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Product Picketing-A New Loophole in Section 8(h) (4) of the National Labor Relations Act?

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COMMENTS

Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?

Secondary pressure is that pressure resulting against the primary employer, with whom the union is trying to bargain, when a secondary employer, who has no direct concern in the labor dispute, is forced to cease dealing with the primary employer.[1] A favored weapon used to exert secondary pressure is the secondary boycott, which historically has consisted of inducement of the employees of the secondary employer to engage in a work stoppage or of inducement of the customers of the secondary employer to withhold their business.[2] This comment is an examination of the latter of these techniques, with particular emphasis on picketing upon or near the premises of a neutral employer in order to appeal to consumers of the neutral to refrain from buying the neutral's products that were produced by the employer with which the union has a dispute.

The relevant federal regulation of secondary activity is embodied in section 8(b)(4)(B)[3] of the National Labor Relations Act.[4] In general, clause (i) of 8(b)(4) prohibits, as an unfair labor practice, a union from inducing any individual employed by a neutral employer to refuse to handle goods or to strike against the neutral employer, and clause (ii) forbids a union from threatening or coercing the secondary employer directly, if in either case the union's object is to force the neutral employer to cease dealing with the primary employer. Although the language of section 8(b)(4)(B) is quite broad, a proviso to this section specifically exempts primary strikes and primary picketing from its proscription.[5] Moreover, a

1. International Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950).

2. See generally GREGORY, LABOR AND THE LAW 120-27, 132-53 (2d rev. ed. 1958); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959).

3. 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. IV, 1963). Section 8(b): "It shall be unfair labor practice for a labor organization or its agents

". . . (4)(i) 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 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; or (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. . . ."

4. Wagner Act, 49 Stat. 449 (1935), as amended, Taft-Hartley Act, 61 Stat. 141 (1947), 29 U.S.C. § 158 (1958), as amended, Landrum-Griffin Act, 73 Stat. 542-43 (1959), 29 U.S.C. § 158 (Supp. IV, 1963).

5. Section 8(b)(4)(B): ". . . *Provided*, that nothing contained in this clause (B)

second proviso, the so-called "publicity proviso," protects publicity activities—*other than picketing*—by the union for the purpose of truthfully advising the public that products produced by its adversary are distributed by another employer, so long as the publicity does not have an effect of inducing work stoppages on the premises of the neutral.[6] When the proscription against activity that threatens or coerces an employer, clause (ii), was added by the Landrum-Griffin amendments[7] to the existing ban on secondary activity, most commentators assumed that all picketing at a secondary site was per se an unfair labor practice.[8] A recent decision by the United States Supreme Court, *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*,[9] upsets these assumptions.

I. The *Tree Fruits* Decision

In *Tree Fruits*, contract negotiations between the Tree Fruits Labor Relations Committee, representing twenty-one fresh fruit packing and warehousing firms, and the Teamster's local, representing the employees of these firms, had broken down and an economic strike had resulted. The union subsequently organized a consumer boycott of the struck employer's products, and twenty-six Safeway food stores in Seattle, Washington were picketed by union members carrying placards appealing to customers of Safeway not to purchase "Washington State" apples.[10] The union also distributed handbills containing a more detailed message to the same effect.

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shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . ." .

6. Section 8(b)(4): ". . . 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 the 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 . . . engaged in such distribution." (Emphasis added.)

7. As a part of the 1959 amendments to the act, § 8(b)(4)(A) of the Taft-Hartley amendments, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4)(A) (1958), became § 8(b)(4)(B).

8. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1114 (1960); Cox, *supra* note 2, at 274; Farmer, *The Status and Application of the Secondary-Boycott and Hot Cargo Provisions*, 48 Geo. L.J. 327, 341 (1959). *But see* Previant, *The New Hot-Cargo and Secondary-Boycott Sections: A Critical Analysis*, 48 Geo. L.J. 346, 353 (1959).

9. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964). See Note, 62 Colum. L. Rev. 1336 (1962); Note, 1962 U. Ill. L.F. 672. See generally Note, 77 Harv. L. Rev. 361 (1963); Note, 47 Minn. L. Rev. 109 (1962).

10. The placards stated: "To the Consumer: Non-Union Washington State apples are being sold at this store. Please do not purchase such apples. Thank you. Teamsters Local 760, Yakima, Washington."

The union took definite steps to insure that the picketing was directed only at the unfair product and not at Safeway generally. The pickets were instructed to make no statements to consumers that the retail stores were unfair and to make no requests of customers to refrain otherwise from patronizing the stores. The union, to avoid a violation of clause (i) of 8(b)(4), also successfully prevented a sympathetic work stoppage by either the employees of Safeway or any other employees. Employee entrances to the Safeway stores were not picketed and union members patrolling the customer entrances were instructed to explain to Safeway's employees that the sole purpose of the picketing was to enlist the support of consumers against their employer's product. The primary employer, Tree Fruits, filed charges against the union, alleging that the union had committed an unfair labor practice by threatening and coercing Safeway to cease purchasing Tree Fruits' apples in violation of clause (ii) of 8(b)(4)(B).

