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SECTION 8(b)(4): MERGED PRODUCTS AND THE SEARCH FOR STANDARDS

INTRODUCTION

In the history of the labor movement, the secondary boycott, in its various forms, has often proved to be one of the most effective weapons in labor's arsenal.[1] A secondary boycott involves economic coercion and an attempt to implicate another party or neutral party in a labor dispute. The practice has been described as "a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A."[2] The most widely quoted definition is one proposed by Judge Learned Hand:

> The gravamen of a secondary boycott is that its sanctions bear not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.[3]

Prior to modern labor legislation, secondary boycotts had been condemned at common law on various theories, including illegal conspiracy,[4] rioting and disturbing the peace,[5] and violations of the federal antitrust laws.[6] After enactment of the Nor-

1. C. MORRIS, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS AND THE NATIONAL LABOR RELATIONS ACT chs. 1-2 (1971) [hereinafter cited as MORRIS].

2. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 43 (1930). In Truax v. Corrigan, 257 U.S. 312 (1921), the Supreme Court provided the following definition: "A secondary boycott is where many combine to injure one in his business by coercing third persons, against their will, to cease patronizing him by threats of similar injury." *Id.* at 330; *see* C. Comella, Inc. v. United Farmworkers Organizing Comm., 33 Ohio App. 2d 61, 292 N.E.2d 647 (1972). "A secondary boycott . . . is union pressure directed at a neutral employer or secondary employer to induce or coerce him to cease doing business with a primary employer with whom the union is engaged in a labor dispute." *Id.* at 75, 292 N.E.2d at 657. *Cf.* H. SHERMAN & W. MURPHY, LABOR RELATIONS AND SOCIAL PROBLEMS, UNIONIZATION AND COLLECTIVE BARGAINING 236 (3d ed. 1975): "Secondary activity occurs when a union which has a dispute with a *primary* employer seeks to bring pressure upon him through a *secondary* employer who does business with him."

3. Local 501, IBEW v. NLRB, 181 F.2d 34, 37, 25 L.R.R.M. 2449, 2451 (2d Cir. 1950), *aff'd*, 341 U.S. 694, 28 L.R.R.M. 2115 (1951).

4. *See, e.g.*, Auburn Draying Co. v. Wardell, 227 N.Y. 1, 124 N.E. 97 (1919).

5. *See, e.g.*, People v. Bellows, 281 N.Y. 67, 22 N.E.2d 238 (1939).

6. *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274 (1908). For a discussion of the labor laws and their relation to antitrust law, see BERMAN, LABOR AND THE SHERMAN ACT (1930); 1 T. KHEEL, LABOR LAW §§ 4.01-4.06 (1978); THORELLI, FEDERAL ANTITRUST POLICY (1954); Cox, *Labor and the Antitrust Laws: Pen-*

ris-LaGuardia Act[7] and the Wagner Act,[8] secondary boycotts were legalized,[9] and they became an effective means by which labor was able to force employers to meet its demands. To curb certain abuses of the secondary boycott, section 8(b)(4) was added to the National Labor Relations Act of 1935 (Wagner Act) by the Taft-Hartley Amendments of 1947[10] and amended by the Landrum-Griffin Act of 1959.[11]

Although the Taft-Hartley and Landrum-Griffin Amendments provided a general proscription against secondary boycotts, it is still permissible for a union to exert economic pressure upon employers through handbills and consumer picketing, notwithstanding the fact that such conduct may constitute a secondary boycott.[12] One of the more common and controversial forms of economic pressure is the consumer boycott.[13] Consumer boycotts often take the form of appeals to the consuming public not to purchase a product produced by the primary employer and sold or used by a secondary employer.[14] A problem

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nington and Jewel Tea, 46 B.U.L. REV. 317 (1966); DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. PITT. L. REV. 705 (1972); Feller & Anker, *Analysis of Impact of Supreme Court's Antitrust Holdings*, 59 L.R.R.M. 103 (1965).

7. 29 U.S.C. §§ 101-115 (1970).

8. 49 Stat. 449 (1939) (current version at 29 U.S.C. §§ 141 *et seq.*).

9. *See* United States v. Hutcheson, 312 U.S. 219, 7 L.R.R.M. 267 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469, 6 L.R.R.M. 647 (1940). *See also* NLRB v. P.C. Kohler Swiss Chocolate Co., 130 F.2d 503, 10 L.R.R.M. 852 (2d Cir. 1942), where the court held that under the original language of the NLRA, secondary boycotts should be considered a "protected activity."

10. The relevant portions of the Taft-Hartley Amendments, § 8(b)(4)(A), provide:

> (b) 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 use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service, where an object thereof is:
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> (A) forcing or requiring any employee or self-employed person to join any labor or employee organization or any employee or other 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.

61 Stat. 141 (1947).

11. 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4). *See* note 29 *infra*.

12. In certain cases secondary consumer activity is permitted due to first amendment considerations. *Compare* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 68 L.R.R.M. 2209 (1968) *and* Thornhill v. Alabama, 310 U.S. 88, 6 L.R.R.M. 697 (1940) *with* Hudgens v. NLRB, 424 U.S. 507, 91 L.R.R.M. 2489 (1976) *and* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

13. R. DERESHINSKY, THE NLRB AND SECONDARY BOYCOTTS 73 (1972).

14. *Id.*; *see, e.g.*, NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58, 55 L.R.R.M. 2961 (1964); NLRB v. Servette, Inc., 377

arises, however, when a union engages in a lawful secondary boycott against a secondary employer whose business is dependent on the product produced by the primary employer. This problem has proved significantly troublesome for both the courts and the National Labor Relations Board.

A partial solution was provided in *American Bread Co. v. NLRB*.[15] The *American Bread* decision introduced a new concept to the field of labor law and consumer picketing, known as the "merged products" doctrine.[16] This doctrine protects the secondary employer where the products produced by the primary and secondary employers have become so integrated that they lose their separate identities.[17] In enunciating this new doctrine, however, the court failed to articulate standards to govern the determination of whether a primary employer's product has "merged" with a product produced by a secondary employer.

