



2-1-1980

Labor Law--Secondary Consumer Picketing-- Picketing to Discourage Purchase of the Struck Product from a Neutral Is Not Unlawful, Although the Struck Product Comprises the Great Bulk of the Neutral's Business

Joseph M. Musilek

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

Recommended Citation

Joseph M. Musilek, *Labor Law--Secondary Consumer Picketing--Picketing to Discourage Purchase of the Struck Product from a Neutral Is Not Unlawful, Although the Struck Product Comprises the Great Bulk of the Neutral's Business*, 55 Notre Dame L. Rev. 436 (1980).
Available at: <http://scholarship.law.nd.edu/ndlr/vol55/iss3/9>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Labor Law—Secondary Consumer Picketing—Picketing to Discourage Purchase of the Struck Product from a Neutral Is Not Unlawful, Although the Struck Product Comprises the Great Bulk of the Neutral’s Business

*Retail Store Employees, Local 1001 v. NLRB**

I. Introduction

It is widely acknowledged that the primary purpose of Congress in adding subsection (ii) to section 8(b)(4) of the National Labor Relations Act (NLRA)¹ was to limit a labor union’s right to exert pressure on a neutral secondary employer.² The subsection was deemed necessary to plug a loophole in the Taft-Hartley amendments of 1947 which allowed unions to appeal to customers of a secondary employer to cease patronizing that employer.³ Since its enactment, however, the courts have had difficulty in formulating a uniform policy with regard to the amendment’s enforcement. In particular, section 8(b)(4)(ii)(B),⁴ dealing with consumer product picketing, has provided a steady stream of litigation due to the inability of courts to agree on the extent of that section’s proscriptions. Confusing matters even further is the fact that the Supreme Court’s sole pronouncement on such activity involved a unique factual situation which precluded the Court from dealing with many of the most controversial aspects of product picketing.⁵

* No. 76-2015 (D.C. Cir. Aug. 10, 1979).

1 Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 158 (1976). The statute provides, in relevant part, that:

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

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

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any producer, processor, 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 picketing . . . *Provided further*, That nothing contained in this paragraph (4) shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . , that a product or products are produced by an employer with whom the labor organization has a primary dispute as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer . . . to refuse to pick up, deliver, or transport any goods . . . at the establishment of the employer engaged in such distribution.

2 2 N.L.R.B., *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959) (Senator McClellan). “The amendment . . . covers pressure in the form of dissuading customers from dealing with secondary employers.” *Id.*

3 *Id.*

4 See note 1 *supra*.

5 *NLRB v. Fruit and Vegetable Packers, Local 760*, 377 U.S. 58 (1964), *rev’g*, 308 F.2d 311 (D.C. Cir. 1962), *rev’g*, 132 N.L.R.B. 1172 (1961). Unless otherwise indicated, subsequent references will be to the Supreme Court’s decision. This case was the subject of numerous notes, among them: *Peaceful Consumer Picketing at Secondary Site Not Prohibited by Section 8(b)(4) of the Labor Management Relations Act*, 33 *FORDHAM L. REV.* 112 (1964); *A New Loophole in Section 8(b)(4) of the National Labor Relations Act*, 63 *MICH. L. REV.* 682

In *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, the Supreme Court held that not all secondary picketing was prohibited by section 8(b)(4)(ii)(B).⁶ Rather, the Court held consumer picketing to "coerce" the neutral employer in violation of 8(b)(4)(ii)(B) only if the appeal requested consumers to boycott completely the secondary employer distributing the struck product. An appeal requesting only that consumers not purchase the struck product was deemed lawful as "merely following the struck product."⁷ Unavoidably imposing itself upon the Court's deliberations was the first amendment question of whether a ban on peaceful consumer picketing was an encroachment on the union's right to free speech. Although the majority opinion avoided dealing directly with that issue by construing narrowly the proscriptions of section 8(b)(4)(ii)(B), both the concurring and dissenting opinions focused on the first amendment issue as one which must be confronted in any picketing controversy.

The decision in *Tree Fruits* has been the starting point for most of the subsequent cases involving consumer picketing. In a number of them, the secondary activity has been held unlawful.⁸ In these cases the courts have not explicitly challenged the *Tree Fruits* rationale. They have, however, limited its scope by their willingness to distinguish *Tree Fruits* on factual grounds. The exception has been the District of Columbia Court of Appeals, which has emerged as the lone court to adhere strictly to a broad, literal interpretation of *Tree Fruits*. And in *Retail Store Employees, Local 1001 v. NLRB (Safeco)*,⁹ the District of Columbia court reaffirmed its unwillingness to depart from the Supreme Court's ruling. The court allowed the consumer picketing involved despite the fact that, if successful, it would almost certainly have resulted in putting the secondary employer out of business. This decision is in conflict with and fails to take account of the competing interests of the neutral employer. The court's decision raises many of the difficult problems which the unique facts of *Tree Fruits* allowed the Supreme Court to avoid. In so doing, the District of Columbia Court of Appeals has given the Supreme Court proper occasion, on the fifteenth anniversary of *Tree Fruits*, to clarify its holding in that case.

