

July 2015

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## Recommended Citation

Briggs, Heather and Mack, Curtis L. (1984) "Secondary Handbilling: The Need For a New Response," *Akron Law Review*: Vol. 17 : Iss. 2 , Article 3.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol17/iss2/3>

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# SECONDARY HANDBILLING: THE Briggs and Mack: Secondary Handbilling

## NEED FOR A NEW RESPONSE

by

HEATHER BRIGGS\* AND CURTIS L. MACK\*\*

### INTRODUCTION

**S**ECTION 8(b)(4)<sup>1</sup> OF THE National Labor Relations Act (“Act” or “NLRA”) prohibits secondary boycotts. The “publicity proviso” contained in that section, however, clearly exempts from that prohibition the dissemination to the public of information that a product is generated by an employer with whom it is engaged in a labor dispute.<sup>2</sup> Because of this proviso, unions engaged in labor disputes have, with increasing frequency, resorted to the distribution of handbills to customers, consumers and the general public which, although naming the primary employer with whom it has the dispute, arguably are aimed at forcing the secondary or neutral employer to cease doing business with the primary employer. As long as these handbills are informational in nature, truthful in content, and sufficiently clear in their identification of the primary employer, their distribution has not been considered an unfair labor practice by the National Labor Relations Board. In this regard, the seminal cases of

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<sup>1</sup>29 U.S.C. § 158(b)(4) (1976).

<sup>2</sup>Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. § 158(b)(4)(ii)(B) (1976), prohibits threats, coercion, and restraint of persons engaged in commerce to force or require them to cease doing business with any other person. The “publicity proviso” to section 8(b)(4), however, exempts from the proscribed conduct a class of activities which would otherwise be prohibited. Section 8(b)(4)(ii)(B) provides in pertinent part:

[i]t shall be an unfair labor practice for a labor organization or its agents . . .

(4)(ii) to threaten, coerce or retrain any person engaged in commerce or in an industry affecting commerce, where . . . an objective thereof is

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where no otherwise unlawful, any primary strike or primary picketing . . . *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity other than picketing, for the purpose of truthfully advising the public, including consumers and members of 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 . . . .

*NLRB v. Servette, Inc.*,<sup>3</sup> *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*,<sup>4</sup> and *NLRB v. Retail Store Employees Union, Local 1001*,<sup>5</sup> are decisive. However, when the language in the handbills goes beyond identifying the nature of the primary dispute or when there is some other corporate or business relationship between the primary employer and the allegedly "secondary" employer, disputes have arisen regarding what conduct is protected by the Act.

Furthermore, in *Edward J. DeBartolo Corp. v. NLRB*,<sup>6</sup> the United States Supreme Court recently severely limited the Board's traditional broad definition of a "producer" or primary employer, thereby resolving one conflict among the circuit courts of appeals<sup>7</sup> regarding this most convoluted section of the Act. While the Court's decision in *DeBartolo* is enlightening, it does not remove all ambiguity from the area of secondary handbilling. The remaining ambiguity stems from a statutory distinction between picketing and handbilling created because Congress considered handbilling to be an ineffective weapon against a primary employer. If that premise is not true, what remedies are available to an employer to relieve the effects of adverse handbilling? This article will examine both the reasoning between the two diverging lines of cases regarding secondary handbilling and picketing, and the possible avenues of relief which might be available to the neutral employer that finds itself caught in the crossfire of a labor dispute.

## I. BACKGROUND

Prior to 1959, section 8(b)(4) of the NLRA prohibited the inducement of "the employees of any employer to engage in a strike or concerted refusal . . . to . . . handle . . . any goods . . ." of a primary employer.<sup>8</sup> Both NLRB and court decisions interpreted this language as creating three major loopholes with regard to the application of this section.<sup>9</sup> First of all, it was noted that only the inducement of "employees of employers" was prohibited.<sup>10</sup> Since section 2(2)<sup>11</sup> of the NLRA excludes from the definition of "employer" all federal and state governments and their agencies who are subdivisions, non-profit

<sup>3</sup>337 U.S. 46 (1964).

<sup>4</sup>377 U.S. 58 (1964).

<sup>5</sup>447 U.S. 607 (1980).

<sup>6</sup>103 S.Ct. 2926 (1983).

<sup>7</sup>*Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981); *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *vacated*, 103 S.Ct. 2926 (1983).

<sup>8</sup>See generally, the Court's painstaking review of the legislative history in *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760* (Tree Fruits), 377 U.S. 58 (1964).

<sup>9</sup>*NLRB v. Servette*, 377 U.S. at 51.

<sup>10</sup>*Id.* at 51. The court observed that "it was permissible for a union to induce work stoppages by [low-level] supervisors, . . . railway or public employees." See *FerroCo Corp.*, 102 N.L.R.B. 1660 (supervisors); *Arkansas Express, Inc.*, 92 N.L.R.B. 255 (supervisors); *W. T. Smith Lumber Co.*, 116 N.L.R.B. 1756, *enforcement denied* 246 F.2d 129, 132 (5th Cir. 1957) (railway employees); *Paper Makers Importing Co., Inc.*, 116 N.L.R.B. 267 (municipal employees).

<sup>11</sup>29 U.S.C. § 152(2) (1976).

hospitals, and employers subject to the Railway Labor Act, inducement of employees of these entities was not prohibited. Similarly, section 2(3)<sup>12</sup> excludes from the definition of "employee" all agricultural laborers, supervisors, and employees of an employer subject to the Railway Act. Accordingly, coercion of these individuals was not proscribed. Finally, it was noted that only inducement to engage in a strike or "concerted" refusal to handle goods was prohibited. This was interpreted to mean that the inducement must be directed at two or more employees in order for a violation of section 8(b)(4) to occur.<sup>13</sup>

Congress amended section 8(b)(4) in 1959 in an attempt to eliminate these loopholes. Specifically, Congress replaced the phrase "employees of employers" with the phrase "any individual employed by any persons" and removed the word "concerted." These amendments were intended to bring all persons not within the definitions of "employee" and "employer" within the scope of section 8(b)(4) and to indicate that coercion of even one person also was prohibited.<sup>14</sup>

The legislative history makes it clear that Congress did not intend to prohibit all union activity at a secondary site. To the contrary, the history shows that Congress was following its usual practice of legislating against peaceful picketing only to the extent necessary to curb "isolated evils."<sup>15</sup> It was not until 1964, however, that the Supreme Court had an opportunity to review the legislative history of section 8(b)(4) and begin defining the boundaries of the secondary boycott prohibition. At that time, the Court issued two decisions which have served as the starting point for all subsequent secondary boycott cases: *NLRB v. Servette, Inc.*,<sup>16</sup> and *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760* ("Tree Fruits").<sup>17</sup>

In *Servette*, a union which had a dispute with a food wholesaler sought to bring pressure at the retail level. It asked managers of food chain supermarkets not to buy from the wholesaler. When this request was denied the union distributed handbills asking shoppers not to buy named items originating

<sup>12</sup>29 U.S.C. § 152(3) (1976).

