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## Labor Law - Secondary Picketing - Buy Local Campaign at a Netural Business Violates Section 8(b)(4) of the National Labor Relations Act

W. James McKay

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**LABOR LAW — SECONDARY PICKETING — “BUY LOCAL” CAMPAIGN AT  
A NEUTRAL BUSINESS VIOLATES SECTION 8(b)(4) OF THE  
NATIONAL LABOR RELATIONS ACT.**

*Soft Drink Workers Union Local 812 v. NLRB* (D.C. Cir. 1980) \*

In response to a continuing loss of jobs in the New York area soft drink bottling industry,<sup>1</sup> Soft Drink Workers Union Local 812<sup>2</sup> decided in early 1978 to institute a “buy local” campaign to encourage the public to purchase locally bottled products.<sup>3</sup> As part of that campaign, Local 812 began picketing<sup>4</sup> and handbilling<sup>5</sup> in front of

\* *Editor’s Note:* As this Note went to print, the principal opinion had not yet been published in the *Federal Reporter*. For the convenience of our readers, the case is cited throughout to the Labor Relations Reference Manual (L.R.R.M.) service. For the record, the official citation is: *Soft Drink Workers Union Local 812 v. NLRB*, No. 79-1888 (D.C. Cir., October 3, 1980).

1. *Soft Drink Workers Union Local 812 v. NLRB*, 105 L.R.R.M. 2658, 2660 (D.C. Cir. 1980). From 1976 to 1978, the area’s bottlers suffered a “serious loss” of business which resulted in the elimination of an estimated 1,000 jobs in 1977, 600 of which had been held by members of Local 812. *Id.* at 2660 & n.3.

2. *Id.* at 2659. Local 812 represents employees of several soda bottlers in and around New York City. *Id.*

3. *Id.* at 2660.

4. *Id.* The picketing was carried on seven days a week, and was found to be peaceful by the National Labor Relations Board. *Id.* See 243 N.L.R.B. No. 126 (1979). The pickets, ranging in number from six to sixteen, carried signs which read:

To the Consumer,  
Please Buy Soft Drinks Made Locally.  
Stop Unemployment Here.  
Local 812,  
Soft Drink Workers Union,  
International Brotherhood of Teamsters.

105 L.R.R.M. at 2658, 2660. The pickets also chanted slogans such as: “Be a smart consumer. Keep the tax dollars in New York;” and “Read the label before you put it on the table.” *Id.* at 2660.

5. 105 L.R.R.M. at 2660. The handbilling, i.e., the distribution of informational materials, was carried on concurrent to the picketing. *Id.* The handbills distributed read:

**BUY LOCAL  
THANK YOU**

For purchasing a local product.

In the past year — in the New York Metropolitan Region alone — there was a loss of 125,000 jobs — and more going. We urge you to save our jobs — your neighbors [*sic*] — by buying soft drinks manufactured and distributed locally.

**SOFT DRINK WORKERS UNION,  
LOCAL 812, I.B.T.**

*Id.*

(1101)

Monarch Long Beach Corporation's (Monarch's)<sup>6</sup> retail beverage store in March, 1978.<sup>7</sup>

Monarch filed an unfair labor practice charge with the National Labor Relations Board (Board), alleging that the conduct amounted to a secondary boycott<sup>8</sup> in violation of section 8(b)(4)(ii)(B) of the National Labor Relations Act (Act).<sup>9</sup> A complaint was issued, and the General Counsel of the Board sought to enjoin the picketing under section 10(l) of the Act, but was denied relief by the district court.<sup>10</sup> The Board itself later affirmed an Administrative Law Judge's finding of a secondary boycott unfair labor practice, and issued a cease and desist order against the picketing.<sup>11</sup>

On the union's petition for review, a panel of the United States Court of Appeals for the District of Columbia Circuit affirmed, and

6. *Id.* Monarch, although primarily a wholesaler of beer and soda, also operates the single retail beverage store at which Local 812 began its activities. *Id.*

7. *Id.*

8. *Id.* at 2659-60. A secondary boycott is one in which the union directs its activities toward people dealing with the primary employer, such as customers, to bring further economic pressure upon the main disputant. See *Loewe v. Lawlor*, 208 U.S. 274 (1908), *aff'd on rehearing*, 235 U.S. 522 (1911).

9. 243 N.L.R.B. No. 126 (1979). Although § 8(b)(4)(ii)(B) does not explicitly condemn the secondary boycott, the statute's focus has been conceded to be that type of union conduct. See R. GORMAN, *BASIC TEXT ON LABOR LAW* 241 (1976); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959* (pts. 1-2), 73 HARV. L. REV. 850, 1086, 1112-13 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 270-71 (1959).

Section 8(b)(4) provides in relevant part:

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

. . .

4(ii) to threaten, coerce, or restrain any person engaged in commerce or in industry affecting commerce, where in either case an object thereof is —

. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . .

29 U.S.C. § 158(b) (1976).

10. 105 L.R.R.M. at 2660.

11. *Id.* See 243 N.L.R.B. No. 126 (1979). The Board rejected the union's contention that the lack of a traditional labor dispute over wages or benefits was a bar to the Board's action. *Id.* Reasoning that the appeal was to discourage sales of nonlocally bottled soda, the Board found that a secondary boycott existed as to Monarch. *Id.* The Board concluded that the union had failed to keep the appeal "closely confined to the primary dispute." *Id.*, quoting *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 72 (1964). For a discussion of *Tree Fruits*, see notes 27-39 and accompanying text *infra*. Local 812's placards were held to be vague since they failed to identify either the struck product or the primary employer. 243 N.L.R.B. No. 126. The Board maintained that further confusion was

granted the Board's cross-application for enforcement,<sup>12</sup> holding that a "buy local" campaign can violate section 8(b)(4)(ii)(B) of the National Labor Relations Act, and can be proscribed consistent with first amendment rights. *Soft Drink Workers Union Local 812 v. NLRB*, 105 L.R.R.M. 2658 (D.C. Cir. 1980).

Picketing has been recognized as a constitutionally protected form of speech since *Thornhill v. Alabama*.<sup>13</sup> Although the *Thornhill* Court stated that this right is subject to limitation,<sup>14</sup> it held that the mere threat of an injury to a business is not a sufficient basis to justify a general infringement of first amendment rights.<sup>15</sup> Only a "clear danger of substantive evils," the Court stated, could override picketers' first amendment rights.<sup>16</sup> The Supreme Court has since stated that the "compulsive features" of picketing are afforded less protection than other purer forms of communication.<sup>17</sup>

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generated in the consumer's mind when, in many instances, the place of bottling could not be determined by examining the containers. *Id.*

Picketing continued until a New York state court issued a preliminary injunction barring further picketing pending resolution of this appeal. 105 L.R.R.M. at 2660.

12. 105 L.R.R.M. at 2559.

13. 310 U.S. 88, 101-02 (1939). The Court in *Thornhill* struck down an Alabama statute that forbade all picketing or loitering about a place of business for the purpose of affecting the trade of that business. *Id.* at 91-92. An important factor in the Court's decision was the overbroad nature of the statute, construed to leave no room for "exceptions based upon either the number of the persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accuracy of the terminology used in notifying the public of the facts of the dispute." *Id.* at 99.

