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Publicity Under Section 8(b)(4) Of the Labor-Management Reporting And Disclosure Act

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I. Introduction

Publicity is an essential device in the arsenal of union weapons. One type of publicity that can be particularly effective is that directed at secondary employers.[1] The union hopes that the pressure generated by such publicity will cause the secondary employer to pressure the primary employer to reach a settlement.

Endeavoring to curb union power, Congress wished to restrict a union's ability to exert pressure on secondary employers. Congress realized, however, that restrictions could not be so severe as to infringe upon a union's first amendment right of free speech. The resulting compromise was Section 8(b)(4) of the Labor-Management Relations Act.[2] The enactment severely restricts a union's ability to exert pressure on the secondary employer, but also contains provisions for publicizing labor disputes. These latter provisions are commonly referred to as the "publicity proviso."

The proviso protects union activity that would otherwise be unlawful under section 8(b)(4). The proviso does not permit unrestrained publicity but rather regulates it. This comment will discuss the acceptable forms of publicity, the requirements for such publicity, and the effect of unlawful publicity (in the form of picketing) combined with otherwise lawful publicity (handbilling). Initially this comment will review the background of the proviso to aid in the discussion of these topics.

II. The Development of the Publicity Proviso

A. Section 8(b)(4) of the Labor-Management Relations Act

The Labor-Management Relations Act[3] was a reaction to the

1. A secondary employer is an employer other than the employer with whom the workers are directly engaged in a labor dispute.

2. LABOR-MANAGEMENT RELATIONS ACT ch. 120, § 8(b), 61 Stat. 141 (1947), *as amended*, 29 U.S.C. § 158(b) (1970).

3. LABOR-MANAGEMENT RELATIONS ACT ch. 120, 61 STAT. 136 (1947), *as*

Wagner Act.[4] The Wagner Act enumerated and prohibited unfair labor practices; the LMRA balanced this by enumerating and prohibiting unfair union practices. One of these unfair union practices was set forth in section 8(b)(4).[5] This section made it an unfair labor practice for a labor organization or its agents

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is, [the achievement of enumerated prohibited goals].[6]

Implicitly, this section included prohibition of publicity directed at a secondary employer that would fit within the scope of the above quoted language. Especially important and relevant to the publicity problem was subsection (A) of 8(b)(4),[7] which forbade secondary boycotts.[8] Union activities including publicity could not force or require any employer or other person to cease handling the products of any producer, processor or manufacturer, or to cease dealing with any person.

There was only one exception to this forbidden activity. Section 8(b)(4) was covered by a proviso that permitted any person to refuse to enter the premises of any employer (other than his own), if the employees of that employer were engaged in a strike approved by their certified representative.

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amended, 29 U.S.C. § 141 (1970). The Labor Management Relations Act was passed in 1947 because of a popular feeling that the Wagner Act had resulted in an improper balance of power in labor relations. There was a basic misconception on the public's part concerning the scope of the Wagner Act. The public felt that the Act would eliminate all strikes and that an employer who was charged with an unfair labor practice had no opportunity to defend himself. In reality the Act attempted to eliminate only organizational strikes, and an employer who was charged with an unfair labor practice did indeed have an opportunity to defend himself. These misconceptions and others, when combined with the coal miner's strike during World War II (despite a "No Strike" guarantee), led the public to clamor for a restoration of the balance of power in labor relations. B. TAYLOR and F. WITNEY, LABOR RELATIONS LAW 196 (1971).

4. NATIONAL LABOR RELATIONS ACT ch. 372, 49 STAT. 449 (1935), *as amended*, 29 U.S.C. § 141 (1970).

5. LABOR-MANAGEMENT RELATIONS ACT ch. 120, § 8(b)(4), 61 STAT. 141 (1947), *as amended*, 29 U.S.C. § 158(b)(4) (1970).

6. *Id.*

7. *Id.* § 8(b)(4)(A).

8. A secondary boycott occurs when pressure is placed on one business unit to force its cessation of business with another business unit with which the union has a dispute.

While one intention of section 8(b)(4) was to limit the ability of unions to use pressure, including publicity, on secondary employers, several loopholes developed that defeated this purpose. The first loophole resulted from the section's application to a "concerted refusal" of employees in the course of their employment to handle the products of another employer. This implied that a union could induce the cooperation of one employee of a neutral employer or more than one employee on different occasions as neither would be action "in concert."[9] The second loophole occurred because the section applied only to the inducement of "employees" of a neutral employer. The section did not prohibit the inducement of a neutral "employer" for the purpose of securing his cooperation in ceasing to deal with the struck employer.[10] The third major loophole of the section developed because of the Act's limited definition of the terms "employees" and "employers." A great number of both "employees" and "employers" were not covered.[11]

These loopholes were closed by the 1959 amendments to the LMRA contained in the Labor-Management Reporting and Disclosure Act (LMRDA).[12] The amendments modified section 8(b)(4)[13] of the Labor-Management Relations Act, making it an unfair labor practice for a labor organization or its agent

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in 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 serv-

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9. This view was adopted by the United States Supreme Court in NLRB v. Int'l Rice Milling Co., 341 U.S. 665 (1951). Because of this decision, it became possible for a union to attempt to influence a "key employee" of a secondary employer, usually the neutral employer's purchasing agent.

10. The Board clearly supported this position of the law. In Texas Industries, Inc., 112 N.L.R.B. 923, 925 (1955) the Board stated, "The Act prohibits inducement of employees only, not of employers, when an object of such inducement is to force or require 'any employer . . . to cease doing business with any other person.'" This interpretation of the Act made it lawful for a union to apply secondary boycott pressure against a neutral employer.

11. The Labor-Management Relations Act ch. 120, § 2(2), 61 STAT. 137 (1947) defined employers who were covered by the Act. Employers who were not covered were the United States Government, any governmental corporation, state governments and their political subdivisions, nonprofit hospitals, and any employer covered by the Railroad Labor Act. The Labor-Management Relations Act ch. 120, § 2(3), 61 STAT. 137 (1947), defined employees who were not covered by the Act. Employees who were not covered by the Act included agricultural laborers, domestic help, persons employed by their parents or spouse, supervisors, independent contractors, and anyone subject to the Railroad Labor Act.

12. PUB. L. No. 86-257 (1959).

13. LABOR-MANAGEMENT RELATIONS ACT ch. 120, § 8(b), 61 STAT. 141 (1947). Title VII of the Act contained several amendments to the Labor-Management Relations Act of 1947, Section 704 specifically designed to close the loopholes that had arisen in section 8(b)(4) of the National Labor Relations Act (Wagner Act).

