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Secondary Consumer Picketing - The Product Boycott

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I. INTRODUCTION

One of the major changes made by the Landrum-Griffin Amendments to the Taft-Hartley Act\(^1\) was the insertion of a prohibition against the use of direct pressure on an unconcerned, neutral employer. The amendment made it unlawful for a union to induce or encourage an employee to refuse to handle or work on any goods or to perform services, or to threaten, coerce, or restrain any employer if the objective of the union was to force that employer to cease doing business\(^2\) with another employer. This prohibition did not make “publicity, other than picketing” unlawful if designed to advise the public that one employer was selling the struck product of another employer, provided this publicity did not result in a work stoppage.\(^3\) Prior to the amendment, indirect pressure exerted upon

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\(^2\) Prior to the 1959 amendments, § 8(b) (4) (A) read as follows: "(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 use . . . or otherwise handle . . . or to perform any services, where an object thereof is: (A) forcing or requiring any employer . . . to cease doing business with any other person." 29 U.S.C. § 151 (1947).

\(^3\) Cessation of a part of the business between two employers is sufficient. NLRB v. Milk Wagon Drivers Union, 335 F.2d 326 (7th Cir. 1964).

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\(^4\) Section 8(b) (4) reads as follows:

It shall be an unfair labor practice for a labor organization or its agents . . . (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . 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 . . . or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . . Provided, That nothing in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . . provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . 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.
an employer, such as inducing his employees to cease handling the struck product, was unlawful, but the union could place pressure directly upon the secondary employer by placing a picket line around his business and asking his customers to boycott the store.

This Comment will be limited to a discussion of the problems which may arise when a union conducts secondary picketing. Secondary picketing takes place when a union pickets the establishment of an employer (secondary employer) with whom the union has no labor dispute. If the union’s objective is to advise the public, particularly the customers of the secondary store, that the union has a dispute with another employer (primary employer), the union is said to be engaged in secondary consumer picketing. If the union asks the customers of the secondary employer to boycott only the primary employer’s product, the union is engaged in a product boycott.

Before discussing the intricacies of secondary consumer picketing, it will be helpful to consider some prefatory issues.

II. THE UNCONCERNED EMPLOYER

A. Who Is An Employer?

A union’s purpose in conducting secondary consumer picketing is to bring about reduced purchases of the struck product and, thus, place pressure upon the primary employer to give in to its demands. The union may seek to bring about this result more directly by asking the secondary employer to cease purchasing the struck product. By the very language of section 8(b)(4) of the act, a union cannot induce or encourage a secondary employee to cease handling the struck product, but it can make the same request of a secondary employer. It is important, therefore, to have some insight into the difference between an employer and an employee.

It is at once apparent that the owner of a business is the employer

4 29 U.S.C. § 112(2) defines an employer to include an agent of the employer. This section exempts from the term "employer" governmental institutions, charitable hospitals, persons covered by the Railway Labor Act and labor organizations when not otherwise functioning as an employer.

5 The National Labor Relations Act, § 8(b)(4), note 3 supra.
of that business and that the people who work under the owner and receive his orders are employees. With the complexities of chain store ownership and with the delegation of authority which have become common place in modern business operations, however, there has evolved a quasi-employer whose duties give him the semblance of both an employer and an employee. For example, the manager of a chain drug store commonly is delegated the authority that an owner of a single enterprise normally would have—the hiring of certain employees, reordering stock, and the general management of the store. Nevertheless, he also has some of the duties of an employee in that he must look to a supervisor or officer of the company before he can make serious adjustments in business operations. Moreover, like an employee, he probably is a salesman of the products sold in the store and, at times, physically handles shipments and helps stock and re-stock the shelves. This type of quasi-employer, if deemed to be an employee, could frustrate the activities of a union which intended to conduct consumer picketing in front of the store dealing with the struck employer. If an agent of the union approached the manager and informed him that the union intended to picket the struck product sold in the store unless he ceased purchases from the struck employer, the company could claim the manager was an employee ("individual employed by any other person") and allege that the union had induced or encouraged him to cease handling a product of another employer. On the other hand, if the manager fell into the category of an "employer," the company would have to prove the union threatened, coerced, or restrained him to cease dealing with another employer.

The above described dilemma was resolved by the Supreme Court in \textit{NLRB v. Servette}. In \textit{Servette}, a union sought support for its strike against a primary employer by asking the managers of certain supermarkets to cease handling merchandise supplied by the primary employer. The test for determining whether the managers were "individual[s] employed by any other person" was said to be "whether the union's appeal is to cease performing employment services, or is an appeal for the exercise of managerial discretion." The Court found that the union was asking the managers to make a managerial decision within their authority, and that a violation of the act had not

\footnotesize{6}The act reads "any person," but for all practical purposes that person can be labeled an "employer.".

\footnotesize{7}See Sheet Metal Workers Union, Local 28 (Ferro-Co Corp.), 102 N.L.R.B. 1660 (1953); Teamsters Union, Local 878 (Arkansas Express, Inc.), 92 N.L.R.B. 255 (1950); Teamsters Union, Local 294 (Conway's Express), 87 N.L.R.B. 972 (1949).

\footnotesize{8}377 U.S. 46 (1964).

\footnotesize{9}Id. at 50 n. 4.
occurred since the union's appeal did not threaten, coerce, or restrain the managers.\textsuperscript{10} Therefore, the language "any individual employed by any other person" under section 8(b) (4) (i) of the act applies to a manager of a secondary store only when the union asks him to withhold his services from the employer.\textsuperscript{11}

The most obvious limitation on the Servette ruling is that many managers and supervisors do not have the authority to cancel an order with another employer. This often would be a difficult fact determination, but if it can be proven that a manager lacks the authority to cease dealing with a struck employer the union probably cannot ask him to do so without violating section 8(b) (4) (i).

B. Who Is A Secondary Employer?

In the enactment of section 8(b) (4) of the act, Congress sought to promote dual objectives. It wished to preserve the rights of a union in a primary dispute and, at the same time, to shield employers from pressures arising out of controversies with which they are unconcerned.\textsuperscript{12} The act was not intended to shield employers from

\textsuperscript{10} The Court found that the managers were authorized to decide as best they could whether to continue doing business with Servette in face of the threat of handbilling, a managerial decision.

\textsuperscript{11} What the picketers say to the secondary employer may be evidence of an unlawful union object. For example, an unlawful object would be shown if one of the picketers were to tell the retailer, "We're going to shut you down."

Likewise, what the union says to the secondary employer before the picketing begins may be evidence of an unfair labor practice. For example, assume that the union approaches a secondary employer or an employee who has managerial discretion, and the secondary employer has a contract with the primary employer. The union asks the retailer to cease purchasing the primary employer's products. The retailer explains that he has a contract and that if he does not continue to purchase the struck product he will breach the contract. The union tells him that he is faced with two alternatives—a breach of the contract or picketing. Does the union's statement "threaten, coerce, or restrain" the secondary employer? If the union tells the retailer that it will conduct product picketing (or will do all the law allows), it is only threatening to do that which it has a legal right to do. On the other hand, if the union does not qualify its "threat," the secondary employer may assume the union intends secondary boycott picketing, i.e., unlawful activity. See Electrical Workers Union, Local 25 (A.E. Electric), 148 N.L.R.B. No. 152 (1964). At this point, the retailer could ask the Board to enjoin the union from threatening him, and even if he did not get the injunction, the union's subsequent picketing might be colored by its previous conduct. See General Driver Union, Local 886 (The Stephens Co.), 133 N.L.R.B. 1393 (1961).