The purpose of this article is to attempt, through a discussion of the legislative history of section 8(b)(4) and the decisions of the National Labor Relations Board (the Board) and federal courts, to formulate standards for such a determination. It is the author's contention that the articulation of definitive standards would aid in lessening the confusion prevailing among practitioners, management, and labor in this complex area of labor relations.[18] It is hoped that the Supreme Court's grant of certiorari in *NLRB v. Retail Store Employees Local 1001*[19] will ultimately produce workable principles.

U.S. 46, 55 L.R.R.M. 2957 (1964); American Bread Co. v. NLRB, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969); Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968).

15. 170 N.L.R.B. 91, 67 L.R.R.M. 1427 (1968), *enforced in part*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969).

16. *Id.* *See* text accompanying notes 61-66 *infra*.

17. 411 F.2d 147, 154, 71 L.R.R.M. 2243, 2249 (6th Cir. 1969). As the court explained, "[T]he picketing of these restaurants produced illegal secondary boycotts since the subject matter of the picketing had become so integrated into the food served that to cease purchasing the single item [bread] would almost amount to customers stopping all trade with the secondary employer."

18. The provisions governing secondary and consumer boycotts have been described by Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113 (1960), as "surely one of the most labyrinthine provisions ever included in a federal labor statute."

19. 100 S. Ct. 658 (Jan. 7, 1980) (No. 79-672).

LEGISLATIVE HISTORY OF SECTION 8(b)(4)

The Landrum-Griffin Amendments[20]

In 1954, with concern growing over internal union activities, a Senate investigation was initiated by the Senate Select Committee on Improper Activities in the Labor or Management Field, chaired by Senator McClellan. The McClellan Committee focused its attention on the issue of union racketeering and corruption.[21] In March, 1958, the committee released its first interim report calling on Congress to take certain action to curb union abuses and resolve jurisdictional disputes in cases which the National Labor Relations Board had declined to decide.[22]

In attempting to reach a satisfactory solution with respect to

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20. Prior to the enactment of the Landrum-Griffin Amendments, the federal labor policy was embodied in the National Labor Relations Act of 1935 (Wagner Act), 49 Stat. 449 (1935), and later, in the Labor-Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 136 (1947). The changes made in the Taft-Hartley Act reflected the shift in federal labor policy from protecting employee organizing rights, collective bargaining rights, and rights to engage in concerted economic activity, towards a more balanced statutory scheme which also proscribed certain union conduct.

The major function of the Wagner Act was to guarantee employees the right to organize. After a series of strikes during and after World War II, a cry for labor reform arose in Congress. The several problem areas spotlighted by the congressional hearings were secondary boycotts, strikes and picketing, and union corruption.

Unlike the Wagner Act, the Taft-Hartley Act prohibited not only employer misconduct, but also union misconduct. Section 8(b), 29 U.S.C. § 158(b), was added to the Wagner Act and prohibited restraint or coercion by a union and discrimination against employees by a union. It also imposed a duty on employee representatives to bargain collectively; it outlawed various secondary boycotts, and prohibited featherbedding.

For a discussion of the pre-Wagner Act period, see S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 937-77 (1965). For discussions of the legislative history of the Wagner Act, *see generally* 1 T. KHEEL, LABOR LAW § 5.01 (1978); MORRIS, *supra* note 1, at 3-34; Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199 (1960). For discussions of the legislative history of the Taft-Hartley Act, *see generally* 1 T. KHEEL, LABOR LAW § 5.02 (1978); H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY (1950); MORRIS, *supra* note 1, at 35-48; Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285 (1960).

For a compilation of all relevant legislative materials pertaining to the Wagner Act and the Taft-Hartley Act, see NLRB, THE LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1936) (2 vols.) [hereinafter cited as LEG. HIST. NLRA] and NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948) (2 vols.) [hereinafter cited as LEG. HIST. LMRA].

21. 1 T. KHEEL, LABOR LAW § 5.03[d] (1978). For a discussion of the political make-up of the McClellan Committee, see A. MCADAMS, POWER AND POLITICS IN LABOR LEGISLATION 36-40 (1964). *See also* THE LABOR REFORM LAW (BNA 1959).

22. The McClellan Committee urged Congress to take action that would:

the McClellan Committee findings,[23] Congress considered no less than five separate bills between January and August, 1959.[24] The Senate passed the Kennedy-Ervin Bill;[25] the House passed the Landrum-Griffin Bill.[26] A conference committee met to consolidate the two,[27] resulting in the present secondary boycott provisions embodied in the Landrum-Griffin Amendments.

The Present Secondary Boycott Provisions

Section 8(b)(4), as enacted by the Taft-Hartley Amendments, was found to contain several serious loopholes[28] and therefore was modified to its present form in the Landrum-Griffin Act of 1959.[29] The chief effect of the Landrum-Griffin Amend-

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1) Regulate and control pension, health, and welfare funds;
2) Regulate and control union funds;
3) Insure union democracy;
4) Curb activities of middlemen in labor-management disputes;
5) Clarify the no-man's land in labor-management disputes.

TAYLOR & WHITNEY, LABOR RELATIONS LAW 474 (1971).

23. S. REP. NO. 1417, 85th Cong., 2nd Sess. (1958).

24. The Kennedy-Ervin Bill, S. 505, 86th Cong., 1st Sess. (1959) (the bill was given a new number, S. 1555, on March 25, 1959); The Elliot Bill, H.R. 8342, 86th Cong., 1st Sess. (1959); The Landrum Bill, H.R. 8400, 86th Cong., 1st Sess. (1959); and the identical Griffin Bill, H.R. 8401, 86th Cong., 1st Sess. (1959). Also introduced at various times were the Administration Bill (introduced by Sen. Goldwater) S. 748, 86th Cong., 1st Sess. (1959), the Kearns Bill, H.R. 3540, 86th Cong., 1st Sess. (1959), the Mundt Bill, S. 1002, 86th Cong., 1st Sess. (1959). In all, over 15 major bills dealing with labor reform were introduced in the 86th Congress. *See* 1 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (1960) at vii-xi [hereinafter cited as LEG. HIST. LMRDA].

For a discussion of the various bills introduced and some of their provisions, see 1 T. KHEEL, LABOR LAW § 5.03[2] (1978).

