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LABOR LAW

Secondary Picketing of a Neutral Employer

NLRB v. Retail Store Employees Union, Local 1001, 100 S. Ct. 2372 (1980)

&

Kroger Co. v. NLRB, 105 L.R.R.M 2897, 89 Lab. Cas. ¶ 12,341

at 25,760 (6th Cir. 1980)

IN 1974 Local 1001 of the Retail Store Employees Union decided to picket Safeco Title Insurance Company and to set up secondary pickets at five title companies which had close business relationships with Safeco.¹ Little did the union know that this picketing would develop into a six year saga until 1980 when the Supreme Court made a decision² which purported to settle the issue of whether consumer picketing by a labor union at the site of a neutral retailer, directed at the product of the primary firm with which the union has a dispute, is prohibited by section 158(b)(4)(ii)(B) of the National Labor Relations Act³ when the foreseeable result of the picketing is to persuade the neutral's customers to stop patronizing the neutral altogether. The Court had to reevaluate its 1964 interpretation of the Labor Act in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*⁴ and determine whether extending the principles of *Tree Fruits* to the present case would be a correct application of the Labor Act. The Court ultimately decided that the conduct of the union in *Safeco* was impermissible under the Labor Act thereby imposing a severe limitation on the application of the *Tree Fruits* principles.⁵

This note compares Justice Powell's reasoning in *Safeco* with the rationale of *Tree Fruits* and concludes that although Justice Powell was correct in limiting the *Tree Fruits* principles, he may have created a more substantial problem for future courts attempting to apply the *Safeco* principles in

¹ In the labor relations context, the primary employer is the company with whom the union has a labor dispute. The secondary or neutral employer is a company that deals with the primary employer's products, usually by selling them to the public. Secondary consumer picketing means picketing at the neutral employer's place of business, usually requesting the public not to purchase the struck product, (produced by the primary employer) or to boycott the neutral altogether because he sells the struck product. See R. GORMAN, BASIC TEXT ON LABOR LAW, 240-44 (1976).

² NLRB v. Retail Store Employees Union, Local 1001 (*Safeco*), 100 S.Ct. 2372 (1980).

³ National Labor Relations Act § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1976) [hereinafter referred to as the Labor Act].

⁴ 377 U.S. 58 (1964).

⁵ 100 S.Ct. at 2378.

light of *Tree Fruits*. This note will explore the constitutional ramifications of the *Safeco* decision and of the Labor Act itself as interpreted by Justice Powell and conclude that the legislative history is clear in its mandate that all secondary picketing is violative *per se* of the Labor Act. To illustrate the difficulties which future courts will encounter when faced with a case where the facts fall somewhere between the extremes of *Safeco* and *Tree Fruits*, the last part of this note will examine a recent Sixth Circuit case.⁶

I. *Safeco* AND *Tree Fruits* - ARE THEY REALLY ALIKE OR ARE THEY POLES APART?

In 1964, the Supreme Court had occasion to interpret section 8(b)(4)(ii) (B) of the National Labor Relations Act, as amended,⁷ to determine whether the respondent unions in *Tree Fruits* had violated this section even though their secondary picketing of the retail stores was limited to an appeal to the customers not to buy the apples produced by certain Washington firms with which the unions had a dispute. The Court concluded that the union's conduct did not violate the Labor Act.⁸ Justice Brennan's majority opinion relied heavily on his interpretation of the legislative history of the Labor Act.⁹ He stated that Congress meant to prohibit only certain "isolated evils" when enacting the Labor Law, and that the only conduct which would qualify as such would be "consumer picketing at secondary sites [which is meant] . . . to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer."¹⁰ Construing the Labor Act

⁶ *Kroger Co. v. NLRB*, 105 L.R.R.M. 2897, 89 Lab. Cas. ¶ 12,341 at 25,760 (6th Cir. 1980).

⁷ National Labor Relations Act § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1976). Section 158(b)(4)(ii)(B) states in relevant part:

It shall be an unfair labor practice for a labor organization or its agents . . . 4 . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . *Provided further*, [t]hat for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

⁸ 377 U.S. at 72-73.

⁹ See 377 U.S. at 65-70 and nn.8-19.

