

Consumer Picketing: Reassessing the Concept of Employer Neutrality

The current doctrines for determining the permissibility of consumer-directed labor picketing produce anomalous results. Criticizing the present federal law of consumer picketing—the Tree Fruits doctrine, the primary-secondary distinction, and the economic impact test—the author proposes that consumer picketing be permitted when its economic effect on the secondary employer does not exceed the relative economic dependence of the secondary on the primary employer. He then suggests that the broader protection for consumer picketing permitted under the California Agricultural Relations Act accords with the proposed test.

The general rules for distinguishing lawful from unlawful consumer picketing are easily stated, but their application has resulted in decisions that tend to substitute doctrinal labels for a careful analysis of the interests at stake. Section 8(b)(4) of the National Labor Relations Act¹ broadly prohibits unions from applying pressures to an

1. Labor Management Relations (Taft-Hartley) Act § 8(b)(4), 29 U.S.C. § 158 (b)(4) (1970) formerly ch. 120, § 101, 61 Stat. 140 (1947):

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

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(4)(i) to engage in, or to induce or encourage [the employees of any employer] any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a [concerted] refusal in the course of [their] his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [;]; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or [any employer or other 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] to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [;]: *Provided, That nothing*

employer who is not a party to the original dispute in order to influence the resolution of the conflict with the primary employer.² A limited exception to this ban has been recognized to permit picketing at the site of a secondary employer's business for the purpose of influencing potential consumers of the primary employer's product. This consumer picketing doctrine was first stated 12 years ago in the historic decision of *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*.³ The Supreme Court explained the circumstances under which consumer picketing is permissible: When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is lawful because it is "closely confined to the primary dispute"; however, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, it is unlawful because it creates a "separate dispute" with the secondary.⁴ Thus the *Tree Fruits* decision rests the protection of consumer picketing that follows the struck product to the premises of a secondary employer on the dis-

contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [;]: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employee 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.

The 1947 provisions are printed in roman; as for the amendments made in 1959, the deletions are placed in brackets and the additions in italics.

2. A primary employer is an employer who has a dispute with his employees. A secondary employer is any other employer who may be affected by the dispute.

3. 377 U.S. 58 (1964), *vacating* 308 F.2d 311, 50 L.R.R.M. 2392 (D.C. Cir. 1962), *rev'g* 132 N.L.R.B. 1172, 48 L.R.R.M. 1496 (1961). [Ed.] For the convenience of practitioners, citations to the Labor Relations Reference Manual are included where applicable.

4. 377 U.S. at 72.

inction between primary and secondary activity, a concept drawn from the common-situs picketing cases.⁵

This distinction has engendered confusion in the subsequent case law without providing workable criteria for deciding hard cases. Consequently, consumer picketing has been prohibited in situations that do not conform to the *Tree Fruits* pattern.⁶ For example, in the recent case of *Steelworkers Local 14055 v. NLRB (Dow Chemical Co.)*,⁷ a union engaged in a strike against a gasoline producer picketed six independently owned gas stations that primarily sold the gasoline of the struck employer. In this situation the request that consumers not purchase the struck product amounted to a request not to patronize the secondary employer. The direct conflict between the District of Columbia Court of Appeals and the National Labor Relations Board over the permissible scope of consumer picketing under *Tree Fruits* highlights the ambiguities in the present law.

A better approach, compatible with the narrow holding in *Tree Fruits*, involves an examination of the secondary employer's neutrality to determine whether consumer picketing should be allowed. The case law that has evolved under the ally doctrine⁸ identifies factors that could be used to assess the secondary employer's neutrality. Under the proposed thesis the lawfulness of consumer picketing would be determined by assessing whether the economic impact of consumer picketing on the secondary employer is disproportionate to the secondary's involvement with the primary.

After exploring the conflicts and inadequacies in the present law, this Comment will develop and then apply the proposed analysis to cases decided under the National Labor Relations Act. Finally, it will assess the significance of the consumer boycott provisions of California's

5. *Id.* When two employers have employees working on the same general site, and the employees of one picket at the common site because of a dispute with their employer, the picketing is referred to as "common-situs picketing." "Roving-situs picketing" is a special case of common-situs picketing, involving a movable work place, such as a delivery truck. These cases are decided on the same general principles; the particular term employed does not affect their analysis. See, e.g., *Teamsters Union Local 279 (Wilson Teaming Co.)*, 140 N.L.R.B. 164, 51 L.R.R.M. 1598 (1962); *Electrical Workers Local 861 (Plauche Electric)*, 135 N.L.R.B. 250, 49 L.R.R.M. 1446 (1962).

6. See, e.g., *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 956 n.9, 68 L.R.R.M. 3004, 3006 n.9 (D.C. Cir. 1968); *Hoffman v. Cement Masons (California Ass'n of Employers)*, 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir. 1972), cert. denied, 411 U.S. 986 (1973).

7. 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975), denying enforcement to 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), summarily vacated, 45 U.S.L.W. 3224 (Oct. 5, 1976).

8. A secondary employer who is so closely identified with a primary employer that he ceases to be neutral is not protected by the Act's ban on secondary activity. See text accompanying note 135 *infra*.

new Agricultural Labor Relations Act⁹ and suggest that the broader protection the California Act affords consumer picketing in agriculture accords with this reexamination of the *Tree Fruits* rationale.

I

HISTORICAL BACKGROUND OF THE LAW GOVERNING CONSUMER PICKETING

The lack of clarity in the law governing consumer boycott picketing reflects the confusion and ambiguity that surrounds the term "secondary boycott."¹⁰ Although the term "secondary boycott" continually appears in the legislative debates preceding the passage of the Taft-Hartley Act,¹¹ the term has been described as a "loose and uncertain label used by courts indiscriminately to condemn a wide variety of labor's activities."¹² The drafters of section 8(b)(4) avoided the term "secondary boycott," but that section's description of proscribed objects of union activity has been criticized as similarly unclear.¹³ What does clearly emerge from an examination of the legislative history is that consumer picketing was not a topic of concern.

In the Congressional debates prior to the enactment of Taft-Hartley, the organizing tactics of the Teamsters Union in refusing to haul goods from or make deliveries to nonunion firms¹⁴ and jurisdictional strikes¹⁵ were the abuses cited most frequently to justify the pro-

9. CAL. LAB. CODE §§ 1140-67 (West Supp. 1976).

10. See generally F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 42-43 (1930); Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 YALE L.J. 341 (1938) [hereinafter cited as Hellerstein].

11. E.g., 93 CONG. REC. 3542 (1947) (remarks of Rep. Landis), reprinted in STAFF OF THE SUBCOMM. ON LABOR OF THE U.S. SENATE COMM. ON LABOR AND PUBLIC WELFARE, 93D CONG., 2D SESS., *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 630* (Comm. Print 1974) [hereinafter cited as LMRA LEG. HIST.]; 93 CONG. REC. A2012 (1947) (extension of remarks of Rep. Meade), reprinted in LMRA LEG. HIST., *supra* at 869; 93 CONG. REC. 4322 (1947) (remarks of Sen. Pepper), reprinted in LMRA LEG. HIST., *supra* at 1105.

12. Hellerstein, *supra* note 10, at 341-42.

13. E.g., Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1394 (1962) [hereinafter cited as Lesnick]; Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113 (1960).

14. E.g., 93 CONG. REC. 3954 (1947) (remarks of Sen. Taft), reprinted in LMRA LEG. HIST., *supra* note 11, at 1012; 93 CONG. REC. A1296 (1947) (extension of remarks of Rep. Landis), reprinted in LMRA LEG. HIST., *supra* note 11, at 583. A favorite example was the "hot milk" boycott in California, in which Teamsters refused to handle milk from certain dairy farmers because the cows' feed grain had been delivered by nonunion trucks. 93 CONG. REC. 3534 (1947) (remarks of Rep. Hartley), reprinted in LMRA LEG. HIST., *supra* note 11, at 614.

15. 93 CONG. REC. 4323 (1947) (remarks of Sen. Taft), reprinted in LMRA LEG. HIST., *supra* note 11, at 1107-08. A jurisdictional strike is the clearest case in which restraints on union secondary activity are justified. By hypothesis, the primary

posed boycott ban. Opponents of the measure argued that there are justified and unjustified boycotts, and that the bill would indiscriminately ban both.¹⁶ Senator Taft, however, expressed the prevailing view in reporting that although his committee had received evidence for weeks, it had learned of no way to tell good secondary boycotts from bad.¹⁷ Thus the majority declined to identify specific evils and, instead, passed a prohibition against boycotts so broad that, read literally, it appears to ban even primary strikes.¹⁸ To the National Labor Relations Board and the courts devolved the task of fashioning limitations.¹⁹

The Board soon found that the ban on secondary picketing applied neither to secondary employers who were not neutral²⁰ nor to properly limited picketing where the primary employees worked on the premises of the secondary employer.²¹ Additionally, it was held that the original section 8(b)(4) applied only to the inducement of concerted action²² by employees,²³ and that its prohibition did not affect the validity of

employer's employees disagree among themselves over who should be their bargaining representatives. Additionally, if the employer accedes to the demands of either union, he risks retaliation by the other. Even the opponents of the bill were generally willing to concede that such strikes were an evil, but objected to the majority's failure to distinguish these from secondary activity with other objectives. *See, e.g.*, 93 CONG. REC. 4156 (1947) (remarks of Sen. Murray, quoting President Truman), *reprinted in* LMRA LEG. HIST., *supra* note 11, at 1047.

16. *E.g.*, 93 CONG. REC. 5046 (1947) (remarks of Sen. Murray), *reprinted in* LMRA LEG. HIST., *supra* note 11, at 1366-67.

