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CUSTOMERS, COERCION AND CONGRESSIONAL INTENT: REGULATING SECONDARY CONSUMER BOYCOTTS UNDER THE NATIONAL LABOR RELATIONS ACT

LARRY S. BUSH*

INTRODUCTION

No subject in American labor law has been more controversial than the secondary boycott.¹ As a labor stratagem it has taken two very different forms—inducing secondary employee work stoppages and encouraging the buying public to withhold patronage. The latter, the consumer boycott, has assumed considerable significance to organized labor in the past four decades. In large part, its importance stems from the fact that it is the only form of true secondary pressure remaining in labor's arsenal of economic weapons.² Moreover, the consumer boycott can be a more effective form of economic pressure than primary strikes or picketing, at least if the primary employer is relatively immune to direct action because of a weak union presence or the availability of a large supply of replacement workers (or automation), but is ultimately dependent upon sales to the general public.³

Over twenty-five years ago Congress first undertook to specifically regulate labor's use of consumer boycotts.⁴ Limitations were imposed in the Landrum-Griffin Act⁵ at that time because of the strong federal policy of shielding employers from

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¹ Felix Frankfurter defined the secondary boycott in classically simple terms as "a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A." F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 43 (1930). The secondary boycott is not unique to labor conflicts. Such devices are also used to further the causes of a wide variety of nonlabor interest groups. See, e.g., *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409 (1982) (boycott seeking racial equality and integration of local government and businesses); *Missouri v. NOW, Inc.*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980) (boycott of convention sites because state legislature had not passed the Equal Rights Amendment).

² See *infra* text in Parts II and III. Lane Kirkland, president of the AFL-CIO, commenting several years ago on the present legal restrictions on secondary activity, lamented, "All you can do is run a consumer boycott campaign—'Do not buy,' 'Do not patronize.' You can't say, 'Don't work on it.'" N.Y. Times, Nov. 16, 1981, at B 12 col. 5.

³ In order to take advantage of this vulnerability at a national level, the AFL-CIO maintains an "unfair list" of companies and their products. Offending employers are regularly added to the list and boycotts of their products are authorized, usually as a result of the employer's refusal to recognize or bargain with a member union. For example, a national boycott of Proctor & Gamble Company soap products was endorsed in 1981 because the company had refused to reach agreement on a collective bargaining agreement with the United Steelworkers. See 1981 Labor Relations Yearbook 212 (1982). While such boycotts are usually directed solely against the offending primary employer's product, to the extent they are successful they necessarily bring adverse economic consequences to secondary employers, the retailers.

⁴ See *infra* text in Part III.

⁵ The Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959).

economic coercion in connection with labor disputes not of their making. Congress offset this protection of the "neutral" employer, however, with a poorly-defined right of organized labor to inform consumers of the primary dispute, and enlist their aid at the site of this secondary employer's business.⁶ Today the parameters of legitimate labor appeals to the public are still far from clear, but recent Supreme Court decisions⁷ reflect increasing judicial solicitude toward the plight of affected businesses and correspondingly less concern for labor's ability to mobilize active public support.

This Article examines the course of federal regulation of consumer boycotts under the National Labor Relations Act (NLRA)⁸ and the balance between the rights of secondary businesses and those of organized labor. Part I briefly sets out the historical prelude to the Taft-Hartley Act amendments, Congress' first explicit effort to control secondary activity. Part II focuses on these amendments, which concerned only work stoppages, and on their expanded interpretation by the National Labor Relations Board (NLRB) to reach consumer boycotts. The ambiguous compromise over consumer boycotts subsequently reached by Congress in the Landrum-Griffin Act amendments is the subject of Part III. The landmark 1964 Supreme Court decisions, *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*⁹ and *NLRB v. Servette, Inc.*,¹⁰ which served to loosen the new statutory restrictions on consumer boycotts, are the subject of Part IV. In addition, Part IV discusses the grudging reception accorded *Tree Fruits* by the NLRB and federal courts of appeal, culminating in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*,¹¹ a virtual rejection of *Tree Fruits*' grant to labor of the right to engage in "product picketing." Part V focuses on the NLRB's recent attempt to extend the protection of the "publicity proviso" in subsection 8(b)(4) of the NLRA,¹² to cover boycotts of any secondary business which could be found to benefit from the activities of the primary employer, and on the *Edward J. DeBartolo Corp. v. NLRB*¹³ decision, which has effectively stymied this movement.

⁶ This right is contained primarily in what has become known as the "publicity proviso" to the secondary boycott section of the National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

⁷ *Edward J. DeBartolo Corp. v. NLRB*, 103 S. Ct. 2926 (1983) (held that handbilling all stores in a shopping mall was not protected by the "publicity proviso" where dispute was with construction company building only one store therein); *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607 (1980) (held that secondary picketing of title companies who derived over 90% of their sales from the primary employer's product violated § 8(b)(4)(ii)(B) despite the fact that normal "product picketing" measures were taken).

⁸ As used in this article, the term "National Labor Relations Act" refers to the original 1935 Act (the Wagner Act), 49 Stat. 449 (as amended by the Labor Management Relations Act of 1947 (the Taft-Hartley Act), 61 Stat. 136, and The Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), 73 Stat. 519. See 29 U.S.C. §§ 151-69 (1976). References to one of the three major enactments will, for the most part, use its commonly-accepted title.

⁹ 377 U.S. 58 (1964).

¹⁰ 377 U.S. 46 (1964).

¹¹ 447 U.S. 607 (1980).

¹² 29 U.S.C. § 158(b)(4) (1976).

¹³ 103 S. Ct. 2926 (1983).

It is the author's contention that the method of regulating consumer boycotts which has evolved since 1959 has been unduly influenced by outmoded attitudes and *a priori* assumptions concerning the likely effects of peaceful public appeals on both shoppers and neutral businesses. Rather than requiring the NLRB and the courts to determine the legitimate scope of secondary consumer activity by reference to nebulous tests centered on the extent of economic injury to the secondary employer and on the proximity of its relationship to the primary employer, an equally fair and far more predictable system could be established by relying solely on the well-articulated standard of truthfulness contained in the publicity proviso. Such a laissez-faire approach should promote a more rational adjustment of the competing economic interests, with the success of boycotts determined by the persuasiveness of appeals in the marketplace, not by conceptually troublesome line-drawing on the part of either the NLRB, the courts, or Congress.

I. SECONDARY CONSUMER BOYCOTTS PRIOR TO THE TAFT-HARTLEY ACT

Consumer boycotts have a long history in this country. Every student learns something of the active efforts by the Sons and Daughters of Liberty to encourage the public to reject British goods after the passage of the Stamp Act of March 1765. The first documented boycotts generated by labor disputes followed by less than sixty years, when the journeyman hatters of Baltimore and the New York printers called on other workers and the general public to cease dealings with employers who reduced wages or rejected union working conditions.¹⁴

By the late nineteenth and early twentieth centuries, organized labor had begun making such effective use of this tactic that beleaguered companies increasingly turned to the courts for injunctive relief. They were not disappointed. In a famous consumer boycott of the Bucks Stove & Range Company, organized by the American Federation of Labor, Samuel Gompers and other labor leaders were enjoined from continuing the boycott or publishing the company's name on a "we don't patronize" list. Their refusal resulted in contempt charges, which reached the Supreme Court in 1911.¹⁵ Although reversing the lower courts on other grounds, the court clearly approved of the existing body of state case law treating such conduct as an unlawful conspiracy subject to injunction:

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words "Unfair," "We Don't Patronize," or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called "verbal acts," and as much subject to injunction as the use of any other force whereby property is unlawfully damaged.

¹⁴ H. LAIDLER, *BOYCOTTS AND THE LABOR STRUGGLE 70-71* (1913).

¹⁵ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 420-23 (1911).

When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction.¹⁶

Judicial hostility to labor-inspired consumer boycotts during this time, though not universal,¹⁷ was certainly the norm. For instance, in *Seattle Brewing & Malting Co. v. Hansen*,¹⁸ the union was enjoined from circulating notices calling the attention of labor union members and the general public to the fact that certain saloon keepers sold the plaintiff's "unfair" product. As in *Gompers*, the court was primarily concerned with the "signalling" effect such publicity would have on union members, who presumably would treat the notices as a command from their labor organization to shun the product, rather than as an appeal to their reason.¹⁹

During the next several decades, however, the political and judicial climate changed in some jurisdictions. The courts of New York were particularly receptive to the argument that it should be lawful to picket retailers with signs requesting the public to refrain only from buying "unfair" goods of the primary manufacturer, as opposed to seeking a total boycott of the secondary's business.²⁰ In *Goldfinger*

¹⁶ *Id.* at 439. See also *Loewe v. Lawlor* (the *Danbury Hatters* case), 208 U.S. 274 (1908) (enjoined a union boycott as an unlawful restraint of interstate commerce under antitrust laws).

¹⁷ See, e.g., Justice Holmes' celebrated dissents in *Plant v. Woods*, 176 Mass. 492, 498, 57 N.E. 1011, 1015 (1900) and *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077, 1079 (1896). He argued that the activities of labor unions, including boycotts, in support of their economic interests were sufficiently justified, absent "violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants was combined" to survive judicial scrutiny, notwithstanding their undeniably adverse impact on both primary and secondary employers. 57 N.E. at 1016.

¹⁸ 144 F. 1011 (C.C.N.D. Cal. 1905).

¹⁹ The mere use of the word "unfair" has a very distinct meaning in these days; and when a notice like this is put out it is almost in the nature of a command. Of course, it does not say to the laboring people, "You shall not drink" such beer, but it says: "To Organized Labor and Friends: Don't use this beer!" These organizations, in the way they are trained, for they are as well trained as any military force, understand these rules and know what they mean. The very use of that term "unfair" has a distinct meaning to them, and it is in the nature of a direction to the members of these organizations not to use that beer, and it is also an intimidation to those who are dealing in it. It gives them to understand that that beer will be boycotted; that it is unfair and will be boycotted. That would deter parties from using it or dealing in it. There are a number of that kind. Here is another one: "Guard Your Health by Refusing to Drink Unfair Beer!" Then it proceeds to name the beer that is unfair, and it includes among others the beer of the complainant. All those things are what would be termed now under the law "a boycott." I need not go into the definition of that. We generally understand what it means. But those things tend to unfairly obstruct the business of the complainant, and in that far these defendants are wrong, and it is the duty of the court to restrain them from doing anything that will interfere with the complainant's business.

Id. at 1014. Compare *Auburn Draying Co. v. Wardell*, 227 N.Y. 1, 124 N.E. 97 (1919), enjoining the use of unfair lists by an association of labor unions to promote the boycott of a trucking company which the Teamsters sought to organize. There the concern expressed by the court was that "the entire union population of the city," not just the Teamsters, participated in the boycott. *Id.* at 100. Presumably the direct economic self-interest of the latter would have insulated the boycott effort from judicial interference had the other unions and their members not participated. *Id.*

²⁰ See generally *Hellerstein, Secondary Boycotts in Labor Disputes*, 47 *YALE L.J.* 341, 349 (1938).

v. Feintuch,²¹ the New York Court of Appeals refused to enjoin such picketing by a butchers' union in front of a delicatessen selling nonunion meat, holding:

[I]t is illegal to picket the place of business of one who is not himself a party to an industrial dispute to persuade the public to withdraw its patronage generally from the business for the purpose of coercing the owner to take sides in a controversy in which he has no interest. . . . Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer but against a nonunion product sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and this may result in unfair reduction of the wages of union members. Concededly the defendant union would be entitled to picket peacefully the plant of the manufacturer. Where the manufacturer disposes of the product through retailers in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public.²²

Changes wrought by Congress in the 1930's rapidly began to overshadow the further development of these state common law principles. Following the failure of early congressional attempts to insulate the activities of organized labor from the reach of legal sanctions,²³ the passage of the Norris-LaGuardia Act in 1932,²⁴ the amended Railway Labor Act in 1934,²⁵ and the Wagner Act in 1935²⁶ marked the beginning of the federal government's rise to preeminence as the regulator of labor-management relations for most of American business and industry. The Wagner Act, however, did not initially govern all aspects of labor-management conflict. Indeed, it contained nothing which either outlawed or protected labor's use of secondary boycotts, a fact which caused their control to remain in the hands of the states until passage of the Taft-Hartley Act in 1947.²⁷

²¹ 276 N.Y. 281, 11 N.E.2d 910 (1937).

²² *Id.* at 286, 11 N.E.2d at 912-13.

²³ Sections 6 and 20 of the Clayton Act, ch. 323, 38 Stat. 730 (1914), were intended to do away with existing judicial precedent, both common law and that developed under the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890), under which union activities, including boycotts, had been subject to sanction as conspiracies in restraint of trade. *See* *Loewe v. Lawlor*, 208 U.S. 274 (1908). This effort foundered on the judicial hostility to secondary boycotts, which led to a strikingly narrow interpretation of these sections by the Supreme Court in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

²⁴ 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-15 (1976)).

²⁵ 48 Stat. 1185 (1934) (codified as amended at 45 U.S.C. §§ 151-88 (1976)).

²⁶ 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1976)).

²⁷ State courts remained active in regulating secondary consumer boycotts for several decades after passage of the National Labor Relations Act. It was not until *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 7 (1937), that the federal government was even deemed to have the power under the Commerce Clause to reach labor relations in intrastate operations. Even after the passage of the Taft-Hartley Act, the states were found to have retained the power to deal with conduct, like consumer boycotts, which was neither protected nor prohibited by the NLRA. *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949) *overruled*, 427 U.S. at 152. Only in 1959, after Congress

II. CONSUMER BOYCOTTS UNDER TAFT-HARTLEY

The first attempt to proscribe secondary boycotts at the federal level, subsection 8(b)(4) of the Taft-Hartley Act,²⁸ was directed solely at its most powerful and effective manifestation—work stoppages by sympathetic workers of employers having business dealings with the primary employer.²⁹ The statute was narrowly drawn. When a forbidden object was present, such as “forcing . . . [a] person to . . . cease doing business with any other person,” the statute prohibited only those boycotts in which secondary employees “engage[d] in . . . a strike or a concerted refusal . . . to perform any services.” It did not forbid inducements, threats or other coercion aimed directly at the secondary employer.³⁰ Unions remained free to encourage consumer boycotts of secondary employers, and thus pressure them either to stop doing business with the primary employer or to try to persuade the latter to accede to the union’s wishes.

In early decisions under Taft-Hartley, the NLRB recognized the distinction between work stoppages and consumer boycotts and applied it in a straightforward manner. For example, in *Crowley’s Milk Co.*,³¹ the NLRB General Counsel refused to issue an unfair labor practice complaint based upon Crowley’s charges that appeals were made to its customers not to buy its products during a wage strike.³² Crowley’s

had twice amended the National Labor Relations Act to encompass union unfair labor practices and include secondary consumer boycotts, did the modern doctrine of federal preemption take shape. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). See generally *Cox, Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972). Despite the fact that states no longer have the power to regulate the content of a secondary consumer boycott, they remain free, under certain circumstances, to control its location. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978).

²⁸ Labor Management Relations Act, § 8(b)(4), 61 Stat. 136, 141 (1947).

²⁹ It did this by making it “an unfair labor practice for a labor organization or its agents” (4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is:

(A) forcing . . . any employer or other 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.

Id.

