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Labor Law -- Secondary Consumer Boycotts, Picketing, and Publicity -- The Landrum-Griffin Amendment to the Labor Management Relations Act

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the close corporation and frustrate its continuance. While it is difficult to understand the objectives achieved by the decision, it is in accord with the weight of authority.⁴⁶ It further demonstrates the necessity of providing for every possible contingency which might adversely affect the affairs of the corporation in a sale or transfer of its shares of stock.⁴⁷

THOMAS C. WETTACH

Labor Law—Secondary Consumer Boycotts, Picketing, and Publicity—The Landrum-Griffin Amendment to the Labor Management Relations Act

In two recent cases, the United States Supreme Court has examined statutory restrictions on secondary boycott activity and, for the first time, the extension of these restrictions in the labor reform legislation of 1959. The Court held in *NLRB v. Fruit & Vegetable Packers*¹ that Congress did not intend that the 1959 Landrum-Griffin amendments² to section 8(b)(4) of the Labor Management

⁴⁶ See note 22 *supra*.

⁴⁷ The need for providing for every contingency is shown in *Albert E. Touchet, Inc. v. Thompson*, 259 Mass. 220, 156 N.E. 41 (1927), where the court held that even though the bylaw of the corporation was binding on the shareholder, his executor, administrator, or assignee to offer the stock for appraisal with rights to purchase it in the corporation, it was not binding on the deceased shareholder's special administrator, since the special administrator had not been provided for in the bylaw. *But see Guaranty Laundry Co. v. Pulliam*, 198 Okla. 667, 181 P.2d 1007 (1947), where the court in effect held that restrictions are usually construed to permit the widest range under the language used.

¹ 377 U.S. 58 (1964).

² (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any 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

Relations Act (Taft-Hartley Act)³ be applied to prohibit secondary consumer picketing when the public is asked "only to boycott the primary employer's goods."⁴ In a companion decision, *NLRB v. Servette, Inc.*,⁵ handed down the same day, the Court held that though Congress had expanded the class protected from inducement by subsection (i) of the amended act from "employees" to "any individual employed by any person," inducement of such individuals was lawful when it was designed to induce "a policy decision"⁶ or was "an appeal for the exercise of managerial discretion."⁷

In *Fruit Packers*, the striking union picketed certain supermarkets that were selling at retail apples packed by the struck employers. Placards worn by the pickets and handbills distributed by them asked customers of the supermarkets not to buy the apples. The customers were not asked to cease dealing with the markets, nor were employees of the supermarkets asked to cease work, to

been certified as the representative of such employees under the provisions of section 159 of this title: *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 labor organizations, 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.

Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704(a), 73 Stat. 542, 29 U.S.C. § 158(b)(4) (Supp. IV, 1963).

³ 61 Stat. 140 (1947). The 1959 amendments to the Taft-Hartley Act (a) changed the phrase "employees of any employer" to "any individual employed by any person engaged in commerce or any industry affecting commerce," (b) eliminated the qualification of a refusal as "concerted," (c) added subsection (ii) prohibiting the threatening, coercing, or restraining of a person engaged in commerce, etc. (d) rewrote the clauses to some extent, shifting certain objects from clause (A) to clause (B), (e) added the proviso to clause (B), and (f) added the second proviso protecting publicity other than picketing.

⁴ 377 U.S. at 63.

⁵ 377 U.S. 46 (1964).

⁶ *Id.* at 49.

⁷ *Id.* at 50 n.4.

refuse to handle the apples, or to honor the picket lines in any way.⁸ Care was taken by the union to make these distinctions as clear as possible to all parties.⁹ In *Servette*, representatives of the striking union asked supermarket managers to cease dealing in products supplied by the struck distributor and warned that handbills would be passed out in front of those markets which continued to deal with the distributor. In some cases handbills were actually passed out, asking customers not to buy the *Servette*-distributed products.