17. 93 CONG. REC. 4198 (1947), *reprinted in* LMRA LEG. HIST., *supra* note 11, at 1106.

18. Any primary strike has the aim of closing the primary's business, with the necessary consequence that the primary employer cease doing business with secondary employers. Yet such activity falls within the language of section 8(b)(4) if it is read literally. *See* Lesnick, *supra* note 13, at 1394.

19. The unions had waged such a bitter struggle to stop Taft-Hartley that, when approached 3 years later by Senator Taft for their support for some amendments favorable to labor, they felt they could not retreat from their demand for outright repeal. P. TAFT, *ORGANIZED LABOR IN AMERICAN HISTORY* 590 (1964).

20. *Douds v. Metropolitan Fed'n of Architects Local 231*, 75 F. Supp. 672, 21 L.R.R.M. 2256 (S.D.N.Y. 1948).

21. *Sailors Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950); *Oil Workers Local 346 (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949).

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

23. Because the 1947 version of section 8(b)(4) used the term "employees of any employer," the Board held that its coverage was limited to persons falling within the definitions of these terms contained in section 2(3), 29 U.S.C. § 152(3) (1970). Thus the Board would permit a union to induce work stoppages by minor supervisors and by railroad, agricultural, and public employees. *E.g.*, *Sheetmetal Workers Local 28 (Ferro-Co Corp.)*, 102 N.L.R.B. 1646, 1660, 31 L.R.R.M. 1479, 1482 (1956) (supervisors); *Teamsters Local 878 (Arkansas Express, Inc.)*, 92 N.L.R.B. 255, 27 L.R.R.M. 1077 (1950) (supervisors); *Automobile Workers Local 883 (Paper Makers Importing Co.)*, 116 N.L.R.B. 267, 38 L.R.R.M. 1228 (1956) (municipal employees). The courts, however, disagreed. *See, e.g.*, *Great Northern Ry. v. NLRB*, 272 F.2d 741, 45 L.R.R.M.

"hot cargo" clauses, provisions in collective bargaining agreements in which an employer agrees not to handle the goods of nonunion employers.²⁴

The courts further defined the scope of section 8(b)(4) in several decisions that held that consumer boycott picketing did not violate the original section 8(b)(4)(A) because the "inducements or encouragements" appealed to an individual consumer's decision and thus were not "aimed at concerted as distinguished from individual conduct."²⁵

Clearly dissatisfied with certain of these limitations, Congress in 1959 amended section 8(b)(4) to close what were regarded as loopholes in the statutory proscription.²⁶ Arguably, the exemption of consumer picketing from section 8(b)(4) was thought to be a loophole as well. The deletion of the word "concerted" from clause (i), and the addition of clause (ii), making it unlawful "to threaten, coerce, or restrain any person,"²⁷ eliminated the textual basis upon which consumer picketing had formerly been withdrawn from the statutory prohibition.²⁸ Further, the inclusion of the publicity proviso, which protects

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,²⁹

seemed to indicate that Congress had considered the impact of its other changes on consumer picketing and decided it should be prohibited.

2206 (9th Cir. 1959), *denying enforcement to* 122 N.L.R.B. 1403, 43 L.R.R.M. 1324 (1959). The Board never acquiesced in the courts' rulings. The question became moot after the 1959 amendments, which changed "employees of any employer" to "individual employed by any person." 29 U.S.C. § 158(b)(4) (1970).

24. Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958).

25. Wholesale & Warehouse Local 261 v. NLRB (Perfection Mattress & Spring Co.), 282 F.2d 824, 46 L.R.R.M. 2554 (D.C. Cir. 1960), *denying enforcement to* 125 N.L.R.B. 520, 45 L.R.R.M. 1129 (1959); NLRB v. Brewery Workers Local 366, 272 F.2d 817, 45 L.R.R.M. 2276 (10th Cir. 1959), *denying enforcement to* 121 N.L.R.B. 271, 42 L.R.R.M. 1350 (1958).

26. Explaining the 1959 amendments, Senator John F. Kennedy stated:

The chief effect of the conference agreement, therefore, will be to plug loopholes in the secondary boycott provisions of the National Labor Relations Act. There has never been any dispute about the desirability of plugging these artificial loopholes.

105 CONG. REC. 17898 (1959). These "loopholes" were the interpretations of the statute discussed in the text accompanying notes 22-24 *supra*. See BNA, THE DEVELOPING LABOR LAW 609-11 (C. Morris ed. 1970) [hereinafter cited as DEVELOPING LABOR LAW].

27. Labor Management Relations (Taft-Hartley) Act, § 8(b)(4), 29 U.S.C. § 158 (b)(4) (1970), quoted in note 1 *supra*.

28. See text accompanying note 25 *supra*.

29. 29 U.S.C. § 158(b)(4) (1970) (emphasis added).

For these reasons most commentators at the time of the enactment assumed that the 1959 amendments to section 8(b)(4) had prohibited all consumer picketing at secondary sites.³⁰

II

AMBIGUITIES IN THE PRESENT LAW

A. *The Tree Fruits Decision*

The *Tree Fruits* decision³¹ defeated the expectations of the commentators by holding that the 1959 amendments did not create a per se ban of consumer picketing. In that case a labor dispute existed between the packers of Washington State apples and their employees; pickets appeared at a grocery store and urged customers not to buy Washington State apples. The Court ruled that the statute prohibited consumer picketing only if it applied pressure to the secondary "designed to inflict injury on his business generally."³² The Court stated that if picketing is employed only to persuade customers not to buy the struck product, "the union's appeal is closely confined to the primary dispute"³³ and thus not within the area of secondary consumer picketing that Congress had intended to prohibit. The opinion's reasoning proceeded from the principle that "Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable."³⁴ Whether the legislative history supports this claim that a major Congressional concern in drafting section 8(b)(4) was to fashion a narrow and carefully limited restriction on picketing is questionable;³⁵ never-

30. See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 274 (1959); Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1114 (1960); Farmer, *Status and Application of the Secondary-Boycott and Hot Cargo Provisions*, 48 GEO. L.J. 327, 341 (1959). But see Previant, *The New Hot-Cargo and Secondary-Boycott Sections: A Critical Analysis*, 48 GEO. L.J. 346, 353 (1959).

31. NLRB v. Fruit & Vegetable Packers Local 760 (*Tree Fruits*), 377 U.S. 58 (1964), *vacating* 308 F.2d 311, 50 L.R.R.M. 2392 (D.C. Cir. 1962), *rev'g* 132 N.L.R.B. 1172, 48 L.R.R.M. 1496 (1961).

32. 377 U.S. at 72.

33. *Id.*

34. *Id.* at 62.

35. The framers of section 8(b)(4) rejected arguments for a narrower and more specific measure. See text accompanying notes 17-18 *supra*. Despite statements by the members of the Conference Committee (105 CONG. REC. 17898-99 (1959) (remarks of Sen. Kennedy); 105 CONG. REC. 19771 (1959) (remarks of Sen. Goldwater)), opponents of the bill (105 CONG. REC. 17882 (1959) (remarks of Sen. Morse); 105 CONG. REC. 6232 (1959) (remarks of Sen. Humphrey)), and the bill's co-author (105 CONG. REC. 15672-73 (1959) (remarks of Rep. Griffin)) that the amendments to section 8(b)(4) were intended to make secondary consumer picketing illegal, the Court

theless, constitutional concerns may justify this narrowing construction.³⁶ Though the Court emphasized the need to limit restrictions on picketing to those required to remedy particular evils,³⁷ neither the *Tree Fruits* decision nor subsequent opinions have defined with specificity the evils involved in consumer picketing.

The Board's decision that consumer picketing had been outlawed was based upon the language of the new publicity proviso.³⁸ Though the Court decided that the legislative history of neither the publicity proviso nor the general proscription of the new clause (ii) showed that Congress intended to effect a per se ban of all consumer picketing, the Court still faced the question whether the picketing of the *Tree Fruits* case, confined to persuading customers to cease buying the product of the primary employer, "threatened, coerced, or restrained" Safeway, the secondary. The Court found that to prohibit such picketing might fall within the "letter of the statute" but not within its "spirit."³⁹ Consumer picketing aimed only at the struck product is not the kind of coercion that the statute seeks to prevent, since it is "closely confined to the primary dispute."⁴⁰ That is, consumer product picketing is protected because it is deemed "primary"; it loses its protected status when it oversteps the bounds of the primary dispute and in effect asks customers not to patronize the secondary employer, thereby creating "a separate dispute."⁴¹

found that the legislative history "lack[ed] the requisite clarity" to show that Congress intended a complete prohibition of all consumer picketing. 377 U.S. at 63. First, the Court noted that consumer picketing was not attended by the abuses which had motivated the revisions in the law (*id.* at 64) and that the sponsors of the amendments did not originally refer to consumer picketing as the reason for the amendments (*id.* at 65). Second, the interpretations of the bill's opponents were dismissed as overstating its reach in their zeal to defeat it. *Id.* at 66. Finally, the Court found the remarks of Representative Griffen in the House debate (105 CONG. REC. 15673 (1959), *cited in* 377 U.S. at 70) and Senator Kennedy's statement after the Conference (105 CONG. REC. 17898-99 (1959), *cited in* 377 U.S. at 70) about the purpose of the publicity proviso to be inconclusive. The statements made it clear that consumer picketing to shut off the patronage of a secondary employer was to be prohibited but did not address the status of picketing aimed only at the struck product. 377 U.S. at 70-71.

36. See note 49 *infra*. Also, section 13 of the Act provides as follows: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1970). In *NLRB v. Drivers Local 639 (Curtis Bros.)*, 362 U.S. 274 (1960), the Court interpreted this section to declare a rule of construction cautioning against an expansive reading of provisions that would limit the right to strike or picket. *Id.* at 282-84.

