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LABOR RELATIONS—Consumer Picketing Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act—*Honolulu Typographical Union, No. 37, I.T.U., A.F.L.-C.I.O. v. NLRB**

When a dispute arose between a local of the International Typographical Union and a Honolulu newspaper, the union proceeded to picket several restaurants which advertised in that newspaper. The pickets carried signs and distributed handbills identifying the dispute and asking potential consumers of the restaurants not "to purchase . . . products advertised in the struck [newspaper]."[1] However, since the restaurants did not advertise individual products but claimed generally that they were good places to eat, the pickets' appeal was, in effect, a request to the public to avoid patronizing those restaurants. The picketed restaurants subsequently instituted proceedings before the National Labor Relations Board claiming that the picketing should be prohibited because it was a secondary boycott which violated section 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA).[2] The union argued that its actions con-

* 401 F. 2d 952 (D.C. Cir. 1968) [hereinafter principal case].

1. Principal case at 954.

2. 29 U.S.C. § 158(b)(4)(ii)(B) (1964). This section provides in part:

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

stituted consumer picketing and that therefore they were protected under the United States Supreme Court's decision in *NLRB v. Fruit & Vegetable Packers Warehousemen, Local 760 (Tree Fruits)*.[3] The Board found that the picketing was a violation of the NLRA and issued a cease and desist order against further picketing by the union. The union appealed, and the Court of Appeals for the District of Columbia upheld the NLRB's finding and granted its cross-petition for enforcement of the cease and desist order. The court stated that the pickets' request was aimed at the restaurants' business in general and not at a specific product;[4] thus, the picketing was not protected by the *Tree Fruits* doctrine and was an illegal secondary boycott.[5]

The principal case is concerned generally with the problem of secondary activity by unions, and specifically with the application of a judicially created exception to the general prohibition against such activity. As originally written, section 8(b)(4) was intended to protect neutral employers from becoming involved in disputes between other employers and unions by prohibiting certain union activities.[6] Among the practices forbidden was the traditional secondary boycott which arises when a union in a dispute with a primary employer brings pressure to bear on other employers (secondary employers), through their employees, to cease doing business with the primary.[7] However, the statute did not seek to insulate the primary employer from this indirect pressure; rather, "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."[8] In short, Congress intended to prevent those who were only tangentially related from becoming involved.

. . . [N]othing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including customers 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 employer engaged in such distribution . . . .

3. 377 U.S. 58 (1964). *See* text accompanying notes 13-15 *infra*.

4. Principal case at 954.

5. Principal case at 957.

6. As added by section 303(a) of the Labor Management Relations Act, ch. 120, § 303(a), 61 Stat., 158 (1947), section 8(b)(4) forbade a union to induce "employees of any employer to engage in, a strike or a concerted refusal in the course of their employment." For a discussion of the shortcomings of this approach to the problem of protecting neutral employers against secondary pressures by unions, *see* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1112-13 (1960).

7. *See, e.g.*, Aaron, *supra* note 6.

8. International Bhd. of Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950) (Judge Learned Hand).

The language of the original section 8(b)(4) prohibited unions only from inducing "the employees" of a secondary employer.[9] This construction proved far too narrow, and in 1959, Congress sought to expand the scope of prohibited secondary activity by enacting section 8(b)(4)(ii)(B). This new provision makes it an unfair labor practice for a union "to threaten, coerce, or restrain *any person* engaged in commerce" if its objective is to force him to stop doing business with "any other person."[10] Obviously, this prohibitory language is very broad, but Congress did make a specific exception for truthful publicity, communicated by means *other than picketing*, designed to inform the public that a product of the primary employer is being distributed by secondary employers.[11] According to many commentators, section 8(b)(4)(ii)(B), when viewed in light of this proviso, is intended to operate as a complete ban on consumer picketing.[12] In their view, any attempt by the union to pressure a secondary employer by inducing his customers to stop doing business with him is illegal secondary activity under the NLRA. The effect of such secondary pressure is certainly similar to a union attempt to influence the primary by appealing to the secondary's work force. In both cases, the neutral employer is forced into a dispute which does not directly concern him.