14. *Id.* at 103-04. The Court stated:

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. . . . It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgement of freedom of speech and the press concerning almost every matter of importance to society.

*Id.* (citations omitted).

15. *Id.* at 105.

16. *Id.* at 104-05. For examples of properly prohibited picketing, see *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (picketing to force employer to violate antitrust law held properly enjoined); *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943) (picketing accompanied by threats and intimidation held constitutionally restrained); *Hotel & Restaurant Employees' Int'l Alliance v. Wisconsin Employment Relations Bd.*, 315 U.S. 437 (1941) (violent picketing held properly enjoined).

17. *Hughes v. Superior Ct.*, 339 U.S. 460, 465-68 (1950). See also *Cox, Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 592-97 (1951). Professor Cox states that the invocation of sanctions by the union marks the

The secondary boycott traditionally has not been accorded the favored status of other union activities, and has a long history of condemnation by the courts.<sup>18</sup> It was not until the Taft-Hartley Act of 1947, however, that Congress first attempted to legislate against the secondary boycott,<sup>19</sup> but section 8(b)(4) of Taft-Hartley failed to fulfill the drafters' objective of totally banning this union weapon.<sup>20</sup> Primarily due to the vague, indirect language selected,<sup>21</sup> the courts read section 8(b)(4) to permit picketing directed at consumers of a secondary employer.<sup>22</sup>

In an attempt to remedy the "problems"<sup>23</sup> with the initial Act, section 8(b)(4) was amended in 1959 by the Landrum-Griffin Act.<sup>24</sup>

line at which restrictions are proper, because the speech elements become secondary at that point. *Id.* at 593-94.

18. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (secondary boycott not excepted from Sherman Antitrust Act by Clayton Act); Loewe v. Lawlor, 208 U.S. 274 (1908), *aff'd on rehearing*, 235 U.S. 522 (1911) (secondary boycott found to violate Sherman Antitrust Act); Bricklayers' Union v. Seymour Ruff & Sons, 160 Md. 483, 154 A. 52 (1931) (secondary boycott illegal under common law).

19. *See* Labor Management Relations Act of 1947, 61 Stat. 136, *amending* National Labor Relations Act, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)).

20. Aaron, *supra* note 9, at 1113. Professor Aaron states that the clear objective of Congress was "to prevent a union engaged in a primary strike against employer A from putting pressure on him by inducing the employees of employer B to stop work with the object of compelling B to cease doing business with A." *Id.*

21. *Id.* The term "secondary boycott" was frequently discussed in the hearings and debates in Congress prior to passing this Act. *See, e.g.*, S. REP. NO. 105, 80th Cong., 1st Sess. 22 (1947), *reprinted in* STAFF OF THE SUBCOMM. ON LABOR OF THE U.S. SENATE COMM. ON LABOR AND PUBLIC WELFARE, 93D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 428 (Comm. Print 1974) [hereinafter cited as COMM. PRINT]; S. MIN. REP. NO. 105, 80th Cong., 1st Sess. 19 (1947), *reprinted in* COMM. PRINT, *supra*, at 481; 93 CONG. REC. A1296 (1947) (extension of remarks of Rep. Landis), *reprinted in* COMM. PRINT, *supra*, at 583; 93 CONG. REC. 3950 (1947) (remarks of Sen. Taft), *reprinted in* COMM. PRINT, *supra*, at 1006; 93 CONG. REC. 4155 (1947) (remarks of Sen. Murray), *reprinted in* COMM. PRINT, *supra*, at 1047; 93 CONG. REC. 4897-98 (1947) (remarks of Sen. Thomas), *reprinted in* COMM. PRINT, *supra*, at 1341. However, the term was neither defined nor explicitly mentioned in § 8(b)(4). *See* Aaron, *supra* note 9, at 1112-13.

22. *See, e.g.*, United Wholesale & Warehouse Employees, Local 261 v. NLRB, 282 F.2d 824 (D.C. Cir. 1960); NLRB v. Brewery Workers Local No. 366, 272 F.2d 817 (10th Cir. 1959); NLRB v. Service, Trade, Chauffeurs, Salesmen, & Helpers, Local 145, 191 F.2d 65 (2d Cir. 1951).

23. It should be noted that it was management which supported the position that amendments were needed to strengthen § 8(b)(4). *See* Aaron, *supra* note 9, at 852. For a discussion of several of the "loopholes" in the Taft-Hartley Act, *see* R. GORMAN, *supra* note 9, at 244-47, 251-54; Aaron, *supra*, at 1110-15. Labor's view of the Taft-Hartley Act, however, was one of adamant opposition. *See* Comment, *Consumer Picketing: Reassessing the Concept of Employer Neutrality*, 65 CALIF. L. REV. 172, 176 n.19 (1977).

24. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, § 704, *amending* National Labor Relations Act, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)).

Most commentators assumed that the amendments, backed by a seemingly clear legislative history,<sup>25</sup> created a per se ban on picketing at a secondary employer's business.<sup>26</sup> The Supreme Court defeated these expectations, however, in *NLRB v. Fruit and Vegetable Packers, Local 760 (Tree Fruits)*,<sup>27</sup> holding that section 8(b)(4) did allow some forms of secondary activities by unions.<sup>28</sup>

In *Tree Fruits*, the union called a strike against fruit packers and warehousemen.<sup>29</sup> The union picketed 46 Safeway stores, appealing to the stores' customers not to buy apples which Safeway had purchased from the struck firms.<sup>30</sup>

The *Tree Fruits* Court began its analysis by expressing concern that an overbroad ban on secondary picketing might collide with the first amendment.<sup>31</sup> Echoing the language used in *Thornhill*,<sup>32</sup> the Court in *Tree Fruits* set forth its mode of statutory interpretation, stating: "In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing."<sup>33</sup> Further, the Court stated that in order for it to recognize a legislative intent to ban peaceful picketing, it must have the "clearest indication" of that intent from Congress.<sup>34</sup>

Using this standard of interpretation, the *Tree Fruits* Court held that the "requisite clarity" to support a broad ban on all consumer picketing at secondary businesses was missing from the legislative history of section 8(b)(4).<sup>35</sup> Therefore, the Court reasoned, such picketing

25. See Comment, *supra* note 23, at 178 n.35; Note, *Peaceful Consumer Picketing at Secondary Site Not Prohibited by Section 8(b)(4) of the Labor Management Relations Act*, 33 *FORDHAM L. REV.* 112, 114-15 (1965).

26. See Aaron, *supra* note 9, at 1114; Cox, *supra* note 9, at 274.

27. 377 U.S. 58 (1964).

28. *Id.* at 71.

29. *Id.* at 59.

30. *Id.* at 59-60. The union's appeal was limited strictly to that purpose by: 1) union instructions directing the pickets not to interfere with deliveries, employees, or consumers; 2) placards that mentioned only the struck product; and 3) handbills that expressly noted that the Safeway stores were not being struck. *Id.* at 59-61, 60 n.3.