II. Statement of the Facts

The controversy in the present case arose in 1974 when five land title companies,¹⁰ all Washington corporations, became involved in a labor dispute between Safeco Title Insurance Company and Local 1001 of the Retail Store

(1965); *Consumer Picketing Under the Landrum-Griffin Amendments to the Taft-Hartly Act*, 12 U.C.L.A. L. REV. 238 (1965); *Picketing and Publicity Under Section 8(b)(4) of the LMRA*, 73 YALE L.J. 1265 (1963-64).

⁶ 377 U.S. at 63.

⁷ *Id.* at 72.

⁸ See, e.g., *K&K Construction v. NLRB*, 592 F.2d 1228 (3d Cir. 1979); *Hoffman v. Cement Masons Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969); *Honolulu Typographical Union No. 37 v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968).

⁹ No. 76-2015 (D.C. Cir. Aug. 10, 1979), *rehearing en banc rev'g*, Lab. Cases (CCH) ¶ 10,993 (D.C. Cir. Dec. 5, 1978), *enforcing*, 226 N.L.R.B. 754 (1976).

¹⁰ Land Title Company of Snohomish County, Land Title Company of Kitsap County, Land Title Company of Cowlitz County, Land Title Company of Clark County, and Land Title Company of Pierce County.

Employees Union, Retail Clerks International Association, AFL-CIO (the Union). All five land title companies provide real estate title searches, issue title insurance, and perform escrow services. All of their title insurance is underwritten by Safeco and this insurance constitutes the great bulk of their business.¹¹ Safeco is also a substantial stockholder in each company¹² and each company has at least one Safeco officer on its Board of Directors.¹³ Safeco, however, exercises no control over the personnel policies of the five land title companies and has no employees who are also employed by any of the five. None of the land title companies' employees have any union affiliation.

Safeco, a California corporation, engages in title insurance underwriting and related activities. The Union was the certified collective bargaining representative of certain Safeco employees. A contract negotiation came to an impasse, whereupon the Union employees went on strike and began picketing Safeco's office in Seattle.

On several occasions striking employees, "with the knowledge and authority of the union,"¹⁴ patrolled the customer entrances of one or more of the land title companies. At such times the employees carried signs reading "SAFECO NONUNION DOES NOT EMPLOY MEMBERS OF OR HAVE CONTRACT WITH RETAIL STORE EMPLOYEES, LOCAL 1001. . . ."¹⁵ The employees also distributed handbills to customers requesting that Safeco policyholders support the strike by cancelling their insurance. The striking Safeco employees were careful to avoid encouraging work stoppages by any land title company employees and made no attempt to interfere with any deliveries to the land title companies.

One of the land title companies filed a complaint with the NLRB charging the Union with carrying on an unlawful secondary boycott.¹⁶ Soon thereafter, Safeco intervened, charging the Union with an unfair labor practice. The parties waived a hearing before an administrative judge and submitted the case directly to the National Labor Relations Board (NLRB or Board) on a stipulation of facts.¹⁷ The Board then ruled against the Union upon a finding that the land title companies were neutrals to the dispute and thereby entitled to protection from coercive secondary activity.¹⁸ The Board ordered the Union to desist in its picketing of the land title companies.¹⁹

The Union petitioned the District of Columbia Court of Appeals to review and set aside the Board's order,²⁰ and the Board applied for enforcement. A three-judge panel affirmed the Board's order by a two-to-one vote. The Union then requested and received a rehearing *en banc*. The full court, in a five-to-four

11 The range is from 90-95%. No. 76-2015 at 3 n.6.

12 Safeco's stock ownership is 53% in one land title company and it ranges from 12% to 38% in the other four. *Id.* at 4 n.7.

13 *Id.*

14 *Id.* at 3.

15 *Id.*

16 Land Title Company of Pierce County.

17 No. 76-2015 at 4 n.10.

18 226 N.L.R.B. 754 (1976). The vote was 3-2, with Members Fanning and Jenkins dissenting.

19 *Id.*

20 Lab. Cases (CCH) ¶ 10,993 (D.C. Cir. Dec. 5, 1978). The Union was allowed to petition the D.C. Circuit pursuant to § 10(f) of the NLRA, which allows any person aggrieved by a final order of the Board to petition for review in any circuit in which the unfair labor practice occurred or in which the person resides, or in the United States Court of Appeals for the District of Columbia.

decision, overruled the three-judge panel, granted the Union's petition to set aside the Board's order and denied the Board's application for enforcement.²¹

III. The Statute

The extent to which pressure can be exerted by a labor organization against a neutral secondary employer is controlled by section 8(b)(4) of the NLRA.²² When the union's object is to force the neutral employer to cease dealing with the primary employer, clause (i) of 8(b)(4) prohibits the union from inducing any individual employed by the neutral employer to refuse to handle goods or to strike against the neutral employer, while clause (ii) prevents the union from threatening or coercing the neutral employer directly.²³ Notwithstanding the broad language of section 8(b)(4), a proviso to this section specifically exempts from its coverage primary strikes and primary picketing.²⁴ In addition, a second proviso, the so-called "publicity proviso," allows informational activities, other than picketing, for the purpose of truthfully advising the public that products produced by the primary employer are being distributed by another employer (the neutral), so long as such activity does not induce work stoppages on the premises of the neutral.²⁵

The "threatening or coercing" language of clause (ii) was thought to suggest that picketing a secondary employer was per se an unfair labor practice.²⁶ This impression, however, was refuted by the Supreme Court's decision in *Tree Fruits*.

