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# Retail Store Employees Union Local 1001 v. NLRB (Safeco Title Insurance Co.): Extending Tree Fruits to Protect Picketing of Predominant Product Secondaries

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## Recommended Citation

Ann C. Hodges, *Note to Retail Store Employees Union Local 1001 v. NLRB (Safeco Title Insurance Co.): Extending Tree Fruits to Protect Picketing of Predominant Product Secondaries*, 74 Nw. U. L. Rev. 970 (1980).

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## NOTE

### *Retail Store Employees Union Local 1001 v. NLRB (Safeco Title Insurance Co.): Extending Tree Fruits to Protect Picketing of Predominant Product Secondaries*

The consumer product boycott is a traditional weapon employed by organized labor in disputes with employers. Picketing to solicit support from the public and other workers is also a traditional labor tactic. The legality of seeking support by combining these two methods—picketing a retailer to urge a consumer boycott of the primary employer's product<sup>1</sup>—has been a source of disagreement among the Supreme Court, the United States Court of Appeals for the District of Columbia, and the National Labor Relations Board. The contested issue is whether picketing to instigate a product boycott on the premises of an employer with whom the union has no dispute—the secondary employer<sup>2</sup>—violates section 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA), which prohibits threatening, coercing, or restraining any employer in order to force that employer to stop doing business with any other person.<sup>3</sup> Read literally, the statute would prohibit any product picketing at a secondary site. The Supreme Court in *NLRB v. Fruit & Vegetable Packers Local 700 (Tree Fruits)*<sup>4</sup> has held, however, that product picketing does not threaten, restrain, or coerce the retailer if the picketing requests only that consumers not purchase the struck product and does not ask them to boycott the secondary employer altogether.<sup>5</sup>

In *Tree Fruits*, the struck product accounted for only a small portion of the sales of the grocery stores picketed by the union. Many retailers, however, sell primarily or only the product or products of one employer, and both unions and employers have significant interests in the legality of consumer product picketing under such circumstances.

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<sup>1</sup> The primary employer is the employer with whom the union has a dispute.

<sup>2</sup> C. MORRIS, *THE DEVELOPING LABOR LAW* 604 (1971).

<sup>3</sup> 29 U.S.C. § 158(b)(4)(ii)(B) (1976). The statute specifically prohibits threatening, restraining, or coercing a person to force that person to cease doing business with any other person. The statute refers to "persons" rather than "employers" because "employers" as defined by the NLRA excludes, *inter alia*, railroads and public employers. 29 U.S.C. § 152(2) (1976).

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

<sup>5</sup> The statute has never been read literally since a literal reading would prevent even primary strikes. See *NLRB v. Denver Bldg. Council*, 341 U.S. 675 (1951); *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

Picketing at the premises of the sole product seller is an efficient and effective means by which a union can pressure the primary employer. Yet, an effective picket may cause severe economic injury to the secondary, who may have little or no power to settle the dispute.

*Retail Store Employees Union Local 1001 (Safeco Title Insurance Co.) v. NLRB*<sup>6</sup> addresses the issue of the legality of consumer product picketing where the primary's product constitutes a substantial portion of the secondary's business. The United States Court of Appeals for the District of Columbia, sitting en banc, held that, regardless of the amount of the secondary's business the struck product represented, picketing the premises of a secondary employer to request consumers to boycott a product of a primary employer was legal if the boycott requested was limited to the struck product. The court reasoned that such picketing was primary in character since it did not expand the dispute beyond the primary's product, and was therefore legal. The court reversed the National Labor Relations Board<sup>7</sup> and a three-judge panel of the Court of Appeals for the District of Columbia,<sup>8</sup> both of which had held that such picketing violated the NLRA because the union used unlawful means to achieve the unlawful object of forcing the secondary to cease doing business with the primary employer. The Board had inferred that object from the predictable impact of effective picketing: a total boycott that would coerce the secondary to stop trading with the primary so as to avoid the economic ruin a successful picket would cause.

Although *Tree Fruits* contains language that supports both the Board and the en banc court in *Safeco*, a close analysis of the court's decision and its underlying policies indicates that the court's interpretation is more consistent with the *Tree Fruits* rationale. The Board's approach, of determining legality according to the impact of the picketing on the secondary, has several flaws: it is speculative,<sup>9</sup> fails to provide a clear standard for decisionmaking<sup>10</sup> and is at odds with the approach of the Board in other secondary boycott cases.<sup>11</sup> The court's approach, unlike the Board's, is consistent with other secondary boycott cases<sup>12</sup> and offers a clear, workable standard for determining legality based on objective factors.<sup>13</sup> Furthermore, the court strikes an appropriate bal-

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<sup>6</sup> 101 L.R.R.M. 3084, (D.C. Cir. 1979) (en banc) cert. granted, 48 U.S.L.W. 3426 (U.S. Jan. 8, 1980) (No. 79-672) [hereinafter cited as *Safeco Title Ins.*]. The decision followed a rehearing en banc and reversed a panel's prior decision in *Retail Store Employees Union Local 1001*, 99 L.L.R.M. 3330 (D.C. Cir. 1978).

<sup>7</sup> *Retail Store Employees Union Local 1001*, 226 N.L.R.B. 754 (1976).

<sup>8</sup> *Retail Store Employees Union Local 1001*, 99 L.R.R.M. 3330 (D.C. Cir. 1978).

<sup>9</sup> See text accompanying notes 88-95 *infra*.

<sup>10</sup> See text accompanying notes 96-100 *infra*.

<sup>11</sup> See text accompanying notes 86-87 *infra*.

<sup>12</sup> See text accompanying notes 101-20 *infra*.

<sup>13</sup> See text accompanying notes 106-10 *infra*.

ance between the interests of the secondary employer and those of the union,<sup>14</sup> in accordance with the realities of modern industrial relations.<sup>15</sup>

### THE FACTUAL SETTING OF *SAFECO*

The Retail Store Employees Union Local 1001, Retail Clerks International Association, AFL-CIO, represented the employees of Safeco Title Insurance Company in the collective bargaining process. After the parties reached an impasse in contract negotiations, the union struck Safeco.<sup>16</sup> To gain support for their strike, union members picketed the premises of five land title companies that sold Safeco policies.<sup>17</sup> The picket signs read: SAFECO NONUNION DOES NOT EMPLOY MEMBERS OF OR HAVE CONTRACT WITH RETAIL STORE EMPLOYEES LOCAL 1001. In addition to picketing, the union distributed handbills asking Safeco policyholders to support the strike by cancelling their insurance. The title companies experienced no work stoppage or interference with deliveries as a result of the union's action.<sup>18</sup>

The picketed title companies derived ninety to ninety-five percent of their revenues from Safeco policies.<sup>19</sup> Although Safeco was a substantial stockholder in each company (and a majority stockholder in one company),<sup>20</sup> it did not control the labor relations policies or other day-to-day operations of any of the companies.<sup>21</sup> Neither was there any interchange of employees between Safeco and the title companies.<sup>22</sup>

In charges filed with the National Labor Relations Board, Safeco and one of the title companies alleged that the union's picketing of the title companies violated section 8(b)(4)(ii)(B) of the National Labor Relations Act.<sup>23</sup> The statute provides:

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<sup>14</sup> See text accompanying notes 127-34 *infra*.

<sup>15</sup> See text accompanying notes 136-41 *infra*.

<sup>16</sup> The union was certified as collective bargaining representative of the Safeco employees in July 1974. Negotiations for a collective bargaining agreement began, and an impasse was reached in November 1974. Safeco Title Ins., 101 L.R.R.M. at 3085.

<sup>17</sup> Striking employees picketed at each of the five companies on various dates between February 19, 1975 and April 15, 1975. 226 N.L.R.B. at 755.

<sup>18</sup> Safeco Title Ins., 101 L.R.R.M. at 3085.

<sup>19</sup> Title searches and escrow services provided the remainder of the revenue. 226 N.L.R.B. at 755.

<sup>20</sup> The percentage of stock owned by Safeco in the various title companies was 12%, 20%, 28%, 38%, and 53%. *Id.*

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

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

<sup>23</sup> 29 U.S.C. § 158(b)(4)(ii)(B) (1976). The charges also alleged that the union violated 29 U.S.C. § 158(b)(4)(i)(B), which provides that it is an unfair labor practice for a union to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the

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

. . .

