Hoff Electric*, and *Atlantic County Authority*,

[We] made clear that only *suppliers* providing materials essential to the primary employer’s normal operations or solely for the use of the primary’s employees may lawfully be picketed. See, e.g., *Electrical Workers 211 (Atlantic County Authority)*, 277 NLRB 1041, 1044 (1985) (delivery of generator essential to primary employer’s normal operation breached neutrality of gate); *J. H. Hoff Electric Co. v. NLRB*, 642 F.2d at 1275 (court finds it significant that supplier delivered products used only by primary). And, as articulated by the Court of Appeals for the District of Columbia in *Hoff Electric*, “[t]he common sense notion of a supplier is a party which delivers goods for the *direct use* of the primary employer in the *primary course* of its business.” Id. at 1274. [Emphasis added.]

In the instant case Santa Fe, at its Richmond rail terminal, is in the business of, among other things, transporting intermodal freight for its customers. This freight is prepacked by its customers in large metal containers or truck trailers, referred to collectively in this decision as vans, which are transported by Santa Fe on flatcars. Santa Fe’s customers deliver the outgoing shipments of intermodal freight to the Richmond rail terminal by truck. The customers employ either their own employees or independent truckers to haul the vans with the intermodal freight to the rail terminal. Santa Fe, rather than using its own employees to load and unload the vans onto and off of its railroad flatcars, employs an independent contractor, Piggyback, to perform this work. Pursuant to the terms of the contract between Santa Fe and Piggyback, Piggyback’s employees work in the terminal’s rail yard loading and unloading the intermodal freight (vans) onto and off of the flatcars. This intermodal freight is delivered to Piggyback’s employees for loading and unloading in the following ways: the truckdrivers employed by Santa Fe’s customers or the independent truckers employed by the customers, deliver the outgoing intermodal freight to Piggyback’s employees by transporting the vans into the rail yard through gate 3; the incoming intermodal freight is delivered to Piggyback’s employees by railroad flatcars, which must pass through Indian Crossing; and, those trains which have only a few flatcars carrying intermodal freight, and because of this are not transported directly to the area where the Piggyback employees work, but go to another area of the rail yard, are “switched” to the Piggyback employees via rail tracks at Indian Crossing, the West End Switching spur, as well as the Zone 3 Industries spur on occasion. The Santa Fe employees, who, as described above, operate the incoming trains which deliver the intermodal freight to Piggyback’s employees and who, as described above, deliver the intermodal freight to Piggyback’s employees by “switching” flatcars to the appropriate tracks, entered and exited the rail yard, during the time material, using gates 4, 4(b), and 5. Lastly, with respect to gate 2, it is undisputed that during the period of the picketing, UPS truck tractors were parked in the parking lot immediately adjacent to that gate and that several times daily during this period, supervisors of UPS exited gate 2 with these truck tractors and drove them to the dropoff point where they picked up and transported vans

containing intermodal freight to the rail yard through gate 3 (Tr. 488–490).

I am persuaded that the instant case differs factually in meaningful respects from *Linbeck* and its progeny. Unlike the crushed stone, lighting fixtures and power generator supplied to the primary employers in those cases, the intermodal freight delivered to Piggyback was not supplied for the purpose of having Piggyback's employees "use" the freight; that is to load or unload the intermodal freight onto and off of the railroad flatcars. Rather, the outgoing intermodal freight was supplied to Piggyback's employees by the neutral truckers for Santa Fe's "use"; for Santa Fe to transport to its destination. The incoming intermodal freight was supplied to Piggyback's employees by Santa Fe's employees for Santa Fe's customers' "use"; for delivery to Santa Fe's customers by the customers' truckers. Therefore, considering the context of the delivery of the intermodal freight to Piggyback's employees, it is clear that neither Piggyback, nor Santa Fe, nor Santa Fe's customers, nor Santa Fe's customers' truckers, considered Santa Fe's customers or Santa Fe's employees to be suppliers of Piggyback when the customers' truckers delivered the outgoing intermodal freight to the rail yard for the purpose of having Santa Fe ship it to its destination or when Santa Fe's employees delivered the incoming intermodal freight to the rail yard for the purpose of having Santa Fe deliver it to Santa Fe's customers. This is because the delivery of the intermodal freight to Piggyback's employees by Santa Fe's customers and by Santa Fe's employees does not accord with "the common sense notion of a supplier [as] a party which delivers goods for the direct use of the primary employer in the primary course of its business." *Hoff Electric*, supra, 642 F.2d at 1274.