IV. Tree Fruits

Tree Fruits involved a situation in which the secondary employer was a Safeway grocery store and the product being picketed was Washington apples—a product comprising only an insubstantial portion of Safeway's business. The NLRB found the object of the union's activity was forcing the neutral Safeway store to cease selling or handling the struck product.²⁷ The Board determined that this was in direct violation of section 8(b)(4)(ii)(B) of the NLRA, and ordered the union to cease picketing. The District of Columbia Court of Appeals reversed the Board, and determined that the picketing must be allowed.²⁸ The court based its holding on the fact that since Safeway was unlikely to suffer any substantial economic impact, the primary purpose of the picketing was the exercise of constitutionally protected free speech. "Thus it may well be that the picketing in this case is closer to the core notion of constitutionally protected free speech than the picketing the Supreme Court has

21 No. 76-2015 at 30.

22 See notes 1-2 *supra*.

23 *Id.*

24 *Id.*

25 *Id.*

26 See Aaron, *The Labor-Management and Reporting Act of 1959*, 73 HARV. L. REV. 1086, 1114 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959). *But see* Previat, *The New Hot-Cargo and Secondary Boycott Sections: A Critical Analysis*, 48 GEO. L.J. 346, 353 (1959).

27 132 N.L.R.B. 1172 (1961).

28 308 F.2d 311 (D.C. Cir. 1962).

held may be banned.”²⁹ The Supreme Court granted certiorari and upheld the picketing, basing its decision upon reasoning substantially different from that used by the court of appeals.

A. *The Supreme Court Majority*

The Court held that not all consumer picketing constituted the “isolated evil” that Congress intended to prohibit by section 8(b)(4)(ii)(B).³⁰ Only those appeals which requested consumers to cease all dealings with the secondary employer were proscribed. A request that consumers not purchase the struck product was more closely allied to the primary dispute and was, in effect, no more than merely following the struck product:

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.³¹

The Court determined that the union’s right peacefully to publicize its dispute with the primary employer outweighed any possible losses encountered by the secondary employer being picketed. As a result of this finding, the Court held that the court of appeals had erred in basing its decision upon the issue of whether the picketing had caused or was likely to cause a substantial economic impact on the secondary employer:

We disagree therefore with the Court of Appeals that the test of “to threaten, coerce, or restrain” for the purpose 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 respondent’s 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.³²

It is the inability of subsequent courts to interpret uniformly the extent of this statement that is at the heart of the present controversy. More immediately, that statement was the source of disagreement between the majority of the Court and Justices Black, Harlan, and Stewart.

²⁹ *Id.* at 316.

³⁰ 377 U.S. at 63 (1964).

³¹ *Id.* at 72.

³² *Id.*

B. *Justice Black's Concurring Opinion*

Contrary to the majority position, Justice Black agreed with the NLRB and Justices Harlan and Stewart in reading the legislative intent of section 8(b)(4)(ii)(B) to prohibit all secondary picketing. In this opinion, however, that intent is at odds with the constitutional right of free speech.

Because of the language of section 8(b)(4)(ii)(B) of the National Labor Relations Act and the legislative history set out in the opinions of the Court and of my Brother *Harlan*, I feel impelled to hold that Congress, in passing this section of the Act, intended to forbid the striking employees of one business to picket the premises of a neutral business where the purpose of the picketing is to persuade customers of the neutral business not to buy goods supplied by the struck employer. Construed in this way, as I agree with Brother *Harlan* that it must be, I believe, contrary to his view, that the section abridges freedom of speech and press in violation of the First Amendment.³³

Justice Black supported his contention by separating the patrolling aspect from the communicative aspect of picketing. He maintained that while there may be times when the damage likely to result to the public from patrolling would warrant restrictions, that was not the case here. In Justice Black's interpretation, both the Board and Justice Harlan sought to restrict the picketing, not because of its effect on the public, but because of what the pickets said:

In short, we have neither a case in which picketing is banned because the pickets are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgement of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment.³⁴

Justice Black concluded by refuting Justice Harlan's argument that the Court can legally proscribe the picketing because the union has other means of communicating its view of the dispute to the public.³⁵ "First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop."³⁶

C. *Justice Harlan's Dissent*

Justice Harlan, joined by Justice Stewart, first found fault with the majority's determination that Congress, in enacting section 8(b)(4)(ii)(B), "ha[d] not, with the 'requisite clarity,' evinced a purpose to prohibit such picketing when directed *only* at the products of the primary employer."³⁷ Justice Harlan could not discern in either section 8(b)(4)(ii)(B) or its legislative history "any

33 377 U.S. at 76 (Black, J., concurring).