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

. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, 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 not otherwise unlawful, any primary strike or primary picketing; . . .<sup>24</sup>

After determining that the title companies were neutral employers with regard to the dispute between Safeco and the union,<sup>25</sup> the Board held that *Tree Fruits*, which held that consumer picketing at the secondary's premises is lawful where limited to the struck product, was not applicable to Safeco where the predictable result of successful picketing would be a complete boycott of the neutral employer. The Board reasoned that since Safeco products constituted such a large portion of the title companies' business, a request for a boycott of the product was, in effect, a request for a total boycott of the neutrals. Because the predictable result of the picketing was a total boycott, the Board found that the union had an objective that violates section 8(b)(4)(ii)(B): forcing

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course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; . . .

*Id.* The Board declined to rule on the § 8(b)(4)(i)(B) allegation because neither the complaint nor the briefs contained any facts or contentions to support the allegation. 226 N.L.R.B. at 757 n.16.  
24 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

<sup>25</sup> Employers who are not neutral are allies of the primary employer, and the union can picket them in furtherance of the primary dispute without violating the NLRA. An employer may be an ally by virtue of performing struck work, *NLRB v. Business Machines Local 459* (Royal Typewriter), 228 F.2d 553 (2d Cir. 1955), or because the primary and secondary are a single employer according to the Board's criteria for assessing neutrality. The Board weighs four factors in determining whether an employer is neutral: (1) common ownership; (2) common control of day-to-day operations, including labor relations; (3) integration of business operations; and (4) economic interdependence. *See NLRB v. Local 810, Steel & Hardware Fabricators (Sid Harvey)*, 460 F.2d 1 (2d Cir.), *cert. denied*, 409 U.S. 1041 (1972); text accompanying notes 128-33 *infra*.

The Board found that the title companies were neutral employers in the dispute between Safeco and the union. The Board based its finding of neutrality in *Safeco* primarily on the lack of common control of the labor relations and day-to-day operations of Safeco and the title companies. Although the title insurance companies were dependent economically on Safeco, the Board, relying on *Local 14055, United Steelworkers (Dow Chem. Co)*, 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), held that economic dependence alone was insufficient to warrant a finding of nonneutrality.

the secondary employer to cease doing business with the primary. The appeal was coercive because of the severity of the potential impact.

A three-judge panel of the United States Court of Appeals for the District of Columbia, with Judge Robinson dissenting, upheld the Board's decision.<sup>26</sup> After affirming the Board's finding that the land title companies were neutral,<sup>27</sup> the panel found that the union's conduct violated the NLRA and the *Tree Fruits* prohibition against total boycotts. The panel reasoned that a boycott of the insurance policies was necessarily a boycott of the secondary's total business since the only other services the secondary offered were ancillary to the policies. The court supported its finding with analogies to several integrated product cases.<sup>28</sup> In those cases, the Board and the courts had held that picketing a struck product was unlawful if the picket amounted to a total boycott of the secondary's business because the primary's product had become an integral part of the secondary's product, losing its separate identity.

Although it agreed with the Board and the panel on the neutrality of the title companies, the United States Court of Appeals for the District of Columbia, sitting en banc, reversed the finding that the picketing was illegal.<sup>29</sup> According to the en banc court, the test of the legality

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<sup>26</sup> Retail Store Employees Local 1001, 99 L.L.R.M. 3330 (D.C. Cir. 1978), *rev'd en banc*, 101 L.L.R.M. 3084 (D.C. Cir. 1979). The court refused to follow its earlier *Dow* decision that had upheld the legality of picketing limited to the product, but was later vacated by the Supreme Court. In *Dow*, the Board found that the union's picketing of several gasoline stations, pursuant to a dispute with the producer of the gasoline they sold, had an unlawful object because the request not to buy gasoline was, in effect, a request not to patronize the neutral gasoline station. Local 14055, United Steelworkers (Dow Chem. Co.), 211 N.L.R.B. 649, 652 (1975), *enforcement denied*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977). The appellate court reversed, holding that the picketing was lawful so long as the boycott request was confined to the struck product. 524 F.2d at 861. The Supreme Court vacated the judgment and remanded to the Board for consideration of whether the issue was moot. 429 U.S. at 807. The Board dismissed the charge as moot since the union had dissolved during the pendency of the proceedings. 229 N.L.R.B. at 303.

<sup>27</sup> 99 L.L.R.M. at 3331-32.

<sup>28</sup> *Id.* at 3333-34. See Cement Masons Union Local 337, 190 N.L.R.B. 261 (1971), *enforced*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) (houses constructed by a primary being offered for sale by a secondary); Teamsters Local 327 (American Bread), 170 N.L.R.B. 91 (1968), *enforced*, 411 F.2d 147 (6th Cir. 1969) (bread supplied by the primary to the secondary's restaurant). See also Honolulu Typographical Union No. 37, 167 N.L.R.B. 1030 (1967), *enforced*, 401 F.2d 952 (D.C. Cir. 1968) (advertising by a secondary in a primary's newspaper). For a discussion of the validity of the reliance on the integrated products cases, see text accompanying notes 121-26 *infra*.

<sup>29</sup> The court upheld the Board's determination that the title companies were neutral, finding that the Board had considered all the relevant factors and evaluated them according to the appropriate criteria. Safeco Title Ins., 101 L.L.R.M. at 3090-94. Since issues of neutrality involve complex factual determinations, courts generally defer to the Board's expertise in the area unless its decision is contrary to law or unsupported by substantial evidence "on the record when viewed as a whole." See *id.* at 3087. See also Carpet Layers Local 419 v. NLRB, 467 F.2d 392 (D.C. Cir. 1972).

of consumer picketing of a secondary established by the Supreme Court in *Tree Fruits* was whether the picketing is closely confined to the primary dispute. If not, the picketing coerces the secondary employer and violates section 8(b)(4)(ii)(B). According to the en banc court's reading of *Tree Fruits*, picketing that is limited to requesting customers not to buy the struck product is confined closely to the primary dispute. In that case, a successful appeal to consumers would result in no greater loss of business than would be caused by a primary strike and therefore would be legal.<sup>30</sup>

The court rejected the argument, accepted by the Board and the dissent, that the predictable impact made the picketing coercive of the neutral employer. The court read *Tree Fruits* as a refusal to adopt the position that the test of coercion was the extent of the actual or potential economic impact on the secondary.<sup>31</sup> The court noted further that its construction of the statute avoided possible first amendment problems.<sup>32</sup>

In his dissent Judge Robb agreed with the Board that the foreseeable effect of the picketing was a total boycott, one of the evils at which Congress had directed section 8(b)(4)(ii)(B).<sup>33</sup> According to Judge Robb, the legislative history of the 1959 amendments to section 8(b)(4) indicates that Congress intended to protect neutrals whose only product was that of the primary employer.<sup>34</sup> Judge Robb would have limited *Tree Fruits* to situations where the struck product constituted only a small part of the secondary's business.

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<sup>30</sup> 101 L.R.R.M. at 3091. Although the *Tree Fruits* Court did not indicate specifically that picketing is primary if the impact is no greater than that of a successful primary strike, such a test has been suggested. Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962). The Board has not explicitly adopted the test, however, and the en banc court used it to support its finding that the picketing was closely confined to the primary dispute, not as a test for primary character. Safeco Title Ins., 101 L.R.R.M. at 3091. Moreover, the test is not predictive of the character of picketing where the secondary derives its business almost exclusively from the primary's product since neither picketing the product nor picketing to stop all business causes consequences greater than those that would be caused by a successful primary strike. A successful primary strike would, in effect, cause a shutdown of the business as would successful product picketing or a successful appeal to cease patronage.

<sup>31</sup> Safeco Title Ins., 101 L.R.R.M. at 3090-91.

<sup>32</sup> The *Tree Fruits* Court had also alluded to first amendment issues to support its conclusion that Congress intended only a limited ban on peaceful picketing in 8(b)(4)(ii)(B). 377 U.S. 58, 63 (1964). The *Safeco* court indicated that the Board's approach of inferring the intent of the union from the circumstances of the employer "enlivens the specter of constitutional infirmity." Safeco Title Ins., 101 L.R.R.M. at 3094. For further discussion of the first amendment issue, see notes 38, 62-73 and accompanying text *infra*.