31. *Id.* at 63, 70-71. This concern then dictated a narrow interpretation of the statute. See notes 32-34 and accompanying text *infra*. Both Justice Black's concurring and Justice Harlan's dissenting opinions thought that the case turned on the first amendment issue. See 377 U.S. at 76-80 (Black, J., concurring); *id.* at 80-94 (Harlan, J., dissenting). For a discussion of these opinions, see note 39 *infra*.

32. See text accompanying note 16 *supra*.

33. 377 U.S. at 62-63, quoting *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 284 (1959).

34. 377 U.S. at 63.

35. *Id.* The Court observed:

All that the legislative history shows in the way of an 'isolated evil' believed to require proscriptions of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary

does not per se "threaten, coerce, or restrain" a secondary employer under that section.<sup>36</sup> If the union's actions appeal to the consumers to boycott only the "struck product" rather than all the services of the secondary employer, no unfair labor practice is established under section 8(b)(4).<sup>37</sup> Rejecting the court of appeals test based on a loss or threat of loss to the secondary employer,<sup>38</sup> the *Tree Fruits* Court concluded that the union had not violated section 8(b)(4) because its appeal was "closely confined" to the struck product and did not urge a general boycott of the Safeway stores.<sup>39</sup>

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employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer.

*Id.*

In discussing the legislative history, the *Tree Fruits* Court found it significant that in the Senate, neither of the bill's chief proponents pointed to consumer picketing as the compelling reason for the amendments. *Id.* at 65-67. Similarly, the Court pointed to the language of Congressman Griffin who had stated: "[O]f course this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to *coerce the retailer not to do business* with the manufacturer . . . , the amendments will reach that conduct." *Id.* at 68, *citing* 105 CONG. REC. 15673 (1959) (emphasis supplied by the Court). The Supreme Court also found it to be significant that one of the bill's authors thought its reach over secondary picketing was constrained to the limited type of coercion italicized. 377 U.S. at 68.

The *Tree Fruits* Court noted the language of the Conference Committee Chairman, Senator Kennedy, who had stated:

The prohibition [of the House bill] reaches not only picketing but leaflets, radio, broadcasts and newspaper advertisements, thereby interfering with freedom of speech. . . .

[O]ne of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement on freedom of expression.

377 U.S. at 69, *citing* 105 CONG. REC. 16591 (1959). Although this seems to indicate that Senator Kennedy viewed the amendments as supporting a broad ban on picketing, the Court disagreed, noting that he was speaking at the time in support of a publicity proviso to the amendment. 377 U.S. at 70. However, the Court did find the remarks supportive of a congressional concern for the potential conflict with the first amendment. *Id.*

36. 377 U.S. at 71. The Court, rejecting the contention that the public would react automatically to the picketing and fail to notice the limited thrust of the union's appeal, noted that, irrespective of the actual results of the picketing, the legislative history did not express disapproval of all consumer picketing with the requisite "clearest indication." *Id.*

37. *Id.* at 72-73.

38. *Id.* This standard was later approved, however, for severe economic injury in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title)*, 447 U.S. 607 (1980). For a discussion of *Safeco Title*, see notes 48-54 and accompanying text *infra*.

39. 377 U.S. at 71-72. Unlike the majority, both the concurring opinion of Justice Black, and the dissenting opinion of Justice Harlan, concluded that the legislative history supported a finding that the secondary boycott provision reached the union's conduct in the instant case. *Id.* at 76 (Black, J., concurring); *id.* at 80-92 (Harlan, J., dissenting). The two opinions reached different

The Board and the courts of appeals have extended the *Tree Fruits* requirement that the union's appeal be "closely confined to the primary dispute"<sup>40</sup> to also require that the pickets' signs clearly identify and limit the appeal to the primary employer's products.<sup>41</sup> Moreover, an early interpretation of section 8(b)(4) concluded that the union's ultimate objective is irrelevant if an illegal purpose can be shown, or is inferrable from, the conduct of the picketing.<sup>42</sup>

Since *Tree Fruits*, two major lines of analysis have developed to test for the "isolated evil"<sup>43</sup> in secondary picketing aimed at consumers.<sup>44</sup> The "merged product"<sup>45</sup> cases have held that picketing at a secondary site is impermissible when the struck product is inseparable from the overall business of the secondary employer, thereby, in effect, urging a general boycott of the neutral's business.<sup>46</sup> The second test

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conclusions on whether the prohibition was permissible under the first amendment.

Justice Black, while recognizing the dual nature of picketing as both speech and conduct, stated that regulation of the conduct aspect must be scrutinized to ensure that the speech rights are not unduly infringed. *Id.* at 77-78 (Black, J., concurring). Justice Black concluded that the conduct banned by the statute was only the dissemination of information, which was not a justifiable state interest to regulate the union's conduct. *Id.* at 78-79 (Black, J., concurring). Only a traditionally recognized basis, such as maintaining public order, could justify such a regulation. *Id.* at 79 (Black, J., concurring). Therefore, Justice Black concurred as he found § 8(b)(4) constitutionally infirm in basing its proscription on the expression of certain views. *Id.*

Justice Harlan, joined by Justice Stewart, concluded that the statute was constitutional because other methods of communication were available to the union. *Id.* at 93 (Harlan, J., dissenting). Justice Harlan reasoned that Congress' weighing of first amendment rights against the problems attendant with secondary picketing was entitled to "great deference." *Id.*

40. 377 U.S. at 72.

41. See *Bedding, Curtain & Drapery Workers Union, Local 140 v. NLRB*, 390 F.2d 495 (2d Cir.), cert. denied, 392 U.S. 905 (1968); *NLRB v. Upholsterers, Frame & Bedding Workers Twin City Local No. 62*, 331 F.2d 561 (8th Cir. 1964); *Local 248, Meat & Allied Food Workers*, 230 N.L.R.B. 189 (1977).

42. *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 685-88 (1951).

43 See notes 32-33 and accompanying text *supra*.

44. See notes 45-54 and accompanying text *infra*. See generally Comment, *Consumer Picketing and the Single-Product Secondary Employer*, 47 U. CHI. L. REV. 112 (1979).