³⁰ See, e.g., *Rabouin v. NLRB*, 195 F.2d 906 (2d Cir. 1952). Two other “loopholes” soon became apparent in the statute: (a) because it only prohibited appeals to “employees” of any “employer,” inducements could legally be made to persons who were either not “employees” or who did not work for “employers,” as these terms were defined in the National Labor Relations Act, e.g., agricultural workers, government employees, railroad and airline employees and supervisors. See 29 U.S.C. §§ 152(2), (3) (1976); and (b) only “concerted refusals” to perform services were covered, making it permissible to appeal to a single employee to cease work. *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951). Pressure to close these “loopholes” led to the § 8(b)(4) amendments in the Landrum-Griffin Act. See *infra* text in Part III.

³¹ 88 N.L.R.B. 1049 (1950), *enforced*, 208 F.2d 444 (3d Cir. 1953).

³² 88 N.L.R.B. at 1049.

termination of an employee who participated in this secondary consumer picketing was subsequently held to be an unfair labor practice.³³

It soon became obvious, however, that even picket lines nominally directed at consumers often resulted in secondary employee work stoppages. The NLRB was then faced with the difficult task of deciding whether the union responsible for the picketing had intended to “induce or encourage” this result. As it has done so many other times in its history,³⁴ the Board devised a presumption to substitute for actual proof of such intent, which, of course, was practically impossible to obtain. It held in *Local 67, Teamsters (Washington Coca Cola Bottling Works, Inc.)*,³⁵ that the union’s placement of consumer pickets in front of entrances used by both customers and secondary employees, without more, constituted inducement and encouragement of employees to stop work within the meaning of subsection 8(b)(4).³⁶

The Board’s treatment of consumer picketing during this period can probably be explained as a response to the post-Taft-Hartley tactics of some unions, camouflaging appeals to workers as consumer boycotts in an effort to frustrate proof of intent. Notwithstanding such attempts to evade the existing secondary boycott restrictions, however, the Board palpably over-reacted. Indeed, after the decision in *Teamsters (Dallas General Drivers), Local 745 (Associated Wholesale Grocers of Dallas, Inc.)*,³⁷ it was clear that an illegal intent to induce a work stoppage would be irrebutably presumed present in virtually any consumer picketing. The Board majority in *Dallas General Drivers*³⁸ held that even picketing addressed solely to consumers and limited to customer entrances at grocery stores, which unavoidably were also used occasionally by some employees and deliverymen, violated subsection 8(b)(4). In so doing, the Board also sustained the Trial Examiner’s refusal to admit evidence that the union had advised representatives of the store’s employees that the purpose of the picketing was not to induce a work stoppage, as well as evidence that no employees had in fact stopped work.³⁹

³³ 95 N.L.R.B. 1023 (1951), *enforced*, 208 F.2d 444 (3d Cir. 1953). Affirming the NLRB’s decision, the Third Circuit framed the issue thusly: “whether . . . (the striking employee’s) participation in secondary picketing was directed at coercion of employees of employers other than Crowley in the course of their employment, contrary to the policy of Section 8(b)(4)(A) . . . or whether he did no more than attempt to persuade consumers not to use Crowley products.” 208 F.2d at 446. Accepting the NLRB’s findings of fact that he was engaged in the latter, it concluded there was “nothing which would make his reinstatement in any way inconsistent with the policies of the Act.” *Id.* at 447.

³⁴ See, e.g., *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943) (work rules prohibiting employee union solicitation outside working hours presumed to violate § 8(a)(1), absent “special circumstances”).

³⁵ 107 N.L.R.B. 299 (1953).

³⁶ *Id.* at 299. Cf. *Business Machine & Office Appliance Mechanics, Local 459 (Royal Typewriter Co.)*, 111 N.L.R.B. 317, 326 (1955) (Trial Examiner’s Intermediate Report).

³⁷ 118 N.L.R.B. 1251 (1957), *enforced*, 264 F.2d 642 (5th Cir.), *cert. denied*, 361 U.S. 814 (1959).

³⁸ 118 N.L.R.B. at 1252.

³⁹ *Id.* See also *Amalgamated Meat Cutters (Peyton Packing Co.)*, 125 N.L.R.B. 531 (1959); *United Wholesale and Warehouse Employees, Local 261 (Perfection Mattress & Spring Co.)*, 125 N.L.R.B. 520 (1959), *enforcement denied*, 282 F.2d 824 (D.C. Cir. 1960); *Laundry, Linen Supply & Dry Cleaning*

Dissenting Member Murdock excoriated the majority for adopting this per se rule of inducement:

If this evidence [of the union's efforts to limit its appeal to consumers] is insufficient to refute allegations in the complaint that the Respondent Union induced employees of neutral employers to engage in a strike, then I cannot see how any union can ever engage in customer picketing. Contrary to the majority, no decision of the Board or of any court stands for the extreme proposition implicit in the majority's decision that *any picket line, wherever located, regardless of the message communicated by the pickets, and regardless of all attempts by the picketing union to limit its picketing to consumers as distinguished from employees* "necessarily invites employees to make common cause with the strikers" and "constitutes inducement of employees within the meaning of Section 8(b)(4)(A). . . ." There is, I believe, a limit to the inferences that can reasonably be drawn from the fact of picketing with regard to the intent of the picketing union and the effect of its picket line upon employees.⁴⁰

The United States Court of Appeals for the Second Circuit, the first appellate court to review the new presumption,⁴¹ rejected the Board's notion that the "natural and probable consequences" of consumer picketing was to induce a work stoppage and therefore refused to accept the Board's finding of such intent, absent actual evidence to that effect.⁴² Most other courts presented with this issue responded similarly.⁴³

The Board's presumption however, was limited to the act of picketing. Other forms of consumer publicity such as handbills, fliers and pamphlets, were not con-

Drivers, Local 928 (Southern Service Co., Ltd.), 118 N.L.R.B. 1435 (1957), *enforced*, 262 F.2d 617 (9th Cir. 1958).

⁴⁰ *Id.* at 1259-60 (emphasis in original).

⁴¹ Business Machine and Office Appliance Mechanics Conference Board, Local 459 (Royal Typewriter Co.), 111 N.L.R.B. 317, *enforcement denied*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

In *Royal Typewriter* striking service personnel of the primary employer established consumer picket lines at its larger commercial customers and picketed independent repair companies which were performing the "struck repair work" for some of the primary customers. The Board found both picket lines in violation of § 8(b)(4). The Second Circuit decided both were protected—the consumer picket line because of the absence of proof of intent to induce a work stoppage, the picketing at the repair companies because of the "ally doctrine." As to the latter, see *Douds v. Metropolitan Fed'n of Architects Local 231*, 75 F. Supp. 672 (S.D.N.Y. 1948).

⁴² 228 F.2d at 561. *Cf.* NLRB v. Teamsters Local 145, 191 F.2d 65, 68 (2d Cir. 1951).

⁴³ Local 50, Bakery Workers Int'l Union (Arnold Bakers, Inc.), 115 N.L.R.B. 1333 (1956), *enforcement denied*, 245 F.2d 542 (2d Cir. 1957); International Union of United Brewery Workers, Local 366 (Adolph Coors Co.), 121 N.L.R.B. 271, *enforcement denied*, 272 F.2d 817 (10th Cir. 1959); United Wholesale and Warehouse Employees Local 261, 125 N.L.R.B. 520, *enforcement denied*, 282 F.2d 824 (D.C. Cir. 1960); *Getreu v. Hatter's Union*, 41 L.R.R.M. 2429 (W.D. Ky. 1957) (N.L.R.A. § 10(l) preliminary injunction denied); *but see* Teamsters Local 745 (Associated Wholesale Grocers of Dallas, Inc.), 118 N.L.R.B. 1251, *enforced in part*, 264 F.2d 642 (5th Cir. 1959), *cert. denied*, 361 U.S. 814 (1959); Teamsters Local 928 (Southern Service Co., Ltd.), 118 N.L.R.B. 1435, *enforced*, 262 F.2d 617 (9th Cir. 1958).

sidered per se inducements to secondary employees to stop work.⁴⁴ The Board's decision in *Dallas General Drivers*⁴⁵ put it this way:

In our opinion, the distribution of handbills to the general public appealing for a consumer boycott, unlike picketing, does not necessarily invite or instigate a work stoppage or a refusal to perform services. As the Supreme Court observed: Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.⁴⁶

Thus, by 1959 (the eve of the Landrum-Griffin amendments), the NLRB's interpretation of subsection 8(b)(4) had already expanded the original provision to encompass all consumer picketing as an unavoidable, and thus illegal inducement to secondary employees, while other forms of consumer-oriented publicity (not resulting in work stoppages) were permitted. It is in this historical context that the legislative maneuvering which led to the Landrum-Griffin amendments must be viewed.

III. THE LANDRUM-GRIFFIN ACT: LEGISLATIVE OVERKILL?

The political climate in 1959, heated to the boiling point by the McClellan Committee's investigation of union racketeering,⁴⁷ was not conducive to reasoned deliberations on amendments intended to eliminate the "loopholes"⁴⁸ in Taft-Harley's secondary boycott provisions.⁴⁹ Congress was caught between the forces of organized labor, which opposed any legislation at all,⁵⁰ and powerful business interests seemingly intent on converting widespread antiunion sentiment into legislation which would hamstring labor's ability to organize and exert economic pressure.⁵¹

⁴⁴ *Teamsters Local 745 (Associated Wholesale Grocers of Dallas, Inc.)*, 118 N.L.R.B. 1251, 1254-55 (1957); *Cf. Casket Makers Local 3128*, 114 N.L.R.B. 1329, 1344-45 (1955).

⁴⁵ 118 N.L.R.B. 1251 (1957).

⁴⁶ *Id.* at 1254-55 (quoting *Hughes v. Superior Court of California*, 339 U.S. 460, 465).

⁴⁷ The Senate Select Committee on Improper Activities in the Labor or Management Field. *See* I T. KHEEL, *LABOR LAW* § 5.03[d] (1978).

⁴⁸ *See supra* note 30 and accompanying text.

⁴⁹ Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1087 (1960).

⁵⁰ *See, e.g.*, 105 CONG. REC. 9691-97 (1959) (AFL-CIO policy position regarding proposed legislation), *reprinted in* II NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 at 1491-97 (1960) (hereinafter cited as LEGIS. HIST. LMRDA).

⁵¹ 105 CONG. REC. APP. 5652-53 (1959) (Rep. Hiestand's insertion of a Wall Street Journal article concerning a Teamster consumer boycott of a dairy cooperative, preceded by his descriptions of "small merchants . . . victimized by a powerful labor union;" "racketeering practices;" and "blackmail"), *reprinted in* II LEGIS. HIST. LMRDA 1758-59 (1960).

Professor Aaron characterized the arguments of business groups seeking greater restrictions on picketing and boycotts as "patently misleading and appeal[ing] to emotion rather than reason." 74 HARV. L. REV. at 1081.

Pro-labor legislators in the Senate acted first. In January, 1959, the Kennedy-Ervin Bill⁵² was introduced. Its supporters were only interested in reforming internal union practices—the racketeering and corruption exposed by the McClellan Committee.⁵³ They offered no amendments to subsection 8(b)(4). The bill ultimately passed by the Senate in April, 1959,⁵⁴ was equally silent on such changes.⁵⁵

Most of the significant legislation introduced in the House of Representatives during the 1959 session,⁵⁶ on the other hand, included sweeping amendments to

⁵² S. 505, 86th Cong., 1st Sess. (1959), *reprinted in* I LEGIS. HIST. LMRDA 29 (1960).

⁵³ 105 CONG. REC. 816-19 (1959), *reprinted in* II LEGIS. HIST. LMRDA 968-72 (1960).

⁵⁴ S. 1555, 86th Cong., 1st Sess. (1959), *reprinted in* I LEGIS. HIST. LMRDA 516 (1960). This bill, introduced by Senator Kennedy, co-sponsor of the original legislation, S. 505, was essentially the same bill as amended in Committee. On April 25, 1959, S. 1555, as amended, was passed by the Senate, 90-1 and sent to the House of Representatives. 105 CONG. REC. 6048 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1257 (1960).

⁵⁵ There were Senate advocates for broadening the scope of § 8(b)(4) to reach consumer boycotts. The Republican administration introduced its bill, S. 748, 86th Cong., 1st Sess. (1959), *reprinted in* I LEGIS. HIST. LMRDA 84 (1960), which paralleled H.R. 8342. *See infra* notes 56-61 and accompanying text. In addition, Senator McClellan sponsored S. 1384, "A bill amending the provisions of the NLRA and the LMRA, 1947, relating to secondary boycotts." 105 CONG. REC. 3520-21 (1959), *reprinted in* I LEGIS. HIST. LMRDA 327 (1960). S. 1384 would have expanded § 8(b)(4) to prohibit union efforts "to exert or attempt to exert any economic or other coercion against, or offer any inducement to, any person engaged in commerce or in an industry affecting commerce" if such efforts furthered an illegal object. *Id.*

Speaking in support of his bill, Senator McClellan stated: "This bill would amend Section 8(b)(4) of the Taft-Hartley Act to prohibit certain types of coercion of the employer and, particularly, to prevent coercion by picketing at the premises of a secondary employer in order to prevent customers from doing business with the employer primarily involved in a labor dispute. Such practices are unjust and impose suffering and hardship on innocent parties who are helpless to protect themselves." 105 CONG. REC. 3524 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1007 (1960).

Senator McClellan also proposed an amendment, substantially identical to S. 1384, during debate on S. 1555. It was defeated, 50-41, 105 CONG. REC. 5975 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1198 (1960), but the Senator's example of what it was intended to prevent was probably indicative of the sentiments of the proponents of changes to § 8(b)(4) in both houses of Congress:

I point out that we have cases of merchants who for 20 years, 10 years, or a long period of time, may have been handling a particular brand of product. A merchant may have built his business around the product, such as the John Deere plows or some kind of machinery from some other country. The merchant may have built up his trade entirely on th[at] product The merchant may have a competitor who is handling a competitive product made by another manufacturer, which serves the same function, but which is a different brand and is manufactured by someone else. In one of these plants there may be a strike, and the union may picket the merchant who is handling the product of the struck plant. The union may say to the merchant, "You cannot sell this product. If you do we will picket your place of business. Thus you will not be able to get your supplies, because the Teamsters will not cross the picket line."

In addition, the merchant's customers would be embarrassed. They would be harassed. They would see the picket sign. What would the sign say? It would say "Unfair to labor." How is the merchant unfair to labor? It is simply a case of the merchant not being willing to stop handling a product which he has been handling for 20 years and on which he has built his business. That is a secondary boycott which, it seems to me, ought to be prohibited. 105 CONG. REC. 5971 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1194 (1960).

⁵⁶ The major labor reform bills filed in the House of Representatives during the first session of

the secondary boycott provisions. Title VII of the Landrum-Griffin Bill, which was passed by the House on August 14, 1959,⁵⁷ contained two major modifications. First, it closed the "loopholes" which had been identified in connection with union appeals for secondary work stoppages.⁵⁸ Those amendments, to what is now subsection 8(b)(4)(i), were not particularly controversial, it being agreed even by the Senate proponents of the Kennedy-Ervin Bill that there had "never been any dispute about the desirability of plugging these artificial loopholes."⁵⁹ The second change was an entirely different matter. The House proposed to add a new subsection 8(b)(4)(ii), making it an unfair labor practice "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" in furtherance of an illegal objective.⁶⁰ Supporters and opponents alike understood that this language was intended to prohibit, *inter alia*, consumer boycotts of secondary employers.⁶¹

Matters came to a head with the passage of Landrum-Griffin in the House of Representatives. This brought about the convening of a Senate-House conference

the 86th Congress were: the Kearns Bill, H.R. 3540, 105 CONG. REC. 1330 (1959), *reprinted in II LEGIS. HIST. LMRDA 996* (1960); the Elliot Bill, H.R. 8342, 105 CONG. REC. 12860 (1959), *reprinted in II LEGIS. HIST. LMRDA 1517* (1960); the Landrum Bill, H.R. 8400, 105 CONG. REC. 13125 (1959), *reprinted in II LEGIS. HIST. LMRDA 1527* (1960); and the Griffin Bill (identical to the Landrum Bill), H.R. 8401, *reprinted in II LEGIS. HIST. LMRDA 1527* (1960).