I agree with the General Counsel and the Charging Party that the common sense notion of supplies for Piggyback's operation would be cranes, tractors, oil and gas, office supplies, maintenance services, and labor, and not the intermodal freight delivered to Piggyback's employees, inasmuch as that freight was not delivered to Piggyback for its employees to "use" in the performance of their duties, but was delivered so that it would be transported by employees of employers, other than Piggyback, to its ultimate destination. Moreover, I find it significant that since the intermodal freight was not for Piggyback's sole "use," but was intended to be "used" primarily by other employers, that unlike *Linbeck* and its progeny, the disruption caused by Respondent's picketing in this case was not confined solely to the primary employer, but was foreseeably intended to impact upon the business of neutral employers. *Hoff Electric*, supra, 642 F.2d at 1275. It is for all of these reasons that I am persuaded that neither the Board or the courts in *Linbeck*, and its progeny, meant to extend the meaning of the term "supplier," as used in those cases, to the facts of this case.

3. The application of the *Moore Dry Dock* criteria to the handbilling

As I have found supra, Respondent violated Section 8(b)(4)(i) and (ii)(B) by picketing the entrances to Santa Fe's Richmond rail yard which had been reserved exclusively for the use of neutrals and had been designated as gates 2, 3, 4, and 5, and further violated Section 8(b)(4)(i) and (ii)(B) by picketing gate 4(b) and the UPS dropoff point, an extension of gate 3. As I have also found supra, in connection

with and contemporaneously with this illegal picketing, the pickets distributed handbills to the employees of the neutral employers at the above-described locations. Admittedly the handbilling was part and parcel of the Respondent's picketing campaign.

The handbills distributed to the neutral truckdrivers at gates 3 and the UPS dropoff point were addressed "To Drivers Entering this Rail Yard" and asked them "to respect our picket line against Piggyback Services" and stated that under the truckdrivers' union contract they had a right not to do business with Piggyback, and specifically asked them not to deal with Piggyback's employees by picking up or leaving intermodal freight in the rail yard. The handbills distributed to Santa Fe's employees at gate 5 described Respondent's labor dispute with Piggyback and asked Santa Fe's employees to refuse to deliver intermodal freight to Piggyback's employees and to otherwise refuse to work with Piggyback's employees or to do work which would enable Piggyback's employees to perform Piggyback's work. Lastly, the handbills distributed to Santa Fe's employees at gates 2, 4, and 4(b), stated Respondent had a labor dispute with Piggyback, described the nature of the dispute, and stated, "we are asking you to refuse to deliver railcars to Piggyback employees to work on, refuse to work with Piggyback employees, and refuse to perform switching services to enable Piggyback employees to do their work."

Section 8(b)(4)(i) and (ii)(B) of the Act, in pertinent part, makes it an unfair labor practice for a union "to induce or encourage any individual employed by any person, to engage in, a strike or a refusal . . . to . . . transport, or to otherwise handle . . . any goods, articles, materials . . . or to perform any services," or to "threaten, coerce, or restrain" any person, with an "object" of "forcing or requiring" that person to "cease doing business with any other person," unless the union is engaging in "publicity, other than picketing, for the purpose of truthfully advising the public including consumers and [union members], that a product or products are produced by an employer with whom the [union] has a primary dispute and are distributed by another employer" and "such publicity does not have an effect of inducing any individual employed by any person other than the primary employer" to refuse to make pickups and deliveries or transport goods or perform services "at the establishment of the employer engaged in such distribution."

The fact that Respondent's handbilling herein was part and parcel of Respondent's picketing campaign, which, as I have found supra, had a proscribed secondary objective, warrants the inference that the handbilling likewise had a proscribed secondary "objective" encompassed by Section 8(b)(4)(B). Moreover, as I have also found supra, the plain language used in the handbills establishes that an object of the handbilling was to force or require Santa Fe to cease doing business with Piggyback by means of inducing the employees of Santa Fe and the truckers employed by Santa Fe's customers to cease doing their assigned job duties.

Respondent's handbilling herein was not protected by the publicity proviso to Section 8(b)(4) because the handbilling succeeded in inducing the employees of neutral employers to withhold their services from their employers. As a result the handbilling cannot escape from the operation of Section 8(b)(4)(B), by virtue of the proviso exempting "publicity, other than picketing, for the purpose of truthfully advising

the public, including consumers and [union members]”; for the handbilling herein had “an effect of inducing an individual employed by [a neutral employer] to refuse . . . to perform any services” Thus, the secondary effect of the handbilling removes it from the protection of the publicity proviso to Section 8(b)(4).