45. See R. GORMAN, *supra* note 9, at 259-61.

46. See, e.g., *Cement Masons Local 337 v. NLRB*, 468 F.2d 1187 (9th Cir.), cert. denied, 411 U.S. 986 (1972) (struck product was homes; secondary employer was real estate developer); *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969) (struck product was bread; secondary employer was restaurant owner); *Honolulu Typographical Union No. 37 v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968) (struck product was advertising services; secondary employers were local merchants); *NLRB v. Local 254, Bldg. Serv. Employees*, 359 F.2d 289 (1st Cir. 1966) (struck product was janitorial services; secondary employer was business contracting for the services). *Contra*, *United Paperworkers Local 832*, 236 N.L.R.B. 1525 (1978) (struck product was paper bags; secondary employer was grocery store). See also Comment, *supra* note 23, at 132-34.



was recently announced by the Supreme Court when it held that secondary boycotts having a severe economic impact upon the neutral employer were banned under section 8(b)(4).<sup>47</sup>

In *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title)*<sup>48</sup> the union struck Safeco Title Insurance Company, and picketed five firms which sold that company's policies.<sup>49</sup> The union urged the secondary employers' customers to cancel their Safeco Title policies.<sup>50</sup> Over ninety percent of the five neutral businesses' income was derived from sales of Safeco Title policies.<sup>51</sup> Although the *Safeco Title* Court reaffirmed the *Tree Fruits* requirement of clear congressional intent to proscribe an "isolated evil,"<sup>52</sup> it rejected the *Tree Fruits* language stating that economic loss by the secondary employer is irrelevant.<sup>53</sup> The

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47. *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title)*, 447 U.S. 607 (1980). For prior discussions of the economic impact test, see Comment, *supra* note 23, at 189-201; Note, *Secondary Consumer-Product Picketing Resulting in Substantial Economic Harm to the Business of the Secondary is Not Illegal*, 10 GA. L. REV. 871 (1976).

48. 447 U.S. 607 (1980).

49. *Id.* at 609.

50. *Id.* at 610.

51. *Id.* at 609.

52. *Id.* at 612. See notes 32-33 and accompanying text *supra*. Justice Powell's first amendment analysis gained the support of only a plurality of the Court. See 447 U.S. at 608. Justice Powell was joined by Chief Justice Burger and Justices Stewart and Rehnquist in this portion of his opinion. *Id.* Justice Blackmun, joining all parts of Justice Powell's opinion with the exception of the first amendment analysis, expressed difficulty in reconciling the Supreme Court's past rejections of content-based laws with § 8(b)(4)'s apparent content selectivity. *Id.* at 616-17 (Blackmun, J., concurring in part). See *Carey v. Brown*, 447 U.S. 445 (1980) (statute banning all *nonlabor* picketing at residences constitutes impermissible content selectivity); *Police Dept. v. Mosley*, 408 U.S. 92 (1972) (statute banning all *nonlabor* picketing near schools constitutes impermissible content selectivity). Justice Blackmun read *Mosley* as rejecting any content selectivity in statutes affecting picketing. 447 U.S. at 617 (Blackmun, J., concurring in part). See also note 39 *supra*. Nevertheless, Justice Blackmun concurred in the result because he was "reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral[s] . . . to remain free from coerced participation in industrial strife." 447 U.S. at 617-18 (Blackmun, J., concurring in part).

Justice Stevens found § 8(b)(4) constitutional as regulating the conduct, not speech, aspect of picketing, therefore avoiding content-selective regulation of speech. *Id.* at 618-19 (Stevens, J., concurring in part). The plurality did not deal with question of content selectivity, finding justification for the regulation in the congressional objective of protecting neutral employers. 447 U.S. at 616.

53. 447 U.S. at 612. See *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. at 72-73. The *Safeco Title* Court distinguished *Tree Fruits*, stating:

The product picketed in *Tree Fruits* was but one item among the many that made up the retailer's trade. . . . The neutral therefore has little reason to become involved in the labor dispute. In this case, on the other hand, the title companies sell only the primary employer's product. . . . Secondary picketing against consumption of the primary

*Safeco Title* Court announced that the test under section 8(b)(4) is whether "the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss."<sup>54</sup>

Although in most instances the existence of a "labor dispute"<sup>55</sup> is readily apparent, the jurisdiction of the Board over secondary boycott charges has been held to be constrained by the necessity of a preliminary finding of such a dispute.<sup>56</sup> The Fourth Circuit, in *NLRB v. International Longshoremen's Association*,<sup>57</sup> held that the Board lacked the "indispensible prerequisite" of a labor dispute<sup>58</sup> defined as a controversy over "terms and conditions of employment."<sup>59</sup> The Fourth Circuit's view, however, has been rejected by courts and commentators alike.<sup>60</sup> The accepted consensus is that the absence of a labor dispute,

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product leaves responsive consumers no realistic option other than to boycott the title companies altogether.

447 U.S. at 613 (citation omitted).

54. 447 U.S. at 615-16 n.11.

55. Section 2(9) of the Act defines a "labor dispute" as "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9) (1976). The phrase "labor dispute" is not used in defining any of the unfair labor practices enumerated in the Act. See *id.* § 158(a)-(g). The Board's jurisdiction is defined as the power to prevent any unfair labor practices. *Id.* § 160(a).

56. *NLRB v. International Longshoremen's Ass'n*, 332 F.2d 992 (4th Cir. 1964).

57. *Id.* The union (ILA) had refused to supply workers to a ship fitting company that had contracted to overhaul a vessel owned by Ocean Shipping Ltd. (Ocean). *Id.* at 993-94. The ship was on the ILA's "blacklist" of ships engaged in trade with Cuba. *Id.* at 993. Ocean filed a secondary boycott unfair labor practice charge against the ILA, alleging coercion of the ship fitting company to cease dealing with Ocean. *Id.* at 994.

58. *Id.* at 995-96. The court stated that the key factor in its decision was not the lack of a primary disputant, but rather, the absence of any labor dispute within the statutory definition. *Id.* The court cited as supporting this proposition *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960). See 332 F.2d 995. The *Marine Cooks* Court stated in dictum that the purpose of the Taft-Hartley Act was "to regulate the conduct of people engaged in labor disputes," but did not speak in terms of the Board's jurisdiction. See 362 U.S. at 372.

59. 332 F.2d at 995-96, quoting 29 U.S.C. § 152(9) (1958). For the complete text of the present § 152(9), see note 55 *supra*. The Court held that the ILA's activities were purely political in nature, being motivated by the Cuban missile crisis. 332 F.2d at 993, 995-96.

60. See, e.g., *National Maritime Union v. NLRB (Delta Steamship Lines)*, 346 F.2d 411, 414-20 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965) (rejecting the Fourth Circuit's analysis); *National Maritime Union v. NLRB (Weyerhaeuser)*, 342 F.2d 538, 540-45 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965) (Fourth Circuit holding limited to political controversies); *Mountain Navigation Co. v. Seafarer's Int'l Ass'n*, 348 F. Supp. 1298, 1302-03 (W.D. Wisc. 1971) (Fourth Circuit holding limited to political controversies).