⁵⁷ On August 11, 1959, the House voted to strike the contents of S. 1555 and substitute H.R. 8342 (the Elliot Bill), 105 CONG. REC. 14175-80 (1959), *reprinted in II LEGIS. HIST. LMRDA 1548-53* (1960). Three days later the House, having voted to substitute H.R. 8400 (Landrum-Griffin) for the H.R. 8342, again voted to strike S. 1555, to be replaced by the amended H.R. 8342 and to request a conference with the Senate. 105 CONG. REC. 14541 (1959), *reprinted in II LEGIS. HIST. LMRDA 1702* (1960).

⁵⁸ See *supra* note 30.

⁵⁹ Comments of Senator Kennedy, 105 CONG. REC. 16413 (1959), *reprinted in II LEGIS. HIST. LMRDA 1431* (1960); see also, Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1114 (1960).

⁶⁰ H.R. 8400, § 705, 105 CONG. REC. 63 (1959), *reprinted in I LEGIS. HIST. LMRDA 680* (1960).

⁶¹ President Eisenhower had made a televised White House address August 6, 1959, little more than a week before the House passed Landrum-Griffin. In it, he expressly condemned secondary consumer picketing:

Chief among the abuses from which Americans need protection are the oppressive practices of coercion. . . . Take another company—let us say a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself, unscrupulous organization officials, in this case, use another scheme. They picket the store which sell the furniture this plant manufactures. The purpose is to prevent those stores from handling that furniture.

How can anyone justify this kind of pressure against stores which are not involved in any dispute? They are innocent bystanders. This kind of action is designed to make the stores bring pressure on the furniture plant and its employees—to force those employees into a union they do not want. This is an example of a secondary boycott.

I want that sort of thing stopped. So does America. 105 CONG. REC. A8488-89 (1959), *reprinted in II LEGIS. HIST. LMRDA 1842-43* (1960).

The President's remarks did not take into account that such conduct had previously been held to be unlawful union coercion of employees' rights to organize under § 8(b)(2), of the Taft-Hartley Act. See *Capital Service, Inc. v. NLRB*, 204 F.2d 848 (9th Cir. 1953), *affirmed on other grounds*, 347 U.S. 501 (1954).

committee to resolve the differences between the two legislative bodies. When the conference met in late August, 1959, the prospect of outlawing consumer boycotts was a major item of contention. Senator Kennedy, the committee chairman, had sought instructions from the Senate to insert a limitation exempting consumer publicity from the reach of the new subsection 8(b)(4)(ii).⁶² By September 2, after twelve days of fierce debate,⁶³ the conference committee had completed work. Its report was submitted to the Senate that day and agreed to by the upper house the following afternoon.⁶⁴ The pro-labor forces had been unable to secure Senator Kennedy's compromise, which would have permitted all forms of consumer publicity; the supporters of Landrum-Griffin had stood firm in their insistence that consumer picketing, at least, was to be eliminated.⁶⁵

What was agreed to, the "publicity proviso," appears to have been cobbled together with little thought beyond addressing the most obvious example of consumer boycott activity confronting the legislators in 1959. Its terms were anything but a model of clarity:

*Provided . . . nothing contained in such paragraph [8(b)(4)] shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, 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*⁶⁶

The Landrum-Griffin Act, including the amendments to subsection 8(b)(4), passed both houses of Congress and was signed by President Eisenhower on September 14, 1959.⁶⁷ Legislative history leaves little doubt that both supporters and opponents of the Act's consumer boycott compromise believed that the new subsection 8(b)(4)(ii) covered all consumer boycotts and that the publicity proviso exempted only truthful nonpicketing publicity which did not have the effect of inducing work stoppages.⁶⁸

⁶² Senate Resolution 181, submitted by Senator Kennedy, contained this caveat:

Provided that nothing contained in this subsection (6) shall be construed . . . to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or distributed, by an employer engaged in a labor dispute, without inducing employees to refuse to pick up, deliver or transport any goods, or perform any services at such establishment.

105 CONG. REC. 15906 (1959), reprinted in II LEGIS. HIST. LMRDA 1383 (1960).

⁶³ 105 CONG. REC. 15901, 16413 (1959), reprinted in II LEGIS. HIST. LMRDA 1378, 1431 (1960).

⁶⁴ 105 CONG. REC. 16435 (1959), reprinted in II LEGIS. HIST. LMRDA 1452-53 (1960).

⁶⁵ 105 CONG. REC. 14339 (1959), reprinted in II LEGIS. HIST. LMRDA 1615 (1960) (remarks of Congressman Griffin).

⁶⁶ 61 Stat. 136, 141 (codified at 29 U.S.C. § 158(b)(4) (1976)).

⁶⁷ 73 Stat. 519, 553 (1959).

⁶⁸ See, e.g., the comments of Senator Kennedy, conference committee chair:

Under the language of the conference, we agreed there would not be picketing at a second-

Many of the Act's backers doubtless felt that singling out consumer picketing was justifiable simply because it removed the most noxious remaining method of embarrassing and harrasing neutral employers.⁶⁹ There are also indications present, however, that other supporters believed, as did the majority of the NLRB at that time,⁷⁰ that it should be outlawed because *any* picketing created an unavoidable appeal for sympathetic secondary employee work stoppages.⁷¹ To the extent that the exclusion of picketing from the publicity proviso is due to this latter rationale, the new amendment contained a remarkable overkill. It had been provided elsewhere therein that any publicity, including picketing, which had "an effect" of causing a secondary work stoppage would by that fact alone be an unfair labor practice, whether or not it could be shown that this effect was intended.⁷²

IV. *SERVETTE* AND *TREE FRUITS*: LIMITED VICTORIES FOR ORGANIZED LABOR

With the passage of Landrum-Griffin, it seemed that federal labor law prohibited all secondary picketing and permitted other secondary consumer-oriented publicity only if (a) it informed the public that the secondary employers "distributed" "products" which were "produced by" the primary employer; (b) it was truthful; and (c) it did not have "an effect of inducing" secondary work stoppages.⁷³

The latter two requirements, truthfulness and no secondary work stoppage effect, were fairly straightforward and, in fact, simply incorporated concepts familiar to

dary site. What was permitted was the giving out of handbills or information through the radio, and so forth.

105 Cong. Rec. 16254-55 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1388-89 (1960); or, the observation of his Republican colleague, Senator Dirksen:

It bars a union from picketing a retail store to advertise that the store is handling the goods of a firm the union was striking, but permits other forms of such advertising—handbills, for example—if they do not cause the store's employees to stop working or prevent pickups and deliveries.

105 CONG. REC. A8275 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1823 (1960). To the same effect are the following remarks and analyses published in the Congressional Record: 105 CONG. REC. A8372 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1834 (1960) (speech by Sen. Paul Douglas); 105 CONG. REC. (1959), *reprinted in* II LEGIS. HIST. LMRDA 1857 (1960) (analysis of the LMRDA by Sen. Barry Goldwater); 105 CONG. REC. A8464 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1842 (1960) (report on the LMRDA by Rep. Jessica Weis).

⁶⁹ See *supra* note 68.

⁷⁰ See *supra* text accompanying notes 37-40.

⁷¹ Thus, Senator Morse, a staunch opponent of Landrum-Griffin, had this to say about the rationale of excluding picketing from the publicity proviso:

[B]y excepting picketing, it acts on the assumption that consumer picketing inevitably and always causes employees not to work as well as customers not to buy. This is a false assumption, and experience has demonstrated its falsity.

105 CONG. REC. 16398 (1959), *reprinted in* II LEGIS. HIST. LMRDA 1427 (1960); see also Senator McClellan's remarks at the end of *supra* note 55.

⁷² See *supra* text accompanying note 66 for the text of publicity proviso.

⁷³ *Id.*

common law⁷⁴ and to preexisting federal labor law, respectively.⁷⁵ The picketing ban and the required producer-distributor nexus were another matter however, since Congress had never before attempted to restrict pure consumer picketing⁷⁶ or to limit either the employer objects of a consumer boycott or the circumstances in which labor might resort to it.

The first chapter in the history of the newly-expanded subsection 8(b)(4)(ii) and its publicity proviso is the NLRB's efforts to define the scope and meaning of these new restrictions, a phase which culminated in the 1964 Supreme Court decisions, *NLRB v. Servette, Inc.*,⁷⁷ and *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*.⁷⁸ As will be seen, the Board applied the picketing ban unquestioningly, while largely ignoring the limitations implicit in the inartfully drawn "producer-product-distributor" language which defined the proviso's reach.

A. *The NLRB and Consumer Picketing—A Literal Interpretation*

The Board's first opportunity to apply the Landrum-Griffin amendments to consumer picketing came on the remand of *Perfection Mattress & Spring Co. (Perfection Mattress II)*.⁷⁹ The union contended that its picketing at retail furniture stores—asking only that the public not purchase mattresses manufactured by the primary employer—was constitutionally-protected free speech,⁸⁰ and that only picketing which urged consumers not to patronize the secondary employer at all gave rise to unlawful "coercion" within the meaning of subsection 8(b)(4)(ii).⁸¹ Both the Board⁸² and the Fifth Circuit⁸³ rejected this attempt to preserve a limited sphere of lawful consumer picketing. Despite the fact that the sign carried by the single picket was directed solely at customers,⁸⁴ that the picketing was scheduled to avoid employees arriving or leaving work,⁸⁵ and that there were no secondary employee work stoppages,⁸⁶ the NLRB upheld the General Counsel's contention

⁷⁴ See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 936-37 (4th ed. 1971) (defamation and misrepresentation may affect the defendant's privilege to interfere with the business relations of another).

⁷⁵ See, e.g., *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951).

⁷⁶ See *supra* text accompanying notes 28-30.

⁷⁷ 377 U.S. 46 (1964).

⁷⁸ 377 U.S. 58 (1964).

⁷⁹ Retail, Wholesale and Dept. Store Union, Local 261 (*Perfection Mattress & Spring Co.*), 129 N.L.R.B. 1014 (1960), *motion to dismiss denied*, 48 L.R.R.M. 2167 (5th Cir. 1961), *supp. decision*, 134 N.L.R.B. 931 (1961), *enforcement denied in part*, 321 F.2d 612 (5th Cir. 1963).

⁸⁰ 129 N.L.R.B. at 1015.

⁸¹ *Id.* at 1022-23.

⁸² *Id.* at 1024.

⁸³ *Burr v. NLRB*, 321 F.2d 612 (5th Cir. 1963).

⁸⁴ 129 N.L.R.B. at 1017.

⁸⁵ *Id.*

⁸⁶ *Id.*

that violations of both subsection 8(b)(4)(i)(B) (inducement of secondary employees)⁸⁷ and subsection 8(b)(4)(ii)(B) (direct coercion of the secondary employers)⁸⁸ had occurred. In addressing this second finding, the Board looked no further than the plain language of the new amendment and its publicity proviso⁸⁹ to find that any “ambulatory picketing in front of a secondary site” was now prohibited.⁹⁰

With the coming of the Kennedy Board, the NLRB finally dropped its insistence, repeated in *Perfection Mattress II*, that consumer picketing also unavoidably gave rise to secondary employee inducements,⁹¹ but steadfastly continued to refuse to permit any form of consumer picketing.⁹² While recognizing that handbilling and other forms of “pure” publicity were authorized,⁹³ the Board was quick to strike down union activity which had the same effect as picketing, even though it lacked the actual placards.⁹⁴ The Board also gave full rein to the perceived congressional intent to remove consumer picketing as a source of coercion by holding that threats to picket were themselves violations of subsection 8(b)(4)(ii),⁹⁵ and by upholding such charges without any showing that secondary employer-retailers had actually ceased to stock the primary’s products.⁹⁶

B. *The NLRB and the Scope of the “Publicity Proviso”*

In *R & B Building Corp.*⁹⁷ the Board initially seemed inclined toward a narrow and literal interpretation of the publicity proviso. There, weekend consumer picketing of the secondary employer’s housing subdivision had been undertaken by the

⁸⁷ *Id.* at 1017-18.

⁸⁸ *Id.* at 1022-23.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1023.

⁹¹ Upholsterers Frame & Bedding Workers, Twin City Local 61 (Minneapolis House Furnishing Co.), 132 N.L.R.B. 40, 41 (1961), *enforcement denied*, 331 F.2d 561 (8th Cir. 1964). In *Minneapolis House Furnishing Co.*, the Board majority reflected the influence of the newly-confirmed Kennedy nominees, who moved quickly to overrule the presumption of *Perfection Mattress II*, holding that consumer picketing was not per se “inducement or encouragement” to stop work within the meaning of § 8(b)(4)(i), but that it was “an issue to be resolved in the light of all the evidence in a particular case.” 132 N.L.R.B. at 41.

⁹² Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits Labor Relations Comm., Inc.), 132 N.L.R.B. 1172 (1961), *enforcement denied*, 308 F.2d 311 (D.C. Cir. 1962), *vacated*, 377 U.S. 58 (1964); Blueprint Photostat & Photo Employees Union, Local 249 (East Photo Lab), 135 N.L.R.B. 1090 (1962).

⁹³ Plumbers Local Union 519 (Babcock Co.), 137 N.L.R.B. 596 (1962).

⁹⁴ Service & Maintenance Employees Union, Local 399 (The William J. Burns International Detective Agency, Inc.), 136 N.L.R.B. 431 (1962).

⁹⁵ New York Typographical Union, No. 6 (Gavrin Press Corp.), 141 N.L.R.B. 1209, 1213 (1963).

⁹⁶ General Teamsters Local 324 (Cascade Employers Ass’n Inc.), 144 N.L.R.B. 836, 839 (1963); Milk Drivers and Dairy Employees’ Local 680 (Durling Dairy Distributors), 145 N.L.R.B. 165 (1963), *supp. decision*, 147 N.L.R.B. 506 (1964); Local 559, International Bhd. of Teamsters (Anopolsky & Son, Inc.), 145 N.L.R.B. 722 (1963).

⁹⁷ Local 1921, United Bhd. of Carpenters (R & B Bldg. Corp.), 131 N.L.R.B. 1052 (1961).

carpenters' union, unhappy that the carpentry work on the homes for sale therein had been done by a nonunion partnership.⁹⁸ The Trial Examiner had observed that, even assuming the picketing was otherwise lawful, the publicity proviso was not available as a shield because the primary employer was "performing a service," not "producing a product for distribution."⁹⁹ The proviso was thus seen as reflecting congressional intent to protect only publicity directed at secondary employers who distributed tangible "products."¹⁰⁰ The Board affirmed this aspect of the Trial Examiner's intermediate report without elaboration.¹⁰¹

This distinction between unprotected publicity if the primary employer provided a "service", versus protected publicity if it produced a "product" was short-lived. By mid-1961, the new members appointed to the NLRB by President Kennedy had begun to reorient the perspectives of federal labor law, often by deliberately overruling the precedents of the "Eisenhower Board."¹⁰² The new majority, in the *Lohman Sales Co.* decision,¹⁰³ lost no time in junking the *R & B Bldg. Corp.* distinction in favor of a much broader construction of the publicity proviso.