The National Labor Relations Board, following its ruling in *Upholsterers Frame & Bedding Workers (Minneapolis House Furnishing)*,¹⁰ held that the union's actions in *Fruit Packers* were a per se violation of section 8(b)(4)(ii)(B) in that they threatened, coerced, or restrained a person (*i.e.*, a supermarket, a corporate person) engaged in commerce.¹¹ The Board found that the picketing was not aimed at and did not induce the supermarket employees (individuals employed by a person engaged in commerce) and thus did not violate section 8(b)(4)(i)(B), but ruled that, by its very nature, consumer product picketing could not help but threaten, coerce, or restrain the supermarkets.¹² Since the second proviso to section 8(b)(4) expressly excepted picketing from the protection it afforded other truthful publicity, and because *Minneapolis House Furnishing* had already rejected any implied protection it might afford to picketing aimed exclusively at the consumer public, the Board did not find it necessary to discuss the proviso again in this case. The Circuit Court of Appeals for the District of Columbia rejected the Board's holding that picketing was a per se violation of subsection (ii), observing that section 8(b)(7) demonstrated that Congress had been more specific when its purpose was to ban all

⁸ "[P]ickets were . . . instructed 'to patrol peacefully in front of the consumer entrances, to stay away from the delivery entrances . . .'" 377 U.S. at 61.

⁹ *Id.* at 73-76 (Appendix).

¹⁰ 132 N.L.R.B. 40 (1961), *enforcement denied*, 331 F.2d 561 (8th Cir. 1964). In denying enforcement the Court of Appeals for the Eighth Circuit cited the Supreme Court's *Fruit Packers* decision.

¹¹ *Fruit & Vegetable Packers (Tree Fruits Labor Committee)*, 132 N.L.R.B. 1172 (1961).

¹² The purpose of picketing Safeway stores was to persuade consumers not to purchase nonunion Washington State apples which Safeway in turn purchased from members of Tree Fruits. The natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers.

Id. at 1177.

picketing in a particular circumstance, and held that to find the picketing in this case was unlawful would require a finding that it did *in fact* threaten, coerce, or restrain the supermarkets.¹³ It remanded the case to the Board so that it might hear evidence on this point. The court of appeals read the publicity proviso as protecting publicity, other than picketing, even when it did in fact threaten, coerce, or restrain. Picketing that did not in fact threaten, coerce, or restrain did not need any protection the proviso might have afforded.

On certiorari, the Supreme Court majority rejected both views taken below, reasoning that Congress has prohibited peaceful picketing only when dealing "explicitly with isolated evils which experience has established flow from such picketing,"¹⁴ and holding that no such explicitness concerning product picketing, as contrasted with general secondary picketing, is to be found in the legislative history of the amendment.¹⁵ It thus took the position that, absent the specificity required of picketing ban legislation, secondary consumer picketing that was limited to following the struck product as a matter of law did not threaten, coerce, or restrain the secondary employer. Since the picketing did not threaten, coerce, or restrain, it did not need the protection of the publicity proviso, and thus the Court did not have to deal with the exception of picketing from that protection.

In the companion *Servette* case, the Board, on the basis of a high-low level supervisor-manager test established in *Local 505, Teamsters Union (Carolina Lumber)*¹⁶ and followed in *Minneapolis House Furnishing*, decided that the supermarket managers were high level supervisors whom the union *could* induce or encourage to cease doing business with other persons and thus they were not individuals within the intent of the act.¹⁷ The *Carolina Lumber* test described such high level supervisors as executives who made managerial decisions and who were not likely to neglect their employer's interests because of sympathies in common with rank and

¹³ *Fruit & Vegetable Packers v. NLRB*, 308 F.2d 311 (D.C. Cir. 1962), 62 COLUM. L. REV. 1336.

¹⁴ 377 U.S. at 62-63, quoting *NLRB v. Drivers Local Union*, 362 U.S. 274, 284 (1960).

¹⁵ The Court rejected indications that at least the opponents of the bill understood it to prohibit consumer product picketing. 377 U.S. at 66.

¹⁶ 130 N.L.R.B. 1438 (1961).

¹⁷ *Wholesale Delivery Drivers Union (Servette, Inc.)*, 133 N.L.R.B. 1501 (1961).

file employees. High level supervisors, although they are not individuals within the meaning of subsection (i), are protected from threats, restraint, or coercion by subsection (ii) since it seems clear that "person" in this subsection means both physical and corporate persons. On the other hand, low level supervisors such as gang foremen are not to be induced under this test because they are likely to have interests closely aligned with labor, including occasionally even union membership. This latter class is protected by both subsections, as are non-supervisory employees. There is no clear dividing line that can be drawn between high and low level. Each new case must be considered on all factors of company organization including, but not exclusively, the supervisor-manager's authority and responsibility, his working conditions, his salary, and his benefits.