25. 105 CONG. REC. 6048 (1959), *reprinted in* II LEG. HIST. LMRDA, *supra* note 24, at 1257.

26. 105 CONG. REC. 14,519 (1959), *reprinted in* II LEG. HIST. LMRDA, *supra* note 24, at 1701-02.

27. The major differences between the two bills were:

1) *Hot Cargo Provisions.* The House version barring hot cargo agreements between a union and any employer was adopted. The Senate version applied only to agreements with common carriers.

2. *Recognitional and Organizational Picketing.* The Committee adopted the House version which barred picketing if another union had been recognized by the employer, or if a valid election had been held within the past 12 months (the Senate bill called for nine months), or if picketing had continued for 30 days or less, and an election petition had not been filed. The Senate bill had no comparable provision.

See generally Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 855 (1960).

28. *See* text accompanying notes 36-38 *infra*.

29. Section 704(a) of the Landrum-Griffin Act amends § 8(b)(4) of Taft-Hartley and provides that it shall be an unfair labor practice for a labor organization or its agents:

(i) to engage in, or to induce or encourage any individual employed by

ments, according to then Senator John F. Kennedy, was "to plug loopholes in the secondary boycott provisions of the Taft-Hartley Act. There [had] never been any dispute about the desirability of plugging these artificial loopholes."[30]

The Labor-Management Reporting and Disclosure Act of 1959,[31] also known as the Landrum-Griffin Act,[32] consists of seven titles.[33] Of particular importance is Title VII which amended, among other provisions, section 8(b)(4) of the Labor Management Relations Act (LMRA or Taft-Hartley) to tighten up the "loopholes" in the 1947 Act's secondary boycott provisions.[34] The three major loopholes in the original section 8(b)(4) were: (1) Since only inducement of employees was pro-

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any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

. . . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained 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, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . .

73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4).

30. 105 CONG. REC. 16,413 (1959), *reprinted in* II LEG. HIST. LMRDA, *supra* note 24, at 1431-32.

31. 73 Stat. 519 (1959), 29 U.S.C. §§ 153, 158-160, 164, 186-187, 401-503.

32. The names "Labor-Management Reporting and Disclosure Act of 1959," "LMRDA," "Landrum-Griffin," "Landrum-Griffin Amendments," and "Landrum-Griffin Act" all refer to the same legislation and will be used interchangeably.

33. Titles I-VI are concerned exclusively with the regulation of internal union affairs. For a discussion of Titles I-VI, see 1 T. KHEEL, LABOR LAW §§ 5.03[3][a]-[f] (1978).

34. 61 Stat. 141 (1947).

scribed, direct inducement of a supervisor of the secondary employer by threats of labor was not prohibited;[35] (2) Since only a strike or a concerted refusal was prohibited, pressure upon a single employee was not forbidden;[36] and (3) Railroads, airlines, and municipalities were not employers under Taft-Hartley, and therefore inducement of their employees was not unlawful.[37]

The applicability of section 8(b)(4) was expanded to make it an unfair labor practice for any labor organization to put pressure on "any person" for any purpose proscribed by the section. Section 8(b)(4) was also amended to prohibit a labor organization from engaging in coercive or threatening conduct in order to attain any of the goals described in sections 8(b)(4)(A), (B), (C), or (D).[38]

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35. Section 2(3) of Taft-Hartley provides that the term employee "shall not include . . . any individual employed as a supervisor." 61 Stat. 138 (1947). *See, e.g.*, Humphrey v. Local 294, International Bhd. of Teamsters, 25 L.R.R.M. 2318 (N.D.N.Y. 1950) *and* Teamsters Local 505, 130 N.L.R.B. 1438, 47 L.R.R.M. 1502 (1961), where attempted inducement of a job foreman was unlawful because the foreman's interests were more closely identified with the rank and file than with the management.

36. Section 8(b)(4) of Taft-Hartley prohibited encouraging employees to engage in "a strike or *concerted* refusal" to use, sell, transport, etc. any goods for a proscribed object. 61 Stat. 141 (1947) (emphasis supplied). *See, e.g.*, NLRB v. International Rice Milling Co., 341 U.S. 665, 28 L.R.R.M. 2105 (1951). "[Union pressures on individual employees] only as they happen to approach the picketed place of business generally are not aimed at *concerted*, as distinguished from *individual*, conduct by such employees." *Id.* at 671, 28 L.R.R.M. at 2107 (emphasis supplied).

37. The Taft-Hartley Act, in section 2(2), expressly excepts persons subject to the Railway Labor Act from the definition of employer and further excepts from the definition of employee, in section 2(3), any individual employed as an agricultural laborer. 61 Stat. 137-38 (1947). *See, e.g.*, Lumber & Sawmill Workers Local 2409, 122 N.L.R.B. 1403, 43 L.R.R.M. 1324, *enf. denied sub nom.* Great N. Ry. v. NLRB, 272 F.2d 741, 45 L.R.R.M. 2206 (9th Cir. 1959); UAW Local 83, 116 N.L.R.B. 267, 38 L.R.R.M. 1228 (1956); Teamsters Local 87, 87 N.L.R.B. 720, 25 L.R.R.M. 1223 (1949), *enforced sub nom.* Di Giorgio Fruit Corp. v. NLRB, 191 F.2d 642, 28 L.R.R.M. 2022 (D.C. Cir. 1951) (agricultural organization).

38. As provided by § 8(b)(4), 29 U.S.C. § 158(b)(4), the proscribed actions are:

> (i) to engage in or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or
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> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
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> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [hot cargo agreements];
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> (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

Significantly, however, the amended section 8(b)(4) permitted union publicity other than picketing, such as by handbilling, for the purpose of truthfully advising the public that there exists a primary dispute with an employer, and that the primary employer's products are being distributed by another, or secondary, employer. Such publicity is not protected, however, if it has the effect of inducing secondary boycotts. Thus, publicity other than picketing which induces employees of employers other than the primary employer to refuse to handle any goods or perform any services is prohibited.[39]

However, handbilling without picketing is a protected activity so long as deliveries and services to the secondary employer are not interrupted. The publicity proviso, which protects handbilling, was the compromise reached by the conference committee and was prompted by first amendment considerations.[40] It permits unions to distribute handbills at the secon-

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with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . .

39. The proviso to § 8(b)(4), 29 U.S.C. § 158(b)(4), added by the Landrum-Griffin Amendments reads:

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, *including consumers* and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . . (emphasis supplied).

40. For discussions of the constitutional aspects of picketing and handbilling, see C. GREGORY, LABOR AND THE LAW 346-48 (rev. ed. 1949); Cox, *Strikes, Picketing, and the Constitution*, 4 VAND. L. REV. 574 (1951); Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513 (1943); Etelson, *Picketing and Freedom of Speech*, 10 J. MAR. J. 1 (1976); Hellerstein, *Picketing Legislation and the Courts*, 10 N.C.L. REV. 158 (1932); Lewis,

dary employer's shop, place advertisements in newspapers, make announcements over the radio, and to engage in any publicity short of ambulatory picketing in front of the secondary site.[41] It is the interpretation and application of section 8(b)(4) by the Board and reviewing courts which has presented management, labor, and especially labor lawyers with extensive problems and distinctions "more nice than obvious"[42] in the area of consumer boycotts.

CONSUMER PICKETING AND THE RISE OF MERGED PRODUCTS

The early Board decisions under the 1959 Landrum-Griffin Amendments strictly adhered to what the Board believed was the intention of Congress in amending section 8(b)(4) to prohibit secondary consumer boycotts.[43] In *Perfection Mattress & Spring Co. v. NLRB*,[44] during fourteen days of union picketing activity at retail department stores which were customers of primary employer Perfection Mattress, no deliveries to the secondary employers were stopped, no neutral employee quit or refused to work, and no retail department store employees refused to handle Perfection's goods. Picketing was conducted after department store employees arrived for work and before they exited for home. The picket signs were addressed to the consuming public and urged consumers not to buy mattresses manufactured by Perfection.

The Board concluded that since the purpose of picketing the retail stores was to force the cessation of business dealings between those store owners and Perfection, the picketing was prohibited by section 8(b)(4)(ii)(B).[45] The Board also held that the fact that the union's appeal was directed to the consumer did not bring the union activity within the publicity proviso. In other words, secondary consumer *picketing* was not intended to

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Free Speech and Property Rights Re-Equated: The Supreme Court Ascends From Logan Valley, 24 LAB. L.J. 195 (1973); Owens, *Plazas, Parking Lots, and Picketing: Logan Valley Plaza is Put to the Test*, 23 LAB. L.J. 742 (1972); Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180 (1942); Comment, *The First Amendment and Section 7 of the National Labor Relations Act: A Union's Right to Picket in the Privately Owned "Public" Forum*, 8 U. TOL. L. REV. 437 (1977); Note, *Shopping Center Picketing: The Impact of Hudgens v. National Labor Relations Board*, 45 GEO. WASH. L. REV. 812 (1977).

41. *See* 105 CONG. REC. 16,413 (1959), *reprinted in* II LEG. HIST. LMRDA, *supra* note 24, at 1431-32 (remarks of Sen. Kennedy).

42. Electrical Workers Local 761 v. NLRB, 366 U.S. 667, 674, 48 L.R.R.M. 2210, 2213 (1961).

43. United Wholesale Employees Local 261, 129 N.L.R.B. 1014, 47 L.R.R.M. 1121 (1960), *enforced sub nom.* Perfection Mattress & Spring Co. v. NLRB, 321 F.2d 612, 53 L.R.R.M. 2800 (5th Cir. 1963).

44. *Id.*

45. 129 N.L.R.B. at 1014, 47 L.R.R.M. at 1121.

be protected.[46]

The Board followed this reasoning in *Upholsterers Frame & Bedding Workers Local 61*.[47] However, in that case, the Board distinguished between the union's unlawful secondary consumer picketing at the department stores and the union's protected right to engage in handbilling truthfully advising the public of its primary dispute with Perfection Mattress. Noting that picketing and handbilling were two separate and distinct forms of informational activity, the Board held that the latter was protected by the publicity proviso,[48] whereas consumer picketing was banned by section 8(b)(4). It reasoned that the picketing, if carried on for a proscribed purpose, was prohibited by section 8(b)(4) because it invited employees to engage in work stoppages, thereby coercing secondary employers in the conduct of their businesses. Handbilling, however, would not have invited employees to engage in work stoppages and was thus protected by the publicity proviso.[49]

Thus, in its early decisions the NLRB effectuated the policy of the statute by protecting secondary employers, while promoting the interests of unions to convey information and publicize their disputes with primary employers.[50] The Board had struck an accommodation between the rights of neutral secondary employers not to be coerced in the conduct of their businesses and allowing unions to engage in informational activity. Between 1959 and 1964 the case law regarding union appeals to the consuming public became well established. This period of stable labor law terminated, however, in 1964 with the Supreme Court's decision in *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760* (Tree Fruits).[51]

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46. *Id.* at 1023, 47 L.R.R.M. at 1123. "[T]he proviso is explicitly limited to publicity 'other than picketing.' " *See also* II LEG. HIST. LMRDA, *supra* note 24, at 1615 (remarks of Rep. Griffin).

47. 132 N.L.R.B. 40, 48 L.R.R.M. 1301 (1961), *enf. denied sub nom.* NLRB v. Upholsterers Frame & Bedding Workers Local 61, 331 F.2d 561, 56 L.R.R.M. 2164 (8th Cir. 1964). The court's refusal to enforce the Board's order was based on the Supreme Court's decision in *Tree Fruits*.

48. While the proviso to section 8(b)(4) does not define the permissive publicity, the legislative history makes it abundantly clear that the Senate and House Conferees, who drafted the proviso, intended thereby to confer, subject to certain conditions, immunity on all forms of informational activity by unions, except picketing.

132 N.L.R.B. at 46, 48 L.R.R.M. at 1306.

49. *Id.* at 47, 48 L.R.R.M. at 1307.

50. R. DERESHINSKY, THE NLRB AND SECONDARY BOYCOTTS 78-80 (1972); *see* Brewery Workers Local 366, 121 N.L.R.B. 271, 42 L.R.R.M. 1350 (1958).

