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The Corporate Campaign--Labor's Ultimate Weapon or Suicide Bomb

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THE CORPORATE CAMPAIGN—LABOR'S ULTIMATE WEAPON OR SUICIDE BOMB?

C. EDWARD FLETCHER III†

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In recent years some labor unions have engaged in increasingly aggressive campaigns. The so-called "corporate campaign," which pressures employers to accede to the union's demands for more favorable working conditions, entails innovative tactics that unions direct against employers, the employers' shareholders, the employers' business associates, government agencies, as well as the consuming public. Using an actual corporate campaign as a prototype, Professor Fletcher examines federal labor and antitrust statutes in their statutory and historical context, and points out labor and antitrust law violations that occur during a typical corporate campaign. He also argues that aggressive corporate

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campaign tactics in toto may violate state tort laws. Finally, he concludes that, while some aspects of the corporate campaign receive constitutional or statutory protection, the more aggressive aspects violate the spirit and the letter of labor, antitrust, and state tort laws.

I. INTRODUCTION

The American labor union movement recently has entered a period of difficult times. Union membership has declined in the United States,¹ and many industries that historically have employed union labor are suffering economically.² The severity of the labor movement's plight has generated considerable publicity as unions continue to make wage and benefit concessions to management.³ Furthermore, in many instances traditional union tactics such as picketing and striking have failed to have any noticeable effect on the willingness of management to compromise.⁴

Although unsuccessful strikes are not a new phenomenon,⁵ more recent failures have occurred in an increasingly hostile climate. Union supporters are worried, and for good reason. Nevertheless, along with the wringing of hands, labor unions have exhibited a creative energy and a willingness to become more aggressive in dealing with recalcitrant employers.

The most recent manifestation of increased labor aggressiveness is the "corporate campaign,"⁶ a centrally coordinated, broad-stroke assault on the employer.⁷ Although the corporate campaign involves few new tactics, its use has broadened the scope of labor disputes considerably. By launching a corporate campaign against a company that refuses to accede to its demands, a labor union attempts to "bust the company."⁸ The corporate campaign idea has even spawned an entrepreneurial enterprise, "Corporate Campaign, Incorporated," which offers to coordinate labor campaigns against targeted employers.⁹

1. Both union density—union membership as a percentage of the total nonagricultural work force—and union membership in real numbers have declined in recent years. See Murphy, *Labor Pains*, 34 POL'Y REV. 76, 78-79 (1985); Weiler, *Promises to Keep: Serving Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771-72 (1983).

2. The steel and wood products industries have experienced a particularly sharp economic downturn. See *Steel Bargaining: The Last Chance*, BUS. WK., Jan. 17, 1983, at 94.

3. See, e.g., Wash. Post, Jan. 10, 1982, at H9, col. 1. A good example in the recent past is the heavily publicized Chrysler concessions made by the United Auto Workers. See N.Y. Times, Oct. 26, 1979, at A1, col. 4. Weakness in the wood products industry continues to require management to seek wage and benefit rollbacks. See Oregonian, Apr. 23, 1986, at C12, col. 1.

4. See, e.g., Oregonian, Mar. 17, 1986, at D9, col. 5; Wall St. J., Feb. 21, 1985, at 1, col. 6; Oregonian, June 25, 1984, at D9, col. 1; San Jose Mercury News, Feb. 19, 1984 (West magazine), at 1.

5. One of the most famous union debacles in British history was the failed general strike of 1926, which did much to propel Winston Churchill's political career. See W. MANCHESTER, *THE LAST LION: WINSTON SPENCER CHURCHILL* 794-804 (1983).

6. Although its origin is unclear, this phrase dates back at least to 1981. See Wall St. J., Mar. 1, 1985, at 38, col. 1.

7. See Daily J. Com., Mar. 12, 1984, at 1, col. 1.

8. See Wall St. J., June 26, 1984, at 27, col. 2 (union official involved in corporate campaign quoted as saying "[w]e're going to bust this company").

9. See Wall St. J., March 1, 1985, at 38, col. 1. This New York corporation has conducted at least six corporate campaigns on behalf of unions. See *id.*; see also *The Picket Line Gives Way to*

Unions have undertaken one of the most widely publicized corporate campaigns against Louisiana-Pacific Corporation, a diversified wood products manufacturer. Beginning in 1984¹⁰ the Western Council of Lumber, Production and Industrial Workers of America (Western Council) and the United Brotherhood of Carpenters and Joiners of America (UBC)¹¹ launched a multifaceted assault against Louisiana-Pacific Corporation. Although the campaign against Louisiana-Pacific ultimately failed, it illustrates the potential breadth of the corporate campaign and demonstrates the creativity that unions can display.

This Article, using the campaign against Louisiana-Pacific as an archetype, examines the corporate campaign from a legal perspective.¹² Part II describes the corporate campaign that the UBC and Western Council conducted against Louisiana-Pacific. Part III analyzes the vulnerability of that particular campaign to claims of unfair labor practices under section 8(b)(4) of the National Labor Relations Act (NLRA).¹³ Part IV addresses antitrust aspects of such campaign activities under the Sherman¹⁴ and Clayton Acts.¹⁵ Finally, Part V examines state tort law implications for labor unions that engage in corporate campaigns. This Article concludes that, although the unions involved in corporate campaigns purposely circumscribe their conduct in an attempt to fit within existing legal parameters, any such corporate campaign represents a transgression of both the letter and spirit of labor, antitrust, and state tort law. However, this Article also concludes that some of the potentially most effective aspects of the corporate campaign are lawful and even protected as a matter of constitutional law.

II. THE CORPORATE CAMPAIGN

When the UBC and Western Council began striking Louisiana-Pacific, they called for a national consumer boycott of all Louisiana-Pacific products, including Louisiana-Pacific's most promising new product, Waferwood, a brand of

Sophisticated New Tactics, BUS. WK., Apr. 16, 1984, at 116 (describing other campaigns conducted by Corporate Campaign, Inc.). The head of Corporate Campaign, Inc., Ray Rogers, served as the chief strategist for Local P-9 of the United Food and Commercial Workers Union's bloody strike against Geo. A. Hormel & Co. See *Oregonian*, Apr. 12, 1986, at C1, col. 6. Rogers was arrested and charged with felony riot after strikers injured nine policemen with rocks and mace in Austin, Minnesota. *Id.*

10. Because union pressures against Louisiana-Pacific increased steadily over a period of months, it is difficult to pinpoint the beginning of the corporate campaign. On March 2, 1984, however, the Western Council's newspaper officially announced the beginning of the corporate campaign. See *Union Reg.*, March 2, 1984, at 1, col. 1.

11. The Western Council and UBC are not formally affiliated. Unlike the Western Council, the UBC is affiliated with the AFL-CIO. Nevertheless, they share a certain amount of common membership, and they have joined together to fight Louisiana-Pacific. Although the UBC has taken the lead in corporate campaign activities, this Article treats the two unions as if they were one.

12. For descriptions of other corporate campaigns, see *A Final Onslaught at Phelps Dodge*, BUS. WK., Sept. 24, 1984, at 44; *The Picket Line Gives Way to Sophisticated New Tactics*, BUS. WK., April 16, 1984, at 116.

13. 29 U.S.C. § 158(b)(4) (1982).

14. 15 U.S.C. §§ 1-7 (1982).

15. 15 U.S.C. §§ 12-17, 44 (1982); 29 U.S.C. § 52 (1982).

compressed wood board designed as a substitute for plywood.¹⁶ This widely promoted "product boycott" involved, among other activities, picketing and leafleting retail distributors of Louisiana-Pacific products; the leaflets asked that consumers not purchase Louisiana-Pacific products at those particular retail establishments.¹⁷

The product boycott ultimately failed,¹⁸ however, and traditional union tactics such as striking and picketing also failed to produce concessions on the part of Louisiana-Pacific. To increase pressures on the company, the UBC and Western Council broadened the scope of their efforts, and in early 1984 launched the real corporate campaign.¹⁹

The first step in the campaign involved the expansion of the product boycott into a "don't patronize" boycott. This intensified boycott had five key components. First, the unions leafleted retailers that sold Louisiana-Pacific products and asked customers not to patronize those stores.²⁰ Second, the unions wrote letters to certain retailers and threatened them with boycott activities if they continued to carry Louisiana-Pacific products.²¹ Third, the unions issued news releases and threatened to conduct boycotts of any retailers carrying Louisiana-Pacific products.²² Fourth, they used radio and newspaper advertisements in an effort to persuade consumers not to patronize certain named retailers carrying

16. Louisiana-Pacific produces plywood, lumber, and wood pulp.

17. See Union Reg., Mar. 2, 1984, at 1, col. 1; see also Union Reg., June 21, 1985, at 1, col. 2 (picket reading, "If You Shop Here, Please Do Not Buy Unfair Louisiana-Pacific Wood Products"). At the request of the UBC, the AFL-CIO Executive Council in December 1983 called for a nationwide boycott of all Louisiana-Pacific wood products. See UNITED BHD. OF CARPENTERS & JOINERS OF AM., THE FIGHT GOES ON: LOUISIANA-PACIFIC STRIKE ANNUAL REPORT, at 4 (n.d.) [hereinafter ANNUAL REPORT].

18. A union newspaper called for tactics more aggressive than those a product boycott would entail. See Union Reg., May 3, 1985, at 6, col. 2.

19. See Union Reg., Mar. 2, 1984, at 1, col. 1.

20. See Union Reg., Mar. 15, 1985, at 1, col. 3; Nat'l Home Center News, Dec. 17, 1984, at 7, col. 1; United Bhd. of Carpenters & Joiners of Am., News Release (Oct. 23, 1984).

21. A letter to one retailer from UBC General President, Patrick J. Campbell, read in part:

Based on information we have received; we have determined that Louisiana-Pacific products are sold at your store, and we plan to commence lawful, noncoercive boycott activities at your store and a number of other stores where Louisiana-Pacific products are sold. We intend to engage in lawful non-picketing publicity, including consumer leafleting to ask the public not to patronize your store. In conjunction with the consumer leafleting, newspaper and radio advertisements will be utilized. I have enclosed a copy of our newspaper advertisement as it appeared in the *Minneapolis Star and Tribune* initiating "don't patronize" activity in that area.

If, in fact, you do not distribute any Louisiana-Pacific products, please let us know as soon as possible.

Letter from Patrick J. Campbell to Yeager & Kirk (Dec. 5, 1984); see also Letter from Campbell to Richard Argin (Mar. 5, 1985) (threatening boycott of retailer). The union sent similar letters to an estimated 400 retailers. See Nat'l Home Center News, Dec. 17, 1984, at 7, col. 1.

22. A press release dated November 15, 1984, read in part:

The UBC confirmed through routine checks that at least three retailers, Menards, Lampert Building Centers, and Knox Lumber Co., located in the Minneapolis-St. Paul area, are distributing L-P products. Handbilling activities will commence on November 10.

The "Don't Patronize" effort includes intensified handbilling activity, newspaper ads, and radio spots naming the specific retailers selling L-P products. In addition to the three retailers targeted for initial activity, other chains retailing L-P wood products will be identified by staff checks in the coming weeks in different areas of the country.

Louisiana-Pacific products.²³ Before airing those advertisements, the unions made explicit public threats that the advertisements would be aired if the retailers did not cease doing business with Louisiana-Pacific.²⁴ Last, the boycott included an "adopt-a-lumber-store" campaign, in which union locals were encouraged to target local retailers of Louisiana-Pacific products and to dissuade those retailers, through boycott activities, from carrying Louisiana-Pacific products. The unions sent interested locals boycott literature, leaflets, instructions, and camera-ready advertisements for local newspapers.²⁵

The unions particularly aimed their "don't patronize" boycott at retailers carrying Waferwood, which the unions identified as a key target product.²⁶ Furthermore, the UBC's head office in Washington, D.C.²⁷ carefully orchestrated all boycott activities in an attempt to fit them within the ambit of what they perceived to be protected activity²⁸ under the NLRA.²⁹ However, the corporate campaign did not end with boycott activities.

The unions also engaged in the following activities in 1984 and 1985:

- (1) they opposed Louisiana-Pacific's application for Urban Development Action Grants,³⁰ claiming that the company made misrepresentations in its application;³¹
- (2) they brought numerous environmental challenges to Louisiana-Pacific activities,³² particularly in cases of proposed expansion of Louisiana-Pacific Waferwood production.³³ Those environmental challenges involved a cooperative effort with local and national environmental and citizen groups;³⁴

United Bhd. of Carpenters & Joiners of Am., News Release (Nov. 15, 1984).

That release contained what appears to be a thinly veiled threat directed at the three named retailers.

23. See Union Reg., May 3, 1985, at 6, col. 3.

24. See Nat'l Home Center News, Dec. 17, 1984, at 7, col. 1.

25. See Union Reg., Apr. 19, 1985, at 1, col. 3.

26. See CARPENTER, June 1985, at 8; Union Reg., May 3, 1985, at 6, col. 3.

27. The UBC produced nearly all the boycott literature. Its General President, Patrick J. Campbell, took an active role, and press releases regarding the boycott show that they emanated from UBC headquarters in Washington, D.C.

28. When the UBC initiated its leafleting campaign, it distributed instructions that admonished union members (1) to be peaceful; (2) not to block entrances; (3) to leaflet only consumer as opposed to employee entrances; (4) not to picket while conducting "don't patronize" leafleting; (5) not to interfere with employees or pick up and deliveries; (6) to keep the area clean and be courteous; and (7) not to use intoxicating beverages while leafleting. UNITED BHD. OF CARPENTERS & JOINERS OF AM., LEAFLETTER INSTRUCTIONS FOR "DON'T PATRONIZE" CAMPAIGN (n.d.). The union sent copies of the instructions to retailers that carried Louisiana-Pacific products with threats to conduct boycott activities at the retailers' establishments.

29. Also known as the Wagner Act, the NLRA is codified at 29 U.S.C. §§ 151-169 (1982).

30. Congress authorized Urban Development Action Grants in 1974 as part of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified at 42 U.S.C. §§ 5301-5320 (1982)). The grants are made, upon application, by the Department of Housing and Urban Development. See 36 C.F.R. § 801 (1985). Their stated purpose is "to promote . . . the development of viable urban communities." 42 U.S.C. § 5318(a) (1982).

31. See Union Reg., May 3, 1985, at 7, col. 4.

32. See, e.g., Campbell, *Two Vital Issues: The L-P Boycott and the Proposals to Tax Life-Support*, CARPENTER, Apr. 1985, at 40; *L-P Strikers at Shareholders Meeting*, CARPENTER, June 1985, at 9; Nat'l Home Center News, Dec. 17, 1984, at 127, col. 2.

33. See ANNUAL REPORT, *supra* note 17, at 5-6; Union Reg., May 3, 1985, at 6, col. 3.

34. Correspondence from the Sierra Club to state and national environmental agencies indi-

- (3) they wrote letters to the governors of states where Louisiana-Pacific was interested in expanding its presence. Those letters ostensibly were designed to "inform" the governors of safety problems at Louisiana-Pacific plants;³⁵
- (4) they opposed Louisiana-Pacific purchases of federal timber;³⁶
- (5) they wrote letters to Louisiana-Pacific creditors to "inform" them of the strike and its effects on Louisiana-Pacific's profitability;³⁷
- (6) they wrote letters to stock analysts to "inform" them of the strike and its effects on Louisiana-Pacific's profitability.³⁸ Later these letters became more threatening in both tone and substance;³⁹
- (7) they leafleted the Davis Cup international tennis matches sponsored by Louisiana-Pacific with union propaganda about the strike. The leaflets did not expressly encourage a boycott of the tennis matches;⁴⁰
- (8) they encouraged and supported local citizen opposition to the construction of a Waferwood plant in Virginia;⁴¹
- (9) they publicized the names of Louisiana-Pacific competitors. The competitors employed union labor, and their products could be substituted for Louisi-

cates that copies were sent to UBC officials. See, e.g., Letter from Judith Kunofsky to Fred Lief (May 9, 1984). Similarly, copies of letters from the Sierra Club to Louisiana-Pacific executives were sent to UBC officials. See Letter from Judith Kunofsky to Harry Merlo (May 9, 1984). In May 1985 the Western Council's newspaper reported:

During the course of the dispute, UBC members and affiliates have found numerous religious, civic and environmental groups interested in the labor dispute with L-P. The extensive research done by the UBC has helped facilitate the actions of varied organizations concerned with aspects of L-P operations. The common concerns of these organizations will help intensify the scrutiny on L-P with regard to a wide range of issues.