37. 377 U.S. at 63. The point is stated with greater clarity in the opinion below, 308 F.2d at 317.

38. 132 N.L.R.B. at 1177, 48 L.R.R.M. at 1498-99 (1961).

39. 377 U.S. at 72.

40. *Id.*

41. *Id.*

B. The Primary-Secondary Distinction: A Blind Alley

The *Tree Fruits* decision made the distinction between secondary and primary activity the touchstone for deciding whether a particular instance of consumer picketing is protected activity. Originally developed in the common-situs and roving-situs picketing cases, this distinction is troublesome even in its original context;⁴² in the context of consumer picketing, the difficulties are compounded because the Court did not expressly label the picketing primary activity but merely analogized it to primary activity.⁴³ So long as a court's attention is focused on the union's duty to limit its appeal through the location and the message of its picket signs, the analogy survives;⁴⁴ however, where the secondary employer does not simply resell the primary's product as part of a larger retail business, the distinction between primary and secondary activity is of no avail. When the secondary resells the primary's product after it has been integrated into another product,⁴⁵ utilizes the primary's product or service for the general benefit of its business,⁴⁶ or sells almost exclusively the product of the primary,⁴⁷ narrowing precautions taken by the union cannot prevent general harm to the secondary because of the integral relationship of the struck product to the secondary's business.

Arguably, these cases may be handled by construing *Tree Fruits* as a narrow exception to a general ban on consumer picketing.⁴⁸ But consider the following hypothetical integrated-product cases. Suppose

42. See Lesnick, *supra* note 13, at 1365; DEVELOPING LABOR LAW, *supra* note 26, at 617-18. The terms "common situs" and "roving situs" are discussed in note 5 *supra*.

43. 377 U.S. at 72; see Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?*, 63 MICH. L. REV. 682, 688 (1965).

44. *E.g.*, NLRB v. Millmen Local 550 (Steiner Lumber Co.), 367 F.2d 953, 63 L.R.R.M. 2328 (9th Cir. 1966) (picketing using words "consumer directed" found unlawful because in fact employee oriented); Laundry Workers Local 259 (Morrison's of San Diego), 164 N.L.R.B. 426, 65 L.R.R.M. 1091 (1967) (inadequate precautions to meet *Tree Fruits* requirement where signs did not clearly identify primary or product).

45. *E.g.*, American Bread Co. v. NLRB, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969) (picketing of restaurants using bread baked by primary held unlawful); Twin City Carpenters Council (Red Wing Wood Products, Inc.), 167 N.L.R.B. 1017, 66 L.R.R.M. 1242 (1967), *enforced*, 422 F.2d 309, 73 L.R.R.M. 2371 (8th Cir. 1970) (picketing of subdivision to advise public that kitchen cabinets were not made with union labor held unlawful).

46. *E.g.*, NLRB v. Typographical Union (California Newspapers, Inc.), 465 F.2d 53, 80 L.R.R.M. 3076 (9th Cir. 1972) (held unlawful to picket stores that advertised in struck newspaper); Honolulu Typographical Local 37 v. NLRB, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968).

47. *E.g.*, Steelworkers Local 14055 v. NLRB (Dow Chemical Co.), 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975), *denying enforcement* to 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974) (held picketing of gas stations that purchased gasoline from primary lawful).

48. See R. DERESHINSKY, *THE NLRB AND SECONDARY BOYCOTTS* 95 (Labor Relations and Public Policy Series Rep. No. 4, 1972).

that after the *Tree Fruits* decision Safeway had begun to market Washington State apples by mixing them with apples grown in California and selling them in sealed plastic bags. The union picketed, and Safeway sought an injunction prohibiting the consumer pickets. Surely the court should refuse this request; the change in marketing appears to be nothing more than a thinly veiled attempt to handcuff the union with the technicalities of the law. If, however, the apples were used to make applesauce, the case is not so clear. There may be many legitimate reasons why the apples were mixed. Further, the picketing of the applesauce may affect food processors and growers unrelated to the primary.

In *Tree Fruits* the Court found important, possibly constitutional, interests that mandated a narrow construction of section 8(b)(4) to exclude product picketing from the general ban on secondary activity.⁴⁹ If, as the Court appeared to believe, strong policy reasons support protecting the right to inform consumers of the facts of a labor dispute by picketing, these interests are best served if permissible consumer picketing is defined by assessing economic interests, not by analogizing to the primary-secondary distinction developed in common-situs picketing cases. To understand the inappropriateness of the distinction, its development and rationale must be examined in the common-situs context.

The basis for the primary-secondary distinction must be sought in the case law. The 1959 amendments, which added the primary marketing proviso to section 8(b)(4)(B),⁵⁰ only codified the existing case law,⁵¹ and neither the amendments nor the Conference Report attempted to define the term "primary."

49. Both the concurring opinion of Justice Black and the dissenting opinion of Justice Harlan would have read the statute as imposing a total ban on secondary consumer picketing and so would have decided the case on constitutional grounds. Justice Black would have held the prohibition unconstitutional because it regulates the message of the picket signs rather than the physical conduct of the pickets. 377 U.S. at 79. Justice Harlan argued that since picketing is "inseparably something more [than] and different' from simple communication," a complete prohibition of consumer picketing is not inconsistent with the first amendment. *Id.* at 93.

The Court refused to base its decision on a constitutional ground, but, in adopting the principle of narrow construction, it stated: "Both the Congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *Id.* at 63.

50. 29 U.S.C. § 158(b)(4) (1970), quoted in note 1 *supra*.

51. CONFERENCE REP. NO. 1147, 86th Cong., 1st Sess. 38 (1959). The report makes clear that the addition of the primary marketing proviso of section 8(b)(4)(B) merely codifies prior case law, specifically: *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *Painters Local 193 (Pittsburgh Plate Glass Co.)*, 110 N.L.R.B. 455 (1954); *Washington Coca Cola Bottling Works, Inc.*, 107 N.L.R.B. 233 (1953). Since the enactment of section 8(b)(4), the Board and the courts have con-

The rationale usually articulated for the ban on secondary boycotts—"the protection of neutrals"⁵²—does little to explain the law's application in the area of common-situs picketing. First, a strike at the primary can severely damage neutrals. For example, a work stoppage in the steel industry can cause a serious curtailment of automobile production resulting in the layoff of auto workers and a loss of sales to the companies.⁵³ Second, the amount of actual or potential damage to the secondary employer has never been a factor considered in the Board's application of the statute.⁵⁴ Even determining whether the harm to the neutral is "intentional" or "avoidable" does not clarify the law's distinction. The union's intention is always to place pressure on the primary. The concept of "avoidable harm to neutrals" presupposes that the union can obtain its objectives through alternative means.⁵⁵

sistently held that it prohibits only "secondary" activity. *Sailors Union of the Pacific* (Moore Dry Dock), 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950); *Oil Workers Local 346* (Pure Oil Co.), 84 N.L.R.B. 315 (1949); *NLRB v. Teamsters Local 145* (Howland Dry Goods Co.), 191 F.2d 65, 28 L.R.R.M. 2450 (2d Cir. 1951).

52. *E.g.*, 93 CONG. REC. 4198 (1947) (remarks of Sen. Taft); *NLRB v. Business Machine & Office Appliance Mechanics Local 459* (Royal Typewriter Co.), 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

53. In *Plumbers Local 638 v. NLRB* (Austin Co.), 521 F.2d 885, 89 L.R.R.M. 2769 (D.C. Cir. 1975), *cert. granted*, 96 S. Ct. 1101 (1976), involving a refusal to work in order to enforce a work-preservation clause in the collective bargaining agreement, the court stated that section 8(b)(4) does not prohibit all harm to secondary employers. Distinguishing between the impermissible objectives of secondary activity and the permissible effects of primary activity, it quoted with approval Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 732 (1951), noting that it had also been cited approvingly in Lesnick, *supra* note 13:

Congress was concerned with the injury suffered by neutral employers, but only where the injury resulted from the use of a secondary boycott. Almost every strike causes economic loss to one or more employers who are unconcerned with the labor dispute. A coal distributor may go bankrupt because of a coal strike. A small steel fabricator may be forced to close his doors because of a major steel strike. Such economic losses as these far outweigh the losses caused by secondary boycotts. Yet Congress has not sought to aid these neutrals * * *. This point is significant—and sometimes overlooked—because it shows that, while harm to a neutral is an essential ingredient of a secondary boycott, such injury is not by itself objectionable in the eyes of the legislature.

521 F.2d at 900 n.36, 89 L.R.R.M. at 2778-79 n.36.

54. *Cf.* *Oil Workers Local 346* (Pure Oil Co.), 84 N.L.R.B. 315 (1949).

55. An early NLRB decision under section 8(b)(4)(A) held that picketing that conformed to the *Moore Dry Dock* standards (rules employed by the Board to test whether common-situs picketing is primary and therefore lawful, discussed at text accompanying notes 65-67 *infra*) was nonetheless in violation of the Act because "effective picketing could have been carried on at the premises of the primary employer." *Brewery & Beverage Drivers Local 67* (Washington Coca Cola), 107 N.L.R.B. 299, 33 L.R.R.M. 1122 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955). Subsequently, this holding evolved into a rigid "fifth rule," which met with substantial judicial criticism. *See NLRB v. Teamsters Local 968* (Otis Massey), 225 F.2d 205, 36 L.R.R.M. 2541 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955); *Sales Drivers Local 859*, 229 F.2d 514, 517, 37 L.R.R.M. 2166, 2168 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 972 (1956). Finally the Board overruled *Washington Coca Cola*, holding that the place of picketing

Yet the union always wishes to maximize the pressure on the primary in order to win as many of its demands as it can. Picketing at one location does not preclude picketing at another as well. Protection of neutrals does not point us toward an administrable standard.