34 *Id.* at 79.

35 *Id.* at 79-80.

36 *Id.* at 80.

37 377 U.S. at 81 (Harlan, J., dissenting).

basis for the Court's subtle narrowing" of the statute.³⁸ "Nothing in the statute lends support to the fine distinction which the Court draws between general and limited product picketing."³⁹ He went on to note that "The distinction drawn by the majority becomes even more tenuous if the picketed retailer depends largely or entirely on sales of the struck product."⁴⁰ By way of example, Justice Harlan described a situation in which an independent gas station owner sells gas purchased from a struck gasoline company, and is then picketed by the gasoline company's employees. Harlan's argument was that the station owner is no less "threatened or coerced" by signs reading "Don't buy X gas" than by signs reading "Don't patronize this gas station."⁴¹

Justice Harlan then addressed the first amendment issue deemed dispositive by Justice Black. Reasoning that picketing is "inseparably something more than and different from simple communication,"⁴² Justice Harlan stated that,

Congress has given careful and continued consideration to the problems of labor-management relations and its attempts to effect an accommodation between the right of unions to publicize their position and the social desirability of limiting a form of communication likely to have effects caused by something apart from the message communicated, are entitled to great deference. The decision of Congress to prohibit secondary consumer picketing during labor disputes is, I believe, not inconsistent with the protections of the First Amendment, particularly when, as here, other methods of communication are left open.⁴³

V. Subsequent Case Law

A. *Distinguishing Tree Fruits*

In a number of cases since 1964, the courts have distinguished *Tree Fruits* in finding consumer picketing unlawful.⁴⁴ These cases have typically involved two different factual situations. The first situation in which consumer picketing is disallowed is when the union requests a total boycott of the secondary employer. The second occurs when the product picketed has become so merged with other products distributed by the secondary employer as to make it impossible for consumers to boycott the struck product without boycotting virtually the entire line of products distributed by the secondary employer.

The first situation is exemplified in *Honolulu Typographical Union No. 37 v. NLRB*.⁴⁵ Employees on strike against a newspaper picketed a number of restaurants which advertised in that paper, asking people not to patronize those establishments. Although the actual placards read similarly to those used in *Tree Fruits*, it was obvious to the court that the real meaning of the placards was

38 *Id.* at 82.

39 *Id.*

40 *Id.* at 83.

41 *Id.*

42 *Id.* at 93.

43 *Id.*

44 See note 8 *supra*.

45 401 F.2d 952 (D.C. Cir. 1968).

to dissuade customers from doing any business with the restaurants, especially since handbills passed out at the time of the picketing said precisely that.⁴⁶ The District of Columbia Court of Appeals, in holding that such blatant interference with the neutral was unlawful, stated,

Here, where picketing means a total boycott, one interest must plainly yield, either the Union's desire to maximize pressure on the primary employer (the newspaper) by cutting off its markets or the neutral's desire to avoid a boycott of his entire business. In the 1959 amendments, Congress chose protection of the neutral from this sort of disruption as the interest more deserving of protection. Indeed, the Supreme Court so stated in *Tree Fruits* when it characterized as one of the "isolated evils" barred by section 8(b)(4)(ii)(B), "picketing which persuades the customers of a secondary employer to stop all trading with him."⁴⁷

The second situation, typified in *American Bread v. NLRB*,⁴⁸ involves the "merged product" theory. In *American Bread*, customers of restaurants were asked not to purchase products produced by the American Bread Company. The Sixth Circuit held that because customers would have had to pass up any meal that included bread in order to boycott the struck product, the union's request unavoidably spread the boycott to products other than those produced by American Bread.⁴⁹ Therefore, the struck product had become inextricably merged with the general business of the secondary employer. The picketing, in effect, requested a total boycott; the court found that request to be an unlawful secondary activity.

B. Dow Chemical

Ten years after Justice Harlan's dissenting opinion in *Tree Fruits*, his example of a picketed gasoline station became a reality when that exact situation was presented in *Local 14055, United Steelworkers of America v. NLRB (Dow Chemical)*.⁵⁰ In that case Dow Chemical manufactured gasoline which it sold to independent gas station owners under the product name "Bay" gas. Striking Dow Chemical workers picketed the stations with signs reading "Don't Buy Bay Gas."

The issue in *Dow Chemical* was first dealt with by the NLRB. By a three-to-two vote, the Board ordered the union to cease picketing the gas stations.⁵¹ The Board held that since the gasoline was a much larger component of the station's income than were the apples of Safeway's income, *Tree Fruits* was not applicable. They found the union's picketing "reasonably calculated to induce customers not to patronize the neutral parties . . . at all."⁵²

⁴⁶ *Id.* at 954 n.4.

⁴⁷ *Id.* at 956.

⁴⁸ 411 F.2d 147 (6th Cir. 1969).