The NLRB, relying upon its earlier decision in *Upholsterers Frame and Bedding Workers*,[11] held that, under the literal wording of clause (ii) and the specific negation of picketing in the publicity proviso, consumer picketing in front of a secondary store was prohibited per se because the natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or discontinue altogether its purchases of such apples from the struck employers.[12] On appeal, the Court of Appeals for the District of Columbia set aside and remanded the Board's order.[13] Looking solely at the language of the statute, the court of appeals held that the most plausible reading was that clause (ii) of 8(b)(4) proscribed only conduct that *in fact* "threatens, coerces or restrains" the secondary employer.[14] Thus, the court concluded that the Board had proceeded on the erroneous premise that the statute completely banned all consumer picketing and remanded to determine whether there was any substantial economic injury to

11. Upholsterers Workers, Local 61, 132 N.L.R.B. 40 (1961), *rev'd*, 331 F.2d 561 (8th Cir. 1964) (on authority of the Supreme Court holding in *Tree Fruits*); *accord*, New York Typographical Union No. 6, 141 N.L.R.B. 1209 (1963); Retail Store Union, Dist. 65, 141 N.L.R.B. 991 (1963); Teamsters Union, Local 445, 140 N.L.R.B. 1097 (1963); Bedding Workers, Local 140, 140 N.L.R.B. 343 (1962); Plumbers Union, Local 519, 137 N.L.R.B. 596 (1962); Blueprint Employees, Local 249, 135 N.L.R.B. 1090 (1962); Int'l Typographical Union, Local 154, 135 N.L.R.B. 991 (1962); United Wholesale Employees, Local 261, 129 N.L.R.B. 1014 (1960), *modified*, 134 N.L.R.B. 931 (1961), *enforced in pertinent part sub nom.* Burr v. NLRB, 321 F.2d 612 (5th Cir. 1963).

12. Fruit & Vegetable Packers, Local 760 (Tree Fruits), 132 N.L.R.B. 1172 (1961). The Board also held that the picketing was not intended to induce Safeway's employees to take any kind of action; thus the picketing did not violate clause (i) of 8(b)(4).

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

14. *Id.* at 317.

Safeway which would support a finding of a threat or coercion.[15] The Supreme Court granted the NLRB's petition for certiorari.

Although the Supreme Court, in a six-to-two decision, disagreed with the opinion of the court of appeals that the test was whether Safeway suffered actual economic loss, the order of the Board was vacated.[16] The Supreme Court reasoned that the legislative history of the amendments to 8(b)(4) did not reflect, with requisite clarity, a congressional plan to prohibit *all* consumer picketing. The court distinguished between picketing directed solely at the product of the primary employer and picketing employed to persuade customers not to trade at all with the secondary employer. Under a product boycott the secondary employer's purchases from the primary would be decreased only because the public demand for those goods has been diminished, while in a general consumer boycott the retailer is persuaded to cease business with the primary by pressure designed to inflict injury on the secondary's business generally. Product picketing, thus analyzed, was held to fall outside the proscriptions of section 8(b)(4)(B).

A. *Legislative History*

A fundamental concern with constitutional guarantees of free speech caused the Supreme Court in *Tree Fruits* to preface its analysis with the premise that a ban on peaceful picketing would not be ascribed to Congress unless it explicitly manifested a purpose to outlaw such picketing.[17] A detailed examination of legislative history was conducted in search of the "isolated evils" intended to be proscribed by section 8(b)(4). The Court found no explicit statement by any proponent of the bill that *all* secondary picketing was to be banned or, in particular, that picketing directed exclusively at a product was to be considered unfair. Rather, it was found that the proponents had made assertions typified by the following:

> "The amendment . . . covers pressure in the form of dissuading customers from dealing with secondary employers. That refers to establishing a picket line around a merchant's store, when the merchant handles the product of a company or of a manufacturing plant in which there is a strike. In other words, that is a form of coercion against an innocent employer, in an effort to compel the employer . . . to come to terms with the union."[18]

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15. *Id.* at 318.

16. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964) (Justice Black concurring and Justices Harlan and Stewart dissenting).

17. NLRB v. Drivers, Local 639, 362 U.S. 274 (1960).

18. 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1194 (1959) (Senator McClellan) [hereinafter cited as 2

Although it would be possible to read this statement as calling for a general ban on all secondary picketing, including product picketing, the Supreme Court interpreted it as a specific statement of congressional intent that only picketing aimed at stopping all patronage of the neutral be banned.

The Court's decision to allow some consumer picketing in the form of product picketing is questionable in view of the congressional proponents' statements; it is even more difficult to support—more specifically, a different meaning might be attributed to the proponent's statements—when certain statements of the members of the conference committee are examined. Senator Morse, illustrating with an example of product picketing substantially the same as that presented in *Tree Fruits*, stated that this type of picketing would be banned under the conference agreement.[19] The Court, however, rejected Senator Morse's interpretation on the ground that he had refused to sign the agreement and opponents in their zeal to defeat a bill understandably tend to overstate its reach.[20] Such an assumption is pure conjecture, and it seems as reasonable to assume that Senator Morse, as a participant in the committee's negotiations, would not at this late point in the debate risk an overstatement, which might be taken as reflecting the consensus of the committee, unless such a meaning was in fact what the committee intended. Furthermore, there is no evidence of any other conferee disputing Senator Morse's assertion.

The Board, in formulating its theory of a per se ban, had relied most heavily on a statement by Senator Kennedy summarizing the purpose of the proviso.