The Court of Appeals for the Ninth Circuit, taking a literal view of the statute's wording, discarded the *Carolina Lumber* test, but it reversed the Board on the basis that Servette, a distributor, was not a producer within the meaning of the publicity proviso and thus the handbilling activities of the union were not protected by it.¹⁸ This position had been taken by dissenting Board Member Rodgers, who also determined that the handbills distributed by the union had not been truthful.¹⁹ The Board majority did not elaborate its finding that a distributor such as Servette was not a producer, having done so already in a previous case.²⁰

The Supreme Court, in its unanimous decision, supported the Board's view of Servette as a producer²¹ and followed the court of appeals in its rejection of *Carolina Lumber*. It held, in a footnote to its opinion, that the applicability of subsection (i) turned not upon the high-low level supervisor-manager distinction but "upon whether the union's appeal is to cease performing employment services, or is an appeal for the exercise of managerial discretion."²²

The language of section 8(b)(4), before and after the 1959 amendments, has never been a subject of easy interpretation for

¹⁸ *Servette, Inc. v. NLRB*, 310 F.2d 659 (9th Cir. 1962). See *Great Western Broadcasting Corp. v. NLRB*, 310 F.2d 591 (9th Cir. 1962).

¹⁹ 133 N.L.R.B. at 1502. See *Middle South Broadcasting Co.*, 133 N.L.R.B. 1698, 1706 (1961); *Teamsters Union (Lohman Sales)*, 132 N.L.R.B. 901, 910 (1961).

²⁰ *Teamsters Union (Lohman Sales)*, *supra* note 19.

²¹ 377 U.S. at 55.

²² *Id.* at 50 n.4.

the courts.²³ To have construed it literally, prior to the amendment, would have been to ban even primary picketing,²⁴ and this was not the intent of Congress.²⁵ Under the original language, the inducement or encouragement had to be concerted, so that an isolated incident of inducement was not covered.²⁶ Even if the picketing was at the secondary employer's place of business, it was not barred unless its object was to cause the secondary employer's employees to walk out.²⁷ Supervisors, since they were specifically not "employees" as defined by the act,²⁸ could be induced or encouraged to support the union, no matter how low their position.²⁹ And the employees of certain activities, such as government agencies,³⁰ were not covered since these activities were not employers subject to the act.³¹

Congress sought, by the 1959 amendment,³² to clarify and broaden the coverage of this section.³³ In attempting to close the

²³ This section is "surely one of the most labyrinthine provisions ever included in a federal labor statute . . ." Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113 (1960).

²⁴ *International Union of Elec. Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 672 (1961).

²⁵ *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672 (1951).

²⁶ *Id.* at 670-71.

²⁷ *NLRB v. Business Mach. & Office Appliance Mechanics*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956). "It was not shown that the picketing had any tendency to induce the employees to strike or cease performing services." 228 F.2d at 560.

²⁸ Labor Management Relations Act (Taft-Hartley Act) §§ 2(3), (11), 61 Stat. 137 (1947), 29 U.S.C. §§ 152(3), (11) (1959).

²⁹ *Sheet Metal Workers (Ferro-Co Corp.)*, 102 N.L.R.B. 1660 (1953) (substitute foreman); *Local 878, Teamsters Union (Arkansas Express)*, 92 N.L.R.B. 255 (1950) (shipping dock foreman, a union member); *Local 294, Teamsters Union (Conway's Express)*, 87 N.L.R.B. 972 (1949), *aff'd sub nom. Rabouin v. NLRB*, 195 F.2d 906 (2d Cir. 1952) (management representatives).

³⁰ *International Bhd. of Elec. Workers*, 104 N.L.R.B. 1128 (1953).

