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Consumer Picketing of Advertised Products

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CONSUMER PICKETING OF ADVERTISED PRODUCTS

Kennedy v. Los Angeles Typographical Union[1] presents a relatively new but increasingly prominent labor-law problem concerning secondary boycotts. The NLRB sought an injunction against union picketing that was aimed at products advertised in a struck newspaper, but was conducted at the site of businesses selling the advertised products. The developing law on this sort of picketing—commonly known as "product picketing"—reflects a basic conflict between two important principles of national labor policy: first that union pressure upon "primary" employers should be permitted, and second that such pressure on neutral or "secondary" employers should be prohibited.

The *Kennedy* case arose out of a strike called by the Los Angeles Typographical Union against the Los Angeles Herald-Examiner. The union, attempting to place additional pressure on the Herald, picketed one of the Herald's advertisers, White Front, with signs which read:

> HELP YOUR NEIGHBORS! DON'T BUY GOODS ADVERTISED BY WHITE FRONT IN THE HERALD-EXAMINER.

White Front countered by filing an unfair labor practice charge with the National Labor Relations Board, claiming that the union was conducting a secondary boycott in violation of section 8(b)(4)(iii)(B) of the National Labor Relations Act.[2] An investigation led the board's regional director to petition the District Court for the Central District of California for a temporary injunction.[3] The injunction was denied. Since the state of the law on product picketing is unclear, the court reasoned, the regional director therefore could not have had reasonable grounds to suspect a violation.[4] On appeal, the Ninth Circuit held that the "unsettled state of the law" was not by itself a sufficient reason to deny the injunction and remanded the case for additional consideration of the equities.[5]

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1. 418 F.2d 6 (9th Cir. 1969).
2. 29 U.S.C. § 158(b)(4)(ii)(B) (1964).
3. The National Labor Relations Act (NLRA) § 10(1), 29 U.S.C. § 160(1) (1964) provides: "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(ii)(A), (B), or (C) of section 158(b) . . . the preliminary investigation of such charge shall be made forthwith. . . . If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint shall issue, he shall, on behalf of the Board, petition . . . for appropriate injunctive relief pending final adjudication of the Board with respect to such matter."
4. 418 F.2d at 8.
5. *Id.*

Consumer Picketing of Advertised Products— A Troubled Area

The "unsettled state of the law" referred to by the Ninth Circuit is the latest ramification of the Supreme Court's 1964 *Tree Fruits* decision, which interpreted the secondary boycott provisions of the act in a factual situation involving product picketing.[6] The pertinent section of the act defining what shall constitute an unfair labor practice reads as follows:

> 8(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, processer, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any . . . 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. . . .[7]

Whether consumer picketing—that is, picketing designed solely to induce consumers to refrain from buying—is prohibited by the act was the principal issue in the *Tree Fruits* case.[8] The Supreme Court held that when consumer picketing at the site of a secondary employer only attacks the struck product, without attacking the secondary employer's business generally, there is no secondary boycotting violation of the act.[9]

At first glance, the Court's holding seems fairly simple and straightforward. It has proved rather difficult to apply, however, in cases where the primary employer is some type of advertising medium, such as a newspaper or a broadcasting station. There was once some question whether the medium qualifies as a "producer" within the meaning of the above-quoted section of the act. This question is now thoroughly settled. The Supreme Court has declared that any employer who in any way works on or handles a product is a producer of

6. NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58 (1964). See text accompanying notes 8 & 16 *infra*.

7. NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4)(ii) (1964).

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

9. *Id.*

that product.[10] The Ninth Circuit expanded the concept of "producer" to include employers engaged in the business of providing a vehicle in which to advertise things produced by someone else; one whose business is advertising any product, whether tangible or intangible, is a producer of the product advertised.[11] A newspaper, therefore, is a producer of the articles or services it advertises.[12]

There still exists the troublesome question of how a union striking a newspaper can follow and picket the struck product itself. To illustrate, suppose that a retail store advertises in the newspaper, and that its ads announce store-wide sales in addition to advertising a large number of specific items. Is the struck product the store itself, or each specific item advertised, or the store-wide sale items? The answer—and the answer to the corollary question of how the union can legally picket the struck product—has presented much difficulty. This Note will attempt to clarify the rules governing consumer picketing of advertised products under NLRA section 8(b)(4)(ii)(B). In order to do so, a more thorough analysis of *Tree Fruits*[13] is necessary.

