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Labor Law—Secondary Boycotts—Permissibility of Consumer Picketing—Labor-Management Reporting and Disclosure Act of 1959, § 8(b) (4) (ii).—NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760.

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noted,[20] however, if the courts are to apply the Code they must look at it not only as originally written, but also as adopted and enforced in the various states.

In summary, the decision in the instant case raises the question of the future applicability of the UCC in federal courts deciding cases affecting the rights of the United States. While this decision does not stand for the proposition that the Code must govern, it hopefully indicates that the federal courts will, in the future, make more use of the UCC.

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Labor Law—Secondary Boycotts—Permissibility of Consumer Picketing—Labor-Management Reporting and Disclosure Act of 1959, § 8(b)(4)(ii).—*NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760.*[1]—This action was begun on a complaint issued by the Tree Fruits Labor Relations Committee, Inc. (hereafter referred to as Tree Fruits), on charges that a strike caused by a dispute over the terms of the renewal of a collective bargaining agreement with Teamsters, Local 760, constituted such conduct as would violate Section 8(b)(4), subsections (i) and (ii) of the National Labor Relations Act (hereafter referred to as the NLRA) as amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act).[2]

The case was submitted directly to the National Labor Relations Board on a stipulation of facts, namely, that Local 760 had called a strike against the members of Tree Fruits and in support of said strike had instituted a consumer boycott against the struck product. Local 760 had placed pickets at the customer entrances of Safeway Retail Stores, distributors of the produce of the struck firms. The pickets, by placards and handbills, appealed to Safeway customers, and the public generally, to refrain from purchasing such struck produce. Care was taken to emphasize that the strike was not

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[20] Supra note 17.

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[1] 377 U.S. 58 (1964).

[2] 61 Stat. 136 (1947), 29 U.S.C. § 141 (1958), as amended by § 704(a) of the Labor-Management Reporting & Disclosure Act of 1959, 73 Stat. 542 (1959), 28 U.S.C. § 158 (1961 Supp.) reads in part:

> It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (4)(i) . . . to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal . . . to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is—
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> . . . .
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> (B) forcing or requiring any person . . . to cease doing business with any other person
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> . . . .
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> *Provided further*, That . . . nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public. . . .

directed at the retailer nor was the support of his employees requested. At no time during the picketing had any work stoppages, interruption of deliveries or pickups, interference with either the normal handling of the struck produce or of the ingress and egress of customers occurred.

The Board held that the Landrum-Griffin Act prohibited consumer picketing in front of a secondary establishment, *i.e.*, Safeway.[3] On petition by both parties to the Court of Appeals for the District of Columbia Circuit, the Board's order was set aside and remanded. The Supreme Court granted certiorari. HELD: Secondary picketing of retail stores confined to persuading customers to cease buying the product of a primary employer did not fall within the area of secondary consumer picketing condemned as an unfair labor practice, even if the picketing was effective in reducing the secondary employer's sales of the primary employer's product, possibly leading to the secondary employer dropping the item as a poor seller.

To fully comprehend the import of the Court's decision in the area of consumer picketing, a brief summary of legislation in the area is imperative. Section 8(b)(4) of the NLRA of 1947[4] was addressed to the problems caused by secondary boycotts.[5] The purpose of the legislation was to prohibit secondary picketing; but as subsequent litigation was to demonstrate, the attempt was deficient since various technical loopholes continued to allow unions a wide range of unhampered picketing with regard to secondary premises and employers.[6] Although the enactment prohibited the inducement and encouragement of strikes on the part of secondary *employees*, it failed to provide for control of the same tactics when directed solely at the secondary *employer*.[7] This construction of the NLRA provision allowed labor a considerable area in which the application of economic sanctions against a secondary party via a secondary boycott could be effectively utilized.