It is also interesting to notice the anti-trust implications which can arise when a secondary employer agrees to a union's request that he cease dealing with the primary employer. See Jewel Tea Co. v. Meat Cutters, Local 189, 331 F.2d 547 (7th Cir. 1964), cert. granted, 379 U.S. 813 (1964); Texas Millinery Co. v. Hatters Workers Union, 229 F. Supp. 341 (N.D. Tex. 1964).

\textsuperscript{12} Senator Taft explained that the purpose of section 8(b) (4) (A), now section 8(b) (4) (B), is to make it unlawful "to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." 93 CONG. REC. 4198 (1947). In 1949, Senator Taft again made reference to section 8(b) (4): "It is not intended to apply to a case where the third person is, in effect, in cahoots with or acting as a part of the primary employer." 95 CONG. REC. 8709 (1949).
pressure arising out of a dispute with which they are primarily con-

cerned. It is important, therefore, to determine when the relation-

ship between two employers is such that the picketed employer, with

whom the union originally had no dispute, will be considered neutral

and protected from union pressure which threatens, coerces, or re-

strains him in violation of section 8(b)(4)(ii)(B) of the National

Labor Relations Act.

One is not an unconcerned or neutral employer if he is an "ally"

of the primary employer. The "ally" doctrine has been employed in

three situations. The traditional example of an ally is an employer

that handles work which the struck employer would have handled

had there been no strike. Such work is termed "struck work," and

the employer handling the struck work is said to be allied with the

primary employer. The doctrine has also been applied in the situation

where two employers are found to constitute a single employer.

Because of the obvious difficulties in determining when two employers

are so intermingled as to become one employer, and the public policy

against piercing the corporate veil (where the two employers are

corporations), the Board has understandably been reluctant to use

this approach to find an alleged secondary employer to be allied with

the struck employer. Thirdly, in cases where the alleged secondary

employer is not handling struck work of the primary employer, the

Board previously has adopted the negative and more cautious ap-

proach merely of finding the secondary employer so related to the

primary employer that he is not neutral.

18 Section 8(b)(4) of the act is violated if the union's objective is to force a secondary

employer "to cease doing business with any other person." The National Labor Relations Act,

note 1 supra.

14 See NLRB v. Business Mach. & Office Appliance Mechanics Conference Bd., 228

F.2d 553 (2d Cir. 1955), cert. denied, 351 U.S. 962 (1956); Brewery Workers Union,

Local 8 (Bert Williams, Inc.), 148 N.L.R.B. No. 70 (1964).

15 See cases cited note 18 infra. Common control over labor policy alone may not be

sufficient for finding two employers are the same employer. Bachman Mach. Co. v. NLRB,

266 F.2d 599, 605 (8th Cir. 1959), reversing 121 N.L.R.B. 1229 (1958).

In National Union of Marine Cooks (Irwin-Lyons Lumber Co.), 87 N.L.R.B. 54 (1949),

the Board held that two corporations whose stockholders and management were approxi-

mately the same were not wholly neutral and unconcerned. The First Circuit, however,
in J. G. Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958), held that a showing of
actual control is necessary, i.e., that common stock ownership without the use of the
stock to exercise control over the corporation is insufficient.

16 The difficulty becomes apparent with a study of NLRB v. Darlington, 380 U.S.

263 (1965). The court ordered the case remanded to the NLRB to determine if there

was a single employer and if the closing of Darlington was anti-union motivated.

17 United Bhd. of Carpenters and Joiners (J. G. Roy & Sons Co.), 118 N.L.R.B. 286

(1957); Teamsters Union, Local 282 (Acme Concrete), 117 N.L.R.B. 1321 (1962). The

recent Board decision in Warehouse Union, Local 6 (Hershey Chocolate Corp.), 133 N.L.R.B.

No. 86 (1965), states that one will be found to be an ally of a struck employer only if

(1) he is handling struck work or (2) that employer is under the same common owner-

ship and control as the primary employer. It might be argued that this holding indicates

the Board will not apply the ally doctrine unless it can be proven that the alleged neutral

employer is handling struck work or is a single employer.
If a third person is in fact a secondary employer, the union cannot “threaten, coerce, or restrain” him for an object prohibited by the act. If, on the other hand, the third person is an ally or alter ego of the primary employer, or found to be not neutral, the alleged secondary employer is not protected by section 8 (b) (4) (B) of the act. This means that the union can conduct itself in a manner which, had it been picketing one truly a secondary employer, would have violated the act. For instance, a union picketing a secondary employer must limit its appeal to a request that the public not buy the primary employer's product, but if the employer is not in fact secondary the union would not be limited to product picketing. In this case, the union lawfully could ask the customers of that employer to boycott the store even though the picketing induced or encouraged the employees of that employer to refuse to work in whole or in part threatened, coerced, or restrained the employer to cease doing business with the primary employer. The Board and the courts have agreed that an ally is involved in the primary dispute, and, in such cases, the union may picket the ally as though it were the primary employer.

If, however, it is established that the person being picketed is a secondary or neutral employer, the lawfulness of the picketing depends primarily upon the union’s purpose in conducting the picketing.

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18 The Board’s approach to making a determination of who is “neutral” is demonstrated in the following cases: Miami Newspaper Pressmen’s Union, Local 46 v. NLRB, 322 F.2d 405 (D.C. Cir. 1963); J. G. Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958); Teamsters Union, Local 21 (J. C. Driscoll Transp., Inc.), 148 N.L.R.B. No. 91 (1964); Teamsters Union, Local 282 (Acme Concrete), 137 N.L.R.B. 1321 (1962); Teamsters Union, Local 179 (Alexander Warehouse & Sales Co.), 128 N.L.R.B. 916 (1960); United Steelworkers of America (Tennessee Coal & Iron), 127 N.L.R.B. 823 (1960); Warehousemen & Distrib. Workers Union, Local 688 (Bachman Mach. Co.), 121 N.L.R.B. 1229 (1958), rev’d, 266 F.2d 599 (8th Cir. 1959); National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.), 87 N.L.R.B. 54 (1949).

19 Employing Lithographers of Greater Miami, Florida v. NLRB, 301 F.2d 20 (5th Cir. 1962); Bachman Mach. Co. v. NLRB, 266 F.2d 599 (8th Cir. 1959). The fact that one is the sole supplier of another employer does not make the secondary employer an “ally.” General Drivers Union, Local 806 (James O'Dell and H. H. Hume), 130 N.L.R.B. 788, 791 (1961).

20 See cases cited note 14 supra. “Common situs” picketing, that is, picketing when the primary and secondary employers are sharing the same premises, has not been discussed herein. For a discussion of the common situs situation, see Moore Dry Dock Co., 92 N.L.R.B. 547 (1950).

21 Who is a secondary employer is both a question of law and of fact. One writer feels the Board “has decided that where the employer, under economic pressure by the union, is itself without power to resolve the underlying dispute, such employer is the secondary or neutral employer.” Kleeb, The Policy of the National Labor Relations Board Toward Current Changes and Developments in Industrial Relations, 15 Lab. L.J. 205, 213 (1964). Another writer is of the opinion that if the picketing or the strike exerts pressure on the same “economic purse” and the loss of income hits the same people, neither party is a neutral employer. Asher, Secondary Boycotts—Allied, Neutral, and Single Employers, 52 Geo. L.J. 406, 418 (1964).
ing, i.e., whether it wishes to produce a boycott of the store or merely a boycott of the struck product.