The legislative history of section 8(b)(4) shows that its framers failed to anticipate the problem of common-situs picketing. Instead, their attention was focused on what a union could lawfully demand.⁵⁶ Such an inquiry is of little use in the common-situs context, where the primary and secondary employees work on the same or contiguous premises. In this situation lawful picketing that applies pressure to the primary employer also inflicts economic harm on the secondary if the secondary's employees refuse to cross the picket line. Whether the union's activity was intended to be directed at the primary or the secondary should not be the pivotal question because it raises difficult evidentiary questions. The problem posed by the common-situs picketing cases is how to provide reasonable and administratively workable standards for determining when picketing the primary simultaneously harms the secondary,⁵⁷ without at the same time proscribing lawful activity.

is just one circumstance among many to be considered in making a common sense application of the *Moore Dry Dock* standards. Electrical Workers Local 861 (Plache Electric), 135 N.L.R.B. 250, 253-54, 49 L.R.R.M. 1446, 1448-49 (1962). Thus the Board has adopted, reconsidered, and repudiated an approach to common-situs picketing that makes its lawfulness depend upon the existence or nonexistence of effective alternatives.

56. Senator Taft commented on the purpose of the change in the wording of section 8(b)(4):

In any strike an employer is informed as to what demands he must submit [sic] in order to get the strikers to return to their work. Consequently, the strikers cannot ask him to do anything which would achieve the objectives prohibited by this section. The hidden motives of the Union or employees would be immaterial.

93 CONG. REC. 6859 (1947) (Supplementary Analysis of the Labor Bill as Passed), reprinted in LMRA LEG. HIST., *supra* note 11, at 1625. Even though the union may be able to show some lawful purpose for its picketing, if it makes illegal demands, the picketing is unlawful. The Conference Committee perceived the difficulties of permitting the trier of fact to probe the union's unstated intentions and sought to avoid it.

57. The interests of administrative certainty make strict rules for the application of section 8(b)(4) desirable. Section 10(1), 29 U.S.C. § 160(1) (1970), requires the Board's Regional Director to issue a complaint and seek a temporary restraining order against the union if he has reasonable cause to believe that the employer's charge of a section 8(b)(4) violation is true. The district court does not decide the case on its merits but seeks only to ascertain if there is reasonable cause to believe that a violation exists. See, e.g., *Kaynard v. Independent Routemen's Ass'n (Urban Distributors, Inc.)*, 479 F.2d 1070, 83 L.R.R.M. 2445 (2d Cir. 1973). Because of the time constraints under which the district courts operate and the greater experience and expertise of the Board in the area of labor law, the district courts tend to defer to the judgment of the Board's agent. See *Lesnick*, *supra* note 13, at 1410. By the time the unfair labor practice proceeding reaches the Board, the labor dispute in which the complaint originated will have long been settled. Although there may be important collateral con-

The rules that have evolved in the common-situs and roving-situs picketing cases meet this need for administrative certainty. Professor Lesnick, in his landmark article on common-situs picketing,⁵⁸ suggests that the underlying rationale of the common-situs case law is that the union should not be permitted to subject the secondary employer to greater pressure than the secondary would feel from a successful strike at the primary. To test the primary or secondary nature of an appeal to secondary employees, one would ask, preliminarily,

whether the appeal seeks to subject the secondary employer to loss of the services of his employees broader than that which would flow from the unavailability of the services of primary employees were the strike to succeed in inducing them to quit work.⁵⁹

The advantage of this inquiry is that it avoids examining the union's intentions without resorting to a mechanical application of geographic criteria. Additionally, one would ask whether the work performed by the employees of the secondary employer lessens the impact of the primary employees' strike of the primary. If so, picketing the secondary would be permitted since the secondary employees otherwise would be acting as strikebreakers. In this situation the neutrality of the secondary employer would be open to doubt.⁶⁰ Thus the rules developed in the cases may be regarded as predicting the foreseeable impact of picketing at the premises of the primary or secondary employer, as the case may be.⁶¹

These rules are expressed in the leading cases of *Sailors Union*

sequences, such as the reinstatement of fired employees (*see* *Schauffler v. Local 1291, Int'l Loughshoremen's Ass'n*, 292 F.2d 182, 187 (3d Cir. 1961)), the Board's decision will not remedy the harm done to the union or the employer by the initial determination whether to issue an injunction. Because the Regional Director's original decision with respect to reasonable cause is so important, the interest in clear rules for the administration of section 8(b)(4) is high.

58. Lesnick, *supra* note 13.

59. *Id.* at 1430.

60. *E.g.*, *General Drivers Local 89 v. American Tobacco Co.*, 258 S.W.2d 903 (Ky. 1953) (processing subsidiary of the primary employer located on same property).

61. Though the case law frequently speaks of the "situs" of the dispute, its usage of the term is ambiguous; although it bears a geographic connotation, it is sometimes also used to show a relationship to the intentions or effects of the picketing. It is probably clearer to avoid the term "situs" and instead to speak of the premises of the primary and secondary employers. *Moore Dry Dock* refers to the "enmeshing of premises and situs." 92 N.L.R.B. at 549, 27 L.R.R.M. at 1110 (1950). Just how removed the inquiry as to the situs of the dispute may become from questions of simple geography is illustrated by *Broadcasting Employees Local 25 (Taft Broadcasting Co.)*, 194 N.L.R.B. 162, 78 L.R.R.M. 1647 (1971). The Board held that a union that represented radio employees did not violate section 8(b)(4) when it picketed a sports arena from which the station was broadcasting. Apparently there were some employees of the primary at work in the arena, and since the pickets intended to direct their message only to these persons, the dispute remained confined to its primary "situs."

of the Pacific (*Moore Drydock*)⁶² and *Local 761, International Union of Electrical Workers v. NLRB (General Electric)*.⁶³ If the picketing occurs at the premises of the primary employer, it is ordinarily primary and lawful, regardless of its appeal to secondary employees not to cross the picket line.⁶⁴ If the picketing occurs at the premises of a secondary employer, it is ordinarily regarded as secondary and therefore violates the statute unless the union complies with the standards set forth in *Moore Drydock*.

For picketing to be lawful at the premises of the secondary employer, *Moore Drydock* requires, first, that the picketing be limited to times when the primary situs is located on the secondary employer's premises; second, that the primary employer be engaged in normal business at that situs; third, that the picketing be limited to places reasonably close to the location of the situs; and fourth, that the picket signs disclose clearly that the dispute is with the primary employer.⁶⁵ *Tree Fruits* borrows from *Moore Drydock* the concept of being "closely confined to the primary situs." Yet careful scrutiny of these rules shows that they are inapplicable to consumer picketing.

The first two rules presuppose that primary work is being done at the secondary's premises, since they are designed to assure that there are primary employees present to whom the appeal may be directed. These considerations are irrelevant to consumer picketing. Even treating the primary's product as the "situs," there would be no primary employees at hand except possibly the pickets themselves. Consumers are not analogous to primary employees, since they cannot be clearly identified as "belonging" to the primary or the secondary employer. A customer entering a store may not have formed the intention of buying a particular product. Even supposing the intention is definite, the customer may nonetheless also intend to purchase other products. The customers of both employers are the same people wearing different hats. Therefore, to try to determine whether consumers of the primary's product are present is not feasible.

The third *Moore Drydock* rule, requiring proximity to the primary situs, was used metaphorically in *Tree Fruits* to distinguish picketing the product from picketing the secondary's business generally. In *Moore Drydock* this rule limits the physical location of the picket signs; in *Tree Fruits* it limits the message of the signs. *Moore Drydock* is

62. 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950).

63. 366 U.S. 667 (1961).

64. *Id.* at 680-81. If it can be shown, however, that the work of the secondary employees is wholly unrelated to the operation of the struck employer's business and that the picketing occurs at a gate reserved for their separate use, this picketing at the premises of the primary employer may be enjoined. *Id.*

65. 92 N.L.R.B. at 549, 27 L.R.R.M. at 1110.

concerned with balancing the employees' right to picket against the impact on the secondary, while in *Tree Fruits* there is the additional concern that restrictions on the content of the union's publicity may collide with the first amendment.⁶⁶ Using *Tree Fruit's* adoption of "closeness" as a concept without an underlying geographical reference merely expresses a result; it does not explain how to distinguish lawful from unlawful consumer picketing. Only the fourth *Moore Drydock* standard—that the picket signs must disclose clearly that the dispute is with the primary employer—is directly applicable to consumer picketing.⁶⁷

In a broad sense, both the *Moore Drydock* rules and the *Tree Fruits* doctrine serve a similar purpose: providing an administratively workable standard for anticipating the impact of picketing in order to determine its lawfulness. But the standards are in no sense the same. Adopting Lesnick's explanation of the rationale for the primary-secondary distinction in the common-situs cases⁶⁸ and applying it to consumer picketing, one arrives at the following formulation: consumer picketing is unlawful if it subjects the secondary employer's business to greater pressure or disruption than would a successful work stoppage at the primary.⁶⁹ Yet an analysis of the economic effects of consumer product picketing on the secondary employer will show that *Tree Fruits* permits picketing the secondary in situations where the picketing may cause greater losses to the secondary than would a successful strike at the primary's premises.

In the paradigm case for consumer picketing—the chain relationship found in *Tree Fruits*, in which goods produced by the primary are sold to consumers by the secondary—the losses to the secondary may be greater than the Lesnick test permits. Unlike the common-situs picketing situations, there is no appeal to secondary employees and no

66. The first amendment concerns involved in consumer picketing are discussed in note 49 *supra*. Restraints on the message of picket signs go beyond regulation of the time, place, and manner of picketing and so pose a more difficult constitutional problem than the *Moore Drydock* requirement that the union "confine" its picketing to the primary situs. See *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58, 79 (1964) (Black, J., concurring).