<sup>33</sup> Safeco Title Ins., 101 L.R.R.M. at 3094 (Robb, J., dissenting).

<sup>34</sup> *Id.* at 3094-95.

THE PREVAILING INTERPRETATION OF SECTION 8(b)(4):  
*TREE FRUITS*

An analysis of *NLRB v. Fruit & Vegetable Packers Local 700 (Tree Fruits)*<sup>35</sup> is essential to determine whether the Board or the en banc court applied the NLRA properly to the facts of *Safeco*. The union in *Tree Fruits* struck the Washington state fruit packers. The union picketed a chain of Safeway stores and requested customers not to buy Washington apples, one of the many products sold by Safeway. No work stoppage resulted, and there was no interference with deliveries to Safeway grocery stores. Prior to *Tree Fruits*, the Board had interpreted the publicity proviso of section 8(b)(4) as prohibiting all consumer product picketing at secondary sites.<sup>36</sup> Adhering to these earlier decisions, it held that the picketing in *Tree Fruits* was a per se violation of the statute.<sup>37</sup>

The United States Court of Appeals for the District of Columbia reversed the Board and held that the statutory prohibition of conduct that threatened, restrained, or coerced the employer required a finding that the secondary was *actually* threatened, restrained, or coerced.

The United States Supreme Court rejected both the per se approach of the Board and the approach taken by the Court of Appeals. The Court concluded that in view of the history of limited congressional regulation of picketing and the possible first amendment problems,<sup>38</sup> it would not attribute to Congress an intention to prohibit peaceful picketing without the clearest indication in the legislative history. The Court found that consumer product picketing did not fall in the category of conduct that Congress intended to prohibit and, therefore, did not threaten, restrain, or coerce the secondary in violation of the statute.<sup>39</sup> The Court continued:

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<sup>35</sup> 377 U.S. 58 (1964).

<sup>36</sup> Upholsterers Frame & Bedding Workers Local No. 61, 132 N.L.R.B. 40 (1961). See note 46 *infra*.

<sup>37</sup> 132 N.L.R.B. 1172 (1961). After finding that the literal wording of the proviso prohibited consumer product picketing, the Board went on to state that such picketing threatened, restrained, or coerced the secondary, presumably inferring that Congress made that determination in passing the statute. The Board also inferred that the union intended the "natural and foreseeable result" of its picketing—that successful picketing would force Safeway, the secondary, to cease doing business with the struck employers, and therefore had an unlawful object. This approach, which was not adopted by the Supreme Court in *Tree Fruits*, is similar to the Board's approach in *Safeco*.

<sup>38</sup> The majority expressed a concern that a broad ban on picketing might violate the first amendment but did not analyze the first amendment issue in detail. *NLRB v. Fruit & Vegetable Packers Local 700*, 377 U.S. at 63. See also *id.* at 77-79 (Black, J., concurring); text accompanying notes 62-66 *infra*.

<sup>39</sup> Professor Engel criticizes the Court's analysis, suggesting that the Court should determine whether the picketing threatens, restrains, or coerces the neutral before deciding whether the picketing is prohibited by the statute. Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 VA. L. REV. 189, 196 (1966). Although the Court based its decision that the picketing



When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.<sup>40</sup>

### *The Legislative History*

The *Tree Fruits* majority engaged in an extensive analysis of the legislative history of the Labor Management Reporting and Disclosure Act of 1959,<sup>41</sup> and found that it did not demonstrate a clear intent to ban consumer picketing necessitated by the potential first amendment problems. The Court stated that the sponsors of the amendments did not mention consumer product picketing as one of the abuses that the statute was intended to correct.<sup>42</sup> Although opponents feared that the amendments would prohibit consumer product picketing, the Court refused to rely on their statements because opponents often exaggerate the potential effects of a bill in order to increase the chances of its defeat.<sup>43</sup> One of the sponsors had referred to consumer product picketing in the debates but indicated that it would be prohibited only if it "coerc[ed] the retailer not to do business with the manufacturer."<sup>44</sup> The Court did not read this statement as indicating a general prohibition on consumer product picketing. The Court also noted that where Congress intended to ban picketing completely, it did so specifically, as in section 8(b)(7).<sup>45</sup>

According to the Court, the publicity proviso to section 8(b)(4)<sup>46</sup>

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did not threaten, restrain, or coerce on its finding that Congress did not intend to prohibit the conduct in question, Professor Engel's suggested approach appears to be more consistent with good judicial practice and with the analysis used by the Board and courts in interpreting the statute.

<sup>40</sup> 377 U.S. at 72.

<sup>41</sup> Congress enacted the NLRA in 1935. Both the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-187 (1976), and the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1976), amended the NLRA.

<sup>42</sup> 377 U.S. at 65, 67.

<sup>43</sup> *Id.* at 66.

<sup>44</sup> *Id.* at 67-68.

<sup>45</sup> *Id.* at 68. Section 8 (b)(7) provides: "It shall be an unfair labor practice for a labor organization or its agents— . . . to picket or cause to be picketed . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization . . ." 29 U.S.C. § 158(b)(7) (1976).

<sup>46</sup> The publicity proviso states:

did not indicate an intent to ban consumer picketing. Rather, the Court said, the proviso was inserted to ensure the constitutionality of the statute by allowing the use of publicity other than picketing to persuade customers to stop trading with the secondary employer.<sup>47</sup> The Court based this finding on Senator Kennedy's interpretation of the proviso. Senator Kennedy had stated that the proviso preserved "the right to appeal to consumers by methods other than picketing by asking them to refrain from buying goods made by nonunion labor *and* to refrain from trading with a retailer who sells such goods."<sup>48</sup> The Court, emphasizing the "and," read the statement to indicate that the proviso banned only picketing designed to stop all trade with the secondary.<sup>49</sup> Based on this analysis, the Court concluded that Congress, in approving the amendments, prohibited "isolated evils" rather than peaceful picketing in general.<sup>50</sup>

Commentators have criticized the majority's interpretation of the statute as contrary to the legislative history.<sup>51</sup> It is argued that even though consumer picketing may not have been one of the problems that the sponsors of the amendments originally intended to correct, when opponents pointed out that the statute could be read to ban consumer picketing, proponents did not repudiate that suggestion.<sup>52</sup> It is also suggested that the publicity proviso<sup>53</sup> was a compromise that was the result of the assumption of both proponents and opponents that the amendments banned consumer product picketing.<sup>54</sup> According to critics, Senator Kennedy's statement about the proviso supports a literal reading rather than the strained reading suggested by the majority.<sup>55</sup> In addition, other statements in the legislative history may be inter-

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*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 . . . .

29 U.S.C. § 158(b)(4) (1976).

<sup>47</sup> 377 U.S. at 70.

<sup>48</sup> *Id.* (emphasis in original) (quoting 105 CONG. REC. 17,898-99 (1959)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 71.

<sup>51</sup> Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits*, 49 MINN. L. REV. 479, 481 (1965). See also Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?* 63 MICH. L. REV. 682, 686 (1965) [hereinafter cited as MICHIGAN Comment].

<sup>52</sup> Lewis, *supra* note 51, at 499. See also MICHIGAN Comment, *supra* note 51, at 686.

<sup>53</sup> See note 46 *supra*.

<sup>54</sup> Lewis, *supra* note 51, at 499.

<sup>55</sup> *Id.* at 500. See also 377 U.S. at 87 (Harlan, J., dissenting).

preted to support a literal reading of the proviso.<sup>56</sup> Critics also note that Congress did not recognize the distinction made by the Court between product picketing and picketing for a total boycott.<sup>57</sup>

Although the criticisms of the majority's reading of the legislative history have some validity, the Court's interpretation of the congressional intent can be supported. The legislative history indicates substantial confusion among members of Congress about the definition of a secondary boycott and what evils the statute was designed to remedy. In view of such confusion, individual remarks in prolonged legislative debates may not demonstrate clearly the intent of Congress.<sup>58</sup> Moreover, the legislative history indicates that Congress intended prior case law, which permitted many types of secondary boycotts, to remain in effect.<sup>59</sup>

Furthermore, the Court's interpretation effectuates the underlying purpose of the NLRA—to encourage collective bargaining and private resolution of labor disputes.<sup>60</sup> The narrow reading of the statute by the *Tree Fruits* Court protects neutrals from greater economic injury than declining sales of the primary's product, but it also permits the parties to use a wide range of economic weapons to resolve their dispute with minimal government interference.