III. Secondary Consumer Picketing

A. Pre-1964 Position Of The NLRB

In the application of the 1947 amendment (Taft-Hartley Act) to the act, the National Labor Relations Board had declared all consumer picketing at a secondary site to be a violation of section 8 (b) (4). The Board took the view that the picketing per se induced the employees of the secondary employer to cease handling the struck product. Later the Board reversed its position, holding that picketing was not per se inducive upon the employees, and that the facts of each case determine if the picketing did induce or encourage the employees. Nevertheless, the picketing was per se coercive upon the secondary employer because it was foreseeable that he would suffer economic loss which would "threaten, coerce, or restrain" him to cease doing business with the primary employer. This point of view was terminated by the Supreme Court's decision of NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760.

B. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760

Tree Fruits is the most important Supreme Court decision defining the extent to which a union can lawfully picket at the situs of a secondary employer. In that case the parties failed to reach a new agreement subsequent to the expiration of a collective bargaining contract, and the union called a strike against the primary employer, Tree Fruits Labor Relations Committee. The union began picketing in front of various Safeway grocery stores which were selling Washington State apples, the struck product, with the ostensible purpose of asking customers of Safeway not to buy the apples.

The union took steps to assure that the picketing would be directed only at the struck product and not at the secondary employer's gen-

35 See note 3 supra.
36 Burr & Perfection Mattress Co. v. NLRB, 321 F.2d 612 (5th Cir. 1963); Upholsters Frame & Bedding Workers Union, Local 61 (Minneapolis House Furnishing Co.), 132 N.L.R.B. 40 (1961), rev'd, 331 F.2d 561 (8th Cir. 1964) in accordance with Tree Fruits. Prior to Tree Fruits, a union had been allowed to follow the product as long as the primary employer continued in control of the product. It could follow the employer or the product to a common situs. NLRB v. Business Machine and Office Appliance Mechanics Conference Board, Local 459, 228 F.2d 553 (2d Cir. 1955). The union had even been allowed to follow the primary employer's delivery trucks to the secondary situs. Teamsters Union, Local 807 (Schultz Refrigerated Service, Inc.), 87 N.L.R.B. 502 (1949).
37 Burr & Perfection Mattress Co. v. NLRB, note 23 supra.
38 Upholsters Frame & Bedding Workers Union, Local 61 (Minneapolis House Furnishing Co.), 132 N.L.R.B. 40 (1961), rev'd, 331 F.2d 561 (8th Cir. 1964).
eral business. The pickets were placed only at consumer entrances and the legend on the picket sign asked the customers to boycott only the struck product. The pickets arrived after the stores opened for business and left before they were closed. Notice was given to the managers and the employees of Safeway that the purpose of the picketing was to ask the customers not to buy the struck product. No pickups or deliveries were interfered with and there were no work stoppages.

The primary employer filed charges against the union alleging that it had violated section 8 (b) (4) (ii) (B) of the act by threatening, coercing, or restraining Safeway with the objective of forcing Safeway to cease doing business with the primary employer.

The Board, following its historical approach, found the conduct by the union in *Tree Fruits* to be per se coercive upon Safeway and held the union guilty of a section 8 (b) (4) (ii) (B) violation. The court of appeals reversed the Board, and held that consumer picketing did not per se "threaten, coerce, or restrain" Safeway, the secondary employer, stating that such a holding would run afoul of the first amendment's guarantee of free speech. The court said that it was necessary to show that the secondary employer had in fact been threatened, coerced, or restrained. According to the court, this could be done by proving that the secondary employer had suffered economic loss as a result of the consumer picketing. The Supreme Court vacated the judgment of the court of appeals. Economic loss or likelihood thereof was held not to be the test for product picketing, at least not in the case of a secondary employer who handles numerous products other than those being boycotted, the only loss being in the sale of the struck product. The Court's reasoning appears to have been based upon the belief that the loss in sales of one of many products would not be a loss sufficient to threaten, coerce, or restrain the secondary employer. Where this is the case, secondary consumer picketing which asks the customers not to buy the primary employer's product is lawful.

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27 Perhaps secondary consumer picketing is best characterized as picketing at a secondary site which would be unlawful if the store were not open for business to its customers.
31 The Court's conclusion that a loss in sales of the struck product is not sufficient to show the secondary employer was threatened, coerced or restrained, at least not where the retailer is selling numerous other products, gives no relief to the retailer who has a binding contract with the primary employer, or one who has a large inventory of the struck product on hand at the time the dispute arose and who has a large sum tied up in overhead, transportation, and advertising costs.
While the legislative history of the 1959 amendments does not show a clear distinction between a secondary boycott appeal and a product boycott appeal, the Court found that a distinction does exist. There are, therefore, two types\(^{33}\) of secondary consumer picketing: (1) lawful picketing to appeal to customers not to buy the struck product (product boycott) and (2) unlawful picketing "which persuades the customers of a secondary employer to stop all trading with him. . . .\(^{34}\) (secondary boycott).\(^{35}\) The Court found that the picketing in front of Safeway was designed only to ask the customers not to buy the struck product. As Safeway had numerous other products to sell, loss in the sale of one product would not be sufficient to threaten, coerce, or restrain Safeway. Any loss in the sale of Washington State apples was said to be a result caused by diminished consumer purchases in the struck product, rather than by pressure designed by the union to inflict general injury upon the secondary employer's business. Therefore, "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,\(^{36}\) and it is not an unfair labor practice even though it might have caused Safeway to stop buying Washington State apples. The Court did not say that such picketing could not be coercive, but merely that it is not to be considered coercive when it is confined to persuading customers to boycott a product produced by the primary employer and sold by a secondary employer who has numerous other products to sell. This reasoning amounts to a declaration that product picketing is merely an extension of the primary dispute to the premises of the secondary employer.

The Court expressed the belief that Congress would not outlaw peaceful picketing unless it reached an undesirable result which experience has established flows from that particular type of picketing (an isolated evil). Further, had Congress intended to outlaw peaceful picketing it would have expressly done so, as it had done in section 8(b)(7) of the act.\(^{37}\) Since section 8(b)(4) does not refer specifi-

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\(^{33}\) According to the Court, Tree Fruits, 377 U.S. 58, 70 (1964).

\(^{34}\) Id. at 71.

\(^{35}\) The distinction between these two terms must be kept in mind, for although all secondary boycotts are unlawful, only a secondary consumer boycott which threatens, coerces, or restrains the secondary employer for the purpose of causing him to cease doing business with another is unlawful. Of course, if the union has an unlawful objective, the secondary consumer picketing is unlawful even though it does not threaten, coerce, or restrain the secondary employer.


\(^{37}\) Section 8(b)(7) makes it unlawful for a union "to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is. . . ."

ally to picketing, other than in the proviso, the Court resorted to the legislative history of the 1959 amendments to determine if Congress indicated a clear intent to ban all secondary consumer picketing.37 Looking only to the supporters38 of the Landrum-Griffin Bill, the Court concluded that Congress only intended to proscribe consumer picketing in front of a secondary site when the union was asking the customers to boycott the entire store. The legislative history did not show with the requisite clarity an intent to proscribe product picketing. The fact that the supporters of the bill did not refer to consumer picketing, but only secondary boycott picketing, was reason to conclude, the Court surmised, that Congress must have been aware that consumer picketing had been held to be valid.40

Merely because the proviso of section 8 (b) (4) sanctions "publicity, other than picketing," did not require a finding of congressional intent to proscribe peaceful picketing.41 The Court reasoned that because Congress was aware of possible infringements upon free speech,42 the proviso was added to allow the union to appeal for a consumer boycott of the secondary employer by means other than picketing, even though the publicity coerced or threatened the secondary employer, so long as it did not have the effect of inducing a work stoppage.