One commentator has argued that such an interpretation of the Act, when considering a § 8(b)(4) charge, would "frustrate" the goal of preventing coercion

and hence, of a primary employer, does not prevent a finding that section 8(b)(4) has been violated.<sup>61</sup>

It was against this background that the *Soft Drink Workers* court considered the union's appeal from the Board's finding of a section 8(b)(4)(ii)(B) unfair labor practice.<sup>62</sup> The court began its analysis by rejecting the union's claim that the absence of a "conventional labor dispute"<sup>63</sup> required reversal for lack of both jurisdiction<sup>64</sup> and a secondary boycott unfair labor practice.<sup>65</sup>

The jurisdiction of the Board, the court held, was clearly not constrained by the Act to traditional labor disputes.<sup>66</sup> Turning to the union's assertion that a traditional labor dispute is a prerequisite to the Board finding a section 8(b)(4) violation, the court stated that the main objective of the secondary boycott provision is to protect neutral

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of a secondary employer regardless of the nature of the dispute. 78 HARV. L. REV. 463, 464 (1964). Another commentator, after examining the language of the Act, could find no support for the Fourth Circuit's view. See Note, *Jurisdiction of National Labor Relations Board—Necessity of Labor Dispute*, 50 IA. L. REV. 946, 950-52 (1965). See also Note, *Refusal To Refer Employees for Work Upon a Single Ship Found Not To Be a Secondary Boycott*, 113 U. PA. L. REV. 1317, 1318-21 (1965) (jurisdictional limitation in Fourth Circuit's holding "hinders protection of secondary employer who," although uninvolved, is always affected whatever the cause of the dispute); Note, *NLRB Lacks Jurisdiction Over Union's Refusal To Supply Labor to Secondary Employer For Work on Primary Employer's Ship Where Union's Action Is Based on Political Controversy Unrelated to Labor Dispute With Primary Employer*, 51 VA. L. REV. 157, 161 (1965) ("[E]mphasis upon cause rather than effect [in a § 8(b)(4)] charge seems unsound").

61. See *National Maritime Union v. NLRB* (Delta Steamship Lines), 346 F.2d 411, 414-20 (D.C. Cir.), cert. denied, 382 U.S. 840 (1965); *National Maritime Union v. NLRB* (Weyerhaeuser), 342 F.2d 538, 540-45 (2d Cir.), cert. denied, 382 U.S. 835 (1965); *NLRB v. Washington-Oregon Shingle Weavers' District Council*, 211 F.2d 149, 151-53 (9th Cir. 1954).

62. 105 L.R.R.M. at 2658. The appeal was before a panel of the District of Columbia Circuit consisting of Chief Judge Wright and Judges Mikva and Wald. *Id.* at 2659. Chief Judge Wright wrote the majority opinion, with Judge Wald submitting a dissent. *Id.*

63. *Id.* at 2662-64. The court conceded that the factual record failed to establish a "conventional labor dispute" in that the union was not seeking to organize the employees of either Monarch or the nonlocal bottlers. *Id.* at 2662. For the Act's definition of labor dispute, see note 55 *supra*.

64. 105 L.R.R.M. at 2662. The union maintained that the Board's jurisdiction was limited to situations where a union was seeking to improve its position vis-à-vis the employer of the union members. *Id.*

65. *Id.* at 2662-64. Without a conventional labor dispute, the union maintained, there could be no primary employer, and therefore, no secondary employer or boycott. *Id.* at 2662. For a discussion of the need for a traditional labor dispute, see notes 55-61 and accompanying text *supra*.

66. 105 L.R.R.M. at 2662. In rejecting the union's position, the court relied on precedent within the circuit. *Id.*, citing *National Maritime Union v. NLRB* (Delta Steamship Lines), 346 F.2d 411 (D.C. Cir.), cert. denied, 382 U.S. 840 (1965). The *Soft Drink Workers* court noted with approval that *Delta Steamship Lines* had rejected the only decision cited by the union in support of its argument, *NLRB v. International Longshoremens' Ass'n*, 332 F.2d 992

employers from becoming embroiled in the labor conflicts of others.<sup>67</sup> Thus, the court reasoned, the only preliminary finding required to activate section 8(b)(4) and its sanctions, is that the union's picketing must be "tactically calculated to satisfy union objectives elsewhere."<sup>68</sup> The court found that the union was trying, through its picketing, to "enhanc[e] job opportunities of union members at local manufacturing plants."<sup>69</sup> Because this objective was unrelated to Monarch's operations, the court concluded that Monarch was a neutral employer deserving protection under the Act.<sup>70</sup>

The *Soft Drink Workers* court therefore proceeded to analyze the union's conduct in light of section 8(b)(4)(ii)(B).<sup>71</sup> Applying the *Tree Fruits* construction of the secondary boycott provision,<sup>72</sup> the court of appeals found two components to such an unfair labor charge: 1) a union objective of forcing the secondary employer to cease trading with another employer; and 2) the use of coercive means by the union.<sup>73</sup>

In finding that the union exhibited a proscribed objective,<sup>74</sup> the court rejected the claim that Local 812 had appealed to consumers to

(4th Cir. 1964). 105 L.R.R.M. at 2662 n.10. For a discussion of the Fourth Circuit case, see notes 56-61 and accompanying text *supra*.

In the alternative, the *Soft Drink Workers* court stated that if proof of a "labor dispute" was a threshold requisite, the scope of that term "might be broad enough to encompass the controversy in this case." 105 L.R.R.M. at 2662 n.11. The court believed the Fourth Circuit's decision was distinguishable under a broad definition of labor dispute because the union in that case was politically, rather than economically motivated. *Id.* at 2662 n.11. See NLRB v. International Longshoremen's Ass'n, 332 F.2d 992 (4th Cir. 1964).

67. 105 L.R.R.M. at 2663. The court found support for this proposition in the legislative history of the Act and in precedent from both within and outside the District of Columbia Circuit. *Id.* at 2663-64. See *National Maritime Union v. NLRB (Delta Steamship Lines)*, 346 F.2d 411 (D.C. Cir.), cert. denied, 382 U.S. 840 (1965); *National Maritime Union v. NLRB (Weyerhaeuser)*, 342 F.2d 538 (2d Cir.), cert. denied, 382 U.S. 835 (1965); *NLRB v. Washington-Oregon Shingle Weavers' District Council*, 211 F.2d 149 (9th Cir. 1954).

68. 105 L.R.R.M. at 2663-64 (citation omitted). The court noted that § 8(b)(4) does not specifically outlaw secondary boycotts. *Id.* at 2663. The proper analysis, the court observed, requires a comparison of the union's conduct to that proscribed in the statute. *Id.*

69. *Id.* at 2664.

70. *Id.*

71. *Id.* at 2664-70. For the text of this provision, see note 9 *supra*.

72. 105 L.R.R.M. at 2664-70. The court noted that the Board in its consideration of this controversy, incorrectly found that *Tree Fruits* announced an exception to § 8(b)(4). *Id.* at 2664 n.16. The court concluded, therefore, that the Board's analysis should not have been limited to determining whether Local 812's actions were identical to those taken by the union in *Tree Fruits*. *Id.* For a discussion of *Tree Fruits*, see notes 27-39 and accompanying text *supra*.

73. 105 L.R.R.M. at 2664.