<sup>13</sup>See *Joliet Contractors Ass'n. v. NLRB*, 202 F.2d 606, 612 (7th Cir. 1952), cert. denied, 346 U.S. 824 (1953); cf. *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 671 (1951).

<sup>14</sup>See § 503(a) of S.748, I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 142.

<sup>15</sup>Indeed, Senator John F. Kennedy, who presided over the Committee on Education and Labor and was the driving force behind passage of the amendments, stated during the Senate debate:

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

105 CONG. REC. 17898-99 reprinted in 2 LEGIS. HIST. 1432. See also remarks to the House by Representative Thompson, 105 CONG. REC. 18133-34 reprinted in 2 LEGIS. HIST. 1720-21.

<sup>16</sup>377 U.S. 46 (1964).

<sup>17</sup>377 U.S. 58 (1964).

from the wholesaler. The Court held that the coercion was secondary because the items on the supermarket shelves were products produced by the wholesaler. The union's requests made to the managers were not, however, inducements to "any individual employed by any person" within section 8(b)(4)(i) because the union was not asking them to refuse to perform any work, but to make a managerial decision not to handle the struck product.<sup>18</sup> Nor were the union's actions prohibited by section 8(b)(4)(ii), since that subsection only proscribed union conduct with "threaten[ed], coerce[d] or restrain[ed]." Here there was only a request to management. That request was not deemed to have been escalated into coercion and restraint by the handbilling, because it was protected under the publicity proviso.<sup>19</sup>

In *Tree Fruits*, the union, in support of a strike against fruit packers and warehousemen, picketed the consumer entrances of supermarkets which continued to sell fruit handled by non-union packers. The picketing was carefully circumscribed — in its text, timing and location — so as to appeal to customers not to buy Washington State apples, rather than not to patronize the supermarket at all. A divided Court sustained the legality of such consumer picketing. A most thorough review of the legislative history by the Court provided some support for the supermarkets' argument that Congress, in outlawing the exertion of pressure against neutrals, intended to outlaw all consumer picketing at secondary sites, regardless of whether it takes the form of an appeal not to patronize at all or simply not to buy the struck product.<sup>20</sup> The Court refused, however, in light of the first amendment to the United States Constitution and of section 13 of the Labor Act to read the congressional intent so broadly.<sup>21</sup> Rather, the majority held that consumer picketing to "coerce" the neutral employer violated section 8(b)(4)(ii) only if it appealed to customers to boycott the distributor or user of the product completely.<sup>22</sup> A consumer appeal limited to only the struck product was held to be akin to a primary appeal and to have an impact on the secondary's business limited to the decline in sales of the struck goods. While this interpretation resolved the case at hand, it gave rise to the spectre of a case in which the secondary employer handled the goods of the primary employer almost exclusively, with the result that an appeal limited to the struck goods sold by the secondary employer would in fact destroy the neutral employer's business altogether.<sup>23</sup>

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<sup>18</sup>*Servette*, 377 U.S. at 54.

<sup>19</sup>*Id.*

<sup>20</sup>*Tree Fruits*, 377 U.S. at 70-71.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* at 72.

<sup>23</sup>See *Id.* at 83 (Harlan and Stewart JJ., *dissenting*), where it is hypothesized:

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 or 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.

*Id.*

Some years later, the exact case which the dissenting justices had feared in *Tree Fruits* arose: *Steelworkers, Local 14055 v. National Labor Relations Board*, (“Dow Chem. Company”).<sup>24</sup> In that case, the Steelworkers had a dispute with the Bay Refining Division of the Dow Chemical Company, which sold Bay Gas to service stations which in turn derived between fifty and ninety-eight percent of their revenue from the sale of such gasoline to their customers.<sup>25</sup> The union picketed at the service stations, appealing to customers not to buy Bay gas or not to buy gasoline at all. There was no interruption, however, of the services of employees or of deliveries or pickups.

The NLRB found that the union’s product picketing at the service stations violated section 8(b)(4)(ii)(B).<sup>26</sup> It distinguished *Tree Fruits*, where the boycotted apples had constituted an insubstantial part of the supermarkets’ business, since a successful consumer boycott of the Bay gas would have the predictable effect of closing down the service stations completely. The Court of Appeals for the Fifth Circuit denied enforcement of the NLRB decision. While acknowledging that several of the gas stations would be forced out of business because they sold only Bay products, the court nonetheless reasoned that the Supreme Court’s acceptance of the picketing in *Tree Fruits* was not based on the insubstantiality of the economic impact on the neutral supermarkets, but rather upon the fact that the picketing induced a boycott which was limited to the struck product, as opposed to the business of the neutral employer.

Even though the Fifth Circuit gave its support to product picketing in circumstances where the secondary employer dealt almost exclusively with one product, the court also gave its support to a line of Board and court cases in which it had been held unlawful to aim consumer appeals at goods manufactured or supplied by the primary employer which became so “merged” into the goods or services of the secondary employer as to be inseparable, thereby converting a boycott of the primary’s goods or services in substance into a total boycott of the secondary employer.<sup>27</sup> The leading, and most illustrative, case in this area is *American Bread Company v. NLRB*.<sup>28</sup> In *American Bread*, the Court of Appeals for the Sixth Circuit affirmed the ruling of the National Labor Relations Board that a union appeal for a boycott of a retail establishment aimed at one product in fact served as an appeal to boycott the restaurant and not just a particular product.<sup>29</sup> The union had a dispute with the American

<sup>24</sup>211 N.L.R.B. 649 (1974) *enforcement denied*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *complaint dismissed on remand for mootness*, 229 N.L.R.B. 302 (1977).

<sup>25</sup>*Id.* at 649-50.

<sup>26</sup>*Id.* at 650-52.