The Union's Object—The Guiding Principle

The primary dispute in *Tree Fruits* involved a strike by the union against its employers who packed and warehoused apples. The struck apples were sold by Safeway along with many other food products. The consumer entrances to some of the Safeway stores were picketed by union members who carried signs asking the public not to buy the struck apples. The signs clearly indicated that the union had no dispute with Safeway itself; the union took considerable pains to ensure that only a boycott of apples, rather than a boycott of the stores, would result. In fact, the handbills passed out in conjunction with the picketing contained specific statements in bold-face type that there was no dispute with Safeway. Charges were filed against the union. In the resulting appeal, the District of Columbia Circuit held that the act only outlaws conduct which in fact threatens, coerces, or restrains the secondary employer.[14] That interpretation was vacated by the Supreme

10. NLRB v. Servette, Inc., 377 U.S. 46 (1964).

11. Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434, 436 (9th Cir. 1966).

12. Los Angeles Typographical Union No.174, 181 N.L.R.B. —, 73 L.R.R.M. 1390 (1970).

13. NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58 (1964), popularly referred to as *Tree Fruits*, is the leading case in this field and has been mentioned in every case cited in this Note. For law review discussions, see, *e.g.*, 67 MICH. L. REV. 1270 (1969); 44 TUL. L. REV. 537 (1970). Whether or not the Court's decision in *Tree Fruits* is correct is outside the scope of this discussion; it is, at this point in time, the controlling law.

14. Fruit & Vegetable Packers Local 760 v. NLRB, 308 F.2d 311, 315 (D.C. Cir. 1962), *vacated & remanded*, 377 U.S. 58 (1964).

Court. The Court went into a lengthy discussion of the legislative history of the act, and concluded that the union was not guilty of an unfair labor practice.[15] Mr. Justice Brennan, writing for the majority, pointed out the distinction to be made in regard to consumer picketing:

> 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. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has decreased its purchases of the struck product. 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.[16]

Special attention should be directed to the italicized language used by Mr. Justice Brennan. Surely the words must be taken to mean "used for the object of persuading."

> "Object" is the term used by the act:
> It shall be an unfair labor practice . . . to threaten, coerce, or restrain [a secondary employer where] an object thereof is: . . . (B) forcing [a secondary employer] to cease . . . doing business with [a primary employer]. . . .[17]

The crucial test, then, is not the *effect* of the picketing—this was the test used in the vacated opinion of the District of Columbia Circuit—but rather the "object" or purpose of the union members. The legality of the consumer picketing depends on whether the object of the picketing is to force the secondary employer to cease doing business with the primary employer because his business as a whole is being attacked, or rather to cause a reduced consumer demand for the struck product which will, in turn, cause the secondary to reduce his orders from the primary. The former activity is illegal; the latter is within permissible bounds.

The "Merged-Product" Doctrine

Application of the object rule to the facts of *Tree Fruits* is relatively simple. Consumer picketing directed only at apples sold by a supermarket was easily found to be within the permissible bounds.

15. 377 U.S. at 71.
16. *Id.* at 72 (emphasis added).
17. Quoted in full in text accompanying note 6 *supra.*

Application of the object rule in cases where the struck product is an advertised product is more difficult. The first major case applying the *Tree Fruits* object rule to picketing of an advertised product was *Honolulu Typographical Union No. 37 v. NLRB.*[18] There the union struck the Waikiki Beach Press and picketed the consumer entrances to some of the paper's advertisers. Four of these secondary employers were restaurants advertising their establishments as good places to dine. They did not advertise anything more specific; they did not, for example, advertise their prime rib dinners. The union tried to comply with the *Tree Fruits* doctrine by carrying signs which read:

> [name of advertiser] ADVERTISES IN THE WAIKIKI BEACH PRESS WHICH IS ON STRIKE KOKUA DO NOT PURCHASE THEIR PRODUCTS ADVERTISED IN THE STRUCK WAIKIKI BEACH PRESS.[19]

The NLRB's view, which was adopted by the District of Columbia Circuit, was that the *Tree Fruits* object rule is inapplicable where the product being picketed has become an integral part of the retailer's entire offering;[20] in such a case, the consumer picketing amounts to an appeal not to patronize the restaurants at all.[21] The picketing must be identifiable as direct action against the primary, and not secondary, employer.[22] When the struck product is merged into the retailer's entire offering, such identification is impossible. In other words, when the advertised product is so merged, there is, by necessity, an illegal object in any consumer picketing; an attack against the merged struck product is necessarily an attack against the general business of the secondary.