C. Board Acceptance Of Tree Fruits

The Board has followed Tree Fruits in every subsequent product

37 Resort to legislative history is proper if the statute to be construed is considered ambiguous. See Annot., 70 A.L.R. 5 (1931). However, because of compromise and ambiguity in the legislative history itself, resort to the legislative history may be of doubtful aid. This would appear to be true of § 8 (b) (4) of the act.

38 Mr. Justice Harlan criticized the majority of the Court for inferring that silence of the supporters of the Landrum-Griffin Bill on the subject of product picketing indicated their intent not to ban this type of consumer picketing at a secondary site. Tree Fruits, 377 U.S. 58, 92 (1964). It would seem that the Court violated the rules of proper analysis on any intellectual discourse by looking at only one side of an argument. Furthermore, the Court did not cite any legislative history showing Congress intended not to proscribe product picketing.

The Court also may have been inconsistent in failing to give weight to Senator Kennedy's statement as to the purpose of the §8 (b) (4) proviso. Senator Kennedy, a supporter of the proviso, said, "We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing." 105 CONG. REC. 17898-899 (1959). (Emphasis added.)


40 NLRB v. Brewery Workers Union, 272 F.2d 817 (10th Cir. 1959); NLRB v. Laundry Drivers Union, Local 928, 262 F.2d 617 (9th Cir. 1958); NLRB v. Business Mach. & Office Appliance Mechanics Conference Bd., 228 F.2d 553 (2d Cir. 1953), cert. denied, 351 U.S. 962 (1956). This is in accord with a practice sometimes followed: if Congress was aware that past law had been construed a particular way, the absence of language to change the old theory is indication that it was to be preserved.


42 "Of course, this bill as any other bill is limited by the constitutional right of free speech." 105 CONG. REC. 15673 (1959) (remarks of Senator Griffin).
picketing case. To date, however, it has not been faced with a fact situation largely deviating from that considered by the Court in Tree Fruits. Two of the cases decided by the Board, however, provide some interesting additions to the evolving law of secondary picketing.

In Teamsters Union, Local 150 (Coca Cola Bottling Co. of Sacramento), the union, having a dispute with Coca Cola, began product picketing in front of various stores selling the struck product. One of the picketers cautioned a manager of one of the stores that a lot of union customers would not cross the picket line, and asked if the profits from the sale of Coca Cola could make up for the loss of general business. It was held that the mere likelihood of a consumer boycott would not convert lawful product picketing into unlawful secondary boycott picketing. Furthermore, since at the time the threat of a consumer boycott was made only product picketing was being conducted, the manager had no reason to fear the picketing would cause a secondary boycott—this, perhaps, ignores the realities of the situation.

In the Trial Examiner's opinion, adopted by the Board, it was said, "if the picketing was designed to induce a boycott of the store . . . rather than a boycott of the product, there would be a violation . . . ." This language implies a common sense approach to secondary picketing, viz., if the picketing and the legend on the picket sign convey a plea to boycott the secondary employer or a signal not to cross the picket line, the picketing is designed to achieve a secondary boycott.

In Chicago Typographical Union, Local 16 (Alden Press, Inc.), the union was engaged in picketing directed at the products of a non-union printer with whom it had a dispute. An authorized union speaker remarked to the secondary employer that the union would "get tough" and "bring some pressure to bear" on him. Such comments were held to amount to general threats of damage to the neutral employer's business and, therefore, in violation of section 8 (b) (4) (ii) (B) of the act. Furthermore, the fact that picketing had taken place at employee entrances was evidence that it was designed to induce or encourage the secondary employees in violation of section 8 (b) (4) (i) (B).

The most interesting aspect of Alden Press is that the Board found the product picketing itself, apart from the accompanying unlawful

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43 See also the product picketing cases decided subsequent to Tree Fruits, discussed in text accompanying notes 88-90 and notes 96-103.
44 151 N.L.R.B. No. 86 (1965).
45 Ibid.
46 151 N.L.R.B. No. 152 (1965).
activities described above, was "publicity, other than picketing" and within the safeguard of the proviso to section 8(b)(4). This reasoning was motivated by the fact that no evidence was presented that the primary employer's products were being sold in the areas being picketed. The Board stated that picketing requires confrontation between the picketers and employees, customers, or suppliers, and that in the absence of such confrontations, it is publicity other than picketing.

IV. PICKETING AND FREE SPEECH

Anytime limitations upon the right to picket are sought, the argument is likely to arise that picketing is absolutely protected as free speech under the first amendment to the Constitution. Because the majority of the Court in Tree Fruits found that Congress did not intend to proscribe secondary consumer picketing when the union's appeal is limited to a boycott of the product, the constitutionality of section 8(b)(4) was not brought directly into question. The remainder of this Comment will focus upon types of secondary consumer picketing which, it will be submitted, are not protected under the Tree Fruits decision. As a preliminary step to the consideration

47 Mr. Justice Black, however, in his concurring opinion averred that the legislative history of the 1959 amendments to the Taft-Hartley Act indicated an intent to proscribe all picketing at a secondary site, including secondary consumer picketing. From this premise, he concluded that the statute was an unconstitutional infringement upon the guarantee of freedom of speech in the first amendment to the Constitution. Justice Black argued that while patrolling may not be speech, the dissemination of information about their labor dispute by the patrollers is free speech, and that when the two are intermingled the patrolling aspect of picketing should receive the protection extended to the speech aspect. Mr. Justice Black summed up his views as follows:

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


Mr. Justice Harlan, in his dissent, agreed with Justice Black that Congress intended to proscribe all secondary picketing. He felt, however, that this did not render the act unconstitutional. His argument for constitutionality was based upon two premises: (1) picketing has been held by the Court to be more than free speech, that is, picketing has a speech-plus effect (signal effect) which causes something more than the message carried by the picketers to be conveyed to others; and (2) Congress has recognized that there should be a balance of interest between the union and the neutral employer whom section 8(b)(4) was designed to protect. Congress decided that "publicity, other than picketing" would be more in keeping with the public interest when information is to be disseminated in front of a secondary site.

48 Tree Fruits, 377 U.S. 58, 76 (1964). The Court will not decide a constitutional question if there is some other ground upon which the case can be decided. Ashwander v. T.V.A., 297 U.S. 288 (1916).
of these suggested limitations upon the right to picket, however, it will be necessary to examine the relationship between picketing and free speech.

The National Labor Relations Act does not expressly give a union the right to picket, but this right can be inferred from provisions in the act and from the first and fourteenth amendments to the Constitution. Section 13 of the act states that nothing "shall be construed so as to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Picketing may be considered as a segment of a strike and, therefore, when otherwise lawful, protected activity. Section 8(c) further extends refuge to picketing, viz.: "the expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." Section 7 of the act protects picketing as a type of concerted activity. Further, the first amendment, extended to the states through the fourteenth amendment, provides a general guarantee of free speech, and thus provides protection to picketing in instances where picketing can be considered free speech. The limitations upon picketing imposed by sections 8(b)(4) and 8(b)(7) of the act have been found not to be abridgments of freedom of expression.59

The relationship between peaceful picketing and freedom of speech was explored in Thornhill v. Alabama.51 In Thornhill, the Court held a state statute unconstitutional because it banned peaceful picketing by placing a limitation on "every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of the business of an employer."55 In a case subsequent to

50 Electrical Workers Union v. NLRB, 341 U.S. 694 (1951); Truck Drivers and Helpers Union, Local 728 v. NLRB, 249 F.2d 512 (D.C. Cir. 1957), cert. denied, 355 U.S. 958 (1958); Brick & Clay Workers Union v. Deena Artware, 198 F.2d 637 (6th Cir. 1952), cert. denied, 344 U.S. 897 (1952); Printing Specialties & Paper Converters Union v. NLRB, 171 F.2d 331 (9th Cir. 1948).
52 Thornhill v. Alabama, 310 U.S. 88, 100 (1940).
Thornhill, the Court upheld an injunction of peaceful picketing that was considered a part of a pattern involving force. It may be concluded that picketing must be considered in the context in which it arises, and that it is not per se free speech. Merely because picketing includes an element of speech does not necessarily make the picketing itself speech.\textsuperscript{34}

The "effect" of the picketing also may place a limitation upon the speech aspect of picketing. While picketing generally is considered to be the most efficacious means for a union to publicize its dispute, the picketing may produce an effect beyond that which the union, by the legend on the picket sign, expressly sought to bring about. The Supreme Court's conception is summed up in Building Service Employees v. Gazzam:\textsuperscript{55}

This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution. But since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket. . . .\textsuperscript{56}

The Court thereby took judicial notice of the fact that picketing may have a "signal" effect. If the legend of the picket sign asks customers not to buy a certain brand of goods, but because of the presence of a picket line customers boycott the store, the picketing may be said to have a signal effect.