⁴⁹ *Id.* at 154.

⁵⁰ 524 F.2d 853 (D.C. Cir. 1975), *rev'g*, 211 N.L.R.B. 649 (1974), *vacated and remanded*, 429 U.S. 807 (1976), *complaint dismissed on remand*, 229 N.L.R.B. 302 (1977). Like *Tree Fruits*, *Dow Chemical* was the topic of a number of law review comments. *See, e.g.*, 10 GA. L. REV. 871 (1975-76); *Developing a Standard for Secondary Consumer Picketing*, 26 LAB. L.J. 585 (1975); *Consumer Picketing—Struck Product as Major Source of Revenue*, 30 RUTGERS L. REV. 176 (1976-77); 54 U. DET. J. URB. L. 579 (1976-77).

⁵¹ 211 N.L.R.B. 649 (1974).

⁵² *Id.* at 651.

A strong dissent, however, argued forcefully that the Supreme Court had made it clear that consumer picketing aimed only at the struck product was not proscribed by section 8(b)(4)(ii)(B). The dissent noted in support of its contention the Supreme Court's unequivocal rejection of the Board's reasoning as originally raised by Justice Harlan in his dissent in *Tree Fruits*.⁵³

The District of Columbia Circuit granted the union's petition to set aside the Board's order, and denied the Board's application for enforcement.⁵⁴ The reasoning was similar to that of the Board's dissent. The three-judge panel noted the similarity between the facts in *Dow Chemical* and Justice Harlan's hypothetical. The court agreed that the position taken by Justice Harlan and the majority of the Board was persuasive, but held that that position had, nonetheless, been explicitly rejected by the *Tree Fruits* majority.⁵⁵ By refusing to distinguish *Tree Fruits* upon the grounds expressed by the Board, and finding no other significant difference between *Dow Chemical* and *Tree Fruits*, the court was left with no choice but to follow *Tree Fruits* and allow the picketing.

The Supreme Court granted certiorari, but simultaneously vacated the judgment of the court of appeals and remanded the case to that court in light of intervening circumstances.⁵⁶ Although the Court did not elaborate on what those circumstances were, it undoubtedly was referring to the demise of the local union involved in the dispute.⁵⁷ The District of Columbia Circuit subsequently remanded the case to the NLRB which dismissed the proceedings as moot.⁵⁸

VI. The Present Controversy (*Safeco*)

A. *The NLRB Position*

The NLRB first dealt with the issue of the neutrality of the land title companies to the primary labor dispute.⁵⁹ It did so by examining four factors: the degree of common ownership between Safeco and the land title companies, the extent to which there was actual common control of their day-to-day operations, the integration of their business operations, and the land title companies' dependence on Safeco for a substantial portion of their business.⁶⁰ The purpose of this inquiry was to assay "the factual relationship between the alleged secondary employer and the primary employer in light of Congressional intent to protect employers who are unconcerned and not involved in the labor dispute of the union and the primary employer."⁶¹ Emphasizing that no one factor was dispositive, the Board determined that all five land title companies were neutrals, even though their dependence on Safeco for business was

53 211 N.L.R.B. at 653 (*Members Fanning and Jenkins*, dissenting).

54 524 F.2d 853 (1975).

55 *Id.* at 860.

56 429 U.S. 807 (1977).

57 See Comment, 54 U. DET. J. URB. L. 583 n.34 (1977).

58 229 N.L.R.B. 302 (1977).

59 226 N.L.R.B. 754, 756 (1976).

60 *Id.* These criteria were first adopted in *NLRB v. Steel Fabricators Local 810 (Sid Harvey)*, 460 F.2d 1 (2d Cir. 1972).

61 226 N.L.R.B. at 756.

significant.⁶² The Board found the other factors to be insubstantial. In particular, the Board noted that the parties had stipulated that no employees were interchanged between Safeco and the other companies and that Safeco had no control over the land title companies' labor relations policies.⁶³

Having determined that the land title companies were neutrals, the Board found the Union's activity to be unlawful under section 8(b)(4)(ii)(B).⁶⁴ The Board maintained that *Tree Fruits* was inapposite in a case in which the struck product is the secondary employer's sole product. It found the Safeco case to more closely resemble *Honolulu Typographical*, *American Bread*, and *Hoffman v. Cement Masons Local 337*.⁶⁵ In following these cases, the Board concluded that the holding in *Tree Fruits* does not apply when the union appeal necessarily asks for a total boycott, and that in such instances the union's "consumer appeal constitutes coercion of neutral employers within the meaning of section 8(b)(4)(ii)(B) of the Act."⁶⁶

B. *The En Banc Decision*

1. The Majority

Judge Robinson's majority opinion began with a review of the Board's determination of the land title companies' neutrality. Upon finding itself in substantial agreement with the Board, the majority refused to overturn the Board's conclusion.⁶⁷ The court then addressed the legality of the picketing in light of that conclusion. Emphasizing the holding of *Dow Chemical*, which the Board had dismissed as inapplicable, the court found no significant difference between the two cases.⁶⁸

Consequently, the court reaffirmed the interpretation of *Tree Fruits* it had used in *Dow Chemical* to uphold the lawfulness of the Union's picketing.⁶⁹ As to the effect of the Supreme Court's vacatur of the judgment in *Dow Chemical*, the court stated,

We need not ponder whether vacatur of the panel's judgment in *Dow Chemical* robbed the accompanying opinion of the precedential force it otherwise would have commanded. Whatever its status as precedent, it cannot be gainsaid that the value of its reasoning endures.⁷⁰

The majority concluded that the use of an economic impact test as determinative of the legality of the Union's activity was expressly ruled out by the

62 *Id.* See also note 11 *supra*.