Union Reg., May 3, 1985, at 12, col. 1; see also Campbell, *supra* note 32, at 40 ("We've worked closely with religious and community groups to broaden our base of support against L-P.").

35. See Address by Patrick J. Campbell, UBC General President, UBC rally on Wall Street (Mar. 22, 1984).

36. See Union Reg., May 3, 1985, at 7, col. 5.

37. See Letter from Patrick J. Campbell to Willard C. Butcher (Chase Manhattan Bank) (February 14, 1984). The letter read in part:

I am taking this opportunity to inform you of the increasing seriousness of this dispute [with Louisiana-Pacific]. The United Brotherhood of Carpenters and the AFL-CIO have initiated a national consumer boycott of the Louisiana-Pacific wood products. Such an action against a wood products producer is unprecedented in the history of this organization, and it signals our total commitment to pursue actions which will aid in the just resolution of the dispute.

38. See Union Reg., Mar. 2, 1984, at 2. One such letter contained unfavorable press clippings concerning Louisiana-Pacific's attempts to expand its waferboard operations. See Letter from Edward J. Durkin to "Louisiana-Pacific Waferboard Analyst" (June 7, 1985).

39. See Letter from Patrick J. Campbell to William A. Schreyer (Merrill Lynch) (n.d.), reproduced in *Louisiana-Pacific Keep the Pressure On*, CARPENTER, Oct. 1985, at 14 ("I represent workers whose retirement funds and welfare funds hold considerable amounts of Merrill Lynch, Inc. stock and who utilize Merrill Lynch Asset Management investment services.").

40. The UBC prepared its own "program" with match information accompanied by union propaganda. In addition, the union passed out flyers that chronicled alleged Louisiana-Pacific transgressions. Included was the statement, "Enjoy the matches, but please don't be fooled by the public image L-P is trying to foster with its sponsorship of the Davis Cup." UNITED BHD. OF CARPENTERS & JOINERS OF AM., DOUBLE FAULT (n.d.); see also Oregonian, Sept. 30, 1984, at D12, col. 1 (reporting protest at match).

41. The UBC supported local citizen opposition to a new Louisiana-Pacific Waferwood plant in Virginia. See Roanoke Times & World News (Virginia), Mar. 17, 1985, at B1, col. 1.

ana-Pacific products;⁴²

(10) they organized a group of union members who owned small amounts of Louisiana-Pacific stock into a "Louisiana-Pacific Workers for Justice Committee." The committee conducted proxy fights in both 1984 and 1985 in an attempt to pass resolutions that would embarrass Louisiana-Pacific's management.⁴³ During both years the union was present at Louisiana-Pacific's annual meeting to conduct demonstrations, make speeches, and ask questions apparently designed to embarrass Louisiana-Pacific management;⁴⁴

(11) they threatened State Farm Insurance Group, a large Louisiana-Pacific stockholder,⁴⁵ with a boycott of State Farm policies if State Farm did not vote with the union in the proxy fight.⁴⁶ At the 1985 annual meeting, State Farm voted with the union on one of the union's three proxy resolutions;⁴⁷

(12) they threatened in public speeches to divest pension monies from companies holding Louisiana-Pacific stock;⁴⁸

(13) they leafleted Louisiana-Pacific's headquarters in Portland, Oregon, with flyers that accused Louisiana-Pacific of rigged timber bids, environmental pollution, racist employment policies, market manipulation, falsified records, and fraud.⁴⁹ Those accusations were repeated in union newspapers and in a letter to Portland mayor Frank Ivancie and other Portland city officials;⁵⁰ and

42. See *Blandex: A Union-Label Alternative to the Boycotted L-P Waferboard*, CARPENTER, Mar. 1985, at 10. A flyer distributed by the UBC read in part:

You don't need to buy L-P. There are plenty of quality wood products on the market. Other fair manufacturers make products comparable to those of *unfair* Louisiana-Pacific.

Here are a few of the hundreds of fair, responsible companies selling wood products at the same price as L-P—or in some cases even lower: [lists 11 Louisiana-Pacific competitors].

UNITED BHD. OF CARPENTERS & JOINERS OF AM., DON'T BUY L-P WOOD PRODUCTS (n.d.).

43. See Union Reg., May 3, 1985, at 7, col. 5. The "Workers for Justice Committee" and the UBC share a common mailing address in Washington, D.C.

44. See *L-P Strikers at Shareholders Meeting*, CARPENTER, June 1985, at 9. A flyer distributed before the 1984 annual meeting, entitled "Reckoning at Rocky Mount," detailed the committee's plans to disrupt the annual meeting. See Union Reg., May 18, 1984, at 1, col. 1 ("L-P shareholders take Merlo to task!").

45. State Farm at the time owned 2.4 million shares, approximately 75% of Louisiana-Pacific stock. Union Reg., May 3, 1985, at 1, col. 1.

46. See *id.* ("The [UBC] maintains a computer file of all union pension fund investments. These investments are increasingly dependent on the labor relations philosophies and practices of those companies in which the funds are invested.").

47. *Id.*

48. On March 22, 1984, UBC General President Patrick J. Campbell spoke to a small group of assembled union members on Wall Street in New York City:

Union pension funds, the lifeblood of this financial center, will be informed of our dispute with L-P. Union pension assets must not support L-P's union busting operations. Those banks, insurance companies and investment advisors who inhabit these streets and manage workers' retirement funds should take notice of our dispute with L-P.

Address by Patrick J. Campbell, UBC General President, UBC rally on Wall Street (Mar. 22, 1984).

49. One such flyer asked the rhetorical question: "Aside from union busting, has Louisiana-Pacific Corporation engaged in any other improprieties?" and then answered: "Yes. Among them are rigged timber bids, environmental pollution, racist employment policies, market manipulation, falsified recordkeeping and fraud." UNITED BHD. OF CARPENTERS & JOINERS OF AM., WHAT'S THE LABOR PROBLEM? (n.d.).

50. See Letter from Bradley K. Witt to Frank Ivancie (August 15, 1984). That letter read in part: "It is incomprehensible that the Mayor of Portland could laud a CEO whose corporation's

(14) they cooperated with a union-shop competitor of Louisiana-Pacific, Blandin Wood Products Company of Grand Rapids, Michigan, in an attempt to put economic pressure on Louisiana-Pacific. Blandin produces Blandex, a Waferwood type product. Blandin produces approximately 190 million square feet of Blandex per year—all produced by a UBC local. Blandin officials met with UBC members in 1985 and gave the UBC reporter and photographer access to the Blandex plant. In exchange the UBC ran a multipage article in its monthly magazine extolling the virtues of Blandex and reporting it to be a superior alternative to Waferwood.⁵¹

Despite the intensified efforts of the UBC and Western Council, their success is difficult to measure. Louisiana-Pacific never compromised in its bargaining position. Rather, the company reacted by backing decertification elections at all the struck plants.⁵² As a result, the union has lost the right to represent employees at many of the plants.⁵³ The unions have claimed that as many as 400 retailers no longer carry Louisiana-Pacific products as a result of union pressures.⁵⁴ Louisiana-Pacific stated in late 1984 that the total monetary cost of the strike and corporate campaign had been approximately four million dollars.⁵⁵ The unions have claimed a much higher figure.⁵⁶

Although the economic effect of the UBC and Western Council corporate campaign may be in question, there can be no doubt about the purpose of the effort. This "Main Street to Wall Street" campaign, as one union official described it,⁵⁷ was designed to put economic pressure on Louisiana-Pacific by costing the company money.⁵⁸ Due to the breadth of its scope and the ambitiousness of its goals, the corporate campaign against Louisiana-Pacific serves as an archetype for future labor campaigns. Furthermore, the campaign raises an important question—namely, whether a union can legally engage in such activi-

modus operandi includes [sic] fraud, market manipulation, environmental abuse, racist hiring policies, falsification of records, bilking public timber and attempted union-busting." Copies of the letter were sent to all Portland city council members and the mayor-elect.

51. *Blandex: A Union-Label Alternative to the Boycotted L-P Waferboard*, CARPENTER, Mar. 1985, at 10-11, 24.

52. At the time of this writing, the strike had not ended. Under the NLRA a union may lose its right to represent a body of workers if the workers vote to "decertify" the union. 29 U.S.C. § 159(e) (1982).

53. The union lost decertification elections in many of the struck plants. See, e.g., *Daily J. of Com.*, July 18, 1984, at 1, col. 3; *Wall St. J.*, June 26, 1984, at 27, col. 1; *Oregonian*, June 23, 1984, at E1, col. 8.

54. See CARPENTER, July 1985, at 12. The UBC has claimed that the boycott has been successful because of the financial pressures the union has brought to bear on retailers. *Union Reg.*, Apr. 5, 1985, at 1, col. 3-4 ("The 'Don't Patronize' aspect of the boycott is now beginning to cost retailers handling L-P products . . . with the result that increased response is now being generated in the form of lost L-P sales.").

55. See *Nat'l Home Center News*, Dec. 17, 1984, at 127, col. 2.

56. *Id.*

57. UBC General President Patrick J. Campbell coined this phrase. Address by Patrick J. Campbell, UBC General President, UBC rally on Wall Street (Mar. 22, 1984). The phrase was repeated in later union publications. See, e.g., *Union Reg.*, May 3, 1985, at 6, col. 3.

58. See *Union Reg.*, Apr. 5, 1985, at 1, col. 1. UBC General President Patrick J. Campbell stated that he was in no hurry to settle immediately: "I'd like to get a few more months of mileage out of this boycott campaign." *Id.* Another union official admitted that "[f]rom the beginning our goal has been to cost L-P money." *Id.* at 1, col. 3.

ties? The answer for the most part is in the negative under a proper interpretation of the relevant statutes and common law.⁵⁹

III. CONSTRAINTS IMPOSED BY THE NATIONAL LABOR RELATIONS ACT

A. *The Legislative Framework*

In analyzing the legal implications of the corporate campaign, the most obvious place to begin is with the legislative framework of the NLRA. Section 8 of the NLRA⁶⁰ describes the actions that constitute unfair labor practices by employers and labor unions. Section 8(b) declares certain union activities unfair labor practices.⁶¹ Subsection 8(b)(4)(ii) outlaws, among other activities, a union's exertion of secondary pressures⁶² on persons who do business with the primary employer. That subsection declares it to be an unfair labor practice for a labor organization or its agents

to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

(A) forcing or requiring any employer or self employed person . . . to enter into any agreement which is prohibited by subsection (e) of this section; [or]

(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 person⁶³

Subsection 8(b)(4) also contains the following "publicity proviso":⁶⁴

Provided . . . [t]hat for the purposes of this paragraph . . . only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public

59. Notwithstanding the expansive breadth of a typical corporate campaign, this Article focuses primarily on those aspects of the campaign that either constitute unlawful activity under applicable law or that enjoy constitutional protection. Those activities that are legally neutral are not discussed at length.

60. 29 U.S.C. § 158 (1982).

61. Section 8(a) defines unfair labor practices for employers; § 8(b) defines unfair labor practices for unions; and §§ 8(e)-(f) apply to both unions and employers. 29 U.S.C. § 158(a)-(f) (1982).

62. The difference between primary and secondary activity was cogently and concisely described by Professor Cox as follows:

Historically, a boycott is a refusal to have dealings with an offending person. To induce customers not to buy from an offending grocery store is to organize a primary boycott. To persuade grocery stores not to buy [a particular brand of] products is also a primary boycott. In each case the only economic pressure is levelled at the offending person—in terms of labor cases, at the employer involved in the labor dispute.

The element of 'secondary activity' is introduced when there is a refusal to have dealings with one who has dealings with the offending person Thus, there are two employers in every secondary boycott resulting from a labor dispute.

Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959).

63. 29 U.S.C. § 158(b)(4)(ii) (1982). Congress enacted § 8(b)(4)(ii) in 1947. Labor Relations Management Act, ch. 120, 61 Stat. 141-42 (codified as amended at 29 U.S.C. § 158(b)(4)(B) (1982)).

64. This phrase was coined by the National Labor Relations Board and first used by the federal judiciary in 1962. See *McLeod v. Business Mach. & Office Appliance Mechanics Conference Bd.*, 300 F.2d 237, 239 (2d Cir. 1962).

. . . 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 . . . 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.⁶⁵

Section 8(e), referred to in section 8(b)(4)(ii)(A) above, provides:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . selling . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person⁶⁶

The publicity proviso by its terms does not apply to section 8(e).⁶⁷

Sections 8(b)(4)(ii) and 8(e) enjoy an intimate relationship in secondary boycott law. By its terms section 8(b)(4)(ii) prohibits certain secondary boycott activities,⁶⁸ and by its terms section 8(e) outlaws the fruits of a successful "don't patronize" boycott—the agreement by the secondary employer to suspend business relations with the targeted primary employer in exchange for an end to the boycott activities.⁶⁹

B. *Secondary Boycott Activities Under Section 8(b)(4)(ii)*

1. Product Boycotts and Total Boycotts

An essential distinction in this area exists among three types of secondary boycott activities: The product boycott at the secondary level, the total secondary boycott with picketing, and the total secondary boycott without picketing. Courts have held the first type of boycott to be legal; the second type is clearly illegal; and the third type clearly should be illegal under the NLRA's proscriptions.

Initially, the unions' secondary activity in the campaign against Louisiana-Pacific took the form of a product boycott.⁷⁰ In such an action the union calls for a consumer boycott of all items produced by the primary employer. The union typically asks consumers not to purchase the primary employer's goods

65. 29 U.S.C. § 158(b)(4) (1982).

66. *Id.* § 158(e).

67. Sections 8(b)(4) and 8(e) in their present forms are both products of the Landrum-Griffin amendments to the Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. § 8(b)(4), (e) (1982)). For a thorough analysis of the Landrum-Griffin amendments, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 1086 (1960).

68. As discussed *infra* text accompanying notes 70-145, the degree to which § 8(b)(4)(ii) prohibits secondary boycott activities is a complicated matter, hotly disputed, and of great consequence to the corporate campaign.

69. See *infra* text accompanying note 151 (discussing the "implied agreement").

70. The UBC initially launched only a product boycott. See, e.g., Union Reg., Mar. 2, 1984, at 1, col. 3.

from a neutral secondary employer, such as a retailer or distributor. Often, union members picket a retailer with signs that read "Please Don't Buy X Brand Product At This Store."⁷¹

The total boycott carries the product boycott one step further. In a total secondary boycott, the union asks consumers not to buy *any* of the secondary employer's products because the secondary employer does business with the "unfair" primary employer. A crucial distinction exists between two types of total secondary boycotts: Those that involve picketing of the secondary employer and those that do not involve such picketing. Typically, if the union does not picket the secondary employer, it distributes leaflets or handbills. In either case, a typical total secondary boycott picket or leaflet would read "Please Don't Patronize This Store—It Buys From An Unfair Employer."

In 1964 the United States Supreme Court in *NLRB v. Fruit & Vegetable Packers* (Tree Fruits)⁷² held that the secondary product boycott is not an unfair labor practice under section 8(b)(4)(ii) of the NLRA.⁷³ In 1980, however, the Supreme Court in *NLRB v. Retail Store Employees*⁷⁴ held that *picketing* a secondary employer and calling for a total boycott of that secondary employer's business violates section 8(b)(4)(ii)(B).⁷⁵ The Supreme Court has discussed⁷⁶ but never decided the question raised by the secondary activities involved in the

71. In the case of Louisiana-Pacific, union members typically carried pickets that read: "Please don't buy unfair Louisiana-Pacific Corp. wood products. We have no dispute with this store." See *id.* at 1, col. 1-2.