The Supreme Court has stated that the practice of construing a statute according to the spirit rather than the letter of the law is particularly appropriate in the case of labor legislation that is:

to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.<sup>61</sup>

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<sup>56</sup> MICHIGAN Comment, *supra* note 51, at 687. The author cites several examples that were also cited by Justice Harlan in his dissent. *Id.* Senator Griffin's analysis of the conference agreement indicated that it prohibited secondary consumer picketing at retail stores but permitted other publicity. 105 CONG. REC. 18,022 (1959). Congressman Thompson analyzed the conference agreement as permitting publicity, but not picketing, advertising the fact that an employer sold goods produced by a company involved in a labor dispute. 105 CONG. REC. 18,133 (1959). These statements and others cited by the author to support criticism of the majority's reading of the legislative history, like statements cited in *Tree Fruits*, can be discounted as statements of opponents, or interpreted as the Court interpreted Senator Kennedy's statement—as prohibiting only a total boycott. See text accompanying notes 48-49 *supra*.

<sup>57</sup> Note, *Picketing and Publicity Under Section 8(b)(4) of the LMRA*, 73 YALE L.J. 1265, 1275-76 (1964).

<sup>58</sup> Engel, *supra* note 39, at 199. Professor Engel suggests that the Court should not rely on interpretations made by individual legislators during the debates, but should utilize its own interpretive ability to determine the intent of Congress based on the legislative history as a whole. Furthermore, first amendment considerations justify the Court's requirement of a clear indication of congressional intent to ban all product picketing. See notes 70-73 and accompanying text *infra*.

<sup>59</sup> *Id.* at 199-200.

<sup>60</sup> *Id.* at 200 n.38.

<sup>61</sup> *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 619 (1967), *rehearing denied*, 387

The "spirit" of section 8(b)(4)(ii)(B) was to protect true neutrals from becoming embroiled in the disputes of others while at the same time protecting labor's right to solicit support for its goals. Limiting picketing to the product accords with this spirit and also avoids the restrictive literal reading that would ban picketing at the primary site. Thus, the complexity of the issues and the desire to effectuate the basic purposes of the NLRA warrant what at first may appear to be a somewhat strained reading of the legislative history by the *Tree Fruits* Court.

### *First Amendment Considerations*

First amendment considerations, though not articulated clearly by the *Tree Fruits* Court, also support the Court's narrow reading of the statutory prohibition.<sup>62</sup> The first amendment protects a union's right to publicize the facts of a labor dispute.<sup>63</sup> Because picketing involves both speech and action, it has impact beyond that attributable to the force of the constitutionally protected message on the signs. Therefore, the Court has permitted the government to effectuate valid government policies by imposing reasonable restrictions on picketing.<sup>64</sup> Restrictions on picketing require a "review of the balance struck by a State between picketing that involves more than 'publicity' and competing interests of state policy."<sup>65</sup> Thus, a decision regarding the constitutionality of a regulation or prohibition of picketing involves a balancing of the purposes for the prohibition with the right to picket. Complete bans are constitutionally impermissible.<sup>66</sup>

In view of the case law, the *Tree Fruits* Court was correct in sensing a potential conflict between the first amendment and section 8(b)(4)(ii)(B) of the NLRA. The prohibition is worded broadly, but the Court has indicated that even abuses of the right to picket in a particular situation do not justify a prohibition of all picketing.<sup>67</sup> The spon-

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U.S. 926 (1967) (quoting *Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door)*, 357 U.S. 93, 99-100 (1958)).

<sup>62</sup> See note 38 *supra*.

<sup>63</sup> *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

<sup>64</sup> *Building Serv. Employees Local 262 v. Gazzam*, 339 U.S. 532, 536-37 (1950). Policies that constitute reasonable bases for regulation of picketing include: (1) prevention of continued, unquestionably false representations and coercive acts, *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295 (1943); (2) protection of property interests, *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1957); (3) prevention of wrongful interference with business by third parties, *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215 (1974); (4) prevention of picketing designed to coerce commission of unlawful acts, *Givoney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); (5) prevention of violence, *Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); and (6) prevention of coercion of employees in the choice of their bargaining representative, *Teamsters Local 695 v. Vogt*, 354 U.S. 284 (1957). These cases involved state laws to which the Court may have given more deference than to a federal law.

<sup>65</sup> *Teamsters Local 695 v. Vogt*, 354 U.S. 284, 290 (1957).

<sup>66</sup> *Thornhill v. Alabama*, 310 U.S. 88, 103-05 (1940).

<sup>67</sup> *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 296 (1943).

sors of the amendments themselves stated that the prohibitions were limited by the constitutional right of free speech.<sup>68</sup> If the Court had read the statute broadly, it would have been necessary to evaluate the purposes of the legislation and balance them against the first amendment interests.<sup>69</sup>

While the outcome of the balancing process is not certain, for several reasons the Court might strike the balance in favor of protecting the picketing by the first amendment. First, in some cases like *Safeco*, the union may not have an effective, alternative means of publicizing a labor dispute.<sup>70</sup> Second, as Justice Black argued in his concurrence in *Tree Fruits*, a ban on all consumer product picketing would violate the first amendment because it would constitute a content restriction on speech.<sup>71</sup> According to Justice Black, there are two significant aspects of picketing—patrolling and speech. Patrolling can be *regulated* in order to protect significant governmental interests, such as public order, but the statute can be read broadly to *prohibit* patrolling. Furthermore the prohibition is content-related; it extends only to those who have a specific message—a request for a product boycott.<sup>72</sup> Accordingly, the Court had a legitimate concern about possible first amendment problems that warranted its narrow construction of the statute.<sup>73</sup>

### *Means-Object Analysis*

The Board and some courts have utilized a means-object test to determine the legality of picketing at locations other than the premises of the primary employer.<sup>74</sup> Both an illegal means—threatening, restraining, or coercing the secondary employer—and an illegal object—forcing the secondary to cease doing business with the primary—must be established to prove a violation. The Supreme Court in *Tree Fruits*

<sup>68</sup> See 105 CONG. REC. 15,673 (1959).

<sup>69</sup> *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Cf. Note, United Steelworkers of America Local 14055 v. NLRB—*Secondary Consumer Boycotts*, 54 U. DET. J. URB. L. 579, 594-96 (1977) [hereinafter cited as DETROIT Note] (in view of subsequent law, there is no first amendment problem). See Comment, *Product Picketing: The Secondary Boycott Provisions of the NLRA and the Tree Fruits and Dow Cases*, 7 TEX. TECH. L. REV. 645, 669-70 (1976), for an argument that the government's purpose is sufficient to permit regulation of the picketing. See Lewis, note 55 *supra*, for a discussion of the policies of statutory construction that the Court might have used in *Tree Fruits*.

<sup>70</sup> *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 775 (1942); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940). Handbilling may offer an alternative method of communication. It may be ineffective, however, when compared to picketing, the traditional sign of a labor dispute. See MICHIGAN Comment, *supra* note 51, at 697. There, the author argues that consumers could be educated to recognize handbilling as a sign of a consumer product picket, and handbilling could thus become as effective as picketing.

<sup>71</sup> 377 U.S. at 79 (Black, J., concurring).

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

<sup>73</sup> See note 69 *supra*.

<sup>74</sup> *United Bhd. of Carpenters v. NLRB (Sand Door)*, 357 U.S. 93, 98 (1958).

did not make such a specific finding as to the legality of the union's object. As noted by Professor Lewis, the Court did not question the Board's finding that an object of the union was to force the secondary employer to cease doing business with the primary, an object that would be illegal.<sup>75</sup> In finding the picketing "closely confined to the primary dispute,"<sup>76</sup> however, the Court seemed to imply that picketing limited to the struck product is both a primary and legal object. Since the Court declared that the means employed were lawful, a specific finding of the legality of the object was unnecessary in *Tree Fruits*, because, if either the object or the means is lawful, there is no violation. The Court's failure to make a clear finding on the legality of the union's object, however, contributes to the confusion over the application of *Tree Fruits*; the Board and courts have continued to utilize the means-object analysis in subsequent cases, and such a finding would have been instructive in those cases.