³¹ Labor Management Relations Act (Taft-Hartley Act) § 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1959). See *International Woodworkers (W. T. Smith Lumber Co.)* 116 N.L.R.B. 1756 (1956), *enforcement denied sub nom. W. T. Smith Lumber Co. v. NLRB*, 246 F.2d 129, 132 (5th Cir. 1957) (railroad); *Local 833, UAW (Paper Makers Importing Co.)*, 116 N.L.R.B. 267 (1956) (municipal employees). Compare *DiGiorgio Fruit Corp.*, 87 N.L.R.B. 720, 721 (1949), *enforced*, 191 F.2d 642 (D.C. Cir.), *cert. denied*, 342 U.S. 869 (1951), where a farm labor union was not prohibited from secondary boycott activity since it was not subject to the act.

³² For the text of the amendment, see note 2 *supra*. For the textual changes it made, see note 3 *supra*.

³³ *NLRB v. Servette, Inc.*, 377 U.S. 46, 51 (1964); Aaron, *supra* note 23, at 1114; Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 270 (1959).

loopholes, it included isolated incidents of inducement by eliminating the word "concerted" in subsection (i) and enlarged the class covered by this subsection at the very least to include low level supervisors, by the change in language to "any individual employed by any person." Coverage was extended to threats, coercion, and restraint of any person by the addition of subsection (ii), thus taking in secondary activities not directed solely at employees. Since Senate conferees were unable to persuade their House brethren not to prohibit at least some kinds of secondary picketing, the publicity proviso was added to protect "informational activity short of picketing."⁸⁴ The proviso to clause (B) was added to clarify Congress' intention not to obstruct picketing that was primary. But at least one author of the amendments, and other persons, have expressed the old problems were solved, new ones have arisen in the extension misgivings about the Board's understanding of these changes.⁸⁵ As of coverage to secondary consumer activity, in the addition of the proviso excepting certain kinds of this activity, and in the extension of coverage to a larger class of individuals that are employed. It is in these areas that the Court has spoken in the two instant cases.

In *Fruit Packers*, the Supreme Court majority's distinction between unlawful secondary consumer picketing "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer,"³⁶ and lawful secondary consumer picketing "directed only at the struck product"³⁷ is not a distinction "alluded to in the [Congressional] debates,"³⁸ nor made by commentators on the amendment immediately after its passage.³⁹ It is, however, a distinction made by other authorities,⁴⁰ including the *Restatement*

⁸⁴ 105 CONG. REC. 17898-99 (1959).

⁸⁵ Browne, *The National Labor Relations Board: Labor Law Rewritten*, 49 A.B.A.J. 64 (1963).

³⁶ 377 U.S. at 63.

³⁷ *Ibid.*

³⁸ *Id.* at 64.

³⁹ See, e.g., Aaron, *supra* note 23; Cox, *supra* note 33.

⁴⁰ *Goldfinger v. Feintuch*, 276 N.Y. 281, 286-87, 11 N.E.2d 910, 913 (1937). This case held that a unity of interest would permit struck product picketing at the secondary employer's place of business but contained dictum that picketing asking a withdrawal of business from the secondary employer was illegal. *Id.* at 286, 11 N.E.2d at 912. See 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 123 (1940). Compare *People v. Muller*, 286 N.Y. 281, 36 N.E.2d 206 (1941), permitting more than struck product picketing where the secondary employer uses the *services* of the

of *Torts*.⁴¹ Here the Court may have chosen to read a distinction not expressly stated by Congress in order to avoid the constitutional question of a blanket ban against picketing.⁴² This possibility was suggested by the concurring opinion of Mr. Justice Black in which he held the section, as applied against product picketing, in violation of the first amendment.⁴³ Black separated the coercive "patrolling" aspect of picketing from the non-coercive "speech"⁴⁴ element and reasoned that since it is the *object* of the picketing (a consumer boycott that threatens, coerces, or restrains a neutral secondary employer) that is determinative of the ban, the amendment is attacking the "speech" element. If the picketing were, for example, a protest against the supermarkets' *own* labor practices, the "patrolling" would be unchanged; only the "speech" would be different and the picketing would be lawful. Mr. Justice Harlan (joined by Mr. Justice Stewart in dissenting) set out a position supported by Black that all secondary consumer picketing is covered by the ban and that none of it is protected by the publicity proviso. But Harlan argued that it is the "patrolling" element that is being restricted, especially since other forms of expressing the same "speech" are permitted.⁴⁵

Restraints on peaceful picketing were broadly condemned by the Court in *Thornhill v. Alabama*.⁴⁶ But this position has been modified so that it is now fairly clear that picketing may be pro-

primary employer, *with* Local 142, Plumbers' Union (Shop-Rite Foods, Inc.), 133 N.L.R.B. 307 (1961).