72. 377 U.S. 58 (1964). The name "Tree Fruits" refers to the employer organization involved in that case, the Tree Fruits Labor Relations Committee, Inc. See *id.* at 59 n.2.

73. *Id.* at 71-72.

74. 447 U.S. 607 (1980).

75. *Id.* at 611. In *Retail Store Employees* the union had called for a secondary product boycott that had the predictable effect of inducing consumers to boycott totally the secondary employer's goods. The Court found this effect to be an evil, because the effect inevitably induces secondary employers to cease business relations with the primary employer and impermissibly expands the labor dispute. Expansion of the labor dispute is one of the evils intended to be countered by § 8(b)(4)(ii)(B) of the NLRA. *Id.* at 613-14. The Court reasoned that the product boycott, on the other hand, has the effect of inducing the secondary employer to drop only the struck product as a poor seller. *Id.* at 613.

The reasoning of the Court in *Retail Store Employees* is unclear. The total secondary boycott is an evil precisely because of the way it expands a labor dispute. The product boycott has the same purpose and effect—coercing the secondary employer to cease or curtail business relations with the primary employer. The distinction between product boycotts and total boycotts is therefore difficult to justify, as is the holding of *Tree Fruits*.

76. See, e.g., *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 153-56 (1982); *Tree Fruits*, 377 U.S. at 63-64. In *Tree Fruits*, the Court seemed to condemn all total secondary boycott activities:

In the [product boycott] case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.

Id. Thus, the Court announced that § 8(b)(4)(ii) of the NLRA prohibits total secondary boycott activities, unless of course those activities are protected by the publicity proviso. As discussed below, however, the proscriptive provisions of § 8(b)(4)(ii) and the publicity proviso are mutually exclusive. That which the Court condemned in the above passage from *Tree Fruits* can never be protected by the publicity proviso. See *infra* text accompanying notes 126-145.

corporate campaign: May a labor union lawfully leaflet, rather than picket, a secondary employer and call for a total boycott of that secondary employer's business in an attempt to induce that secondary employer to cease doing business with the primary employer? The answer, under a proper reading of the NLRA, is no.

2. The NLRB on Total Secondary Boycotts

The National Labor Relations Board (NLRB), however, has consistently espoused a position at variance with both the judicial case law and the statute itself on the question of secondary boycotts. The NLRB provides an alternative forum for victims of unfair labor practices who elect not to bring suit in federal court.⁷⁷ Since Congress inserted the publicity proviso into section 8(b)(4) in 1959,⁷⁸ the NLRB often has asserted that the publicity proviso protects the total secondary boycott so long as the boycott does not involve picketing.⁷⁹ Most recently, the NLRB's Regional Director in New York found that a total secondary boycott of a Louisiana-Pacific retailer in Connecticut by the UBC did not constitute an unfair labor practice.⁸⁰

Not only does the NLRB position contradict the judicial case law,⁸¹ but one hand of the NLRB does not seem to know what the other hand is doing. While the NLRB sitting as a board has consistently rejected unfair labor practice claims for total secondary boycott activities that do not involve picketing, the enforcement arm of the NLRB has obtained injunctions in federal court against these same types of activities.⁸² In fact, in at least one case this inconsistency has tripped up the NLRB. In *McLeod v. Business Machine & Office Appliance Mechanics Conference Board, Local 459*⁸³ the NLRB sought to enjoin total secondary boycott activities that did not involve picketing. The United States Court of Appeals for the Second Circuit rejected the injunction request, not because the court found such activity to be outside the prohibition of section

77. The NLRA authorizes a private right of action in federal court for violations of § 8(b)(4). See 29 U.S.C. § 187 (1982). The victim of an unfair labor practice may instead decide to file a complaint with the NLRB regional director. After the complaint is filed, the regional director investigates the charge. If the director finds merit in the charge, he or she may obtain an injunction *pendente lite* on a showing of reasonable cause. The full board will then hear the case and may issue an order to stop the practice and to have the employer reinstate aggrieved employees if necessary. See *id.* § 153(d), 160.

78. The Landrum-Griffin Amendments, which include the publicity proviso, were enacted as part of the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1960) (codified as amended in scattered sections of U.S.C. (1982)).

79. See *Florida Gulf Coast Bldg. Trades Council*, 252 N.L.R.B. 702 (1980), *petition denied sub nom.* *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *vacated*, 463 U.S. 147 (1983); *Local 54, Sheet Metal Workers Int'l Ass'n*, 174 N.L.R.B. 362 (1969).

80. See NLRB Letter Ruling, Case No. 2-CC-1861 (March 4, 1985). An NLRB Associate General Counsel reached an identical conclusion concerning a UBC boycott of an Oregon retailer of Louisiana-Pacific products. See *Oregon State District Council of Carpenters (Fred Meyer, Inc.)*, 120 L.R.R.M. (BNA) 1347 (Sept. 30, 1985) (Advice Memorandum).

81. See *infra* text accompanying notes 86-98.

82. See, e.g., *NLRB v. National Ass'n of Broadcast Employees*, 631 F.2d 944 (D.C. Cir. 1980); *Solien v. United Steelworkers of Am.*, 593 F.2d 82 (8th Cir.), *cert. denied*, 444 U.S. 828 (1979); *Potter v. United Plant Guard Workers*, 192 F. Supp. 918 (S.D. Tex. 1961).

83. 300 F.2d 237 (2d Cir. 1962).

8(b)(4), but because the NLRB had taken a position contrary to its holdings in quasi-judicial settings.⁸⁴ Under the circumstances, the court refused to find reasonable cause for an unfair labor practice claim.⁸⁵

3. The Courts on Total Secondary Boycotts

Unlike the NLRB, the federal courts never have looked favorably on secondary pressures in the labor context.⁸⁶ In addition, they have recognized that the primary purpose of the new and improved version of section 8(b)(4) "is to protect neutral employers, i.e. those not directly involved in a labor dispute, from direct union sanctions."⁸⁷ The courts' antipathy toward secondary pressures rests on well-founded statutory⁸⁸ and policy grounds: the resolution of a labor dispute is facilitated when the scope of that dispute does not extend beyond the union and the primary employer, between whom settlement "negotiations . . . should properly take place."⁸⁹

The federal courts quite properly have been willing to translate that antipathy into concrete disapproval of total secondary boycotts that involve handbilling activities.⁹⁰ In *NLRB v. National Association of Broadcast Employees*,⁹¹ for example, a union had struck against its primary employer, the American Broadcasting Company television and radio network, which was covering news events at various Washington, D.C. hotels. The union appeared at one of the hotels and passed out handbills that asked customers not to patronize that hotel, the

84. *See id.* at 239, 241-42.

85. *Id.* at 237. The court based its application of the "reasonable cause" standard on § 10(l) of the NLRA, 29 U.S.C. § 160(l) (1982), which authorizes the NLRB to seek appropriate injunctive relief whenever, after investigation, the board or its regional director finds reasonable cause to believe an unfair labor practice is occurring.

86. The Supreme Court has consistently condemned secondary pressures. *See, e.g.*, *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 222-26 nn.19-24 (1982); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 627 (1967) ("central theme" of § 8(b)(4) said to be "the protection of neutrals against secondary pressure"); *Tree Fruits*, 377 U.S. at 63-64; *Local 1776, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 100 (1958). Congress clearly intended § 8(b)(4)(ii) to prohibit all secondary pressures. *See infra* note 117.

87. *Frito-Lay, Inc. v. Retail Clerks Union Local 7*, 629 F.2d 653, 659 (10th Cir. 1980); *see also* *NLRB v. Local 825, Int'l Union of Operating Eng'rs*, 400 U.S. 297, 302 (1971) (enactment of § 8(b)(4) was prompted by "congressional concern over the involvement of third parties in labor disputes not their own"); *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1377 (1st Cir. 1981) (long recognized that § 8(b)(4) was enacted to shield "unoffending employers and others from pressures in controversies not their own") (quoting *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 627 (1967)), *aff'd*, 456 U.S. 212 (1982).

88. Section 8(b)(4) derived its present form from the Landrum-Griffin Amendments, Pub. L. No. 86-257, § 704(a), 73 Stat. 519, 542-43 (1959) (codified as amended at 29 U.S.C. § 158(b)(4) (1982)), which "culminated a congressional effort begun in 1947 to prohibit union pressure on employers not directly involved in a labor dispute." Note, *Picketing and Publicity under Section 8(b)(4) of the LMRA*, 73 YALE L.J. 1265, 1265 (1964).

89. *Gilmore v. Wood, Wire & Metal Lathers Int'l Union*, 223 F. Supp. 236, 245 (N.D. Ill. 1963).

90. Although this Article focuses on the practice of handbilling, judicial antipathy toward secondary boycotts extends to "don't patronize" lists as well. A union acts unlawfully when it puts a secondary employer on its "don't patronize" list with the intent to force that employer to cease doing business with the primary employer. *See* *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 620 F. Supp. 1073, 1079 (E.D. Wis. 1985).

91. 631 F.2d 944 (D.C. Cir. 1980).

secondary employer.⁹² At the urging of the NLRB, the District of Columbia Circuit Court of Appeals held that such activity constituted an impermissible secondary boycott outside the protection of section 8(b)(4)'s publicity proviso.⁹³ The court first found that a union could call for a boycott only of those products made by the primary employer and sold by the secondary employer.⁹⁴ As discussed previously, the Supreme Court had held such activity permissible in *Tree Fruits* sixteen years earlier.⁹⁵ However, the court in *National Association of Broadcast Employees*⁹⁶ distinguished the total boycott in which the union urges a boycott of all the secondary employer's products; the court held that form of secondary pressure to be illegal even when conducted by means of handbilling.⁹⁷ Other courts have reached the same conclusion regarding a union's use of handbills to promote a total secondary boycott.⁹⁸

A more difficult problem arises when the union *threatens* the secondary employer with secondary pressures. The corporate campaign described in this Article involved numerous instances of such threats.⁹⁹ If the union threatens to conduct an illegal secondary boycott and intends to dissuade a secondary employer from carrying the primary employer's goods, then clearly such pressure represents an unfair labor practice.¹⁰⁰ But what if the union threatens to conduct lawful secondary activity, such as calling for a product boycott at the secondary level or handbilling with leaflets that merely inform the customers of the union's dispute with the primary employer and the secondary employer's relation to that primary employer?¹⁰¹ Do threats to conduct lawful secondary activities violate section 8(b)(4) of the NLRA if those threats are designed to compel a secondary boycott? The answer should be "no."

In *NLRB v. Servette, Inc.*,¹⁰² a companion case to *Tree Fruits*, the Supreme

92. *Id.* at 947.

93. *Id.* at 952-53.

94. *Id.* at 953. Of course, when the struck product comprises all or a substantial portion of the secondary employer's business, a product boycott becomes a total boycott. The United States Supreme Court has correctly held that § 8(b)(4) prohibits a product boycott that has the predictable effect of operating as a total secondary boycott. See *Retail Store Employees*, 447 U.S. at 613-15; *supra* notes 74-75 and accompanying text (discussing *Retail Store Employees*).

95. See *supra* text accompanying notes 72-73.

96. 631 F.2d 944.

97. *Id.* at 953. The court based its holding on the distinction the *Tree Fruits* Court established between total and product boycotts. *Id.* The former is said to be "poles apart" from the latter. *Tree Fruits*, 377 U.S. at 70.

98. See, e.g., *Solien v. United Steelworkers*, 593 F.2d 82, 87 (8th Cir.), *cert. denied*, 444 U.S. 828 (1979); *Potter v. Plumbers & Pipefitters Local 142*, 192 F. Supp. 641, 642-43 (W.D. Tex. 1961); *Brown v. American Fed'n of Television & Radio Artists*, 191 F. Supp. 676, 680-81 (N.D. Cal. 1961); *Phillips v. Local 662, Radio & Television Eng'rs*, 192 F. Supp. 643, 645 (E.D. Tenn. 1960). But see *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264, 271 (4th Cir. 1981) (stating that Congress intended to allow coercive pressure of neutral employers through handbilling), *vacated*, 463 U.S. 147 (1983).

99. See *supra* notes 20-29 and accompanying text.

100. See, e.g., *Brown v. American Fed'n of Television & Radio Artists*, 191 F. Supp. 676, 679 (N.D. Cal. 1961); *Phillips v. Local 662, Radio & Television Eng'rs*, 192 F. Supp. 643, 645 (E.D. Tenn. 1960).

101. Engaging in such activities without any accompanying threats is explicitly permitted by the publicity proviso. See 29 U.S.C. § 158(b)(4) (1982).

102. 377 U.S. 46 (1964).

Court drew a distinction between the use of threats to conduct lawful secondary activity and the use of threats to conduct unlawful secondary activity. The Court held that a union did not commit an unfair labor practice when, at a secondary employer's store, the union distributed handbills that called for a consumer product boycott of the primary employer's products sold at the store.¹⁰³ The Court based its decision on the publicity proviso, which it viewed as an exception to the strictures of section 8(b)(4)(ii). The Court further held, however, that the union could *threaten* to pass out such handbills at any stores that continued carrying any of the primary employer's goods, apparently even if the union intended to use such threats to coerce secondary employers into ceasing all business with the primary employer. "The statutory protection for the distribution of handbills would be undermined if a threat to engage in protected conduct were not itself protected."¹⁰⁴

The latter holding in *Servette* is curious. The Court did not explain how statutorily protected handbilling would be undermined if a union could not use the threat of such activity to coerce retailers into boycotting the primary employer. Subsection 8(b)(4)(ii) of the NLRA expressly prohibits threats and coercion that have as their object forcing a secondary employer to cease doing business with the primary employer.¹⁰⁵ To reach its holding the Court had to go through the mental gymnastics of first finding implicit in section 8(b)(4) the permissibility of handbilling that calls for a secondary product boycott regardless of the union's purpose.¹⁰⁶ The Court then in effect reasoned that to protect this implicitly permitted activity, it had to interpret the express strictures of section 8(b)(4)(ii) to mean something other than what they say.¹⁰⁷ The *Servette* Court should have held that the statutory prohibition on secondary boycotts would be undermined if a threat to engage in permitted conduct, as a means of enforcing the boycott, was not also prohibited. Instead, the Court twisted the logic of section 8(b)(4) by finding primacy in the publicity proviso rather than in the text of section 8(b)(4).

Three years prior to the *Servette* decision, a federal district court adopted a better approach to this problem. In *Brown v. American Federation of Television & Radio Artists, San Francisco Local*¹⁰⁸ a union on strike against a radio station attempted to put pressure on the station by pressuring its advertisers. The union "used various means to exert coercive pressure on those advertisers, in order to compel them to boycott [the station]."¹⁰⁹ For example, (1) the union threatened to publicize the advertisers' patronage of the "unfair" employer; (2) union supporters organized a telephone campaign in which callers threatened the advertis-

103. See *id.* at 55.

104. *Id.* at 57.

105. "It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person . . . where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person" 29 U.S.C. § 158(b)(4)(ii) (1982).

106. See *Servette*, 377 U.S. at 53-54.

107. See *supra* text accompanying note 104.

108. 191 F. Supp. 676 (N.D. Cal. 1961).

109. *Id.* at 677.

ers with a boycott of their products if the advertisers did not stop advertising with the employer; (3) the union printed various leaflets naming advertisers that continued to run advertisements on the station. The union then threatened to distribute the leaflets if the advertisements were not pulled; and (4) the union sent letters to advertisers warning that those advertisers who supported the station would be viewed as taking sides in the labor dispute and would be remembered by union members and sympathizers.¹¹⁰

The *Brown* court first held that distribution of the leaflets violated subsection 8(b)(4)(ii) of the NLRA, reasoning that such total secondary boycott activity constituted "coercion of the employers to force them to cease doing business with [the station]."¹¹¹ Furthermore, the court condemned all union threats to distribute such handbills when the object of those threats was to force the advertisers to cease doing business with the radio station.