Lohman was a wholesale distributor of cigarettes, cigars, other tobacco products, candy and related merchandise.¹⁰⁴ The union representing Lohman's employees, having been unable to negotiate a satisfactory collective bargaining agreement, called a strike, and picketed Lohman's premises.¹⁰⁵ Going beyond this primary activity, the union also asked the retail stores served by Lohman not to stock its goods.¹⁰⁶

⁹⁸ *Id.* at 1058-59.

⁹⁹ *Id.* at 1067 (Trial Examiner's Intermediate Report).

¹⁰⁰ The Trial Examiner reasoned as follows:

In a sense, R & B by performing the carpentry work on Spar's houses was producing a product distributed by Spar but this result is reached only by stretching the meaning of the words used beyond their accurate and customary usage. R & B was essentially performing a service for Spar and was not producing a product for distribution. The service was comparable to that of the electrician who wired the houses or the painter who painted the walls, neither of whom was producing a product. Congress used the words "product or products" advisedly in the proviso and was not at that point dealing with services. When Congress intended to embrace situations relating not only to the handling of products but also to the performance of service or of business not restricted to product handling, it chose appropriate language. It is reasonable to conclude that if Congress had intended a wider application of the proviso it would have stated that publicity other than picketing was permissible to advise consumers and union members that a product or products or labor or services are produced, furnished, or performed by an employer with whom the union has a primary dispute and are distributed or used by another employer. Moreover, the legislative history of Section 8(b)(4) and the proviso sustain the view that the proviso was addressed to product boycotts in the usual sense of that term.

Id. at 1067 (footnotes omitted).

¹⁰¹ *Id.* at 1052-53.

¹⁰² See, e.g., *Upholsterers Frame & Bedding Workers, Twin City Local 61*, 132 N.L.R.B. 40 (1961); *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962).

¹⁰³ *International Bhd. of Teamsters Local 537*, 132 N.L.R.B. 901 (1961).

¹⁰⁴ *Id.* at 902.

¹⁰⁵ *Id.* at 904.

¹⁰⁶ *Id.* at 902.

Some of those who refused were then subjected to handbilling asking the public not to purchase Lohman's products.¹⁰⁷

The Board was asked to decide three issues arising under the publicity proviso: whether the union's handbilling was "truthful" within the meaning of the statute; whether the handbilling was tantamount to picketing; and, whether the proviso applied to employers who did not "produce" goods in the sense of fabricating or manufacturing them.¹⁰⁸ The union's conduct was held to be protected in all respects.¹⁰⁹ The Board refused to restrict the proviso's coverage to the narrow fact pattern suggested by the statutory language (applicable only if the primary employer actually manufactured products), opting instead for an interpretation that would encompass virtually any primary employer. Relying in the first instance upon a construction of the terms "product" and "produced" it held:

[I]t seems clear that, so far as human effort is concerned, *labor* is the prime requisite of one who produces. A wholesaler, such as Lohman, need not be the actual manufacturer to add his labor in the form of capital, enterprise, and service to the product he furnishes the retailers. In this sense, therefore, Lohman, as the other employers who "handled" the raw materials of the product before him, is one of the producers of the cigarettes distributed by his customers. A contrary view would attach a special importance to one form of labor over another and attempt to isolate fabricators of products from those who otherwise add to its value. Excluded as non-producers might be those companies engaged in the assembly of machine parts; the soft drink bottling industry; communications, such as newspapers, magazines, and TV stations, which produce products of an abstract rather than physical nature. If our dissenting colleague is right, vast numbers of our working population produce nothing. Their thought, labor, or business enterprise is not a "product." We do not believe that the plain meaning of the words "product" and "produced" requires the Board to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled.¹¹⁰

¹⁰⁷ *Id.* at 903.

¹⁰⁸ *Id.* at 906-08.

¹⁰⁹ The Board rejected the contention that handbilling was the equivalent of picketing for purposes of the proviso. Rather, this was held to be the very type of publicity Congress explicitly intended to protect. *Id.* at 906.

With regard to the claim of untruthfulness, the Board established the following standard:

Even if these handbills were susceptible of an interpretation that the store handbilled purchased *all* the items listed thereon from Lohman, which was not the case, they were substantially accurate in their representations, as appears from the Intermediate Report. And when [one of the secondary employees] notified the Union that the handbill was not altogether accurate in its case, the Union promptly remedied the matter. . . . [T]he proviso does not require that a handbiller be an insurer that the content of the handbill is 100 percent correct, and . . . where, as here, there is no evidence of an intent to deceive and there has not been a substantial departure from fact, the requirements of the proviso are met.

Id. at 905-06 (emphasis in original).

¹¹⁰ *Id.* at 907.

Buttressing this conclusion with references to the legislative history,¹¹¹ the Board concluded:

Reading the statute as a whole, there is not the slightest reason to conclude that Congress was concerned with permitting truthful publicity with respect to products derived from manufacturers, but was unconcerned with such publicity as it affected products from other wholesalers, such as Lohman. Nor, as indicated above, is there any reason to suppose from the legislative history that an arbitrary and purposeless distinction of this type was intended. Accordingly, we shall accord the words "product" and "produced" their natural and accepted interpretation set forth above.¹¹²

In *Lohman*, the Board thus rejected limiting the right to publicize disputes solely to those cases involving a manufacturer of tangible products. Instead, any primary employer who created or added value to products by the application of "labor in the form of capital, enterprise and service" was henceforth a legitimate target of nonpicketing publicity. This principle was soon applied to protect the publicizing of disputes involving not only distributors,¹¹³ but also employers who serviced equipment,¹¹⁴ installed machinery,¹¹⁵ and advertised the products of others.¹¹⁶

The proviso could also have been interpreted to authorize publicity at the secondary employer's place of business solely as a means of asking consumers to boycott the primary employer's product,¹¹⁷ but not to seek a boycott of the entire secondary business.¹¹⁸ The Board held in *Middle South Broadcasting*,¹¹⁹ however, that even calls for total consumer boycotts were protected.

The dispute in *Middle South* was with the owner of a radio station. The union involved had distributed leaflets to its members, to local companies and to the public, urging them not to patronize any businesses that advertised on the station.¹²⁰ The

¹¹¹ *Id.* at 907-08.

¹¹² *Id.* at 908.

¹¹³ International Bhd. of Teamsters Local 968, 133 N.L.R.B. 1420 (1961); Local 848, Wholesale Delivery Drivers & Salesmen's Union (Servette, Inc.), 133 N.L.R.B. 1501 (1961), *enforcement denied sub nom.* Servette Inc. v. NLRB, 310 F.2d 659 (9th Cir. 1962), *rev'd*, 377 U.S. 46 (1964).

¹¹⁴ Radio-TV Service Technicians, Local 202, IBEW (Packard Bell Electronics Corp.), 132 N.L.R.B. 1049 (1961).

¹¹⁵ Plumbers & Pipefitters Local 142 (Shop-Rite Roods, Inc.), 133 N.L.R.B. 307 (1961).

¹¹⁶ Radio and Television Eng'rs Local 662 (Middle South Broadcasting Co.), 133 N.L.R.B. 1698 (1961).

¹¹⁷ The ambiguity of the statute ("publicity . . . for the purpose of truthfully advising the public . . . that a product or products . . . produced by an employer with whom the labor organization has a primary dispute . . . are distributed by another employer") arguably could have supported such a limited range of permissible publicity.

¹¹⁸ It was to be seen later that such a distinction was impossible in the case of "merged" products or single product retailers. See *infra* text in subparts IV. E. 1. and 3.

¹¹⁹ Radio and Television Eng'rs Local 662 (Middle South Broadcasting Co.), 133 N.L.R.B. 1698 (1961).

¹²⁰ *Id.* at 1701.

NLRB's General Counsel argued that calling for a boycott of the secondary employer's entire business exceeded the law's protection.¹²¹ The Board did not agree. Believing its conclusion supported by the legislative history,¹²² the majority held that even though nonpicketing publicity seeking a total secondary consumer boycott would otherwise have been impermissible restraint or coercion under subsection 8(b)(4)(ii),¹²³ it was nonetheless protected by the publicity proviso.¹²⁴ The Board thus pronounced itself willing to countenance direct, possibly crippling, action against the primary employer's customers and retail dealers, as long as the actors were the individual members of the consuming public, responding to nonpicketing publicity. This broad secondary appeal quickly proved itself to be an effective economic tool in cases where the primary employer did not produce actual products sold at retail to the public, but engaged in such activities as construction,¹²⁵ maintenance and repairs,¹²⁶ advertising¹²⁷ and delivery service.¹²⁸

C. *Servette—the Spirit Prevails*

Lohman's expansive interpretation of the publicity proviso soon came under attack in the courts of appeals. In *Great Western Broadcasting Corp.*,¹²⁹ the Ninth Circuit rejected the Board's conclusion that a union boycott of retail stores which sold products advertised on the primary employer's television station was protected. The Board had relied on its *Middle South* holding that such advertisers were "producers" of the products advertised, and that the retailers of these products "distributed" them within the meaning given this term in *Lohman*.¹³⁰ The court was convinced, however, that providing advertising "services" was not the production of a product as contemplated by Congress.¹³¹

The Ninth Circuit then invoked the *Great Western Broadcasting* holding to strike down secondary handbilling in *Servette Inc.*,¹³² a case remarkably similar to *Lohman*, wherein the union's dispute with a wholesale distributor had led to

¹²¹ *Id.* at 1704-05.

¹²² *Id.* at 1715-17 (Trial Examiner's Intermediate Report).

¹²³ *Id.* at 1705.

¹²⁴ *Id.*

¹²⁵ Local 712, IBEW (Golden Dawn Foods), 134 N.L.R.B. 812 (1961). *Cf.* Local 73, IBEW (Northwestern Constr. of Wash., Inc.), 134 N.L.R.B. 498 (1961).

¹²⁶ *McLeod v. Business Machine & Office Appliance Mechanics Conf. Bd.*, Local 459 (Remington Rand), 49 L.R.R.M. 2270 (S.D.N.Y. 1961), *rev'd*, 300 F.2d 237 (2d Cir. 1962).

¹²⁷ American Fed'n of Television and Radio Artists, San Francisco Local (Great Western Broadcasting Corp.), 134 N.L.R.B. 1617 (1961), *enforcement denied*, 310 F.2d 591 (9th Cir. 1962).

¹²⁸ United Plant Guard Workers (Houston Armored Car Co.), 136 N.L.R.B. 110 (1962).

¹²⁹ *Great Western Broadcasting Corp. v. NLRB*, 310 F.2d 591 (9th Cir.), *denying enforcement to* 134 N.L.R.B. 1617 (1961).

¹³⁰ 134 N.L.R.B. at 1621.

¹³¹ 310 F.2d at 596.

¹³² *Wholesale Delivery Drivers & Salesmen, Local 848 (Servette, Inc.)*, 133 N.L.R.B. 1501, *vacated*, 310 F.2d 659 (9th Cir. 1961), *rev'd*, 377 U.S. 46 (1964).

handbilling at the retail stores which sold its products. In turn, *Servette*, and a companion case from the D. C. Circuit, *Tree Fruits*,¹³³ were selected by the Supreme Court as vehicles to interpret subsection 8(b)(4)(ii) and the publicity proviso.

Justice Brennan, speaking in *Servette* for a unanimous court, embraced the Board's *Lohman* doctrine, holding that the publicity proviso's purpose—safeguarding the unions' freedom to appeal for public support—could not be achieved if disputes with actual manufacturers or processors were the only ones covered.¹³⁴ In addition to pointing out that Congress had previously used the term "produced" in other statutes to apply to the activities of distributors,¹³⁵ Justice Brennan found support for his view of congressional intent within the 1959 session of Congress itself:

Moreover, a primary target of the 1959 amendments was the secondary boycotts conducted by the Teamsters Union, which ordinarily represents employees not of manufacturers, but of motor carriers. There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.¹³⁶

No serious questions have arisen since this decision concerning the publicity proviso's applicability to primary employers. *Servette* established the broadest possible standard for determining which of the primary employers could be the ultimate targets of secondary consumer (nonpicketing) publicity: all of them could be, without regard to whether they manufactured or distributed tangible products, or whether they provided only "services." This result is surely sound. To have held otherwise, that unions could not publicize disputes with nonmanufacturing employers, would have raised grave first amendment problems, unless at least certain kinds of publicity, such as newspaper advertisements and union unfair lists, could be considered non-coercive and therefore not at all within the coverage of subsection 8(b)(4)(ii).¹³⁷

Servette was also a salutary decision from a practical standpoint. By ignoring the indefensible strictures suggested by the unhappy choice of statutory language, the Court put in place a predictable, uniform standard which parties to labor disputes could understand, and on which they could rely. To the extent that ambiguities remained, they centered on the prohibition of picketing and on the hitherto unconsidered question of which secondary employers could be deemed to "distribute" the primary's "products." The former issue was to boil into controversy in *Servette*'s companion case, but the latter question lay dormant for almost two decades.

¹³³ *NRLB v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits Labor Relations Comm., Inc.)*, 377 U.S. 58 (1964). See *infra* text accompanying notes 138-64.

¹³⁴ 377 U.S. at 55.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ One type of publicity, product picketing, was held to be "noncoercive" in the *Tree Fruits* decision. See *infra* text accompanying the discussion in notes 168-88.

D. *Tree Fruits—Pruning Congressional Intent*

Servette's interpretation of the permissible employer-objects of nonpicketing publicity was relatively uncontroversial, but the decision in the *Tree Fruits* case, handed down the same day, was a bombshell. *Tree Fruits* dealt with secondary consumer picketing. Not unsurprisingly, given the wording of the statute¹³⁸ supported by a fairly extensive legislative history,¹³⁹ the NLRB¹⁴⁰ and the commentators¹⁴¹ had assumed that Congress intended to outlaw all such picketing. Meanwhile, the AFL-CIO had doggedly pursued the legal theory first broached in *Perfection Mattress*¹⁴²—that picketing limited to the “struck product” was constitutionally protected and should not be considered “coercion” under subsection 8(b)(4)(ii)(B).¹⁴³ This argument fell upon deaf ears when *Tree Fruits* was heard by the Board, which found a subsection 8(b)(4)(ii)(B) violation in the union’s efforts, through consumer picketing, to persuade Safeway supermarket customers not to purchase the primary’s apples.¹⁴⁴ Even though successful efforts were made by the picketers to prevent secondary employee work stoppages and to inform both the supermarkets and the public that a total consumer boycott of Safeway was not sought, the Board held that the product picketing “threaten[ed], coerce[ed] or restrain[ed] persons within the meaning of subsection 8(b)(4)(ii)” and that it was intended to “force . . . Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers”—an illegal object.¹⁴⁵

Labor’s arguments made headway on appeal to the D.C. Circuit,¹⁴⁶ where concern with the first amendment implications of a total ban on consumer picketing underlay the decision. Judge Bazelon’s opinion distinguished the facts before him from “signal” picketing, which is directed at unionized employees and calculated to produce certain results “irrespective of the ideas being disseminated.”¹⁴⁷ Noting that the publicity picketing “may well be . . . closer to the core notion of constitutionally protected free speech,” than such “signal” picketing,¹⁴⁸ and that this was a device regularly used by many of society’s non-labor groups to protest various

¹³⁸ See *supra* text accompanying notes 60 and 66 for the text of § 8(b)(4)(ii) and the publicity proviso.