¹⁰ 377 U.S. at 65.
<https://www.oakland.acron.edu/akronlawreview/vol15/iss1/9>

this narrowly allowed the Court to conclude with no difficulty that peaceful picketing which is only intended to follow the struck product is not an "isolated evil" proscribed by Congress. The apples which were being picketed were but one of many items sold in the retail stores, and a successful boycott by consumers of only those apples would have had a negligible effect on the neutral retailer's business as a whole. This, according to Justice Brennan, was not what the drafters of the Labor Act intended to prohibit. On the other hand, if the union had appealed to the consumers to boycott the neutral grocers entirely, the grocer would have been forced to stop doing business with the primary manufacturer in order to avoid the ruin of his whole trade. This conduct would be "poles apart" from boycotting only the apples because in this instance, the union would in effect be creating a separate dispute with the neutral rather than merely following the struck product.¹¹

Rejecting the test of whether the economic loss to the neutral should determine if the union's conduct was permissible or prohibited, the Court stated:

A violation of § 8(b)(4)(ii)(B) would not be established, merely because respondent's picketing was effective to reduce Safeway's sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller.¹²

The test set out by Justice Brennan was based on the union's *intent* in setting up pickets at the location of the neutral's business. If the secondary picketing is aimed solely at urging the consumer to boycott only the struck product, it is permissible under the Labor Act. If, however, the secondary picketing is aimed at urging consumers to stop trading entirely with the neutral, it is prohibited by the Labor Act.¹³

In 1980, the United States Supreme Court was faced with the problem of applying this test to somewhat different facts in *National Labor Relations Board v. Retail Store Employees Union, Local 1001 (Safeco)*.¹⁴ Safeco Title Insurance Company was struck by the union representing certain employees of Safeco, following an impasse in negotiations for an initial contract. In addition to picketing the Safeco office, pickets were established outside the offices of five land title companies which sold only Safeco title insurance policies. It was established that between ninety and ninety-five per-

¹¹ *Id.* at 63-64.

¹² *Id.* at 72-73.

¹³ *Id.* at 72.

cent of the gross income of the title companies came from the sale of Safeco insurance.¹⁵

Safeco and one of the title companies filed complaints with the NLRB charging the union with a violation of section 8(b)(4)(ii)(B) of the Labor Act which prohibits threatening or coercive conduct.¹⁶ Although the union had directed its boycott at the Safeco insurance policies, just as the union in *Tree Fruits* had directed its boycott at the apples, the Board found that since the sale of Safeco policies accounted for the bulk of the title companies' business, a boycott of the policies would essentially force the neutral companies to stop selling Safeco policies and ultimately to suffer substantial ruin to their businesses as a whole. Thus, the union's action was "reasonably calculated to induce customers not to patronize the neutral parties at all,"¹⁷ since a consumer boycott of the Safeco policies would of necessity be a near total boycott of the land title companies. The Board found the union to be in violation of the Labor Act and ordered it to cease picketing and to take limited corrective action.¹⁸

The Board's decision was appealed to the United States Court of Appeals for the District of Columbia Circuit which reversed, holding that the union's activity followed only the struck product and even though a successful boycott of the policies would predictably encourage the consumer to boycott the neutral altogether, the union's activities were protected.¹⁹

The United States Supreme Court granted certiorari "to consider whether the Court of Appeals had correctly understood § 8(b)(4)(ii)(B) as interpreted in *Tree Fruits*. Having concluded that the Court of Appeals misapplied the statute," the Court reversed and remanded for enforcement of the Board's order.²⁰ Justice Powell, who delivered the opinion of the

¹⁵ 100 S.Ct. at 2374-75. The picket signs read:

"SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001."

Id. at 2375 n.2. Safeco owned stock in all of the land title companies and an officer of Safeco served as an officer and member of the board of directors of each land title company. Safeco, however, had no control over the title companies' employees' wages, hours, or other terms or conditions of employment. Retail Store Employees Union, Local 1001, 226 NLRB 754, 755 (1976).

¹⁶ 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

¹⁷ Retail Store Employees Union, Local 1001, 226 NLRB at 755.

¹⁸ *Id.* at 757-58.

¹⁹ Retail Clerks, Local 1001 v. NLRB, 101 L.R.R.M. 3085 (1979). *Cf.* Local 14055 United Steelworkers of America v. NLRB (Dow), 524 F.2d 853 (D.C. Cir. 1975), *vacated* 429 U.S. 807 (1976). (The court of appeals applied *Tree Fruits* and allowed secondary picketing even though the primary product constituted nearly the entire business of the neutral).