The obvious failure of the legislation enacted in 1947 to cope with the problem of union application of secondary pressures led Congress in 1959 to seek its amendment.[8] The purpose of such an amendment, as declared by the then Senator Kennedy, was to plug the technical loopholes in the provi-

[3] 132 N.L.R.B. 1172 (1961). The complaint charged violations of both subsections (i) and (ii), but the Board held that picketing, directed at consumers only, did not violate subsection (i).

[4] 61 Stat. 136 (1947), 29 U.S.C. § 158 (1958) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (4) 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 perform any services. . . .

This should be contrasted with the amended version, supra note 2.

[5] See NLRB v. Denver Bldg. & Constr. Trades, 341 U.S. 675, 686 (1951).

[6] For a discussion of the technical loopholes in the Taft-Hartley Act and the attempted remedy by the 1959 Landrum-Griffin Act, see Farmer, Secondary Boycotts—Loopholes Closed or Reopened, 52 Geo. L.J. 217 (1964).

[7] See the concurring opinion of Board Chairman Farmer in International Bhd. of Teamsters, 110 N.L.R.B. 1769, 1788 (1954).

[8] 105 Cong. Rec. 15673 (daily ed. Aug. 12, 1959); Legislative History of LMRDA, 1959 (NLRB ed., 1959), Vol. II, p. 1615.

sions dealing with secondary boycotts.[9] The pertinent amending provision is an additional clause which extends the enactment to cover union pressure imposed directly upon the secondary employer.[10] It is the extent to which this new section curtails consumer picketing without a factual showing of threats and coercion that is at issue in the principal case.

Since its enactment, section 8(b)(4)(ii) has spawned two schools of thought regarding the manner in which it is to be interpreted.[11] These two views conflict both as to the scope and emphasis of the provision. The first, the "literal" approach, pressed by the NLRB and the Fifth Circuit, maintains that the end result of the provision is to declare that all secondary picketing *per se* effects coercion and restraint,[12] since such picketing is in the nature of economic retaliation.[13] This theory is based upon the literal wording of the enactment and the accompanying "publicity proviso" as well as the interpretive gloss of the drafters.[14] It should be noted that the main emphasis of the "literal" approach is that the amendment is aimed primarily at prohibiting the picketing of a secondary employer, without reference to the motives or methods of the picketers.

The second interpretation of the provision has been advanced by the Court of Appeals for the District of Columbia Circuit in its argument that the intent of Congress was not to abolish all secondary picketing, but only to abolish picketing of a secondary employer if such conduct constitutes *in fact* the equivalent of threats, coercion or restraints.[15] The court also proposed a test by which such an equation could be measured, *i.e.*, whether the secondary employer suffered or was likely to suffer economic loss.[16] This latter view, the more liberal of the two, is premised on the opinion that the main emphasis of the provision is directed against threatening and coercive tactics and not the prohibition of union activity which did not entail threats or coercion. In light of this approach, the court of appeals construed the "publicity proviso" as exempting from regulation publicity other than picketing even though it was of a threatening or coercive nature.

The clash of these opposing theories was before the Supreme Court in the present controversy. In its opinion the Court rejected the approach of *per se* prohibition and adopted the more liberal view.[17] The Court affirmed

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[9] 105 Cong. Rec. 16413 (daily ed. Sept. 3, 1959); Legislative History of LMRDA, 1959 (NLRB ed., 1959), Vol. II, p. 1431.

[10] 73 Stat. 542 (1959), 28 U.S.C. § 158(4)(ii) (1961 Supp.).

[11] For an extended comparison of these conflicting theories, see Desmond, Consumer Picketing: The Limited Restrictions of the Labor Management Relations Act, 4 B.C. Ind. & Com. L. Rev. 79 (1962); Note, 5 B.C. Ind. & Com. L. Rev. 806 (1964).

[12] Burr v. NLRB, 321 F.2d 612 (5th Cir. 1963); Upholsterers Frame & Bedding Workers, Twin City Local 61 (Minneapolis House Furnishing Co.), 132 N.L.R.B. 40 (1961).