#### APPLICATION OF *TREE FRUITS* TO *SAFECO*: THE APPROACH OF THE NLRB

At first glance, the picketing in *Safeco* seems to fit the definitions of both legal and illegal picketing as stated in *Tree Fruits*. The picketing in *Safeco* was limited to the product, which the *Tree Fruits* Court said would be lawful; yet, it was, as a practical matter, an appeal not to trade at all, which the *Tree Fruits* Court held would be unlawful. Despite this confusion, the basis of the distinction between lawful and unlawful picketing lends support to the en banc court's determination that the picketing was lawful. The *Tree Fruits* Court found that Congress did not intend to prohibit peaceful picketing limited to the struck product because such picketing is "closely confined to the primary dispute." Such picketing is, in effect, primary picketing at the secondary site, since the union is not creating a dispute with the secondary employer. If the secondary ceases trading with the primary, the cessation results from a lack of demand for the product, not from coercion of the secondary. Picketing becomes coercive, and therefore unlawful, only when it appeals for a boycott of products other than the struck product.<sup>77</sup> This rationale supports the en banc court's position in *Safeco*.

The Board, however, felt that the factual distinction between *Safeco* and *Tree Fruits* was legally significant.<sup>78</sup> It articulated its view most clearly in *Local 14055, United Steelworkers (Dow Chemical Co.)*,<sup>79</sup> a case on which it relied in *Safeco*. In *Dow*, the Board said that the

<sup>75</sup> Lewis, *supra* note 51, at 486.

<sup>76</sup> 377 U.S. at 72.

<sup>77</sup> *Id.*

<sup>78</sup> 226 N.L.R.B. at 757.

<sup>79</sup> 211 N.L.R.B. 649, 651 (1974), *enforcement denied on other grounds*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977).

significance of the product to the secondary removed the picketing from the protection offered by *Tree Fruits*. Since *Tree Fruits* did not apply, the Board had to make an independent finding whether the NLRA prohibited picketing under such circumstances. The Board then applied means-object analysis and found the picketing unlawful.

The Board in *Safeco* found that the picketing was designed to persuade customers not to patronize the secondary. The employer would then be forced to cease doing business with the primary because of the serious actual or potential economic loss.<sup>80</sup> Therefore, the Board found an unlawful object—a total boycott to force the neutral to cease doing business with the primary—and an unlawful means—coercion—bringing the picketing within the statute's prescription. The Board read *Tree Fruits* to hold that the picketing at issue in that case did not threaten, restrain, or coerce the retailer because of the minimal impact. In addition, the Board concluded that it was the minimal impact of a successful picket in *Tree Fruits* that militated against the inference of an unlawful object in that case.<sup>81</sup> The predictably greater impact of the picketing on the secondaries in *Safeco*, however, warranted a different holding, according to the Board.

#### THE COURT'S APPROACH: A BETTER BALANCE

Although the Board's analysis is not unpersuasive, since potential economic injury may cause the secondary to cease doing business with the primary, there are several problems with the Board's approach. An analysis of these problems reveals that the court's approach is the preferable interpretation of *Tree Fruits* and should be adopted by courts considering picketing similar to that in *Safeco*.

#### *The Predictable Impact Analysis*

The Board in *Safeco* focused on predictability of impact rather than on economic impact per se. Nevertheless, reliance on economic impact similar to that rejected in *Tree Fruits* is inherent in the Board's approach. Both the economic impact approach and the predictable impact approach determine the legality of consumer picketing according to the actual or potential effects of picketing on the business of the secondary and the secondary's response to those effects.

Although the Court in *Tree Fruits* mentioned the insignificant potential impact of a successful boycott in that case, its decision that the

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<sup>80</sup> The secondary in the *Tree Fruits* situation would also be forced to cease doing business with the primary as a result of successful picketing. The reason for the cessation of business is the distinguishing factor. In a *Tree Fruits* situation, the lack of demand for the product, rather than coercion, causes the cessation of business. See 211 N.L.R.B. at 651.

<sup>81</sup> See Comment, *Secondary Boycotts—Consumer Picketing—Struck Product as Major Source of Revenue*, 30 RUTGERS L. REV. 176 (1976); DETROIT Note, *supra* note 69, at 579.

picketing was not coercive was not based upon that factor.<sup>82</sup> In fact, the *Tree Fruits* majority specifically rejected an economic impact test for coercion. The Court stated:

We disagree therefore with the Court of Appeals that the test of "to threaten, coerce or restrain" for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss. *A violation of § 8(b)(4)(ii)(B) would not be established, 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.*<sup>83</sup>

In addition to the Supreme Court's explicit rejection of the economic impact test of coercion in *Tree Fruits*,<sup>84</sup> there are several other reasons to reject the *Safeco* Board's predictable impact approach. First, the predictable impact approach is inconsistent with the primary activity rationale of the Supreme Court in *Tree Fruits*. The Court found the picketing at issue in *Tree Fruits* to be primary in character because it was limited to the primary's product. It does not become less primary as the struck product increases as a percentage of the secondary's business as in *Safeco*. In fact, as suggested by dissenting Board members in *Dow*, increasing economic interdependence between the primary and secondary has the opposite effect of increasing the primary nature of the picketing.<sup>85</sup>

Second, the Board has not used economic impact as a test of coercion in other secondary boycott situations because it does not provide a useful standard.<sup>86</sup> The purpose of all picketing is to put pressure on the

<sup>82</sup> Local 14055, *United Steelworkers (Dow Chem. Co.)*, 524 F.2d at 858, *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977).

<sup>83</sup> 377 U.S. at 72-73 (emphasis added).

<sup>84</sup> Patrick Duerr suggests that the Supreme Court in *Tree Fruits* did not reject an economic injury test that would find picketing that causes substantial economic loss coercive. Duerr reads the Court as rejecting only a test that would find any economic impact coercive. Duerr, *Developing a Standard for Secondary Consumer Picketing*, 26 LAB. L.J. 585 (1975). The language of the Court, however, is not limited to situations where the impact is minimal. The Court states that a violation would not be established even if the picketing caused reduced sales sufficient to lead Safeway to cease purchasing apples. 377 U.S. at 72-73. Duerr's interpretation is appropriate only if the decision is limited to a factual situation similar to *Tree Fruits*.

In addition, Justice Harlan's dissent in *Tree Fruits* raised the problem of the secondary who sells predominantly the primary's product. He suggested that the Court's interpretation would permit picketing in such a situation. *Id.* at 83 (Harlan, J., dissenting). Although not conclusive, the majority's failure to repudiate such a construction supports the en banc court's interpretation.

<sup>85</sup> Local 14055, *United Steelworkers (Dow Chem. Co.)* 211 N.L.R.B. 649, 654-55 (Fanning and Jenkins, dissenting) (1974), *enforcement denied on other grounds*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977). According to Fanning and Jenkins, the more dependent the secondary is on the primary, the less neutral the secondary is in relationship to the primary's labor disputes.

<sup>86</sup> The Board and the courts have used effect to establish a violation only where the statute specifically requires it. See note 46 *supra* (quoting proviso to § 8(b)(4)). The proviso to § 8(b)(7)(C) also bans picketing with a specific effect. The proviso states:

*Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including con-



primary employer. Secondary employers who deal with the primary will be affected by successful pressure on the primary. When a strike at the primary halts production, all purchasers of the primary's product, as well as suppliers of the primary, will be adversely affected. Yet, Congress specifically protected primary strikes.<sup>87</sup>

The third reason for rejecting the Board's predictable impact analysis is that it is based on questionable assumptions about the behavior of consumers and neutral employers. The analysis assumes that customers will refuse to patronize a business if pickets request a boycott of the predominant product. In fact, even casual observance demonstrates that picket lines turn away few customers. Moreover, as the dissent in *Dow* noted,<sup>88</sup> the Court in *Tree Fruits* rejected the argument that picketing, even if limited to one product, should be banned merely because it might cause the public not to patronize a business.<sup>89</sup> Similarly, the possibility that customers, when requested to boycott the major product, may not patronize an establishment at all should not warrant a prohibition against picketing properly limited to the product.<sup>90</sup>

Predicting the secondary's reaction to product picketing is as speculative as predicting the public's reaction. The secondary, faced with a boycott of a product that generates a substantial portion of the revenue of its business, may be forced to cease doing business with the primary because of the potential economic loss.<sup>91</sup> On the other hand, the sole or predominant product seller might find it more difficult to cease doing business because of the benefits, *i.e.*, advertising, of being a sole product seller and the difficulties of obtaining another supplier.<sup>92</sup> An employer, such as the grocery store in *Tree Fruits*, may be more likely, because of the lack of importance of the product, to cease doing business with the primary, than the employer selling predominantly the primary's product will be. The lack of predictability of the secondary's

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sumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

29 U.S.C. § 159(b)(7)(C)(1976).

<sup>87</sup> The proviso to § 8(b)(4)(B) says: "Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ." 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

<sup>88</sup> 211 N.L.R.B. at 654 (Fanning and Jenkins, dissenting), *enforcement denied on other grounds*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977).