51. 377 U.S. 58, 55 L.R.R.M. 2961 (1964). For a discussion of *Tree Fruits*, see Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits*, 49 MINN. L. REV. 479 (1965).

The Tree Fruits *Decision*

In *Tree Fruits*, the union struck certain fruit packers and warehousemen who sold Washington State apples to the Safeway chain of retail stores. All of the Safeway stores in the Seattle area were picketed.[52] Strikers distributed handbills and carried placards appealing to consumers to refrain from purchasing Washington State apples. The pickets were instructed to stay away from delivery entrances and were forbidden to request customers not to patronize the stores. No attempts were made to prevent customers, employees, or deliverymen from entering or leaving the stores.[53]

The Board concluded that the union had engaged in prohibited secondary activity. Adhering to its prior decisions, the Board again reasoned that, according to the literal language of the proviso to section 8(b)(4) and its legislative history, consumer picketing in front of a secondary establishment was prohibited.[54] The Court of Appeals for the District of Columbia Circuit refused to enforce the Board's order on the ground that there was no specific finding of the union's use of threats, coercion, or restraint to achieve any of the objectives prohibited by section 8(b)(4)(A), (B), (C), or (D).[55]

The Supreme Court affirmed the court of appeals' decision, reasoning that not every instance of consumer picketing at a secondary employer's premises was prohibited.[56] The Court held that a union may peacefully picket a neutral party when the object is to persuade customers not to purchase the struck product. The union could not, however, urge customers to completely cease doing business with the neutral party.[57] The

52. The picket signs read: "To the Consumer: Non-Union Washington State Apples are being sold in this store. Please do not purchase such apples. Thank you. Teamsters Local 760, Yakima, Washington." 377 U.S. at 60 n.3, 55 L.R.R.M. at 2962 n.3.

53. These facts are the same as those presented in *Perfection Mattress* and *Upholsterers Frame & Bedding Workers Local 61*. *See* text accompanying notes 43-50 *supra*.

54. 132 N.L.R.B. 1172, 48 L.R.R.M. 1496 (1961).

55. 308 F.2d 311, 50 L.R.R.M. 2392 (D.C. Cir. 1963).

56. "[I]t does not follow from the fact that some coercive conduct was protected by the [publicity] proviso, that the exception, 'other than picketing,' indicates that Congress had determined that all consumer picketing was coercive." 377 U.S. at 69, 55 L.R.R.M. at 2966.

In order for consumer picketing to be lawful, other requirements must be met. The picket signs must limit their appeals to the struck product. Carpenters Local 550, 227 N.L.R.B. 196, 94 L.R.R.M. 1426 (1976). The picket signs must adequately identify the struck product and the primary employer. Meat Cutters Local 248, 230 N.L.R.B. 189, 96 L.R.R.M. 1221 (1977); *see* MORRIS, *supra* note 1, at 602-03. *See also* Paper Workers Local 832, 236 N.L.R.B. No. 183, 98 L.R.R.M. 1430 (1978).

57. 377 U.S. at 72, 55 L.R.R.M. at 2967.

Supreme Court's decision created an exception to the total prohibition of consumer picketing, but it has spawned considerable criticism.[58] It has proved difficult to apply in certain cases, namely where the primary employer's product has become integrated with the product of the secondary employer.

The Doctrine of American Bread

The Board and federal courts, in applying the *Tree Fruits* doctrine, have encountered the problem of whether consumer picketing, proper under *Tree Fruits*, was still legal where the primary's product had become integrated into the secondary's product. In other words, was consumer picketing permitted where it was difficult, if not impossible, for consumers to avoid purchasing the primary employer's product without simultaneously boycotting the entire business of the secondary employer? A partial answer to this question was supplied by *American Bread Co. v. NLRB.*[59]

In *American Bread*, the union had a dispute with a bread producer and set up picket lines outside certain restaurants, advising customers that the struck bread was being served inside. The Board held that the *Tree Fruits* doctrine was inapplicable since the struck product had become so integrated into the retailer's product that any bread boycott would necessarily result in a total cessation of business between the secondary employer and consumers.[60] Therefore, the Board found that the union had engaged in unlawful consumer picketing in violation of section 8(b)(4)(ii)(B). The Sixth Circuit enforced the Board's order,[61] noting that a customer has no choice in the brand of bread served with the meals prepared by a restaurant.[62] Thus, the touchstone of consumer picketing where products have merged is the ability or inability of consumers to respond in a sufficiently limited manner by refraining from purchases of the struck product.

Where only tangible products have been involved, application of the "merged products" doctrine has been relatively un-

58. *See* 377 U.S. at 80, 55 L.R.R.M. at 2970 (Harlan, J., dissenting); R. DERESHINSKY, THE NLRB AND SECONDARY BOYCOTTS 82-84 (1972).

59. 170 N.L.R.B. 91, 67 L.R.R.M. 1427 (1968), *enforced in part*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969) (also involved issue concerning representation).

60. NLRB v. Honolulu Typographical Union No. 37, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968).

61. 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969).

62. "[The bread] had become so integrated into the food served that to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer." *Id.* at 154, 71 L.R.R.M. at 2249.

complicated.[63] If consumers can recognize the struck product and refrain from buying only that product, the picketing is lawful.[64] The most problematic "merged products" situations occur when the secondary employer or retailer sells only the primary's product,[65] or where the primary employer provides a service to the secondary employer.[66]

SINGLE-PRODUCT SECONDARY EMPLOYERS

In *Steelworkers Local 14055 (Dow Chemical)*,[67] Dow Chemical, which produced gasoline at its Bay Refining Division, had a dispute with a steelworkers local. The union struck the division and also picketed six independently-owned gas stations which received their revenues from the sale of gasoline produced at the Bay Refining Division. The Board found that nearly all the business of each station consisted of gasoline sales and incidental services.[68] It distinguished *Tree Fruits* on the ground that picketing the gas stations was reasonably calculated to induce customers not to patronize the establishment since most of their sales were of gasoline.[69] Thus, the Board determined that the