¹³⁹ See *supra* Part III.

¹⁴⁰ See *supra* notes 79-96 and accompanying text.

¹⁴¹ See, e.g., Aaron, *supra* note 49, at 1114 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 274 (1959).

¹⁴² See *supra* note 79 and accompanying text.

¹⁴³ See *supra* notes 80-81 and accompanying text.

¹⁴⁴ Fruit and Vegetable Packers & Warehousemen Local 760 (*Tree Fruits Labor Relations Comm., Inc.*), 132 N.L.R.B. 1172 (1961).

¹⁴⁵ *Id.* at 1177.

¹⁴⁶ Fruit and Vegetable Packers & Warehousemen Local 760 v. NLRB, 308 F.2d 311 (D.C. Cir. 1962).

¹⁴⁷ *Id.* at 316 (quoting Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J. concurring)); see also International Bhd. of Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

¹⁴⁸ 308 F.2d at 316.

business policies,¹⁴⁹ the appeals court felt constitutionally constrained to construe the statute to avoid infringement of the exercise of potentially “pure speech”, absent “a substantial economic impact on the secondary employer.”¹⁵⁰

Given this constitutional concern, Judge Bazelon concluded that the Board’s assumption that the statute completely banned secondary consumer picketing was an “erroneous premise.”¹⁵¹ Rather, such conduct violated subsection 8(b)(4)(ii) only if it amounted to “threats, coercion . . . [or] restraint” which, the opinion suggested, would have been the case only if there had been work stoppages, interrupted deliveries, violence or threats of violence, coercion of or confrontation with consumers, or the likelihood of “substantial economic injury” to the supermarket.¹⁵²

It was this holding—that picketing the “struck product” could run afoul of subsection 8(b)(4)(ii)(B) if it resulted in substantial economic injury to the retailer—which led the Supreme Court to reverse the court of appeals.¹⁵³ Justice Brennan, writing for the five member majority, shared the lower court’s concern over the troubling constitutional questions raised by a broad ban on picketing. He elected to avoid this problem, however, not by requiring proof of actual economic injury to the secondary, but by implicitly assuming that no such harm existed. He reasoned that there was no violation of the statute, “merely because respondents’ picketing was effective to reduce Safeway’s sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller.”¹⁵⁴

The effort to interpret subsection 8(b)(4)(ii)(B) in a way that permitted this product picketing prompted Justice Brennan to engage in one of the most myopic examinations of legislative history in the annals of Supreme Court history.¹⁵⁵ Declaring that the Court would not “ascrib[e] to Congress a purpose to outlaw peaceful picketing unless ‘there is the clearest indication in the legislative history’ . . . that Congress intended to do so as regards the particular ends of the picketing under review,”¹⁵⁶ the majority opinion steadfastly ignored statements, by congressional supporters and opponents alike, which demonstrated that, while consumer

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 317.

¹⁵¹ *Id.* at 318.

¹⁵² *Id.* at 317-18. This willingness to find a congressional intent to ban publicity picketing when it caused substantial economic injury to the secondary retailer but not otherwise anticipated the rationale found in the Supreme Court’s retreat from *Tree Fruits* in *NLRB v. Retail Store Employees Union, Local 1001, (Safeco)* 447 U.S. 607 (1980). See *infra* text accompanying notes 217-24.

¹⁵³ *NLRB v. Fruit and Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964).

¹⁵⁴ *Id.* at 72-73.

¹⁵⁵ The extent to which Justice Brennan has been willing to engage in creative statutory construction to avoid addressing first amendment issues is legendary. For a particularly enlightening and intimate treatment of how this was accomplished in *International Ass’n of Machinists v. Street*, 367 U.S. 740 (1961) (mandatory union dues used for political purposes alleged to violate the first amendment), see B. SCHWARTZ, *SUPERCHEIF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 371-76 (1983).

¹⁵⁶ 377 U.S. at 63 (quoting *NLRB v. Drivers, Chauffeurs, Helpers Local 639*, 362 U.S. 274, 284).

picketing generally was intended to be banned, no one in Congress ever made the distinction sought by Justice Brennan—between picketing directed solely at the struck product and that seeking a total consumer boycott of the secondary's business.¹⁵⁷ Nonetheless, the former category of picketing was held not to be one of the "isolated evils" intended to be outlawed by Congress and therefore it did not "threaten, coerce or restrain" Safeway within the meaning of subsection 8(b)(4)(ii).¹⁵⁸ Unlike a total consumer boycott, which would have "coerced" the supermarket by "inflict[ing] injury on his business generally"¹⁵⁹ and thereby have created a "separate dispute,"¹⁶⁰ "struck product" picketing was deemed to injure the primary employer only, leaving the secondary free to replace the offending product with other goods, should it become a "poor seller."¹⁶¹ This picketing was thus determined to have no more serious impact upon the secondary retailer than would successful primary activity. In fact, although the opinion stopped short of characterizing this picketing as "primary," it took pains to stress that "the union's appeal is closely confined to the primary dispute."¹⁶²

The majority opinion in *Tree Fruits* seized upon the specific facts of the case—picketing a limited number of products among the hundreds sold in the supermarket—to categorize "struck product" picketing as being "poles apart" from "consumer picketing to shut off all trade with the secondary employer."¹⁶³

Justice Harlan, speaking for the dissent, was not at all convinced that such a dichotomy existed:

The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced or restrained by picket signs which said "Do not buy X gasoline" than by signs which said "Do not patronize this gas station." To be sure Safeway is a multiple article seller, but it cannot well be gainsaid that the rule laid down by the Court would be unworkable if its applicability turned on a calculation of the relation between total income of the secondary employer and income from the struck product.¹⁶⁴

Justice Harlan's concerns were to prove prophetic.

¹⁵⁷ See *id.* at 80-94 (Harlan, J., dissenting). See also *supra* notes 67-72 and accompanying text.

¹⁵⁸ 377 U.S. at 71.

¹⁵⁹ *Id.* at 72.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 70.

¹⁶⁴ *Id.* at 83. The dissenters (Harlan, J. and Stewart, J.) would have enforced the NLRB's order, after reaching the first amendment issue and finding no constitutional violation in Congress' "attempts to effect an accommodation between the right of unions to publicize their position and the social desirability of limiting a form of communication likely to have effects caused by something apart from the message communicated. . . ." *Id.* at 93.

Justice Black concurred in the result, but rejected the majority's strained analysis. Justice Black

E. *The Seed Falls on Mostly Barren Ground—the Response to Tree Fruits*

Unions eagerly reembraced their old friend, the picket line, often using it in a context vastly different than the Safeway apple boycott. They were to learn, however, that their victory in *Tree Fruits* was severely limited. In fact, from the date of that decision to the present, with only a couple of fairly recent exceptions under the “Carter Board,”¹⁶⁵ the NLRB has proven itself remarkably unwilling to permit the use of product picketing in other circumstances. Instead, the Board has found almost all the cases of consumer picketing which have come before it since 1964 to be unlawful,¹⁶⁶ invoking one of three doctrines developed to get around *Tree Fruits*: “merged products;” misidentification of the struck product or the primary-secondary employer relationship; and, the single product employer—Justice Harlan’s hypothetical, which the Court ruled on in *NLRB v. Retail Store Employees Union Local 1001 (Safeco Title Ins. Co.)*.¹⁶⁷

1. Merged Products

The *Tree Fruits* rationale works in a straightforward manner only if the picketed product sold to the public by the secondary employer-retailer is identifiable as the discrete product which left the primary employer. Should the latter provide a service, such as cleaning or building construction, which cannot be directly resold, or should its product be incorporated only as a part of the ultimate product which reaches the public, then it is not possible to limit the desired response to the struck product

agreed with the dissenters that Congress had intended to proscribe the picketing in this case, and that the first amendment constitutional issue had to be reached. Unlike the dissent, however, Justice Black found a first amendment violation: the picketing was not banned because the picketers were asking others to do something unlawful (indeed, similar requests using nonpicketing forms of publicity are protected by the statute), nor was the picketing banned in the interest of public order; rather, under the proviso, the picketing was banned because of the substance of the picketers’ particular views. *Id.* at 76-80. “The result is an abridgment of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject . . . protected by the First Amendment.” *Id.* at 79.

The constitutional aspect of secondary consumer boycott regulation has been the subject of numerous valuable articles. See, e.g., Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951); Mack and Lieberwitz, *Secondary Consumer Picketing: The First Amendment Questions Remain*, 32 MERCER L. REV. 814 (1981); St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK U. L. REV. 883 (1982); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L. J. 938 (1982).

¹⁶⁵ United Paperworks Local 832 (Duro Paper Bag Mfg. Co.), 236 N.L.R.B. 1525 (1978), *vacated sub nom.* Kroger Co. v. NLRB, 647 F.2d 634 (6th Cir. 1980); Local 399, United Bhd. of Carpenters and Joiners of America (K & K Constr. Co.), 233 N.L.R.B. 718 (1977), *vacated sub nom.* K & K Constr. Co. v. NLRB, 592 F.2d 1228 (3d Cir. 1979).

¹⁶⁶ This is of course, far from saying that all attempts at *Tree Fruits* picketing have failed. Under § 3(d) of the NLRA, 29 U.S.C. § 153(d) (1976), the NLRB’s General Counsel has the discretion to decide whether or not to file a complaint alleging that product picketing violated § 8(b)(ii)(B). Cases closely conforming to the *Tree Fruits* fact pattern would thus have been unlikely to reach the Board. One which did, shortly after the *Tree Fruits* decision was issued, was summarily decided in favor of the union. Brewery Workers Union No. 8 (Bert P. Williams, Inc.), 148 N.L.R.B. 728 (1964).

¹⁶⁷ *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607 (1980).

alone. Unavoidably, there must also be a boycott of other products or the entire secondary business. The policy question, in light of *Tree Fruits*, therefore, is which party must suffer because of this inability to isolate the primary's product.¹⁶⁸

Although such cases began to reach the NLRB shortly after *Tree Fruits*, the Board took several years to articulate its position.¹⁶⁹ It did so initially in *Honolulu Typographical Union, No. 37 (Hawaii Press Newspapers, Inc.)*,¹⁷⁰ wherein the disputing union picketed a shopping center in which some of the tenants, mostly restaurants, had advertised in the primary's newspaper. The Board had previously held,¹⁷¹ with judicial approval,¹⁷² that advertising services became part of the product which was advertised, within the meaning of subsection 8(b)(4) and the publicity proviso. Thus retailers who advertised specific wares could find themselves the legitimate targets of consumer boycotts, including picketing directed at the struck (advertised) product.¹⁷³ Therefore, because the restaurants in *Honolulu Typographical Union* had advertised their businesses as a whole in the struck newspaper, the union apparently believed, as did dissenting Board Member Jenkins, that picketing requesting the public not to patronize them at all was permissible.¹⁷⁴

¹⁶⁸ See generally Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KAN. L. REV. 651, 701-02 (1971); Note, § 8(b)(4): *Merged Products and the Search for Standards*, 13 J. MAR. L. REV. 421 (1980).

¹⁶⁹ In Local 254, Building Service Employees (University Cleaning Co.), 151 N.L.R.B. 341 (1965), enforced, 359 F.2d 290 (1st Cir. 1966), the Board adopted, without comment, the Trial Examiner's finding that picketing at the consumer entrances of secondary employers who used the primary's cleaning services violated § 8(b)(4)(ii)(B). The Trial Examiner's Intermediate Report, written before the Supreme Court's opinion in *Tree Fruits*, had distinguished the Circuit Court's decision therein by pointing out that "neither [secondary employer] was purveying to its customers—who might have been inclined to respect a product boycott picket line—any goods or services furnished by the primary employer." 151 N.L.R.B. at 347. The same result was reached without elaboration, on similar facts, in Building Service Employees Local 105 (Charles R. Johnson), 151 N.L.R.B. 1424 (1965), enforced, 367 F.2d 227 (10th Cir. 1966). Cf. Laundry, Dry Cleaning & Dye House Workers, Local 259 (Morrison's of San Diego, Inc.), 164 N.L.R.B. 426 (1967). During this period (1965-1967), the Board also upheld violations when construction unions having primary disputes with non-union contractors placed consumer pickets at the housing developments or commercial facilities built by the contractor. See Salem Bldg. Trades Council (Cascade Employers Ass'n., Inc.), 163 N.L.R.B. 33 (1967), enforced, 388 F.2d 987 (9th Cir.) (per curiam), cert. denied, 391 U.S. 965 (1968); Alton-Wood River Bldg. & Constr. Trades Council (Alton District Indep. Contractors), 154 N.L.R.B. 982 (1963); Millmen & Cabinet Makers Union, Local 550 (Steiner Lumber Co.), 153 N.L.R.B. 1285 (1965), enforced, 367 F.2d 953 (9th Cir. 1966).

¹⁷⁰ 167 N.L.R.B. 1030 (1967), enforced, 401 F.2d 952 (D.C. Cir. 1968).

¹⁷¹ See *supra* text accompanying notes 120-24 for a discussion of the *Middle South* case.

¹⁷² Great Western Broadcasting Corp. v. NLRB, 356 F.2d 434, 436-37 (9th Cir. 1966), enforcing 150 N.L.R.B. 467 (1964).

¹⁷³ Cf. Atlanta Typographical Union No. 48 (Times-Journal, Inc.), 180 N.L.R.B. 1014 (1970).

¹⁷⁴ Member Jenkins felt that the *Tree Fruits* result directly controlled the case:

The rationale of [*Tree Fruits*] is that the picketing can be directed at the struck product and nothing more, but it hardly follows from this, as my colleagues apparently conclude it does, that if all the products or services of an establishment are advertised in struck newspapers the picketing of all somehow becomes unlawful. The decision that the struck product—the items advertised in the struck papers—may be picketed requires the opposite conclusion. Since the Union here attempted to reach no more than these products, they did not spread their

The majority did not agree. It chose instead to interpret *Tree Fruits* to mean that, if product picketing had a different impact on the secondary employer than would successful primary action, the "limited privilege" to picket did not exist.¹⁷⁵ In other words, in *Tree Fruits* either a successful strike at the primary employer's apple packing plants or the picketing of Safeway's stores would have created the same result. Safeway would have been unable to sell the primary's apples, but there would have been no effect on the rest of its business. Here, however, a successful strike at the newspaper would have had no appreciable effect on customers who would otherwise have chosen to eat at the restaurants, whereas honoring the picketers' request led to "injury . . . inflicted on their business generally."¹⁷⁶ This presented the other, unlawfully coercive, side of the dichotomy set out by Justice Brennan in *Tree Fruits*.