> ices; 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, [the achievement of enumerated prohibited goals].[14]

This change eliminated the "loopholes" of the earlier version. First, the activity directed toward neutral employers no longer had to be "concerted." Now inducement of only one individual to cease working would violate the law. Second a labor organization could no longer threaten, coerce, or restrain an employer. The amended section outlawed this activity when it was directed against any "person," not merely employees. This change made secondary consumer picketing unlawful since it exerted pressure against the secondary employer. Last, the amended section removed the definitional deficiencies of the terms "employees" and "employers" by using the terms "individuals" and "persons." While the 1959 amendments made the legislation more effective by closing the loopholes, they also softened section 8(b)(4) by adding the publicity proviso.[15]

B. The Creation of the Publicity Proviso

The "publicity proviso" states that,

> for the purpose 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 labor organizations, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.[16]

This form of the proviso represents a compromise of the conflict among the Senate, the House, and President Eisenhower regarding the extent of protection of publicity that was required by the first

14. 29 U.S.C. § 158(b)(4) (1970).

15. The amended section 8(b)(4) also contained several other changes. First, the secondary boycott provision of 8(b)(4)(A) was moved to 8(b)(4)(B), and in its place Congress foreclosed a sixth area as a legitimate objective of union pressure—forcing the employer to enter into a "hot cargo" agreement. Secondly, the amended 8(b)(4)(B) included a "primary action proviso." This proviso stated that nothing contained in subsection (B) would be construed to make unlawful any primary strike or primary picketing unless it was unlawful for another reason.

16. 29 U.S.C. § 158(b)(4) (1970).

amendment. The Senate proposed to permit all forms of publicity, the House proposed to prohibit publication to customers of neutral employers, and President Eisenhower demanded a prohibition of picketing that was intended to induce secondary boycotts.

Throughout the legislative debates there existed the fear that a failure to allow certain forms of publicity would cause the entire section to be declared unconstitutional. This was particularly apparent in the Senate. Senator Humphrey urged the Senate to authorize some forms of publicity of a labor dispute.[17] He cited the court of appeals reversal of an NLRB decision[18] that held a "We Do Not Patronize" list to be restraint and coercion of an employer. In reversing, the Ninth Circuit[19] held that the union's listing and persuasion were within the general protection of the first amendment's free speech guarantee. The Senator feared that the proposed amendments of section 8(b)(4) without a publicity proviso would face this same problem. He quoted from *United States v. Hutchinson*,[20] which stated that

> publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by Congress.[21]

Although some congressmen shared Senator Humphrey's fears[22] and agreed with the Senate position, the Senate's version of the proviso would have gone so far as to permit picketing to induce secondary consumer boycotts. The House of Representatives version of section 8(b)(4) contained no provision that would specifically have allowed publication of a labor dispute to customers of a neutral employer.[23] Any use of publicity for inducing secondary boycotts was to be prohibited. The House position was unacceptable to the Senate.[24] Before a conference committee resolution had been

17. 105 CONG. REC. 6232 (1959).
18. Alloy Mfg. Co., 119 N.L.R.B. 307 (1957).
19. N.L.R.B. v. I.A.M., Local 942, 36 L.C. 65, 214 (9th Cir. 1959).
20. 312 U.S. 219 (1940).
21. *Id.* at 243.
22. Congressman Griffin shared Senator Humphrey's fears. Discussing the proposed legislation and its prohibitions the Congressman stated:
> [W]hether it is the handing out of handbills or putting an ad in the paper or picketing, if it is done in such a way so as clearly to be nothing more than an exercise of free speech, then the provision would not be violated.

105 CONG. REC. 15673 (1959).
23. H.R. REP. No. 741, 86th Cong., 1st Sess. (1959).
24. Professor Archibald Cox was an advisor to Senator Kennedy during the congressional consideration of the Labor-Management Reporting and Disclosure Act. Professor Cox believed that the Senate-House Conference Committee could have agreed to allow labor organizations to organize a consumer boycott of a store that sold products of a struck producer by any available means of publicity. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959).

reached, President Eisenhower delivered a radio and television speech in which he demanded a prohibition against the use of picketing to induce a secondary consumer boycott.[25] After this speech the House conferees became adamant that picketing would not be allowed as a means of inducing a secondary consumer boycott.[26] The Senate, therefore, drafted a bill that allowed all forms of publicity other than picketing.[27] This is the form the bill took as it emerged from the conference committee. The conference chairman, Senator John Kennedy, explained the compromise proviso to the Senate.

> We were not able to persuade the House conferees to permit picketing in front of a secondary shop, but were able to persuade them to agree that the unions shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in the newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.[28]

Congress' proscription of secondary consumer picketing, while allowing other forms of publicity of a labor dispute, was clearly within the guidelines laid down by the United States Supreme Court in 1940. In *Thornhill v. Alabama*[29] the Court had declared:

> The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.[30]

The Court however, while recognizing a labor organization's right to publicize a labor dispute, added a caveat that the right could be limited to protect the interests of the state as a whole:

> Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under cir-

25. President Eisenhower had long advocated this measure but did not throw the full weight of his office behind it until the conference committee was to convene.

26. Cox, *supra* note 24.

27. *Id.*

28. 105 CONG. REC. 17898-99 (1959). Professor Cox reflected on the matter of the House-Senate compromises:

> This is the reason for the proviso which permits unfair lists, radio broadcasts, newspaper advertising, sound trucks, and every other form of publicity except picketing, for the purpose of inducing consumers to boycott an unfair product or a distributor who does business with an unfair producer.

Cox, *supra* note 24, at 274.

29. 310 U.S. 88 (1940).

30. *Id.* at 101-02.

cumstances affording no opportunity to test the merits of ideas for competition by acceptance in the market of public opinion.[31]

Despite passage of the proviso, which seemed to protect the constitutional guarantee of free speech, the matter of publicity of labor disputes was not completely resolved. The publicity proviso left certain areas of ambiguity.

C. *Initial Ambiguities Concerning the Publicity Proviso*

While both the Board and the courts generally agreed as to the forms of publicity permitted by the proviso, there was uncertainty and disagreement concerning the application of the proviso. Terms drafted to achieve clarity proved ambiguous and created much disagreement among the courts and the Board concerning the circumstances in which the proviso was to be applied. These terms desperately needed clarification, because if the proviso were found inapplicable, any prohibited type of publicity would be unprotected and would therefore constitute an unfair labor practice under 8(b)(4).

The first major ambiguity was whether the primary employer involved in a labor dispute had to "produce" a tangible good in order for the union's publication to fall within the protection of the proviso. The courts and members of the Board were deeply divided on this issue. Some[32] felt that in order for the union's publication activities to be protected, the primary employer had to actually, physically create a tangible good. Others[33] took a less restrictive view and contended that the union's publication activities would be protected if the employer produced a product or in any way added his labor to the production of a product. It was argued that an employer whose business consisted of the distribution of another's product or the performance of some service to aid in the production and sale of a product was also an employer who "produced a product" within the meaning of the proviso.

The issue was addressed in *Lohman Sales Co.*[34] In this case the union was engaged in a labor dispute with Lohman, a tobacco distributor. The union handbilled in front of the retail stores Lohman serviced and asked the public not to buy products delivered to the retail stores by Lohman. Lohman charged the union with a

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31. *Id.* at 104-05.

32. This point of view was always taken by Board member Phillip R. Rodgers in dissenting opinions and by some of the courts of appeals, particularly the Ninth Circuit.