⁴¹ In all cases, however, the scope of the request must be limited to A and his products. . . . B, the retailer, is also not entitled to complain, since the action is not directed at him and his loss of sales, if any, is due only to the diminution in the prestige of goods which he buys and markets If, however, the third persons are requested not to buy other goods from B because he sells A's soap, the rule stated in this section is inapplicable

RESTATEMENT, TORTS § 799, comment on clause (a) (1939). Cf. RESTATEMENT, TORTS § 801 (1939).

⁴² This is the position of one recent treatment of the case. Note, 42 TEXAS L. REV. 905 (1964).

⁴³ 377 U.S. at 76-80.

⁴⁴ *Id.* at 77. See Mr. Justice Douglas's concurring opinion in *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 775 (1942).

⁴⁵ "[T]hat Congress in prohibiting secondary consumer picketing has acted with a discriminating eye is the very thing that renders this provision invulnerable to constitutional attack." 377 U.S. at 93.

⁴⁶ 310 U.S. 88 (1940). "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Id.* at 102.

hibited if its object is either unlawful⁴⁷ or "far outweighed" by the interests that would be harmed by the picketing.⁴⁸ Even if the picketing is considered to be speech, it may be restricted to the area of the primary dispute.⁴⁹ This line of cases suggests that, recognizing an unequivocal congressional ban on secondary consumer picketing aimed only at the product and thus compelled to deal with the constitutional question, the majority opinion in *Fruit Packers* could be read as exhibiting a willingness to find that the evils seen by Congress justified the prohibition.⁵⁰

In the first attempts at dealing with secondary boycotts, the concern and emphasis was with the detrimental effect on the neutral secondary employer. "Picketing the premises of a secondary is of course a prototype secondary boycott, forbidden by the act."⁵¹ Complications arose in the blending of permitted primary effects and undesired secondary effects of picketing when the primary employer and secondary employer were doing business on common or adjacent premises. These complications led the Board, in *Sailor's Union (Moore Dry Dock Co.)*,⁵² to declare that picketing at a common situs was permitted at times when the primary employer was engaged in normal business on the site of the secondary employer, provided the picketing was performed so as to disclose clearly that the dispute is with the primary employer only. This rule was limited by *Brewery Drivers (Washington Coca-Cola Bottling Works)*⁵³ to situations in which the primary employer had no separate place of business that could be picketed. However, this limitation was at least somewhat removed by *Local 861, Int'l Bhd. of*

⁴⁷ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

⁴⁸ *International Bhd. of Teamsters v. Hanke*, 339 U.S. 470, 477 (1950).

⁴⁹ But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communications to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication.

Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 727-28 (1942).

⁵⁰ See Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591-602 (1951).

⁵¹ Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1374 (1962).

⁵² 92 N.L.R.B. 547 (1950) (primary employer's ship at secondary employer's dock).

⁵³ 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955) (picketing at retail outlets asked public not to buy Coca-Cola).

Elec. Workers (Plauche Elec., Inc.).⁵⁴ Thus, the lawfulness of such picketing in such blended situations remains unclear.⁵⁵

Fruit Packers, however, places little emphasis on the secondary character of the picketing, *i.e.*, that it is on a clearly secondary site.⁵⁶ The Court gives lip service to the strict traditional view that this is a secondary boycott because "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,"⁵⁷ but, by implication, seems to move toward abandoning it. The aim of the picketing in *Fruit Packers*, the Court found, was not "to compel [the neutral secondary employer] . . . to stop business with the [primary] employer in the hope that this will induce the [primary] employer to give in to his employees' demands."⁵⁸ Rather, it was primary picketing, in that it was aimed at sales depended upon by the primary employer, with inevitable secondary side effects—a drop in the supermarkets' sales of apples and some contingent economic damage to the markets—which are unfortunate but not the subject of real concern. When the side effects are thus de-emphasized, perhaps the picketing could be viewed as not within section 8(b)(4) at all.⁵⁹ Whether the Court could comfortably make the same de-emphasis if the secondary employer were a one-product retailer is a question raised by

⁵⁴ 135 N.L.R.B. 250 (1962) (workers spending entire day on secondary site after reporting in at primary site).