<sup>27</sup>*Dow Chemical Company*, 524 F.2d at 860 (*citing and distinguishing* Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952 (D.C. Cir. 1968) and *American Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969)).

<sup>28</sup>411 F.2d 147 (6th Cir. 1969).

<sup>29</sup>The Board’s decisions are reported at 170 N.L.R.B. 91 (1968) *enforced in part sub. nom.* *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969), and 170 N.L.R.B. 85 (1968), *enforced in part sub nom.* *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969).

Bread Company which supplied bread and bread products to various restaurants. The Board held that these restaurants

purchased the Employer's bread and used it in the preparation of the meals that they dispense to their customers. Neither of these establishments retails the bread except as part of a meal served for consumption on the premises and a customer is hardly in a position to choose the brand of bread he will consume, as a customer in a retail store is able to do. The customer in the restaurant either takes the meal as offered, or goes elsewhere for a meal. Thus, it appears that the bread, like any other food-stuff purchased by a restaurant, loses its identity when served, and becomes a part of the restaurant's product which is offered to its customers.<sup>30</sup>

*American Bread*, therefore, appeared to restrict the Supreme Court's holdings in *Tree Fruits* and *Servette*. Furthermore, in *NLRB v. Retail Store Employees Union, Local 1001* ("Safeco"),<sup>31</sup> the Supreme Court held, in effect, that the picketing which *Tree Fruits* had struggled to authorize might be prohibited if it proved *too* successful. *Safeco* involved a primary dispute between the retail clerks and the Safeco Title Insurance Company. The retail clerks picketed five neutral title insurance companies, each of which derived more than ninety percent of its revenues from the sale of Safeco insurance policies. A successful consumer boycott of the Safeco policies would certainly have had a profound effect on their ability to survive. Drawing a distinction from *Tree Fruits* based solely on these circumstances, the Court, as had the Board, found the picketing to violate section 8(b)(4)(ii)(B). The Court ruled that "[s]ince successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco, the picketing plainly violates the statutory ban on the coercion of neutrals."<sup>32</sup>

Critics of the *Safeco* decision have pointed out that nothing in the legislative history of section 8(b)(4) suggests that Congress intended to draw any distinctions based on the level of injury suffered by the secondary employer.<sup>33</sup> Moreover, the decision ignores the realities of secondary boycotts by making the critical distinction between lawfulness and unlawfulness turn upon the secondary employer's choice between ruin and termination of its relationship with the primary employer.<sup>34</sup> As a result of *Safeco*, the Board and the courts have been left to draw often minute distinctions between permissible product boycott picketing under *Tree Fruits* and the prohibited picketing under *Safeco*.

<sup>30</sup>170 N.L.R.B. at 93. See also *NLRB v. Retail Store Employees Union (Safeco)*, 447 U.S. 607 (1980); *K & K Construction Co. v. NLRB*, 592 F.2d 1228 (3d Cir. 1979); Note, *Consumer Picketing and the Single-Product Secondary Employer*, 47 U. CHI. L. REV. 112, 132-136 (1979).

<sup>31</sup>447 U.S. 607 (1980).

<sup>32</sup>*Id.* at 615.

<sup>33</sup>See Zimmerman, *The Changing Arsenal of Economic Weapons: Consequences for Section 8(b)(4), the Board and the Courts*, 107 LAB. REL. REP. 173 (BNA LAB. REL. Y.B., June 1981).

<sup>34</sup>See the Court's statement in *Tree Fruits* that where the union's activities depress the secondary employer's business, "the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer" (footnote omitted). 377 U.S. at 72.

*Safeco* is interesting for one more point. Justice Stephens wrote a separate opinion concurring in part and concurring in the result wherein he quoted Justice Douglas' opinion in *Bakery Drivers v. Wohl*<sup>35</sup>:

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.<sup>36</sup>

After quoting Justice Douglas, Stephens observed, "[i]ndeed, no doubt the principle reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea."<sup>37</sup> This single statement represents what the authors suggest is the false premise underlying both the Court's handling of secondary handbilling cases and congressional intent in the drafting of the 1959 amendments — that non-picketing secondary activities are relatively ineffective against a primary employer and, therefore, that secondary employers have no need of insulation from its effects.

## II. PET, INC. AND DEBARTOLO

In the case of *United Steelworkers* ("Pet, Inc.")<sup>38</sup> the Board continued its twenty year history of protecting non-picketing secondary consumer boycott activities by the use of an imaginative interpretation of the term "produced." Pet, Inc. was a "billion-dollar conglomerate enterprise with plants and retail stores located throughout the United States." It consisted of twenty-seven independent operating divisions, each engaged in a separate and distinct line of business.<sup>39</sup> The Steelworkers represented approximately 1,500 employees at one of Pet's many operating divisions, the Hussmann Refrigerator Company. When the contract between Hussmann and the union expired on May 1, 1977 the employees commenced an economic strike. The union called for a national boycott of Pet and all of its subsidiaries and consumers were urged to boycott all retail stores owned by Pet. They were requested not to purchase any product on a list of seventeen brand name food products, all of which were manufactured by divisions of Pet other than Hussmann. These boycott requests were made through radio and television broadcasts, newspaper advertisements, and handbilling on the streets of St. Louis and University City, Missouri and O'Fallon, Illinois. The handbilling "was not accompanied by any picketing and patrolling, and it was not conducted in the vicinity of any establishments owned by Pet Inc., or selling Pet products."<sup>40</sup>

<sup>35</sup>315 U.S. 769 (1942).

<sup>37</sup>*Id.*

<sup>38</sup>*United Steelworkers (Pet, Inc.)*, 244 N.L.R.B. 96, *enforcement denied sub nom. Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

<sup>39</sup>*Id.* at 97.

<sup>40</sup>*Id.* at 99.