67. See *Laundry Workers Local 259 (Morrison's of San Diego)*, 164 N.L.R.B. 426, 65 L.R.R.M. 1091 (1967).

68. Lesnick's article has been widely cited with approval. See, e.g., *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 389, *rehearing denied*, 394 U.S. 1024 (1969); *Ramey Constr. Co. v. Local 544, Painters*, 472 F.2d 1127, 1131 (5th Cir. 1973); *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 955 n.8, 68 L.R.R.M. 3004, 3006 n.8 (D.C. Cir. 1968).

69. This approach was first suggested in Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?*, 63 MICH. L. REV. 682, 689-91. It was reiterated in *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 955 n.8, 68 L.R.R.M. 3004, 3006 n.8 (D.C. Cir. 1968) (*dicta*).

attempt to prevent the performance of work. Instead, the union seeks to make it unprofitable for the secondary employer to do business with the struck primary employer. If the union engages in picketing at the premises of the seller and is successful in persuading customers not to buy the struck product, the seller loses the profit that would have been made on the sale of the boycotted item.⁷⁰ This same loss would be incurred if the product were not available because of a successful strike at the primary. Picketing, however, causes the added loss, generally of greater concern to the secondary employer, of reduced customer goodwill and decreased patronage because of identification with the struck product. It is doubtful that even narrowing precautions ever will be completely effective at shielding the secondary employer from the loss of other business or that the union ever wishes them to be.

In cases that do not conform to the paradigm of *Tree Fruits*, the courts find the picketing unlawful even if the harm to the secondary that results from consumer picketing is no greater than that which would be caused by a successful work stoppage at the primary. For example, if the secondary incorporates the product of the primary in the product that it sells,⁷¹ a work stoppage at the primary would either prevent the secondary from manufacturing and selling its goods or force it to substitute another product for the primary's. Consumer picketing aimed at the integrated product would seek to accomplish this same result. Yet such picketing has generally been held to be proscribed.⁷²

If the secondary in fact *ceases to do business with* the primary, the secondary does not lose any customer goodwill or patronage. Consequently, the impact of picketing on the secondary is no greater than

70. There are additional factors that may affect the extent of the secondary's loss from decreased sales of the boycotted items. First, consumers may purchase a substitute for the struck item, so that the seller's loss is limited to the difference in his profit, if any, due to the greater popularity and/or lower price of the struck product. Second, there may be some loss associated with the holding of inventories. If the struck product is perishable, a seller may lose the full value of his inventory as well as the profit he would have made on sales. If the product is nonperishable, he loses the cost of holding his inventory until the end of the boycott in addition to his loss of profits. Unless the secondary's inventory is large and the boycott is lengthy, these effects are not very significant. They do, however, reinforce the conclusion that the effects of a consumer boycott on a secondary seller are not the same as the effects of a work stoppage at the primary. For example, in the case of a work stoppage, the seller would regard a large inventory as an asset rather than a liability.

71. *E.g.*, *American Bread Co. v. NLRB*, 411 F.2d 147, L.R.R.M. 2243 (6th Cir. 1969) (picketing of restaurants using bread baked by primary held unlawful); *Twin City Carpenters Council (Red Wing Wood Products, Inc.)*, 167 N.L.R.B. 1017, 66 L.R.R.M. 1242 (1967), *enforced*, 422 F.2d 309, 73 L.R.R.M. 2371 (8th Cir. 1970) (picketing of subdivision to advise public that kitchen cabinets were not made with union labor held unlawful).

72. See cases cited in note 71, *supra*.

the impact of a successful strike at the primary. Nevertheless, the courts and the Board have often concluded that consumer picketing in this situation violates the Act because it is "tantamount to a demand the [the secondary] cease dealing with the primary object of the Union's grievance."⁷³ Although these cases are arguably incorrectly decided⁷⁴ or decided on narrower grounds,⁷⁵ their language illustrates the basic confusion engendered by the primary-secondary analysis.⁷⁶

Thus, in the typical consumer boycott situation, ceasing to do business with the primary will result in no more harm to the secondary than would lawful picketing that proves successful: the effect on the secondary of ceasing to do business with the primary is no greater than the effect of a successful strike at the primary. Some courts, however, focusing their attention on whether the object of consumer picketing is "primary" or "secondary," have concluded that *Tree Fruits* precludes picketing if its object is to cause the secondary to cease all trade with the primary.

The *Tree Fruits* decision distinguishes between picketing with the object of curtailing trade in the struck product and picketing with the object of causing general harm to the secondary's business. It is incor-

73. *Hoffman v. Cement Masons (California Ass'n of Employers)*, 468 F.2d 1187, 1191, 81 L.R.R.M. 2641, 2643 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *see Kroger Co. v. NLRB*, 477 F.2d 1104, 83 L.R.R.M. 2149 (6th Cir. 1973); *Steelworkers Local 14055 (Dow Chemical Co.)*, 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), *enforcement denied*, 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975), *summarily vacated*, 45 U.S.L.W. 3224 (Oct. 5, 1976).

74. For example, in *Steelworkers Local 14055 (Dow Chemical Co.)*, 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), the Board employed such an argument to hold picketing unlawful, but the D.C. Circuit refused to enforce the Board's cease-and-desist order. 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975). The decision of the court of appeals was subsequently vacated, 45 U.S.L.W. 3224 (Oct. 5, 1976).

75. In *Kroger v. NLRB*, 477 F.2d 1104, 83 L.R.R.M. 2149 (6th Cir. 1973), the union's picketing had induced employees of the secondary to refuse to work. *Hoffman v. Cement Masons (California Ass'n of Employers)*, 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), could arguably have been decided on the basis that the work of the primary employees had been integrated into the seller's total product.

76. The courts' treatment of threatened picketing demonstrates this confusion. Although they have maintained that consumer picketing with the object of causing the secondary to cease doing business with the primary is unlawful, it has been held, somewhat anomalously, that threatening the secondary with consumer picketing unless he stops carrying the struck product is lawful. *Teamsters Local 150 (Coca Cola of Sacramento)*, 151 N.L.R.B. 734, 58 L.R.R.M. 1477 (1965). The Board based its decision on *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964), the companion case to *Tree Fruits*. To hold such threats unlawful would create further paradoxes. Presumably then the unions would make no threats but would merely picket until the product was taken off the shelves of the store. By announcing its intention to picket, the union permits the supposedly neutral seller to minimize the harm he might suffer. Yet this is a demand that the secondary employer stop doing business with the primary—a demand that, by the reasoning of the decisions mentioned above, should be held illegal.

rect to assert that only in the latter case is the picketing for the object of coercing the secondary to cease doing business with the primary. In both cases such coercion is the object. The distinction lies in the degree of pressure that may be brought to bear on the secondary. Yet there is ambiguous language in *Tree Fruits* suggesting that the focus is on the object rather than the kind of pressure:

All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites, was its use 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.⁷⁷

Yet when consumer picketing is involved, attempting to distinguish between "object" and "effect" is untenable. Unlike the common-situs picketing situation, there is no primary activity at the secondary employer's premises at which the picketing could be directed. One is forced to conclude with the Board:

The natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers. It is reasonable to infer, and we do, that Respondents intended this natural and foreseeable result.⁷⁸

Thus the economic effects of product picketing are not "primary" as that term is used in the common-situs picketing cases, nor can it be maintained that product picketing does not have the object of inducing the secondary employer to cease doing business with the primary. This conclusion, however, seems to bring the result of the *Tree Fruits* case squarely into conflict with the language of the statute. In *Tree Fruits* the Court's final resort was to distinguish between the "letter" and the "spirit" of the law.⁷⁹ Yet without the underpinning of the primary-secondary distinction, the *Tree Fruits* decision provides no guidelines for deciding consumer picketing cases that differ from its narrow facts, forcing us to seek other theories consistent with the results of *Tree Fruits*.

C. *The Economic Impact Test*

The court of appeals in *Tree Fruits* would have remanded the case to the Board for an affirmative showing of serious economic harm to Safeway before determining whether the picketing was unlawful.⁸⁰

77. 377 U.S. at 63.

78. *Tree Fruits Labor Relations Committee, Inc.*, 132 N.L.R.B. 1172, 1177-78, 48 L.R.R.M. 1496, 1499 (1961), *rev'd*, 308 F.2d 311, 50 L.R.R.M. 2392 (D.C. Cir. 1962), *vacated*, 377 U.S. 58 (1964).

79. 377 U.S. at 72.

80. 308 F.2d 311, 50 L.R.R.M. 2392 (D.C. Cir. 1962), *vacated*, 377 U.S. 58 (1964).

Though the Supreme Court rejected this approach, subsequent decisions have persisted in using the economic impact of consumer picketing as the crucial factor for determining the applicability of the *Tree Fruits* doctrine.⁸¹ Although an economic impact test has the advantage of giving some tangible content to the concept of "closely confined," it fails to provide an explanation of why consumer picketing is permitted.