²⁰ 100 S.Ct. at 2375.
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court,²¹ was quick to conclude that the *Tree Fruits* test could not be readily applied to the *Safeco* facts. Extending the *Tree Fruits* principles would require the Court to uphold the union's conduct regardless of the economic loss suffered by the title companies since the union in *Safeco* was boycotting only the Safeco insurance policies and was not urging the consumers of the title companies to end their business altogether with the companies. Justice Powell did not agree with this anomalous result. Rather than applying the *Tree Fruits* "purpose" test, he concluded that there may be situations where a union's secondary picketing of a struck product may result in undue injury to the neutral even though the picketing was aimed solely at the struck product. In this instance, applying *Tree Fruits* would legalize activity which Congress intended to prohibit.²²

To justify this conclusion, the Court first examined *Hoffman ex rel. NLRB v. Cement Masons, Local 337*.²³ In *Cement Masons* the product being picketed had become so merged with the business of the neutral that the picketing resulted in a loss to the neutral from a boycott of other products with which the picketed product had merged. The Court held that merged product picketing was prohibited by the Labor Act.²⁴ Justice Powell analogized the merged product situation to the situation in *Safeco* where the picketed product made up a substantial portion of the title companies' business and a successful boycott of the policies would leave the responsive consumers no choice other than to boycott the title companies altogether.²⁵ Ultimately, if the strike was successful, the title companies would stop selling Safeco policies not because of a reduced demand by the consumer, but in order to save their business as a whole. This would create a separate dispute between the title companies and the union. This result is one of the evils that Con-

²¹ Justice Powell delivered the opinion of the Court joined by the Chief Justice and Justices Stewart and Rehnquist. Justice Blackmun concurred in parts I & II, but not in part III which stated that the union's first amendment rights were not impermissibly restricted. 100 S.Ct. at 2378 (Blackmun, J., concurring). Justice Stevens joined parts I & II and agreed that the statute was constitutional; yet he thought that the constitutional issue was "not quite as easy as the Court would make it seem." *Id.* at 2379 (Stevens, J., concurring). Justice Brennan, joined by Justices White and Marshall, dissented.

²² 100 S.Ct. at 2377.

²³ 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). In *Cement Masons* the union had a dispute with a general contractor and picketed the housing subdivision the contractor had built for a real estate developer. Although the picketing was aimed solely at urging consumers not to purchase houses built by the contractor, a successful boycott of the houses would have led the consumers to "reasonably expect that they were being asked not to transact any business whatsoever" with the neutral developer. *Id.* at 1192. Thus the issue becomes a question of whose interests should prevail—the union's right to picket the struck product or the neutral's right not to be involved in the labor dispute between the union and the contractor? The court concluded that the neutral's interests should prevail. *Id.*

²⁴ *Id.*

²⁵ 100 S.Ct. at 2376.

gress intended to prevent by enacting the Labor Act.²⁶ Justice Powell concluded that, "[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B)."²⁷

In applying the test of substantial loss to the neutral to determine whether the union's conduct was prohibited, Justice Powell did not overrule the *Tree Fruits* test but refused to apply it to the facts of *Safeco* because the result would be contrary to legislative intent.²⁸ In essence, the test applied by Justice Powell does not consider the *purpose* of the secondary picketing as set out by *Tree Fruits*, but instead considers the predictable *result* of the secondary picketing on the neutral's business regardless of whether the sole purpose of the picketing is just to follow the struck product.

As a result of this decision, the courts may be faced with the problem of determining which test to apply in which situation. Although the union's purpose was easily discernible in *Tree Fruits*, and the probability of substantial ruin was readily apparent in *Safeco*, a case will surely present itself in the future in which the determinations of "purpose" and "substantial ruin" will not be quite as apparent. "The critical question [is] . . . whether by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss."²⁹ This places a severe limitation on the use of the *Tree Fruits* test because now it can only apply to those situations where, as in *Tree Fruits*, the secondary boycott of the struck product will not produce any additional injury to the neutral that would not be produced by a successful primary boycott. The *Tree Fruits* exception to the prohibitions of the Labor Act is exceedingly difficult to apply in the real world, especially in cases like *Safeco* where the primary employer's product constitutes nearly the entire business of the neutral or is totally merged into the neutral's finished product. For example, the merged product cases reveal that the exception granted to the union in *Tree Fruits* is inapplicable when the picketed product has been so integrated into the neutral's product line that a successful secondary boycott of the primary product would necessarily lead to a boycott of the neutral's other products.³⁰ This type of union-induced boycott would clearly

²⁶ *Id.* (quoting 377 U.S. at 63-64, 72).