> "[T]he Senate conferees insisted that the report secure the following rights: . . . (c) The right to appeal to consumers by methods *other than picketing* asking them to refrain from buying goods made by nonunion labor *and* to refrain from trading with a retailer who sells such goods. . . . We were not able to persuade the House conferees to permit picketing in front of the secondary shop, but we were able to persuade them to agree

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LEGIS. HIST.]; see generally 2 LEGIS. HIST. 1386 (Senator Goldwater); 2 LEGIS. HIST. 1615 (Congressman Griffin).

19. "It also makes it illegal for a union to 'coerce, or restrain.' This prohibits consumer picketing. What is consumer picketing? A shoe manufacturer sells his product through a department store. . . . The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying, 'Do not buy X shoes.' This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer." 2 LEGIS. HIST. 1426.

20. Another opponent stated that under the amendment: "Unions can only advertise against an establishment selling unfair goods. Picket lines are illegal where there is no primary dispute." 2 LEGIS. HIST. 1734 (Congressman Libonati). See also 2 LEGIS. HIST. 1037 (Senator Humphrey).

that the union shall be free to conduct informational activity short of picketing."[21]

Even without the aid of this history behind the publicity proviso, the Board had held that, in permitting appeals to consumers by methods *other than picketing*, the proviso manifested an intent to prohibit all consumer picketing.[22] In the Board's view, Senator Kennedy's summary simply reaffirmed this intent,[23] indicating that the House bill as it existed before conference allowed no picketing and that the effort made in conference to relax this restriction was unsuccessful,[24] although some publicity not involving picketing was to be allowed.[25] The Supreme Court rejected this interpretation. The Court, emphasizing the word "and" in Senator Kennedy's statement, held that it, in effect, meant it is permissible to ask consumers via picketing "to refrain from buying goods made by nonunion labor" so long as the union does not in addition ask the public to boycott the neutral. It would seem at least an equally plausible reading, however, that Senator Kennedy was listing two separate restrictions, the first explicitly prohibiting product picketing.[26] In addition, other assertions are disclosed in the legislative history that also indicate product picketing was to be prohibited.[27]

It is true, as the Court says, that Congress did not specifically recognize the distinction between product and general consumer picketing and that there was no statement explicitly prohibiting product picketing. The preponderance of the history, however, supports the Board's view that Congress did not wish to make any distinction in regard to consumer picketing, but rather such activity was to be banned per se because all types of secondary picketing necessarily coerce the neutral.

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21. 2 LEGIS. HIST. 1431-32 (Emphasis added.)

22. See note 11 *supra* and accompanying text.

23. Upholsterers Workers, Local 61, 132 N.L.R.B. 40, 61 (1961), *rev'd*, 56 L.R.R.M. 2164 (8th Cir. 1964).

24. *Id.* at 61; Aaron, *supra* note 8, at 1114; Cox, *supra* note 2, at 274.

25. *Ibid.*

26. See note 27 *infra*.

27. "Under the language of the conference report we agreed that there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth." 2 LEGIS. HIST. 1389 (Senator Kennedy). The amendment ". . . prohibits secondary customer picketing at a retail store which happens to sell [a] product produced by [a] manufacturer with whom [the] union has [a] dispute." 2 LEGIS. HIST. 1712 (Analysis of the conference agreement by Congressman Griffin). "Employees will also be entitled to publicize, *without picketing*, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. All appeals for a consumer boycott would have been barred by the House bill." 2 LEGIS. HIST. 1720 (Analysis of the changes made in conference by Congressman Thompson) (Emphasis added.); 2 LEGIS. HIST. 1706 (Congressman Thompson); 2 LEGIS. HIST. 1437 (Senator Goldwater); note 19 *supra*.

B. *The Primary-Secondary Dichotomy*

After determining the limited scope of section 8(b)(4), the Court turned to the question of whether the product picketing in *Tree Fruits* fell within the area of secondary consumer picketing that Congress clearly had indicated an intention to prohibit. The Court recognized that the effect of a product boycott on the neutral is a decrease in sales of the unfair product, and that such a decrease would result in a violation of the literal terms of clause (ii)(B) because the neutral would necessarily be forced to cease dealing with the primary employer to the extent of the decrease in his consumer sales of the products. Likewise, an appeal to cease buying a product is clearly an appeal to customers to cease dealing with the neutral, at least to the extent of the one product, thus violating the literal terms of the proponents' statements. The Court held, however, that upholding a ban on consumer picketing merely because it caused a decrease in consumer purchases violated the "spirit" of the statute. By picketing only the product, the union's appeal was confined, in a sense, to its dispute with the primary employer; thus, the union was just expanding the site of the primary dispute to the secondary premises. The Court contrasted this activity with picketing to induce a general consumer boycott, which creates a separate dispute with the secondary employer.