On appeal,¹⁷⁷ the D.C. Circuit affirmed, rejecting the *Tree Fruits* result, as all federal appellate courts subsequently faced with merged product cases have done.¹⁷⁸ The decision reached an assessment of the underlying policy tensions:

Here, where picketing means a total boycott, one interest must plainly yield, either the Union's desire to maximize pressure on the primary employer (the newspaper) by cutting off its markets or the neutral's desire to avoid a boycott of his entire business. In the 1959 amendments, Congress chose protection of the neutral from this sort of disruption as the interest more deserving of protection. Indeed, the Supreme Court so stated in *Tree Fruits* when it characterized as one of the "isolated evils" barred by § 8(b)(4)(ii)(B), "picketing which persuades the customers of a secondary employer to stop all trading with him."¹⁷⁹

The Board soon considered another restaurant case, *Teamsters Local 323 (American Bread Co.)*,¹⁸⁰ in which the union was able to identify a discrete product—bread—that the customers were asked to avoid, unlike the generalized appeal in *Honolulu Typographical Union*. Despite this distinction, the Board found the union's objective to be a total boycott, reasoning that, since the restaurant's

dispute beyond the permissible bounds, even though in those cases where all the establishment's products were advertised, the tendency of the picketing was to cause a cessation of all patronage.

167 N.L.R.B. at 1034.

¹⁷⁵ 167 N.L.R.B. at 1031.

¹⁷⁶ *Id.* at 1032.

¹⁷⁷ 401 F.2d 952 (D.C. Cir. 1968).

¹⁷⁸ See also *Kroger Co. v. NLRB*, 647 F.2d 634 (6th Cir. 1980); *K & K Constr. Co. v. NLRB*, 592 F.2d 1228 (3d Cir. 1979); *Hoffman v. Cement Masons Local 337*, 468 F.2d 1187 (9th Cir. 1972); *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1967). Cf. *NLRB v. Building Service Employees Local 105*, 367 F.2d 227 (10th Cir. 1966).

The D.C. Circuit later reached a different conclusion in "single-product secondary" cases, despite the fact that the net effect was the same—an unavoidable boycott of virtually the entire business. See *infra* notes 203-24 and accompanying text.

¹⁷⁹ 401 F.2d at 956 (quoting 377 U.S. at 71).

¹⁸⁰ 170 N.L.R.B. 91 (1968), *enforced*, 411 F.2d 147 (6th Cir. 1969).

customers could not choose among breads as they could in a supermarket, their choice as a practical matter was between taking the meals as offered or going elsewhere.¹⁸¹ As the Board saw it, “the bread . . . loses its identity when served, and becomes a part of the restaurant’s product which is offered to its customers.”¹⁸²

The “merged product” doctrine did not require that the struck product be literally incapable of separation from other items sold by the secondary employer, only that it be inconvenient, so that the likely response of customers wishing to honor the picket line would be to go somewhere else. This lesson was brought home to the NLRB recently by the Sixth Circuit when the Board approved picketing to encourage grocery store shoppers not to use the primary’s paper bags to bag their groceries, but instead to bring their own bags or ask the store for boxes.¹⁸³ The Board had held that even though the bags might be considered a “service” by the store, as opposed to one of its products, there had been no “loss of product identity,” and the shoppers “could purchase all the products they desired without necessarily using paper bags to carry the groceries.”¹⁸⁴ On review, the Sixth Circuit disagreed, rejecting the Board’s attempt to distinguish this case from *American Bread*: “In *American Bread*, it was physically possible for consumers to bring their own bread or go without, just as it was possible for Kroger shoppers to bring their own bags or go without. However, in both cases it was unrealistic to expect them to do so.”¹⁸⁵ The court also concluded that “the picketing could have had no other object but a boycott of Kroger.”¹⁸⁶ The Board’s decision was held unsupported by substantial evidence, despite undisputed proof that the union had clearly directed its appeal toward the bags alone, that some shoppers had in fact brought their own bags, and that Kroger had either boxes or plastic bags (normally carried as part of its stock) to substitute for the subject paper bags.¹⁸⁷ In short, because inconvenience to shoppers was likely to discourage some from trading with Kroger, the paper bag manufacturer’s employees were barred from maintaining any pickets whatsoever.¹⁸⁸

¹⁸¹ 170 N.L.R.B. at 93.

¹⁸² *Id.* This, of course, was not entirely accurate with regard to most of the ways in which bread would be served in a restaurant. For a somewhat facetious example, it is certainly possible to separate a chicken salad sandwich order, leaving the chicken salad and disposing of the bread, as Jack Nicholson so eloquently explained to his waitress in the film *Five Easy Pieces*—a process which, in her case, would have left the bread stuck between her legs. Or a meal can be provided without bread (or, at least in Nashville where this case arose, with cornbread, something almost invariably made on the premises).

¹⁸³ *United Paperworkers Local 832 (Duro Paper Bag Mfg. Co.)*, 236 N.L.R.B. 1525 (1978), *vacated sub nom. Kroger Co. v. NLRB*, 647 F.2d 634 (6th Cir. 1980).

¹⁸⁴ 236 N.L.R.B. at 1527.

¹⁸⁵ 634 F.2d at 638.

¹⁸⁶ *Id.*

¹⁸⁷ *See* 236 N.L.R.B. at 1526-28.

¹⁸⁸ Persons having spent time in the United Kingdom, as well as other foreign countries, would likely find the conclusion that free paper bags are indispensable to grocery shoppers more than a little ethnocentric. There the norm is for shoppers either to bring their own bags, use boxes supplied by the store, or purchase bags (usually plastic) at the checkout counter.

2. Misidentification

The requirement in the publicity proviso that all protected nonpicketing communication must be truthful¹⁸⁹ has been construed liberally by the NLRB,¹⁹⁰ which requires only that there be "no evidence of intent to deceive" and no "substantial departure from fact."¹⁹¹ Thus, for example, handbilling which did not specifically identify the items "produced" by the primary employer did not lose its protection simply because the reader might incorrectly interpret it to mean that all items in the store came from that source.¹⁹²

Such liberality was never accorded to the message conveyed by product picketing, however. It is understandable that a more demanding approach would be taken here, where calls for total boycotts were impermissible coercion. Yet the NLRB and the courts have enforced such a high standard in these cases that picketers are required to be insurers that the public will correctly perceive the limitations of their appeal or the relationship of the primary to the secondary employer. Instances where it was impossible to do so have been as much subject to sanction as those in which it appeared the union appeal had been deliberately or negligently broadened to encompass a general boycott.

As it did with the merged product doctrine, the NLRB first fully articulated its test for impermissible misidentification in connection with products advertised in a newspaper involved in a labor dispute. In *Atlanta Typographical Union No. 48 (Times-Journal, Inc.)*,¹⁹³ the picketers' sandwich board signs had asked the public not to buy "products advertised by this store" in the target newspaper.¹⁹⁴ The names of the specific items, which numbered in the hundreds and were changed frequently in the advertisements, were not listed on the signs, but copies of the advertisements themselves were shown to customers who inquired.¹⁹⁵ Nonetheless the Board held

¹⁸⁹ In the words of the statute, it must be "for the purpose of truthfully advising the public. . . 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." 29 U.S.C. § 158(b)(4) (1976).

¹⁹⁰ *International Bhd. of Teamsters Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901 (1961).

¹⁹¹ *Id.* at 806.

¹⁹² *Id.*

¹⁹³ 180 N.L.R.B. 1014 (1970). Two earlier cases which had come before the Board had turned on the fact that the primary's product was not clearly identified as the focus of the union's picketing: *Twin City Carpenter's Dist. Council (Red Wing Wood Products, Inc.)*, 167 N.L.R.B. 1017 (1967), *enforced*, 422 F.2d 309 (8th Cir. 1970); *Bedding, Curtain & Drapery Workers Union, Local 140 (U.S. Mattress Corp.)*, 164 N.L.R.B. 271 (1967), *enforced*, 390 F.2d 495 (2d Cir.), *cert. denied*, 392 U.S. 905 (1968). In *Redwing*, the union had accurately identified the primary's cabinets, which were being installed in homes sold by the secondary, as the offending product, but had failed to explain the nature of the primary and secondary employer's relationship, or the labor dispute, to the public. 167 N.L.R.B. at 1026. In *U.S. Mattress*, a union dispute centering on bedding was inaccurately broadened into a request not to purchase not only bedding, but furniture and upholstery as well, 164 N.L.R.B. at 273-74; moreover, the union's request that the public "look for the union label" was deemed deceptive because not even manufacturers of products acceptable to the union used such labels. *Id.*

¹⁹⁴ 180 N.L.R.B. at 1015.

¹⁹⁵ *Id.*

this to be unprotected by *Tree Fruits* because, when the union broadened its appeal beyond asking consumers not to purchase the paper and sought a boycott of products advertised therein, “it assumed the added burden of pursuing such a course in a manner to insure that its actions would not affect the secondary employer’s business beyond the sale of the product advertised.”¹⁹⁶ Nor did the union’s attempt to supply the necessary information by making the newspaper ads themselves available meet this burden. The Board held that subsection 8(b)(4)(ii)(B) prohibited all such picketing “unless the picket signs themselves adequately inform potential customers of the action they are asked to take.”¹⁹⁷ The rationale of *Atlanta Typographical Union* was subsequently used by the Board to find violations in similar advertising cases, even though in one of them¹⁹⁸ identification of the individual products was found to be “nigh impossible.”¹⁹⁹ This was in part because the advertisement referred both to named items and to other unnamed ones “in all 100 departments,”²⁰⁰ and in the other a copy of the advertisement had been attached to the picket placards.²⁰¹

The effect on consumers of a picketing union’s failure to clearly identify the discrete products of the primary employer is much like the effect of merging those products with others sold by the secondary. In both instances the members of the public who wish to honor the picketers’ request are likely to do so by either withholding all patronage, or by boycotting other items not tainted by association with the primary employer. This places more economic pressure on the secondary than it would have experienced had there been successful primary action and therefore creates a “separate dispute” with the secondary within the meaning of *Tree Fruits*, as interpreted by the NLRB and the courts of appeals.²⁰² The responses in both instances accordingly have been the same: regardless of whether it is impossible, impractical, or merely inconvenient for the consumer to isolate the struck product, the union invariably has been found to have used an unlawful means of seeking a product boycott.

3. The Single Product Secondary Employer—*Safeco* Substitutes Harm to the Secondary as the Primary Criterion

A distinct, well-identified product capable of being purchased separately can be picketed without fear of broadening the appeal beyond the product itself to

¹⁹⁶ *Id.* at 1016.

¹⁹⁷ *Id.* See also *Local 248, Meat & Allied Food Workers (Milwaukee Indep. Meat Packers Ass’n.)*, 230 N.L.R.B. 189 (1977); *Independent Routemen’s Ass’n. (Urban Distrib., Inc.)*, 206 N.L.R.B. 245 (1973).

¹⁹⁸ *Los Angeles Typographical Union No. 174 (White Front Stores, Inc.)*, 181 N.L.R.B. 384 (1970).

¹⁹⁹ *Id.* at 388.

²⁰⁰ *Id.*

²⁰¹ *San Francisco Typographical Union No. 21 (San Rafael Indep. Journal)*, 188 N.L.R.B. 673 (1971), *enforced*, 465 F.2d 53 (9th Cir. 1972). The sincerity of the union’s effort to restrict its message was suspect here, however. The copies of the advertisements were often folded and hard to read, and the simultaneous handbills, as well as the oral comments of picketers, urged shoppers to boycott the stores completely. 188 N.L.R.B. at 678.

²⁰² See *Soft Drink Workers Union Local 812 v. NLRB (Monarch Long Beach Corp.)*, 657 F.2d 1252, 1264-65 (D.C. Cir. 1980), *enforcing* 243 N.L.R.B. 801 (1979).

other aspects of the secondary business. Nonetheless, if its sale constitutes the bulk of the secondary's income the ultimate impact, insofar as that business is concerned, is the same as the most extreme merged product or misidentified product picketing—a total boycott. It was in such cases, where the manner of picketing authorized by *Tree Fruits* had been scrupulously adhered to, that the NLRB was most pressed to justify reaching a different result. It did so, however, by shifting the focus entirely away from whether the union had been able to restrict its appeal to the struck product, and emphasizing only the adverse economic impact suffered by the secondary employer, despite such a limitation.

The NLRB first addressed this issue²⁰³ in *Steelworkers, Local 14055 (Dow Chemical)*,²⁰⁴ the case that Justice Harlan had warned was coming in his *Tree Fruits* dissent.²⁰⁵ The union there had picketed six service stations, asking consumers not to purchase Bay gasoline, the product from which all of the stations received most of their revenue. Brushing aside the argument that the economic interdependency between the stations and the primary employer (Dow's Bay Refining Division) made the former "allies" in the labor dispute,²⁰⁶ thus rendering the picketing primary activity,²⁰⁷ the three-member majority came to grips with *Tree Fruits*. It reasoned that the Supreme Court had not found subsection 8(b)(4)(ii) coercion in that case largely because of "the minimal impact the picketing there would have had, if successful, upon the total business of the secondary retailer,"²⁰⁸ whereas in this case, as in *American Bread*, "the picketing was reasonably calculated to induce customers not to patronize the neutral parties . . . at all."²⁰⁹ Because the Bay service stations "would predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply,"²¹⁰ the coercion lacking in *Tree Fruits* was deemed present here.

²⁰³ Picketing of a one-product secondary employer had come to the Board before, but it was erroneously classified as an instance of merged product picketing. *Cement Masons Union Local 337 (California Ass'n of Employers)*, 190 N.L.R.B. 261, *modified*, 192 N.L.R.B. 377 (1971), *enforced sub nom. Hoffman v. Cement Masons Local 377*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

²⁰⁴ 211 N.L.R.B. 649 (1974), *enforcement denied*, 524 F.2d 853 (D.C. Cir. 1975), *vacated*, 429 U.S. 807 (1976).

²⁰⁵ See *supra* text accompanying note 164.

²⁰⁶ Three of the stations were owned by one of Bay's distributors, who leased the stations' property from Dow, began business with a loan on which Dow as the co-signer had the power to control the use of the money, paid Dow a percentage of sales as rent, stored his gasoline in tanks owned and maintained by Dow, and ran the stations using Dow's equipment. The other stations, while not having such a close interrelationship with Dow, nonetheless operated under similar lease arrangements. 211 N.L.R.B. at 649-51.

²⁰⁷ Relying on established doctrine, the Board rejected the "ally doctrine" because of the absence of either "common ownership or managerial control." *Id.* at 651. For an argument that such cases should be analyzed in terms of the employers' neutrality, see Comment, *Consumer Picketing: Reassessing the Concept of Employer Neutrality*, 65 CALIF. L. REV. 172 (1977).

²⁰⁸ 211 N.L.R.B. at 651.

²⁰⁹ *Id.*

²¹⁰ *Id.*

Without saying so, the Board had thus returned to Judge Bazelon's rationale in *Tree Fruits*,²¹¹—that unlawful coercion existed whenever the product picketing had a substantial economic effect on the secondary^o employer²¹²—despite the fact that this had been the very reason the court of appeals had been reversed by the Supreme Court.²¹³ This fact was not lost on the two dissenting Board members,²¹⁴ nor on the D.C. Circuit, which distinguished merged product cases and its *Honolulu Typographical Union* decision and refused to enforce the NLRB's order.²¹⁵

Dow Chemical was vacated by the Supreme Court,²¹⁶ which then granted certiorari on the next single product secondary consumer picketing case decided by the NLRB—*Retail Store Employees Union Local 1001 (Safeco Title Ins. Co.)*.²¹⁷ *Safeco* presented essentially the same facts as *Dow Chemical*: a union representing a title insurance company's employees picketed five land title companies which earned ninety to ninety-five percent of their income from selling the primary's insurance. Customers were urged to cancel their policies.²¹⁸ Both the NLRB and the D.C. Circuit reaffirmed their earlier holdings in *Dow Chemical*, the Board again finding a subsection 8(b)(4)(ii)(B) violation, and the court, sitting en banc and dividing five to four, denying enforcement.