[13] United Wholesale & Warehouse Employees, Local 261, 129 N.L.R.B. 1014 (1960).

[14] Ibid.

[15] NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 308 F.2d 311 (D.C. Cir. 1962).

[16] Ibid.

[17] [O]ur holding today simply takes note of the fact that a broad condemnation of peaceful picketing, such as that urged upon us by petitioners, has never been

that a statute, making it an unfair labor practice to coerce any person to cease selling the products of any other person, does not prohibit all consumer picketing at a secondary site. In support of its position, the Court went beyond the legislative history of the Landrum-Griffin Act and drew upon the tenets of national labor policy culled from prior federal regulation of labor relations.[18] The Court also relied on the absence of any specific prohibition against consumer picketing in the provision, arguing that such a specific condemnation would have been inserted had Congress intended a blanket prohibition as was urged by the Board.[19] The majority opinion dismissed, without prolonged discussion, a portion of the legislative history of the amendments which had been relied on by the Board and by the Fifth Circuit. The majority cited the authority of *Schwegman Bros. v. Calvert Distillers Corp.*, in which the Court counseled that:

> [T]he fears and doubts of the opposition are no authoritative guide to the construction of the legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.[20]

Although rejecting the "literal" approach and affirming the result reached by the District of Columbia Circuit, the Court refused to affirm the test of "economic loss" as applied by that appellate court and in its stead relied upon a distinction well established in state labor cases prior to 1940.[21] This distinction hinges upon the difference between picketing a secondary employer merely to follow the struck goods, and picketing designed to result in a generalized loss of patronage to the secondary employer.[22] On this basis the Court preferred to gear its test more to the *motives* and *methods* of union

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adopted by Congress, and an intention to do so is not revealed with that "clearest indication in the legislative history," which we require.

NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, supra note 1, at 71.

[18] Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. Id. at 62.

[19] Note that to base the conclusion that Congress intended a blanket prohibition by indirection on the wording of the publicity proviso, is to construe the proviso as the master, rather than the servant, of the subsection. Such a construction would conflict with the history of legislative interpretation, since the function of a proviso is to limit, not expand, that which precedes it. Wayman v. Southard, 23 U.S. 1 (1825). See also, Previant, The New Hot-Cargo and Secondary Boycott Sections: A Critical Analysis, 48 Geo. L.J. 346, 352-54 (1960).

[20] 341 U.S. 384, 394-95 (1951).

[21] See 1 Teller, Labor Disputes and Collective Bargaining § 123 (1940).

[22] The distinction was sometimes justified on the ground that the secondary employer, who was presumed to receive a competitive benefit from the primary employer's non-union, and hence lower wage scales, was in "unity of interest" with the primary employer, Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937); and sometimes on the ground that picketing, restricted to the primary employer's product is a "primary boycott against the merchandise." Chiate v. United Cannery Agricultural Packing & Allied Workers of America, 2 CCH Lab. Cas. 185-86 (1937). The latter is the rationale adopted by the Court in the present case. It is interesting, however, to note the former rationale in connection with the hypothetical situation, regarding the secondary party who distributes solely the struck product.

activity than to the result of such activity upon the secondary party.[23] The Court considered that:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. . . . On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, . . . [it is] pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.[24]

Though it can be argued that the result of both these forms of consumer picketing will be adverse to the interests of the secondary party, it must be recalled that the statute is not a guarantee of immunity from economic loss to the secondary employer, but rather an attempt to immunize him from union use of coercive tactics aimed at controlling his choice of those with whom he shall transact his business.