63 226 N.L.R.B. at 756.

64 *Id.* at 757.

65 See note 8 *supra*. *Hoffman* involved a situation where the union picketed homes held for sale by a developer. The primary dispute was between the union and the general contractor who actually built the homes. The union request not to buy the homes built by the contractor constituted a request for a total boycott of the developer. While the court conceivably could have held that the picketing was lawful as directed solely at the struck product, it chose instead to view the union request in light of its inevitable effect on the neutral developer.

66 226 N.L.R.B. at 757.

67 No. 76-2015 at 10.

68 *Id.* at 19.

69 *Id.* at 27. See generally, 524 F.2d 853 (1975).

70 No. 76-2015 at 18 n.62.

Supreme Court in *Tree Fruits*, and that barring such a test, there is no significant difference between *Tree Fruits* and the present case.⁷¹ The court stated, in effect, that it is not the Union's fault that the land title companies chose to deal exclusively with one underwriter. To attempt to draw a line between lawful and unlawful consumer picketing purely on the basis of the percentage of the secondary employer's business dependent upon the struck product would not only be impossible, it would conflict with congressional and judicial interpretation of section 8(b)(4)(ii)(B).⁷² The court found there to be a clear line of demarcation between what section 8(b)(4)(ii)(B) 'leaves unaffected and what it plainly forbids—the line distinguishing between picketing a secondary employer merely to 'follow the struck goods,' and picketing designed to result in a generalized loss of patronage. . . .'⁷³

The court closed by defending its position as necessary to avoid a possible confrontation with the First Amendment. When legislation otherwise suspect is fairly susceptible to an interpretation shielding it from constitutional doubt, federal courts are duty bound to give it that reading. . . . Section 8(b)(4)(ii)(B) has before been accused of encroaching upon those hallowed freedoms, and the Board's nebulous inferred-intent approach to its operation enlivens the specter of constitutional infirmity. Here, no less than in *Tree Fruits*, the call to sidestep uncertainty of that sort is imperative.⁷⁴

2. Judge Robb's Dissent

Although agreeing with both the Board and the majority opinion that the land title companies were neutrals in the dispute between the Union and Safeco, Judge Robb insisted that *Tree Fruits* is inapposite where the struck product constitutes the great bulk of the neutral's business. The dissent supported its conclusion by comparing the Union's request to boycott Safeco insurance to the request in *Honolulu Typographical* that customers boycott the restaurants which advertised in the Honolulu paper.⁷⁵ In essence, Judge Robb viewed the Union as having requested a total boycott while the majority viewed the same request as one merely following the struck product.

The majority argues in this case that, regardless of the intended or foreseeable effect of its picketing on the land title companies, the picketing is lawful under the holding in *Tree Fruits* because it followed the struck product, Safeco insurance. The Court in *Tree Fruits*, however, repeatedly stressed that section 8(b)(4)(ii)(B) proscribes picketing which is intended to persuade the customers of a secondary employer to cease dealing with him. And the Board has found here that the Local was seeking a "virtual boycott of the land title

71 *Id.* at 28-29. "As we read *Tree Fruits*, Congress has weighed the policies competing for dominance in the situation at hand, and has cast its lot in favor of picketing designed only to reduce the secondary employer's market for products of the primary employer. Our charge as judges is to remain faithful to that understanding." *Id.*

72 *Id.* at 26-27. "In urging that the foreseeable economic consequences of the Union's effort converted an appeal directed solely to the struck product into a prohibited call for a full boycott of the secondary employer's business, the Board and the dissent alike embrace the concept of coercion that the *Tree Fruits* consigned to the graveyard. More than that, they stand the decisional rationale of *Tree Fruits* on its head." *Id.*

73 *Id.* at 22.

74 *Id.* at 29.