The theory of product picketing is that the customers will cross the picket line and, if they sympathize with the union, merely refuse to buy the struck product. Customers of a secondary employer may, however, spontaneously look upon picketing at the secondary site as being directed against the secondary employer rather than against one of the products he handles.\textsuperscript{57} These customers may boycott the store entirely without reading the legend on the picket sign. Others who read the picket sign may feel that one who handles a struck product is unfair to the union. Further, if a complicated message must be conveyed, such as product picketing at a secondary site, the


\textsuperscript{56} Id. at 536-37.

\textsuperscript{57} In Superior Derrick Corp. v. NLRB, 273 F.2d 891, 896 (5th Cir. 1960), the court stated, "To a loyal unionist it is both a spontaneous plea not to engage in any business activity with those behind the picket curtain and an instantaneous branding of 'unfairness' on those engaged in activity behind the picket line."
legend may not make it abundantly clear to the customers that the boycott appeal is limited to a product. In addition, there may be some customers who do not sympathize with the union, but nevertheless prefer not to brave a picket line. If a substantial number of the customers decide to avoid the store so long as the picketing continues, the result would appear to be a secondary boycott irrespective of the union's objective.

The signal effect of picketing may be an “isolated evil” which Congress sought to ban in section 8(b)(4), and, therefore, signal picketing cannot be equivocated to free speech. The Court in Tree Fruits acknowledged that picketing may have a “signal” effect which “persuades the customers of a secondary employer to stop all trading with him...” Although the public might not read the legend of the picket sign, and for that reason assume the picketing was against the secondary employer, “be that as it may, our holding today simply takes note of the fact that a broad condemnation of peaceful picketing... has never been adopted by Congress...”. The mere likelihood of a signal effect and a secondary boycott does not require a finding that consumer picketing necessarily produces this result. Therefore, it is not per se coercive upon the secondary employer.

V. Prospective Limitations on Product Picketing

The discussion to this point has focused upon the right of a union to picket a product sold by a secondary employer. It should not be assumed, however, that a union has an absolute right, by means of picketing, to ask customers of a secondary employer to boycott a struck product. There are three possible limitations on this right.

A. The Foreseeable Consequences Of Product Picketing

It has often been said that one is presumed to have intended the natural and foreseeable consequences of his acts. Suppose that a union pickets a struck product which is being sold by a neutral employer, but that, because of the picketing, many customers boycott the secondary employer entirely. If a consumer boycott is considered

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59 There are several reasons why customers might refuse to enter a store where there is picketing, even though the picketing is designed only as a primary product boycott appeal. When a picket line appears in front of a store, two presumptions normally arise in the minds of many customers of the store: first, that the employees of the store are on strike, and secondly, that the employees of that store believe their employer to be unfair. The legend of the picket sign may or may not rebut these presumptions, and the picketing is likely to evoke several responses from the customers.

The union cannot picket to inform a single or a few customers. Millmen and Cabinet Makers Union, Local 510 (Steiner Lumber Co.), 153 N.L.R.B. No. 86 (1965).
natural under the attendant circumstances, then the secondary boycott may be a foreseeable consequence of the union's product picketing. One may reasonably conclude under such circumstances that the union intended a secondary boycott.

Following the language of section 8 (b) (4) (ii) (B) of the act, the Board and the courts will look to the means used or the object sought to determine if the union's secondary consumer picketing is lawful. It is submitted that the additional element, "effect," should be introduced where the result, although not expressed as an object nor perhaps even intended, was a natural and foreseeable consequence of the picketing. While an intermediary effect and object should not be considered to be synonymous, a foreseeable effect which flows naturally from the picketing permits an inference that the effect was an objective. According to one court of appeals, "the effect of the picketing is one of the circumstances considered in determining

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61 In any picketing situation two elements, the means used and the object sought, must be considered. As these terms are used in section 8 (b) (4) (ii) (B), means refers to threatening, coercing or restraining the secondary employer by the use of picketing or any other methods; the object relates to whether or not the union intended the means used to force or require the secondary employer to cease doing business with another employer. Thus, a violation of the act occurs if the union threatens, coerces or restrains the secondary employer with the object of forcing him to cease doing business with another employer. It is not a violation of the act if the secondary employer voluntarily ceases to do business with the primary employer, nor is it a violation if the secondary employer is threatened, coerced or restrained, but as a result of some lawful union objective. Cf. NLRB v. Servette, 377 U.S. 46, 57 (1964). There the Court said, "the warnings that handbills would be distributed in front of noncooperating stores are not prohibited as 'threats' within subsection (ii). The statutory protection for the distribution of handbills would be undermined if a threat to engage in protected conduct were not itself protected." See also Teamsters Union, Local 150 (Coca Cola Bottling Co. of Sacramento), 151 N.L.R.B. No. 86 (1965).

62 Section 8 (b) (4) does not limit the right of a union to exert primary action, even though it has incidental or even foreseeable secondary consequences. Seafarers Union v. NLRB, 265 F.2d 585 (D.C. Cir. 1959); Rabuin v. NLRB, 195 F.2d 906, 912 (2d Cir. 1952). The union, however, would be responsible if the secondary effect was the purpose of the primary activity, Petroleum Employees Union v. NLRB, 249 F.2d 322 (8th Cir. 1957), or if it was the expressed purpose of the picketing. Tree Fruits, 377 U.S. 58 (1964).

63 It is not necessary that the unlawful conduct be the primary objective of the picketing. Electrical Workers Union v. NLRB, 341 U.S. 694 (1951). The mere existence of a vague and speculative hope of obtaining an unlawful objective, however, does not, in itself, make otherwise lawful picketing unlawful. Seafarers Union v. NLRB, 265 F.2d 185 (D.C. Cir. 1959). Nor is picketing unlawful because it has some intermediary effect, particularly if the statute requires an unlawful object as does section 8 (b) (4). Operating Engineers Union, Local 155 (Syracuse Supply Co.), 139 N.L.R.B. 778 (1962). But if the unlawful effect naturally follows from the picketing, an inference that the union had an unlawful objective (unlawful motivation) would not be unreasonable. Understandably, the union should not be held accountable for intermediary effects which it could not have anticipated in the normal course of events; but by definition an effect which is a natural and probable consequence of the picketing can reasonably be anticipated.