II. The Theory of Product Picketing as "Primary" Activity

The Court, by introducing as a consideration the "primary" nature of the *Tree Fruits* picketing, raised the troublesome problem of distinguishing between primary and secondary activity, a distinction which is generally determinative of whether conduct falls within the proscriptions of 8(b)(4)(B).[28] It has been said that the most stable element in the struggle with the problems presented by the primary-secondary dichotomy has been discord.[29] The decision in *Tree Fruits* only adds to the confusion surrounding this dichotomy. The difficulties of distinction are compounded by the fact that the Court does not expressly label the picketing as primary activity, but merely analogizes it to that which is primary activity.[30] This is regrettable because what is needed in this area is a deeper examination of the theory involved in interpreting section 8(b)(4)

28. The use of the term "secondary boycott" was originally adopted by the courts in applying § 8(b)(4)(B); it was only upon the adoption of the primary picketing proviso as part of the 1959 amendments, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. IV, 1963), that Congress explicitly recognized the primary-secondary dichotomy.

29. Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1365 (1962).

30. "[T]he Union's appeal is *closely confined* to the primary dispute." 377 U.S. at 72. (Emphasis added.)

(B) and the development of a rationale to serve as a starting point both for the courts in presently applying the statute and for the legislature in drafting further secondary boycott legislation.[31] At least one comprehensive attempt has been made, by Professor Howard Lesnick, to provide a rationale to explain and define the primary-secondary dichotomy.[32] Although Professor Lesnick limits his examination to the "common situs,"[33] "roving situs,"[34] and "reserved gate"[35] problems, application of his rationale to consumer picketing indicates that perhaps the Court's instinct in analogizing product picketing to primary activity was theoretically correct.

Professor Lesnick first states that one can not profitably analyze solely the effects on the neutral in a particular labor dispute because Congress has not considered harm to the neutral objectionable per se.[36] On the contrary, Congress has given a wide latitude to the right to strike even though almost every strike causes economic loss to neutrals, and these losses from primary strikes far outweigh the usual losses caused by secondary activity.[37] In addition, the intentional infliction of harm on the neutral by the union does not necessarily render the conduct secondary, for even in the traditional primary strike the union hopes that the secondary will put pressure on the primary because of a disruption of the secondary's business caused by the shutdown or delay of the primary's production.[38] Nevertheless, the most important consideration in analyzing the primary-secondary dichotomy is the union's intent. The intent that is significant for Professor Lesnick, however, is the intent "to subject the secondary to pressure *different in kind* from that generated against him by a primary strike."[39] More specifically, if a business is shut down by a primary strike, normal business relations with the customers of that business are adversely affected, causing an economic loss to the secondary employer. Thus, while the secondary may or may not feel compelled because of his losses to try to persuade the primary to settle his dispute, the pressure generating the secondary employer's reaction "flows entirely from the disruption of the primary employer's business."[40] However,

31. "The dichotomy between primary and secondary activity is unquestionably the area of greatest difficulty and importance in the administration of the statute . . . ." Koretz, *Federal Regulation of Secondary Strikes and Boycotts—Another Chapter*, 59 COLUM. L. REV. 125, 129 (1959).

32. Lesnick, *supra* note 29.

33. *E.g.*, Sailor's Union, 92 N.L.R.B. 547 (1950).

34. *E.g.*, International Bhd. of Elec. Workers, Local 861, 135 N.L.R.B. 250 (1962).

35. *E.g.*, International Union of Elec. Workers, Local 761 v. NLRB, 366 U.S. 667 (1961).

36. Lesnick, *supra* note 29, at 1411.

37. Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 732 (1951).

38. Lesnick, *supra* note 29, at 1412.

39. *Id.* at 1412. (Emphasis added.)

40. *Id.* at 1413.

when the primary union induces the neutral's employees to refuse to perform their jobs, the effect is one independent of consequences that normally results from a shutdown of the primary premises. As such it is "different in kind" and, therefore, secondary.[41]

Applying this "different in kind" test to *Tree Fruits*, a theoretical basis for labeling product picketing as primary rather than secondary can be articulated. Most simply, the initial objective of a union's primary action against an employer who deals in goods is to prevent the sale of those goods, thus causing the employer, because of the economic injury, to capitulate to union demands. This may be accomplished by a strike causing a production slowdown or shut-down of the primary's plant; it may be accomplished by inducing employees of the secondary to refuse to cross the picket line at the primary premises in order to pick up the goods; or it might be effected by roving situs picketing to induce the primary employees to refrain from unloading the goods at the secondary premises.[42] Under the "effect different in kind" analysis, picketing to induce consumers to refrain from buying the product is merely another way of exerting direct pressure on the *primary's* business. The union, by labeling the product unfair, still attempts to prevent sale of the primary employer's goods, but the attempt is directed toward those persons and at that time and place where it would have the greatest effect—an appeal to the ultimate consumers of the goods and immediately prior to the potential sale. If the picketing is successful, the retailer may be compelled for self-protection to cease stocking the primary employer's goods because there is no longer a market for them. However, the retailer would also have to stop handling the goods if the traditionally recognized primary action at the primary's premises had succeeded because then the goods

41. An example of the application of this rationale is presented in the *General Electric* reserved gate decision. International Union of Elec. Workers, Local 761 v. NLRB, 366 U.S. 667 (1961). The Supreme Court in this case held that an entrance to a plant reserved for neutral employees engaged in work on the neutral premises may be picketed but only when the employees are performing work unrelated to the normal operation of the plant. Applying Professor Lesnick's rationale, if the neutral employees' work were related to the normal operation of the plant, for example, maintenance work, closing of the primary plant would abrogate the need for the neutral's services, thus causing an economic loss to the neutral. Such a loss would be "primary" because it would flow directly from the disruption caused by the primary strike. Consequently, picketing a reserved gate through which such neutral employees pass would also be primary because its effect on the neutral employer would not be "different in kind" from a successful strike at the primary plant. On the other hand, if the work was unrelated, for example the neutral was a lessee on the premises, a disruption of the primary operation of the plant would have no impact on the neutral. Therefore, an appeal to the neutral's employees in this situation by picketing in front of their reserved gate would be "different in kind" and thus "secondary." For the application of this rationale to primary situs, common situs, and roving situs problems, see generally Lesnick, *supra* note 29, at 1411-30.