Identification of the Product

The doctrine of the *Honolulu Typographical Union* case—which might be termed the "merged-product" doctrine—is a logical application of the object rule to cases where the business generally is advertised in the struck newspaper. That doctrine is not sufficient, however, when the store advertises a number of specific items. Such was the type of ad used by the retailer in *Atlanta Typographical Union No. 48*,[23] where the union struck a newspaper and picketed the consumer entrances to an advertiser's place of business. The signs were almost

18. 401 F.2d 952 (D.C. Cir. 1968).
19. *Id.* at 953.
20. *Id.* at 955.
21. *Id.* at 954.
22. NLRB v. Building Servs. Employees Local 105, 367 F.2d 227 (10th Cir. 1966), *cited with approval in* Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952, 955 (D.C. Cir. 1968).
23. 180 N.L.R.B. —, 73 L.R.R.M. 1241 (1970).

identical with those displayed by the picketers in *Honolulu*.[24] They did not attempt to identify the specific products advertised, but the picketers carried copies of the ads to show to any customer who might inquire. The NLRB held that the signs must adequately inform the consumer of exactly what action he is being asked to take. The board reasoned that when a union decides to conduct a picketing operation aimed at inducing a consumer boycott of some product, it additionally takes upon itself the burden of ensuring that its actions will not affect the secondary employer's business beyond the sale of the advertised product. It is not the public's responsibility to try to determine what products are to be boycotted; it is the union's responsibility to identify, in writing on the signs, what those products are.[25]

In *Los Angeles Typographical Union No. 174*, the board's opinion on the merits of the principal case resulted in the same decision.[26] The signs did not specify which products were to be boycotted, even though White Front had advertised specific items. Neither did the handbilling which accompanied the picketing serve to identify the particular products.[27] Again the board held that the sign must clearly designate the struck product.[28]

In both these decisions, the unions' conduct led the board to infer that the pickets had the illegal objective of inducing a total boycott of the advertisers' businesses. It would seem that if the signs do not sufficiently identify the products to be boycotted, an inference of an illegal object may be warranted.

The "Merged-Product" Doctrine—Marginal Cases

The application of the object rule is especially difficult in what may be termed marginal cases. The problems of the marginal situa-

24. The signs read: "Stand up for Unionism fair wages and Working conditions. DON'T BUY products advertised by this store in the SCAB-RAT produced MARIETTA DAILY JOURNAL. *Id.* at —, 73 L.R.R.M. at 1241. See text accompanying note 19 *supra*.

25. The fact that some of the picketers carried the actual advertisements to show to the public did not save the union from its responsibility; a customer would have had to go out of his way to inquire of the picketer before he would have been shown the ad. *Id.* at —, 73 L.R.R.M. at 1241.

26. 181 N.L.R.B. —, 73 L.R.R.M. 1390 (1970).

27. Four handbills were used: one was a flyer alleging that by advertising in the *Herald*, White Front supported strike-bearers; one was a flyer asking the public to boycott advertised products and to shop at the 300 stores named on a list which did not include White Front; one was a "newspaper" containing articles about the dispute and a list of 12 firms, which did not include White Front, that the public was asked to boycott; the last was a flyer explaining why the public should support the union. *Id.* at —, 73 L.R.R.M. at 1391.

28. Id. at —, 73 L.R.R.M. at 1392.

tion are presented especially well in cases where the product advertised constitutes a major portion of the business of the secondary employer.