74. *Id.* The court stated that the Supreme Court had held that only a union objective need be proscribed, not necessarily the ultimate union goal. *Id.*, citing *NLRB v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675, 688-89 (1951).

buy locally bottled soda. Rather, the court found that the union had urged consumers to cease buying nonlocal bottlers' products.<sup>75</sup> Noting that Local 812's objective may have been the same as the union's objective in *Tree Fruits*, the *Soft Drink Workers* court held nonetheless that this similarity was of no avail to Local 812 since the *Tree Fruits* Court had based its holding on the lack of coercion.<sup>76</sup>

Turning to the second component of a section 8(b)(4) violation, whether the means used "threaten, coerce, or restrain" Monarch,<sup>77</sup> the *Soft Drink Workers* court recognized that "buy local" campaigns closely paralleled the union conduct in *Tree Fruits*.<sup>78</sup> Drawing on the *Tree Fruits* language indicating that coercion could be found if the appeal was not "closely confined to the primary dispute,"<sup>79</sup> the court concluded that the similarity did not automatically legitimate this picketing for it still must be shown that the union adequately identified the struck product.<sup>80</sup> The court held that Local 812 had made an overbroad appeal in that their signs: 1) failed to define the term "local";<sup>81</sup> 2) failed to adequately identify the soda products which the consumer should buy;<sup>82</sup> and 3) gave an indication that a complete boycott was

75. 105 L.R.R.M. at 2665. The court stated that the slogan chanted by the picketers, "[r]ead the label before you put it on the table," evidenced this objective. *Id.* at 2665 n.18.

76. *Id.* at 2665-66. For a discussion of *Tree Fruits*, see notes 27-39 and accompanying text *supra*. The court dismissed the union's contention that its conduct was legal because it was not aimed at inducing a general boycott, reasoning that the forbidden objective need only be to force a cessation of business between the primary and secondary employers — an objective which can result from less than a total boycott. 105 L.R.R.M. at 2665 n.19.

77. For the relevant text of § 8(b)(4), see note 9 *supra*.

78. 105 L.R.R.M. at 2666.

79. *Id.* at 2666, quoting *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. at 72.

80. 105 L.R.R.M. at 2666-67. Citing *Tree Fruits*, the *Soft Drink Workers* court stated that the failure to isolate the primary dispute created a new conflict with the secondary employer. *Id.* at 2667, citing *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. at 72. This separate dispute coerces the neutral since the harm to him is potentially greater than if the union successfully, through a primary strike, stopped only the primary employer's production. 105 L.R.R.M. at 2667. The fact that here, unlike in a conventional labor dispute, the union could not continue primary activities if its "buy local" campaign was stopped, was held to be irrelevant on the ground that the statute is simply concerned with the secondary effects on the neutral. *Id.* The court further noted that the Board did not have to hold that the nonlocal bottlers were the primary disputants in light of this statutory construction. *Id.* at 2668.

The court cited as further support for its conclusion that the primary dispute must be isolated the so-called "merged product" cases. *Id.* at 2666 n.20. For a discussion of the "merged product" cases, see notes 45-46 and accompanying text *supra*.

81. 105 L.R.R.M. at 2669-70. For the message on the placards and handbills, see notes 4 & 5 *supra*.

82. 105 L.R.R.M. at 2669-70. The court noted that it was difficult to identify the favored products because the place of bottling was often not

intended when considered together with the pickets' vocal exhortations.<sup>83</sup>

The court then considered the union's contention that, even if Local 812's appeal was overbroad, its conduct was illegal only if it urged a total boycott.<sup>84</sup> Stressing the fact that *Tree Fruits* had not held that only the urging of a total boycott could be banned under the Act,<sup>85</sup> the *Soft Drink Workers* court ruled that a section 8(b)(4) violation could also be established by the union's failure to limit the appeal to the confines of the primary dispute.<sup>86</sup> Further, the court maintained that the Board need not quantify, by empirical evidence, any actual loss by the secondary employer, but need only demonstrate "reasonably foreseeable effects" caused by the prohibited conduct.<sup>87</sup>

In conclusion, the court discussed Local 812's claim that prohibiting the union pickets' conduct on these facts infringed their first amendment rights to free speech.<sup>88</sup> The *Soft Drink Workers* court, characterizing the Board's assessment as "painstaking"<sup>89</sup> and the restriction

indicated, or was impossible to ascertain due to the crimping on the edges of the caps where it was indicated. *Id.* at 2669-70 & n.30. Thus, the court concluded, this case was distinguishable from an earlier Eighth Circuit "buy local" case where the union supplied the consumer with a list of the manufacturers favored. *Id.* at 2667 n.24, citing *NLRB v. Upholsterers Frame & Bedding Workers Twin City Local No. 61*, 331 F.2d 561, 562, 564 (8th Cir. 1964). The *Soft Drink Workers* court found a Second Circuit case to be supportive of its position on this issue. 105 L.R.R.M. at 2667 n.14, citing *Bedding, Curtain & Drapery Workers Union, Local 140 v. NLRB*, 390 F.2d 495, 502 (2d Cir.), cert. denied, 392 U.S. 905 (1968) ("buy local" picketing overbroad when not all union-made products carried an identifying label).

83. 105 L.R.R.M. at 2669-70. The court stated that consumer frustration with their inability to identify the favored products, together with vagueness of the signs, could lead the responsive consumer to totally boycott Monarch. *Id.*

84. *Id.* at 2668-69. The court assumed, *arguendo*, that the union's appeal "could at most deprive Monarch of the 35% of its retail income stemming from soda sales." *Id.* at 2668 n.25.

85. *Id.* at 2668-69. *Tree Fruits*, the *Soft Drink Workers* court noted, had "referred to the total boycott only as a counter-example of an illegal consumer boycott." *Id.* at 2668, citing *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. at 63. The *Soft Drink Workers* court found support for the conclusion that other consumer boycotts violated § 8(b)(4) in *Safeco Title*. 105 L.R.R.M. at 2668-69. That case, the court stated, had stressed that the harm to a secondary employer was the same as a total boycott when the struck product accounted for over 90% of the secondary's business. *Id.* at 2669. For a discussion of *Safeco Title*, see notes 48-54 and accompanying text *supra*.

86. 105 L.R.R.M. at 2669.

87. *Id.* at 2669-70. The *Soft Drink Workers* court reasoned that *Safeco Title* did not require proof of a "substantial loss" in all cases of secondary picketing, but only in the context of that case. *Id.* at 2669.

88. *Id.* at 2670.

89. *Id.* The court remarked that the Board had correctly found the union's picketing to create "a peculiarly severe burden on commerce by imposing upon a neutral employer economic pressures disproportionate to the union's legitimate campaign to protect its members' jobs." *Id.*

as "narrow,"<sup>90</sup> was satisfied that the constitutional concerns voiced by the *Tree Fruits* and *Safeco Title* courts had been met.<sup>91</sup>

In a vigorous dissent, Judge Wald expressed two major objections to the majority's analysis: 1) the lack of a "labor dispute" precluded a finding of an illegal secondary boycott;<sup>92</sup> and 2) Local 812's picketing was not in violation of section 8(b)(4) since it did not urge a total boycott of Monarch.<sup>93</sup> After reviewing the narrow construction given to section 8(b)(4) by the *Tree Fruits* Court,<sup>94</sup> Judge Wald concluded that the "isolated evil" prohibited was *only* union conduct which placed pressures on a secondary employer to cease trading with the primary opponent of the union.<sup>95</sup>

In Judge Wald's view, this "isolated evil" was absent in *Soft Drink Workers* because no "labor dispute" existed.<sup>96</sup> Although recognizing that the existence of a traditional labor dispute is not explicitly made the trigger for the applicability of section 8(b)(4)'s prohibitions,<sup>97</sup> Judge Wald voiced concern that prohibiting union conduct in the absence of such a dispute might unduly restrict the union's right "to com-

90. *Id.* The court observed that the Board's holding allowed the union "ample means" to continue its "buy local" campaign. *Id.*

91. *Id.*

92. 105 L.R.R.M. at 2672-73 (Wald, J., dissenting). See notes 96-99 and accompanying text *infra*.