²⁷ 100 S.Ct. at 2377.

²⁸ *Id.*

²⁹ *Id.* at 2377-78 n.11.

³⁰ Brief for Safeco Title Insurance Co. at 16, *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 100 S.Ct. 2372 (1980). The merged product cases are at the other end of the spectrum from *Tree Fruits*. In *Tree Fruits*, the apples were easily severable from the neutral's other products and amounted to only a minor part of the grocer's business. 377 U.S. at 60. In *K & K Construction Co. v. NLRB*, the carpentry company's work that was

be prohibited by the Labor Act even if the union's picketing was directed solely at the primary product.

Even when the facts are not so clear-cut and the primary employer's product has not merged into the neutral's, the argument can be made that the very fact that there are picketers in front of a business will dissuade some customers from entering the premises of the neutral regardless of its thrust or message. The mere sight of a picket line will convey an unfavorable impression of unfairness to some consumers. Thus, it appears that even peaceful picketing which is aimed solely at the picketed product may cause the neutral to lose much more than just the sales of the picketed product. In effect, applying *Tree Fruits* and allowing the picketing would be fostering an illegal result.³¹

If Justice Powell had reconsidered the *Tree Fruits* test and found once and for all that secondary picketing is banned *per se* under the Labor Act, he would have greatly simplified the task of the courts in future cases. Perhaps considerations of *stare decisis* prevented his taking such a radical stand, but Powell's *Safeco* test will prove to be just as difficult to apply on a case by case basis as the *Tree Fruits* test was.

Justice Brennan, who wrote the *Tree Fruits* opinion, dissented rather vehemently to the test employed by Justice Powell. As he stated:

Labor unions will no longer be able to assure that their secondary site picketing is lawful by restricting advocacy of a boycott to the primary product, as ordained by *Tree Fruits*. Instead, picketers will be compelled to guess whether the primary product makes up a sufficient proportion of the retailer's business to trigger the displeasure of the courts or the Labor Relations Board. Indeed . . . [the Court's opinion] leaves one wondering whether unions will also have to in-

being picketed had totally merged into the houses the neutral was trying to sell; thus the picketing was unlawful. 592 F.2d 1228 (3d Cir. 1979). See, e.g., *Hoffman ex rel. NLRB v. Cement Masons, Local 337*, 468 F.2d 1187 (9th Cir. 1972), cert. denied, 411 U.S. 986 (1973); *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969); *Honolulu Typographical Union No. 37 v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968); *Bennett v. Local 456, Teamsters & Chauffers Union*, 459 F. Supp. 223 (S.D.N.Y. 1978).

See generally, Comment, *Consumer Picketing of Economically Interdependent Parties: Retail Store Employees Local 1001 v. NLRB (Safeco Title Insurance Co.)*, 32 STAN. L. REV. 631 (1980); Comment, *Secondary Consumer Picketing: Some Grafts on Tree Fruits*, 44 TUL. L. REV. 537 (1970); Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 VA. L. REV. 189 (1966).

³¹ 377 U.S. at 82-83 (Harlan, J., dissenting). See generally *K & K Construction Co. v. NLRB*, 592 F.2d 1228, 1233 (3d Cir. 1979); Lewis, *Consumer Picketing and the Court—the Questionable Yield of Tree Fruits*, 49 MINN. L. REV. 479, 486 (1965); Brief for Safeco Title Insurance Co. at 17, *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 100

spect balance sheets to determine whether the primary product they wish to picket is too profitable for the secondary firm.³²

II. THE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION VERSUS THE RIGHT OF THE NEUTRAL TO REMAIN FREE FROM COERCION — THE "THIN LINE"