<sup>89</sup> 377 U.S. at 71.

<sup>90</sup> See Duerr, *supra* note 84, at 589.

<sup>91</sup> Local 14055, United Steelworkers (Dow Chem. Co.), 211 N.L.R.B. 649, 651 (1974), *enforcement denied on other grounds*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977).

<sup>92</sup> Duerr, *supra* note 84, at 590.

response makes any inference of coercion or unlawful object based on the predominance of the product seem speculative at best.

The fourth reason the predictable impact standard is problematic is that it creates difficulties in line-drawing. It is not clear how significant to the secondary the product must be in order to create an inference of an intent to seek a total boycott. Safeco policies constituted ninety to ninety-five percent of the business of the land title companies. One of the secondary employers in *Dow* derived less than fifty percent of its revenues from the primary's product.<sup>93</sup> In both situations, the Board found a violation. The only guidance the *Dow* Board gave for drawing a line was the "predictability of such impact,"<sup>94</sup> yet, the impact is certainly not as predictable as the Board implied.<sup>95</sup>

Finally, the Board's construction is unacceptable because it predicates the legality of the picketing on a factor outside the union's knowledge and control: the percentage of the secondary's business attributable to the primary's product. The union may have little or no information on which to base a determination whether it can legally picket a retailer.<sup>96</sup> Yet, it has an affirmative duty to conform its picketing to legal requirements.<sup>97</sup> Imposing such a burden without clear standards based on factors known to the union fosters frequent litigation.

Clear standards are important for two reasons. First, they enable the union to picket only where lawful, and thus to avoid the risk of costly damage judgments,<sup>98</sup> and, second, they enable the Board to make proper decisions about the legality of picketing on the basis of initial investigations. Section 10(1) of the NLRA requires the Board to seek an injunction in federal district court whenever it has reasonable cause to believe that there is a violation of, *inter alia*, section 8(b)(4)(ii)(B).<sup>99</sup> If the district court agrees with the Board's determination of reasonable cause, it will issue an injunction against the union that will remain in effect pending a final decision by the Board on the merits of the charge. Thus, the Board's initial decision regarding the

<sup>93</sup> Local 14055, United Steelworkers (Dow Chem. Co.), 524 F.2d 853, 855 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977).

<sup>94</sup> 211 N.L.R.B. at 652. *See also* Retail Store Employees Union Local 1001 (Safeco Title Ins. Co.), 226 N.L.R.B. 754, 757, *rev'd*, 101 L.R.R.M. 3084 (D.C. Cir. 1979) (en banc).

<sup>95</sup> *See* text accompanying notes 87-91 *supra*.

<sup>96</sup> Local 14055, United Steelworkers (Dow Chem. Co.), 524 F.2d 853, 861 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977).

<sup>97</sup> *Millmen & Cabinet Makers Local 550*, 227 N.L.R.B. 196 (1976). In *Millmen*, the Board found that a union that picketed a secondary employer for two days with a sign requesting customers not to patronize the secondary employer violated § 8(b)(4)(ii)(B) even though they subsequently changed the sign. The Board held that the union had the burden of insuring that its appeal was limited to the primary product.

<sup>98</sup> Section 303 of the NLRA authorizes employers injured by unions violating § 8(b)(4) to sue for damages. 29 U.S.C. § 187(b) (1976).

<sup>99</sup> *Id.* § 160(e) (1976).

legality of the picketing determines whether the union can continue to picket, and therefore may determine the success of the union's economic pressure on the employer.<sup>100</sup> The lack of clear standards will increase the likelihood of error in the determination whether reasonable cause exists to believe a violation has occurred. Standards that enable the union to determine whether it can legally picket prior to actually picketing will also aid employers. If the union knows the picket is illegal, employers will be spared any injury the picketing might cause to the extent that unions will decide not to picket unlawfully.

### *The Primary-Secondary Dichotomy*

The primary-secondary distinction utilized by the en banc court in *Safeco* has been criticized as confusing<sup>101</sup> and as lacking a rationale generally applicable to all secondary boycott cases.<sup>102</sup> Although the primary-secondary analysis does not explain the results of all cases decided under section 8(b)(4)(ii)(B), it is consistent with the approach of the Board and the courts in many areas of secondary activity.<sup>103</sup>

The primary-secondary approach is utilized in common situs picketing<sup>104</sup> and roving situs picketing<sup>105</sup> cases. In these cases, the Board applies specific standards to decide whether the picketing is directed at the secondary employer, and thus whether the picketing is unlawful. These standards, articulated in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*,<sup>106</sup> include: (1) whether picketing is conducted at times when the primary is present at the site; (2) whether picketing takes place when the primary is engaged in normal business at the site; (3) whether picketing takes place reasonably close to the primary; and (4) whether signs clearly reflect that the dispute is with the primary not the

<sup>100</sup> Comment, *Consumer Picketing: Reassessing the Concept of Employer Neutrality*, 65 CALIF. L. REV. 172, 183 n.57 (1977) [hereinafter cited as CALIFORNIA Comment].

<sup>101</sup> Comment, *Primary v. Secondary Labor Boycotts: Is There a Rational Basis for the Distinction?* 22 CLEV. ST. L. REV. 531 (1973).

<sup>102</sup> See Engel, *supra* note 39, at 198; CALIFORNIA Comment, *supra* note 100, at 180.

<sup>103</sup> Providing a standard of analysis applicable to all § 8(b)(4)(ii)(B) cases would involve a major upheaval in many areas of settled law. Such an approach seems appropriate for legislative action rather than adjudication.

<sup>104</sup> Common situs cases involve situations where the primary employer and the secondary employer are located on the same work site. C. MORRIS, *supra* note 2, at 625. See NLRB v. Denver Bldg. Trades Council, 341 U.S. 675 (1951); Retail Fruit Clerks Union (Crystal Palace Market), 116 N.L.R.B. 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957). The Board looks at various objective factors in common situs cases to determine whether a union picketing at the site violates § 8(b)(4)(ii)(B). C. MORRIS, *supra* note 2, at 626.

<sup>105</sup> In roving, or ambulatory situs cases, the situs of the primary dispute moves, stopping periodically at the premises of secondary employers. C. MORRIS, *supra* note 2, at 625. In the typical example, the primary employs truck drivers who deliver to secondary employers. Brewery & Beverage Drivers Local 67 (Washington Coca-Cola Bottling Works, Inc.), 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955); International Bhd. of Teamsters (Schultz Refrigerated Serv. Inc.), 87 N.L.R.B. 502 (1949).

<sup>106</sup> 92 N.L.R.B. 547 (1950).

secondary. The Supreme Court approved the application of similar standards to common situs picketing in *NLRB v. Denver Building Trades Council*.<sup>107</sup> In roving situs and common situs cases, economic harm to the secondary is irrelevant if the manner and circumstances of the picketing and other evidence of the union's object, *i.e.*, statements of union officials, do not indicate that the union is attempting to coerce the secondary to cease doing business with the primary.<sup>108</sup>

Modifying these standards to fit the product picketing situation and applying them to the union's actions in *Safeco* demonstrates that a primary object existed there. First, the union in *Safeco* picketed when the primary's product was present at the site. Second, the picketing took place when the product was being sold as a part of normal business. Third, the union picketed at a location that appeared reasonably calculated to reach potential consumers rather than the secondary's employees or suppliers. Fourth, the picket signs clearly identified the primary employer as the employer with whom the union had a dispute.<sup>109</sup> *Tree Fruits* adds a fifth criterion, also met in *Safeco*: the picketing was limited to appeals to boycott the primary's product and did not include other products that would create a separate dispute with the secondary.<sup>110</sup>

*Electrical Workers Local 61 v. NLRB (General Electric)*<sup>111</sup> is a variation on the typical common situs picketing case in which the primary-secondary test was used to assess the legality of picketing. General Electric operated a manufacturing facility at which it set up a separate gate or entrance for employees of the various contractors working at the site.<sup>112</sup> The General Electric plant employees struck and picketed all entrances including the one reserved for the employees of the independent contractors. The Supreme Court held that the statute did not bar picketing of the separate gate unless the employees of the independent contractors were performing work unrelated to the normal operations of the primary employer.<sup>113</sup> Although the Court recognized an intent to force the secondary to cease doing business with the primary, it found that the picketing was sufficiently primary in character

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<sup>107</sup> 341 U.S. 675 (1951).