93. 105 L.R.R.M. at 2673-76 (Wald, J., dissenting). See notes 100-04 and accompanying text *infra*.

94. 105 L.R.R.M. at 2671 (Wald, J., dissenting). For a discussion of this aspect of *Tree Fruits*, see notes 32-34 and accompanying text *supra*.

95. 105 L.R.R.M. at 2671 (Wald, J., dissenting). In support of her conclusion, Judge Wald referred to the *Tree Fruits* statement that

[a]ll that the legislative history [of § 8(b)(4)] shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer.

*Id.*, quoting NLRB v. Fruit & Vegetable Packers, Local 760 (*Tree Fruits*), 377 U.S. at 64. Further, Judge Wald maintained that the *Safeco Title* holding had not affected this conclusion and had, in fact, quoted approvingly the above language from *Tree Fruits*. 105 L.R.R.M. at 2671 (Wald, J., dissenting), citing NLRB v. Retail Store Employees Union, Local 1001 (*Safeco Title*) 447 U.S. at 608.

96. 105 L.R.R.M. at 2672-73 (Wald, J., dissenting).

97. *Id.* at 2672 (Wald, J., dissenting). Judge Wald, however, argued that, despite the lack of "explicit" language to this effect, other provisions in the Act which used the words "labor dispute" indicate congressional intent to describe the jurisdiction of the Board in those terms. *Id.* at 2672 & n.5 (Wald, J., dissenting), citing 29 U.S.C. §§ 141, 151 (1976) (declarations of policy of the Act); 29 U.S.C. § 164(c) (1976) (description of totality of cases to which the Act applies). For further discussion of the phrase "labor dispute" in the Act, see notes 55-61 and accompanying text *supra*.

municate with the public on a matter of general concern.”<sup>98</sup> Courts should not reach beyond the “guidepost” of a labor dispute, Judge Wald warned, without proof of the existence of the “isolated evil.”<sup>99</sup>

Judge Wald’s second argument was that the “‘isolated evil’ did not exist because the picketing was not aimed at a cessation of all patronage of the neutral employer.”<sup>100</sup> *Tree Fruits*, she stated, held that the legislative intent to deal with an “isolated evil” only covered the situation where a total boycott of the neutral employer was urged.<sup>101</sup> Noting that *Tree Fruits* did not announce the *only* exception to illegal picketing,<sup>102</sup> Judge Wald charged that the majority opinion had totally

98. 105 L.R.R.M. at 2672 (Wald, J., dissenting).

99. *Id.* at 2672-73 (Wald, J., dissenting). Judge Wald argued that in cases where no labor dispute existed, the courts have emphasized the “functional similarities” of the facts to such disputes. *Id.* at 2673 (Wald, J., dissenting). The majority’s reasoning, Judge Wald stated, would bring all “buy local; American; and good quality” campaigns under the Board’s power, which, Judge Wald opined, was something the legislative history clearly demonstrated was not intended. *Id.* at 2673 & n.3 (Wald, J., dissenting).

100. *Id.* at 2673-76 (Wald, J., dissenting). Judge Wald disagreed with the majority’s assumption that the campaign was aimed at stopping nonlocal bottlers’ sales. *Id.* at 2672 n.3 (Wald, J., dissenting). In Judge Wald’s view, “[t]he only consumer action which *aids* the union to achieve its goal of enhancing job opportunities would be an affirmative purchase of local soda.” *Id.* (emphasis in original). Judge Wald concluded that a buy local campaign, with signs urging the affirmative purchase of local products, is a “leap of imagination” away from a negative appeal to boycott the secondary employer. *Id.* at 2675-76 (Wald, J., dissenting).

101. *Id.* at 2674 (Wald, J., dissenting). Judge Wald again quoted *Tree Fruits* as supporting her position:

There is thus *nothing* in the legislative history prior to the convening of the Conference Committee which shows any congressional concern with consumer picketing *beyond that with the “isolated evil” of its use to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer.*

*Id.*, quoting *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. at 68 (emphasis supplied by Judge Wald). Moreover, Judge Wald noted that *Safeco Title* supported this conclusion when it analogized a boycott comprising a high percentage of the secondary employer’s business, to the situation hypothesized in *Tree Fruits* where the boycott was “reasonably calculated to induce customers not to patronize the neutral at all.” 105 L.R.R.M. at 2674-75 (Wald, J., dissenting), citing *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title)*, 447 U.S. at 608.

102. 105 L.R.R.M. at 2674 (Wald, J., dissenting). Judge Wald stated that such a reading of *Tree Fruits* “is standing the case on its head,” for the *Tree Fruits* Court had merely indicated what conduct *could* fall within § 8(b)(4)’s proscription. *Id.* For further discussion of Judge Wald’s statements on this point, *see* note 101 *supra*.

According to Judge Wald, the *Tree Fruits* decision, as modified in *Safeco Title*, had enunciated the test of the “threaten, coerce, or restrain” language in the statute, to be whether the product boycott appeal could “reasonably . . . threaten the neutral party with ruin or substantial loss.” 105 L.R.R.M. at 2676 (Wald, J., dissenting), quoting *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title)*, 447 U.S. at 615-16 n.11. Judge Wald asserted that



ignored the teachings of that case and had created an "unwarranted" new test for section 8(b)(4) violations by holding "that it is enough that the customers may be 'confused.'" <sup>103</sup>

Judge Wald concluded that the majority had, practically speaking, banned all consumer picketing unless "stringent standards" can be met by the union pickets.<sup>104</sup>

It is submitted that the *Soft Drink Workers* court, by finding that the union's conduct amounted to a secondary boycott in violation of section 8(b)(4),<sup>105</sup> has strayed far afield from the repeated Supreme Court pronouncements that the first amendment constrains the reach of that section.<sup>106</sup> The opinion by Chief Judge Wright fails to consider whether there is present the "clearest indication" of congressional in-

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there had been no finding which established a violation of this test, and, in fact, none could be, since the nonlocal products at most accounted for less than seven percent of Monarch's total business. 105 L.R.R.M. at 2675 & n.13 (Wald, J., dissenting).

103. 105 L.R.R.M. at 2675 (Wald, J., dissenting). The majority's "strict" interpretation of the "vague sign" test, Judge Wald claimed, was factually unsupported in that the thrust of that test — the protection of secondary employers from pickets conveying a total boycott message when not intended — could under no construction be found to be violated in the affirmative message "buy local." *Id.* at 2675-76 (Wald, J., dissenting). For a discussion of the "vague sign" test, see notes 40-41 and accompanying text *supra*.

104. 105 L.R.R.M. at 2675 (Wald, J., dissenting). Judge Wald remarked, "The opinion, dangerously I think, systematically discards each of the limitations which might be relied upon to avoid first amendment difficulties with [§ 8(b)(4)]." *Id.* at 2676 (Wald, J., dissenting).