Justice Powell dealt very quickly with the constitutional issue in *Safeco*.³³ His holding that the ban was constitutional was based primarily on a statement made by Justice Brennan in *Tree Fruits*, that Congress meant to prohibit secondary picketing calculated "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer."³⁴ Although the *Tree Fruits* decision has been criticized by some as an effort to avoid dealing with the first amendment issue.³⁵ Justice Brennan was very careful to draw a distinction between secondary picketing aimed at the neutral's business generally and picketing aimed only at the primary struck product.³⁶ Since the picketing in *Tree Fruits* was of the latter type and thus was not prohibited by the statute, the union's first amendment rights were left intact and there was no first amendment issue. However, secondary picketing directed at the neutral which forces the neutral to either stop doing business with or put pressure on the primary employer is banned by Congress and the ban is constitutional because the picketing has an "unlawful objective."³⁷ Justice Powell seized the language in *Tree Fruits* to conclude that since the secondary picketing in *Safeco* was precisely the type which would coerce the neutral to become engaged in the labor dispute, the Court's ban was rightfully and constitutionally prescribed.

There was some disagreement with Justice Powell's rationale by Justices Blackmun and Stevens who wrote separate concurring opinions. Justice Blackmun had difficulty squaring the majority opinion with *Police Department of Chicago v. Mosley*, in which the United States Supreme Court had concluded that prohibiting picketing because of its message or content violates the Equal Protection clause and the first amendment.³⁸ However, the *Mosley*

³² 100 S.Ct. at 2382 (Brennan, J., dissenting).

³³ 100 S.Ct. at 2378.

³⁴ 377 U.S. at 63. The Court found that the picketing in *Tree Fruits* did not fit this description. *Id.* at 64.

³⁵ See Duerr, *Developing a Standard for Secondary Consumer Picketing*, 26 LAB. L.J. 585 (1975).

³⁶ 377 U.S. at 63.

³⁷ 100 S.Ct. at 2378 (citing *American Radio Ass'n. v. Mobile S. S. Ass'n.*, 419 U.S. 215, 229-31 (1974); *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957)).

³⁸ 408 U.S. 92 (1972). *Mosley* involved a city ordinance which banned all types of picketing near a school, but did not ban any picketing near a school which was involved in a labor dispute. See also 377 U.S. at 79 (Black, J., concurring).

Court did state that there was no substantial governmental purpose for the content-based discrimination in *Mosley*.³⁹ This differs significantly from the *Safeco* situation where Congress did have a valid purpose for banning secondary picketing when the probable effect of that picketing would be to cause the neutral to become involved in the labor dispute.⁴⁰ Perhaps for this reason, Justice Blackmun decided that the picketing in *Safeco* was constitutional. He carefully worded his opinion to convey the caveat that it is only when Congress has the difficult task of drawing the "thin line" between the first amendment rights of the union and the rights of the neutral to remain free from coercion that a statute which classifies according to message or content is constitutional. As Justice Blackmun stated: "[m]y vote should not be read as foreclosing an opposite conclusion where another statutory ban on peaceful picketing, unsupported by equally substantial governmental interests, is at issue."⁴¹

Justice Stevens agreed that the governmental interest in protecting neutrals justified the content-based restriction but was reluctant to grace Congress with unlimited power to draw the "thin line." He believed it was the Court's responsibility "to determine whether the method or manner of expression, considered in context, justifies the particular restriction."⁴²

III. LEGISLATIVE HISTORY OF SECTION 8(b)(4)(ii)(B) — DID CONGRESS REALLY PLUG THE LOOPHOLES OR DID IT MERELY CREATE DIFFERENT ONES? -

The first part of this note alluded to the difficulties which will confront the courts and the NLRB in the future when trying to cope with the *Tree Fruits* test and its limitation by the *Safeco* Court. The legislative history also supports the view that these cases should not have grappled with so many difficult intricacies but instead should have decided that all forms of secondary picketing are banned *per se* by the Labor Act.

"The Labor-Management Reporting and Disclosure Act was the product of compromise between the Senate's Kennedy-Erwin bill and the House of Representative's Landrum-Griffin bill."⁴³ The Landrum-Griffin bill proposed to close certain "loopholes" which existed in section 8(b)(4) of

³⁹ 408 U.S. at 100-02.

⁴⁰ Reply Brief for the NLRB at 10, 100 S.Ct. 2372 (1980).

⁴¹ 100 S.Ct. at 2379 (Blackmun, J., concurring).

⁴² *Id.* (Stevens, J., concurring).