33. This point of view was always taken by the majority of the members of the Board.

34. 132 N.L.R.B. 901 (1961).

violation of § 8(b)(4)(ii)(B),[35] claiming the union was trying to threaten, coerce, and restrain the retailers from doing business with him. Lohman claimed the handbilling was not protected by the proviso since Lohman, as the primary employer, did not actually produce, but only distributed a product. The Board dismissed this contention and found that the proviso covered primary employers who distributed goods as well as those who produced them. The Board relied on a dictionary definition of "production,"[36] stating:

> [S]o far as human effort is concerned, *labor* is the prime requisite of one who produces. A wholesaler such as Lohman need not be an actual manufacturer to add his labor in the form of capital, enterprise, and service to the product he furnishes the retailers. In this sense therefore, Lohman, as the other employer who "handled" the raw materials of the product before him, is one of the producers of the cigarettes distributed by his customers.[37]

In this case and others the Board emphasized that the primary employer, by adding his labor in the form of capital, enterprise, and service to the products that it advertised, distributed, or serviced for the secondary employer, became one of the producers of that secondary employer's product.[38]

Not every court or all of the Board members agreed with this interpretation. In *Great Western Broadcasting Corp. v. NLRB*,[39] the court of appeals overturned a Board decision[40] that had classified a television station as a "producer of a product." The court ruled that the term "product", "produced", and "production" had

35. Labor-Management Reporting and Disclosure Act of 1959 § 704(a), 73 STAT. 542 (1959), 29 U.S.C. § 158(b)(4)(ii)(B) (1970).

36. The Board relied on BLACK'S LAW DICTIONARY (3d edition 1933), which defines production as follows:

> In political economy. The creation of objects which create wealth. The requisites of production are labor, capital, and the materials and motive forces afforded by nature. Of these, labor and the raw materials of the globe are primary and indispensible. Natural motive powers may be called in to the assistance of labor and are a help, but not an essential of production. The remaining requisite, capital, is itself the product of labor. Its instrumentality in production is therefore. in reality, that of labor in an indirect shape. Mill, Political Economy; Wharton.

37. 132 N.L.R.B. 901, 907 (1961).

38. *Accord*, Houston Armored Car Co., 136 N.L.R.B. 110 (1962) (primary employer provided armored car service); Ypsilanti Press, Inc., 135 N.L.R.B. 991 (1962) (primary employer a newspaper company); Middle South Broadcasting Co., 133 N.L.R.B. 1698 (1961) (primary employer a radio station); Great Western Broadcasting Corp., 134 N.L.R.B. 1617 (1961) (primary employer a television station).

39. 310 F.2d 591 (9th Cir. 1962).

40. Great Western Broadcasting Corp., 134 N.L.R.B. 1617 (1961).

been restricted in their meaning by the context in which they were used in other places in section 8(b)(4).[41] The court ruled that as the term "produced" was used in the proviso, "Congress was referring to the activity of a primary employer in applying capital, labor and enterprise to effect the conversion of raw materials in his possession into a more finished tangible article."[42] The court therefore declared the publicity proviso inapplicable to this dispute. Without the protection of the proviso the union's conduct violated section 8(b)(4)(ii)(B).[43]

The other major ambiguity springing from the equivocal terminology of section 8(b)(4) and the publicity proviso was whether a union could attempt to induce supervisors of neutral employers to exercise their managerial discretion to cease doing business with the primary employer without violating section 8(b)(4)(i)(B).[44] This section made it unlawful to induce any individual to refuse to work on any goods, or to perform any services, if the object of the inducement was to force any person to cease doing business with any other person.

This precise issue was raised in *Carolina Lumber Co.*,[45] in which a neutral supervisor refused to use the primary employer's lumber after being informed of a labor dispute by a striking union. After reviewing the legislative history of the section the Board dismissed the charged violation of section 8(b)(4)(i)(B), stating

> that among the class of individuals to be insulated from "inducement" are supervisors who, although they are management's representatives at a low level, are through their work, associations, and interests still closely aligned with those whom they direct and oversee.[46]

The Board reasoned that the two clauses protected different individuals and forbade different activities. Clause (i) referred to inducement of "any individual employed"; clause (ii) referred to threats, restraint, and coercion of "any person engaged in commerce." The Board stated that "to threaten a person is to induce him."[47] If the two separate clauses were to have meaning, some distinction must have been intended. The Board felt that if the expression "individual employed by any person" referred to high level supervisors, the spe-

41. In 29 U.S.C. § 158(b)(4)(B) (1970) the term "product" is described as being associated only with a "producer," "processor" or "manufacturer." This led the court to conclude that Congress wanted to include within the coverage of the act only those employers who created a product.

42. 310 F.2d 591, 598 (9th Cir. 1962).

43. *Accord*, Servette, Inc. v. N.L.R.B., 310 F.2d 659 (9th Cir. 1962).

44. Labor-Management Reporting and Disclosure Act of 1959 § 704(a), 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(i)(B) (1970).

45. 130 N.L.R.B. 1438 (1961).

46. *Id.* at 1443.

47. *Id.*

cific prohibition against coercive tactics would have been unnecessary. The Board reconciled the clauses in regard to supervisors by applying clause (i), "inducement of individuals employed by any person," to those whose interests were near rank and file members, *i.e.*, low level supervisors, and by applying clause (ii), "threats, restraint or coercion of any person," to those who actually exercised managerial discretion, *i.e.*, high level supervisors. The authority of the neutral supervisor[48] would have to be investigated in each case to determine whether a neutral supervisor was subject to inducement as an employee under clause (i).[49]

There was not complete agreement with this view of the problem. In *Servette, Inc. v. NLRB*,[50] the Ninth Circuit took the opposite approach. The court concluded that the substitution by Congress of the term "individual" for "employee" in the 1959 amendment was conclusive proof that Congress intended to include supervisors as "individuals" whom a union could not induce without violating section 8(b)(4)(i)(B). This meant that all supervisors, not just low level supervisors, were to be protected from publicity aimed at inducement. The court felt that the Board's creation of two ill-defined categories would place a union in the "untenable and precarious position"[51] of having to gamble on which supervisor they could induce.

The Board's and courts' conflicts regarding the interpretation of both the individuals who could not be subject to inducement through publicity and the employers who were engaged in production needed to be resolved. In 1964, the United States Supreme Court decided two cases that clarified both of these major ambiguities.

D. Supreme Court Resolution of Ambiguities

In *NLRB v. Servette, Inc.*[52] the United States Supreme Court

48. 29 U.S.C. § 152(10) (1970) describes a supervisor as follows:
any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

49. *Accord*, Staats Express, 131 N.L.R.B. 242 (1961); Peyton Packing Co., 131 N.L.R.B. 406 (1961); Alpert v. Teamsters Local 379, 184 F. Supp. 558 (D. Mass. 1960).

50. 310 F.2d 659 (9th Cir. 1962), *rev'g* 133 N.L.R.B. 1501 (1961).