In its use of the term "coercive," Congress necessarily was cognizant of the necessity of striking a balance between the protection of the union's right under the First Amendment to appeal to the public, and on the other hand, the promulgation of effective regulations to combat union utilization of methods such as threats and intimidations. Since picketing, as a method of appeal, involves more than ordinary free speech[25] and exceeds the bounds of protected speech, it is subject to a greater degree of regulation. Nevertheless, "the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes."[26] It is important to note that in dealing with picketing in the past, the Court has recognized that as a process it utilizes economic and social pressures, and yet the Court "has refused to uphold any legislation which amounted to a blanket prohibition of picketing."[27] The Court has upheld restrictions, as in *Hughes v. Superior Court*,[28] but only on the basis that, in addition to these accompanying pressures, there can be detected influences and consequences which are different from those of other modes of communication. The Court attributes to Congress, in light of the absence of clear and concise language to the contrary, an intent to follow the *Hughes* rationale rather than revive the previously rejected *per se* prohibition.[29] The Court is thus in keeping with the judicial position that *per se* rules are inconsistent with the language and

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[23] Note that the Court adopted the same emphasis rather than a per se approach in NLRB v. Servette, Inc., 377 U.S. 46, 54 (1964).

[24] NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, supra note 1, at 72.

[25] Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942).

[26] Teamsters Union v. Vogt, Inc., 354 U.S. 284, 294-95 (1957).

[27] Chauffeurs Local Union v. Newell, 356 U.S. 341 (1958) (per curiam); Thornhill v. Alabama, 310 U.S. 88 (1940).

[28] 339 U.S. 460 (1950).

[29] See cases cited supra note 27.

purpose of section 8(b)(4).[30] Regarding this point, it is of consequence that the Board has similarly rejected *per se* rules as applicable to section 8(b)(4)(i), and concluded that any determination should be based on all the evidence in the particular case and not by an *a priori* assumption.[31]

Based on this rejection of blanket rules and upon the absence of any statutory language which could reveal any intent to radically alter judicial precedent, the Court has correctly interpreted that what Congress condemned as coercion was not picketing *per se* but only picketing which is the equivalent of a boycott against the secondary employer generally. This would seem to be in keeping with its determination in *NLRB v. Drivers Local 639* that "[S]ection 13 [of the Act] is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike."[32]

In the final evaluation of the decision, it must be emphasized that in validating consumer picketing, when limited to the struck produce, the Court does so on the finding that the appeal did not affect the secondary employer in any way except through the medium of customer product preference. Even allowing for the limiting effect of these controlled circumstances on the decision, an increase of union activity in the area of consumer appeals is to be expected, not necessarily limited to the utilization of placard-carrying union members.[33]

PETER J. NORTON

Patents—Torts—Inventor's Right to Professional Credit—"Droit Moral"—Interference with Prospective Economic Advantage.—***Misani v. Ortho Pharmaceutical Corp.***[1]—Defendant employed plaintiff as a chemist, subject to a standard assignment to the defendant of all plaintiff's inventions developed during her employment. Plaintiff claimed that, while so employed, she invented a chemical compound and the process for making it. Plaintiff's supervisor, also a defendant, alleged that this discovery was made under his direction as part of a long-term inventive process in which he was developing the compound. On this basis, and as agent for the defendant company, he filed for a patent, naming himself as inventor. Following the issuance of the patent, plaintiff protested defendant's claim to inventorship, but her protest was dissolved when the Patent Office disallowed the patent on the ground that the compound was unpatentable. Although defendant

[30] United Wholesale Employees Local 261 v. NLRB, 282 F.2d 824 (D.C. Cir. 1960); NLRB v. Brewery Workers Local 366, 272 F.2d 817 (10th Cir. 1959).

[31] Brief for Respondents, pp. 10-11, NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, supra note 1.

[32] 362 U.S. 274, 282 (1959).

[33] The International Ladies Garment Workers Union has distributed to the general public shopping bags bearing the message, "JUDY BOND INC. ON STRIKE—DON'T BUY JUDY BOND BLOUSES," thereby creating, in effect, *consumer pickets*, an interesting innovation. Barmash, Behind Those Shopping Bags, N.Y. Herald Tribune, July 26, 1964 (Magazine), p. 10.

[1] 83 N.J. Super. 1, 198 A.2d 791 (1964).