⁴³ Brief for Petitioner at 1a, NLRB v. Retail Store Employees Union, Local 1001 (*Safeco*), 100 S.Ct. 2372 (1980). See Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, § 704(a), 73 Stat. 519 (1959) (current version at 29 U.S.C. § 158 (1976)); Kennedy-Erwin bill, S. 1555, 86th Cong., 1st Sess. (1959); Landrum-Griffin bill, H.R. 8342, as amended, 86th Cong., 1st Sess. (1959) cited in Brief for Petitioner at 1a, 100

the NLRA. One "loophole" of concern to the Representatives was the fact that the NLRA did not effectively and consistently protect the secondary employer against direct pressures to stop doing business with a primary employer.⁴⁴

Opponents of the House bill worried that it abridged the unions' first amendment rights by restricting their ability to appeal to consumers for assistance in boycotts.⁴⁵ After the House approved the Landrum-Griffin bill, the Senate Conference Committee adopted the House position on the amendments but added two provisos. The first exempted all publicity other than picketing from the ban of section 8(b)(4); the second preserved the right to engage in primary picketing.⁴⁶ Senator Kennedy very clearly explained that the provisos were added to protect the union's rights, but that there were still certain limitations on the union imposed by the Landrum-Griffin bill which were unchanged by the provisos. He stated that: "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."⁴⁷

Thus it is quite obvious from the legislative history that both the opponents and the supporters of the Labor Act amendments thought the amendments prohibited all secondary picketing.⁴⁸ Congress intended to close the "loopholes" in the existing law while protecting the fundamental right of the unions to express their views. This delicate balance was achieved by protecting the neutral from any form of secondary picketing but at the same time allowing the union to appeal to the public by other forms of communication.⁴⁹ This examination of the legislative history leads to the conclusion that the picketing in both *Tree Fruits* and *Safeco* was unlawful *per se*, because the Labor Act amendments were intended to prohibit secondary site picketing regardless of the result or the intent of the picketing.

⁴⁴ Brief for Petitioner at 1a, 100 S.Ct. 2372 (1980).

⁴⁵ E.g., 105 Cong. Rec. 15515 (1959) (comments of Rep. Madden); 105 Cong. Rec. 15540 (1959) (comments of Reps. Udall and Thompson); 105 Cong. Rec. 17882-83 (1959) (comments of Sen. Morse).

⁴⁶ 29 U.S.C. § 158(b)(4)(ii)(B) (1976). See 377 U.S. at 69-70; Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 VA. L. REV. 189, 223-25 (1966) (referring to the publicity proviso).

⁴⁷ 105 Cong. Rec. 17898-99 (1959) (comments of Sen. Kennedy).

⁴⁸ Comment, *Consumer Picketing of Economically Interdependent Parties: Retail Store Employees Local 1001 v. NLRB (Safeco Title Insurance Co.)*, 32 STAN. L. REV. 631, 636 (1980). See 377 U.S. at 92 (Harlan, J., dissenting); 105 Cong. Rec. 17904 (1959) (comments of Sen. Goldwater) ("The House bill . . . closed up every loophole in the boycott section of the law including the use of a secondary consumer picket line." *Id.*); Brief for Safeco Title Insurance Co. at 16, *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 100 S.Ct. 2372 (1980) (and authorities cited therein). *Contra*, 377 U.S. at 69.

⁴⁹ See 377 U.S. at 87-88 (Harlan, J., dissenting).

The courts have yet to reach this conclusion; they continue to examine the facts of each case to determine whether the picketing is proscribed by the Labor Act.

IV. KROGER COMPANY V. NLRB—A NEW TEST?

In October of 1980, the Sixth Circuit had occasion to deal with a case which fell between the *Tree Fruits* and *Safeco* extremes. In *Kroger Co. v. NLRB*,⁵⁰ the petitioner, Kroger Company, was engaged in the grocery business. The paper bags used by the stores were supplied exclusively by the Duro Paper Bag Manufacturing Company. During the first half of 1977, Duro's production employees were engaged in a lawful economic strike against Duro. Although the union representing the Duro employees had no dispute with the petitioner, it established secondary pickets at the site of two grocery stores operated by Kroger. The pickets carried signs throughout the operating hours of both stores and distributed handbills which asked consumers to request boxes from Kroger rather than bags or to supply their own means of carrying their groceries home. During the two days of picketing, Kroger was able to provide enough boxes for only two and one-half percent of its customers. Very few customers provided their own means of carrying groceries and at least one customer left the store refusing to accept Duro bags.⁵¹