64 National Maritime Union (Delta Steamship Lines, Inc.), 147 N.L.R.B. 1328, 1330-31 (1964). The Board said, "a picket line is known for its 'signal' effect—that all union men make common cause with the picketing union. . . . The Board in determining legality of picketing does not differentiate between the ultimate, alternative, conditional or immediate nature of the various objectives that may be involved in the activities of a labor organization."
in any case what the purpose was in so far as it was the natural and logical consequence of what the picketers are saying and doing.\textsuperscript{66}

The effect of picketing cannot be ignored:

Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.\textsuperscript{66}

In several recent decisions, attempts have been made to pierce the foreseeable consequences doctrine as applied to labor situations. In \textit{NLRB v. Darlington Mfg. Co.},\textsuperscript{67} the Court said that although the complete closing of a business to avoid unionization by an employer may deter employees in other plants (in which the closing employer has little or no interest) from unionizing, the doctrine of foreseeable consequences does not apply. The act of closing a business is, itself, too ambiguous.\textsuperscript{68} It would appear that such an employer cannot be held liable for the foreseeable consequences of closing his business because (1) he has nothing to gain, economically speaking, from going out of business to avoid bargaining with a union, and (2) going out of business is not in itself an unfair labor practice. If an employer's action causes union organization or bargaining to be impaired, such effect is said to be merely incidental.\textsuperscript{69} The same is not true for a union which is picketing a secondary employer; if the picketing causes a secondary boycott, pressure is exerted on the secondary employer to cease dealing with the primary employer. This effect cannot be considered incidental. A union picketing in front of a secondary store is directly involved in an effect of its picketing. Activity directed against the primary employer's product, \textit{i.e.}, picketing which asks customers of a secondary employer not to buy a struck product is lawful primary activity under the \textit{Tree Fruits} decision. Nevertheless, a secondary boycott has never been labeled lawful activity;\textsuperscript{70} thus, picketing which affects the secondary employer's business beyond the extent of loss in sales of the struck product should not be considered lawful. This is not activity which is directed against the primary employer's products. The very purpose of section 8(b)(4) is to prevent the exertion of pressure on a

\textsuperscript{66} \textit{NLRB v. Electrical Workers Union, Local 3}, 317 F.2d 193, 199 (2d Cir. 1963).


\textsuperscript{68} \textit{Id.} at 269. The Court did indicate, however, that the doctrine would be applied in cases where the business was not completely closed.

\textsuperscript{69} \textit{Id.} at 276.

\textsuperscript{70} \textit{Tree Fruits}, 377 U.S. 58 (1964).
secondary employer. Whether the union or the customers of the neutral employer are the direct cause of the boycott is immaterial, for the boycott would not have come about without the presence of the picket line.

The Second Circuit Court of Appeals made a more direct attack upon the foreseeable consequences doctrine in *National Maritime Union of America v. NLRB*. In reference to the foreseeable effect of the union’s secondary picketing at a neutral employer’s loading dock, the court said:

Such a phrase, with its tort implications, is not descriptive of a proper basis for concluding that picketing is signal picketing because a work stoppage might be highly probable in response to what was genuinely intended to be nothing more than informational picketing. . . . Under such circumstances there would be no violation of section 8(b)(4) even though a reasonably prudent man would have foreseen that such cessation of business would occur.

This statement, not acquiesced in by the Board, is weakened by the fact that the court found unlawful motivation on the part of the union without the necessity of resorting to the foreseeable consequences doctrine and, also, the court held the union’s conduct to be signal picketing. If a union is to be held liable for “signal picketing” without the need for a showing of intent to cause a secondary boycott, it is immaterial whether the phrase “foreseeable consequence” or the phrase “signal effect” is used to describe the unlawful effect.

The foreseeable consequences doctrine has not yet been applied to secondary consumer picketing which results in a secondary boycott, probably because prior to *Tree Fruits* secondary consumer picketing had been held to be *per se* unlawful. It is possible to draw an analogy between the cases involving union coercion of a secondary employer

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71 342 F.2d 538 (2d Cir. 1965).
72 Id. at 546.
73 In National Maritime Union (Houston Maritime Ass’n, Inc.), 147 N.L.R.B. 1243, 1245 (1964), the Board said “in setting up its picket line, Respondent [union] must be deemed to have known—and intended—the foreseeable consequence of its conduct . . . .” Also, in National Maritime Union of America (Delta Steamship Lines, Inc.), 147 N.L.R.B. 1328, 1330 (1964), the Board said, “we are mindful of the fact that in the maritime-longshore industry, a picket line is known for its ‘signal’ effect—that all union men make common cause with the picketing union.”

The Board’s thinking is more in line with that of the Supreme Court. See notes 55-56 and accompanying text.
74 342 F.2d at 546.
75 The only possible distinction between signal effect and foreseeable consequence is that the phrase “signal effect” has traditionally been limited to picketing situations. Either theory may be used to hold a union liable for its unexpressed intention if a prohibited effect actually occurred. The two phrases are sometimes used interchangeably. See Houston Maritime, 147 N.L.R.B. 1243 (1964).
76 See notes 24-21 supra.
and those cases holding a union accountable for the inducement of secondary employees. That is, if the union is to be liable for inducing employees of a secondary employer to cease work when it was foreseeable that its picketing would have this effect, then logically the union should be held accountable if its secondary consumer picketing coerces the secondary employer, if such an effect was foreseeable.77 For example, if the facts show that the picketing has caused the retailer general business loss, and that he intends to cease doing business with the primary employer if the picketing continues, and if this effect followed naturally from the picketing, logically the secondary employer has been threatened, coerced, or restrained in violation of section 8(b)(4)(ii)(B). "In such a case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer."78

Holding the union liable for the foreseeable consequences of secondary consumer picketing would merely be an extension of the following established rules of law: (1) the doctrine of foreseeable consequences as applied to union picketing which induces or restrains the secondary employees, and as applied to employer action taken against union activities; (2) liability for the signal effect of picketing; and (3) the violation of the act, committed when the secondary consumer picket sign expressly asks the customers to boycott goods other than the struck product. The Court has long since recognized that the nature of picketing itself may be to cause a "signal" effect.79

77 The doctrine of foreseeable consequence is familiar to the field of labor law. In Radio Officer's Union v. NLRB, 347 U.S. 17, 45 (1954), the Supreme Court stated that "an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such. . . . Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent . . . is sufficiently established." Likewise, the Second Circuit in NLRB v. IUE, Local 459 (Royal Typewriter), 228 F.2d 553, 560 (2d Cir. 1955), cert. denied, 351 U.S. 962 (1956), said, "It may be true that something less than a finding of specific intent to induce or encourage employees will suffice. . . . If it were shown that such inducement was the inevitable result or even the 'natural and probable consequence' of the picketing this would perhaps be enough. Certainly if it were shown that the employees actually ceded work, no finding of intent would be necessary." In NLRB v. Erie Resistor, 373 U.S. 221, 228 (1962), the Supreme Court said,

The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions. . . . His conduct does speak for itself—it is discriminatory and it does discourage . . ., [and] it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.

78 Tree Fruits, 377 U.S. 58, 72 (1964). Once it has been demonstrated that the union's picketing did cause an unlawful object, the union should have the burden of proving the alleged violation was not an unlawful object. Teamsters Union, Locals 160 and 641 (Riss and Co., Inc.), 127 N.L.R.B. 1327, 1330 (1960).