51. 310 F.2d 659, 665 (9th Cir. 1962).

52. 377 U.S. 46 (1964), *rev'g* 310 F.2d 659 (9th Cir. 1962).

directly addressed the two major areas of ambiguity—whether a union could attempt to induce a supervisor to exercise his managerial discretion to cease doing business with the employer with whom the union had a labor dispute, and whether the primary employer actually had to produce a tangible good in order for the union's publication activities to fall within the scope of the proviso. A third issue, whether the threat to handbill a neutral employer was a prohibited "threat" under section 8(b)(4)(ii)(B), was also raised.

The Court found that the union, in asking managers not to handle the goods that Servette distributed, was not asking them to cease performing their managerial duties in order to force their employers to cease doing business with Servette. The Court declared that this type of activity had not been considered a violation of section 8(b)(4)(A) before 1959 and that the legislative history of the 1959 amendments made it clear that the amendments were not intended to make such an appeal an unfair labor practice. The Court noted that the purpose of the 1959 amendments was to close loopholes in the application of section 8(b)(4)(A) and not to expand the type of conduct that section 8(b)(4)(A) condemned. Thus the inducement of supervisors to exercise their discretion to cease dealing with the primary employer was not unlawful. The Court discarded the reasoning of both the Board in *Carolina Lumber Co.*[53] and the court of appeals in *Servette v. NLRB*[54] and stated that the crucial test for union action in approaching supervisors is whether the appeal is to the exercise of managerial discretion or to the avoidance of duties for which they were hired.

Likewise, the Court ruled on the "produced" issue favorably to the union position. The Court ruled that the term "produced" as used in the publicity proviso did not mean that the primary employer actually had to manufacture or process a tangible good. The Court said that the proviso was an outgrowth of the Senate's concern to guard the union's freedom to appeal to the public for support. The proviso would fall far short of achieving this purpose if it applied only to cases of union disputes with processors or manufacturers. The Court noted that in the Fair Labor Standards Act[55] the term "produced" was defined as "produced, manufactured, mined, handled, or in any manner worked on . . . ."[56] This definition was known to Congress when it enacted the publicity proviso. The Court stated that "produced" must be given a broad range lest it be rendered superfluous.

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53. 130 N.L.R.B. 1438 (1961).
54. 310 F.2d 659 (9th Cir. 1962).
55. 29 U.S.C. § 201 (1970).
56. 29 U.S.C. § 203(j) (1970).

The resolution of the third issue was also favorable to unions. The Court ruled that warnings of handbillings did not constitute "threats" as defined in clause (ii) of section 8(b)(4), stating that the protection of handbill distribution by the proviso would be undermined if a threat to engage in such activity were not protected.

On the same day that the Court decided *Servette*, it ruled on another case that dealt with the publicity proviso. In *NLRB v. Fruit and Vegetable Packers & Warehousemen, Local 760*,[57] the Court ruled on whether secondary consumer picketing was lawful. Secondary consumer picketing occurs when a union engaged in a labor dispute pickets a neutral employer and asks the consuming public to refrain from buying only the goods of the struck employer handled by the neutral employer. The pickets do not ask the public to cease all dealings with the neutral employer.[58]

The Court viewed the legislative history of the 1959 amendment and concluded that it did not "reflect with requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites. . . ."[59] The Court recognized two types of consumer picketing. The purpose of one was to shut off *all* trade with the neutral employer unless he cooperated with the union; the purpose of the other was to limit the goods of the primary employer that were bought by the public from the neutral employer. The first typed induced the neutral employer to cease buying the struck product because of the injury inflicted on his business generally. The Court held this type of picketing unlawful. But the second type of picketing, which asks the public to boycott only the goods of the struck employer, keeps the union's appeal closely confined to the primary dispute. The neutral employer will stop buying the primary employer's goods because the demand for them has decreased, not because his business is being injured. The union merely follows the struck product, it does not create a separate dispute with the neutral employer. This activity the Court ruled was lawful. The Court's decision and a later case[60] indicate, however, that a union's activities

57. 377 U.S. 58 (1964).

58. The publicity proviso clearly states that picketing is not a form of publicity available to unions. It states "nothing contained in such paragraph shall be construed to prohibit publicity, *other than picketing* . . . ." 29 U.S.C. § 158(b)(4) (1970).

59. 377 U.S. 58, 63 (1964).

60. Hawaii Press Newspapers, Inc., 167 N.L.R.B. 1030 (1967), *aff'd*, Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952 (D.C. Cir. 1968).

directed at only the struck product or service will lose the protection of the proviso if they cause a general decrease in the neutral employer's business.[61]

While the drafters of the publicity proviso apparently thought they were prohibiting all picketing for secondary boycott purposes,[62] the Supreme Court interpreted this langugage differently. But, the courts found other restraints and requirements for publicity implicit within the proviso.

III. Requirements That All Publicity Must Fulfill Under the Publicity Proviso

Even though the form of publicity that a labor organization utilizes is one that has usually been recognized by the Board and courts,[63] it must meet other requirements to fall within the protection of the proviso, requirements that are implicit in the proviso itself. The publicity must meet all of the requirements; a failure to do so will place the publicity outside the protection of the proviso, subjecting the union to a charge of violating section 8(b)(4).

A. A Labor Dispute Must Exist

The first requirement that a union must meet in order for its publicity to fall within the protection of the proviso is that it must be engaged in a labor dispute with the employer against whom the publicity is ultimately directed. A labor dispute includes

> any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.[64]

The usual issue that arises in this context is what constitutes a labor dispute. This is illustrated in *Cedar Crest Hats, Inc. v. United Hatters, Cap, and Millinery Workers International Union.*[65] The case involved the union's attempt to organize the millinery workers of the Dallas, Texas area. The union, able to organize only one company, started a nationwide education program, which included threatening retailers with handbilling that would ask the public to buy only

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61. An example of this would occur if a restaurant advertised in a paper that was being struck. Secondary consumer picketing would urge the public not to buy any of the goods that the primary employer helped to produce. In this case that would mean a total cessation of the restaurant's business because all of its "products" were advertised in the struck newspaper.

62. *See* note 28 *supra.*

63. *See* notes 99-137 and accompanying text *infra.*

64. 29 U.S.C. § 113(c) (1970).

65. 62 L.R.R.M. 2441 (5th Cir. 1966), *rev'g* 229 F. Supp. 341 (N.D. Tex. 1964).

union-made hats. The district court[66] issued an injunction restraining the union. The court of appeals, after reviewing the activity and the definition of a labor dispute, held that the union's activity fell within the proviso because a labor dispute did exist between the union and the millinery manufacturers. Therefore, the activity was protected, and the district court injunction was laid aside.