The stage was set for a determination of whether the legality of such picketing was henceforth to be judged by the success of its restriction to the struck product, as the court of appeals would have it, or by the economic impact yardstick now favored by the NLRB. The Supreme Court not only emphatically endorsed the NLRB's approach, but went a considerable distance further, in a majority²¹⁹ opinion

²¹¹ *Fruit and Vegetable Packers & Warehousemen, Local 760 v. NLRB*, 308 F.2d 311 (D.C. Cir. 1962), vacated, 377 U.S. 58 (1964).

²¹² 308 F.2d at 317-18.

²¹³ 377 U.S. at 72-73.

²¹⁴ 211 N.L.R.B. at 652.

²¹⁵ 524 F.2d at 857. The panel, which included Judge Bazelon, concluded that in *Tree Fruits* the Supreme Court "did not consider that the lawfulness of the exercise of the right depended upon differences in the degree of the possible economic impact upon the secondary." *Id.* at 860.

²¹⁶ 429 U.S. 807 (1976). The case was remanded to the NLRB to determine if intervening circumstances—the alleged dissolution of the local union—had rendered it moot. *Id.* The complaint was subsequently dismissed. 229 N.L.R.B. at 1162-63.

²¹⁷ 226 N.L.R.B. 754 (1976), enforcement denied, 627 F.2d 1133 (D.C. Cir. 1979) (en banc), *rev'd*, 447 U.S. 607 (1980).

²¹⁸ 226 N.L.R.B. at 755. Again, as in *Dow Chemical*, the ally doctrine surfaced as an issue. Safeco owned between 12 and 53 percent of each title company, had at least one of its officers serving as an officer and board member of the title company and issued all policies under the joint signature of Safeco's president and a title company officer. *Id.* Nevertheless, both the NLRB and the court of appeals found the title companies to be neutral employers and the ally doctrine to be inapplicable. *Id.* at 756, 627 F.2d at 1144. This issue was not argued before the Supreme Court. 447 U.S. at 611 n.5.

²¹⁹ The sixteen years between *Tree Fruits* and *Safeco* had seen many changes in the composition of the Court. Only one member of the *Safeco* majority, Justice Stewart, was on the Court when *Tree Fruits* was decided. The other five Justices, including the opinion's author, Justice Powell, were all President Nixon appointees. Justice Brennan, joined by Justices White and Marshall, dissented.

harboring such uncertain implications that it has virtually eliminated the use of product picketing.

The Court sharply limited the significance of *Tree Fruits* as precedent, characterizing it as being on the extreme end of the "spectrum of conduct" likely to be encountered in this area.²²⁰ Echoing the NLRB's interpretation, *Tree Fruits* was deemed to have turned on the insignificant part the picketed product played in the secondary's business—"but one item among the many that made up the retailer's trade"—and on the conclusion that the injury to the store would have been so "marginal," as to give it little reason to become involved in the labor dispute.²²¹ The Safeco boycott, on the other hand, was described as being at the other extreme of that spectrum, with sympathetic customers having "no realistic option other than to boycott the title companies altogether,"²²² leaving those businesses with a choice between economic survival and cutting the ties with Safeco. A company put in such a position, the majority believed, was being coerced within the meaning of subsection 8(b)(4)(ii)(B).

Liability in these cases was henceforth to exist if there was a reasonable likelihood that the product picketing would "threaten the neutral party with ruin or substantial loss."²²³ The ramifications of this new standard extend far beyond the *Safeco* setting. The holding certainly seems to have implicitly approved the earlier decisions in the merged product and misidentification cases.²²⁴ Moreover, it has extended the ban to include even pure *Tree Fruits* picketing of secondary employers whose income does not come primarily from one struck product. The Court gave few hints as to how deeply successful picketing could cut into sales before the loss of revenue would be "substantial," but that point clearly lies somewhere short of forcing the company out of business. Indeed, all but the most successful businesses could argue convincingly that any appreciable reduction in profit margin was a "substantial loss." Under such a test, the weaker the financial position of the secondary employer, the more likely that the picketing would be found illegal, notwithstanding the fact that the target product could have been far from the dominant item sold by the business.

Perhaps unions are not now chargeable with accurate knowledge of what the secondary company's financial condition is, but they apparently are at least required to anticipate whether picketing would cause it to fear for its economic well-being, so that this fear, and not the nuisance of dumping a "poor seller," would influence the secondary company's decision-making. Such a judgment is exceedingly difficult

²²⁰ 447 U.S. at 615 n.11.

²²¹ *Id.* at 613.

²²² *Id.*

²²³ *Id.* at 615 n.11. The Court established this test to govern struck product picketing in the future, warning that neither the results in *Tree Fruits* nor those in *Safeco* would necessarily control. *Id.*

²²⁴ See *Kroger Co. v. NLRB*, 647 F.2d 634 (6th Cir. 1980), *vacating* 236 N.L.R.B. 1525 (1978), in which the court of appeals applied the *Safeco* test to strike down what it characterized as merged product picketing.

for outsiders to make with any assurance. As a result, virtually no product picketing, other than the type encompassed within the narrow facts of *Tree Fruits* itself, could now be safely said in advance to be lawful. Doubtlessly reflecting this uncertainty, no labor organization has been willing to risk an NLRB decision on this issue in the more than three years since *Safeco* was decided.

V. THE PUBLICITY PROVISIO—NEW LIMITS ON AN OLD RIGHT

After the *Servette* decision, with its flat statement that Congress had not intended the protection of the publicity proviso to be any narrower than the prohibitions of subsection 8(b)(4),²²⁵ it seemed that virtually all consumer boycotts solicited by means other than picketing²²⁶ were acceptable, as long as there was no substantial departure from the facts and no intent to deceive the public about the primary-secondary employer relationship or the nature of the labor dispute.²²⁷ Recent decisions have retreated from this position, however, establishing boundaries beyond which the primary-secondary economic relationship was deemed too tenuous to permit a boycott and engrafting a relevance requirement onto the existing truthfulness standard.

A. The "Producer-Distributor" Nexus

It has long been settled that within the meaning of the publicity proviso all employers generate something which could be considered a "product" and its use or consumption by other employers could subject them to a consumer boycott, despite the fact that nothing coming from the first employer is ever sold to the public.²²⁸ Viewed in this light, the "producer-distributor" nexus set out in the publicity proviso "a product or products . . . produced by an employer . . . and . . . distributed by another employer," seemed to be merely an awkward way of describing any economic relationship beneficial to the secondary employer's business. Therefore, assuming the public was given a substantially accurate description of this relationship and of the primary labor dispute, it should matter little what the exact nature or magnitude of the relationship was, as long as one existed. This has in fact been the NLRB's approach recently when boycott attempts involved businesses which purchased nothing from the primary but received demonstrable benefits from its activities.

²²⁵ 377 U.S. at 55.

²²⁶ There were several notable, and unsuccessful, union attempts to convert picketing into "pure" publicity. See, e.g., *Cement Masons Union Local 337 (California Ass'n of Employers)*, 190 N. L.R.B. 261, *modified*, 192 N.L.R.B. 377 (1971), *enforced sub nom. Hoffman v. Cement Masons Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) (patrolling with placards reading: "I am a cement mason union handbiller—Please take my handbill!"); *Nashville Bldg. & Constr. Trades Council (Castner-Knott Dry Goods Store)*, 188 N.L.R.B. 470 (1971) (picket signs urging customers only to "Please Read Handbills Given at Each Entrance").

²²⁷ See *supra* notes 109 and accompanying text for a discussion of *Lohman*.

²²⁸ *American Federation of Television and Radio Artists, San Francisco Local (Great Western Broadcasting Corp.)*, 150 N.L.R.B. 467 (1964), *enforced*, 356 F.2d 434 (9th Cir. 1966), *cert. denied*, 384 U.S. 1002 (1966).

The Board's first occasion to construe the producer-distributor nexus outside the context of either a direct contractual relationship or a product chain came in *United Steelworkers of America (Pet, Inc.)*.²²⁹ A national boycott of the products and services of Pet and many of its subsidiary companies was mounted by the Steelworkers, who represented only the employees at one of the subsidiaries, the A. Hussman Refrigerator Company. Hussman manufactured commercial refrigeration equipment, display cases and other commercial and industrial equipment, but nothing which was sold to the general public. Pet, Hussman's parent company, was a diversified, billion-dollar conglomerate, which also owned numerous other companies producing various retail food products, as well as a restaurant chain. Having no product of Hussman's which consumers could be asked to shun, the union might have urged a boycott of all retail stores using Hussman equipment. Such a move would foreseeably have put little feed-back pressure on Hussman, however, because the retailers would be difficult to identify and, even if boycotted, very few of them would have had any further business dealings with Hussman, having already purchased its equipment. It would have made no sense to pressure companies that were not in a position to threaten the primary with loss of business. The union elected instead to boycott the retail products of the parent corporation and its other subsidiaries, presumably a much more effective tactic given the fact that their profits and losses all contributed to Pet's viability, and that Hussman's labor relations were, in the final analysis, subject to Pet's direction. Pet charged, however, and the NLRB General Counsel agreed, that such a boycott was a form of coercion not encompassed by the publicity proviso, because Hussman was not a "producer" of Pet's "products" or those of its subsidiaries.²³⁰

The Board rejected this contention, drawing on *Lohman* and *Middle South Broadcasting Corp.* for the proposition that a total secondary boycott could be urged here, as long as Hussman had "at some stage produced, in the sense of applying capital, enterprise or service, a product of the neutral employer."²³¹ It found such production in Hussman's contribution of its profits, goodwill and the element of diversification to Pet and, derivatively, to the other subsidiaries. Thus, the economic well-being that Hussman supplied was seen by the Board as playing a significant enough role in the ability of the other companies to produce their products to satisfy the producer-distributor nexus.²³²

The NLRB adhered to this rationale in *Florida Gulf Coast Building Trades Council (The Edward J. DeBartolo Corp.)*.²³³ As in *Pet*, the labor organization in *DeBartolo* needed an effective way to use public pressure in its dispute with a

²²⁹ 244 N.L.R.B. 96 (1979), *enforcement denied*, 641 F.2d 545 (9th Cir. 1981).

²³⁰ 244 N.L.R.B. at 99.

²³¹ *Id.* at 101.

²³² On appeal, the Eighth Circuit denied enforcement, castigating the NLRB's willingness to equate Hussman's contributions to the production of products. The court believed the proviso was unavailable because Hussman did not literally "work on" actual products of the other companies. 641 F.2d at 549.

²³³ 252 N.L.R.B. 702 (1980), *enforced*, 662 F.2d 264 (4th Cir. 1981), *vacated*, 103 S. Ct. 2926 (1983).

primary employer which sold nothing directly to the public. In this case, the primary employer was a nonunion construction company (High) which was building a department store for a major tenant in DeBartolo's shopping mall. The unions could have limited their boycott to the business of the tenant in question (Wilson's) by asking customers not to shop at its other branches.²³⁴ Such a boycott at the shopping mall itself would have been completely ineffective, though, for the simple reason that the store, being still under construction, would have had no customers.

The unions took another tack. Apparently believing, rightly or wrongly, that the shopping mall owner, DeBartolo, could persuade Wilson's to cease doing business with High, union members handbilled at the mall. They asked customers not to shop at any of the stores, or at least to express their concern to the store managers therein, until DeBartolo "publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits."²³⁵ The appeal, of course, was for a total boycott of all the other tenants, since DeBartolo itself owned the shopping center but did not run the shops or directly sell products to the public. In the unions' view, references to the stores of the other tenants was no different than asking generally for a boycott of the mall, because the public perceived the mall and its stores as one and the same enterprise.²³⁶

The NLRB found such a boycott to be protected, even though there was no direct contractual relationship between High and DeBartolo or any of the other tenants. The requisite "producer-distributor" relationship was present, in the Board's judgment, because of the economic realities underlying the cooperative nature of shopping center ventures—realities reflected in DeBartolo's standard lease agreement which "evidence[d] the collective dependence of the mall owner and its tenants," whereby "the success of each tenant contributes to, and depends upon, the success of the others."²³⁷ In other words, High's construction of Wilson's store

²³⁴ Such a boycott had been given Board approval in Local Union No. 54, Sheet Metal Workers (Sakowitz, Inc.), 174 N.L.R.B. 362 (1969).

²³⁵ 252 N.L.R.B. at 703.

²³⁶ *Id.* at 704.

²³⁷ *Id.* at 705. As summarized by the NLRB, DeBartolo's standard tenant lease provided that:

Each tenant agrees to pay DeBartolo a set minimum rent. The standard lease further provides that each tenant's minimum rent will automatically increase 10 percent upon the date each additional department store of certain size or larger opens for business. And, in addition to the minimum rent, each tenant agrees to pay DeBartolo a percentage rent based upon a percentage of the tenant's adjusted gross sales in excess of a set yearly figure.

The standard lease also provides that all tenants shall pay a proportionate share of the cost of operating, maintaining, and repairing the common areas of the shopping center. A new tenant in the shopping center will reduce each tenant's proportionate share.

All tenants must join and pay dues to a merchants association, the purpose of which is *inter alia*, joint advertising projects. DeBartolo, through the standard lease, exercises control over its tenants' construction work, business hours, employees, signs, and equipment. Each tenant agrees not to use its premises in any way that will injure the reputation of the shopping center or interfere with the operations of the other tenants.

Id. at 703.

represented the production of a product from which both Wilson's and the other tenants would derive some benefit by sales to persons attracted to the mall by that store. DeBartolo, in turn, benefitted by virtue of the fact that Wilson's rent, like that of the other tenants, was calculated in part based on a percentage of the store's adjusted gross sales.²³⁸ Based upon the existence of these mutual obligations and benefits which the Board characterized as a "symbiotic relationship," High was held to be a "producer" of products distributed by DeBartolo and all of its tenants, within the meaning of the publicity proviso.

This result was affirmed by the Fourth Circuit,²³⁹ which declined to follow the Eighth Circuit's earlier rejection of the Board's view in *Pet.*²⁴⁰ Faced with this conflict between the circuits, the Supreme Court granted certiorari in *DeBartolo* to determine whether the requisite producer-distributor relationship existed. In a unanimous decision, the Court held that it did not.²⁴¹

Even though the Court, like the parties, was willing to assume that Wilson's "distributed" High's "product" here,²⁴² it was unwilling to find that DeBartolo and the other tenants did so, reasoning instead that the NLRB's "symbiotic relationship" test had impermissibly shifted the inquiry from the primary-secondary relationship to that between the secondaries and "then test[ed] that relationship by a standard so generous that it will be satisfied by virtually any secondary employer that a union might want consumers to boycott."²⁴³ This the Court was not willing to accept, believing as it did, that the "distribution requirement" reflected congressional intent to exclude at least some "peaceful, truthful handbilling that informs the public of a primary dispute."²⁴⁴ Thus, the Court observed, boycotting DeBartolo and the cotenants would have come within the publicity proviso only if they had had a "business relationship with High" or had "[sold] any products whose chain of production can reasonably be said to include High."²⁴⁵

The Court's unwillingness to construe the publicity proviso so as to permit a boycott at the mall raised once again the troubling question of the first amendment's relevance to these economic disputes.²⁴⁶ But aside from this, it also insured that the NLRB and the courts must evaluate every consumer boycott to determine whether the secondary employer's connection to the primary is direct enough, or

²³⁸ See *supra* note 237.