In all events, even if respondents *were* entitled to publicize the facts by circulating such a leaflet, they were *not* entitled to threaten [the station's] advertisers, engaged in commerce, with such action, in order to force or require them to cease doing business with [the station]. It is *not* true that one may threaten to do whatever he may [legally] do. One may not threaten to take lawful action, where the purpose of the threat is illicit.¹¹²

In other words, the *Brown* court condemned any union pressures that, in effect, would "blackmail"¹¹³ neutral parties into discontinuing their business with the primary employer.

As the holding in *Brown* suggests, the United States Supreme Court in *Servette* failed to grasp the key to subsection 8(b)(4)(ii) of the NLRA—namely its proscriptive element. After all, that proscriptive element forms the *raison d'être* for the entirety of section 8(b) as evidenced by both the structure of the statute¹¹⁴ and its legislative history.¹¹⁵ Because Congress' overriding intent in

110. See *id.* at 677-78.

111. *Id.* at 680. The *Brown* court rejected the argument that either the publicity proviso or the first amendment protected the distribution of such handbills. *Id.* at 679-80. The first amendment issue was also addressed in *Retail Store Employees*, 447 U.S. at 616, in which a plurality of the Supreme Court summarily rejected the assertion that the first amendment protects union calls for secondary boycotts.

112. *Brown*, 191 F. Supp. at 679; see also *Phillips v. Local 662, Radio & Television Eng'rs*, 192 F. Supp. 643, 645 (E.D. Tenn. 1960) (enjoining act of mailing proposed leaflet to secondary employer's premises with notation, "We would rather not add you to list."). The court granted the injunction sought by the NLRB, finding that the union's practices transgressed the "freedom of neutral persons to operate business without undue pressure." *Id.* at 645.

113. A classic definition of blackmail provides as follows: An "[u]nlawful demand . . . under threat to do bodily harm, to injure property, to accuse of crime, or to expose disgraceful defects." BLACK'S LAW DICTIONARY 155 (5th ed. 1979) (emphasis added). This textual reference to blackmail serves only by way of analogy in the context of a labor-management dispute.

114. Section 8(b) of the NLRA first and foremost constitutes a list of conduct in which labor unions may not engage. The publicity proviso then clarifies congressional intent with respect to one proscription. In other words, a union's activities do not constitute unlawful secondary coercion if those activities merely publicize a dispute and are not intended to have coercive secondary effects. See 29 U.S.C. § 158(b)(4) (1982).

115. The Taft-Hartley Act, otherwise known as the Labor-Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151-169 (1982)) contained the original proscription of secondary boycotts, but gaping loopholes led to union abuses. See Note, *supra* note 88,

enacting the section was to prohibit undesirable conduct, a court errs when it focuses instead on a narrow exception, gleans legislative purpose from that exception, and formulates its understanding of the rule based on the perceived animating force for the exception. The Supreme Court took a backward approach. Coercion of secondary employers is the evil, and the exception to the rule must be understood in light of that overriding concern.¹¹⁶ Any union threat against a secondary employer that seeks as its object a cessation or curtailing of business with the primary employer is unlawful unless the union's activity falls within the narrow wording of the publicity proviso.¹¹⁷

4. NLRB v. Federal Judiciary—Why the Conflict?

Notwithstanding the judicial confusion concerning the lawfulness of threats to do lawful acts, the case law on total secondary boycotts makes clear that a total secondary boycott, even one conducted through the use of media other than pickets,¹¹⁸ is unlawful. The NLRB apparently would not accept this position.¹¹⁹ How could the NLRB have been so confused over the years?

Theoretically, the courts should defer to the NLRB regarding matters in which the NLRB has expertise.¹²⁰ However, the NLRB has no particular expertise in interpreting statutes¹²¹ and, as an Article I¹²² adjudicative body, must

at 1265-66. Those abuses prompted Congress to adopt the Landrum-Griffin Amendments in 1959, Pub. L. No. 86-257, 73 Stat. 541 (1959) (codified at 29 U.S.C. §§ 151-169 (1982)), which Congress enacted to close the loopholes. See Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 CORNELL L. Q. 724, 727 (1960). A congressional conference committee inserted the publicity proviso into the bill; it had not been a part of either the house or senate version of the amendment to § 8(b)(4) of the NLRA. See Note, *supra* note 88, at 1271 n.32 and materials cited therein.

116. Cf. *Iodice v. Calabrese*, 345 F. Supp. 248 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 512 F.2d 383 (2d Cir. 1975). In *Iodice* the union had threatened secondary employers with future union trouble if those secondary employers continued to do business with the primary employer. *Iodice*, 345 F. Supp. at 254. The trial court found such threats to be an unfair labor practice. *Id.* at 263. The United States Court of Appeals for the Second Circuit affirmed the award of monetary damages and focused its analysis on the coercion: "When a labor organization takes action for the purpose of forcing an employer to cease doing business with another, it violates § 8(b)(4)(B) . . ." *Iodice*, 512 F.2d at 388.

117. Senator Robert Taft, Jr., who sponsored the Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151-169 (1982)), stated adamantly that all forms of secondary boycott should be prohibited by the Act: "Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." 93 CONG. REC. 4198 (1947). As discussed *infra* text accompanying notes 131-145, the publicity proviso is not an exception to the proscriptive language of § 8(b)(4). Rather, the proviso clarifies legislative intent.

118. If union members display pickets that call for a total boycott of that secondary employer, then that activity constitutes an unfair labor practice. See *supra* note 75 and accompanying text.

119. See *supra* notes 77-85 and accompanying text.

120. See, e.g., *Frattaroli v. NLRB*, 526 F.2d 1189, 1193 (1st Cir. 1975); *United Steelworkers v. NLRB*, 430 F.2d 519, 521 (D.C. Cir. 1970).

121. Cf. *Horwath v. NLRB*, 539 F.2d 1093, 1097 n.4 (7th Cir. 1976) (NLRB given no extraordinary judicial deference in interpretation of contracts), *cert. denied*, 430 U.S. 940 (1977); *Retail Clerks Int'l Ass'n v. NLRB*, 510 F.2d 802, 805 (D.C. Cir. 1975) (NLRB given no particular deference in interpretation of contracts).

122. U.S. CONST. art. I, § 8.

defer on questions of law to Article III¹²³ courts.¹²⁴ Although the NLRB should defer to judicial interpretations of section 8(b)(4) of the NLRA, it does not do so. The board instead looks almost exclusively to its own decisions¹²⁵ and, of course, to decisions of the United States Supreme Court, notwithstanding a well-developed body of case law in lower federal courts. If the NLRB followed the sound judicial construction of section 8(b)(4), it would find total secondary boycotts within the prohibitions of section 8(b)(4).

5. Interpreting the Publicity Proviso

As noted previously, the NLRB has sanctioned total secondary boycotts so long as they do not involve picketing. The NLRB's position stems from an erroneous interpretation of the publicity proviso contained in section 8(b)(4) of the NLRA.¹²⁶ That proviso has generated much more confusion and controversy than it warrants.¹²⁷

A well-established rule of statutory construction states that courts will not employ interpretive devices to glean meaning from a statute unless there exists an ambiguity in the statute or the statute is otherwise unclear.¹²⁸ Congress made its intentions clear in drafting the publicity proviso. A union violates section 8(b)(4)(ii)(B) when it:

- (1) threatens, coerces or restrains;
- (2) any person engaged in commerce or in an industry affecting commerce;
- (3) with an object of;
- (4) forcing any other person to sever business relations with any other person.¹²⁹

The publicity proviso then protects the following:

- (1) *publicity* other than picketing;
- (2) for *the* purpose of;
- (3) truthfully advising the public, including consumers and workers;
- (4) that products are produced by a primary employer with which the union has a dispute, and that a secondary employer distributes those products; but only if
- (5) such publicity does not have the effect of causing a walkout at the

123. *Id.* art. III.

124. Article I bodies are Congressional creations; article III courts are constitutionally prescribed. For a discussion of the relationship between them, see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 HARV. L. REV. 703, 704-08 (1982).

125. Any random review of NLRB decisions shows that a clear majority of citations by the NLRB are to its own decisions.

126. See *supra* notes 77-85 and accompanying text.

127. For an early discussion of potential issues raised by the publicity proviso, see Comment, *supra* note 115, at 759-66.

128. See, e.g., *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978); *Carlson v. Commissioner*, 712 F.2d 1314, 1315 (9th Cir. 1983); *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981).

129. See 29 U.S.C. § 158(b)(4)(ii)(B) (1982).

secondary employer's establishment.¹³⁰

One striking aspect of the publicity proviso is that it does not constitute at all an exception to the prohibitory language of section 8(b)(4). The proviso and the general rule of section 8(b)(4) are mutually exclusive. The prohibitory language contained in section 8(b)(4) of the NLRA condemns coercion that has as *an* object forcing the neutral secondary employer to sever business relations with the primary employer. The publicity proviso protects certain union conduct only if the sole purpose of that conduct is to advise the public truthfully of the strike against the primary employer and of the secondary employer's distribution of the primary employer's goods.¹³¹ Of course, if a union's activities fit within the publicity proviso, the union would not violate section 8(b)(4)(ii): if a union's only purpose is to advise the public truthfully of its grievances, it cannot also have a coercive purpose. The proviso simply means that section 8(b)(4) does not prohibit certain nonpicketing publicity if the union does not intend it to be coercive.¹³² Congress has made a union's motive the touchstone of liability, and neither the courts nor the NLRB should hesitate to inquire into that motive.¹³³

In other words, to come within the ambit of the publicity proviso, a union must act solely for the purpose of truthfully advising the public of its primary dispute and the second employer's relationship with the primary employer.¹³⁴ Otherwise the publicity proviso is inapplicable and does not shield the union's conduct.¹³⁵ If the union has an ulterior motive, the publicity proviso does not apply, and if that ulterior motive extends to coercion of the neutral secondary employer, the union commits an unfair labor practice. If the union's literature

130. See *id.* § 158(b)(4).

131. With an apparent disregard for the statutory language of the publicity proviso, Professor Cox has described the proviso as one that "permits unfair lists, radio broadcasts, newspaper advertising, sound tracks and every other form of publicity except picketing, *for the purpose of* inducing consumers to boycott . . . a distributor who does business with an unfair producer." See Cox, *supra* note 62, at 274 (emphasis added). Section 8(b)(4) expressly condemns such a purpose, and the publicity proviso protects only an entirely different purpose. Perhaps Professor Cox's indiscretion may be dismissed as one of his admitted "shortcomings of a protagonist." See *id.* at 257.

132. One student commentator has suggested that a union would never handbill a secondary employer unless the union had some coercive motives and, therefore, using the union's motive as a touchstone of liability would write the publicity proviso out of the statute. See Comment, *supra* note 115, at 765. The commentator's speculation concerning likely union motives is one of fact that, if true, would not write the proviso out of the statute but would prevent a union from invoking it. Simply because unions will rarely if ever qualify is not an argument for disregarding the plain words of the proviso.

133. Despite the obvious primacy of motives in § 8(b)(4), courts as well as the NLRB do not make the necessary inquiry into union motives. The product boycott serves as a perfect example. If a union pickets a distributor calling for a boycott of the primary employer's goods sold by the distributor, the critical question under § 8(b)(4)(ii) is whether the union intends to compel the distributor to cease carrying the primary employer's goods. Nevertheless, the Supreme Court has held such activity to be permissible without any inquiry into motives. See *Tree Fruits*, 377 U.S. 58. The Court ignored the statute and focused directly on the legislative history. See *id.* at 63. The Court's disregard for the words of the statute led the Court to its erroneous holding.

134. See 29 U.S.C. § 158(b)(4) (1982) (publicity protected only if "*for the purpose of truthfully advising the public*") (emphasis added).

135. See *Hospital & Service Employers Union, Local 399 v. NLRB*, 743 F.2d 1417, 1424-25 (9th Cir. 1984) (if handbill or any part thereof is not solely for the purpose described in publicity proviso, the proviso does not apply).

contains extraneous material that is not designed to advise the public truthfully of the primary dispute and the relationship of the secondary employer to that dispute, the union cannot invoke the publicity proviso.¹³⁶

A final requirement for making use of the publicity proviso is that the material be "publicity." The legislative history behind the Landrum-Griffin amendments, however, supplies no useful definition of the term.¹³⁷ Nevertheless, a word is ordinarily interpreted in its plain, everyday sense.¹³⁸ The term "publicity" in its ordinary sense simply does not contemplate advocacy or a call to action such as a plea to boycott.¹³⁹ Thus, when a union calls on consumers to cease doing business with a distributor of the primary employer's goods, that call does not comprise publicity¹⁴⁰ and therefore is not covered by the publicity proviso.¹⁴¹

136. *Id.* Inapplicability of the publicity proviso does not entail a § 8(b)(4) violation. For example, a union may call for a primary strike and not come within the protection of the publicity proviso, and yet not violate § 8(b)(4).

137. The legislative history appears in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (1959).

138. *See, e.g.*, *Malat v. Riddell*, 383 U.S. 569, 571 (1966); *Bowie v. City of Columbia*, 378 U.S. 347, 362-63 (1964).

139. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1836 (1981) (listing 6 definitions of the word "publicity," none of which incorporates the word "advocacy"). Congress clearly knew the difference between publicity and advocacy. In 29 U.S.C. § 104(e) (1982) (prohibiting injunctions of certain forms of publicity), Congress has called for protection of certain *publicity*. Congress has used a separate section of the same statute to protect certain *advocacy*. *See id.* § 104(i). If Congress had intended to protect advocacy with the publicity proviso, it would have done so.

140. Senator John F. Kennedy tried to fit the total secondary boycott within the scope of the publicity proviso when he was discussing the proviso before the Senate in 1959. Kennedy had chaired the conference committee, which inserted the publicity proviso into the framework of § 8(b)(4) of the NLRA. In the committee Kennedy had pressed for pro-union wording in the amendments and, more specifically, had pressed for a proviso that would permit total secondary boycotts. Nonetheless, he was unable to convince his conferees, and the conference committee recommended the proviso as it now appears. In discussing the proviso before the full Senate, however, Kennedy attempted the ruse of legislating by comment. Although he was unable to obtain conference committee approval for his version, he was able to "interpret" what did pass as though it were the one he had favored. Senator Kennedy told his fellow senators that the publicity proviso would protect a union's "right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor or to refrain from trading with a retailer who sells such goods." 105 CONG. REC. 17,898 (1959) (remarks of Sen. Kennedy). Of course, the proviso, as enacted, does not protect the right of a union to ask consumers to do anything. The proviso merely authorizes unions to inform customers of their dispute with management. Senator Kennedy admitted that:

Under the [House version] it would have been impossible for a union to inform the customers of a secondary employer that the employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing.

Id. 17,898-99.

At least one court has been drawn in by Senator Kennedy's ruse. *See Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264, 270 n.4 (4th Cir. 1981) (quoting Senator Kennedy's remarks in support of proposition that publicity proviso protects calls for total secondary boycotts), *vacated*, 463 U.S. 147 (1982). This example illustrates the danger of relying too heavily on legislative history, especially when the statute construed is plainly worded.

141. Furthermore, the call for a product boycott does not constitute "publicity" as that term is properly understood. Thus, the Supreme Court should reconsider its holding in *Tree Fruits* with primary attention given to the "object" and "purpose" of the union action, as contemplated by the statute.

Properly understood and interpreted, the publicity proviso constitutes a safe harbor within section 8(b)(4) and a clarification of congressional intent. Unless labor union practices are undertaken with a coercive intent, they should not be deemed illegal simply because those practices have the incidental and unintended effect of causing a cessation of business between the primary and secondary employer.¹⁴² The publicity proviso reflects congressional concern about a union's right under the first amendment¹⁴³ to publicize its dispute with the primary employer.¹⁴⁴ A call for a total secondary boycott is not protected by the first amendment.¹⁴⁵ This aspect of a union's corporate campaign activities fits within neither the *raison d'être* nor the plain words of the publicity proviso.