⁵⁵ See *United Steelworkers v. NLRB*, 376 U.S. 492 (1964), the Court's most recent ruling in this area.

⁵⁶ 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 firm are decreased only because the public has diminished its purchase of the struck product.

⁵⁷ 377 U.S. at 72. (Emphasis added.) See also *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961), stating:

Important as is the distinction between legitimate "primary activity" and banned "secondary activity," it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade.

Id. at 673.

⁵⁸ *International Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950) (L. Hand, J.).

⁵⁹ *Ibid.*

⁶⁰ See Note, 73 *YALE L.J.* 1265, 1278 (1964). The author there takes the position that "the expansion of the concept of primary dispute to encompass product picketing may run counter to the rationale of many cases involving common situs picketing." *Ibid.*

Mr. Justice Harlan in his dissent.⁶⁰ On its face, the majority's decision in *Fruit Packers* would seem to preclude any other emphasis.

While the above basis can be found for the *Fruit Packers* decision, *Servette* established an entirely new rule of labor law by shifting the test of proscribed section 8(b)(4) inducement from the type of employee or individual induced to the function that he is to perform or not to perform. The Court supplies no definition of the exercise of "managerial discretion"⁶¹ and cites nothing in explanation of the term, either in congressional action or elsewhere.⁶² Though the new rule would not alter the outcome if applied by the National Labor Relations Board in the instant case,⁶³ it cannot be dismissed as dicta.⁶⁴

⁶⁰ *E.g.*, an "independent gas station owner [who] sells gasoline purchased from a struck gas company," as in Harlan's example. 377 U.S. at 83. To the one-product retailer, the distinction is certainly of no comfort. If the picketing is successful, he is put out of business either way. But is his unity of interest with the gas company sufficient to justify this?

⁶¹ NLRB v. *Servette, Inc.*, 377 U.S. 46, 50 n.4 (1964).

⁶² *Quaere*, when is discretion not managerial and its inducement thus presumably unlawful under section 8(b)(4)(i) as a withdrawal of services, if ever? To remain within the *Servette* fact situation, if the union had approached a low level employee, perhaps a union member, who was responsible for storefront displays and induced him not to use *Servette*-distributed products in his displays, would his action be a refusal "to perform . . . services," a "refusal in the course of his employment to use . . . any goods," or an exercise of managerial discretion within the rule? A situation similar to this arose in Local 294, Teamsters Union (Van Transport Lines), 131 N.L.R.B. 242, *enforced*, 298 F.2d 105 (2d Cir. 1961).

⁶³ It is doubtful that use of the managerial discretion test would have changed the results in other cases decided by the Board on the high-low level principle. See, *e.g.*, Warehouse Employees Union (C. R. Sheaffer & Sons), 136 N.L.R.B. 968 (1962) (manager refused to accept delivery of struck products after being informed union would handbill, an activity deemed legal); Teamsters Union (Editorial "El Imparcial," Inc.), 134 N.L.R.B. 895 (1961); Teamsters Union (Lohman Sales), 132 N.L.R.B. 901 (1961); Excavating & Building Material Chauffeurs Union (Consalvo Trucking, Inc.), 132 N.L.R.B. 827 (1961) (*held*, a managerial decision); Upholsterers Frame & Bedding Workers (Minneapolis House Furnishing), 132 N.L.R.B. 40 (1961), *enforcement denied*, 331 F.2d 561 (8th Cir. 1964); Sheet Metal Workers Int'l Ass'n (S. M. Kisner & Sons), 131 N.L.R.B. 1196 (1961) (vice president told union "wished" that a subcontract not be awarded struck employer); Amalgamated Meat Cutters (Peyton Packing Co.), 131 N.L.R.B. 406 (1961) (meat market manager asked to stop or slow down buying from struck employer); Local 294, Teamsters Union (Van Transport Lines), 131 N.L.R.B. 242, *enforced*, 298 F.2d 105 (2d Cir. 1961); Local 324, Int'l Union of Operating Engineers (Brewer's City Coal Dock), 131 N.L.R.B. 228 (1961) (inducement of top supervisor not to accept delivery of struck sand); Local 505, Teamsters Union (Carolina Lumber), 130 N.L.R.B. 1438 (1960).