²³⁹ 662 F.2d 264 (4th Cir. 1981), *vacated*, 103 S. Ct. 2926 (1983).

²⁴⁰ See *supra* note 232.

²⁴¹ 103 S. Ct. 2926.

²⁴² *Id.* at 2932.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 2933.

²⁴⁶ Having concluded that the publicity proviso was not applicable, the Court remanded the case to the NLRB to decide two questions not reached in the initial Board decision: whether the handbilling constituted unlawful coercion under § 8(b)(4)(ii)(B). If so, the further question of whether such a statutory prohibition violated the unions' first amendment rights would then be squarely presented, an issue the Court felt compelled not to reach. *Id.*

strong enough, to bring the union activity within the protection of the statute. It is difficult to tell, for instance, whether Pet and its subsidiaries could now be picketed because of their "business relationship" with Hussman, or whether this term envisions something more akin to arms-length contractual dealings, capable of being severed by the affected secondary employer.

B. "Relevance" is Added to the Truthfulness Standard

Unions guilty of confusing the public's perception of the primary object of their labor dispute have regularly been found in violation of the publicity proviso's "truthfulness" requirement.²⁴⁷ Until recently, however, the NLRB had demanded only that "the publicity advise the public of the nature of the primary dispute and the secondary employer's relationship to it."²⁴⁸ It was a standard which could be met by substantial compliance, so that, for instance, failure to identify the primary employer by name was not fatal, as long as its relationship to the boycotted business was made clear.²⁴⁹

In *Hospital and Service Employees Union, Local 399 (Delta Airlines, Inc.)*,²⁵⁰ the NLRB had the occasion to add a further requirement to the effect that, even if the above disclosure was made, no other "coercive" information could be conveyed during the boycott which was not specifically "for the purpose of" (to use the publicity proviso's phrase) truthfully advising the public of the nature of the primary dispute. The use of other truthful information to encourage consumers to boycott the secondary employer would remove the protection of the publicity proviso, if the additional matters were not relevant to that employer's relationship to the primary employer or its labor dispute.²⁵¹ In *Delta* that meant that the union's publicity (handbills and articles in the union newspaper) was unlawfully coercive because it contained statistics on Delta's safety record, when the labor dispute involved the janitorial contractor employed by Delta at its administrative offices.²⁵² The result is not wholly unsalutary in that case, for the union was arguably attempting to shift the public's attention totally away from the actual labor dispute by implying the existence of a separate safety dispute with Delta. Yet a requirement that all aspects of boycott publicity must henceforth relate strictly to the primary dispute has disturbing implications for unions wishing to enlist public support in less misleading ways. For instance, would a reference to the secondary employer's past business dealings with, and support for, other employers involved in similar but unrelated disputes now render a union's publicity unlawful? Adding this new relevance requirement has thus simply placed another stumbling block of uncertain proportions in the path of those wishing to use the consumer boycott.

²⁴⁷ See, e.g., *Local 732, Int'l Bhd. of Teamsters (Servair Maintenance, Inc.)*, 229 N.L.R.B. 392, 402 (1977) (Intermediate Report).

²⁴⁸ *Central Indiana Bldg. and Constr. Trades Council (K-Mart Corp.)*, 257 N.L.R.B. 86 (1981).

²⁴⁹ *Id.* at 89.

²⁵⁰ 263 N.L.R.B. 996 (1982).

²⁵¹ *Id.* at 998-99.

²⁵² *Id.*

VI. CONCLUSIONS AND A PROPOSAL FOR A MORE RATIONAL APPROACH

After a quarter of a century's experience regulating consumer boycotts under subsection 8(b)(4)(ii)(B), it is certainly appropriate to ask how well the system is working. Does it adequately protect and balance the respective interests of business and labor? Does it provide affected parties with reasonably clear and reliable guidelines? In most instances, the answer to both questions is yes, at least as long as the only two relevant statutory considerations are whether the union's publicity contained a substantially truthful explanation of the labor dispute and the relationship of the boycotted business to it, and whether, as a result of the boycott, secondary employees have refused to work.

Insofar as clarity and predictability are concerned, both of these inquiries look to objective, verifiable criteria, enabling parties and adjudicators alike to determine with reasonable accuracy whether these requirements are being met. Moreover, both also relate to matters within the control of the boycotting union.²³³ Thus a campaign can be organized with advance assurance of its legitimacy and, conversely, the responsibility for failing to meet these standards can be placed solely at the union's door. Both requirements conform to the spirit of the Landrum-Griffin compromise as well. The quid pro quo for labor's retention of the right to seek public support should certainly be the obligation to deal with that public honestly and to refrain from using a consumer boycott to mask a signal for organized employee activity which has long been illegal.

I would submit that these two requirements are the only ones essential to the equitable regulation of secondary consumer boycotts. The other existing considerations, the consumer picketing and producer-distributor nexus standards, are largely irrelevant to maintaining the statutory balance of interests. They have also undeniably been the source of a great deal of confusion, uncertainty, and therefore, litigation. Given the questionable premises upon which they rest and the dubious distinctions they make, it would probably serve the public interest better to eliminate them altogether as limitations on the right to mount consumer boycotts.

With regard to picketing, it is now apparent that the *Tree Fruits* experiment has been a failure. While picketing could be permitted or prohibited altogether, it has proven impossible to preserve a meaningful sphere for product picketing alone. In far too many cases, the struck product cannot be satisfactorily isolated and even when it can the lawfulness of picketing is now conditioned upon a factor (extent of economic injury) beyond the union's control or perhaps even its knowledge. Thus this aspect of labor-management relations has all the certainty of Russian roulette.

²³³ While the statute is framed in terms of the boycott having "an effect of inducing" a work stoppage in order to eliminate the element of intent, the boycotting union is not absolutely liable for isolated work stoppages or interrupted deliveries. *Cf.*, Retail Clerks Union Local 329 (Barker Bros. Corp.), 138 N.L.R.B. 478 (1962), *enforced*, 328 F.2d 431 (9th Cir. 1964) (construing analogous "effect" language under § 8(b)(7)).

If the assumptions about consumer picketing which prevailed in 1959 were valid, it would probably be best to abandon *Tree Fruits* altogether and return to a total ban on picketing. For several reasons, however, these assumptions now appear to be largely unwarranted. First, experience has put the lie to the belief, widely held before 1959, that any picketing would inevitably cause sympathetic union members to stop work or refuse to make deliveries. Since passage of the Landrum-Griffin Act, organized workers have repeatedly demonstrated their willingness to cross and work behind a picket line, when informed that it is directed solely toward consumers. Second, it is undoubtedly true that, out of loyalty, many union member consumers would honor a picket line in support of a total boycott.²⁵⁴ But would such persons react differently if picketers were replaced by handbillers? It does not seem likely, since the message is exactly the same.

Beyond the belief that picketing exerts a disproportionately strong reaction from sympathetic members of organized labor lies the fear of its negative impact upon the vastly larger group of disinterested citizens generally. Violence, physical intimidation, mass picketing, threats and abusive language are always possible, but such conduct is unlawful in any context and the secondary employer has ample legal recourse, both civil and criminal, state and federal, to stop it should the occasion arise.²⁵⁵ This leaves the unpleasantness of being asked to publicly take sides in a labor dispute and the "I dare you to cross this line" sort of confrontation that faces persons who might wish to enter a picketed store. Eliminating this kind of "coercion" has been a major, if not always explicit, objective in the many cases since *Tree Fruits* which have found product picketing to be illegal. Yet, again it is hard to see enough difference in the level of coercion to justify a policy of treating picketing any differently than, say, leafletting.²⁵⁶

It is difficult to escape the feeling that opposition to consumer picketing sprang as much from disapproval of boycotts in general as from any of these assumptions. Boycotts are just not things that nice people do; they must be tolerated, if at all, only because of first amendment considerations. Indeed, it is obvious from the legislative history that consumer boycotts would probably have been outlawed altogether in 1959 were it not for this constitutional inhibition.²⁵⁷ Assuming this assessment is correct, it is a sad commentary on what little appreciation legislators (and judges) have had for the reasons why boycotts should be permitted, as a positive

²⁵⁴ Justice Stevens, concurring in *Safeco*, seemed to be concerned with this kind of "signalling" effect. See 447 U.S. at 619.

²⁵⁵ Cf., R. GORMAN, LABOR LAW, ch. 10, §§ 5-6; ch. 16, § 7 (1976).

²⁵⁶ The threats, coercion and restraints of § 8(b)(4)(ii)(B) properly refer to pressures experienced by secondary employers or their agents, not consumers. In this sense, picketing probably does result in greater "coercion" against the boycotted business, in large part because the union's message can be transmitted to the potential audience more effectively on signs that can be seen from a distance than by leaflets (which may or may not be accepted or read by shoppers), newspaper advertisements or other publicity not available at the site. But surely Congress did not intend to distinguish between forms of public communication solely on the basis of how well they worked!

²⁵⁷ See *supra* notes 62-72 and accompanying text.

element in national labor policy. Since workers, even when organized, have no control over any ingredient essential to a successful business operation, save their own labor, it would seem that the use of such a democratic forum would be encouraged as a way of permitting public opinion to weigh in the balance in labor disputes. Certainly the public, acting as individuals, should be entitled to choose whether to aid the labor organization or to continue to support those who benefit financially from association with the primary employer. Given a more positive view of the boycott, there would be little reason why properly controlled picketing could not be used for exactly the same kinds of public appeals as other forms of publicity.

The Supreme Court's recent constriction of the producer-distributor relationships that can give rise to lawful boycotts also appears to represent an unnecessary judicial intrusion into labor disputes. First of all, *DeBartolo's* assumption that the publicity proviso implicitly limits the range of permissible secondary boycott targets is certainly not the only possible reading of the statute. Attempts to give the terms "product" and "produces" similarly restrictive meanings, and thus insulate certain categories of primary employers²⁵⁸ from the effect of consumer boycotts, have long since foundered on the inconsistency of such constructions with the well-established understanding that the purpose of the proviso was to protect consumer boycotts generally.²⁵⁸ Given this policy of preserving public appeals as the sole form of legitimate secondary coercion, an equally persuasive interpretation of the product-producer-distributor passage is that it was merely a way of phrasing the publicity exemption in terms of one of the major evils to which subsection 8(b)(4)(ii) was addressed—coercion of stores selling the primary employer's products.²⁵⁹

Even if the Court was correct in its view that Congress wished lines to be drawn between different categories of secondary employers, however, this cannot be done in any coherent fashion. *DeBartolo's* "business relationship/product chain" standard seems to rest upon an evaluation of one or both of the following factors: Whether the secondary's economic interests are aligned closely enough with the primary so that it would be fair to permit it to share the primary's economic suffering; or, whether the relationship is such that the secondary employer would be able to choose between ending it unilaterally, by terminating a contract or dropping a product, or riding out the boycott. Would this standard actually shield employers whose well-being is more remotely connected to the primary, exposing only those with the stronger economic ties? If *Pet* and *DeBartolo* are themselves any indication, the answer is clearly no. The parent corporation and fellow subsidiaries of a primary employer, all of whom are joined in the common pursuit of maximized profits, have a much greater stake in the primary's economic health than would many of the completely independent businesses that simply carry its product or use its services. So too the economic benefits from a primary employer's construction of a store in a shopping mall flow not only to the tenant for whom it is built, but

²⁵⁸ See *supra* text accompanying note 136.

²⁵⁹ See Kramer, *The 8(b)(4) Publicity Proviso and NLRB v. Servette: A Supreme Court Mandate Ignored*, 16 GA. L. REV. 575, 583 (1982).

to the complex owner and other tenants as well. The direct benefits from a general increase in business would presumably be less for the latter businesses than for the occupant. Yet, in any given case, they are likely to be much greater, in terms of total revenue, than the income to a hypothetical retailer from the sale of a primary's product.

The other possible *DeBartolo* rationale for distinguishing between secondary employers—the ease of severing business connections—appears at first blush to make more sense. It would not have been possible for the secondary companies in either *Pet* or *DeBartolo* to end their connection with the primary employer or its “product” simply by terminating a contract with it (direct bilateral contracts did not form the basis for the relationships), or by dropping out of a retail product chain. Nevertheless, in practical terms, none of the circumstances these businesses found themselves in were necessarily any more desperate or less amenable to change than, say, the plight of a licensed retailer whose business is built around the sale of a single manufacturer's products. In all of these instances the cost of severing the perceived connections would doubtlessly greatly exceed the economic damage suffered in a boycott, yet only the product retailer is clearly vulnerable to union pressure.

Forcing the NLRB and the courts to establish these all-or-nothing categories will not regulate the extent of economic harm actually suffered by any given secondary employer, nor apportion injury according to the proximity of the primary and secondary's interests. Neither the Board nor the courts are in a position to gauge the actual results of any given boycott. Success or failure is determined by many factors, including the degree of community support for or opposition to the particular union (or organized labor generally), the availability or absence of alternative products or businesses, and the persuasiveness of the union's appeal, to name but a few. None of these can be accurately assessed before the fact. Perhaps as a result, the Board and the courts make no attempt to do so. Instead their decisions simply postulate a hypothetically successful boycott,²⁶⁰ an exercise bearing no necessary correlation to the level of harm that would have occurred had the boycott gone forward.²⁶¹ To be required to assume, as *Safeco* directs, that “ruin or substantial loss” is reasonably likely to occur simply because picketing is directed at a single product secondarily, or involves a merged product, is to deny the very real possibility that the public might not respond to the appeal, leaving the boycotted business largely unaffected.²⁶²

²⁶⁰ See *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. at 615 (“Since successful secondary picketing would put [the secondary employer] to a choice between survival and the severance of ties with [the primary employer], the picketing plainly violates the statutory ban” (emphasis added)). See also *Kroger Co. v. NLRB*, 647 F.2d 634, 639 (6th Cir. 1980) (“[T]he Board should have restricted its inquiry to the likely result of the Union's appeal if it accomplished its object, a boycott of the Duro bags.”).

²⁶¹ It must be borne in mind that, under § 10(l) of the NLRA, 29 U.S.C. § 160(l)(1976), the regional attorney is required to seek an injunction if there is “reasonable cause to believe such charge is true and that a complaint should issue.”

²⁶² See *Kroger Co. v. NLRB*, 647 F.2d 634, 639-42 (Merritt, J., dissenting).

Rather than such speculative inquiries, surely a more even-handed policy would be to entrust the public itself with the power to decide whether, or the extent to which, the union's boycott request should be honored. Assuming shoppers have been accurately informed and have not been subjected to coercion beyond the mere presence of union members seeking their support, there is every reason to suppose that their response will be governed to an appreciable extent by the degree to which the primary and secondary's interests are perceived to be congruent, or put another way, by the extent of the union's effort to tailor its campaign so as to avoid punishing the innocent.

It makes little sense to institute a boycott without taking these perceptions into account. Appeals to the public represent a significant commitment of prestige on a union's part. Because success depends more on the reasonableness of its position than on its ability to control the behavior of the customers, a union rarely would risk turning public opinion against it by attacking businesses with no easily-understood vested interests in the success of the primary employer.

All that is necessary to effectively regulate consumer boycotts is machinery to insure that the public is neither misled nor actively coerced. To the extent that the law has imposed requirements beyond these it is building fences where the cattle are unlikely to stray.