The General Counsel argued at the publicity had the illegal effect of inducing consumers to cease doing business with Pet and its subsidiaries and divisions, with the intended consequences of causing a diminution of business between Pet's divisions and their suppliers and distributors, and cessation of business among the various divisions of Pet. The General Counsel also argued that finding the Steelworker's publicity activities "unprotected by the publicity proviso would not be an unconstitutional abridgment of free speech."<sup>41</sup> The Board, however, dismissed the complaint in its entirety. It held that the hand-billing and other consumer boycott activities were protected by the publicity proviso.<sup>42</sup> In order to reach this result, the Board engaged in some logistical gymnastics. Rather than holding that Hussmann should be treated as a separate person within the meaning of section 8(b)(4), as had heretofore appeared to be a well-established principle,<sup>43</sup> the Board found that Hussmann made valuable contributions to Pet and therefore became a producer of the other subsidiaries' products.<sup>44</sup>

On petition for review by Pet, the Eighth Circuit Court of Appeals reversed the Board's decision on two grounds. It held that the Board's interpretation of the words "don't produce" was "unreasonable" and "totally at odds with any normal interpretation of the word 'produce.'" <sup>45</sup> The court also rejected the Board's reliance on the Supreme Court's decision in *Servette*.<sup>46</sup> It distinguished *Servette* by noting that there the Supreme Court had not been considering a case in which the primary's products were unrelated to the parent's products.<sup>47</sup>

Shortly thereafter, the Board was faced with a similar issue regarding secondary handbilling in *Florida Gulf Coast Building Trades Council* ("Edward J. DeBartolo Corp.").<sup>48</sup> The DeBartolo Corporation owned a shopping mall. Wilson Department stores was one of its tenants. Wilson employed High Construction Company to build its new facility at the mall. The lease agreement between DeBartolo and Wilson provided that neither DeBartolo nor any of the other tenants had any right to control the manner in which High discharged its contractual obligation to Wilson. Thereafter, the Building Trades Council handbilled the four entrances to the mall, asserting that Wilson was not paying High's employees fair wages and fringe benefits. The handbills themselves failed to identify High or Wilson as the primary employers; rather, they named

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<sup>41</sup>*Id.*

<sup>42</sup>*Id.* at 102.

<sup>43</sup>Los Angeles Newspaper Guild, Local 69 (The Hearst Corp.), 185 N.L.R.B. 303 (1970), *enf'd* 443 F.2d 1173 (9th Cir. 1971), *cert. denied* 404 U.S. 1018 (1972).

<sup>44</sup>244 N.L.R.B. at 101.

<sup>45</sup>641 F.2d at 549.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>242 N.L.R.B. 702 (1980), *enf'd sub. nom.* Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264 (4th Cir. 1981), *vacated* 103 S.Ct. 2926 (1983).

Edward J. DeBartolo Corporation as the mall owner and said that the stores were being built by contractors that were paying substandard wages. DeBartolo then filed an unfair labor practice charge with the Board alleging a violation of section 8(b)(4).

The Board concluded that the handbilling was exempt from the proscription of the Act because of the publicity proviso and dismissed the complaint.<sup>49</sup> The Court of Appeals for the Fourth Circuit agreed with the Board's finding that there was a symbiotic relationship between DeBartolo and its tenants, including Wilson, and that they would all derive a substantial benefit from the product that High was constructing. The court concluded that High's status as a producer brought the total consumer boycott of the shopping center, urged by the handbills, within the protection of the publicity proviso. This conclusion was in direct conflict with the conclusion reached by the Eighth Circuit in *Pet, Inc.*

In reversing the Fourth Circuit's decision in *DeBartolo*, the Supreme Court rejected the traditional broad interpretation which the Board had given to the publicity proviso. The Court held that "[t]he only publicity exempted from the [secondary boycott] prohibition is publicity intended to inform the public that the primary employer's product is 'distributed by' the secondary employer."<sup>50</sup> The Court expressly rejected the theory that there was a "symbiotic relationship" between the primary employer and DeBartolo or Wilson. It said:

[T]hat form of analysis would almost strip the distribution requirement of its limiting effect. It diverts the inquiry away from the relationship between the primary and secondary employers and toward the relationship between two secondary employers. It then tests 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.<sup>51</sup>

In place of the Board's broad interpretation, the Court adopted a much more straightforward analysis and reasoned that since neither DeBartolo nor any other tenants had any business relationship with High and they did not sell any products whose chain of production could reasonably be said to include High, the union's publicity could not fall within the publicity proviso.

In *DeBartolo*, the Supreme Court did not reach the constitutional issue presented by the facts. On that point, the Court noted that the Board had not yet decided whether the handbilling was in fact proscribed by the Act.<sup>52</sup> It had

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<sup>49</sup>*Id.* at 705. See also *Central Indiana Bldg. Trades Council (K-Mart Corp.)*, 257 N.L.R.B. 86 (1981), where the Board relied on *DeBartolo* to dismiss the complaint in a similar construction industry case involving section 8(b)(4)(ii)(B) and the publicity proviso.

<sup>50</sup>103 S.Ct. at 2932 (1983).

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 2933.

rested its decision on the publicity proviso and failed to consider, apart from that proviso, whether the union's conduct fell within the terms of section 8(b)(4)(ii)(B). The Court concluded, therefore, that it was premature to address the constitutional question.<sup>53</sup> In any event, the Court in *DeBartolo* made a strong statement that it was no longer going to tolerate the denial of NLRA protections to neutral employers because of the convoluted and, indeed, strained interpretation of the term "producer" propounded by the Board.

### III. WHAT IS UNPROTECTED?

If the publicity proviso in section 8(b)(4) gives unions a limited right to truthfully advise the public that a product generated by an employer with whom the union has a dispute is distributed by another employer, it is essential to define the limitations of that right. As discussed above, the basis for the statute was a congressional concern that neutral third-party employers not become embroiled in labor disputes not their own.<sup>54</sup> Thus, it is essential that the line between lawfulness and unlawfulness be as clearly defined as possible to ensure that neutral employers are able to avail themselves of the Act's protection before incurring substantial losses. In *Delta Airlines*,<sup>55</sup> the Board ruled that publicity was entitled to the protection of the proviso if it met the following requirements:

1. The publicity must convey truthful information to the public;
2. The publicity must clearly identify the primary employer and the nature of the primary dispute; and,
3. The publicity must be intended for the purpose of advising the public that "a product or products is produced by an employer with whom the labor organization has a primary dispute and distributed by another employer."<sup>56</sup>

After delineating the scope of the proviso in *Delta Airlines*, the Board held that the union handbill under scrutiny was not entitled to the protection of the proviso because it contained coercive matters which attacked "the secondary employer for reasons unrelated to the labor dispute."<sup>57</sup> Moreover, the majority expressly adopted Board member Jenkins' more detailed and expansive conclusion that the proviso protects only publicity which informs the public that a product is produced by an employer with whom the union has a dispute.<sup>58</sup> In rejecting the union's claim that the proviso protected its right to disseminate information that was harmful to the secondary employer, member Jenkins con-

<sup>53</sup>*Id.* For a full discussion of the constitutional issues see Mack and Lieberwitz, *Secondary Consumer Picketing: The First Amendment Question Remains*, 32 *MERCER L. REV.* 815 (1981).