The NLRB dismissed the complaint filed by the General Counsel of the NLRB. The dismissal was based on the Board's finding that paper bags were not necessary to sell groceries. Since both boxes and the customers' own containers were available to Kroger as an alternative to paper bags a successful boycott of Duro bags would not impinge on Kroger's ability to conduct its own business. The Board's finding was premised on the fact that Duro bags did not merge into the other products sold by Kroger but instead retained their own separate identity. Thus there was no impermissible secondary boycott.⁵²

⁵⁰ 105 L.R.R.M. 2897, 89 Lab. Cas. ¶ 12,341 at 25,760 (6th Cir. 1980).

⁵¹ *Id.* at 2897-98, 89 Lab. Cas. ¶ 12,341 at 25,760-61. The distribution of handbills was not at issue in the case. The picket signs read:

"CONSUMER BOYCOTT
OF
DURO PAPER BAG
MANUFACTURING CO. PRODUCTS.

B.Y.O.B.
(BRING YOUR OWN BAG)
DURO PAPER BAG MFG. CO.
UNFAIR
LOCAL 832, UNITED PAPER WORKERS
INT'L
UNION, AFL-CIO."

⁵² *Id.* at 2897, 89 Lab. Cas. ¶ 12,341 at 25,761.

⁵² United Paperworkers Int'l. Local 832 & Duro Paper Bag Mfg. Co., 236 NLRB 1525, 1527-28 (1978).

On appeal, the United States Court of Appeals for the Sixth Circuit set aside the Board's dismissal.⁵³ The court felt that the Board's reasoning, although theoretically correct, could not apply as a practical matter to the facts in the present case. Although the paper bags technically retained their separate physical identities, they merged for all practical purposes with the other products sold by the groceries because the bags were an essential part of every sale made by Kroger.⁵⁴ Although Kroger did have the alternative of providing boxes to its customers, this option was not realistic because the potential demand for boxes was much greater than the supply Kroger had on hand; to supply one hundred percent of the demand, Kroger would have had to make separate purchases of boxes to substitute for the bags. Furthermore, although customers were able to utilize other means of carrying their own groceries, very few did.⁵⁵ Although few Kroger customers actually complied with the pickets' request, the court found that since the bags were an essential part of every transaction made with Kroger "the picketing could have had no object but a boycott of Kroger."⁵⁶

The court had a difficult decision to make in the *Kroger* case in light of both *Tree Fruits* and *Safeco*. Had they chosen to fit the *Kroger* facts into the *Tree Fruits* test, they could very easily have concluded that the union's activity was intended solely to picket the Duro bags since the picket signs specifically urged the consumers to continue shopping at the Kroger stores but to request or utilize alternative means of carrying their groceries home. Following the *Tree Fruits* analysis, Kroger's loss would be based solely on the union's dispute with Duro, and not because the consumers were asked to stop shopping at Kroger stores. This picketing therefore would be permissible under section 158(b)(4)(ii)(B) because it was a primary dispute between the union and Duro. Since Kroger could have used containers other than Duro bags, it was not forced to become involved in the primary dispute.⁵⁷

The court recognized the *Tree Fruits* exception, but applied the "well-established exception to the *Tree Fruits* exception to § 8(b)(4)(ii)(B)."⁵⁸ The struck products had become so integrated with the neutral's other prod-

⁵³ 105 L.R.R.M. at 2898, 89 Lab. Cas. ¶ 12,341 at 25,761.

⁵⁴ *Id.* at 2898-99, 89 Lab. Cas. ¶ 12,341 at 25,762.

⁵⁵ *Id.* at 2897-98, 89 Lab. Cas. ¶ 12,341 at 25,761.

⁵⁶ *Id.* at 2900, 89 Lab. Cas. ¶ 12,341 at 25,763. 29 U.S.C. § 158(b)(4)(ii)(B) prohibits, *inter alia*, coercive conduct when "an object thereof is . . . forcing . . . any person to cease . . . dealing in the products of any other producer." (emphasis added).

⁵⁷ See 377 U.S. at 63.