The opinion of the court of appeals construed the statute narrowly and found no intention to ban secondary consumer picketing per se. Rather, it found that Congress had condemned the use of threats, coercion, and restraints to achieve certain specified objectives.⁸² Since consumer picketing does not involve work stoppages, disruption of deliveries to the secondary employer, or violence, the court found that no coercion or restraint against Safeway had been shown.⁸³

The Supreme Court rejected this approach on the ground that the permissibility of picketing should not hinge on the amount of harm that in fact occurs.⁸⁴ To hold otherwise would mean that only *effective* consumer picketing was prohibited. The argument of the court of appeals seems to rest on the distinction between picketing as publicity and picketing as coercion—a distinction that the Court had refused to adopt, at least as a constitutional distinction, in *Hughes v. Superior Court*.⁸⁵ An ambiguity, however, underlies the use of the word "coerce"; limited, peaceful picketing does not coerce consumers, but its aggregate effect is to coerce the store. Such an effect is the natural and foreseeable consequence of such picketing and so must be taken as the union's object.⁸⁶ If consumer picketing had no such effect, why would the union go to the trouble? Yet if consumer picketing would be held lawful only so long as the pressures on the secondary are minor, it gives the union a hollow and inconsequential right.

Additionally, if the impact test were used, how would it apply when the secondary employer responded to a union threat of picketing by taking the struck product off its shelves? When no picketing occurs

81. See *Hoffman v. Cement Masons (California Ass'n of Employers)*, 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir. 1972), cert. denied, 411 U.S. 986 (1973); *Steelworkers Local 14055 (Dow Chemical Co.)*, 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), enforcement denied, 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975); *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968).

82. 308 F.2d at 317, 50 L.R.R.M. at 2396.

83. *Id.*

84. "A violation of § 8(b)(4)(ii)(B) would not be established, merely because respondents' 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." 377 U.S. at 72-73.

85. 339 U.S. 460, 466 (1950).

86. See text accompanying note 78 *supra*.

because the secondary complies with the union's demand, should the courts determine what the impact would have been had the union picketed? The threat to engage in protected activity must also be protected.⁸⁷ The test as proposed by the court of appeals would thus involve the Board in some highly speculative judgments.

Despite these problems in applying the *Tree Fruits* doctrine, the courts and the Board have continued to focus on the economic impact of the picketing on the secondary employer. They have avoided the question of actual impact, however, by asking instead: how much of the secondary employer's business does the struck product potentially represent? This formulation limits the empirical inquiry to an examination of the role a struck product plays in the business of the secondary.⁸⁸ Under this approach the key for determining the permissibility of product picketing is whether it results in a total or only a partial boycott of the secondary, if successful. For example, in *Honolulu Typographical Local 37 v. NLRB*,⁸⁹ the D.C. Circuit held that employees of a struck newspaper had violated section 8(b)(4) by picketing establishments that advertised in the struck paper, even though the appeal was limited to requesting customers not to purchase the advertised products. Most of the picketed businesses were restaurants. The court stated that "where picketing means a total boycott, one interest must plainly yield,"⁹⁰ and that the 1959 amendments showed that Congress had chosen to place protection of the neutral before the union's desire to maximize pressure. Although the court in *Honolulu* was concerned with "an attempt to cling to a legal concept evolved for another case even though the language patently does not fit the facts of the situation,"⁹¹ and although it cautioned against giving its holding too broad a reading,⁹² the decision was later cited (with *Tree Fruits*) for the proposition that product picketing is permissible "only if such

87. See *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964); *Teamsters Local 150 (Coca Cola of Sacramento)*, 151 N.L.R.B. 734, 58 L.R.R.M. 1477 (1965).

88. See, e.g., *Teamsters Local 327 (American Bread Co.)*, 170 N.L.R.B. 91, 67 L.R.R.M. 1430 (1968), *enforcement denied on other grounds*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969). The court reasoned from the nature of the product to the illegality of the picketing:

In the case before us consumers would have had to stop ordering sandwiches, baked goods, and all meals served or made with bread. It is this Court's opinion that the picketing of these restaurants produced illegal secondary boycotts since the subject matter of the picketing had become so integrated into the food served that to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer.

411 F.2d at 154, 71 L.R.R.M. at 2249.

89. 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968).

90. *Id.* at 956, 68 L.R.R.M. at 3007.

91. *Id.* at 954, 68 L.R.R.M. at 3005. The court was referring to the *Tree Fruits* rule in this context.

92. *Id.* at 956 n.9, 68 L.R.R.M. at 3006 n.9.

secondary boycott does not attempt to influence customers to completely cease *all* transactions with the neutral employer."⁹³ In this latter case, *Hoffman v. Cement Masons (California Association of Employers)*, nonunion labor had been utilized by the primary in building homes in a subdivision owned and operated by the secondary. Neither *Honolulu Typographical* nor the *Cement Masons* case conforms to the paradigm "chain relationship" in *Tree Fruits*. The former two cases involve the integration of the product or services of the primary into the products of the secondary.⁹⁴ Further explanation and criticism of these opinions will be developed below.⁹⁵ For now it suffices to note that they could have been decided on the narrower distinction between integrated and nonintegrated products.

The recent *Dow Chemical*⁹⁶ case was the first squarely to test the economic impact theory. A union having a primary dispute with a gasoline producer engaged in picketing calling for a consumer boycott of Bay gasoline at six independently owned gas stations where the struck product represented as much as 90 percent of their business.⁹⁷ The Board found that under these circumstances a true *Tree Fruits* situation did not exist and held the picketing unlawful:

In *Tree Fruits*, the Supreme Court majority . . . decided that the minimal impact the picketing there would have had, if successful, upon the total business of the secondary retailer would not justify a conclusion that an object of the union was to persuade the retailer to discontinue handling the struck product to cut its losses.⁹⁸

The court of appeals, rejecting the Board's interpretation of *Tree Fruits* and denying enforcement of the Board's order,⁹⁹ reasoned that the *Tree Fruits* decision depended only on whether the appeal of the picketing was confined to the struck product, and not on the small part played by that product in Safeway's business. Here there was no express request that the public abstain from all trade with the secondary employer. Influenced by the rule of statutory construction "which requires the courts to avoid unnecessary confrontation with the constitu-

93. *Hoffman v. Cement Masons (California Ass'n of Employers)*, 468 F.2d 1187, 1190, 81 L.R.R.M. 2641, 2642 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) (emphasis in original).

94. The advertising in *Honolulu* was found to promote the general businesses of the advertisers. As a matter of economic theory, the cost of advertising is part of the value of each item or meal sold.

95. For analysis of the operative significance of the facts of these cases see text accompanying notes 156-57, 161-65 *infra*.

96. *Steelworkers Local 14055 v. NLRB (Dow Chemical Co.)*, 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975), *denying enforcement to* 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), *summarily vacated*, 45 U.S.L.W. 3224 (Oct. 5, 1976).

97. 211 N.L.R.B. 649, 650, 86 L.R.R.M. 1381, 1382 (1974).

98. *Id.* at 651, 86 L.R.R.M. at 1383.

99. 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975).

tional guarantee of freedom of speech,"¹⁰⁰ the court concluded that in light of *Tree Fruits* it could not hold that Congress had intended to make the exercise of what is arguably a first amendment right hinge on the uncertainties of an economic impact test.

The difficulties the court found with determining lawfulness by measuring economic impact were twofold. First, it would make the lawfulness of picketing turn upon a factor especially difficult to subject to line-drawing. Second, the union in exercising its claimed right to picket would not be likely to possess good information about the potential impact on the secondary employer.¹⁰¹

The court, however, did not reexplore the rationale underlying the *Tree Fruits* doctrine. If it had, the reason why the distinction between total and partial boycott is difficult to apply might have been made more apparent: the economic impact approach fails to explain why the law permits any secondary consumer picketing at all. Because the economic impact approach does not identify factors that would justify consumer picketing, it is unable to say how much impact is too much. The suggestion of the cases employing economic impact language is that no further explanation of why the law permits such picketing is possible (or needed) beyond recognizing that *Tree Fruits* has so interpreted the statute. Thus in *Honolulu Typographical* the court of appeals said:

The Board relies, and we think properly, on the Court's distinction between limited and total boycott

. . . [T]he law makes distinctions in terms of the tradition and economic realities of Union pressure, even though this may result in differences not easily subject to logical delineation between the scope and kinds of picketing available, to unions in different labor circumstances.¹⁰²

Similarly, in *Cement Masons*, Judge Carter wrote:

Asking the public to totally boycott a neutral, is tantamount to a demand that he cease dealing with the primary object of the Union's grievance. It is just such activity which the Act prohibits.¹⁰³

Yet, as developed above in the discussion of the primary-secondary distinction, the object of consumer picketing is nearly always to cause cessation of the secondary's business dealings with the primary. The question is how to distinguish the pressures the law permits from those it does not. The distinction drawn in *Tree Fruits* is between "do not buy" and "do not patronize," not between "partial" and "total" boy-

100. *Id.* at 860, 90 L.R.R.M. at 3286.

101. *Id.* at 861, 90 L.R.R.M. at 3286-87.

102. 401 F.2d at 955, 68 L.R.R.M. at 3006-07.

103. 468 F.2d at 1191, 81 L.R.R.M. at 2643 (citations omitted).

cotts. In *Honolulu Typographical* the court expressly left undecided the case where sale of the primary's product is the sole business of the secondary—"the hard problem posed by the *Tree Fruits* dissenters."¹⁰⁴

A major concern in the cases decided under *Tree Fruits* involves union attempts to disguise appeals not to patronize as appeals not to buy.¹⁰⁵ Consequently, an affirmative duty has been imposed on unions to limit the scope of their appeal.¹⁰⁶ The hard cases have occurred where a good faith effort to limit the scope of the appeal is likely to have little practical effect.¹⁰⁷ The line between total and partial boycott has emerged from the application of *Tree Fruits* to these hard cases, but has served as a generalization about the typical results of employing this rule, not as an explanation of its rationale. The distinction has assumed this function because distinguishing permissible from prohibited picketing on the basis of its impact presupposes both a right to engage in secondary consumer picketing and some limitation on the right beyond the union's good faith.