<sup>54</sup>*NLRB v. Local 825, Int'l. Union of Operating Engineers*, 400 U.S. 297, 302 (1971).

<sup>55</sup>263 N.L.R.B. 153, 111 L.R.R.M. 1159 (1982). In *Delta Airlines*, the neutral airline company claimed that CAB accident and consumer complaint records published in union handbills were factual, but misleading because they tended to imply that Delta was not a safe airline. The Board refused to rule on this contention only because Delta failed to present any evidence in support of its position.

<sup>56</sup>111 L.R.R.M. at 1161.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.* at n.9.

cluded that handbills which contain coercive statements wholly unrelated to the labor dispute in question and which are included for the sole purpose of injuring a neutral employer are not entitled to the protection of the proviso.<sup>59</sup>

For purposes of the proviso, publicity is considered truthful if “there is no evidence of an intent to deceive and there has not been a substantial departure from fact . . . .”<sup>60</sup> In applying the truthfulness requirement, however, the Board has not mandated that handbills and other publicity be one hundred percent accurate. Communications that are false and immaterial do not offend the policy of the proviso because they are normally not coercive.<sup>61</sup> Nonetheless, if handbills are not substantially truthful, they will not qualify for the exemption provided by the publicity proviso.<sup>62</sup>

A seminal case in this area is *International Bhd. of Teamsters Local 531* (“Lohman”)<sup>63</sup>. In *Lohman*, the Board explicitly recognized that untruthful and deceitful handbills were not entitled to the protection of the publicity proviso. The Board, however, did not find a violation of section 8(b)(4) of the Act because there was no evidence that the union intended to deceive the public.<sup>64</sup> Although the leaflets in that case contained some inaccurate information,<sup>65</sup> the Board concluded that the false publicity did not substantially depart from the truth. With respect to determining intent, the Board placed significant emphasis on the fact that the union promptly revised its handbills after receiving notification that they were not completely accurate. Conversely, in *Hoffman v. Cement Masons Union Local 337*,<sup>66</sup> the Court of Appeals for the Ninth Circuit affirmed the Board’s decision that false claims made with knowledge of or reckless disregard for the truth are not protected by the publicity proviso.<sup>67</sup> In *Hoffman*, the union requested consumers not to buy homes owned by the secondary employer but built by a general contractor named Whitney. The request was communicated by “a sign and handbill method of appeal rather than traditional sign-only picketing.”<sup>68</sup> The court said that the union’s conduct, if

<sup>59</sup>*Id.* at 1165.

<sup>60</sup>*International Bhd. of Teamsters Local 531*, 132 N.L.R.B. 901, 906 (1961). Moreover, false and reckless statements are not protected by the proviso because they are actionable under state libel and defamation laws. See, e.g., *Letter Carriers v. Austin*, 86 L.R.R.M. 2740 (S.C. 1974); *Hasbrouck v. Sheet Metal Workers*, 586 F.2d 691 (9th Cir. 1978).

<sup>61</sup>*Local 248, Meat and Allied Food Workers, A/W Meat Cutters (Service Food Stores, Inc.)*, 230 N.L.R.B. 189 (1977); *International Bhd. of Teamsters Local 531*, 132 N.L.R.B. 901 (1961).

<sup>62</sup>*Pet, Inc.*, 244 N.L.R.B. 96, *enforcement denied sub. nom. Pet, Inc. v. NLRB*, 641 F.2d 454 (8th Cir. 1981); *Plumbers, Steamfitters & Pipefitters Local 155 (The Kroger Company)*, 195 N.L.R.B. 900 (1972); *Cement Masons Union Local 337, Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, AFL-CIO (California Association of Employers)*, 190 N.L.R.B. 261, (1971), *aff’d. sub. nom. Hoffman v. Cement Masons*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied* 411 U.S. 986 (1972).

<sup>63</sup>132 N.L.R.B. 901 (1961).

<sup>64</sup>132 N.L.R.B. at 907.

<sup>65</sup>*Id.*

<sup>66</sup>468 F.2d 1187 (9th Cir. 1972).

<sup>67</sup>468 F.2d at 1191.

<sup>68</sup>*Id.*

effective, would result in coercing Shuler to cease doing business with Whitney — conduct proscribed by the statute.<sup>69</sup> More importantly, the court also stated that

the mere use of a handbill does not convert its action into unsanctioned “publicity, other than picketing, for the purpose of truthfully advising the public” that the product is a subject of dispute. The sign simply referred to the handbill, which stated the Union’s message. We have no difficulty agreeing with the Board that this was picketing. But even if it were not, the Board also found, on conflicting evidence, that the Union’s false claims were made “with knowledge of, or reckless disregard for, the truth,” because Whitney’s wages were not in fact below union standards, a fact which the Union did not attempt to discover. The publicity exception of the statute does not apply.<sup>70</sup>

Thus, while the Act technically provides a remedy for neutral employers where the union’s message falls outside the protection of the proviso, the employer may encounter difficulty in actually having a complaint issued by the General Counsel. This might be the result of insufficient evidence, a misinterpretation of the employer’s status as discussed above or any of a myriad of problems that often arise in an administrative process. Additionally, the remedy afforded by the administrative proceeding may be unsatisfactory to the employer’s needs. While the Board can enjoin the union’s secondary activities,<sup>71</sup> it can neither award damages nor impose a penalty.<sup>72</sup> Accordingly, state law remedies designed to compensate the victim may be a more advantageous alternative avenue of recourse to the injured secondary employer.

#### IV. ALTERNATIVE REMEDIES

Until the Supreme Court’s recent decision in *Bill Johnson’s Restaurants v. NLRB*,<sup>73</sup> state law remedies were not readily available to employers. Prior to this decision, the Board had ruled that it was an unfair labor practice for an employer to institute a civil lawsuit for the purpose of penalizing or discouraging employees from filing charges with the Board, seeking access to the Board’s processes or otherwise engaging in protected activities.<sup>74</sup>

The first case in this area was *W. T. Carter and Bros.*,<sup>75</sup> where the Board rejected an employer’s argument that obtaining a state court injunction to bar

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>29 U.S.C. § 160(1) (1976).