⁵⁸ 105 L.R.R.M. at 2899, 89 Lab. Cas. ¶ 12,341 at 25,762.

ucts that it would be virtually impossible to picket just the primary product. The court stated that this merged product situation was "essentially no different" than the *Safeco* situation where the union boycotted the only product the neutral sold.⁵⁹ In both of these instances a neutral will be forced to choose between ceasing to do business with the primary employer or suffering substantial ruin to its own business. This type of secondary boycott is exactly what Congress meant to prohibit by enacting section 8(b)(4)(ii)(B). Since the damage to Kroger could have been very severe if most of its customers had complied with the union's request to boycott Duro bags, the Court set aside the Board's dismissal of the complaint against the union and remanded the case.⁶⁰

The court's analogy to the merged product cases appears somewhat misplaced. In those cases the primary product had actually become so integrated with the neutral's whole business that the primary product had totally lost its separate identity.⁶¹ In *Kroger* the bags retained their separate identities for all purposes, and Kroger could have utilized other methods of packing groceries. If Kroger had had enough boxes or alternative containers it could easily have separated the Duro bags from its other products and continued to conduct its business.

The *Safeco* test would be of no assistance because the threat of "ruin or substantial loss" to Kroger would not be readily apparent.⁶² In order to determine in advance whether its picketing would be considered legal or prohibited, the union would have had to predict what the demand for alternative containers would be and whether or not Kroger could be expected to meet that demand. If Kroger had a lot of boxes on hand, the unavailability of the Duro bags would have had a negligible effect on Kroger's overall operation of its stores and the picketing would be lawful under *Tree Fruits*. If, on the other hand, Kroger's ability to supply boxes was very limited, the Board would be more likely to find that the secondary picketing was illegal. In the future, the legality of secondary picketing should not depend totally upon the neutral's stock of substitutes for the primary product.

Moreover, as pointed out by Judge Merritt, who dissented in the *Kroger* case, the "threat of ruin or substantial loss" required by *Safeco* must be reasonably likely to occur. The only way in which this determination can be made in a case such as *Kroger* is to apply a "hindsight" test to the facts. Judge Merritt would have held that the picketing in *Kroger* was not illegal

⁵⁹ *Id.*

⁶⁰ *Id.* at 2900, 89 Lab. Cas. ¶ 12,341 at 25,763.

⁶¹ *See, e.g., K & K Construction Co. v. NLRB*, 592 F.2d 1228 (3d Cir. 1979).

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⁶² *See* 100 S.Ct. at 2377 n.11.

because, as a practical matter, *Kroger* did not in fact suffer any substantial loss because most of the consumers chose not to comply with the picket signs.⁶³

Judge Merritt's analysis would completely contravene the purpose of the Labor Act which is to prevent secondary picketing having the purpose of forcing the neutral to become involved in the labor dispute. Congress could not have intended that the legality of the secondary picketing depend on the effect it *in fact* has on the neutral. If this were the case, the legality of secondary picketing would be directly affected by the location of the picketing, the time, the mood of the customers on a particular day, the neutral's stock on hand of alternative means, and possibly even the color of the picket signs.

CONCLUSION

The National Labor Relations Board and the appellate courts will continue to encounter the problems raised in *Kroger* because the *Tree Fruits* and *Safeco* tests have proven to be exceedingly difficult to apply to facts which do not fall squarely into either of these two extremes. The legislative history of section 158(b)(4)(ii)(B) reveals that Congress meant to outlaw all forms of secondary picketing at the site of a neutral employer. Thus neither *Tree Fruits* nor *Safeco* should have grappled with the difficulties of trying to establish a standard for deciding when secondary picketing is legal and when it is not. Perhaps courts in the future will re-examine the legislative history of the Labor Act along with the *Kroger*, *Safeco* and *Tree Fruits* cases and formulate a more realistic and workable standard to apply in cases involving secondary picketing of a neutral employer or decide that secondary picketing should be altogether prohibited.

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⁶³ 105 L.R.R.M. at 2902, 89 Lab. Cas. ¶ 12,341 at 25,765 (Merritt, J., dissenting). Judge Merritt felt that even a successful boycott of the paper bags would not threaten *Kroger* with substantial ruin since "[i]f consumers had complied with the boycott, *Kroger* could have, and no doubt would have, taken steps to ameliorate the problem." *Id.*