79 See cases cited note 54 supra.
When secondary consumer picketing causes a signal effect resulting in a secondary boycott, it is submitted that the picketing should come within the proscription intended by section 8(b)(4)(ii)(B). 80

Picketing, however, which may permit an inference of an unlawful object (e.g., product picketing at a secondary site), as opposed to picketing which does have an unlawful object (e.g., an expressed appeal for a secondary boycott) cannot and should not be enjoined until the foreseeable consequence, a secondary boycott, has been proven an actual result. That is, although product picketing may induce customers to boycott the retailer, it may have no effect at all, or even the opposite effect if some people patronize the stores in response to the union’s picketing. 81

The foreseeable consequences doctrine probably should be limited to situations where the message on the union’s picket sign would lead a customer of the secondary employer to conclude that the dispute is with the retailer. Thus, the union should not fear a section 8(b)(4) violation if the legend makes it clear that the boycott appeal is limited to the struck product—as a legend reading: “Please do not buy Neuhoff meats.” However, there may be other avenues of attack.

B. Employers Dealing In A Few Products

The Court in Tree Fruits characterized Safeway as an employer selling “numerous” products who, in the face of possible loss in one of the products, was not likely to be threatened, coerced, or restrained by the economic loss. 82 What would have been the result if Safeway

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80 That this was the purpose of section 8(b)(4)(ii)(b) is clearly indicated by the legislative history of the act. 105 CONG. REC. 15672-673 (1959) (remarks of Senators Brown and Griffin); 105 CONG. REC. 19771 (1959) (remarks of Senator Goldwater).

81 The procedure to be followed by a complaining employer is set forth in the act. Section 10(1) of the National Labor Relations Act states that the Board will petition the district court for injunctive relief if it has reasonable cause to believe that an unfair labor practice charge is true. 29 U.S.C. § 160(1). In relation to § 8(b)(4), injunctive relief would be appropriate if there is reasonable cause to believe a secondary boycott has been caused by the union’s picketing.

When the union’s conduct violates the act, the Board should grant a request for an injunction. It should be remembered that an injunction is not issued to prevent the union from advising the public of a labor dispute, but because the manner in which the picketers conducted themselves or the objectives sought by the union violate the act or a state or national policy designed for the protection of all citizens.

In 1963, 230 injunction litigation cases were filed with the Board. Of this number, 215 arose under § 10(1), and 70 of the petitions for injunctive relief were granted. 1963 N.L.R.B. ANNUAL REPORT at 184.

82 The Board referred to Tree Fruits in American Federation of Television and Radio Artists Union, Local 52 (Great Western Broadcasting Co.), 150 N.L.R.B. No. 46 (1964), where it said, “The Supreme Court has held that picketing appeals to customers of a large retailer. . . . ” (Emphasis added.)
had sold only fruits or only apples? Safeway was not an "ally" of the packagers of Washington State apples. 83

Mr. Justice Harlan showed his concern for the possible consequences of Tree Fruits by presenting a hypothetical problem 84 involving a similar situation in which a secondary employer had sales volume and profits composed largely of a struck product.

To borrow from Justice Harlan, consider a service station which buys eighty per cent of its products from the Petro Oil Company. To this employer there is little difference, if any, between a picket sign reading, "Don't buy Petro Products," and one which says, "Don't patronize Herb's Petro Station." The closer the relationship between the struck product and the secondary employer's business, the closer a union's picketing is to secondary boycott picketing. In this instance the union's picketing does "more than merely follow the struck product; it creates a separate dispute with the secondary employer." 85 There is, then, the possibility that a product boycott appeal will be the same as a secondary boycott appeal. 86

A comparison between the position of a large retailer who sells numerous products, as in Tree Fruits, and that of a retailer who relies upon a primary employer to supply all or most of the retailer's inventory raises an obvious question for future secondary consumer picketing cases. Can the union, in the latter case, still picket the secondary employer's products so long as the appeal is limited to a boycott of the struck products? Or, can the union picket only to the extent that the picketing against the struck products does not become a secondary boycott appeal, that is, only to the degree that a boycott of the struck products sold by the secondary employer would not be the same as a boycott of the secondary employer's whole business? 87

The Board came close to facing the problem in Millmen and Cabinet Makers Union, Local 550 (Steiner Lumber Co.). 88 Steiner Lumber Company supplied lumber to a contractor for use in building homes.

83 See note 19 supra and accompanying text.
85 Id. at 72.
86 In J.G. Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958), the court said that two employers were not made allies by the fact that there was a straight-line operation between them, i.e., an operation in which the business of the primary employer continues in a direct line into the business of the secondary employer, as, for example, an oil company which supplies a service station with most of its products. Something more than just a straight-line operation must be found before the secondary employer will be deprived of the protection of § 8(b) (4).
87 The ambiguity is exemplified in Great Western Broadcasting, 150 N.L.R.B. No. 46 (1964), where the Board said, "The Supreme Court has held that picketing appeals to customers of a large retailer, which are limited to requesting customers to refrain from purchasing the particular product of the primary employer, did not constitute coercion within the meaning of the Act." (Emphasis added.)
Following a dispute with Steiner, the union began picketing in front of the secondary employer's homes. The legend of the picket sign stated that the dispute was with the primary employer, and only asked that the customers not buy the struck product, lumber. The Board held that the picketing was designed to have customers boycott the secondary employer, since the homebuyer could scarcely buy a home without buying the lumber in the home.\(^8\) The Board relied upon language in *Tree Fruits* to find a violation: "picketing which persuades the customers to stop all trading with him was also to be barred."\(^9\)

The *Steiner* holding is very logical. If picketing the product amounts to picketing the secondary employer's business, the union's appeal is designed to effectuate a secondary boycott. This reasoning should also be applied in cases where the struck product can be separated from other products sold by the secondary employer if the struck product constitutes a sufficient portion of his business so that a boycott of the product can be said to affect his business generally. Looking to the language of the Court in *Tree Fruits*,\(^9\) the language used by the supporters of section 8(b)(4),\(^9\) and to the language of the act,\(^9\) secondary consumer picketing which results in or amounts to a boycott of the secondary employer's business is unlawful. Any other interpretation would seem to make it impossible for an unconcerned employer to receive the protection of section 8(b)(4)(ii)(B) so long as the boycott appeal on the union's picket signs was limited to the primary employer's products (struck products), even though the picketing inflicted injury on the secondary employer's business generally.\(^9\)

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\(^8\) The Board also found the picketing was designed to induce or encourage employees of the secondary employer not to handle the struck product, a violation of § 8(b)(4)(i)(B). It is interesting to note that the Board held the union accountable for inducing the employees even though only one employee failed to show up for future work during the picketing: "It exemplifies a potential effect which may have been exercised on other employees." *Ibid.*


\(^9\) "On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such a case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." *Tree Fruits*, 377 U.S. 58, 72 (1964). The Court also said, "picketing which persuades the customers of a secondary employer to stop all trading with him was also to be barred." *Supra* at 71.

\(^9\) See notes 12 and 80 *supra.*

\(^9\) It shall be unlawful for a union "(ii) to threaten, coerce, or restrain any person . . . where an object thereof is: (B) forcing or requiring any person to cease . . . dealing in the products of any other producer . . . or to cease doing business with any other person." The *National Labor Relations Act*, note 1 *supra.*

\(^9\) *Cf. Richfield Oil*, 95 N.L.R.B. 1191 (1951).
C. "Products Of Any Other Producer"

As has been pointed out, a striking union has no dispute with a secondary employer and, therefore, cannot picket the secondary employer, but it can conduct a picketing campaign against a struck product being sold by the secondary employer. It follows that before a union can picket at the premises of a neutral employer there must be a product produced by the primary employer which the customers of the neutral employer can be asked to boycott. In a case like Tree Fruits where the retailer is selling a definable product of the primary employer which it, in turn, offers for sale to its customers, the union finds no difficulty in picketing a product. Not all products are so easily ascertainable.