<sup>72</sup>*Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966).

<sup>73</sup>249 N.L.R.B. 115 (1980), *enfd.*, 660 F.2d 1335 (9th Cir. 1981), *vacated and remanded* 103 S.Ct. 2161 (1983).

<sup>74</sup>*Power Systems, Inc.*, 239 N.L.R.B. 445, 449-50 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979). For a full discussion of the preemption doctrine see Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

<sup>75</sup>90 N.L.R.B. 2020, 2023-24 (1950).

employees from holding union meetings on company property was “a lawful exercise of a basic right.”<sup>76</sup> *W. T. Carter* was overruled ten years later in *Clyde Taylor Co.*,<sup>77</sup> where the Board agreed with Chairman Herzog’s dissent in *Carter*<sup>78</sup> that an employer has a right to judicial recourse even if its motive was to interfere with employees’ rights. This right was restricted, however, by the Board’s decision<sup>79</sup> in *Power Systems, Inc.*<sup>80</sup> in 1977. In *Power Systems* the Board, upon concluding that the employer had “no reasonable basis for [his] lawsuit” noted that “the lawsuit had as its purpose the unlawful objective of penalizing [the employee] for filing a charge with the Board.”<sup>81</sup>

The *Bill Johnson* case arose after the employer discharged one of its waitresses. She filed an unfair labor practice charge alleging that she had been discharged because of her attempts to organize her fellow employees. On the same day, the waitress, Myrland Helton, and other individuals picketed the restaurant. The picket signs accused management of making “unwarranted sexual advances” and maintaining a “filthy restroom for women employees.” Four days later, the restaurant filed an action in an Arizona state court alleging that employees and others had engaged in mass picketing, harassed customers, blocked public ingress and egress and threatened public safety. The complaint also alleged libel and tortious interference with business. Helton then filed a second unfair labor practice charge, alleging that the state action was in retaliation for her protected activities. The unfair labor practice charges were consolidated for hearing, after which the Administrative Law Judge concluded that the employer lacked “a reasonable basis upon which to assert” a state claim and was therefore in violation of the Act. The employer was ordered to withdraw its state-court complaint. The Court of Appeals for the Ninth Circuit enforced the Board’s order<sup>82</sup> and the employer sought certiorari, urging that the Board could not lawfully enjoin it from maintaining its state action.

The Supreme Court granted certiorari<sup>83</sup> and found for the employer.<sup>84</sup> The Court stated that the Board’s purported distinction of *Clyde Taylor* and its progeny, based upon the conclusion that the lawsuits in those cases were not “a tactic calculated to restrain employees in the exercise of their rights under

<sup>76</sup>90 N.L.R.B. at 2025.

<sup>77</sup>127 N.L.R.B. 103, 109 (1960).

<sup>78</sup>90 N.L.R.B. at 2029.

<sup>79</sup>*Compare*, *Peddie Bldgs.*, 203 N.L.R.B. 265 (1973) *enforcement denied on other grounds* NLRB v. *Visceglia*, 498 F.2d 43 (3d Cir. 1973); and *United Aircraft Corp. (Pratt & Whitney Division)*, 192 N.L.R.B. 382 (1971), *modified sub. nom.* *Lodges 743 and 1746 Int’l. Ass’n. of Machinists and Aerospace Workers v. United Aircraft Corp.* 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976); *with, e.g.*, *International Organization of Masters, Mates and Pilots*, 224 N.L.R.B. 1626 (1976), *enf’d.* 188 U.S. App. D.C. 15, 575 F.2d 896 (D.C. Cir. 1978).

<sup>80</sup>239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979).

<sup>81</sup>239 N.L.R.B. at 450.

<sup>82</sup>660 F.2d 1335 (9th Cir. 1981).

<sup>83</sup>103 S.Ct. 253 (1982).

<sup>84</sup>103 S.Ct. 2161 (1983).

the Act,"<sup>85</sup> was an "illusory" one.<sup>86</sup> The Court concluded:

Considering the First Amendment right of access to the courts and the State interests identified in cases such as *Linn* and *Farmer*, however, we conclude that the Board's interpretation of the Act is untenable. The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.<sup>87</sup>

The Court ruled equally clearly, however, that "it is an enjoined unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA."<sup>88</sup>

The most interesting part of *Bill Johnson's* is the Court's statement concerning the steps the Board may take in evaluating whether a state-court suit lacks the requisite basis. Contrary to all precedent, the Court ruled that if a "state plaintiff is able to present the Board with evidence that shows his lawsuit raises genuine issues of material fact, the Board should proceed no further with the Section 8(a)(1) - 8(a)(4) unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded."<sup>89</sup> Indeed, it reasoned, "the State's interest in protecting the health and welfare of its citizens, leads us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge."<sup>90</sup>

Through its decision in *Bill Johnson's*, the Supreme Court removed the biggest roadblock to employers seeking state remedies: the possible chilling effect such suits would have on employees' section 7 rights. Clearly, the Board has not been pleased with the Court's decision in this case. In response to the decision, member Fanning has said that an employee is likely to "think twice before running to the Board" with an unfair labor practice charge and that he doubted that any Board remedy following an employer's suit would be very effective.<sup>91</sup> It has also been pointed out, however, that the Court's decision leaves an employee free to pursue alternative remedies, such as a suit for malicious prosecution against the employer as well as a NLRB unfair labor practice charge. The Board has also criticized the Court's decision for allowing state courts, which may be subject to influence from large local employers, to make the initial determination regarding whether the employer's suit has a reasonable

<sup>85</sup>239 N.L.R.B. at 449.

<sup>86</sup>103 S.Ct. at 2168.

<sup>87</sup>103 S.Ct. at 2170. The "state interests" identified in *Linn*, 383 U.S. 53 (1966) and *Farmer*, 430 U.S. 290 (1977) were the states' concern with redressing malicious libel and protecting the public health and welfare.

<sup>88</sup>103 S.Ct. at 2171.

<sup>89</sup>*Id.* at 2172 (footnote omitted).

<sup>90</sup>*Id.* at 2171 (footnote omitted).