63. Upholsterers Frame & Bedding Workers Local 61, 331 F.2d 561, 56 L.R.R.M. 2164 (8th Cir. 1964) (enforcement denied); Salem Bldg. Trades Council, 163 N.L.R.B. 33, 64 L.R.R.M. 1265 (1967), *enforced sub nom.* NLRB v. Salem Bldg. Trades Council, 388 F.2d 987, 67 L.R.R.M. 2512 (9th Cir.), *cert. denied*, 391 U.S. 965, 68 L.R.R.M. 2353 (1968); *see* NLRB v. Twin City Carpenters Dist. Council, 422 F.2d 309, 73 L.R.R.M. 2371 (8th Cir. 1970), *enforcing* 167 N.L.R.B. 1017, 66 L.R.R.M. 1242 (1967); Independent Routemen's Ass'n, 206 N.L.R.B. 245, 84 L.R.R.M. 1265 (1973); Cement Masons Local 337, 192 N.L.R.B. 377, 77 L.R.R.M. 1825 (1971) (supplementing 190 N.L.R.B. 261, 77 L.R.R.M. 1255 (1971)), *enforced sub nom.* Hoffman v. Cement Masons Local 337, 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir. 1972). *See also* Danielson v. Fur Dressers Local 2F, 411 F. Supp. 655, 90 L.R.R.M. 2820 (S.D.N.Y. 1975), where the court denied the Board's request for injunctive relief against two unions who were picketing at the premises of a New York fur skin importer with picket signs appealing to consumers to save union jobs by refusing to buy Argentine-dressed fur skins imported and sold by the firm.

64. This statement must be qualified by the assumption that the pickets limit their appeals to the struck product and that the picket signs adequately identify the struck product and the primary employer. The picket signs must also be addressed specifically to the consumer. *See* note 56 *supra*.

65. *See* Justice Harlan's dissenting opinion in *Tree Fruits*. 377 U.S. at 83, 55 L.R.R.M. at 2970.

66. *See* text accompanying notes 80-90 *infra*.

67. 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), *enf. denied sub nom.* Steelworkers Local 14055 v. NLRB, 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975), *vacated*, 429 U.S. 807, 93 L.R.R.M. 2362, *dismissed as moot*, 229 N.L.R.B. 302, 96 L.R.R.M. 1090 (1977).

68. 211 N.L.R.B. at 651, 86 L.R.R.M. at 1382.

69. [Here] the picketing was reasonably calculated to induce customers not to patronize the neutral parties, in this case the gas station operators, at all. Even though some of the stations involved sell tires and provide repair service, which special aspects of their business might be

union had violated section 8(b)(4)(ii)(B).

In refusing to enforce the NLRB order, the District of Columbia Circuit rejected the Board's interpretation of *Tree Fruits* and held that consumer picketing was not made unlawful merely because a large percentage of the retail stations' income was earned from sales of Bay gasoline.[70] The court believed that although the effect of a successful consumer boycott may have been economically harmful to the gas station owners, the picketing was not conduct which Congress had intended to prohibit in section 8(b)(4).[71] The court held that the public policy favoring the right of a union to peacefully publicize a dispute outweighed any possible loss to a secondary employer.[72] On certiorari, the Supreme Court did not rule on the merits; it reversed the court of appeals and remanded the case to the Board for reconsideration in light of intervening circumstances.[73]

An inconsistent result was reached in *Retail Store Employees Local 1001 (Safeco)*.[74] In that case the union had a dispute with Safeco, a company which issued title insurance policies. Contract negotiations reached an impasse. The union picketed Safeco and five land title insurance companies whose policies were underwritten by Safeco, urging consumers to cancel their insurance policies. Ninety to ninety-five percent of each land title company's total income was derived from the issuance of Safeco title policies. The Board followed its reasoning in *Dow Chemical*[75] and concluded that a successful boycott of Safeco insurance policies would predictably involve a virtually com-

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relatively unimpaired, most of their business is gasoline sales and minor items incidental thereto. Some, at least, would predictably be forced out of business . . . and all would predictably be squeezed to a position of duress . . . . It is not only the potential impact of the picketing, however, that distinguishes this case from *Tree Fruits*. It is, more importantly, the predictability of such impact that leads us to conclude that the picketing had an unlawful object.

Id. at 651-52, 86 L.R.R.M. at 1383.

70. This picketing, we think, cannot reasonably be held to have been aimed at "all trade" of Alexander's under the reasoning of the Court in *Tree Fruits*. As the Court there held, picketing "confined as it was to persuading customers to cease buying the product of the primary employer" (citation omitted) did not fall within the area Congress clearly indicated an intention to prohibit under section 8(b)(4)(ii)(B) and, therefore, did not "threaten, coerce, or restrain". . . .

Steelworkers Local 14055 v. NLRB, 524 F.2d 853, 858-59, 90 L.R.R.M. 3281, 3284 (D.C. Cir. 1975).

71. *Id.* at 857, 90 L.R.R.M. at 3283.

72. *Id.* at 859, 90 L.R.R.M. at 3285.

73. 429 U.S. 807, 93 L.R.R.M. 2362 (1976).

74. 226 N.L.R.B. 754, 93 L.R.R.M. 1338 (1976), *enforced*, 99 L.R.R.M. 3330 (D.C. Cir. 1978).

75. *See* text accompanying notes 67-72 *supra*.

plete boycott of the neutral land title companies.[76] The District of Columbia Circuit agreed with the Board and enforced the order finding a section 8(b)(4) violation.[77]

Dow Chemical and *Safeco* demonstrate the difficulties encountered in applying the merged products doctrine to the single product secondary employer. The Board was consistent in its reasoning in both cases. The Board felt that due to the predictable effect a successful consumer boycott would have on the secondary employer, forcing it out of business, the union's consumer appeal constituted coercion of neutral employers within the meaning of section 8(b)(4)(ii)(B).[78] The court of appeals, however, took disparate approaches to the issues presented by those cases.