105. For a discussion of the majority's analysis, see notes 62-91 and accompanying text *supra*.

106. For a discussion of the relevant Supreme Court cases, see notes 27-39 & 48-54 and accompanying text *supra*.

It is suggested that, as a preliminary matter, the *Soft Drink Workers* court correctly rejected the contention that a traditional "labor dispute" is a prerequisite to both Board jurisdiction, and a finding of a § 8(b)(4) violation. For a discussion of the court's analysis regarding this issue, see notes 63-70 and accompanying text *supra*. For Judge Wald's dissenting argument, see notes 96-99 and accompanying text *supra*.

The only limitation on the Board's jurisdiction is found in § 10(a) which provides: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1976) (emphasis added). No unfair labor practice enumerated in § 8 of the Act is defined using the words "labor dispute." See *id.* § 158(a)-(g). In each instance, the conduct regulated does not gain sudden significance when it occurs in a traditional labor dispute. Rather, it represents the legislature's view of activities to be stopped in order to effectuate the declared policy of eliminating "the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions." *Id.* § 151. See generally *National Maritime Union v. NLRB* (Delta Steamship Lines), 346 F.2d 411 (D.C. Cir.), cert. denied, 382 U.S. 840 (1965). For a discussion of a contrary view, see notes 44-51 and accompanying text *supra*. Further, as noted by several commentators, a preliminary requisite of a labor dispute in secondary boycott questions would seriously hamper the goal of protecting secondary employers from illegal activities that fall beyond the technical interpretation of a traditional labor dispute. See note 60 *supra*.

tent to ban an "isolated evil,"<sup>107</sup> or whether the union's conduct is equivalent to a total boycott of the secondary employer.<sup>108</sup>

The *Tree Fruits* court chose its narrow mode of statutory analysis due to concerns that an overbroad proscription of secondary activities would unconstitutionally infringe upon the union's free speech.<sup>109</sup> The majority opinion in *Soft Drink Workers* failed, as noted by Judge Wald,<sup>110</sup> to consider language in the legislative history which indicates an intent not to reach buy local campaigns through section 8(b)(4).<sup>111</sup> Thus, by ignoring the legislative desire, the court has bypassed the limitation imposed by *Tree Fruits* that was formulated to avoid first amendment conflicts.

More fundamentally, it is submitted, the *Soft Drink Workers* court misconstrued the relevant cases of *Tree Fruits*<sup>112</sup> and *Safeco Title*.<sup>113</sup> Although correctly stating that the union conduct must be directed to an illegal objective and use coercive means,<sup>114</sup> the court ignored the basic thrust of this two prong test — whether the picketing has the effect of urging a total boycott of the secondary employer.<sup>115</sup> Instead,

107. See notes 31-34 and accompanying text *supra*. For a more detailed criticism of this point, see notes 109-11 and accompanying text *infra*.

108. See notes 37-39 & 52-54 and accompanying text *supra*. For a more detailed criticism of this point, see notes 112-21 and accompanying text *infra*.

109. See note 31 and accompanying text *supra*.

110. 105 L.R.R.M. at 2673 & n.8 (Wald, J., dissenting).

111. *Id.* As Judge Wald noted, the legislative history of § 8(b)(4) reveals a contrary indication for "buy local" campaigns:

Mr. Goldwater: I have been asked by people who are vitally concerned whether . . . anything in the conference report would limit or prohibit the buy-America campaigns which are being carried on by certain unions and business groups, and even by some governmental bodies. I should like to ask the distinguished chairman of the conference committee whether the report was intended to have this effect. It is certainly my own conviction that no such effect was intended, either by the Senate or by the conferees.

Mr. Kennedy: I know that a good deal of effort has been made by some groups of workers . . . to make sure that their working standards are protected. The answer to the Senator's question is no, it was not intended that the conference report have such an effect. I am glad we have had the opportunity to establish legislative history in this matter.

*Id.*, quoting 105 CONG. REC. 17899 (1959).

112. 377 U.S. 58 (1964).

113. 447 U.S. 607 (1980).

114. 105 L.R.R.M. at 2664.

115. For a discussion of the relevant portions of *Tree Fruits* and *Safeco Title*, see notes 37-39 & 52-54 and accompanying text *supra*.

In *Tree Fruits*, the Court stated that the illegal secondary picketing intended to be proscribed by Congress was that picketing which will "persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." 377 U.S. at 63 (emphasis added). The *Safeco Title* Court recognized the validity of this formulation. 447 U.S. at 612. In fact, the *Safeco Title* Court

the *Soft Drink Workers* court stated that the union conduct could be proscribed if the picketing harms the neutral employer beyond the legitimate union objective.<sup>116</sup>

Both the Board and the court facilely asserted that coercion was found in that the union had violated the "vague sign" standard.<sup>117</sup> The thrust of this test is also directed at whether the picket signs signal the consumer to a *general boycott*.<sup>118</sup> As Judge Wald correctly noted, however, a buy local campaign is "a leap of imagination" away from a negative appeal to boycott the secondary employer totally.<sup>119</sup> In effect, the union could violate section 8(b)(4) whenever it inferentially urged the consumer to boycott products not being struck,<sup>120</sup> regardless of the impact upon the secondary employer. This formulation would ban conduct that fails to reach the coercive means test of "ruin or substantial loss" announced in *Safeco Title*.<sup>121</sup>

It is contended that the holding in *Soft Drink Workers* represents the furthest relaxation of the strict standard set in *Tree Fruits* for finding an unfair labor practice in a union's picketing. By upholding the Board's ruling, the District of Columbia Circuit has encouraged the Board to apply the *Soft Drink Workers* analysis to similar situations in the other circuits. Not only are unions placed under a cloud of suspicion whenever they picket secondary employers, but their rights of free speech are likely to be chilled as a result of this decision.

W. James McKay

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took great pains to equate its factual situation to that type of conduct, noting that the 90% reliance of the secondary employers on the primary's product "leaves responsive consumers no realistic option other than to *boycott the title companies altogether*." 447 U.S. at 613 (emphasis added). The Court went on to specifically hold that the union's conduct is "reasonably calculated to induce customers *not to patronize* the neutral parties *at all*." *Id.* at 614 (emphasis added).

116. 105 L.R.R.M. at 2887. The court stated that it would be sufficient to invoke the sanctions of § 8(b)(4) if the picketing "may cause consumers to boycott products to which the union is indifferent or even those which the union favors, and thus may subject the neutral employer to economic pressure and harm which exceed the scope of the union's legitimate campaign." *Id.*

117. *Id.* at 2675-76.

118. See *United Paperworkers Local 382 (Duro Paper Bag)*, 236 N.L.R.B. No. 183 (1978).

119. 105 L.R.R.M. at 2667-76 (Wald, J., dissenting).

120. The majority reasoning could be used to ban any union campaign urging a consumer to buy a certain product, as by implication, the consumer would forgo any product capable of being substituted with the preferred product.

121. See text accompanying note 54 *supra*.