An economic impact argument is predicated upon *Tree Fruits'* holding that some consumer picketing is justified. Yet an economic impact approach was expressly rejected by the *Tree Fruits* Court.¹⁰⁸ The distinction between partial and total boycott is not identical with the distinction between "do not buy" and "do not patronize"; they should not be freely interchanged without further justification. The difficulty of evolving any criteria for deciding hard cases by using the primary-secondary distinction in fact employed in *Tree Fruits* has been

104. 401 F.2d at 956 n.9, 68 L.R.R.M. at 3005 n.9.

105. See *NLRB v. Millmen Local 550* (Steiner Lumber Co.), 367 F.2d 953, 63 L.R.R.M. 2328 (9th Cir. 1966). The court held picketing at the construction and sales sites of the secondary who purchased most of his lumber from the primary to be an unlawful appeal to secondary employees. The court stated:

A mere facade of "consumer" picketing cannot foreclose the Board from determining the true purpose of the union's conduct. What in actuality is employee oriented conduct, or veiled coercion of the secondary employer, cannot by the simple use of the words "consumer directed," be given statutory protection.

Id. at 955-56, 63 L.R.R.M. at 2330.

106. See *Laundry Workers Local 259* (Morrison's of San Diego), 164 N.L.R.B. 426, 428, 65 L.R.R.M. 1091, 1093 (1967); *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 957, 68 L.R.R.M. 3004, 3007 (D.C. Cir. 1968).

107. *E.g.*, *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968) (restaurants advertising in struck paper picketed); *Steelworkers Local 14055 v. NLRB* (Dow Chemical Co.), 524 F.2d 853, 90 L.R.R.M. 3281 (D.C. Cir. 1975), *refusing enforcement* to 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), *summarily vacated*, 45 U.S.L.W. 3224 (Oct. 5, 1976) (sale of struck product almost entire business of secondary); *Twin City Carpenters Council* (Red Wing Wood Products, Inc.), 167 N.L.R.B. 1017, 66 L.R.R.M. 1242 (1967), *enforced*, 422 F.2d 309, 73 L.R.R.M. 2371 (8th Cir. 1970) (picketing of sales site of homes containing kitchen cabinets manufactured by nonunion labor).

108. See note 84 *supra*.

examined earlier. Constitutional doctrines may underlie the Court's concern with fashioning some limitation on section 8(b)(4)'s broad language, but these provide neither justification nor explanation for the particular limitations that have in fact been made. This analysis exhausts the major arguments present in *Tree Fruits* and the cases decided under it. A more promising approach to the consumer picketing exception to section 8(b)(4) made by *Tree Fruits* is suggested in passing by footnotes in *Honolulu Typographical*¹⁰⁹ and *Dow Chemical*:¹¹⁰ reexamine the premise that the secondary employer is neutral.

III

A PROPOSED APPROACH

A. *Evaluating the Secondary Employer's Neutrality*

When a secondary employer is so closely identified with the primary that he ceases to be neutral, the proscription of section 8(b)(4) does not apply. The cases that employ this principle have identified factors with which to assess the neutrality of the secondary. These factors may be appropriately applied in determining when the law should permit consumer picketing.

Before the enactment of Taft-Hartley, several state courts had held that consumer boycott picketing was not subject to common law restraints on secondary activity on the ground that the secondary employer in a consumer boycott is not really neutral or innocent.¹¹¹ First, there was said to be a "unity of interest" between the two employers because the secondary benefits from the lower wages and prices paid by the primary.¹¹² Second, by providing an outlet for the primary's product, the secondary enabled the primary to maintain conditions that labor was protesting and so "inescapably" became an ally.¹¹³ Finally, the courts noted that there was no other place where the facts of the dispute could be effectively brought to the attention of the public.¹¹⁴

109. 401 F.2d at 956 n.9, 68 L.R.R.M. at 3006 n.9 (D.C. Cir. 1968), quoted and discussed in text accompanying note 132 *infra*.

110. 524 F.2d at 856 n.4, 90 L.R.R.M. at 3282-83 n.4 (D.C. Cir. 1975), *summarily vacated*, 45 U.S.L.W. 3224 (Oct. 5, 1976). See text accompanying note 133 *infra*.

111. See generally 1 L. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 319-474, especially 375-82. See also *Comella, Inc. v. Farm Workers*, 33 Ohio App. 2d 61, 292 N.E.2d 647, 657-58, 82 L.R.R.M. 2503, 2510 (1972), for a compilation of state court decisions.

112. *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E.2d 910, 1-A L.R.R.M. 718 (1937).

113. *Fortenbury v. Superior Court*, 16 Cal. 2d 405, 106 P.2d 411, 7 L.R.R.M. 700 (1940).

114. *Id.*; *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E.2d 910, 1-A L.R.R.M. 718 (1937).

It was recognized early in the history of section 8(b)(4) that the Act's prohibition of inducing any person to cease doing business with any other person must be construed narrowly and limited to situations where the secondaries are neutral with respect to the primary dispute.¹¹⁵ To hold otherwise would permit primary employers to defeat strikes by contracting with professional suppliers of strikebreakers.¹¹⁶ Further, the harm Congress had sought to remedy by section 8(b)(4) was harm to disinterested bystanders as a result of labor disputes, not harm to third parties who involve themselves in strikes. The House Committee Report described the problem at which this legislation was aimed:

The employer's plight has likewise not been happy. . . .

His business on occasions has been virtually brought to a standstill by disputes to which he himself was not a party and in which he himself had no interest. . . .

. . . .

. . . More often than not the employers are powerless to comply with the demands giving rise to the activities, and many times they and their employees as well are the helpless victims of quarrels that do not concern them.¹¹⁷

Similarly, in the Senate debates, Senator Taft stressed that the provision makes illegal a "secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."¹¹⁸ Two years later, when amendment of section 8(b)(4) was under discussion, Senator Taft said that the "spirit of the Act is not intended to protect a man who . . . is cooperating with a primary employer and taking his work and doing the work which he is unable to do because of the strike."¹¹⁹

The ally doctrine has evolved as a judicially created limitation on section 8(b)(4): an employer who is so closely identified or allied with the primary employer that he ceases to be neutral is not protected by this section and is therefore subject to any economic pressures that may lawfully be used against the primary.¹²⁰ There are two major

115. *Douds v. Metropolitan Fed'n of Architects*, 75 F. Supp. 672, 677, 21 L.R.R.M. 2256, 2260-61 (S.D.N.Y. 1948).

116. *Id.* at 677, 21 L.R.R.M. at 2260.

117. H.R. REP. NO. 245, 80th Cong., 1st Sess. 4-5, 23 (1947).

118. 93 CONG. REC. 4198 (1947).

119. 95 CONG. REC. 8709 (1949).

120. See generally DEVELOPING LABOR LAW, *supra* note 26, at 635-40. Of course the pressures applied to an ally could be said to be really "primary" because the ally and the primary employer are "inextricably united," but this usage invites confusion. Unlike the common-situs picketing situation, there is no ambiguity as to who is the immediate target. Each of the employers and the pressures applied at the premises of each are clearly separable and identifiable. The ally lacks the power to satisfy the union's ultimate demands; it can merely cease doing business with the primary, the pro-

branches to the doctrine. An ally relationship has been found, first, where the secondary employer performs struck work either as a part of a continuing relationship¹²¹ or as part of an arrangement initiated after the strike has commenced;¹²² and second, where the primary and secondary employers' businesses are part of the same integrated operation.¹²³ This latter case is more analogous to the typical consumer picketing situation and therefore will be examined more closely.¹²⁴

The courts have construed the integrated operation or "straight-line" ally concept narrowly, demanding common ownership, control, and integration of operations.¹²⁵ This strict requirement has been justified by reference to Congress' policy of localizing labor disputes.¹²⁶ The great variety of ways in which ownership and management can be shared may make courts hesitant to find an ally relationship on the basis of one of these factors alone.¹²⁷ The Board at first took a more elastic view than the courts,¹²⁸ but now adheres to a strict view of control and

scribed object of the statute. No useful purpose would be served by labeling pressures applied to an ally as "primary."

121. *Douds v. Metropolitan Fed'n of Architects*, 75 F. Supp. 672, 21 L.R.R.M. 2256 (S.D.N.Y. 1948) (primary transferred additional work to subcontractor after commencement of strike).

122. *NLRB v. Business Machines Local 459 (Royal Typewriter Co.)*, 228 F.2d 553, 37 L.R.R.M. 2219 (2d Cir. 1955) (during strike primary subcontracted with secondary in order to meet contractual obligations for repair work on typewriters).

123. *Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 87 N.L.R.B. 54, 25 L.R.R.M. 1092 (1949) (primary operated sawmill and logging operations; secondary transported logs); *Carpenters Union (Roy & Sons Co.)*, 118 N.L.R.B. 286, 40 L.R.R.M. 1171 (1957), *enforcement denied*, 251 F.2d 771, 41 L.R.R.M. 2445 (1st Cir. 1958) (secondary was sole supplier of millwork lumber to primary, a construction company).

124. Throughout the remainder of this Comment, the term "ally approach" is employed as a convenient label, not found in the case law, to denote the proper analysis for assessment of consumer picketing. This is not meant to imply that consumer picketing cases are "really" ally doctrine cases; rather, only to suggest that certain factors identified in the straight-line ally cases are useful to the analysis of interests in consumer picketing cases.

125. *Television & Radio Artists v. NLRB (Hearst Corp.)*, 462 F.2d 887, 80 L.R.R.M. 2001 (D.C. Cir. 1972) (held that separate divisions of corporations operating completely separate businesses are not allies).