In *Dow Chemical*, the court correctly noted that the *Tree Fruits* decision should not be limited in its application to a factual situation where the struck product constitutes only a small portion of the business of the secondary retailer.[79] The public was not asked to withhold its patronage from the secondary employer but only to boycott the primary's goods. This was not a classic *American Bread* situation where the public could not refuse to buy the primary's goods without also boycotting the secondary's products. The relationship of the struck product to the consuming public was still direct because the identity of that product, gasoline in *Dow Chemical* and title insurance in *Safeco*, had not been lost.

SECONDARY EMPLOYERS WHERE THE PRIMARY'S "PRODUCT" IS A SERVICE

The confusion resulting from the utilization of the *Tree Fruits* analysis in cases involving a single product is matched when the primary's product is a service. *Honolulu Typographical Union No. 37 v. NLRB*[80] involved a union dispute with the

76. 226 N.L.R.B. at 757, 93 L.R.R.M. at 1341.

77. 99 L.R.R.M. 3330 (D.C. Cir. 1978). "Neither Congress in the legislative history accompanying the 1959 Amendments, nor the Court in its decision in *Tree Fruits*, intimated that a neutral secondary employer loses his protection against a union-inspired total boycott if his only item of merchandise is the struck product." *Id.* at 3333.

78. *See* Steelworkers Local 14055, 229 N.L.R.B. 302, 96 L.R.R.M. 1090 (1977).

79. The correctness of this reasoning may finally be determined by the Supreme Court. After the preparation of this article for publication, the United States Supreme Court granted certiorari in NLRB v. Retail Store Employees Local 1001, 100 S. Ct. 658 (Jan. 7, 1980) (No. 79-672).

80. 167 N.L.R.B. 1030, 66 L.R.R.M. 1194 (1967), *enforced*, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968).

publisher of a "throw away" newspaper.[81] The union struck the newspaper and picketed a privately-owned shopping center which housed approximately sixty shops. Six of those shops regularly advertised in the primary employer's newspaper. Each picket sign named one of the advertisers who was a target of the picketing.

The Board held *Tree Fruits* inapplicable. It distinguished situations where peaceful consumer picketing was used to halt all trade with the secondary employer and consumer picketing to persuade customers not to buy the struck product.[82] The Board held that the union's picketing encouraged total cessation of business not only with the six establishments who advertised in the primary's "throw away" newspaper, but with all the stores in the shopping center. It therefore found that the union's picketing constituted an unlawful consumer boycott in violation of section 8(b)(4)(ii)(B).

The court of appeals, in enforcing the Board's order, noted that the scope of protection which section 8(b)(4) affords secondary employers, is dependent upon the nature of the secondary's business and the type and extent of picketing employed by the union.[83] For example, in a *Tree Fruits* situation where a secondary employer has a retail business and sells separate and distinct products, only one of which is the primary's product, a union may appeal to the consumer not to buy the primary's product. The consumer is able to respond in accordance with the union's request without totally ceasing to do business with the secondary employer. However, in certain situations such as in the construction[84] or restaurant[85] industries, customers are

81. A "throw away" newspaper is a newspaper which contains only advertising and is distributed to the public free of charge.

82. 167 N.L.R.B. 1030, 66 L.R.R.M. 1194 (1967).

> A loss of patronage resulting from the picketing appeal could have no direct impact upon the restaurants' need for further advertising; indeed a reduction of patronage under normal circumstances might well lead to a desire and need for more advertising. Thus the picketing of the restaurants in this case constituted more than a mere following of the struck product in a *Tree Fruits* sense; its obvious aim was to cause a cessation of the secondary employer's dealings with the primary employer, not as a natural consequence of a falling consumer demand, but by force of the injury that would otherwise be inflicted on their businesses generally.

Id. at 1032, 66 L.R.R.M. at 1196; *accord*, Los Angeles Typographical Union No. 174, 181 N.L.R.B. 384, 73 L.R.R.M. 1390 (1970).

83. 401 F.2d 952, 956, 68 L.R.R.M. 3004, 3006 (D.C. Cir. 1968).

84. *See, e.g.*, Carpenters Local 399, 233 N.L.R.B. 718, 96 L.R.R.M. 1575 (1977), *enf. denied sub nom.* K & K Constr. Co. v. NLRB, 592 F.2d 1228, 100 L.R.R.M. 2416 (3d Cir. 1979). In that case the carpenters' union had a dispute with K & K Construction and picketed at the construction site where K & K was constructing homes, and at the offices of Panther Valley, Ltd. Panther Valley owned and sold the homes built by K & K. The dispute between

not able to respond to a union's appeal not to buy the primary's product without totally discontinuing dealings with the secondary employer.

The *Tree Fruits* analysis was also held inapplicable in *International Union of Operating Engineers Local 139*,[86] where the union, in a dispute with a non-union construction contractor, picketed a telephone company's business office. The public was urged not to pay twenty percent of each telephone bill until the telephone company ceased doing business with the primary employer. The contractor constructed manholes and underground telephone conduits which formed an integral part of the telephone company's operations. The Board held that lawful consumer picketing did not extend to situations where goods or services produced by the primary employer have lost their identity and become fully merged into the output (telephone service) of the secondary employer being picketed.[87] This holding was consistent with *American Bread* because it would have been impossible for the consumer to cease purchasing the primary's product or service without ceasing to buy the non-struck product or service.[88] Thus, a limited consumer response, vital to a lawful secondary consumer boycott under the *Tree Fruits* analysis, was not possible. In addition, when the primary employer provides the secondary employer with services which cannot be separately offered to the public, union appeals to the consumer to refrain from buying the secondary's *products* may be held unlawful. This has occurred in cases involving janitorial,[89] laundry,[90] and advertising services.[91]

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the union and K & K arose because K & K was not paying its workers the prevailing union wage. The Board, over a strong dissent by Member Pennello, held that the publication of area-standards disputes was a legitimate primary activity even though consumers may have been discouraged from buying Panther Valley homes.

The Third Circuit remanded the case, holding that a legitimate activity, area-standards picketing, may be unlawful secondary activity. The court noted that in light of the special circumstances of the construction industry, the merged-product doctrine would be applicable in almost all cases. The court went on to state that the lack of any specific exemption from the secondary boycott prohibitions indicates that Congress intended to include construction unions in the Landrum-Griffin picketing proscriptions. 592 F.2d at 1233, 100 L.R.R.M. at 2420. On remand, the Board accepted the findings and conclusions of the court and found a violation of section 8(b)(4)(ii)(B). 242 N.L.R.B. No. 42, 101 L.R.R.M. 1130 (1979).