Another attempt to define labor disputes arose in *Roywood Corp. v. IBEW Local 1264.*[67] In this case the employer television station broke off collective bargaining in February, 1966, at which time the union went on strike and publicized the dispute by various means. In May, 1967, the Board conducted a representation election.[68] The union was soundly defeated, but continued to publicize its original dispute with the television station. The union finally agreed to stop the publicity. In a suit for damages from the union's activities the court, ruling in the employer's favor, found that there was not a bona fide labor dispute. Since a representative election had been held within the past twelve months, the union was no longer engaged in a "labor dispute" with the employer.[69]

B. The Publicity Must Be Substantially Truthful

The second requirement is that the publicity must be substantially truthful. In *Lohman Sales Co.*[70] the Board stated this basic rule:

> [T]he proviso does not require that a handbiller be an insurer that the content of the handbill be one hundred percent correct, and that where, as here, there is no evidence of an intent to deceive and there has not been a substantial departure from fact, the requirements of the proviso are met.[71]

The Board stated that it is necessary that the publicity be "substantially accurate" in its representations. In practice this is not a stringent standard. For example, in *Packard Bell Electronics,*[72] the company

66. Texas Millinery Co. v. United Hatters, Cap and Millinery Workers Int'l Union, 229 F. Supp. 341 (N.D. Tex. 1964).
67. 290 F. Supp. 1008 (S.D. Ala. 1968).
68. The Board conducted the election as required in 29 U.S.C. § 159 (1970).
69. 29 U.S.C. § 158(b)(7)(B) (1970) makes it unlawful for a union to picket an employer in the hope of threatening him to recognize the union as the representative of his employers when a valid election has been conducted within the preceding twelve months.
70. 132 N.L.R.B. 901 (1961).
71. *Id.* at 906.
72. 132 N.L.R.B. 1049 (1961).

service department was out on strike. The union handed out leaflets stating that Packard Bell products were made under non-union conditions. In fact, the manufacturing division's employees had voted not to be represented by a labor organization. The Board felt that although the handbills were misleading, the statutory requirements of substantial truthfulness had been met.

Another example is found in *California Association of Employers*,[73] in which the Board ruled that the publicity had failed to meet the substantial accuracy requirement. In this case the union distributed handbills that said the contractor hired employees who worked for less than union rates. In fact, the contractor's employees received $6.83 an hour in wages and fringe benefits while union men received only $6.73 an hour. The union official in charge of the handbilling stated at the hearing that he had never bothered to investigate to discover what the contractor's employees were being paid. The Board ruled that the handbills were not only misleading but untrue when they stated that the union standards were higher than those of the contractor. In light of the falsity of the handbills and the fact that they were issued with reckless disregard for the truth, the Board held that they were not protected by the proviso.

Similarly, in *Honolulu Typographical Union No. 37 v. NLRB*[74] the court of appeals upheld a Board determination[75] that handbills distributed in front of a market place asking the public "not to patronize this establishment" were untruthful. This determination was based on the handbills' reference to the entire establishment when only a small number of stores[76] in the market place were actually advertising in the newspaper against which the union was striking. The Court would not rule whether the publicity might be protected because the union had not acted with flagrant disregard of the accuracy of the publicity, since this point had not been raised before the Board.[77]

C. Geographical Limitation on the Publicity

A third issue that arises in regard to publicity is whether any geographical limitation should be imposed upon a union's publicity campaign. In most cases, publicity at the point where the neutral employer sells the struck employer's goods is most effective. But on

73. 190 N.L.R.B. 261 (1971).
74. 401 F.2d 952 (D.C. Cir. 1968), *aff'g* 167 N.L.R.B. 1030 (1967).
75. Hawaii Press Newspapers, Inc., 167 N.L.R.B. 1030 (1967).
76. There were 50 to 60 shops in the market place, of which only six were regular advertisers.
77. The court found that the publicity was illegal for other reasons also. *See* notes 52-63 and accompanying text *supra*.

occasion a union will publicize the dispute elsewhere. While there is usually no geographic limitation imposed, the Board or courts may find limitations necessary in some circumstances.

The normal absence of limitations is illustrated in *Schepps Grocery*[78] and *Sakowitz, Inc.*[79] In *Schepps Grocery*[80] the union and the struck employer stipulated that the union would not publicize the dispute in front of the retail grocery stores to which the struck employer delivered for a period of thirty days. During this period, the union distributed handbills from house to house in the vicinity of the retail stores, but never at the stores themselves. The Board found that the expansion of the area of publicity did not violate section 8(b)(4)(B) and held that the publicity remained protected by the proviso. In *Sakowitz, Inc.*[81] the union was engaged in a labor dispute with a contractor involved in a shopping mall construction project. The union handbilled a store of one of the companies that planned to rent space in the new shopping center. The General Council of the Board contended that a union may engage in a secondary consumer boycott only if the secondary employer conducts his business with the neutral employer. The Board rejected this argument, holding that

> [t]he absence of a geographical limitation to the scope of the proviso is inherent in the fact that radio and newspaper advertising is within the scope of its protection. To restrict the locus of permissible handbilling while protecting appeals to all prospective customers who listen to radios or read newspapers would be patently inconsistent.[82]

The Board concluded that the union's handbilling was protected by the publicity proviso.

But in *Raywood Corp. v. IBEW Local 1264*[83] the district court indicated that there was a geographical limitation to the proviso. The union sent placards to labor organizations throughout the country asking them not to buy the products of the companies that advertised on the struck television station. Most of these companies sold their goods both in the Alabama region and nationally. The court concluded that this publicity was not protected by the proviso. Not only

78. 133 N.L.R.B. 1420 (1961).
79. 174 N.L.R.B. 362 (1969).
80. 133 N.L.R.B. 1420 (1961).
81. 174 N.L.R.B. 362 (1969).
82. *Id.* at 364.
83. 290 F. Supp. 1008 (S.D. Ala. 1968).

did the publicity hurt the local distributors of the companies, but it also affected distributors in others parts of the country who had no connection with the advertising on the struck television station. The court, therefore, imposed a geographical limitation on union publicity that harms completely disinterested neutral employers.

D. *The Publicity Must Not Be Intended to Induce Employees of the Neutral Employer to Cease Working*

The last requirement that publicity must meet is that it cannot be directed toward inducing the employees of the neutral employer to stop working.[84] The proviso states that publicity is protected

> as long as [it] does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.[85]

Any publicity that is not protected by the proviso because it is intended to induce an individual to cease working almost automatically violates section 8(b)(4)(i)(B) of the Act.[86]

In *Lohman Sales Co.*,[87] the union, which was engaged in the handbilling of retail stores, asked the employees of several of the retailers "not to order from Lohman." None of the employees were supervisors who exercised any managerial discretion in deciding what company to purchase from. The Board found that these oral requests constituted inducement of employees not to perform their work and that they attempted to force the neutral employer to cease doing business with Lohman.[88] The Board indicated that this constituted inducement of the neutral employer's employees for the purpose of altering the relationship between the neutral and primary employer, and would not be protected by the proviso. Similarly, in *Carolina Lumber Co.*,[89] union agents approached workmen of the neutral employer and told them that it was wrong for them to handle the primary employer's lumber because it would "bust" their union. Although the crew did not stop working on the job, the Board held that this was a violation of section 8(b)(4)(i)(B) because the union

84. Of course the union can still attempt to induce a supervisor to exercise his managerial discretion and not deal with the struck employer. *See* notes 52-54 and accompanying text *supra*.