Five years after the 1959 amendments, in *Tree Fruits*,[13] the Supreme Court declared that the ostensibly comprehensive prohibitions of section 8(b)(4)(ii)(B) do not forbid all consumer picketing. In that case, the union's dispute was with a producer of apples, but it chose to picket a retail supermarket which sold the apples as one of many items. The picketing was not specifically aimed at the retailer; it clearly identified the primary employer—the producer —as the union's target and asked only that the consumers refrain from purchasing his apples. The Court held that peaceful secondary picketing of retail stores was not prohibited by section 8(b)(4)(ii)(B) when its sole purpose was to ask consumers not to buy the primary employer's product.[14] The Court found that Congress intended to

9. *See* note 6 *supra*.

10. NLRA, § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1964). This section is reproduced in note 2 *supra*. *See* note 27 *infra*.

11. *Id.*

12. *E.g.*, Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits*, 49 MINN. L. REV. 479, 481 n.6 (1965). *See also* Cox, *The Landrum-Griffin Amendments to the N.L.R.A.*, 44 MINN. L. REV. 257, 274 1959; Aaron, *supra* note 6, at 1114-15.

13. NLRB v. Fruit & Vegetable Packers Warehousemen, Local 760, 377 U.S. 58 (1964).

14. 377 U.S. at 71. It would appear necessary to come within the standard established that the picket signs clearly identify the primary employer (both who he is and that he is the target) and ask only that consumers not buy *his* product. Such a test very closely approximates the language of the proviso to section 8(b)(4), which states that the union does not commit an unlawful secondary boycott if its actions amount only to "truthfully advising the public . . . that a product or products are

distinguish picketing which merely follows the struck product and attempts to persuade consumers not to buy it from picketing which is aimed at preventing all trade with the secondary employer. The majority opinion stated:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. . . . On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, 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.[15]

In the Court's view, then, only that picketing aimed at preventing all trade with the secondary corresponds to the traditional secondary boycott proscribed by section 8(b)(4)(ii)(B).

Despite the Court's rationale in *Tree Fruits*, the decision is difficult to support as a matter of strict statutory interpretation; section 8(b)(4)(ii)(B) and its proviso seem to indicate that all consumer picketing is illegal.[16] In fact, the NLRB's opinion in *Tree Fruits* states that " 'by the literal wording of the proviso . . . as well as through the interpretative gloss placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited.' "[17] Thus, the Board held that the picketing in question was illegal. The Board's holding, then, as well as the views of some commentators,[18] indicates that *Tree Fruits* must be regarded as a judicially created exception to the general rule against consumer picketing. Consequently, the decision should be narrowly construed to assure the continuing validity of the general rule.

The *Tree Fruits* case distinguished between picketing one of many products handled by a secondary—a partial boycott—and an attempt to prevent all trade with the secondary—a total boycott. This test is difficult to apply in factual contexts that differ from the situation in *Tree Fruits*. For instance, when the struck product encompasses all or a substantial part of the secondary's business ("one product" cases),[19] consumer picketing of the primary's product at the secondary's place of business may well produce the same pressures on

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produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer [as long as there are no effects on employees of anyone other than the primary in the course of their employment]."

15. 377 U.S. at 72.

16. *See* text accompanying note 12 *supra*.

17. Fruit & Vegetable Packers, Local 760, 132 N.L.R.B. 1172, 1177 (1961).

18. *See* note 6 *supra*.

19. That is, if he sells only one particular brand of gasoline or one type of car.

the secondary as would the traditional secondary boycott which section 8(b)(4) proscribes.[20]

The principal case presents a somewhat related problem. The picketed restaurants did not advertise a specific product in the struck newspaper; rather, they claimed that they were good places to eat. Picketing the advertised product, therefore, necessarily affected the secondary's entire business.[21] The court applied the *Tree Fruits* doctrine and found the total-partial boycott distinction to be crucial. Picketing, the court stated, is permissible when only a small part of the secondary's business is affected (as in *Tree Fruits*), but impermissible when the "picketing appeal to consumers is expanded to request a total boycott of the secondary seller . . . ."[22] In the latter situation, found to exist in the principal case, the picketing is illegal under section 8(b)(4)(ii)(B).