⁶⁴ Respondent *Servette* argued that the evidence disclosed that the managers in fact had no managerial discretion to exercise in dealing with

The liberal rather than the restrictive approach to statutory interpretation in the labor field is seen in *Servette* in the Court's approach to the subsection (i) phrase "any individual employed by any person." Though Congress intended to close the loophole in the original section 8(b)(4) whereby "supervisors"⁶⁵ were not protected from inducement, any apparent broadening of the protection to all persons employed of whatever description had been severely limited by the Board in decisions following *Carolina Lumber*.⁶⁶ The Court of Appeals for the Ninth Circuit attempted to correct this limitation by reading the new phrase in its plain, literal, and broadest sense.⁶⁷ The Supreme Court agreed,⁶⁸ but to leave this as its decision would limit the union's appeal for support in its dispute to "employers" or "persons engaged in commerce" alone. If the "person" is not an individual proprietorship or a partnership, but a corporation, under this literal reading there is no one within the business enterprise who legally can be induced. To induce the corporate person it is necessary to induce some individual employed by it. To avoid this trap it was necessary for the Court to examine the function that an individual of the now all-inclusive class is to be induced to perform or not to perform.

There is direct support for the Court's reading of "produced" in the publicity proviso as intended by Congress to include activities such as those of *Servette*.⁶⁹ If the Court had been intent in taking the restrictive rather than the liberal approach to statutory interpretation in the labor field, it could have attached "significance to the fact that an earlier version of the proviso read: '. . . that goods are produced *or distributed* by an employer . . .'"⁷⁰ The omission of the italicized phrase could have been read as a deliberate intention

Servette. They had to consult with their supervisors. Brief for Respondent, pp. 20-22, *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964). It was also argued that corporate officers were not included in "any individual." *Id.* at p. 19. See Upholsterers Frame & Bedding Workers (Minneapolis House Furnishing), 132 N.L.R.B. 40, 66 (1961). Though it was insisted that the plain meaning of the statute should be followed. Brief for Respondent, p. 11.

⁶⁵ Labor Management Relations Act (Taft-Hartley Act) §§ 2(3), (11), 61 Stat. 137 (1947), 29 U.S.C. §§ 152(3), (11) (1959).

⁶⁶ The Board has applied the high-low level test in at least ten other cases. See cases cited note 63 *supra*.

⁶⁷ *Servette, Inc. v. NLRB*, 310 F.2d 659, 665 (9th Cir. 1962).

⁶⁸ 377 U.S. at 49-50.

⁶⁹ "'Produced' means produced, manufactured, mined, *handled* or in any other manner worked on . . ." Fair Labor Standards Act § 3(j), 52 Stat. 1061 (1938), 29 U.S.C. § 203(j) (1958). (Emphasis added.)

⁷⁰ 105 CONG. REC. 17333 (1959). (Emphasis added.)

to exclude distributors' employees from the protection of the proviso rather than an understanding that "produced" included distributing activities. Such an intention, however, would be subject to attack as arbitrary. There is no apparent basis for not extending to distributors' employees a right that seems to be constitutionally guaranteed.

The close distinctions made by the Court in these two decisions seem to have been made with a favorable attitude toward the labor movement. Implicit in them is a view that labor's right to present its case to the public outweighs the damage that may be caused to neutrals by necessary means of presenting that case. Yet the criteria that this view forced upon the Court can be expected to haunt it in later cases and, more certainly, to cause sleepless nights for labor counsel. Will the Court protect consumer product picketing of one-product retailers? If Congress is more explicit in banning such picketing, will the Court respect its wishes? Most difficult, what can the unions ask "any individual" to do or not to do? At first examination, the labor movement might take comfort in answers projected from these two decisions. A wiser approach would be one tempered by caution.

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