42. See International Bhd. of Elec. Workers, Local 861, 135 N.L.R.B. 250 (1962).

would be unattainable. On the other hand, if the picketing at the retailer's place of business goes beyond an effort to inform the public that a particular product sold by the secondary is being produced by an unfair employer and becomes an attempt to persuade the public to cease dealing generally with the secondary, the neutral would be subjected to a loss of business "different in kind" from that caused by successful primary action; closing the primary plant would have no effect on the retailer's general patronage except as it affected the primary product.[43]

III. Possible Limitations on the Scope of *Tree Fruits*

The rationale outlined above supports the Court's theory that product picketing is to be associated with primary activity. However, one of the principal difficulties presented by the *Tree Fruits* decision is that no specific damage was shown by Safeway, and, thus, the Court confined itself to a discussion of the *theory* of product picketing. There are, however, a number of complications which may arise when a product is picketed. It is difficult to predict how the addition of facts other than those of *Tree Fruits*, when presented in future cases, will affect what on its face appears to be a broad and general sanction of product picketing. Nevertheless, it is of some benefit to examine these situations and the arguments that can be made toward limiting the apparently broad scope of *Tree Fruits*.

One possible limitation on product picketing could be raised in situations where the picketing has some demonstrable effect on the secondary's *general* consumer patronage. It is doubtful that the only harm to Safeway from product picketing was a loss of sales of the primary product, regardless of the precautions taken by the union. It has often been recognized that a picket line suggests a sort of psychological embargo around the picketed premises,

43. A somewhat different analysis is suggested in the minority common-law cases, footnoted by the court, which recognize the product boycott-general consumer boycott distinction. The leading case is Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937), which allowed product picketing at a delicatessen serving meat produced by an employer with which the union had a dispute. The New York court in upholding the picketing suggested that a "unity of interest" was created between the retailer and the manufacturer on the theory that, since the unfair manufacturer pays less than union wages, both it and the retailer who sells the product are in a position to undersell competitors. Or as another court stated it, the one who sells the product of a primary becomes an ally by providing an outlet for the unfair product. Fortenbury v. Superior Ct., 16 Cal. 2d 405, 106 P.2d 411 (1940). Carrying this to the extreme, it would seem that this theory would justify coercion including a general consumer boycott. The common-law courts following *Goldfinger*, however, have universally applied the same distinction as the Supreme Court applied in *Tree Fruits* by denying the union the right to picket the secondary employer to persuade the public to withdraw its patronage generally. The fact that this distinction is made would indicate that underlying considerations for the common-law rule are those outlined in the text.

depending for its persuasiveness on the associations most people have in mind when they think of picketing,[44] thus inducing action "quite irrespective of the nature of the ideas which are being disseminated."[45] Therefore, the product picketing may very well have the "signal" effect of causing many members of the public to cease patronizing Safeway entirely, thereby achieving the effect of a general consumer boycott against a secondary employer. As a minimum, a picket line will tend to harm Safeway's goodwill and public image since anyone glancing at a picketed Safeway store is likely to assume that Safeway itself is being branded as unfair.[46]

In *Tree Fruits,* the only effect on Safeway attributed to product picketing by the Court was a loss in sales of the primary product. However, the Court also stated that picketing "requesting the public to not trade at all with the neutral" would be coercive within the proscriptions of 8(b)(4) because it would cause a general consumer boycott. But the opinion does not make clear the effect a showing of actual economic loss would have upon the lawfulness of the product picketing. Arguably, therefore, if the effect of a general consumer boycott were shown to have resulted from product picketing, the picketing could constitute coercion of the neutral in violation of section 8(b)(4). On the other hand, since product picketing has now been held valid, perhaps it would be unjust to deprive the union of the right to product picket because of incidental effects the union is powerless to prevent beyond taking the precautions utilized in *Tree Fruits.*[47] Furthermore, a limitation requiring evidence of a neutral's general consumer patronage loss would create a morass of administrative difficulties. The proof necessary to show the damage, and the degree of damage which must be shown, would be difficult standards to formulize.[48] Both the neutral and the union

44. See note 45 *infra.*

45. Bakery & Pastry Drivers, Local 802 v. Wohl, 315 U.S. 769, 776 (1942) (concurring opinion by Justice Douglas). Picketing ". . . establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey . . . ." Building Serv. Employees v. Gazzam, 339 U.S. 532, 537 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950); Teamsters Union v. Vogt, 354 U.S. 284 (1957).

46. "To a loyal unionist it is both a spontaneous plea not to engage in any business activity with those behind the picket curtain and an instantaneous branding of 'unfairness' on those engaged in activity behind the picket line." Superior Derrick Corp. v. NLRB, 273 F.2d 891, 896 (5th Cir. 1960).