The simplest situation is where the advertised product constitutes the entire business of the secondary. Such businesses are far from uncommon. For example, everyone knows of at least one ice cream parlor which sells ice cream and nothing else. Suppose that it advertises its ice cream, and a union engaged in a dispute with the newspaper pickets the street entrance to the shop. In his dissent in *Tree Fruits*, Mr. Justice Harlan cited this situation as an illustration of the unworkability of the *Tree Fruits* doctrine.[29] The District of Columbia Circuit noticed the existence of such situations in *Honolulu*, but specifically declined to discuss the issue.[30] The board's decision in *Los Angeles*, however, did confront the problem. The trial examiner, whose recommended decision was adopted in full by the board, specifically "found" that unions are limited to product picketing which would not, as a matter of necessity from the factual situation, encompass the entire business of the secondary employer.[31] Such a result seems a logical extension of the "merged-product" doctrine. In the case of the single-product advertiser, as in the case of the multiproduct advertiser who advertises his business as a whole, there is no way to separate an attack against the advertised product from an attack against the whole business of the secondary.

Suppose, however, that the ice cream parlor in question also conducts a catering service. If only the ice cream is advertised, there is no merged-product problem because the business consists of more than merely selling ice cream. Nevertheless, the ice cream sales are undoubtedly a major portion of the total business. A successful consumer boycott of that portion would probably either force the ice cream parlor to go out of business, or force it to stop advertising in the struck newspaper.

Whether or not consumer picketing in such circumstances would

29. NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 83 (1964). Mr. Justice Harlan used the example of a gasoline station selling a particular brand of gas.

30. The question was not necessary to the issue before the court. The court, therefore, said: "We need not decide in this case, nor do we intimate a view on, the question . . . ." Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952, 956 (D.C. Cir. 1968).

31. Los Angeles Typographical Union No. 174, 181 N.L.R.B. —, —, 73 L.R.R.M. 1390, 1392 (1970). It should be noted that this position was not taken by all members of the board. In his dissent, Member Jenkins indicated that he would allow a boycott of the entire business if the business were advertised as a whole, *e.g.*, "Shop at X's Department Store for savings in all departments." Presumably, he would allow a boycott of the entire business if its only product were advertised, *e.g.*, "Buy Brand X gasoline." *See id.* at —, 73 L.R.R.M. at 1393.

violate the act will probably depend upon how great a percentage of the business is attributable to the struck product.

One can readily imagine many situations in which it will be difficult to determine whether the object of the consumer picketing is lawful. Some guidance is available, however, from the rules governing other methods used by unions to communicate with the public.

Determining the Union's Object—Handbilling

Unions commonly pass out handbills in conjunction with their picketing. In order to determine how handbilling influences the decision as to the object of any consumer picketing, it will be necessary to examine briefly the rules governing handbilling alone.

The proviso to section 8(b)(4)(ii) of the act[32] exempts the use of publicity other than picketing from the ban on secondary boycotts, provided that such publicity is used for the purpose of truthfully advising the public that the secondary employer is dealing in a product of a primary employer with whom the union has a dispute. Although *picketing* with an object of boycotting the entire business of the secondary employer is prohibited, *handbilling* with such an object is protected by the proviso:

> Thus, even though the handbilling . . . calling for a consumer boycott of the secondary employers was coercive, it nevertheless was protected by the proviso to Section 8(b)(4) of the Act.[33]

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32. 29 U.S.C. § 158(b)(4)(ii) (1964). See text accompanying notes 2 & 7 *supra*.

33. Great W. Broadcasting Co., 150 N.L.R.B. 467, 472, 58 L.R.R.M.1019, 1021 (1964). The board specifically held that threats to handbill, handbilling, speaking to the central labor council and other such activities were part of a campaign whose object was to force advertisers to cease dealing with a television station. *Id.* at 470, 58 L.R.R.M. at 1020. The object was to cause a total boycott of the advertisers. The board specifically found that the union's conduct constituted threats, coercion or restraint within the meaning of the act. Nevertheless, the board did not find a violation. The language used shows how clear this holding was: "In summary, we have found that . . . [r]espondents' conduct did constitute threats, restraint, or coercion within the meaning of section 8(b)(4)(ii)(B) of the Act, but that it is not violative of the Act because of the protection afforded by the publicity proviso." *Id.* at 473, 58 L.R.R.M. at 1022. This interpretation of the publicity proviso was affirmed by the Ninth Circuit. Great W. Broadcasting Co. v. NLRB, 356 F.2d 434, 436-37 (9th Cir. 1966).