In Television and Radio Artists (Great Western Broadcasting Corp.), a union having a dispute with a television station sought a consumer boycott of the station's advertisers by means of verbal requests and distribution of leaflets. Disregarding the holding of the Ninth Circuit, the Board found that these advertisers were dealing in products produced by the television station, since the station by its advertising enhanced the economic value of the products sold by the advertisers.

What constitute "products of any other producer" was further explored in Building Serv. Employees Union (University Cleaning Co.). A cleaning establishment contracted out cleaning and janitorial services to various concerns. The union began picketing at the situs of several of the customers, including United Airlines and A & P, with signs bearing the legend: "The contract cleaners employed here are not members of Local 254, AFL-CIO." The Board adopted the Trial Examiners opinion that the only objective the union possibly could have had was to force the secondary employers to cease doing business with the primary employer, saying that "neither United nor A&P was purveying to its customers—who might have been inclined to respect a product boycott line—any goods or services furnished by the primary employer." In short, there was no product produced by University Cleaning which United or A & P could have sold to their customers.

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95 The National Labor Relations Act, § 8 (b) (4), note 3 supra.
96 110 N.L.R.B. No. 46 (1964).
97 Great Western Broadcasting Corp. v. NLRB, 310 F.2d 191 (9th Cir. 1962).
98 A position contrary to Great Western is taken in NLRB v. International Typographical Union, Local 37 (D.C. Hawaii 1961), 52 CCH Lab Cas. ¶ 16,594, where picketers asked customers of advertisers in a struck newspaper not to buy the advertised products. The court held this amounted to a secondary boycott since the secondary employers did not sell a struck product.
100 Ibid.
customers; thus, there could be no product boycott. The union’s picketing and threats of picketing were therefore in violation of section 8 (b) (4) (ii) (B) of the act.101

The reasoning in Great Western and University Cleaning conflicts. Great Western involved “publicity, other than picketing,” i.e., handbilling and verbal requests, but since the Board has held product picketing to be “publicity, other than picketing,”102 this is not a distinguishing point.103 What goods or services furnished by the television station were the advertisers of Great Western “purveying” to its customers? It is submitted that the reasoning of University Cleaning is by far the more reasonable. A union should not be allowed to conduct picketing or publicity other than picketing at the premises of a secondary employer unless that employer sells a service or product produced or distributed by the primary employer. In the absence of such a product, the picketing should be deemed to be directed at the secondary employer and a violation of section 8 (b) (4) (ii) (B). Where there is no product to picket, the proscription against the secondary publicity is absolute: neither picketing nor publicity other than picketing may lawfully be conducted.

VI. SUMMARY AND CONCLUSION

The present status of lawful secondary consumer picketing requires that it not: (1) have an object of inducing or encouraging an employee, or threatening, coercing or restraining the employer in violation of the National Labor Relations Act; (2) have any other object prohibited by the act; (3) take place at an employee entrance; (4) block consumer entrances; (5) give the customers the impression that there is a dispute with the secondary employer; (6) be the picketing of a retailer who does not handle the struck product; (7) cause a work stoppage; (8) be violent; (9) extend the boycott appeal beyond the struck product.

Before a union’s secondary picketing will violate section 8 (b) (4)- (ii) (B) of the act, it must “threaten, coerce, or restrain” the secondary employer for an object prohibited by the act. This require-

101 Employees of University were not at the premises of the secondary employers during the picketing. Had they been, the union may have been able to conduct common situs picketing. Contra, Teamsters Union, Local 895 (Eastern New York Construction Employers, Inc.), 153 N.L.R.B. No. 81 (1965).


103 Handbilling, truly “publicity, other than picketing” is much less likely to have the signal effect picketing itself does. In some cases, however, where the handbillers walk back and forth before the entrance to the secondary store, handbilling can take on the character of picketing. For instance, see Service and Maintenance Employees Union, Local 399 (Burns International Detective Agency), 136 N.L.R.B. 431 (1962).
ment is somewhat frivolous, because the view seems to have developed that if the product picketing is lawful it does not "threaten, coerce, or restrain" the retailer within the meaning of the act, even though the retailer cancels all future orders from the primary employer out of fear of what will happen to his business if he does not. On the other hand, if the picketing is unlawful, e.g., secondary boycott picketing, the conduct threatens, coerces, or restrains the retailer within the meaning of the act even though he is not fearful of the picketing.

A union, in certain circumstances, may lawfully picket at the situs of an employer who is either primarily or secondarily involved in its dispute with the struck employer. If the alleged secondary employer is primarily involved, i.e., if he is an ally of the primary employer, the union can, by means of picketing, ask the customers to boycott both employers. If the other employer is only secondarily involved, however, the union may direct its picketing only against the struck products being sold by the secondary employer.

It has been submitted that there are three major limitations upon the right to conduct product picketing. The picketing will amount to a secondary boycott, and therefore be unlawful, if (1) a boycott was a foreseeable consequence of the product picketing (signal picketing), or (2) the struck products represent such a large portion of the secondary employer's business that the product picketing may be said to have been designed to inflict injury on his business generally, or (3) the secondary employer is selling no product of the struck employer which the customers can be asked to boycott.

Focusing primarily upon the labor hybrid of the foreseeable consequences doctrine, while that doctrine appears to present a valid argument, proof sufficient to show that the secondary employer has been threatened, coerced or restrained may be difficult indeed. A showing that the secondary employer suffered a general business loss as a result of the picketing—i.e., that a substantial number of his

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104 Congress sought to proscribe coercion designed to control the retailer's choice of a supplier, not merely coercion in the abstract.

105 A number of cases have demonstrated that many employers when faced with picketing will adhere to the union's demand to cease dealing with the primary employer. See, for example, Coca Cola Bottling, 151 N.L.R.B. No. 86 (1965); Colony Liquor Distributors, Inc., 140 N.L.R.B. 1097 (1963).

106 The union could take certain precautions to assure that its picketing would not become secondary boycott picketing. It could include an additional item in its notice to the secondary employer, which might read, "If you find that your customers are refusing to enter Safeway because of the picketing, please notify the undersigned official so that the problem may be corrected." It could also picket for short periods of time and make it difficult to prove that the picketing caused a consumer boycott. However, once it has been determined that past picketing has produced an unlawful result, future picketing will probably be enjoined. See Electrical Workers Union, Local 25 (A.E. Electric), 148 N.L.R.B. No. 152 (1964).
customers have boycotted the store because of the consumer picketing—probably would have to be made. To date, the foreseeable consequences doctrine has been applied to union picketing which induced or encouraged the secondary employees to leave their work, and to employer conduct which threatened or restrained his employees in violation of some provision of the act, but it has not been applied to secondary consumer picketing which threatens, coerces or restrains the secondary employer. This probably can best be explained by the fact that prior to Tree Fruits secondary consumer picketing had been held to per se threaten, coerce or restrain the secondary employer. There seems to be no reason why the Court should hold the employer liable for the foreseeable consequences of his acts and not treat the union similarly.

The union has no dispute with the secondary employer. By engaging in conduct known to create union sympathy and to bring about a secondary boycott which will coerce the secondary employer, there should be no difficulty in proving an object of causing cessation of business between the neutral and primary employers. Having found the union's picketing had at least an object prohibited by section 8(b)(4), it is of no consequence that the union's ultimate aim was to have customers boycott only a product. The public has an interest in seeing that the right of a union to advise the public of its labor dispute is balanced with the right of an employer to carry on his business. On the one hand, a union should not be punished if its message is clearly conveyed to the customers of the secondary employer; on the other hand, the union should not escape all liability because of a carefully worded picket sign, if in fact some other message is conveyed.

197 Compare with language used by the Board in Delta Steamship, 147 N.L.R.B. 1328, 1331 (1964).