C. *Prohibited Agreements Under Section 8(e)*

Although section 8(e) of the NLRA is rarely invoked, at least in secondary boycott cases, that section proscribes the fruits of successful prohibited secondary boycott activities:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, *express or implied*, whereby such employer ceases or refrains or agrees to cease or refrain from . . . selling . . . or otherwise dealing in any of the products of any other employer or to cease doing business with any other person¹⁴⁶

Section 8(e) works in tandem with subsection 8(b)(4)(ii)(A),¹⁴⁷ which prohibits unions from using threats or coercion when an object thereof is "forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by subsection (e) of this section."¹⁴⁸ The limited case law under section 8(e) suggests that the statutory provision means precisely what it says. If a union agrees with an employer that the employer will cease doing business with any other person, both the union and the employer commit an unfair labor practice.¹⁴⁹

The wording of section 8(e) lends considerable support to the notion that

142. The publicity proviso constitutes an expression of congressional concern for the *effects* of union activities. The exception to the publicity proviso states that the proviso only applies 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.

29 U.S.C. § 158(b)(4) (1982). Thus, Congress designed the publicity proviso to permit unions to influence business between the primary and secondary employer if that influence was unintentional, but to prohibit any action that had the *effect* of causing a secondary boycott.

143. U.S. CONST. amend. I.

144. See *Tree Fruits*, 377 U.S. at 69.

145. See *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 616 (1980); *Brown*, 191 F. Supp. at 679-680.

146. 29 U.S.C. § 158(e) (1982) (emphasis added).

147. For a discussion of the relationship between § 8(b)(4) and § 8(e), see Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965).

148. 29 U.S.C. § 158(b)(4)(ii)(A) (1982).

149. See *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d

Congress intended to prohibit a union's call for a total secondary boycott by whatever means. Section 8(e) proscribes agreements "express or implied," which indicates that either of the two following scenarios would constitute a prohibited agreement:

Scenario A: Union calls for total boycott of secondary employer and leaflets secondary employer's business with "don't patronize" literature. On the second day of the boycott, secondary employer calls for a meeting with union representatives at which the parties agree that union will stop the boycott and secondary employer will quit ordering primary employer's products. *Prohibited express agreement.*¹⁵⁰

Scenario B: The same as Scenario A, except on the second day of the boycott secondary employer relents and unilaterally announces that it will no longer carry primary employer's goods. Both secondary employer and union understand that secondary employer's cessation of business with primary employer will result in an end to the boycott. *Prohibited implied agreement.*

Although at first scenario B may appear to demonstrate nothing more than unilateral capitulation on the part of the secondary employer, the existence of an implicit agreement is clear given the shared undertaking of the parties.¹⁵¹ To hold otherwise would write out of the statute section 8(e)'s proscription of implied agreements.

Because in either scenario both the union and the employer may commit unfair labor practices, two anomalous consequences would result if the publicity proviso contained in section 8(b)(4) allowed unions to exert total secondary boycott pressures. First, the union's call for a total secondary boycott would constitute a protected activity only if the call were unsuccessful. The moment an employer relents, the union crosses into unlawfulness and drags the neutral secondary employer along with it. Surely Congress did not intend to permit only unsuccessful secondary boycott pressures. Second, the secondary employer would be placed in an untenable position in the face of nonpicketing total secondary boycott activities. That secondary employer could not complain about secondary pressures exerted by the union,¹⁵² and it could not give in. If it relented, then it would commit an unfair labor practice under section 8(e).¹⁵³ Thus the

1368, 1375 (3d Cir. 1979), *cert. denied*, 459 U.S. 916 (1982); *Altomose Constr. Co. v. Atlantic Cape May*, 493 F. Supp. 1181, 1192 (D.N.J. 1980).

150. The union in this scenario may or may not have already violated § 8(b)(4)(ii)(A) or (B) of the NLRA, depending on its purpose in calling for the boycott. In reality, the union would have no purpose other than causing a secondary employer to cease doing business with the primary employer, in which case both § 8(b)(4)(ii)(A) and (B) are violated. In unambiguous language, those subsections proscribe secondary pressure designed to compel agreements to honor total secondary boycotts and those boycotts themselves.

151. The fact finder would determine whether the union and the secondary employer had impliedly acted in concert.

152. If the secondary pressure is illegal, as this Article suggests, the secondary employer may complain to the NLRB or bring a private damage action. *See* 29 U.S.C. §§ 160, 187 (1982).

153. Although § 8(e) violations cannot form the basis for a private damage action, *see id.* § 187, there are antitrust implications to agreements proscribed by § 8(e). *See infra* text accompanying note 239.

neutral secondary employer would have to endure the boycott and become enmeshed in a labor dispute not its own.

Curiously, although section 8(e) represents a natural counterpart to section 8(b)(4)(ii), and although the publicity proviso clearly does not qualify section 8(e),¹⁵⁴ the latter section is rarely invoked in secondary boycott cases. It can soundly be invoked whenever, as in the case of the UBC's corporate campaign against Louisiana-Pacific, a union extracts an express or implied agreement that, in exchange either for the cessation of boycott activities or for a promise not to conduct boycott activities, the secondary employer ceases to carry the primary employer's products.¹⁵⁵

Whether lawful or not, union pressures may form the basis for an unlawful agreement. For example, a secondary product boycott, which the United States Supreme Court unwisely held lawful in *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*,¹⁵⁶ may produce a prohibited express or implied agreement under section 8(e). Concomitantly, whenever a union exerts secondary pressure on an employer in an attempt to extract such an agreement, the union violates section 8(b)(4)(ii)(A) of the NLRA.¹⁵⁷ In short, the unfair labor practice statutes are cohesive, coherent, and clear, and they prohibit many of the tactics used in the corporate campaign.

IV. ANTITRUST IMPLICATIONS OF CORPORATE CAMPAIGN ACTIVITIES

In addition to unfair labor practice implications, the corporate campaign carries with it antitrust implications. In some cases the same acts that form a basis for liability under the NLRA also will serve as a basis for liability under antitrust laws.¹⁵⁸ As in the unfair labor practice analysis, the starting point for

154. See 29 U.S.C. § 158(b)(4) (1982) ("For the purpose of this section 4 only").

155. To violate § 8(e) of the NLRA, an agreement obviously requires some form of consideration. Noncoercive requests that a secondary employer stop dealing with the primary employer are not prohibited. See *Teamsters Local 20 v. Morton*, 377 U.S. 252, 259 n.14 (1964); *Altomose Constr. Co. v. Atlantic Cape May*, 493 F. Supp. 1181, 1192 (D.N.J. 1980). Cf. Lesnick, *supra* note 147, at 1012 & n.52 (questioning the notion that a union's request can ever be "noncoercive" and criticizing without explanation the Supreme Court's requirement of consideration before finding an agreement to exist under § 8(e)).

156. 377 U.S. 58 (1964).

157. 29 U.S.C. § 158(b)(4)(ii)(A) (1982) provides that it shall be an unfair labor practice for a labor organization to force or require "any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section."

158. The relationship between the antitrust laws and labor law has been the subject of a tremendous amount of analysis in the literature. The following authorities comprise a partial list: Barnes, Goldberg, & Miller, *Unions and the Antitrust Laws*, 7 LAB. L.J. 133 (1956); Boudin, *Organized Labor and the Clayton Act*, 29 VA. L. REV. 272 (1942); Boudin, *The Sherman Act and Labor Disputes: II*, 40 COLUM. L. REV. 15 (1940); Boudin, *The Sherman Act and Labor Disputes: I*, 39 COLUM. L. REV. 1283 (1939); CCH, *Interface of National Labor and Antitrust Policies: When Antitrust Liability Attaches*, 33 LAB. L.J. 115 (1982); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Di Cola, *Labor Antitrust*: Pennington, Jewel Tea, and Subsequent Meandering, 33 U. PITT. L. REV. 705 (1972); Handler, *Labor and Antitrust: A Bit of History*, 40 ANTITRUST L.J. 233 (1970); Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459 (1981); Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOKLYN L. REV. 1 (1983); Schulman, *Labor and the Antitrust Laws*, 34 ILL. L. REV. 769 (1940); St. Antoine, *Secondary Boycott: From*

an antitrust analysis is the statutory regime.

A. *The Legislative Framework*

Sections 1 and 2 of the Sherman Act¹⁵⁹ provide the relevant substantive proscriptions. These sections outlaw, respectively, combinations or conspiracies in restraint of trade and attempts at monopolization. The statute also provides labor unions with numerous exemptions.¹⁶⁰

Because labor organizations effectively restrain labor markets, many courts originally interpreted the Sherman Act to outlaw unions as unlawful combinations.¹⁶¹ In response Congress enacted section 6 of the Clayton Act,¹⁶² which declares that the labor of a human being is not a commodity subject to the antitrust laws and that unions are exempt from the prohibitions of all antitrust laws so long as they are "lawfully carrying out [their] legitimate objects." This Article examines that phrase in depth below.¹⁶³

Section 20 of the Clayton Act¹⁶⁴ also exempts certain union activities from antitrust scrutiny. However, unlike section 6, section 20 contains a long list of permissible activities.¹⁶⁵ For example, section 20 specifically allows a union to

Antitrust to Labor Relations, 40 ANTITRUST L.J. 242 (1971); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963); Note, *From Norris-LaGuardia to Connell—Consistency Yields Comprehensive Labor Antitrust Protection*, 17 NEW ENG. L. REV. 845 (1982).

159. 15 U.S.C. §§ 1-2 (1982).

160. See *infra* notes 164-75 and accompanying text.

161. On its face, the Sherman Act seems to outlaw labor unions because a union is a combination that restrains labor markets. However, the United States Supreme Court quickly interpreted the Sherman Act to proscribe only unreasonable restraints of trade. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). After *Standard Oil* the question was whether a labor union constituted an "unreasonable" restraint of trade. The answer for many courts was yes. Between 1890 and 1914 at least 101 cases resulted in injunctions of labor union activities under the Sherman Act, a fact Congress recognized in passing the Clayton Act. See 51 CONG. REC. 9173-74, 13,665-66 (1914). Many of those lower court decisions postdated the Supreme Court's *Standard Oil* decision in 1911.

162. Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 17 (1982)).

163. See *infra* text accompanying notes 187-208.

164. 29 U.S.C. § 52 (1982).

165. Section 20 of the Clayton Act provides as follows:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of

cease patronizing a party to a dispute over working conditions or wages and to persuade others to cease patronizing that party.¹⁶⁶ Thus the primary boycott cannot form a basis for antitrust liability in the corporate campaign.¹⁶⁷ However, section 20 does not exempt or otherwise apply to secondary boycott activities.¹⁶⁸ Such activities, therefore, must be scrutinized under a traditional antitrust analysis, unless some other exemption applies.

Section 4 of the Norris-LaGuardia Act¹⁶⁹ prohibits injunctions that prevent unions from doing certain specified acts.¹⁷⁰ That section lists acts afforded par-

value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

15 U.S.C. § 20 (1982).

166. The relevant portion of the statute provides that "no . . . restraining order or injunction shall prohibit any person or persons . . . from ceasing to patronize . . . any party to [a labor] dispute . . . or persuading others by peaceful and lawful means so to do . . . nor shall [such acts] be considered . . . violations of any law of the United States." *Id.*

167. Nor can the primary boycott form a basis for an unfair labor practice claim. See *id.* For an explanation of the difference between primary and secondary boycotts, see *supra* note 62.

168. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 475-477 (1921). The extent to which other aspects of *Duplex* have been overruled by later statutory development is discussed *infra* text accompanying notes 251-55.

169. 29 U.S.C. § 104 (1982).

170. Section 4 of the Norris-LaGuardia Act provides as follows:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this Title;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
- (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
- (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
- (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this Title.

Id.

Although § 20 of the Clayton Act, 15 U.S.C. § 20 (1982), exempts the enumerated activities from antitrust scrutiny, § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1982), only prohibits a court from enjoining the activities listed in that statute. The unmistakable inference is that Congress did not intend to give the type of blanket protection it provided in the Clayton Act to the activities set forth in § 4 of the Norris-LaGuardia Act.

tial protection, including the use of publicity to notify the public of the existence and circumstances of a labor dispute,¹⁷¹ notifying any person of the union's intent to engage in a protected activity,¹⁷² and agreeing with any other person to engage in a protected activity.¹⁷³ Section 4 activities, however, are not necessarily lawful nor even exempt from antitrust scrutiny. Section 4's protection is only partial because it only prohibits injunctions;¹⁷⁴ it does not limit the availability of monetary damages.¹⁷⁵

In addition to the three explicit statutory provisions that exempt union activities, courts have developed a "nonstatutory exemption"¹⁷⁶ based on the perceived relationship between federal antitrust policy and federal labor policy.¹⁷⁷ This so-called nonstatutory exemption dates back to two decisions of the United States Supreme Court, *Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*¹⁷⁸ and *Connell Construction Co. v. Plumbers & Steamfitters Local 100*.¹⁷⁹ In *Connell* the Supreme Court held that a union loses its antitrust exemption when it attempts through coercion to force a general contractor to use only union subcontractors.¹⁸⁰ In so holding, the Court distinguished direct restraints on a product market from indirect restraints on a product market that result only from restraints on a labor market. The Court found a direct restraint on the product market and held that the union had violated the Sherman Act.¹⁸¹ Lower courts have interpreted *Connell* to stand for the proposition that a labor union enjoys an antitrust exemption for labor market restraints that only indirectly restrain a product market.¹⁸²

171. 29 U.S.C. § 104(e) (1982).

172. *Id.* § 104(g).

173. *Id.* § 104(h).

174. Adoption of the Norris-LaGuardia Act was motivated, at least in part, by the "extravagant use of the labor injunction." See Winter, *supra* note 158, at 15-16. Congress did not intend to protect the activities listed in the Norris-LaGuardia Act from damage actions under the antitrust laws. Otherwise, it would have done so as it had done in § 20 of the Clayton Act. See 29 U.S.C. § 52 (1982).

175. See, e.g., *Republic Prods., Inc. v. American Fed'n of Musicians*, 245 F. Supp. 475, 476-77 n.2 (S.D.N.Y. 1965).

176. This Article contends that there is nothing "nonstatutory" about the exemption. See *infra* note 182.

177. An inherent conflict exists between antitrust laws, which seek to prohibit market restraints, and labor laws, which foster labor market restraints. At least one commentator has pointed out the difficulty of judicially reconciling federal antitrust and labor laws. See Di Cola, *supra* note 158, at 706. But see Hoffman, *supra* note 158, at 3-4 ("antitrust policy and labor policy need not work at cross purposes").

178. 381 U.S. 676 (1965). In *Jewel Tea* the Supreme Court held that a market restraint can be "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision . . . falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Id.* at 689-90.

179. 421 U.S. 616 (1975).

180. *Id.* at 625.

181. *Id.* at 622-25.

182. See *Mid-American Regional Bargaining Ass'n v. Will City Carpenters Dist. Council*, 675 F.2d 881 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982); *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368 (3d Cir. 1979), *cert. denied*, 459 U.S. 916 (1982). The holdings of these courts, although justifiable, need not rest on the mystical term "nonstatutory exemption." Section 6 of the Clayton Act expressly sanctions labor market restraints, and any restraints on the labor market necessarily create restraints on product markets. To find antitrust

Of the four principal labor exemptions, only section 6 of the Clayton Act substantially affects the corporate campaign. Restraints imposed by the corporate campaign constitute direct product restraints, not indirect restraints as in *Connell*, and so make the nonstatutory exemption inapplicable. Section 4 of the Norris-LaGuardia Act does not immunize unions from liability, but instead protects certain activities against injunctive relief. Furthermore, the laundry list of protected activities in section 20 of the Clayton Act does not extend to the aggressive tactics used in a corporate campaign.