47. Professor Lesnick's solution to the problem of adverse incidental effects different in kind is to allow the picketing to the extent that such effects do not occur. In the common and roving situs cases, where picketing at secondary premises is allowed, there is often the danger, in preserving the right to primary action, that the secondary's employees will be induced to refuse to cross the picket line. Professor Lesnick argues, although it is not clear that it is the law, that the picketing union should be responsible to see that secondary employees are not so induced, feeling that the union in most cases is in a position to prevent it. Lesnick, *supra* note 29, at 1429.

48. See the criticism of the circuit court's holding in *Tree Fruits,* which required a showing of economic loss, in Burr v. NLRB, 321 F.2d 612, 620 (1963).

have legitimate interests to protect in this situation, and it would be difficult to predict without a specific factual situation which argument will prevail. It should be noted, however, that an actual general consumer patronage loss will seldom arise because it is doubtful that most neutrals would be willing to suffer the necessary damage in order to test the scope of *Tree Fruits*. Rather, they will be inclined to cease dealing with the primary simply upon the *threat* of picketing.[49]

A second possible limitation of the *Tree Fruits* holding is suggested by Mr. Justice Harlan's dissent.[50] Justice Harlan argued that the majority's distinction is tenuous if the picketed retailer depends largely or entirely on sales of the struck product.[51] For example, if an independent gas station owner purchases gasoline from a struck firm,[52] arguably he would be as injured by picketing that appeals to his consumers to refrain from buying his gasoline because it originated from an unfair source as by picketing that appeals to his consumers to refrain entirely from patronizing his gas station. If the product picketing is successful in this situation it will result in a virtual shutdown of the neutral's business. In *Tree Fruits,* the Court's only basis for holding that a decrease in consumer sales caused by product picketing does not violate the literal terms of the statute is that such an interpretation is not within the "spirit" of the statute, seemingly because the harm to Safeway would be minimal. If it could be shown that the retailer is suffering substantial economic losses, perhaps the picketing should be barred, since the major concern of Congress in prohibiting secondary activity was a concern over the burdens imposed on neutrals by such activity.[53] However, if *Tree Fruits* were so limited, again the problem of determining the degree of harm that must be shown would pose difficulties. More importantly, such a limitation would not be consistent with the apparent theory of product picketing that it is primary activity, and thus activity which the union should have available to appeal to the public. Nevertheless, the fact that the equities in each particular factual situation are likely to control the decision of whether the "one product" neutral should be protected makes it difficult again to predict to what extent *Tree Fruits* may be so limited.

A third possible limitation on the *Tree Fruits* sanction of product picketing arises from an assumption stated earlier that most neutrals will cease dealing with the primary upon the mere

49. See text accompanying notes 55-61 *infra*.
50. 377 U.S. at 80.
51. *Id.* at 83.
52. An example of such a factual situation at common law was Alliance Auto Serv., Inc. v. Cohen, 341 Pa. 283, 19 A.2d 152 (1941).
53. *E.g.*, 2 LEGIS. HIST. 1615.

threat of product picketing. That a neutral does, in fact, frequently so react is supported by a significant number of Board decisions. The NLRB in deciding *Tree Fruits*, because of the lack of evidence of economic harm, was limited to a finding that the "natural and foreseeable result" of the *Tree Fruits* product picketing was to coerce and restrain the neutral.[54] In other cases involving product picketing, however, the Board has found that when the union approached a neutral and threatened to picket unless he acceded to its demands, the retailer ceased selling the product rather than face a picket line.[55] In addition, upon the threats of picketing by the union, neutrals have removed the products from public display,[56] refused to accept goods already ordered,[57] refused to order more goods,[58] and ceased advertising the goods.[59] These cases provided the NLRB with enough evidence to hold not only that coercion of the neutral was the natural and foreseeable result of product picketing, but also that such coercion was, *in fact*, the result.[60] The reasons in these cases for the neutrals' decision to cease dealing entirely rather than to have their premises picketed were not expressly set out. Presumably, however, it was because of the fear of the concomitant adverse effects previously suggested.

The Supreme Court in sanctioning product picketing said, "if the appeal succeeds, the secondary employers' purchases from the struck firms are decreased *only* because the public has diminished its purchases of the struck product."[61] The Court also said a violation of 8(b)(4) would not occur if the neutral dropped the product as a poor seller because the picketing was successful in reducing the neutral's sales of the product. The Court, however, seemingly because it failed to consider the signal aspects of all picketing—including product picketing—did not say whether evidence that a neutral had ceased business with the primary upon the *threat* of picketing would have any effect on the validity of product picketing. Therefore, it is possible such a showing would result in a limitation on *Tree Fruits'* sanction of product picketing. Despite the Court's language, the probability of the union doing significant damage to its adversary by appeals to the public through a product

54. 132 N.L.R.B. 1172, 1177 (1961).

55. Teamsters Union, Local 445, 140 N.L.R.B. 1097, 1099 (1963); Bedding Workers, Local 140, 140 N.L.R.B. 343, 357-58 (1963); Blueprint Employees, Local 249, 135 N.L.R.B. 1090, 1094-95 (1962).