Although this conclusion is consistent with the *Tree Fruits* rationale, it ignores the conceptual problems involved with extending that rationale to cases in which intangible services rather than products are furnished by the primary. It is suggested that these conceptual problems might be solved by dividing consumer picketing situations into two basic types which could be called "chain" and "merger." *Tree Fruits* and the "one product" situations[23] are examples of chain cases.[24] The struck product of the primary passes to the retailer-secondary (perhaps through middlemen) unchanged. Consequently, it is relatively easy to visualize the product in question as that of the primary, although it is ultimately picketed at the secondary's place of business. The problem with chain cases then becomes one of deciding what portion of the secondary's business must be involved in order to make the picketing a violation under the *Tree Fruits* distinction between total and partial boycotts. This question, although vital for an effective application of the test, has not yet been answered by the Supreme Court.

Cases like the principal case, however, do not fit this chain con-

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20. The court in the principal case expressly reserved opinion on the "one product" case. Principal case at 956 n.9. The *Tree Fruits* decision did not specifically discuss "one product" cases either. However, the effect in such a case of consumer picketing appears to be indistinguishable from the effect in the principal case. Both fact situations appear closely analogous to a total boycott of the secondary, which, under *Tree Fruits*, would be illegal.

21. The court in the principal case stated:

> [T]he picketing appeal to consumers not to buy "products advertised in the struck . . . [p]ress" was an attempt to cling to a legal concept evolved for another case even though the language patently does not fit the facts of this situation. The only realistic meaning of the appeal is the traditional "do not patronize this establishment.

Principal case at 954.

22. Principal case at 955.

23. *See* text accompanying note 20 *supra*.

24. There may be other chain cases involving more than one product picketed, but the analysis would be the same.

cept, because the product of the primary (intangible services) is not simply passed along to and sold by the secondary in the same form. The picketing, therefore, is not directed at the particular service in question—in the principal case the newspaper advertising—but at the products ultimately produced and sold by the secondary. In order to visualize the primary's product as the one being picketed, resort must be made to a concept such as merger. In the principal case, for instance, since advertising costs contribute to the cost of the secondary's product and ultimately to the price a diner pays for his meal, the advertising might be thought of as "merged" into the secondary's product.[25] The unions would undoubtedly argue that this merger of the primary's product into the secondary's is sufficient to identify the two so as to justify consumer picketing of the secondary's product. It is submitted, however, that such an argument should be rejected. Since the product of the secondary in merger cases is *substantially different* from that of the primary, permitting consumer picketing of the secondary's product does not accord with the *Tree Fruits* rationale. In these situations the union's appeal cannot be said to be "closely confined to the primary dispute." It also seems that this type of picketing "create[s] a separate dispute with the secondary employer."[26] Moreover, in merger cases, since picketing the primary's contribution means picketing the *entire* product sold by the secondary, the appeal of the pickets is aimed directly at the secondary's total business. Therefore, the picketing becomes, in effect, a total boycott of the secondary which, under *Tree Fruits,* clearly violates section 8(b)(4)(ii)(B). At least one recent Board decision is in accord with this analysis.[27]

25. Examples of "merger" cases, in addition to the advertising situation, would be cases in which the primary provided some intangible service or component part that contributed to what the secondary ultimately sold to his customers. For an example of an intangible service other than advertising, *see* Laundry, Dry Cleaning & Dye House Workers International Union, Local 259, 1967 CCH NLRB Dec. ¶ 21,328. *See also* note 27 *infra.*

An example of a component parts type of merger case is Twin City Carpenters District Council & Boot & Shoe Workers Union, Local 527-C, AFL-CIO, 167 N.L.R.B. No. 51, 1968-1 CCH NLRB Dec. ¶ 21,858 (1968). In that case, the union picketed a builder and seller of houses advising that the cabinets being used in the houses were not made by union members, but failing to name the cabinetmaker at whom the pickets were directed. The Board found this activity to be a coercive attempt to get the builder to stop dealing with the cabinetmaker.