B. *The Scope of the Section 6 Exemption*

An antitrust analysis of the corporate campaign, therefore, necessarily focuses on section 6 of the Clayton Act, which exempts only union activities that are (1) lawful, and (2) in pursuit of legitimate union objectives.¹⁸³ For the exemption to apply, both requirements must be satisfied.¹⁸⁴ The express language of section 6 makes clear that labor unions do not enjoy a blanket immunity from the antitrust laws.¹⁸⁵ If an exemption does not apply, then the union's activities must undergo a traditional antitrust analysis.¹⁸⁶

To scrutinize a union's corporate campaign activities thoroughly in terms of the section 6 exemptions, it is first necessary to understand which objectives a union may lawfully and legitimately pursue under the Clayton Act. A union may lose its section 6 exemption in three primary ways: (1) By conspiring with nonunion groups; (2) by conducting illegal boycott activities; or (3) by committing violence. These activities, all of which may occur during a corporate campaign, involve unlawful objectives that carry antitrust implications.

1. Lawfully Carrying Out Legitimate Union Objectives

The threshold question focuses on what it means for a union to be carrying out legitimate union objectives. Unfortunately, the courts rarely ask the proper questions anymore because they prefer to rely on judicially developed doctrine rather than the statute itself. In 1929, however, Justice Pitney offered the following interpretation of section 6 of the Clayton Act: "[T]here is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade."¹⁸⁷

Although Justice Pitney did not elaborate on his phrase "actual combina-

liability as a result of indirect product market restraints would eviscerate § 6 of the Clayton Act. Such a finding would effectively outlaw labor unions.

183. 15 U.S.C. § 17 (1982).

184. See *United States v. Drivers, Chauffeurs & Helpers Local 639*, 32 F. Supp. 594 (D.D.C. 1940).

185. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-88 (1939); *Embry Riddell Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 901 (5th Cir. 1974); *Adams Dairy Co. v. St. Louis Dairy Co.*, 260 F.2d 46, 54 (8th Cir. 1958).

186. See, e.g., *Republic Prods., Inc. v. American Fed'n of Musicians*, 245 F. Supp. 475, 476 (S.D.N.Y. 1965); *United States v. Chattanooga Chapter, Nat'l Elec. Contractors Ass'n, Inc.*, 116 F. Supp. 509, 510 (E.D. Tenn. 1953).

187. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921).

tion or conspiracy in restraint of trade," the rest of the passage expresses a preference for statism that reflects the conservative nature of the Court in the 1920s.¹⁸⁸ In Pitney's view, a union is exempt under section 6 of the Clayton Act only if it acts the way unions normally act. Such a static view of a union's legitimate objects has surfaced elsewhere as well.¹⁸⁹

This conservative approach has enormous consequences for the corporate campaign because of the campaign's novelty. Surely Congress did not intend to prevent unions from employing new and better tactics if otherwise lawful. Rather, the "legitimate objects" phrase can be understood best as an expression that a union may permissibly pursue only those goals that justify a union's existence: Higher wages, shorter hours, and improved working conditions.¹⁹⁰ A labor organization may not, for example, refuse to unload Russian cargoes or to work in a theater exhibiting an objectionable work as a means of political protest.¹⁹¹

Although the avowed intent to destroy an employer should not be a legitimate union objective,¹⁹² the courts appear confused on this point. The judiciary has been hesitant to scrutinize labor objectives, a disinclination that also surfaces in the unfair labor practice context.¹⁹³ In *Hunt v. Crumboch*¹⁹⁴ plaintiff, an employer, alleged that the union had engaged in a conspiracy that ultimately destroyed his business and further alleged that the union was motivated simply by spite. The Supreme Court found the union's motive to be irrelevant,¹⁹⁵ notwithstanding language contained in section 6 of the Clayton Act that refers to the union's "objects."¹⁹⁶ The United States Court of Appeals for the Fifth Circuit has made a similar statement in dictum.¹⁹⁷

188. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 434-35 (1978) (describing the conservative nature of the court during the "Lochner era").

189. See *IPC Distribs. v. Chicago Moving Picture Mach. Operators Union*, 132 F. Supp. 294, 299 (N.D. Ill. 1955) (A union "must be exercising the peaceful activities normally incident to achieving its usual and proper aims.").

190. See *National Ass'n of Women & Children's Apparel Salesmen, Inc. v. FTC*, 479 F.2d 139, 144 (5th Cir.) ("[T]he antitrust laws yield only insofar as the union pursues legitimate subjects of collective bargaining"), *cert. denied*, 414 U.S. 1004 (1973); *Great Atlantic & Pacific Tea Co. v. Amalgamated Meat Cutters & Butcher Workmen, Local 88*, 410 F.2d 650, 653 (8th Cir. 1969) ("But when unions . . . venture outside legitimate union interests they also step outside the boundary of exemption."); *Afran Transp. Co. v. National Maritime Union*, 169 F. Supp. 416, 423 (S.D.N.Y. 1958) ("A union may act in restraint of trade if it does so in furtherance of a legitimate labor purpose . . .").

191. See, e.g., *International Longshoremens Ass'n v. Allied Int'l*, 456 U.S. 212, 225-26 (1982); *IPC Distribs. v. Chicago Moving Picture Mach. Operators Union*, 132 F. Supp. 294, 299 (N.D. Ill. 1955).

192. UBC officials have more than once stated that their goal is the infliction of damage on Louisiana-Pacific, even at the expense of a satisfactory collective bargaining agreement. See *Union Reg.*, Apr. 5, 1985, at 1, col. 3; *Wall St. J.*, June 26, 1984, at 27, col. 1.

193. See *supra* note 133.

194. 325 U.S. 821 (1945).

195. *Id.* at 824-25.

196. See 15 U.S.C. § 17 (1982) (exempting from antitrust liability union activities that lawfully carry out "legitimate objects").

197. In *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896 (5th Cir. 1974), the court stated that

[a] union can, without forfeiting the exemption or substantively transgressing the antitrust laws, act with a purpose to injure or even eliminate the business of an employer, no matter

In light of policy concerns and statutory authority, these antitrust decisions have drawn improper conclusions. The union may, for tactical reasons, state that it intends to destroy the employer and act accordingly, all for the purpose of obtaining a favorable collective bargaining agreement. Neither public policy nor statutory authority, however, should exempt a union from antitrust liability when it acts in restraint of trade for the actual purpose of destroying the employer.¹⁹⁸

Furthermore, some courts confuse improper objectives with improper means. For example, one court has held that forcing a third party to breach its contract with the primary employer does not constitute a proper union goal,¹⁹⁹ while another court has ruled similarly regarding a union's concerted refusal to deal with the employer.²⁰⁰ Those acts were not union objects. Rather, the activities found objectionable in both cases were means to other ends that must be examined under the "lawful" language of section 6. As some courts correctly have recognized, "the methods the union [chooses] are not immune from antitrust sanctions simply because the goal is legal."²⁰¹ Thus, a union that engages in a corporate campaign may be pure at heart in its efforts to obtain better working conditions from the employer, and yet open itself to antitrust liability if its tactics are "unlawful."

The use of a standard such as "lawful" in a statute that itself is designed to describe lawful conduct creates obvious circularity problems that cannot be resolved completely in the case of section 6. To resolve the circularity, unlawfulness within the meaning of section 6 of the Clayton Act would have to be limited to mean lawfulness outside antitrust laws. But as discussed below,²⁰² one way that a union may lose its exemption is by acting in concert with nonlabor groups.

The courts' justifiable antipathy toward union conspiracies with business entities derives from three primary sources, all of which are founded on antitrust law. First, such conspiracies tend to place direct restraints on product markets rather than indirect restraints through restrained labor markets,²⁰³ a dichotomy

whether it does so because it more or less legitimately defines its interests in terms of injuring the employer or because of personal animus toward a particular employer.

Id. at 903. The court in *IPC Distribrs., Inc. v. Chicago Moving Picture Mach. Operators Union*, 132 F. Supp. 294, 299 (N.D. Ill. 1955) stated: "Whatever the legitimate and normal objectives of a labor union may be, they surely do not include a conspiracy to effectively stop one item of business." Taken together, *IPC Distributors*, *Embry-Riddle*, and *Hunt* stand for the curious proposition that a union may not seek to stop one item of business but may attempt to destroy the employer's entire business.

198. It is significant, however, that the mere attempt to destroy an employer will not automatically create antitrust liability for a union. In such a case, the union merely loses its exemption. The actions of the union must then be scrutinized under standard antitrust principles.

199. *United States v. Drivers, Chauffeurs & Helpers Local 639*, 32 F. Supp. 594, 598 (D.D.C. 1940).

200. *Westlab, Inc. v. Freedomland, Inc.*, 198 F. Supp. 701, 708 (S.D.N.Y. 1961).

201. *Connell*, 421 U.S. at 625.

202. See *infra* text accompanying notes 209-37.

203. See, e.g., *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 809 (1945) (when union aids business in combining to restrain trade directly, it goes beyond legitimate, indirect restraints).

the Supreme Court recognized in *Connell*.²⁰⁴ Second, courts rightly see in section 6 of the Clayton Act a congressional expression of approval for union activities that look like union activities.²⁰⁵ Of course, problems arise in forcing a rigid staticism on unions, a point that has been discussed above.²⁰⁶ Last, a union's conspiracy with nonunion groups may be perceived not as a direct antitrust violation by the union, but as aiding and abetting its nonunion conspirators in their antitrust violations.²⁰⁷ This "two cushion" analysis almost resolves the circularity problems, but not quite. The concept of unlawfulness is difficult to understand in the context of section 6 without resorting to some circularity; however courts tend to avoid such detail. As noted previously,²⁰⁸ courts have focused on three primary ways that a union can lose its section 6 exemption, without appearing to worry about the exact wording of section 6.

2. Conspiracy with Nonunion Groups

Although its origin is unclear,²⁰⁹ and its soundness remains open to question,²¹⁰ a standard black letter rule still prevails in this area. This rule provides that although a union is exempt from the antitrust laws when it acts unilaterally and lawfully in pursuit of its own legitimate objectives, it loses its exemption if it combines or conspires with a business or other nonlabor group.²¹¹ The jury determines whether, as a question of fact, the union has entered into an improper conspiracy with a nonlabor group.²¹² But the jury cannot make its decision unassisted. The trial judge must first decide whether the nonlabor group with whom the union has conspired is the type that could expose the union to

204. See *supra* text accompanying note 181.

205. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921).

206. See *supra* text accompanying notes 188-91.

207. See, e.g., *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945).

208. See *supra* text accompanying notes 183-87.

209. The notion that a union loses its antitrust exemption if it conspires with a nonunion group may have originated with Justice Frankfurter's dictum in *United States v. Hutcheson*, 312 U.S. 219 (1940). Justice Frankfurter stated that a union's motives were irrelevant under § 20 of the Clayton Act "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." *Id.* at 232. The only authority Justice Frankfurter cited for this *caveat* was *United States v. Brims*, 272 U.S. 549 (1926), in which the Supreme Court upheld the convictions of both union members and nonunion members under the Sherman Act. *Id.* at 553. In *Brims*, however, the Court did not discuss a possible exemption for the union. *Id.* at 549-53.

Four years after *Hutcheson*, the Court decided *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1944), a case sometimes cited as the origin of the prohibition against unions cooperating with nonunion groups. See, e.g., *Davis Pleating and Button Co. v. California Sportswear & Dress Ass'n.*, 145 F. Supp. 864, 865 (S.D. Cal. 1956). In *Allen Bradley* the Court held that, notwithstanding § 20 of the Clayton Act, a union may be held liable for antitrust violations as an aider and abetter of a business' antitrust violation. *Allen Bradley*, 325 U.S. at 809-10. Thus, under the *Allen Bradley* reasoning, a union's liability in such cases is derivative: It requires a showing that the nonlabor organization with whom the union combined was guilty of an antitrust violation. Otherwise there is nothing to aid and abet.

210. See, e.g., *Di Cola*, *supra* note 158, at 714-15 (criticizing the *Allen Bradley* rule).

211. See, e.g., *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 810 (1945); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941); *Julian v. Raytheon*, 499 F. Supp. 949, 955 (D. Del. 1980); *Davis Pleating & Button Co. v. California Sportswear & Dress Ass'n*, 145 F. Supp. 864, 865-66 (S.D. Cal. 1956).

212. See *Adams Dairy Co. v. St. Louis Dairy Co.*, 260 F.2d 46, 55 (8th Cir. 1958).

antitrust liability. The judge also must decide whether the conspiracy itself is of a type that should result in a per se violation.²¹³ It is significant that the type of conspiracy that constitutes an unprotected combination with a nonlabor group may result in a per se violation of the antitrust laws.²¹⁴ This means that a plaintiff need not show any market effects to prevail.²¹⁵

The threshold question thus concerns the type of nonlabor group that results in a loss of exemption for the union. This question has perplexed many courts.²¹⁶ Its importance for the corporate campaign cannot be overemphasized, however, because a typical corporate campaign involves, among other things, cooperation with a variety of nonlabor groups.²¹⁷

In cases in which courts have held unions liable for conspiracies with nonlabor groups, the nonlabor conspirators generally comprise other business entities.²¹⁸ At least one court has gone so far as to state that the nonlabor group *must* have been in competition with the plaintiff at the time of the conspiracy.²¹⁹ Other courts apparently leave open the possibility that a conspiracy with a non-business, nonunion group will destroy the union's exemption.²²⁰

Analytically, the courts should not distinguish between conspiracies in restraint of trade based solely on the nature of the coconspirators. Courts should treat conspiracies between unions and all nonlabor groups the same. Nonbusiness entities clearly are capable of violating antitrust laws.²²¹ If the objection to removing the exemption whenever a union conspires with, for example, an envi-

213. The second question requires no extensive analysis. The court simply determines whether the combination or conspiracy is, as a matter of law, "in restraint of trade" within the meaning of § 1 of the Sherman Act, 15 U.S.C. § 1 (1982). If the unprotected combination is in restraint of trade, per se liability attaches. See *infra* text accompanying note 214.

214. See *Southeast Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 775 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

215. See, e.g., *White Motor Co. v. United States*, 372 U.S. 253, 261-62 (1963); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 987 (8th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984).

216. See *infra* text accompanying notes 218-20.

217. In the corporate campaign against Louisiana-Pacific, these nonlabor groups included citizens groups, environmental groups, stockholders, and a competitor of Louisiana-Pacific. See *supra* text accompanying notes 34, 43-47, & 51.

218. See, e.g., *Great Atlantic & Pacific Tea Co. v. Amalgamated Meat Cutters & Butcher Workmen, Local 88*, 410 F.2d 650, 653 (8th Cir. 1969) (union said to lose exemption if it conspires with business people); *United States v. Employing Lathers Ass'n*, 212 F.2d 726, 729-30 (7th Cir. 1954) (unions conspired with business contractors to suppress competition); *Associated Orchestra Leaders v. Philadelphia Music Soc'y*, 203 F. Supp. 755, 759 (E.D. Pa. 1962) (exemption said to be lost when union conspires with employers to restrain competition).

219. See *Thompson Newspapers, Inc. v. Toledo Typographical Union*, 387 F. Supp. 351, 354 (E.D. Mich. 1974).

220. See, e.g., *Afran Transp. Co. v. National Maritime Union*, 169 F. Supp. 416 (S.D.N.Y. 1958), in which the court stated:

The doctrine of these cases is in essence that unions are not exempt from provisions of the Sherman Act if they combine with nonlabor groups to create business monopolies, to control the marketing of goods and services or to restrain trade.

A union may act in restraint of trade if it does so in furtherance of legitimate labor purposes, either alone or in combination with other unions. If, however, it acts to restrain trade in combination with nonlabor or business groups it violates the Sherman Act [and has no exemption].

Id. at 423.