85. 29 U.S.C. § 158(b)(4) (1970).

86. 29 U.S.C. § 158(b)(4)(i)(B) (1970) makes it unlawful for a union to induce or encourage any individual to engage in a strike or a refusal to perform his duties where an object of such inducement is to require one person to cease dealing with another person. If the union engages in inducement of an individual to cease working, this is not protected by the proviso and is an action prohibited by the Act.

87. 132 N.L.R.B. 901 (1961).

88. This was a violation of 29 U.S.C. § 158(b)(4)(i)(B) (1970).

89. 130 N.L.R.B. 1438 (1961).

agents had attempted to induce the workmen to cease performing their jobs. The success or failure of the inducement was immaterial to the finding of a section 8(b)(4) violation.

E. Attempts to Impose Additional Requirements

While the above discussed requirements for publicity proviso protection are commonly recognized, occasional attempts have been made to add further impediments. These attempts have been in the form of ordinances and have generally arisen in communities where anti-union feelings exist. A common attempt to further restrict publicity is the enactment of anti-littering statutes directed at discouraging handbilling. Their purpose is to prevent a union from notifying the public of the labor dispute that exists. The courts have usually refused to enforce these laws where the enforcement would be patently unconstitutional. This is illustrated in *Steelworkers v. Bagwell.*[90] This case involved an ordinance[91] of the town of Statesville, North Carolina that made it unlawful to distribute without permit any leaflet except those dealing with politics or religion. The union wished to solicit members through handbilling. The district court[92] refused to issue an injunction against enforcement of the ordinance. On appeal the Fourth Circuit observed that the district court had improperly abstained from issuing the injunction, adding that

> [a] municipality may prohibit the distribution of commercial advertisements on its streets and the throwing of litter on its sidewalks, but its interest in keeping the street clean does not warrant an ordinance forbidding the distribution to willing recipients of handbills expressing ideas and opinions.[93]

The court declared that the ordinance was plainly unconstitutional as a violation of the first amendment free speech guarantee.

Another attempt to impose additional restrictions had been directed toward the use of sound trucks. In both *Saia v. New York*[94] and *Kovacs v. Cooper*,[95] the Court ruled that the use of sound trucks was not absolutely protected by the first amendment but was subject to regulation. In the latter case the Court upheld a city ordinance which prohibited the use of any sound truck that emitted

90. 66 L.R.R.M. 1157 (4th Cir. 1967).
91. STATESVILLE, N.C. CODE § 14-5 (1947).
92. 239 F. Supp. 626 (W.D.N.C. 1965).
93. 66 L.R.R.M. 2257, 2259 (4th Cir. 1967).
94. 334 U.S. 558 (1948).
95. 336 U.S. 77 (1949).

loud and raucous noises in a public place. The Court stated, "Opportunity to gain the public's ear by objectionably amplified sound on the streets is no more assured by the right of free speech than is unlimited opportunity to address gatherings on the street."[96]

Relying on these two Supreme Court decisions, the Supreme Court of California in *Wollman v. City of Palm Springs*[97] struck down a city ordinance[98] that prohibited sound trucks from traveling less than ten miles per hour unless they were stopped for traffic, and from emitting sound for more than one minute when they were stopped. A union which had intended to use a sound truck to publicize a labor dispute brought suit to have the ordinance struck down. The court agreed with the union charge that the ordinance violated the first amendment because it exceeded the burden of reasonable regulations.

The effort to limit the use of sound trucks and handbilling indicates that some forms of publicity have been more readily accepted than others. While a few municipalities have opposed the use of these two types of publicity, the Board and courts have generally recognized them.

IV. Forms of Publicity That May Be Utilized

A few specific forms of publicity have been considered lawful since the 1959 amendments.[99] Although the Supreme Court's decision in 1964 concerning the publicity proviso did not consider what forms of publicity were allowable under the proviso, the Board and the courts have often considered the matter.

A. Handbilling

Handbilling is the most common form of publicity utilized by labor organizations to inform the public that a neutral employer is selling goods produced by the employer with whom the labor organization has a dispute. In handbills unions are able to describe the circumstances of a labor dispute more accurately than in picket signs. There is little doubt that handbills were intended by Congress to be a permissible means of publication.[100]

The Board and the courts have with virtual unanimity declared handbilling of a neutral employer to be lawful as long as it meets stated requirements. In *Lohman Sales Co.*[101] the union hand-

96. *Id.* at 87-88.
97. 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963).
98. PALM SPRINGS, CAL., ORDINANCE 395, August 27, 1958.
99. The dates of cases cited in the text should be noted (ed.).
100. 105 CONG. REC. 17898 (1959).
101. 132 N.L.R.B. 901 (1961).

billed the retail stores to which Lohman delivered certain goods, asking the public not to buy his goods. Lohman claimed that the handbilling was tantamount to picketing and therefore was not protected by the proviso. The Board cited Senator Kennedy's remarks to the Senate and concluded that the legislative history had made it "abundantly clear that mere handbilling is not picketing but is embraced by the term 'publicity' which is protected by the proviso."[102] The Board ruled that even though such conduct might threaten, coerce, or restrain an employer, as long as it was permissible publicity it was protected by the proviso.

The union's handbilling activity does not have to be aimed only at the goods being sold by the neutral employer that are identified with the primary employer. With handbills, as with all other permissible forms of publicity, unions can request the public to cease dealing with the neutral employer as long as he deals with the employer with whom the union is engaged in a dispute. This is in complete contrast with the form secondary consumer picketing must take, as mandated by the Supreme Court in *NLRB v. Fruit Packers and Warehousemen, Local 760.*[103]

This point was illustrated in *Industrial Electrical Service* (1961),[104] a case in which a union had a labor dispute with two contractors who helped to construct a supermarket. The union handbilled at the completed market asking the public not to patronize it. The Board found that the handbilling was protected by the proviso. Although the intent of the union was to force the supermarket to cease all dealings with the contractors[105] for maintenance or future construction, the publicity was protected since it met all statutory requirements and was of permissible form.

The distribution of handbills, even if the handbills fulfill statutory requirements, is not absolutely protected. The Board has on occasion construed the distribution of handbills to be picketing. In *Staltz Land and Lumber Co.*[106] the union was ordered to cease picketing a primary employer. The union then positioned some of its agents in front of the company's headquarters in cars.

102. *Id.* at 905.
103. 377 U.S. 58 (1964).
104. 134 N.L.R.B. 812 (1961).
105. A violation of 29 U.S.C. § 158(b)(4)(ii)(B) (1970) unless protected by the publicity proviso.
106. 156 N.L.R.B. 388 (1965).