The remaining issue, whether Respondent’s handbilling induced or encouraged employees of neutral employers within the meaning of Section 8(b)(4)(i) and threatened, coerced or restrained neutral employers within the meaning of Section 8(b)(4)(ii), must be answered in the affirmative. The plain language contained in the handbills was reasonably calculated to induce or encourage the employees of Santa Fe and the truckers employed by Santa Fe’s customers to refuse to perform their assigned work tasks. The inevitable consequence of such a refusal would be to restrain or coerce Santa Fe within the meaning of Section 8(b)(4)(ii). Accordingly, the handbills distributed herein by Respondent’s pickets induced and encouraged the employees of neutral employers within the meaning of Section 8(b)(4)(i) and restrained and coerced Santa Fe within the meaning of Section 8(b)(4)(ii) of the Act.

Having found that Respondent’s handbilling at gates 2, 3, 4, 4(b), and 5, and at the UPS dropoff point, had a secondary object proscribed by Section 8(b)(4)(B) of the Act, and was not protected by the publicity proviso to Section 8(b)(4), and that the handbilling induced and encouraged the employees of neutral employers, within the meaning of Section 8(b)(4)(i), and threatened, coerced and restrained neutral employers, within the meaning of Section 8(b)(4)(ii), I further find that by engaging in this handbilling Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Alternatively, I find that since Respondent’s handbilling herein was part and parcel of Respondent’s illegal campaign of picketing in which handbills were distributed by the pickets at the entrances to the rail yard reserved exclusively for neutrals, that for this additional reason Respondent’s handbilling violated Section 8(b)(4)(i) and (ii)(B), because it was inextricably linked with Respondent’s unlawful picketing. *Cement Masons Union Local 337 (California Association of Employers)*, 190 NLRB 261 fn. 1 (1971); *San Francisco Building Trades Council (Goold Electric)*, 297 NLRB 1050, 1055–1057 (1990); cf. *Broadcast Employees NABET Local 31*, 237 NLRB 1370, 1376–1377 (1978), enfd. 631 F.2d 944, 951 (D.C. Cir. 1980).

CONCLUSIONS OF LAW

1. Santa Fe is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and Section 8(b)(4) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing Santa Fe’s Richmond, California rail yard at gate 3 from July 12 through August 29, at gate 5 from August 10 through August 29, at gates 2 and 4 from August 24 through 29, all of which gates were reserved exclusively for the use of neutrals; by picketing neutrals at gate 4(b) on August 24 and 25 and at the UPS dropoff point on August 28 and 29; by picketing trains operated by Santa Fe’s employees at the Indian Crossing, the West Switching Lead spur and the Zone 3 Industries spur from August 10 through 29; and, by engaging in the aforesaid picketing with an ob-

ject of forcing neutral employers to cease doing business with Santa Fe and of forcing Santa Fe to cease doing business with Piggyback, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

4. By distributing at Santa Fe’s Richmond, California rail yard handbills to employees employed by neutral employers at gate 3 from July 12 through August 29, at gate 5 from August 10 through 29, at gates 2 and 4 from August 24 through 29, at gate 4(b) on August 24 and 25, and at the UPS dropoff point on August 28 and 29, and by engaging in this handbilling with an object of forcing neutral employers to cease doing business with Santa Fe and of forcing Santa Fe to cease doing business with Piggyback, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On the foregoing findings of fact, conclusions of law, and on the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended²⁹

ORDER

The Respondent, General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Local 315, affiliated with International Brotherhood of Teamsters, AFL–CIO, Richmond, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Inducing or encouraging any individual employed by Santa Fe or any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, transport, or to otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Santa Fe, or any person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Piggyback.

(b) In any manner threatening, coercing, or restraining Santa Fe or any other persons engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Santa Fe, or any other person engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, Piggyback.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

²⁹If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at its office and meeting halls copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Deliver to the Regional Director for Region 32 signed copies of the notice in sufficient number for posting by Santa Fe, if willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

³⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in or induce or encourage any individual employed by The Atchison, Topeka and Santa Fe Railway Company, or by any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, transport to, or to otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require The Atchison, Topeka and Santa Fe Railway Company, or any person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Piggyback Services, Inc.

WE WILL NOT threaten, coerce, or restrain The Atchison, Topeka and Santa Fe Railway Company or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require The Atchison, Topeka and Santa Fe Railway Company, or any other person engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Piggyback Services Inc.

GENERAL TRUCK DRIVERS, WAREHOUSEMEN,
HELPERS AND AUTOMOTIVE EMPLOYEES OF
CONTRA COSTA COUNTY, LOCAL No. 315,
AFFILIATED WITH INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMERICA, AFL-
CIO