221. See generally ANTITRUST AND LOCAL GOVERNMENT (J. Siena ed. 1982) (analyzing antitrust liability of local governments).

ronmental group is that such cooperation is not anticompetitive, then the objection is really that such a conspiracy or combination is not "in restraint of trade." The courts have construed that phrase broadly enough to encompass a union's conspiracy with an environmental group when the union's purpose and effect is to make interstate shipments by the employer more expensive, all to the benefit of the employer's union shop competitors.²²² Of course, under current doctrine the means of carrying out the conspiracy may offer protection to both the union and the nonlabor group.²²³

Two cases effectively illustrate the way in which a union may lose its section 6 exemption by joining with nonlabor groups. They also contain important parallels to the typical corporate campaign. First, in *Harlem River Construction Co-op v. Associated Grocers*²²⁴ plaintiff, a cooperative grocery store, alleged that union members ran a competing grocery store and that the union, its members, and the competing store conspired to make plaintiff's store less profitable to benefit the competing store.²²⁵ In denying the union's motion for a directed verdict, the *Harlem River* court first noted that proof of a conspiracy is almost always circumstantial. It found sufficient evidence from which a jury could conclude that various defendants had conspired as alleged.²²⁶ After finding sufficient evidence of a conspiracy between the union defendants and the nonunion store, the court held that the union could not claim antitrust immunity under section 6 of the Clayton Act.²²⁷

The parallel between *Harlem River* and the UBC's corporate campaign against Louisiana-Pacific derives from the UBC's relationship with Blandin Wood Products.²²⁸ Blandin and Louisiana-Pacific were competitors in the nascent waferboard market, and Blandin produced its waferboard product, Blandex, with union labor.²²⁹ As the market share for Blandex increased, so did the amount of work for the union and its members.²³⁰ The UBC apparently attempted to eliminate Louisiana-Pacific's waferboard product from as much of the market as possible. Blandin cooperated by giving the union access to the Blandin manufacturing facilities, by providing the union with factual informa-

222. Not long after Congress enacted the Sherman Act, 15 U.S.C. § 1 (1890), the Supreme Court stated that the Act broadly condemns all combinations and conspiracies that restrain the free and natural flow of trade in interstate commerce. See *Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U.S. 600, 609 (1914). In fact, the Sherman Act condemns restraints of trade lawful at common law. See, e.g., *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 560 (1898); *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 316 (1897); *Wheeler-Stenzel Co. v. National Window Glass Jobbers Ass'n.*, 152 F. 864, 868 (3d Cir. 1907).

223. See *infra* text accompanying notes 281-83.

224. 408 F. Supp. 1251 (S.D.N.Y. 1976). For a cogent analysis of this case, see DiCola, *supra* note 158, at 739-40.

225. See *Harlem River*, 408 F. Supp. at 1261-68 (detailing the facts of the case).

226. *Id.* at 1268-69.

227. *Id.* at 1269-70.

228. See *supra* text accompanying note 51.

229. See *Blandex: A Union-Label Alternative to the Boycotted L-P Waferboard*, CARPENTER, Mar. 1985, at 10.

230. The union's other and more immediate motive was simply to put economic pressure on Louisiana-Pacific. See *supra* text accompanying note 58.

tion for the union's publicity, and by meeting with union representatives.²³¹ Although Blandin's role in the corporate campaign was small, and although Blandin may not have been aware of the UBC's purpose in seeking its cooperation, the *Harlem River* holding would indicate that the UBC lost its antitrust immunity and exposed itself to a claim of per se liability when it enlisted the help of a competitor of Louisiana-Pacific to reduce Louisiana-Pacific's market share.²³²

Second, the Supreme Court in *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*²³³ denied a union's claim of antitrust immunity because the union had used its boycott and strike powers to force local contractors and others to use only locally manufactured electrical equipment. Union members produced the locally manufactured equipment but not the out-of-state equipment, and the union naturally wanted union manufacturers to have all the local business. Plaintiffs, out-of-state manufacturers, sued the union, its officials, and its members. Plaintiffs alleged that defendants, using coercion, had extracted agreements from the local contractors not to purchase out-of-state equipment.²³⁴ The Supreme Court held that the union enjoyed no immunity because the union entered into agreements with plaintiffs' business competitors. The Court reasoned that a labor union violates the Sherman Act when, to further its own interests, it aids and abets businesses to do that which the Sherman Act prohibits.²³⁵

The UBC's corporate campaign presented facts similar to those in *Allen Bradley*. The UBC had extracted agreements from some retailers whereby the retailers would not purchase Louisiana-Pacific's nonunion products and, in turn, the unions would not conduct boycott activities of the retailers' establishments.²³⁶ The union obviously intended that only union made goods would be sold at the retail outlets. Of course, that intent alone would not cause antitrust problems. Antitrust violations would occur only if the unions entered into agreements with retailers whereby the retailers would boycott Louisiana-Pacific in exchange for the union's promise to cease its activities against the retailers. Thus, a violation of section 8(e) of the NLRA also would entail a removal of the Clayton Act section 6 exemption and would result in a per se violation of the Sherman Act.²³⁷

231. See *Blandex: A Union-Label Alternative to the Boycotted L-P Waferboard*, CARPENTER, Mar. 1985, at 10-11, 24.

232. In light of the *Harlem River* decision, Blandin could be a named defendant in an antitrust action because it played a role as a coconspirator, depending on the degree of its participation and awareness.

233. 325 U.S. 797 (1945).

234. *Id.* at 798-800.

235. *Id.* at 809-10. The Supreme Court also stated that the Norris-LaGuardia Act prohibits injunctions of a union's secondary boycott activities if it acts alone. See *id.* at 812. The secondary boycott aspects of Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), are discussed *infra* notes 252-255 and accompanying text.

236. See *supra* text accompanying note 54.

237. See *supra* text accompanying note 214.

3. Illegal Boycott Activities

An even stronger case for antitrust liability arises when a union engages in successful secondary boycott activities. Section 6 of the Clayton Act exempts only lawful acts; and even if the circularity problem of that term²³⁸ is avoided by limiting criteria for unlawfulness to sources other than antitrust law, boycotts prohibited by section 8(b)(4)(ii) of the NLRA also clearly lie outside the scope of the section 6 exemptions.²³⁹

Two early United States Supreme Court cases established the principle that a union may violate the Sherman Act when it engages in secondary boycott activities. In *Lawlor v. Loewe*²⁴⁰ the Supreme Court upheld a jury verdict awarding money damages against a hatters union. The union had declared a boycott of certain employers with whom it had a primary dispute.²⁴¹ However, the hatters also declared a boycott of all dealers who bought goods from the primary employer, and they circulated a list of "unfair dealers" who dealt with the primary employer.²⁴² The Court held such secondary activities to be illegal under the Sherman Act.²⁴³

In *Duplex Printing Press Co. v. Deering*,²⁴⁴ which the Supreme Court decided under the Clayton Act, plaintiff was a Michigan based manufacturer of printing presses whose sales took place all over the United States. Defendants were business agents of a union that represented 14 of plaintiff's 250 employees. The union called a strike with predictably little effect given its limited penetration at the employer's plant. The union then sought to prevent the employer from selling its presses by threatening purchasers, truckers, exhibitors, and installers with economic ruin if those parties refused to stop dealing with the employer.²⁴⁵ The *Duplex* Court recognized that, under certain circumstances, a union is exempt from antitrust liability. However, the court found that the union had departed from "its normal and legitimate objects,"²⁴⁶ and it held that

238. See *supra* text accompanying note 202.

239. This conclusion holds true even under a "strict constructionist" view, which would define illegality to mean that which was illegal at the time the Clayton Act was enacted. Total secondary boycotts were illegal when the Clayton Act was enacted. See *Lawlor v. Loewe*, 235 U.S. 522, 534 (1914).

240. 235 U.S. 522 (1914).

241. *Id.* at 533.

242. *Id.* at 534.

243. The Court found that:

[I]respective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of [the primary employer's] possible customers . . . is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

Id.

244. 254 U.S. 443 (1921).

245. *Id.* at 462-63.

246. *Id.* at 469. This case provides a good example of the confusion of means and ends discussed *supra* text accompanying notes 199-200. The union was pursuing its normal and legitimate objects—recognition by the employer and improved terms of employment. The illegality derived from the means employed by the union.

neither section 6²⁴⁷ nor section 20²⁴⁸ of the Clayton Act exempts labor unions' secondary boycott²⁴⁹ activities from antitrust liability. Thus, the Court upheld an injunction of the union's secondary activities.²⁵⁰

Congress responded to the *Duplex* case by enacting the Norris-LaGuardia Act in 1932.²⁵¹ That Act overrules *Duplex* to the extent that *Duplex* allowed an injunction for secondary boycott activities.²⁵² However, the Norris-LaGuardia Act does not apply to damage actions like the action brought in *Lawlor*.²⁵³ For that reason, *Duplex* and *Lawlor* still control any analysis of secondary boycott damage actions under the Sherman and Clayton Acts.²⁵⁴ In addition, more recent cases reinforce the basic holdings of those cases: A union loses its immunity under the antitrust laws because it acts in restraint of trade if it intentionally coerces third parties to cease business relations with the targeted or primary employer.²⁵⁵

247. *Duplex*, 254 U.S. at 469.

248. *Id.* at 473-77.

249. The *Duplex* Court provided an early definition of "secondary boycott:":

[T]hat is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott") but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

Id. at 466. Along similar lines, the District Court for the Eastern District of Pennsylvania, in *Allentown Racquetball & Health Club v. Building & Constr. Trades Council*, 525 F. Supp. 156, 160 n.2 (E.D. Pa. 1981), observed that

[a] secondary boycott is the application of economic pressure upon a person with whom the union has no dispute regarding its own terms of employment (neutral or secondary employer) in order to induce that person to cease doing business with another employer with whom the union does have a dispute (primary employer).

Id.

250. *Duplex*, 254 U.S. at 478.

251. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101-115 (1982)).

252. See *Allen Bradley*, 325 U.S. at 805-06.

253. See 29 U.S.C. § 104 (1982); see also *Republic Prods., Inc. v. American Fed'n of Musicians*, 245 F. Supp. 475, 476-77 n.2 (S.D.N.Y. 1965) (court lacking jurisdiction to issue injunction in a labor dispute nevertheless has jurisdiction to award damages).

254. Commentators generally agree with this proposition. See *Handler & Zifchak*, *supra* note 158, at 470 n.60.

255. See, e.g., *Allen Bradley*, 325 U.S. at 808-10 (union liable under antitrust laws for coercing contractors into boycotting out-of-state electrical equipment manufacturers); *Frito Lay, Inc. v. Retail Clerks Local 7*, 629 F.2d 653, 663 (10th Cir. 1980) (if union agreement is intended to have secondary rather than primary objectives, the antitrust exemption is forfeited); *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1372-73 (3d Cir. 1979) (coerced agreements to boycott primary employers held to violate Sherman Act and destroy any exemption), *cert. denied*, 459 U.S. 916 (1982); *James Julian, Inc. v. Raytheon Co.*, 499 F. Supp. 949, 959 (D. Del. 1980) (allegations that union coerced business into agreeing not to deal with plaintiff sufficient to preclude dismissal of complaint); *United States v. Olympia Provision & Baking Co.*, 282 F. Supp. 819, 828 (S.D.N.Y. 1968) (union's attempts to enforce agreements with manufacturers that manufacturers would deal only with union shops held illegal), *aff'd*, 393 U.S. 480 (1969); *Westlab, Inc. v. Freedomland, Inc.*, 198 F. Supp. 701, 703 (S.D.N.Y. 1961) (motion to dismiss denied when complaint alleged that union coerced business into breaking contract with plaintiff and refusing to deal with plaintiff).

An important aspect of these cases is that courts generally do not require that all businesses which agree to refuse to deal with the plaintiff be engaged in joint action among themselves. Rather, the essential element is the agreement with the union that the business entity will refuse to deal with the plaintiff. If the union secures agreements with a number of entities, each such agreement can be an independent basis of liability. By analogy, in criminal law this principle is known as the "spoke

Two relatively recent cases illustrate exactly how secondary boycott activities can result in antitrust as well as unfair labor practice liability, especially when they occur in the context of a corporate campaign. In *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council*²⁵⁶ plaintiff, a nonunion construction contractor, sued a restaurant chain and two unions. The complaint alleged an illegal agreement between defendants whereby the restaurant chain promised to use only union contractors in building new restaurants and, in turn, the union agreed to boycott plaintiff.²⁵⁷ At trial plaintiff introduced evidence that the unions had engaged in picketing and leafleting of the restaurant chain.²⁵⁸ The trial court granted a directed verdict in favor of the unions, because it found no evidence of anything but a unilateral decision on the part of the restaurant chain to use contractors other than plaintiff.²⁵⁹ In reversing the trial court, the United States Court of Appeals for the Third Circuit found evidence that the unions had coerced the restaurant chain into boycotting plaintiff. The court held that the jury could have inferred a coerced, illegal agreement between the restaurant chain and the union.²⁶⁰ The court held that such a coerced boycott agreement violated the Sherman Act and further held that none of the statutory or nonstatutory exemptions would apply, because the jury could have found union cooperation with a nonunion group.²⁶¹

Under these facts, as the jury could have perceived them, a coerced agreement also could lead to liability under the NLRA. The jury could have found both coercion designed to compel an agreement to boycott and an actual agreement to boycott, resulting in liability under section 8(b)(4)(ii)(A) and section 8(e) of that act.²⁶² Similar findings may result in the context of a corporate campaign such as the one described in this Article.²⁶³

Another relatively recent case that carries implications relating to the corporate campaign is *United States v. Olympia Provision & Baking Co.*²⁶⁴ In that case the union had attempted to coerce frankfurter manufacturers into refusing to deal with nonunion distributors. The court first termed it "elementary" that boycotts and attempted boycotts are illegal.²⁶⁵ The court then declared such forced agreements to be illegal under the antitrust laws.²⁶⁶

Thus, because total secondary boycotts are illegal under the NLRA and

and wheel" as opposed to the "chain" conspiracy. See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 754-55 (1946) (describing spoke and wheel conspiracy); *United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.) (describing chain conspiracy), *rev'd on other grounds*, 308 U.S. 287 (1939); L. WEINREB, *CRIMINAL LAW* 589 (3d ed. 1980) (discussing difference between the two types of conspiracy).

256. 609 F.2d 1368 (3d Cir. 1979), *cert. denied*, 459 U.S. 916 (1982).

257. *Id.* at 1370-72.

258. *Id.* at 1371.

259. *Id.* at 1372.

260. *Id.*

261. *Id.* at 1372-73.

262. For a discussion of these provisions of the NLRA, see *supra* notes 60-157 and accompanying text.

263. See *supra* notes 16-59 and accompanying text.

264. 282 F. Supp. 819 (S.D.N.Y. 1968).

265. *Id.* at 828.

266. *Id.*

under antitrust principles, the use of corporate campaign tactics may destroy the union's exemption under section 6 of the Clayton Act. Also, because the union's activities almost always result in a restraint of trade, the union almost inevitably encounters antitrust liability under the Sherman Act.²⁶⁷ Furthermore, total secondary boycott activities are of the type that may invoke per se analysis, which obviates a plaintiff's need to prove market effect.²⁶⁸

4. Violence in the Corporate Campaign

As a practical matter, no union will publicly admit to the use of violence as a tactic in a corporate campaign. In fact, national leadership generally cautions locals against strike violence.²⁶⁹ However, violence is nearly inevitable during a protracted strike that involves large numbers of workers, especially when rhetoric is sharp and, as in the corporate campaign,²⁷⁰ when the union sets out to attack the employer on a broad front. In such cases courts uniformly recognize that if the union members agree, combine, or conspire to restrain trade in the employer's goods by using violence, they lose their immunity and violate the Sherman Act.²⁷¹ This conclusion is inevitable given that the exemptions listed under section 6 of the Clayton Act apply only to lawful acts.²⁷²

Viewed from the standpoint of traditional antitrust theory, however, it seems odd to subject workers to antitrust liability for essentially localized tor-

267. A variation on this "coerced boycott" theme is the "concerted refusal to deal" or "group boycott," which gives rise to a per se violation of the antitrust laws. See *United States v. General Motors Corp.*, 384 U.S. 127, 146-47 (1966); *Lewis v. Pennington*, 400 F.2d 806, 813-14 (6th Cir.), cert. denied, 393 U.S. 983 (1968). Typically, a concerted refusal to deal involves competitors of the plaintiff who attempt to drive the plaintiff out of business. See, e.g., *Lewis*, 400 F.2d at 813. In fact, some cases suggest that the conspirators must be actual or potential competitors of the plaintiff. See, e.g., *West Tex. Utils. Co. v. Texas Elec. Serv. Co.*, 470 F. Supp. 798, 822 (N.D. Tex. 1979); *KOS v. Alyeska Pipeline Serv. Co.*, 676 P.2d 1069, 1076 (Alaska 1983). In the typical case, conspirators agree among themselves not to deal with the victim and, as in *Lewis*, may enlist the aid of a union.