<sup>108</sup> *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 627 (1967).

<sup>109</sup> The picket signs read: SAFECO NONUNION DOES NOT EMPLOY MEMBERS OF OR HAVE CONTRACT WITH RETAIL STORE EMPLOYEES LOCAL 1001.

<sup>110</sup> See CALIFORNIA Comment, *supra* note 100, at 185-86, which argues that the standards do not lend themselves to application in consumer product picketing cases.

<sup>111</sup> 366 U.S. 667 (1961).

<sup>112</sup> The contractors using the gate included construction contractors erecting new buildings, contractors installing and repairing heating and air conditioning equipment, contractors retooling machines, and general maintenance contractors. The original purpose of the separate gate was to insulate General Electric from the labor disputes of the contractors.

<sup>113</sup> 366 U.S. at 682.

and not unlawful.<sup>114</sup> The character of the picketing depended on the nature of the relationship between the work of the primary and that of the secondary, not on the extent of the impact of the picketing on the secondary.<sup>115</sup> An independent contractor doing business only with General Electric would be in a similar position to the secondary employers in *Safeco*, yet the *General Electric* Court did not consider the extent of the impact of the picketing. The rationale of *General Electric* accords with that of the en banc court in *Safeco* and provides support for that decision.<sup>116</sup>

Work preservation picketing also provides an example of the primary-secondary distinction. In *National Woodwork Manufacturers Association v. NLRB*,<sup>117</sup> a union refused to handle prefitted doors purchased by the employer for installation in buildings under construction. The Court held that although compliance with the union's demands would result in the contractor ceasing to do business with the supplier of the doors, the union's object was actually primary—preserving the work of fitting the doors for their members—rather than secondary—putting economic pressure directly on their employer to force the employer to cease doing business with the primary.<sup>118</sup> The economic action in *National Woodwork* took place at the primary's premises and consisted of refusals to install doors rather than picketing. Therefore, the action was less likely to injure the secondary employer than picketing might have been.<sup>119</sup> Nevertheless, the decision supports the rationale that picketing or other economic action may have the predictable effect of forcing an employer to cease doing business with another employer but still remain sufficiently directed at the primary so that the statute is not violated.<sup>120</sup>

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<sup>114</sup> *Id.* at 673-74.

<sup>115</sup> *Id.* at 680-81.

<sup>116</sup> Although *General Electric* dealt with § 8(b)(4)(i)(B), the rationale also applies to § 8(b)(4)(ii)(B), since the only difference in the two provisions is in the means considered unlawful.

<sup>117</sup> 386 U.S. 612 (1967). See *International Longshoremen's Ass'n v. NLRB*, 102 L.R.R.M. 2361 (D.C. Cir. 1979), for a recent decision involving work preservation picketing.

<sup>118</sup> The case required the Court to decide who was the primary employer in order to determine whether the object was primary or secondary. The Court concluded that the contractor was the primary since his employees were seeking to preserve their own work. It found that the door manufacturer was not the primary and that the dispute was not with that employer because the doors were not produced by union members. 386 U.S. at 644-46.

<sup>119</sup> It has been frequently recognized that picketing has an effect beyond the message conveyed. Some people may avoid locations with pickets because of their reluctance to confront a picket line regardless of whether they support the cause of the picketers. *NLRB v. Fruit & Vegetable Packers Local 700 (Tree Fruits)*, 377 U.S. 58, 71 (1964); *Building Serv. Employees Local 262 v. Gazzam*, 339 U.S. 532, 537 (1950).

<sup>120</sup> The Court also noted in reviewing prior secondary boycott cases that "however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective." 386 U.S. at 627.

Both the *Safeco* panel<sup>121</sup> and dissent to the en banc opinion<sup>122</sup> rely on the integrated product cases<sup>123</sup> to support their conclusion that the picketing in *Safeco* was unlawful. The integrated product cases base the determination of illegality on the predictable result of product picketing—a total boycott. These cases, however, are distinguishable. Unlike the product in *Safeco*, the primary's product in the integrated product cases is an inseparable part of the secondary's product so that it is impossible to boycott the primary's product without expanding the dispute to include other products and, in most cases, the entire business of the secondary. The union necessarily broadens its dispute beyond the product to affect truly neutral aspects of the secondary's business.<sup>124</sup> Since the proposed boycott in *Safeco* was aimed only at the primary's product, however, no part of the secondary's business unrelated to the primary would have been affected. Moreover, predicting the impact of integrated products picketing is less speculative than in *Safeco*, since it is impossible to boycott only the primary product. For example, in *Cement Masons Union Local 337*,<sup>125</sup> the union picketed a subdivision sales office, requesting customers not to buy houses, to further a dispute with the general contractor who had constructed the houses. The Board found the picketing violative of section 8(b)(4)(ii)(B), and the court affirmed the decision. In that case, if consumers responded to the picket at all, the dispute was necessarily expanded beyond the primary, the general contractor, to affect all subcontractors who participated in the construction. Although the developer may derive some benefit from the wages and working conditions of the primary employees, any benefits the subcontractors derive are significantly less direct. Therefore, the subcontractors are clearly the type of neutrals Congress intended section 8(b)(4)(ii)(B) to protect. In *Safeco*, the title insurance companies benefited directly from the wages and working conditions of the *Safeco* employees. In addition, the picketing had no direct effect on other more neutral employers. The title insurance companies are therefore less entitled to protection than secondaries in integrated products cases.<sup>126</sup>

### *Policies Underlying The Secondary Boycott Ban*

The secondary boycott provisions of the NLRA have a dual purpose: to protect neutrals from labor disputes that do not concern them and to permit unions to communicate the facts of their labor disputes to

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<sup>121</sup> 99 L.R.R.M. at 3334.

<sup>122</sup> *Safeco Title Ins.*, 101 L.R.R.M. at 1095-96 (Robb, J., dissenting).

<sup>123</sup> See note 28 *supra*.

<sup>124</sup> See *Safeco Title Ins.*, 101 L.R.R.M. at 3092-93 n.93.

<sup>125</sup> 190 N.L.R.B. 261 (1971), *enforced*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

<sup>126</sup> See text accompanying notes 128-33 *infra*.

the public.<sup>127</sup> The en banc court's decision in *Safeco* accommodates these two purposes.

*Protection of Neutrals.*—Protection of neutrals has been emphasized as an objective of the secondary boycott provisions of the NLRA, perhaps because it was the motivating factor for the 1959 amendments. An interpretation of congressional intent, however, necessarily encompasses more than a determination of the motivating factor for the legislation. The Board's economic impact approach emphasizes the protection of neutrals at the expense of protecting the union's right to communicate, the other objective of the statute. But injury to a neutral is not, in and of itself, objectionable since activity that is legally permissible frequently harms neutrals.<sup>128</sup> Therefore, a test based solely on the protection of neutrals cannot provide a workable standard for determining legality.<sup>129</sup>

In addition, as the dissent from the Board's *Safeco* decision noted, sole or predominant product sellers may not be the type of employers that Congress intended to protect by enacting the statute. The dissent referred to the title insurance companies as "hardly the neutral employers our colleagues consider them."<sup>130</sup> The reasoning behind this finding is explained in their *Dow* dissent. The dissent there suggested that the "statutory concept of neutrality tends to lose its substance as the struck goods rise toward being the sole or nearly sole product handled

<sup>127</sup> *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 626-27 (1967).

<sup>128</sup> The Court of Appeals for the District of Columbia in *Plumbers Local 638 v. NLRB*, 521 F.2d 885, 900 n.36 (D.C. Cir. 1975), *rev'd*, 429 U.S. 507 (1977), quotes with approval a statement to this effect from Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 732 (1951).