75 No. 76-2015 at 5 (Robb, J., dissenting).

companies.” Thus, the legislative history recounted by the Court in its *Tree Fruits* opinion amply demonstrates that the Local’s conduct was one of the “isolated evils” at which the section was directed.⁷⁶

In concluding, the dissent asserted that the Board’s resolution of the conflicting claims represented a defensible construction of the statute. The Board’s interpretation had, in fact, been followed by every other circuit court that had addressed the issue,⁷⁷ and was, therefore, entitled to considerable deference.⁷⁸

VII. Analysis

At present, any attempt to deal with section 8(b)(4)(ii)(B) must inevitably hinge upon some interpretation of the Supreme Court’s holding in *Tree Fruits*. Whether the goal is to constrict as narrowly as possible the union’s right to engage in secondary activity or to allow virtually unlimited product picketing, consideration must first be given to the Supreme Court’s sole pronouncement on that issue. Judge Robinson may have summed up the problem best in his preface to the present case:

We approach the problem confronting us with full appreciation of its perplexity. Section 8(b)(4)(ii)(B) is ambiguous on the point at issue; and the Supreme Court’s *Tree Fruits* interpretation of the statutory language, of course, was not an undertaking to deal with every question that conceivably could arise. We would be less than frank if we failed to acknowledge that a good many passages in *Tree Fruits* can be read in isolation to lend support to either side of the present controversy. Our decision, then, is only what it can be: our very best judgment, guided maximally by *Tree Fruits* considered as a whole, as to what Congress had in mind.⁷⁹

Adding to the confusion is the fact that the District of Columbia Court of Appeals is the lone court which has refused to distinguish *Tree Fruits* when the struck product comprises the great bulk of the neutral employer’s business.⁸⁰ The NLRB has held that in such instances *Tree Fruits* is inapposite.⁸¹ The Ninth Circuit in *Hoffman v. Cement Masons Local 337* also circumvented *Tree Fruits* when to do otherwise would have allowed a union to request a virtual boycott of the neutral employer.⁸² Thus, the current status of consumer picketing under such circumstances is uncertain.

Further clarification of section 8(b)(4)(ii)(B) is needed to assure uniform enforcement of its provisions. Such clarification should soon be forthcoming because this case provides an opportunity for the Supreme Court to remedy the confusion surrounding *Tree Fruits*. On January 8, 1980 the Supreme Court accepted the *Safeco* controversy for review.⁸³

There are a variety of options available to the Court in facing the issues brought forth for review in *Safeco*. One possibility would be for the Court to

76 *Id.* at 3.

77 *Id.* at 5 n.2.

78 *Id.* at 7.

79 No. 76-2015 at 18.

80 See note 77 *supra*.

81 226 N.L.R.B. at 757 n.15.

82 See note 65 *supra*.

83 *Cert. granted*, 48 U.S.L.W. 3425 (U.S. Jan. 8, 1980) (No. 79-672).

adopt the reasoning of the NLRB and make use of some form of economic impact test. This appears to be the least likely alternative. In *Tree Fruits*, both the majority and dissenting opinions expressly rejected an economic impact test. It has been suggested, however, that the *Tree Fruits* rejection of an economic impact test was narrow in scope, and leaves open the possibility of devising some standard which would leave the holding in *Tree Fruits* untouched while prohibiting the inequitable result of *Dow Chemical* and *Safeco*.⁸⁴ This approach would focus on the significance of the product being picketed to the neutral and hinge upon a determination of whether that product was economically essential to the neutral employer.

A more likely alternative and one involving the slightest departure from *Tree Fruits* would be to focus on the relation of the union's request to the struck product. Consumer picketing which is confined to the struck product would clearly be lawful regardless of the economic impact of the picketing on the neutral employer. This approach is substantially the position of the District of Columbia Court of Appeals.⁸⁵ This position would provide the needed clarification of *Tree Fruits*, enabling a uniform application of section 8(b)(4)(ii)(B) by the courts and the NLRB. Although it would not eliminate the need for the merged product exception, this position would provide clearer boundaries than now exist for application of that doctrine. Most importantly, this stance would strike a balance between the rights of unions to publicize their disputes and the rights of neutrals to be protected from the adverse effects of picketing directed at more than the struck product. This stance is balanced heavily in favor of the union. It would uphold picketing in situations similar to *Dow Chemical* and *Safeco*. It would, however, be a workable, unambiguous position for the Court to take.

Finally, the Court could completely depart from its decision in *Tree Fruits* and declare all consumer picketing to be unlawful. As mentioned earlier, section 8(b)(4)(ii)(B), prior to *Tree Fruits*, had been interpreted by a number of legal commentators to suggest such a result.⁸⁶ In order for such a decision to be reached, however, the Court will inevitably have to contend with the first amendment issue originally raised by the late Justice Black in his concurring opinion in *Tree Fruits*.⁸⁷ Arguing that section 8(b)(4)(ii)(B) was indeed intended to ban all consumer picketing at a neutral site, Justice Black was convinced that such a prohibition violated the first amendment.⁸⁸ The first amendment issue in picketing is still very much an open question.⁸⁹ Concern over that issue undoubtedly affected the decision in the present controversy. "We believe also that our construction of section 8(b)(4)(ii) is necessary to avoid a possible confrontation with the First Amendment."⁹⁰ In light of the developing limitations on the first amendment with regard to product picketing, however, support

84 26 LAB. L.J. 585, 589 (1975).

85 Both *Dow Chemical* and *Safeco* stand as glaring examples of the inequitable results which that position would uphold as lawful.