56. Teamsters Union, Local 445, *supra* note 55, at 1100; Bedding Workers, Local 140, *supra* note 55, at 357-58.

57. *Ibid.*

58. *Ibid.*

59. Bedding Workers, Local 140, *supra* note 55, at 357-58.

60. Cases cited note 55 *supra*.

61. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 72 (1964). (Emphasis added.)

picket is slight when compared with the pressure the union can exert on the primary through the secondary. The latter's desire to avoid threatened product picketing at his premises will cause him to cease dealing with the primary employer or to attempt to persuade the primary employer to settle the labor dispute. Significantly, the union would thereby engender the neutral's aid simply by threat, without ever having to persuade the public to aid the union voluntarily.

There are, however, considerations which militate persuasively against a limitation on the *Tree Fruits* sanction of product picketing when the neutral reacts to a *threat* of product picketing. First, a complete business cessation by the secondary with the primary does not do violence to the theory explaining the primary-secondary dichotomy outlined above, because a total cessation could also be the result of traditionally recognized primary activity. Second, establishing such a limitation on the *Tree Fruits* holding would be almost entirely for the benefit of the primary employer, since the choices open to the neutral remain the same. However, Congress in drafting section 8(b)(4) evidenced no concern for the effects of secondary activity on the primary employer. Third, the proposed limitation would seemingly allow the creation of a union unfair labor practice at the whim of the neutral employer. It would be difficult to guard against collusion between the neutral and the struck employer whereby the neutral would engage in a sham business cessation, undertaken only for the purpose of ridding itself of the pickets and lasting only until a section 10(*l*) injunction of the picketing is ordered. Finally, there is some possibility that the recent *Servette* case could be used as authority to uphold the union's use of a threat of a product picket to apply secondary pressure.[62]

62. Section 10(*l*) of the act allows an injunction to be issued as soon as there is reasonable cause to believe an 8(b)(4)(B) violation has been committed. 73 Stat. 544 (1959), 29 U.S.C. § 169(*l*) (Supp. IV, 1963).

Arguably, a logical extension of the Supreme Court's recent holding in NLRB v. Servette, Inc., 377 U.S. 46 (1964), precludes a limitation on the right to product picket based upon a showing that cessation resulted from a threat to picket. *Servette* involved a union threat to pass out handbills appealing to consumers to refrain from buying an unfair primary product at the secondary retail store. One question presented in *Servette* was whether a threat to handbill made to the managers of the stores was an inducement of "an individual employed by any person" in violation of clause (i) of section 8(b)(4)(B). The Court held that there was no violation because the warning by the union of its intent to handbill was an appeal for the exercise of managerial discretion, rather than an appeal to employees, and, therefore, not an illegal inducement. In addition, the Court found no violation of clause (ii) of section 8(b)(4)(B); the Court held handbilling protected by the publicity proviso and, a fortiori, that the threat to handbill, which was the situation in *Servette*, should also be protected. Arguably, a general rule could be inferred from this later holding that if the union's proposed conduct, whether handbilling *or* product picketing, is recognized as legal, reaction by the neutral's management, who will generally be the

IV. Summary

Although there are possible ways of finding a middle ground to control the extent of the right to product picket, it is doubtful that any significant curb on this right will be made by the Board or courts in view of the present state of the law and the difficulties that would attach to any limitation. Whether the Supreme Court's sanction of product picketing in *Tree Fruits* should stand will ultimately have to be faced by Congress. Professor Lesnick's rationale has initial validity in determining theoretically whether the picketing in question is primary or secondary. It must be recognized, however, that when the union's actions are based on "following the unfair product," the probability of undesirable secondary effects flowing from the theoretically primary action may outweigh the advantages provided the union in allowing it a right to product picket. At this point Congress might well decide to prohibit the activity because of its adverse secondary effects even though it might be called primary under Professor Lesnick's test. Even if Congress does not take this step, it is possible the courts will conduct a deeper analysis of secondary activity and conclude that when the secondary effects of union activity become dominant, the union will be presumed to intend such effects, and, because such effects are different in kind from those the neutral would experience under more traditional primary activity, such activity might yet be categorized as secondary.

A helpful analogy is suggested by clause (i) of 8(b)(4), prohibiting a union's inducement of the employees of the neutral.[63] If the theory of product picketing as primary activity is that the primary dispute is to a limited degree expanded to the secondary premises by following the unfair goods, this same reasoning should allow the union to induce the employees of the neutral to cease handling the primary goods.[64] If the secondary employees were to cease

recipient of the threat, to a threat to engage in the conduct will not impair the validity of the conduct. Perhaps, however, threats to picket should be distinguished from threats to handbill because of a possible difference between the two in the reasonableness of the neutral's fear of secondary effects. It may reasonably be assumed that in the situation where a mere threat of picketing or handbilling causes the neutral to cease dealing with the union's adversary the only explanation for the neutral's business cessation is a fear of the secondary (incidental) effects of the picketing or handbilling, since the neutral's lost sales of the product resulting from a product boycott could only approach but never surpass the impact of a voluntary business cessation with the primary. It is the fear of a loss of general consumer patronage or goodwill which prompts the neutral, not actual losses in the sales of the products. See text accompanying notes 44-46 *supra*. Thus, because of the "signal" aspect of picketing, not present to substantial degree in handbilling, the retailer may be more justified in fearing a loss of general patronage.