26. NLRB v. Fruit & Vegetable Packers Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58, 72 (1964). *See* text accompanying note 15 *supra.*

27. In Laundry, Dry Cleaning & Dye House Workers Intl. Union, Local 259, 1967 CCH NLRB Dec. ¶ 21,328 (1967) the union picketed a restaurant that used a linen service supplied by a laundry with which the union was engaged in a dispute. The restaurant did not sell linen service to its customers, but merely used it in its operations. The Board found that there was not sufficient identification between the picketing and either a primary product or primary employer to render the picketing permissible as an attempt to persuade consumers not to buy a struck product. *See also* Twin Cities Carpenters Dist. Council & Boot & Shoe Workers, Local 527-C, AFL-CIO, 167 N.L.R.B. No. 51, 1968-1 CCH NLRB Dec. ¶ 21,858 (1968).

Under the approach presented above, the *Tree Fruits* rationale might be stated as follows: consumer picketing which acts exclusively on the demand for a struck product of the primary and which does not affect either any other part of the secondary's business or so much of his business as to be a threat to its continuance is not a secondary boycott for purposes of section 8(b)(4). If there are any coercive effects in such chain situations, they are merely incidental or insubstantial. On the other hand, in merger cases it is impossible to act exclusively on the demand for the primary's product without disturbing other business of the secondary. Therefore, in such situations the basic evil of the traditional secondary boycott—pressuring the secondary into a complete cessation of business with the primary—is likely to occur. It is this difference which suggests that the *Tree Fruits* exception should not be extended to merger cases. The principal case recognizes this approach.

The court in the principal case suggested another possible test for determining the legality of consumer picketing. According to that test, the determination would turn on whether the union's picketing subjects the secondary employer to greater pressure or disruption than he would suffer from a successful strike against the primary.[28] In the chain cases, assuming a successful strike against the primary, the unavailability of the primary's product because of that strike would have substantially the same effect as a successful appeal to consumers—the secondary would be unable to sell any of the struck product.[29] In such cases, consumer picketing of the primary's product at the secondary's place of business should be allowed. On the other hand, in the "merger" cases, picketing the secondary would have a substantially greater effect on him than would a strike against the primary. On the facts of the principal case, for example, a successful strike against the newspaper would merely extinguish one source of advertising services and might therefore have little impact on the demand of the secondary's customers for his meals. However, if the union were allowed to picket the advertised product, the secondary would be subjected to much greater pressure affecting his entire business. In the event of a strike, the secondary could merely change advertising outlets, while if picketed he would bear

28. This test was suggested earlier by Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1412 (1962). Although Professor Lesnick's focus is limited to "common situs," "roving suits," and "reserved gate" problems, the distinction he suggests seems no less appropriate in determining when secondary picketing should constitute a violation of section 8(b)(4)(ii)(B). Carried to its logical conclusion, however, this test would seem to permit consumer picketing in the total boycott situation when the secondary sells only the struck product (the "one product" case). This demonstrates the weakness of the suggested test and indicates that the "merger" theory would be preferable.

29. Of course, he might get a similar product elsewhere and, therefore, lose nothing.

a considerable risk of losing business. Accordingly, in merger cases consumer picketing of the secondary should be disallowed.

The result in the principal case can be supported on several grounds, as discussed above. It is suggested that the merger-chain analysis is preferable since it eliminates automatically any need to consider the application of *Tree Fruits* once the merger label is attached. But, helpful as this categorization is, it is not a panacea for solving the problems of determining when consumer picketing violates section 8(b)(4). As chain cases approach the one product situation, a difficult line-drawing task awaits the Board and the courts.