86 See note 26 *supra*.

87 377 U.S. 58, 76 (1964) (Black, J., concurring).

88 *Id.*

89 See Etelson, *Picketing and Freedom of Speech: Comes the Evolution*, 10 J. MAR. J. PRAC. PRO. 1 (1976-77); Note, *First Amendment Analysis of Peaceful Picketing*, 28 ME. L. REV. 203 (1976); Comment, *The Secondary Boycott Provisions of the NLRA and the Tree Fruits and Dow Cases*, 7 TEX. TECH. L. REV. 645 (1976).

90 No. 76-2015 at 29.

can be found for such a departure by the Court. One such example of a recent limitation can be found in *Hudgens v. NLRB*,⁹¹ which overruled *Food Employees v. Logan Valley Plaza, Inc.*⁹² *Hudgens* involved a situation where a union sought to picket a retail store in a shopping center. The Court, in denying the union's right to picket, dealt extensively with the first amendment issue and retreated significantly from their previous decision in *Logan Valley*. The Court's holding emphasized that the constitutional guarantee of free speech is a guarantee only against abridgment by the government, and not against abridgment by private persons.⁹³ That holding by no means eliminates the first amendment issue in the *Safeco* controversy, but it does suggest the possibility that the Supreme Court may well be prepared to go even further in limiting application of the first amendment to secondary picketing. It has been argued that the Supreme Court must limit the application of the first amendment if the two-pronged intention of Congress in passing section 8(b)(4)(ii)(B) is to be followed.⁹⁴ That is, the protection of the neutral business is to be balanced against, not subjugated to, the right of the labor union to publicize its labor disputes. When the very existence of the neutral is threatened by the actions of a union in picketing the neutral, the balance must clearly be struck in favor of the neutral employer.

Therefore, it is possible that in the present case the Court will hold that a nondiscriminatory proscription against all consumer picketing would not unconstitutionally abridge the first amendment rights of unions. A number of benefits would result from a holding to that effect.

Such a holding would provide lower courts and the NLRB with the needed clarification to enforce uniformly section 8(b)(4)(ii)(B). It would also further the unquestioned intent of Congress to protect neutral employers from coercive interference with their businesses. The publicity proviso of section 8(b)(4)(ii)(B) which allows "publicity, other than picketing, for the purpose of truthfully advising the public . . ." ⁹⁵ leaves the union a number of adequate alternative methods for publicizing their disputes with primary employers. Finally, it would eliminate the need for lower courts to strain the merged product doctrine to include cases further removed from the initial situations envisioned as falling within that exception. Such a strain has become increasingly evident as lower courts deal with the problem of avoiding a clearly inequitable result while nominally following the guidelines of the Supreme Court.⁹⁶ As a broad ban on consumer picketing would encompass the merged product line of cases, the need for resort to that doctrine would lapse.

91 424 U.S. 507 (1976). *Noted in: Freedom of Speech: Property Rights Triumphant in the Shopping Center*, 28 U. FLA. L. REV. 1032 (1975-76); *Hudgens v. NLRB—A Final Definition of the Public Forum?*, 13 WAKE FOREST L. REV. 139 (1977).

92 391 U.S. 308 (1968). *Logan Valley* is discussed at length in both of the Notes cited at note 91 *supra*.

93 424 U.S. at 513.

94 Note, *supra* note 89, at 220.

95 See note 1 *supra*.

96 See *NLRB v. Salem Building Trades Council*, 388 F.2d 987 (9th Cir. 1968), *enforcing*, 163 N.L.R.B. 33 (1967); *NLRB v. Local 254, Building Service Employees Int. Union*, 359 F.2d 289 (1st Cir. 1966). In the former case the union was picketing an ice cream store which had been built by an employer with whom the union was involved in a primary dispute. Rather than deal with the effect of the picketing on the neutral, the court outlawed the picketing upon the theory that the "goods" struck had become merged with the general business of the ice cream store. In the latter case there was no product involved at all, the union was one whose members provided janitorial services. The use of the merged product theory was difficult to understand.

VIII. Conclusion

The *Safeco* controversy is an important addition to the case law evolving from section 8(b)(4)(ii)(B). It highlights the inability of the courts to come to a uniform interpretation of congressional intent in enacting section 8(b)(4)(ii)(B), and the inadequacy of *Tree Fruits* as a guide for resolving disputes in this area. Furthermore, it serves the purpose of resurrecting the almost identical situation which *Dow Chemical* first brought forward for review. Finally, as a result of the majority opinion's declaration that the first amendment is undoubtedly at issue in a case of this nature, the Supreme Court will almost certainly have to face that contention directly. The Supreme Court should face that issue directly. The Court should provide the needed clarification of its holding in *Tree Fruits* that is necessary to enforce properly section 8(b)(4)(ii)(B). The Court should do so in a manner that will leave no doubt as to the unlawfulness of consumer picketing when that picketing is directed at the sole product of a secondary employer who is helpless to resolve the dispute, and who is in every sense of the phrase being "threatened and coerced" by the union's act.

Joseph M. Musilek