<sup>129</sup> CALIFORNIA Comment, *supra* note 100, at 183.

<sup>130</sup> *Retail Store Employees Local 1001*, 226 N.L.R.B. 754, 758 (1976) (Fanning and Jenkins, dissenting), *rev'd*, 101 L.R.R.M. 3084 (D.C. Cir. 1979) (en banc). In support of the argument that Congress intended to protect sole product sellers, the *Safeco* panel cited a statement made by Senator McClellan in the congressional debates in support of the amendments to § 8(b)(4). 99 L.R.R.M. at 3333. Senator McClellan stated:

I point out that we have cases of merchants who for 20 years, 10 years, or for 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 company. The merchant may have built up his trade entirely on that product. 105 CONG. REC. 6667 (1959). The en banc dissent also relied on Senator McClellan's statement for support. *Safeco Title Ins.*, 101 L.R.R.M. at 3095 (Robb, J., dissenting). The remainder of Senator McClellan's statement, however, indicates that his concern was with general economic pressure on the secondary rather than a consumer product boycott. 99 L.R.R.M. at 3339 n.42 (Robinson, J., dissenting). Senator McClellan went on to say:

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. 6667 (1959).

by the retailer."<sup>131</sup> The dissent implies that the relationship inherent in such economic interdependence warrants less protection of the secondary.

One commentator has proposed a reevaluation of the standards for determining employer neutrality to solve the problems posed by consumer product picketing cases.<sup>132</sup> The argument has much appeal since the suggested changes could be accomplished by adjudication and would apply to all secondary boycott situations. For the present, however, the law on neutrality is well-settled and an evaluation of the *Safeco* decision is limited by prior case law.<sup>133</sup> Nevertheless, in light of the questionable neutrality of the secondary employers, the balance struck by the en banc court permitting limited picketing of predominant product sellers seems particularly appropriate.

*Protection of the Union's Right to Appeal to Consumers.*—The second objective of the secondary boycott provisions of the NLRA is protection of the union's right to appeal to consumers for support of their labor disputes.<sup>134</sup> A prohibition on picketing of secondaries whose business is comprised largely of the primary's product deprives the union of its most effective and efficient means of informing the public about a labor dispute. Nothing in the NLRA requires the union to choose the least disruptive means of publicizing a dispute. That would be clearly contrary to the union's interest. Arguably, the Supreme Court in *Tree Fruits* struck a balance between the two objectives when it decided that picketing of struck products was permissible; the harm to the neutral that might result from such picketing did not outweigh the union's right to publicize its dispute.<sup>135</sup> The en banc court in *Safeco* struck the same balance, protecting neutrals from involvement

<sup>131</sup> Local 14055, United Steelworkers (Dow Chem. Co.), 211 N.L.R.B. 649, 654-55 (1974) (Fanning and Jenkins, dissenting), *enforcement denied on other grounds*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977). See also *Bennett v. Teamsters & Chauffeurs Local 456*, 459 F. Supp. 223, 232 n.19 (S.D.N.Y. 1978). *Bennett* suggests that it is illogical to treat the factor of economic interdependence as requiring protection of the secondary in consumer picketing cases but, at the same time, allowing picketing in situations where the economic interdependence contributes to a finding of an ally relationship between the employers. For an explanation of ally relationships, see note 25 *supra*.

<sup>132</sup> CALIFORNIA Comment, note 100 *supra*. There, the author suggests that the legality of consumer picketing be determined by the degree of interrelationship of the producer and the retailer as measured by the standards used for ascertaining whether an ally relationship exists. This approach has the advantage of protecting the most neutral employers but creates problems of line-drawing in cases where the relationship is neither very close nor very distant.

<sup>133</sup> The majority and the dissent in both the Board and the court decisions agreed that under existing law, the title insurance companies are neutral. Although there is some room for argument, the courts have generally deferred to the Board's findings on neutrality issues if they are supported by substantial evidence. See note 29 *supra*.

<sup>134</sup> *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 692 (1951).

<sup>135</sup> Local 14055, United Steelworkers (Dow Chem. Co.), 524 F.2d 853, 859 (D.C. Cir. 1975), *vacated and remanded*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302 (1977).



in disputes that extend beyond their business with the primary employer while, at the same time, permitting unions to pressure the primary employer with publicity directed at the primary.

*The Realities of Modern Industrial Relations.*—The en banc court's balance between the dual objectives of the secondary boycott provisions of the NLRA is especially appropriate in view of the complexity of modern industrial relations. Business relationships today are substantially more complex than even twenty years ago, the date of the passage of the secondary boycott amendments. Businesses are frequently part of large conglomerates and have substantial resources to resist economic pressure brought by unions. Furthermore, many industries have become increasingly vertically integrated.<sup>136</sup> There may be highly interdependent relationships, and even common ownership of producers, distributors, and retailers, that meet the Board's tests of neutrality.<sup>137</sup> The existence of highly integrated businesses increases the difficulty of affecting wages and working conditions.<sup>138</sup> The California legislature considered this factor when it specifically permitted consumer picketing of product ingredients, as well as products, in its Agricultural Labor Relations Act.<sup>139</sup>

Also, the location of work sites often complicates efforts to publicize labor disputes. The majority of work sites are located in places not frequented by the public—in industrial parks, in central cities, or along rural highways. Effective publicity may be possible only at retail outlets for the employer's products.

The NLRA was originally passed to promote peaceful, private resolution of labor disputes by correcting the imbalance in power between labor and management.<sup>140</sup> Subsequent amendments have attempted to maintain a balance of power.<sup>141</sup> Recognition of the changing nature of modern business in interpreting the secondary boycott provisions of the NLRA is consistent with this policy. That balance is accomplished in *Safeco*.

#### CONCLUSION

The en banc court's opinion in *Safeco*, permitting picketing of the secondary employer limited to the primary's product regardless of the

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<sup>136</sup> For a discussion of the extent of integration in the agriculture industry, see CALIFORNIA Comment, *supra* note 100, at 211-12.

<sup>137</sup> See note 25 *supra*.

<sup>138</sup> CALIFORNIA Comment, *supra* note 100, at 212.

<sup>139</sup> *Id.* at 215.

<sup>140</sup> II LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3269-70 (1935) (statement of President Roosevelt as to purpose of bill).

<sup>141</sup> I LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT I (1947); II *id.* at 1654-55; I LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT I (1959).

significance of that product to the secondary, is consistent with the primary-secondary rationale used by the Court in *Tree Fruits* and with the Board's standards in other types of secondary boycott cases. To determine whether the picketing of a secondary is coercive and has an unlawful object, the Board must determine whether the appeal goes beyond the struck product. To make this determination, the Board should look at objective factors similar to those considered in other types of secondary boycott cases: (1) the wording on the sign; (2) the location of the pickets; (3) the timing of the picketing; and (4) any conversations of the pickets with consumers, employees, or the secondary employer that might belie the ostensible object.<sup>142</sup> Although the percentage of the secondary's business that the primary product constitutes is also an objective, easily discernible factor, the Board decision in *Safeco* not to permit picketing if the "predictable result" is a total boycott offers little guidance regarding the percentage that warrants finding such a violation. Moreover, the decision is based on questionable assumptions about the predictability of the response of consumers and secondaries to a picket.

The standard enunciated by the en banc *Safeco* court enables all parties to a dispute to predict more closely the outcome of a charge alleging a violation of section 8(b)(4)(ii)(B). It is easier for a union to conform its picketing to legal requirements since they are not based on factors over which it has no control or about which it has little information.<sup>143</sup> Employers will also be better able to determine whether an appeal is within the limits on consumer picketing. Clear, objective standards should limit the number of charges filed to those where a violation at least arguably occurred.

Finally, the court's decision provides an administratively workable standard for consumer product picketing that takes into account the changing nature and increasing complexity of business and industrial relations. The standard effectuates both purposes of the secondary boycott provisions of the NLRA—protection of neutrals and protection of the right of unions to solicit support in labor disputes—as well as the basic purpose of the NLRA as a whole—encouraging free collective bargaining and peaceful, private resolution of labor disputes.

*Ann Hodges*

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<sup>142</sup> See *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950).

<sup>143</sup> See note 96 and accompanying text *supra*.