These agents distributed leaflets explaining the labor dispute to anyone who approached the company offices. The Board found that this distribution of leaflets constituted picketing, stating that such activity was designed to prevent potential customers and employees from entering onto the company's premises, not to inform the public of a dispute. The Board felt that "patrolling" a location was similar to picketing it. In *William J. Burns International Detective Agency*[107] the Board found that the distribution of leaflets by a large number of people at a neutral employer's exhibition was a violation of section 8(b)(4)(ii)(B). The Board held that this activity impeded entrance and exit to prospective customers. It is, therefore, clear that "handbilling" will be considered sufficiently similar to picketing to be impermissible if it impedes ingress and egress. As long as its primary effect is informational, however, it will be protected by the proviso.

B. Unfair Lists

A second permissible form of publication under the proviso is the "unfair list." An unfair list is a list of employers who are engaged in a labor dispute. The list is usually published by a labor council;[108] the council circulates this list to affiliated locals and their members and often to employers with whom the unions deal. The union hopes that those who receive the list will cease dealing with the struck employer until he resolves his labor dispute, at which time his name will be removed from the list.

Northwestern Construction of Washington, Inc.[109] concerned such an "unfair list." The union was engaged in a labor dispute with a contractor who employed nonunion workers. The contractor, who was hired primarily by oil companies to build new gas stations, was placed on an unfair list that was then circulated to various oil companies in the region. The Board found this publicity lawful, holding that

> the distribution of an unfair list is, like the handbilling there, a form of publicity other than picketing which similarly serves to advise the public, including consumers, and members of a labor organization of the existence of a labor dispute.[110]

In *Great Western Broadcasting Corp.*[111] the Board faced a similar situation. A union and a television station were engaged in a labor

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107. 136 N.L.R.B. 431 (1962).
108. A labor council is an association of local unions for the unified promotion of their common interests.
109. 134 N.L.R.B. 498 (1961).
110. *Id.* at 500.
111. 134 N.L.R.B. 1617 (1961).

dispute. The union placed the businesses that advertised on the television station on the local trade council's unfair list. The list also contained the suggestion that customers return credit cards of any of the station's advertisers. Some customers complied with this request. The Board ruled that such a means of publication was lawful, declaring:

> The proviso specifically states that the request not to use a product is protected where the purpose is to truthfully advise the public, including consumers and members of a labor organization, that a product or products are produced by an employer. It is therefore clear that the Act specifically enables a union which is involved in a primary dispute to seek assistance in members of a labor organization.[112]

C. Sound Trucks

A third form of publicity that is permissible under the proviso is the use of "sound trucks."[113] The United States Supreme Court has recognized the use of a sound truck as a permissible means of communication. In *Saia v. New York*[114] the Court declared: "Loudspeakers are totally indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning."[115] In *Kovacs v. Cooper*[116] the Court recognized the right of a citizen to use sound trucks to express his views on matters that he considered of interest to himself and the community. The Court felt that there was no question that this form of communication is protected by the freedom of speech guarantee of the first amendment. But, as discussed above, the use of sound trucks can be regulated.

D. Newspaper Advertising, Radio and Television Broadcasts

A fourth form of publicity that is widely accepted as being protected within the meaning of the proviso is the use of newspaper advertisements.[117] In *Schepps Grocery Co.*[118] the union handbilled a neutral employer's store, asking the public not to buy the

112. *Id.* at 1621.
113. Cox, *supra* note 24, at 274.
114. 334 U.S. 558 (1948).
115. *Id.* at 561.
116. 336 U.S. 77 (1949).
117. 105 CONG. REC. 17898 (1959).
118. 133 N.L.R.B. 1420 (1961).

primary employer's goods. It also placed a full page advertisement in the local newspaper. After reviewing the legislative history of the 1959 amendments, the Board found that this newspaper advertisement fell within the protection of the proviso.[119]

The last generally accepted forms of publicity are radio and television broadcasts. Senator Kennedy's report to the Senate provided a very strong indication that this form of publicity would be acceptable.[120] Professor Cox in his assessment of the forms of publicity that the conference committee intended to allow also included radio broadcasts as one of the lawful forms.[121] Also in 1960, the General Counsel of the Board, Stuart Rothman, discussing the objectivity of union publication, included radio advertisements among the forms of publicity protected by the proviso.[122] In *Sakowitz, Inc.*[123] the Board, while not dealing with radio or television advertisements as a form of publicity, stated that such publicity was within the scope of the proviso.

E. Other Forms of Publicity

Several additional means of publication are perhaps legitimate, although the case law is unsettled. In *Packard Bell Electronics Corp.*[124] a union agent taped a placard onto his car urging customers not to buy the goods of the primary employer from the neutral employer. The car was parked directly in front of the neutral employer's store and was clearly visible to all customers. The Board's trial examiner found that this form of publicity was similar to that of picketing and, because potential customers could not avoid seeing the placard, he found it to be illegal. The Board did not adopt this view, but upheld the finding pro forma because the union failed to contest it. In light of the fact that other permissible forms of publicity are also thrust upon a potential customer, the finding by the trial examiner is contrary to the Board's stated policy.

Another interesting form of publicity, one which the Board upheld as being within the publicity proviso, was employed in Hawaii. In *Hawaii Press Newspaper Inc.*[125] the union was engaged in a labor

119. The Board reached this conclusion after reviewing the legislative history of the 1959 amendments, particularly Senator Kennedy's statement. In *Sakowitz, Inc.*, 174 N.L.R.B. 362 (1969), the Board, while discussing the effect of handbilling reaffirmed that newspaper advertising was within the scope of the proviso.

120. The Senator said, "In other words, the union . . . can make announcements over the radio . . . ." 105 CONG. REC. 17898 (1959).

121. Cox, *supra* note 24.

122. Address by Stuart Rothman, before the Institute on "Labor-Management Reporting and Disclosure Act of 1959" sponsored by Emory University School of Law, at the Lawyers Club of Atlanta, Georgia, February 12, 1960.

123. 174 N.L.R.B. 362 (1969).

124. 132 N.L.R.B. 1049 (1961).

125. 167 N.L.R.B. 1030 (1967).

dispute with a newspaper company. In addition to handbilling and picketing the union engaged in several native musicians and singers to perform on a truck in front of the marketplace in which the advertisers conducted business. The show attracted a large crowd, which effectively blocked the entrance to the marketplace. The Board found that this type of "publicity" was not unlawful, stating that this was the type of entertainment for which Hawaii was famous and which tourists were encouraged to watch. Since the show was peaceful and there were no arrests despite the size of the crowd, the Board concluded that the show constituted publicity within the protection of the proviso. It is unlikely, however, that the Board would routinely find similar forms of entertainment protected by the proviso, since it has found the blocking of ingress and egress to a neutral employer by a large crowd unlawful in another case.[126]

F. Combined Forms of Publicity—Handbilling and Picketing

While the Board's discussions indicate that almost any form of publicity that is normally considered protected by the first amendment's free speech guarantee will be upheld, a different result may ensue when such publicity is combined with illegal publicity. This question has arisen most often in the context of handbilling combined with picketing. When permissible this is the most effective form of publicity utilized by a union. If the picketing is lawful and the handbills meet all of the statutory requirements, this activity is lawful. But often the picketing is illegal. In most instances this occurs because the picket sign calls for a total boycott of the neutral employer. Such illegal picketing can have a number of effects on otherwise proper handbilling.