63. 73 Stat. 449 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. IV, 1963), quoted note 3 *supra*.

64. Professor Lesnick recognized that this consideration complicated his rationale

dealing with the goods, thus preventing their sale, this in itself would not be pressure different in kind from primary action preventing the goods from reaching the neutral's premises in the first place. However, a union inducement of employees to refuse to work with the goods of another employer is generally prohibited by clause (i) of section 8 (b) (4).[65] Seemingly, the reason for banning this theoretically primary activity in clause (i) of the statute is that the secondary effects are no longer incidental, but have become dominant. If the employees of a retailer could refuse to handle every unfair product that passes through a retail store, it would cause considerable disruption of the retailer's operation, and it seems unfair to the neutral to incite workers satisfied with their own conditions.[66] Similarly, the probability of product picketing signaling a general consumer boycott may be deemed such a dominant secondary effect as to call for a ban on the activity.

The problem demands not only examination of the secondary effects of picketing but also examination of the alternative methods of publicizing a labor dispute, such as handbilling and advertising, currently protected by the publicity proviso.[67] The strongest argument in favor of the use of product picketing is that the public traditionally associates "picketing" with a labor dispute.[68] Thus, picketing, because it instantly signals a labor dispute, distinguishes this kind of union plea from other types of publicity campaigns, including those which utilize handbilling and advertising.[69] As previously noted, however, picketing is likely to signal the public that the employer being picketed is unfair to labor in addition to the more generalized notification of the existence of a labor dispute.[70] By limiting the union appeals to informational activity short of picketing, the appeal to consumers to honor the "picket line" does not arise. Conceivably, under a product picketing ban the consistent use of handbilling may eventually come to signal a labor dispute; however, instead of also signaling that the neutral is unfair, handbilling would signal a product boycott and union sympathizers would readily accept and read the leaflets. Thus, handbilling could approach the effectiveness of picketing as a method of informing the public that the neutral is selling a product produced

and thus to avoid the problem of "following the product," he modified his rule. Lesnick, *supra* note 29, at 1414.

65. An exception to this generalization is presented in the reserved gate situation, see note 41 *supra*.

66. LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1107 (1948) (Senator Taft).

67. 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (Supp. IV, 1963), quoted note 6 *supra*.

68. See generally 2 LEGIS. HIST. 1427 (Senator Morse). Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 YALE L.J. 341, 350 (1938).

69. *Ibid.*

70. See notes 44-46 *supra* and accompanying text.

by the union's adversary.[71] If product picketing continues to be sanctioned, in order to prevent the effects of a general consumer boycott, the public must be educated in the distinction between picketing directed at the product and picketing directed at the neutral employer. Arguably, however, it would be easier to limit product boycotts to handbilling and to educate consumers that handbilling signals a product boycott than it would be to continue a right to product picket and teach the public to govern its reaction by the message on the placard and not by the fact of picketing itself.

Since picketing involves an element of free speech, when a congressional ban on picketing is contemplated, first amendment guarantees must be considered. Mr. Justice Black, in a concurring opinion in *Tree Fruits*, disagreed with the majority and argued that Congress did intend a per se ban on consumer picketing and that such a prohibition was unconstitutional.[72] Justice Black recognized that picketing is sometimes more than free speech because of its signal nature in inducing action irrespective of the ideas attempted to be communicated and, thus, is sometimes subject to regulation. He argued, however, that Congress' ban on consumer picketing did not manifest any concern with picketing itself, but rather the ban seemed intended only to "prevent dissemination of information about the facts of a labor dispute . . . ."[73] However, a congressional ban on product picketing expressly based on the danger that the signal nature of picketing will cause a general consumer boycott, the prospect that other methods of publicity may be as effective as picketing, and the administrative difficulties inherent in any middle ground approach of permitting some but not all product picketing would seem to satisfy Mr. Justice Black's first

71. This would present the issue of distinguishing between handbilling and picketing. There is no authority giving precise definitions of either of these terms. Traditionally, however, picketing suggests patrolling with placards while handbilling suggests a more or less stationary distribution of leaflets. There has been only one case decided in which handbilling took on a characteristic of picketing. Service Employees, Local 399 (Burns Detective Agency), 136 N.L.R.B. 431 (1962). In this case the union was held to have threatened and coerced a secondary employer in violation of clause (ii) of § 8(b)(4) when twenty to seventy union members patrolled in an elliptical path in front of the main entrance of a sports arena, some passing out handbills but none carrying placards. Two members of the Board held expressly that this conduct was picketing. Two other members declined to decide the question of whether the activity was picketing but merely held that this was not the traditional means of handbilling and therefore not protected by the publicity proviso. Although nothing conclusive is indicated by the *Burns* case, it would seem that the proper test in the secondary boycott area for distinguishing picketing from handbilling is whether the conduct is likely to have the signal aspect of labeling the neutral as unfair. Thus, whether the "handbilling" is accompanied by patrolling or the carrying or posting of signs of any sort and the number of union members present are all factors to consider.

72. 377 U.S. at 76.

73. *Id.* at 78.

amendment objections and to be supported by existing case authority upholding proscriptions on the right to picket.[74]

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74. See cases cited note 45 *supra*.