<sup>91</sup>Remarks of member Fanning to the annual meeting of the District of Columbia Bar, reported at 113 LAB. REL. REP. 181 (BNA, 1983).

basis. This is because the Court logically concluded that if the employer prevails in the state court proceedings he "should also prevail before the Board, for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."<sup>92</sup>

In any event, having had the *Power Systems* "roadblock" removed by *Bill Johnson's*, it is clear that state law remedies are now readily available to employers who are adversely affected by secondary handbilling. These remedies typically include general and punitive damages<sup>93</sup> and, in some states, injunctive relief for tort claims based on libel and slander, defamation or disparagement and tortious interference with business.<sup>94</sup> While it is not the intention of this article to provide a state-by-state analysis of permissible causes of action and remedies, virtually every state provides appropriate relief.<sup>95</sup>

An alternative remedy available to a neutral employer is an action under section 303 of the Labor Management Relations Act,<sup>96</sup> which provides a judicial remedy for injuries to business or property caused by the commission of certain unfair labor practices — without requiring a Board determination that an unfair labor practice has in fact been committed. In effect, section 303 is an alternative not only to a state action in tort but also to the pursuit of an administrative remedy. It is an entirely independent action and an employer may pursue a section 303 remedy and a section 8(b)(4) charge before the Board simultaneously, sequentially, or alternatively.<sup>97</sup> This is important because as a matter of practicality most secondary employers first will turn to the Board for administrative relief and will seek alternative avenues only after the Board has dismissed the employer's unfair labor practice charge.

Prior to 1966, the circuit courts of appeals were split as to whether a finding by the Board that a union had violated section 8(b)(4)(B) or a determination

<sup>92</sup>103 S.Ct. at 2172.

<sup>93</sup>*See, e.g.*, Harber v. Ohio National Life Insurance Co., 390 F. Supp. 678 (E.D. Mo. 1974) *aff'd* 512 F.2d 170 (8th Cir. 1975); Salomon v. Crown Life Ins. Co., 399 F. Supp. 93 (E.D. Mo. 1975), *modified* 536 F.2d 1233, *cert. denied* 429 U.S. 961 (1976).

<sup>94</sup>*See, e.g.*, Esskay Art Galleries v. Gibbs, 172 S.W. 2d 924 (Ark. 1943).

<sup>95</sup>*See generally*, PROSSER, THE LAW OF TORTS (4th Ed. 1971) at 942; Harrison v. AFL-CIO, 452 F. Supp. 102 (E.D. Pa. 1978); Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, 371 Ill. 377, 21 N.E.2d 308, *cert. denied* 308 U.S. 596 (1939).

<sup>96</sup>29 U.S.C. § 187 (1976). Section 303 provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business and property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 187(a)(b) (1976).

<sup>97</sup>*Spancrete Northeast, Inc. v. Int'l. Assoc. of Bridge, Structural and Ornamental Ironworkers*, 514 F. Supp. 326 (N.D.N.Y. 1981) *aff'd* 679 F.2d 874 (2d Cir. 1982); *Int'l. Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).



by a regional director not to issue a complaint could serve as *res judicata* in a subsequent section 303 action. The Supreme Court's decision in *United States v. Utah Construction and Mining*<sup>98</sup> ended the debate by indicating its intention to heavily rely upon administrative determinations. *Utah Construction* involved an administrative hearing before the Atomic Energy Commission. In that case the Court held that where disputed issues of fact are fully litigated by the parties, the administrative determination can constitute *res judicata*.<sup>99</sup> Since *Utah Construction*, cases arising under the NLRA and LMRA have been consistent with the Supreme Court's preference for deferring to administrative determinations where the facts are undisputed. This merely means, however, that the court, before proceeding with the section 303 action, must determine whether the matter was, in fact, "fully litigated" before the Board and whether any substantial factual issue remains to be tried.<sup>100</sup>

Thus, in *International Wire v. IBEW Local 38*,<sup>101</sup> the Sixth Circuit Court of Appeals held that a determination by the full Board, after a trial before an administrative law judge, that the union did not violate section 8(b)(4)(B) was *res judicata* in a subsequent action. Both parties were represented by counsel, presented evidence, and had an opportunity to cross examine witnesses. Therefore, the issue was fully litigated. Conversely, in *Clark Engineering & Const. Co. v. United Brotherhood of Carpenters*,<sup>102</sup> the court determined that the dismissal of a section 8(b)(4)(B) charge filed by the employer, by the regional director and the general counsel, did not constitute a defense which the union could legitimately assert to the section 303 complaint.<sup>103</sup> Thus, even if an employer's section 8(b)(4) charge were dismissed, that dismissal would not bar an action under section 303 and could not be used in evidence in a section 303 action.<sup>104</sup>

The question of who has standing to bring a section 303 action also has been a source of debate. It is clear, however, that a neutral employer, a primary employer, and a third party may be proper parties. In 1952, the Supreme Court held in *United Brick & Clay Workers v. Deena Artware, Inc.*,<sup>105</sup> that a primary employer could maintain a section 303 action against a union for illegal secondary picketing. In the process of making its decision, the Court interpreted

<sup>98</sup>384 U.S. 394 (1966).

<sup>99</sup>*Id.* at 422.

<sup>100</sup>*Tipler v. DuPont Co.*, 443 F.2d 125 (6th Cir. 1971).

<sup>101</sup>475 F.2d 1078 (6th Cir. 1973), *cert. denied* 414 U.S. 867 (1973).

<sup>102</sup>510 F.2d 1075 (6th Cir. 1975).

<sup>103</sup>*See also* Eazor Express, Inc. v. General Teamsters Local 326, 388 F. Supp. 1264 (D. Del. 1975); Paramount Transport Systems v. Chauffeurs, Teamsters & Helpers Local 150, 436 F.2d 1064 (9th Cir. 1971); Jaden Electric v. IBEW, Local Union No. 211, 508 F. Supp. 983 (D. N.J. 1981).

<sup>104</sup>*See* NLRB v. Deena Artware, Inc., 198 F.2d 637 (6th Cir. 1952) *cert. denied*, 345 U.S. 906 (1953) and *United Brick and Clay Workers v. Deena Artware, Inc.*, 198 F.2d 637 (6th Cir. 1952), *cert. denied*, 344 U.S. 897 (1952).