The corporate campaign involves an atypical form of a concerted refusal to deal. The union acts as the organizer of the group and the others merely agree to go along. The retailers boycotting the primary employer may be unaware of the concerted nature of their activity.

268. See, e.g., *United States v. General Motors Corp.*, 384 U.S. 127, 145-46 (1966); *Lewis v. Pennington*, 400 F.2d 806, 813 (6th Cir.), cert. denied, 393 U.S. 983 (1968).

269. In its labor dispute with Louisiana-Pacific, the UBC leadership cautioned against violence in its strike literature. See *supra* note 28. Such conduct helps the union create a paper trail so that it may avoid liability for individual members' acts. A union or any member of a union cannot be liable without "clear proof" that that union or member participated in, authorized, or ratified the act of violence. See 29 U.S.C. § 106 (1982). Nonetheless, individual union members may be held liable for any violence they actually commit. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715, 735-36 (1966).

270. Violence has erupted in the unions' strike against Louisiana-Pacific. See *Daily J. Com.*, Jan. 11, 1984, at 3, col. 1 (describing violence). Although union officials generally eschew violence, the head of Corporate Campaign, Inc., Ray Rogers, has been arrested for rioting during corporate campaign activities. See *Oregonian*, Apr. 12, 1986, at C1, col. 6.

271. See, e.g., *Altemose Constr. Co. v. Atlantic Cape May & Parts*, 493 F. Supp. 1181, 1190-91 (D.N.J. 1980) (vandalism, violence, and threats of violence destroy union's antitrust immunity under § 4 and § 20 of the Clayton Act); *United States v. Drivers, Chauffeurs & Helpers Local 639*, 32 F. Supp. 594, 598-600 (D.D.C. 1940) (violence precludes union from Clayton Act exemption); *Dean v. International Longshoremen's Ass'n*, 17 F. Supp. 748, 750 (W.D. La. 1936) (union's restraint of trade by force and violence violates Sherman Act).

272. Availability of the exemption depends on whether the union is "lawfully carrying out" legitimate union objectives. See 15 U.S.C. § 17 (1982).

tious activity. In 1939 the Supreme Court addressed that concern in *Apex Hosiery Co. v. Leader*.²⁷³ The union in that case had illegally seized plaintiff's plant and prevented interstate shipments of plaintiff's goods.²⁷⁴ The Court held that union violence whose only consequence is a restraint on interstate trade does not necessarily contravene the antitrust laws.²⁷⁵ Rather the employer's remedy in such cases is under state tort law.²⁷⁶ The purpose of the Sherman Act is to protect free competition, not to police interstate commerce.²⁷⁷ To be actionable under the antitrust laws, the violence must "have or be intended to have an effect upon prices in the market or otherwise to deprive the purchasers or consumers of the advantages which they derive from free competition."²⁷⁸

Thus, in accord with *Apex Hosiery*, sporadic and uncoordinated picket violence in the course of a corporate campaign would not result in a "combination . . . or conspiracy . . . in restraint of trade"²⁷⁹ as that term of art contemplates. Such violence may, however, constitute a combination and may in fact restrain trade. But if a plaintiff employer can show that a union was using violence as a tactic to put economic pressure on the employer by raising the cost of the employer's goods in order to make the employer less competitive than union-shop competitors, such violence may give rise to a per se violation of the antitrust laws.²⁸⁰

5. Protected Corporate Campaign Activities

Although certain aspects of the corporate campaign potentially violate federal antitrust law provisions, some elements would not result in antitrust liability. For example, a thorough corporate campaign strategy includes opposition to employer initiatives before governmental bodies. In the UBC corporate campaign against Louisiana-Pacific, union tactics included seeking to block Louisiana-Pacific's Urban Development Action Grant funding, opposing environmental variances, opposing construction permits for Waferwood plants, and opposing Louisiana-Pacific's access to federal timber.²⁸¹ None of these actions provide a basis for antitrust liability. Under the *Noerr-Pennington* doctrine a union or any other group may attempt to convince governmental bodies to take action favorable to it.²⁸² Because the doctrine is grounded in federal consti-

273. 310 U.S. 469 (1939). *Apex Hosiery* has received much attention from commentators. See, e.g., Handler & Zifchak, *supra* note 158, at 479; Hoffmann, *supra* note 158, at 4-9; Winter, *supra* note 158, at 39-43.

274. *Apex Hosiery*, 310 U.S. at 482-83.

275. *Id.* at 486-87, 489, 506, 512.

276. *Id.* at 512-13.

277. *Id.* at 500 (identifying the protection of competition as the Sherman Act's purpose).

278. *Id.* at 500-01.

279. 15 U.S.C. § 1 (1982).

280. See *supra* notes 269-72 and accompanying text. The Court in *Apex Hosiery* stated that a union loses its exemption from the antitrust laws if the violence has or is intended to have a direct market effect. See *Apex Hosiery*, 310 U.S. at 501.

281. See *supra* text accompanying notes 30-34, 36.

282. See *United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965); *Eastern R.R. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

tutional law principles rather than in antitrust doctrine,²⁸³ the scope of its protection properly extends to claims under the NLRA and state tort law as well.

V. LIABILITY UNDER STATE TORT LAW

An analysis of potential liability for corporate campaign activities under state tort law differs from an analysis under federal labor and antitrust law. Under labor and antitrust analyses individual tactics come under scrutiny. State tort law analysis, however, requires an examination of the cumulative purpose and effect of the campaign. In other words, analysis under state tort law requires scrutiny of the campaign as a campaign. The synergistic effect of all the corporate campaign activities, when combined with the motivation behind them, may transcend the legality of any one act in isolation.

Under tort principles applicable in nearly every state, a person commits tortious interference with another's business relations if that person intentionally interferes with the other's business either in pursuit of an improper objective, such as harming the other, or by use of improper means.²⁸⁴ Some states have codified the tort.²⁸⁵ Either explicitly or implicitly, the doctrine requires that the defendant not be privileged to interfere in the way it does.²⁸⁶ Three examples of privileged conduct under federal labor law would include strikes,²⁸⁷

283. The *Noerr-Pennington* doctrine, which is based on the right of petition protected by the Bill of Rights, stands for the proposition that private citizens jointly have a right to petition governmental bodies for the enactment of policies. *Eastern R.R. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); see *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965).

284. See, e.g., *Baldwin v. Marin City Properties, Inc.*, 79 Cal. App. 3d 393, 406, 145 Cal. Rptr. 406, 413 (1978) (dictum); *Rudoff v. Huntington Symphony Orchestra, Inc.*, 91 Misc. 2d 264, 265, 397 N.Y.S.2d 863, 864-65 (N.Y. Sup. Ct. 1977); *Juhaz v. Quik Shops, Inc.*, 55 Ohio App. 2d 51, 55, 379 N.E.2d 235, 239 (1977); *Straube v. Larson*, 287 Or. 357, 360-61, 600 P.2d 371, 374 (1979); *Top Service Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 209, 582 P.2d 1365, 1369 (1978); PROSSER AND KEETON ON THE LAW OF TORTS § 130 (W. Keeton 5th ed. 1984).

285. See, e.g., VA. CODE ANN. § 18.2-499 (1982). The Virginia statute provides for both civil and criminal penalties when two or more persons combine or conspire "for the purpose of willfully and maliciously injuring another in his . . . business." *Id.* To recover under that statute, a "plaintiff must prove (1) a combination . . . for the purpose of willfully and maliciously injuring plaintiff in his business and (2) resulting damage to plaintiff." *Allen Realty Corp. v. Holbert*, 227 Va. 441, 445, 318 S.E.2d 592, 596 (1984). That statute specifically exempts acts that are permitted by federal labor law. See VA. CODE ANN. § 18.2-499(c) (1982).

286. See, e.g., *Bendix Corp. v. Adams*, 610 P.2d 24, 29 (Alaska 1980) (persons privileged to interfere in business relations to protect an investment); *Worldwide Commerce, Inc. v. Fruehauf Corp.*, 84 Cal. App. 3d 803, 808, 149 Cal. Rptr. 42, 45 (1978) (privileged conduct applies only to certain socially accepted activities); *Rudoff v. Huntington Symphony Orchestra, Inc.*, 91 Misc. 2d 264, 265, 397 N.Y.S.2d 863, 864-65 (N.Y. Sup. Ct. 1977) (persons generally privileged to interfere "where such interference is in protection of an equal or superior right").

287. 29 U.S.C. § 157 (1982) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [29 U.S.C. § 158(a)(3) (1982)].

The Supreme Court has construed this section to authorize concerted work stoppages. See, e.g., *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385 n.20 (1969); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308 (1965).

picketing,²⁸⁸ and the product boycott.²⁸⁹ Even in those states that do not explicitly recognize lack of privilege as an element of the interference with business relations tort, those methods could not constitute tortious conduct due to federal preemption doctrine.²⁹⁰

The tort of intentional interference with business relations may encompass the type of union tactics used in a typical corporate campaign. Besides more traditional tactics, such as striking, picketing, handbilling, and product boycotts, the union may engage in a number of hostile activities. The union may cooperate with business competitors to damage the targeted employer economically, it may increase pressures on secondary employers to cease doing business with the employer, and individual union members may engage in acts of violence to intimidate the employer.²⁹¹ Federal labor law would not sanction any of these activities.²⁹² Furthermore, as part of a concerted campaign, they may expose the union to liability under a state tortious interference with business theory.

The state tort of intentional interference offers the most obvious response to the corporate campaign. It offers the prospect of punitive damages whereas unfair labor practice claims do not.²⁹³ Furthermore, an injured employer may make the state tort claim pendent to an unfair labor practice and antitrust case in federal court,²⁹⁴ and this strategy would have several advantages.

Such an avenue allows the employer to forum shop. When jurisdiction is based on a federal labor or antitrust claim, the plaintiff may sue where its princi-

288. 29 U.S.C. § 157 (1982) also has been construed to permit picketing activity on the premises of the primary employer. *See, e.g., Ex parte George*, 371 U.S. 72, 73 (1962); *NLRB v. Visceglia*, 498 F.2d 43, 47-48 (3d Cir. 1974). Significantly, boycott activities instituted for an unlawful purpose are not protected by 29 U.S.C. § 157 (1982). *See, e.g., Hoover Co. v. NLRB*, 191 F.2d 380, 386 (6th Cir. 1951); *Adams Dairy, Inc. v. Burke*, 293 S.W.2d 281, 292-93 (Mo. 1956), *cert. denied*, 352 U.S. 969 (1957).

289. *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 60, 71-73 (1964) (holding product boycott permissible under federal labor law).

290. Federal labor law preempts a tortious interference claim if what is being claimed would also constitute an unfair labor practice. *See United Ass'n of Journeymen v. Borden*, 373 U.S. 690, 693-94 (1963). This does not mean, however, that federal labor law has "occupied the field" when it comes to union conduct. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966) (states may regulate union violence). More importantly, that which Congress declares legal, a state may not declare illegal. *See U.S. CONST.*, art VI.

291. At one time or another, the unions' corporate campaign against Louisiana-Pacific involved all of these activities. For a description of that particular campaign, see *supra* notes 16-59 and accompanying text.

292. For a discussion of legal consequences under the NLRA that arise from the exertion of secondary pressures, see *supra* notes 77-145 and accompanying text. For a discussion of legal consequences under the antitrust laws that arise from illegal combinations in restraint of trade, see *supra* notes 209-37 and accompanying text. For a discussion of legal consequences that arise when a union engages in violence, see *supra* notes 269-80 and accompanying text.

293. The federal courts have long held that plaintiffs may not recover punitive damages when they assert an unfair labor practice case under 29 U.S.C. § 187 (1982). *See, e.g., Teamsters Union v. Morton*, 377 U.S. 252, 259-61 (1964); *United Mine Workers v. Patton*, 211 F.2d 742, 749-50 (4th Cir. 1954). If, however, the recovery is under a state tort theory, punitive damages may be available. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 720-21 (1966) (state tort law giving punitive damages not preempted by conflicting federal law); *Price v. United Mine Workers*, 336 F.2d 771, 775 (6th Cir. 1964) (punitive damages may be awarded under state tort law for violations of NLRA's boycott provisions), *cert. denied*, 380 U.S. 913 (1964).

294. For example, a tort claim is included in what is primarily an antitrust complaint against a union. *See, e.g., James Julian, Inc. v. Raytheon Co.*, 499 F. Supp. 949, 959 (D. Del. 1980).

pal office is located or where any agent or officer has represented union members.²⁹⁵ Thus, a large national union may be pursued with a pendent tort claim nearly anywhere in the United States. If a plaintiff brings the tort claim separately, however, diversity of citizenship must be the basis of jurisdiction.²⁹⁶ Because a union is a citizen, for diversity purposes, of every state where it has members,²⁹⁷ and because a national union is likely to have members in the employer's state of citizenship, complete diversity is difficult to achieve.

By forum shopping, an employer also can select the applicable substantive tort law. A federal court will apply the forum state's substantive law,²⁹⁸ including its conflict of laws principles.²⁹⁹ An employer therefore can look for a state that calls for application of its own tort law, even for torts committed out of state, and that also has tort principles advantageous to the employer.

By bringing claims under all three theories—labor, antitrust, and state tort law—at once, the employer may avoid compulsory joinder problems. If the employer brings only a state tort claim, or only a federal antitrust claim, or only an unfair labor practice claim, or any combination thereof, and the omitted claims are factually related enough to the claims brought, principles of *res judicata* may bar the employer from asserting any omitted claims thereafter.³⁰⁰

VI. CONCLUSION

As the climate for labor unions has become less hospitable, many unions have become more aggressive in their tactics. The most recent manifestation of increased labor aggressiveness is the corporate campaign, a centrally coordinated, broad-stroke assault on the employer. As typically structured, the corporate campaign opens the union to potential liability under federal labor law, federal antitrust law, and state tort law.

Certain aspects of the corporate campaign, however, receive the protection of federal statutory or constitutional law. For example, the union's right to petition the government with alleged employer violations of federal law and the union's right to engage in more traditional tactics, such as the use of handbills, pickets, and product boycotts to target the primary employer, are protected. Also, less egregious aspects of the campaign, such as the use of media publicity directed against the primary employer and the union members' rights to publicize its dispute at shareholders' meetings, are examples of protected conduct.

295. See 29 U.S.C. § 185(c) (1982).

296. 28 U.S.C. § 1332(a) (1982) grants diversity jurisdiction.

297. See *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 149-53 (1965).

298. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

299. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

300. See, e.g., 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4407 (1981); Blume, *Required Joinder of Claims*, 45 MICH. L. REV. 797, 801-03 (1947). A plaintiff may be barred even though theoretically joinder of claims is always permissive rather than compulsory in federal courts. See FED. R. CIV. P. 18(a). The commonality of facts that must be present for *res judicata* principles to apply must be no more broad than the "common nucleus of operative fact" required for pendent jurisdiction purposes. Otherwise, principles of *res judicata* could force a plaintiff to bring claims for which the court would have no subject matter jurisdiction. See C. WRIGHT, A. MILLER & E. COOPER, *supra*, § 4407, at 54-56, 62.

Nevertheless, as this Article has demonstrated, the more hostile and egregious aspects of the campaign, taken together, represent a novel and illegal union assault against the primary employer. Employers, unions, and the courts must be sensitive to the illegality inherent in an aggressive corporate campaign.