In *Tree Fruits*, Mr. Justice Brennan concluded that "[p]eaceful consumer *picketing* to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product. The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to authorize *publicity other than picketing* which persuades the customer of a secondary employer to *stop*

When handbilling is used in conjunction with picketing, the object of the handbilling may be deemed indicative of the object of the picketing. Such was the case in *Los Angeles*, where the board said that the intent of the picketing, especially where the picket signs are not clear and specific, must be interpreted by the statements which accompany it.[34] In the marginal cases, the issue may well be resolved by attributing to the picketing the object of any accompanying handbilling. This should work both ways: handbilling with an object of totally boycotting the secondary would probably make any accompanying picketing illegal, while handbilling with an object of boycotting only the struck product would probably make the accompanying picketing legal.

Conclusion

A brief recapitulation of the rules heretofore discussed seems appropriate. The test used to determine whether consumer picketing is legal is an "object", or purpose test: If the object is a general attack on the entire business of the secondary employer, the picketing is illegal, while if the object is solely to attack the struck product without any general attack on the secondary's business, the picketing is legal.[35] An inference of illegal purpose will be drawn if the struck product is merged into the general business of the secondary employer.[36] If the struck product is insufficiently identified in the picket signs, an inference of an illegal object may be drawn.[37] The object of any accompanying handbilling may be deemed the object of the picketing.[38]

The foregoing rules, however, ignore a basic fact of life. It seems fair to say, regardless of whether the "object" is legal or illegal within

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all trading with him. . . . On the other hand, *picketing* which [also] persuades the customers of a secondary employer to *stop all trading* with him *was . . . barred.* NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 70-71 (1964) (emphasis added). In *Honolulu Typographical Union No. 37*, the NLRB noted the distinction drawn by Mr. Justice Brennan "between proviso-authorized publicity, which the Court found allowed a union to persuade the customers of a secondary employer to stop *all* trading with him, and permissible consumer picketing, which the Court made clear did not extend to such a broadside appeal." 167 N.L.R.B. 1030, 1031, 66 L.R.R.M. 1194, 1195-96 (1967). The board's view was apparently adopted by the District of Columbia Circuit because it upheld the board and enforced its order. Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952, 953 (D.C. Cir. 1968).

34. Accompanying statements, for example, would include handbills and television or radio interviews. *See* Los Angeles Typographical Union No. 174, 181 N.L.R.B. —, —, 73 L.R.R.M. 1390, 1392 (1970).

35. See text accompanying note 17 *supra.*

36. See text accompanying notes 20-22 *supra.*

37. See text accompanying note 28 *supra.*

38. See note 33 & text accompanying note 34 *supra.*

the meaning of the act, that the real purpose of *any* consumer picketing by a union is to cause the secondary employer to pressure the primary employer. Whether or not the union will be allowed to try to accomplish this end depends on the set of legal niceties already developed. It also seems fair to say that the union's most effective weapon with the consumer is a picket line. Because some consumers never read the signs, and others refuse to cross any type of picket line, it behooves the union to make a conscious effort to stay within the bounds of a "good" object even at the risk of using a less forceful message on the picket signs. The question, then, is what the union should do as *a matter of practicality* when it decides to consumer-picket or "product-picket" a secondary employer who advertises in the primary employer's newspaper.

It seems clear that the union should only picket those advertisers who advertise specific items. If an advertiser advertises his business generally, the merged-product doctrine will make any consumer picketing illegal. If action is to be taken against such an advertiser, it should be in the form of publicity other than picketing.

The picketing should be limited to one or two items which the consumer is being asked to boycott. If the store advertises many items, the union should pick one or two. Failure to make a clear indication of just one or two items may subject the union to the criticism that it has failed to sufficiently identify the struck product. The argument would be that too many "struck products" on the signs either confuse the consumer or cause him to forego reading the sign because to do so would be too time consuming. In such a situation, the inference of an illegal object might well be warranted. Similarly, the items identified should be prominently displayed on the signs in large print. Failure to do so might result in a finding that the union was trying to conceal the identity of the struck product. This, too, could justify the inference of an illegal object.

It would be wise for the union to use handbilling in addition to the picketing. Just as handbilling can be used to infer an illegal object, it ought to be available to infer a proper object. If the handbills explained the dispute, and then clearly identified the one or two items to be boycotted, the union's activity should be within the permissible limitations of the act.

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