<sup>105</sup>198 F.2d 637 (6th Cir. 1952) *cert. denied* 345 U.S. 906 (1953).

the phrase "Whoever shall be injured" in a highly literal fashion in order to encompass the party with whom the union had the labor dispute.<sup>106</sup>

Based on the same rationale, the Court of Appeals for the Fifth Circuit ruled that even third parties had standing to bring suit. In *W. J. Milner & Co. of Florida v. IBEW, Local 349*,<sup>107</sup> the court held that a third party can recover damages under section 303 if such a plaintiff can establish the existence of some combination of the following circumstances: (1) an integrated business enterprise which includes the third party and either the primary or neutral employer; (2) direct injury to the third party's property; and (3) a principal-agent relationship between the third party and the primary employer.

Section 303(b) also provides that an injured party "shall recover the damages by him sustained and the cost of the suit." Not surprisingly, cases are legion discussing the types of damages which are recoverable. For example, it is undisputed that compensatory damages are recoverable and punitive damages are not.<sup>108</sup> Compensatory damages are the "actual damages proximately caused by union wrongdoing."<sup>109</sup> Allowable compensatory damages have included lost profits from business interruptions,<sup>110</sup> excess labor costs incurred, lost interest income on profits and out-of-pocket expenses from picketing.<sup>111</sup> Damages have also been awarded to compensate an employer for loss of an employee's time where the employee was actively and substantially involved both in trying to stop the illegal action<sup>112</sup> and in subsequent litigation of the matter.<sup>113</sup> Thus, any loss that was proximately and foreseeably caused by the union's activity may be recovered.

Unlike other compensatory damages, the recovery of attorney fees under section 303(b) has been vigorously debated in various district courts. The issues have focused on whether attorney fees may be recovered at all or, if so, for which purposes.<sup>114</sup> For example, the Court of Appeals for the Eighth Circuit has held that attorney fees may not be recovered in a section 303 action for the cost of bringing the action.<sup>115</sup> The Eighth Circuit also has held, however, that attorney fees incurred in achieving the resumption of work may be recovered

<sup>106</sup>See also *Jaden Electric*, 504 F. Supp. 983 (D. N.J. 1981).

<sup>107</sup>476 F.2d 8 (5th Cir. 1973).

<sup>108</sup>*Teamsters, Local 20 v. Morton*, 377 U.S. 252 (1964); *Collier v. Operating Engineers*, 228 Kan. 52, 612 P.2d 150 (Kan. 1980).

<sup>109</sup>*Pickens-Bond Const. v. United Brotherhood of Carpenters*, 586 F.2d 1234 (8th Cir. 1978).

<sup>110</sup>*C & K Coal Co. v. UMW*, 537 F. Supp. 480 (W.D. Pa. 1980), *modified*, 704 F.2d 690 (3d Cir. 1983).

<sup>111</sup>*Kerry Coal Co. v. UMW*, 488 F. Supp. 1080 (W.D. Pa. 1980), *aff'd* 637 F.2d 957 (3d Cir. 1981), *cert. denied* 454 U.S. 823 (1981).

<sup>112</sup>*Capeletti Bros. Inc. v. Local Union 487*, 514 F.2d 1239 (5th Cir. 1975).

<sup>113</sup>*Summit Valley Industries, Inc. v. United Brotherhood of Carpenters*, 475 F. Supp. 665 (D. Mont. 1979), *aff'd* 652 F.2d 65 (9th Cir. 1981), *aff'd* 456 U.S. 717 (1982).

<sup>114</sup>*Compare e.g., Linbeck Const. Corp. v. International Association*, 547 F.2d 948 (5th Cir. 1977) *cert. denied* 434 U.S. 955 (1977) *with Sillman v. Teamsters Local Union 386*, 535 F.2d 1172 (9th Cir. 1976).

<sup>115</sup>*Pickens-Bond Const.*, 586 F.2d 1234 (8th Cir. 1978); *Bryant Air Cond. and Heating Co. v. Sheet Metal Workers' Int'l. Ass'n. Local 541*, 472 F.2d 969 (8th Cir. 1973).

just like any other compensatory damage claim.<sup>116</sup> In effect, these fees are incurred in an attempt to mitigate losses resulting from a work stoppage and are aimed at preserving the enterprise.

In any event, all damages must be proved by a "fair preponderance of the credible evidence."<sup>117</sup> At trial, the damages need not be established with exactitude, but they cannot be sustained by sheer speculation or guess work.<sup>118</sup> Accordingly, any neutral employer considering a section 303 action or engaged in such litigation should keep accurate sales records to substantiate losses due to the union's handbilling activities as well as any additional expenses not ordinarily incurred and which would not have been incurred but for the union's illegal conduct.

### CONCLUSION

The publicity proviso clearly was intended to protect the unions' rights to distribute handbills to the public. As the legislative history reveals, this was a tolerable compromise in light of the other conceded anti-labor provisions contained in the 1959 amendments. The result has been that as long as a union's appeal falls within the judicially decreed boundaries defined above, a secondary employer is virtually powerless under the NLRA to stop it. This is true even though the union's conduct would be prohibited if it made the same appeal through traditional picketing and even though the handbilling does serve, in practical terms, to embroil the secondary employer in a labor dispute not of its own making.

Because of the protections afforded by the proviso, it is suggested that labor organizations will, in the near future, rely more heavily on handbilling to publicize their labor disputes. This is likely to be especially true in industries where the primary employer is relatively unknown but its product is ultimately distributed by companies which are household names and which, accordingly, might be most inclined to avoid such adverse publicity. So long as the handbilling falls within the defined parameters, there will be little that the secondary employer can do to avoid its detrimental effects. Nevertheless, as handbilling acquires greater popularity within the labor movement as an effective economic weapon against primary employers — and it can be, regardless of congressional opinion in 1959 — it is probable that its proponents will be untutored in the intricacies of permissible handbilling. When the inevitable errors are made, state law actions may prove to be not only the most readily available remedies, but the most effective counter-attacks.

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<sup>116</sup>*AGC of Minnesota v. Construction & General Laborers Local No. 563*, 612 F.2d 1060 (8th Cir. 1979), (relying on *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)). See also *Texas Distributors, Inc. v. United Ass'n. of Journeymen & Apprentices of the Plumbing and Pipefitting Industry*, 598 F.2d 393 (5th Cir. 1979); *Sillman v. Teamsters Union Local 386*, 535 F.2d 1172 (9th Cir. 1976).

<sup>117</sup>*Iodice v. Calabrese*, 345 F. Supp. 248 (S.D.N.Y. 1972), modified 512 F.2d 383 (2d Cir. 1975).

<sup>118</sup>*Id.*