Most Board decisions indicate that even though the picketing used by the union is illegal, the handbilling which accompanies it is still protected by the proviso. In *Minneapolis House Furnishing Co.*[127] the union picketed and handbilled retail companies in an attempt to boost the sale of locally made union goods. The Board found the picketing violative of section 8(b)(4)(ii)(B)[128] but ruled that the accompanying handbilling was not illegal. The handbilling never became part of the picketing. The picketing and

126. The William J. Burns Int'l Detective Agency, 136 N.L.R.B. 431 (1962).
127. 132 N.L.R.B. 40 (1961).
128. Labor-Management Reporting and Disclosure Act of 1959, § 704(a), 73 STAT. 542 (1959), 29 U.S.C. § 158(b)(4)(ii)(B) (1970).

handbilling remained two distinct and separate forms of publicity. The one form (picketing) was designed to induce workers to engage in a work stoppage and to coerce the employer in the conduct of his business. The other form (handbilling), was addressed to the public and did not presume to induct employees or coerce employers. The handbilling remained protected by the proviso.

A similar situation was at issue in *Sardec, Inc.*,[129] in which a union picketed and handbilled a retail store that was building another of its franchise stores with nonunion help. The picketing was found unlawful because it advocated a boycott against the entire store and all its products.[130] The General Counsel of the Board urged that the handbilling not be protected because the handbills advised the public of the unlawful activity of the union. The Board concluded that the handbilling was protected by the proviso even though it was used in conjunction with the unlawful picketing.

In the *Minneapolis* and *Sardec* cases the Board determined that the two forms of publicity, though found in physical conjunction, could be severed to determine the legality of each under the proviso. In other cases, however, the Board and the courts have not severed the two forms of publicity. Because of the circumstances in which these forms of publicity are found, the Board and the courts have declared them to be so intermingled that they must be dealt with as only one form—usually picketing.

When the handbilling has become so intimately connected with the picketing as to leave them indistinguishable, both are considered illegal. This is true despite the fact that the handbilling alone would be permissible. In *Castner-Knott Dry Goods Store*[131] the union's picket signs asked the public to take a leaflet from one of the union's handbillers. The handbill called for a total boycott of the retail store. The Board concluded that the picketing and handbilling were both to be considered picketing since they were designed by the union to work together. Both the picketing and handbilling, when considered together as picketing, were unlawful because they called for a total consumer boycott of the neutral employer.

Similarly, in *Kroger Co. v. NLRB*,[132] the Sixth Circuit found that handbilling and picketing could not be separated. This case

129. 192 N.L.R.B. 6 (1971).

130. This picketing was not of the type allowed by the United States Supreme Court in NLRB v. Fruit & Veg. Packers & Warehousemen, Local 760, 377 U.S. 58 (1964). The court ruled that pickets could not advocate a total boycott of the neutral employer, only a boycott of the primary employer's goods that were being sold by the neutral employer.

131. 188 N.L.R.B. 470 (1971).

132. 477 F.2d 1104 (6th Cir. 1973).

involved union picketing and handbilling of a retailer who had moved into a store constructed by a contractor with whom the union had a labor dispute. The retailer had already agreed to a contract with the contractor and could not appease the union without breaching the contract and violating section 8(b)(4)(A).[133] The Board[134] had found that the picketing was illegal, because it attempted to coerce the neutral employer by asking the public not to deal with him, but that the handbilling, which also coerced the employer, was protected by the proviso. Consequently the Board held that the handbilling and picketing were separable and subject to different findings.

The court of appeals disagreed, however, finding that the objectives of the picketing and handbilling were not severable. Both conveyed substantially the same message and were conducted simultaneously in the same general area. These factors, when combined with the picketing's unlawful objective, constituted a violation of section 8(b)(4)(B). The court's reasoning leans heavily upon the fact that the neutral employer was in an impossible position: it could not appease the union without violating the law.[135]

On occasion picketing that advocates a boycott of only the primary employer's goods (*i.e.*, picketing that would normally be legal) is found illegal when it is considered in conjunction with lawful handbilling. This is usually because the picket signs do not clearly identify the fact that the picketing is aimed only at the goods of the struck employer, while the handbills call for a total boycott of the neutral employer. In *California Newspapers, Inc.*[136] the union was engaged in a labor dispute with a newspaper. The union picketed and handbilled the stores of the newspaper's advertisers. The picket signs contained a copy of the store's advertisement in the struck paper. The handbills asked the public not to buy the advertised products but did not identify them. The Board found that since the picket signs did not delineate which products the public was being asked not to buy, they seemed to be calling for a total

133. If the employer had entered into an agreement with the labor union, both parties would have been guilty of a violation of 29 U.S.C. § 158(e) (1970).

134. 195 N.L.R.B. 900 (1972).

135. The neutral employer could only appease the union by breaching its contract with the primary employer for maintenance work. The primary employer had no more real construction work to do. The union's effort here seems to be either retaliatory or as a warning to future contractors.

136. 188 N.L.R.B. 673 (1971).

boycott of the store, especially when taken in conjunction with the handbills. The picketing was deemed as calling for a total boycott and was therefore a violation of section 8(b)(4)(ii)(B). A similar result was reached in *Urban Distributors, Inc.*,[137] in which picket signs stated that the union was "On Strike" and listed the company against whom the strike was directed. The handbills threatened more picketing if the stores failed to cooperate. The Board concluded that the union picket signs failed to specify that the public was being asked not to buy only certain goods.

VI. Conclusion

Since the Supreme Court's resolution of the major ambiguities in the publicity proviso in 1964, the scope of the proviso has not been significantly altered. The forms of publicity that unions may utilize are well established. Any form of publicity, with the exception of picketing, that is subject to protection under the first amendment will be protected by the proviso. All forms of publicity are subject to reasonable regulation by the state when necessary to protect the peace and safety of its citizens.

The publicity must fulfill certain requirements in order to come within the protection of the proviso. The publicity must evolve from a labor dispute, it must be substantially accurate, and it cannot be intended to induce employees to cease performing the services for which they have been hired. Publicity need not, however, be geographically restricted.

Unlawful picketing found in conjunction with handbilling does not necessarily render the handbilling illegal. On occasion, however, the courts have determined that the two are so closely related that the handbilling has become part of the picketing and should be treated as such. Ambiguously worded picket signs, when combined with a call for a total boycott in accompanying handbills, will cause the otherwise legal picketing to be declared unlawful.

Most cases involving publicity can be correctly analyzed by applying fairly specific standards to the publicity being utilized. The publicity, with the exception of picketing, may call for a total boycott of the neutral employer as long as it fulfills all statutory requirements. Any form of publicity that is protected by the free speech guarantee of the first amendment is legal, albeit subject to reasonable regulation by the state.

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137. 206 N.L.R.B. 245 (1973).