85. *See* American Bread Co. v. NLRB, 170 N.L.R.B. 91, 67 L.R.R.M. 1427 (1968), *enforced in part*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969).

86. 226 N.L.R.B. 759, 93 L.R.R.M. 1385 (1976).

87. *Id.*

88. *See* text accompanying notes 59-66 *supra*.

89. *See, e.g.*, NLRB v. Local 254, Building Serv. Int'l Union, 367 F.2d 227, 63 L.R.R.M. 2307 (10th Cir. 1966). *See also* NLRB v. Local 254, Building Serv. Int'l Union, 359 F.2d 289, 61 L.R.R.M. 2709 (1st Cir. 1966).

CONCLUSION: THE SEARCH FOR STANDARDS

It is apparent that since the Supreme Court's decision in *Tree Fruits*,[92] both the Board and the courts have been searching for standards by which union appeals to consumers can be governed. The merged products exception to *Tree Fruits*, announced in *American Bread*,[93] is an example. The congressional intention in enacting and amending section 8(b)(4) to outlaw secondary boycotts, though ambiguous,[94] was to close artificial loopholes in order to further restrict the ability of unions to involve neutral employers in disputes not of their own making.[95] Due to the ambiguous legislative history of the secondary boycott provisions coupled with first amendment guarantees of free speech,[96] administrative and judicial attempts to balance the interests of unions and neutral employers have produced divergent results.

The Court in *Tree Fruits* struck a balance between the union and the neutral employer which was acceptable, despite the fact that the Court had little statutory support for its decision.[97] The problem is that the *Tree Fruits* holding was overly broad rather than limited to its facts. Realizing this, the Board and the courts have created an exception to the *Tree Fruits* doctrine. The exception, merged products, has encountered a fate similar to that of the general rule: it has wrought considerable confusion and has been applied in situations where it should not have been.

The standards needed to alleviate the disorder produced in

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90. *See, e.g.*, Laundry Workers Local 259, 164 N.L.R.B. 426, 65 L.R.R.M. 1091 (1967).

91. *See* text accompanying notes 81-83 *supra*. *But see* Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434, 61 L.R.R.M. 2364 (9th Cir.), *cert. denied*, 384 U.S. 1002, 62 L.R.R.M. 2392 (1966).

92. 377 U.S. 58, 55 L.R.R.M. 2961 (1964). For a discussion of *Tree Fruits*, see text accompanying notes 52-57 *supra*.

93. 170 N.L.R.B. 91, 67 L.R.R.M. 1427 (1968), *enforced in part*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969). For a discussion of *American Bread*, see text accompanying notes 59-66 *supra*.

94. Compare the majority and minority opinions in *Tree Fruits*, 377 U.S. 58, 55 L.R.R.M. 2961 (1964).

95. *See* 105 CONG. REC. 16,413 (1959), *reprinted in* II LEG. HIST. LMRDA, *supra* note 24, at 1432 (remarks of Sen. Kennedy).

96. This guarantee is embodied in the national labor policy in § 8(c), 29 U.S.C. § 8(c), which provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

See note 40 *supra*.

97. The publicity proviso to § 8(b)(4) expressly exempts picketing from its protection. *See* note 39 *supra*.

this complex area should be based on the policy of outlawing secondary boycotts as intended by the Taft-Hartley and Landrum-Griffin Amendments. A total ban on secondary boycotts, however, would not be wise. Yet only certain specific types of secondary boycotts should be permitted.[98]

Where the consumer's response to the union's appeal can be limited so that the consumer can refrain from buying only the primary's product, such secondary activity clearly should be allowed. It is part of the national labor policy to protect employees' rights to strike and to put economic pressure on the primary employer to induce it to meet the union's demands. The fact that a secondary employer derives a substantial percentage of its income from the sale of the primary's product should not be considered in determining the lawfulness of the activity. To focus on such a factor would leave national labor policy at the mercy of attenuated differences of fact.[99]

Where the consumer cannot sufficiently limit his response and refrain from buying only the primary's product, union consumer picketing should be prohibited. In such situations the innocent secondary becomes involved in a primary dispute over which he has no control. A partial boycott by the consumer is not possible. To allow such union activity would upset the delicate balance between the competing interests of management and labor and undermine the purpose of section 8(b)(4).[100]

It is clear that the current state of the law of consumer boycotts and merged products is as one commentator remarked, "in a dreadful mess."[101] It is only through a return to the basic labor policy stated by Congress and a determination of whether the primary product sought to be boycotted has retained its separate identity or has become integrated into the product of the secondary employer that clear labor principles will evolve to regulate the conduct of management and labor. Dwelling on subtle factual variations merely creates confusion. Only through the formulation of comprehensive standards will labor

98. These recommendations do not in any way involve the established law concerning common-situs picketing, the ally doctrine, reserved gate picketing, and picketing the performance of struck work. *See generally* R. DERESHINSKY, THE NLRB AND SECONDARY BOYCOTTS 5-72 (1972); 8 T. KHEEL, LABOR LAW §§ 37.01-.02 (1978).

99. *See* text accompanying notes 67-78 *supra*.

100. *See, e.g.*, American Bread Co. v. NLRB, 170 N.L.R.B. 91, 67 L.R.R.M. 1427 (1968), *enforced in part*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969); Honolulu Typographical Union No. 37, 167 N.L.R.B. 1030, 66 L.R.R.M. 1194, *enforced*, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968). *But see, e.g.*, Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434, 61 L.R.R.M. 2364 (5th Cir.), *cert. denied*, 384 U.S. 1002, 62 L.R.R.M. 2392 (1966).

101. C. GREGORY, LABOR AND THE LAW 426 (2d rev. ed. 1961).

and management be able to conform their conduct to the law without acting at their peril. Only then will the "path through the swamp"[102] become easier and more predictable.

Taras R. Proczko

102. Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KAN. L. REV. 651 (1971).