126. *Miami Pressman's Local 16 v. NLRB (Knight Newspapers, Inc.)*, 322 F.2d 405, 53 L.R.R.M. 2629 (D.C. Cir. 1963):

Although it is frequently true that the object of secondary picketing is to obstruct dealings with the primary employer Congress did not so limit its language. . . . [Congress'] purpose was to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from unallied employers.

Id. at 410, 53 L.R.R.M. at 2632.

127. See *Television & Radio Artists v. NLRB (Hearst Corp.)*, 462 F.2d 887, 80 L.R.R.M. 2001 (D.C. Cir. 1972); *Miami Pressman's Local 16 v. NLRB (Knight Newspapers, Inc.)*, 322 F.2d 405, 53 L.R.R.M. 2629 (D.C. Cir. 1963); *Bachman Machine Co. v. NLRB*, 266 F.2d 599, 44 L.R.R.M. 2104 (8th Cir. 1959).

128. See *Carpenters Union (Roy & Sons Co.)*, 118 N.L.R.B. 286, 40 L.R.R.M. 1171 (1957), *enforcement denied*, 251 F.2d 771, 41 L.R.R.M. 2445 (1st Cir. 1958); *Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 87 N.L.R.B. 54, 25 L.R.R.M. 1092 (1949).

integration.¹²⁹

Neutrality, however, is not a technical concept; finding the ally doctrine applicable requires a common sense evaluation of the relationship between the two employers. The court of appeals in *NLRB v. Local 810, Teamsters (Sid Harvey, Inc.)*¹³⁰ called for a case by-case consideration of the facts tending to show a vertically integrated operation, including de facto control of one corporation by another, the extent of common ownership, integration of business operations, and the dependence of one employer on another for a substantial portion of his business.

Because a finding that a secondary employer is an ally deprives him of all protection under section 8(b)(4), the courts' reluctance to expand the concept is understandable. Yet a finding of neutrality in a close case may severely limit labor's ability to apply economic pressure on the primary, even though the secondary is by no means "unrelated."¹³¹

The limited consumer picketing of the secondary employer permitted by *Tree Fruits* may be regarded as a means of mitigating the harshness of the dichotomy between the "neutral, wholly unrelated party" and the "ally." Though no consumer picketing case decided under section 8(b)(4) has rested squarely on an ally rationale, dicta in the *Honolulu Typographical* and *Dow Chemical* decisions suggest

129. See *Teamsters Local 616 (Southwest Forest Indus., Inc.)* 203 N.L.R.B. 645, 83 L.R.R.M. 1302 (1973); *Local 810, Teamsters (Sid Harvey, Inc.)*, 189 N.L.R.B. 612, 77 L.R.R.M. 1191 (1971), *enforcement denied*, 460 F.2d 1, 80 L.R.R.M. 2417 (2d Cir.), *cert. denied*, 409 U.S. 1041 (1972). The Board currently applies the following standard:

Common ownership alone is not sufficient. There must be in addition such actual or active common control, as distinguished from merely a potential, as to denote an appreciable integration of operations and management policies. *Teamsters Local 639 (Poole's Warehousing, Inc.)*, 158 N.L.R.B. 1281, 1286 (1966).

130. 460 F.2d 1, 6, 80 L.R.R.M. 2417, 2420 (2d Cir.), *cert. denied*, 409 U.S. 1041 (1972).

131. See, e.g., *Bachman Machine Co. v. NLRB*, 266 F.2d 599, 44 L.R.R.M. 2104 (8th Cir. 1959), *denying enforcement to* 121 N.L.R.B. 1229, 42 L.R.R.M. 1543 (1958); *Carpenters Union (Roy & Sons Co.) v. NLRB*, 251 F.2d 771, 41 L.R.R.M. 2445 (1st Cir. 1958), *denying enforcement to* 118 N.L.R.B. 286, 40 L.R.R.M. 1171 (1957). In *Bachman* the court held that a secondary employer owned and operated by the same family as the primary employer, with the same president and majority stockholder, was not an ally of the primary. The two businesses were separate corporations engaged in different lines of business at different premises. Apart from the president, the only employee the two companies shared was a bookkeeper. The companies did a substantial amount of business with each other. In *Roy & Sons* a construction company and a lumber company were owned and controlled by the same persons, brothers, and the lumber company was the construction company's sole supplier of millwork lumber. The court found that the Board had erred in holding the construction company an ally of the lumber company. The construction company's purchases were only a small part of the lumber company's total sales, and there was no evidence of actual common control.

the possibility. In *Honolulu Typographical* the court reserved decision on whether a secondary seller who sells only the struck product could be picketed when the picketing would necessarily amount to a request to cease all patronage. The court observed:

It may be that this issue will be academic, and in real life situations the economic interrelationships between the primary employer and such a secondary seller require that the latter be considered as an "ally."¹³²

The issue did not prove academic; it arose in the *Dow Chemical* case. The court of appeals found no violation since the picketing had been confined to the struck product, gasoline. Taking note of the union's argument that when the struck product approaches being the sole product of the secondary seller, the secondary may become an ally by virtue of his economic relationship with the primary, the court stated that it

will not upset the Board's finding of neutrality but agrees that the putative alliance between a primary and a secondary selling almost exclusively the goods of the primary weakens the force of an "economic impact" test.¹³³

Of course all secondary employers in consumer picketing cases do not border on being "allies," as that term is used in the ally doctrine cases, but some of the factors used to establish an ally relationship are present in the typical factual patterns of the consumer picketing cases, especially economic interdependence and integration of business operations. For example, employees of a lumber mill may picket the construction and sales sites of a secondary employer who purchases most of his lumber from the primary;¹³⁴ the primary employer may build homes in a subdivision of the secondary owned and sold by the secondary;¹³⁵ or the primary may be a wholesale distributor that sells routes to other distributors, including the secondary.¹³⁶ In all these cases the secondary was not a "wholly unconcerned"¹³⁷ or neutral party.

Certain ally cases also involve consumer picketing. For example,

132. 401 F.2d at 956 n.9, 68 L.R.R.M. at 3006 n.9.

133. 524 F.2d at 856 n.4, 90 L.R.R.M. at 3282-83 n.4, *summarily vacated*, 45 U.S.L.W. 3224 (Oct. 5, 1976).

134. NLRB v. Millmens Local 550 (Steiner Lumber Co.), 367 F.2d 953, 63 L.R.R.M. 2328 (9th Cir. 1966) (picketing of secondary held unlawful because in actuality appeal was directed at employees, not at consumers).

135. Hoffman v. Central Masons Local 337 (California Ass'n of Employers), 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) (judgment of contempt against union affirmed).

136. Independent Routemen's Ass'n (Urban Distribs., Inc.), 206 N.L.R.B. 245, 84 L.R.R.M. 1265 (1973) (picketing held lawful, but independence of secondary from primary not fully litigated).

137. 93 CONG. REC. 4198 (1947) (remarks of Sen. Taft), quoted in text accompanying note 118 *supra*.

in *NLRB v. Local 810, Teamsters (Sid Harvey, Inc.)*,¹³⁸ three corporations were commonly owned—a corporation that rebuilt air conditioning equipment, a distributor, and several sales companies. At the stores (the sales companies) pickets asked customers not to buy Sid Harvey products because of a dispute with the distributor. They also persuaded carriers not to make deliveries. The court of appeals allowed both forms of picketing, finding that the Sid Harvey corporations, while not totally interdependent, did constitute essentially a vertically integrated operation. Even if the court had not found an ally situation, presumably it would have permitted consumer picketing at the company's stores and at any other outlets for the company's goods.

If a secondary employer is found to be an ally, the statute no longer insulates him from the dispute in any way. The union has the right not only to picket his premises, but also to induce his employees to refuse to work, his carriers not to make pickups or deliveries, and his customers not to patronize. In short, he is subject to the same pressures as the primary. Consumer picketing, however, is permitted a far more limited impact. Pickets may not appeal to employees or carriers but only to customers. The appeal must specifically identify the employer with whom the union has its dispute and request only that the customer refrain from purchasing the struck product.

In the chain situation, where the secondary employer merely resells the primary's goods, limiting consumer picketing to the struck product ties the extensiveness of its impact to the degree of interdependence. Although some members of the public may be reluctant to patronize any store being picketed, this loss of patronage is not likely to be great if the appeal is limited to a separate, identifiable product that is just one of many products sold. In cases that do not conform to the chain pattern, such as where the primary's product is incorporated into another product produced by the secondary,¹³⁹ the correlation between the impact of the picketing and the degree of interdependence is not likely to be as close. The pressure on the secondary from a limited appeal, however, is still potentially much less disruptive than unrestricted picketing. Currently, where the interdependence is high, unrestricted and totally disruptive picketing is permitted. In all other situations no secondary picketing is allowed,¹⁴⁰ not even the limited appeal of consumer picketing.

The economic impact test thus creates a paradox. The secondary

138. 460 F.2d 1, 80 L.R.R.M. 2417 (2d Cir.), *cert. denied*, 409 U.S. 1041 (1972).

139. *E.g.*, *Teamsters Local 327 (American Bread)*, 170 N.L.R.B. 85, *enforcement denied on other grounds*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969); *Twin City Carpenters Council (Red Wing Wood Products, Inc.)*, 167 N.L.R.B. 1017, 66 L.R.R.M. 1242 (1967), *enforced*, 422 F.2d 309, 73 L.R.R.M. 2371 (8th Cir. 1970).

140. *See Hoffman v. Cement Masons Local 337 (California Ass'n of Employers)*, 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973);

who is highly involved with the business of the primary receives greater protection from consumer picketing than another employer who is less involved so long as he is not so closely identified with the primary employer that he becomes an ally. To assess the lawfulness of consumer picketing by asking if its impact on the secondary employer is significantly disproportionate to the degree of economic interdependence between the primary and the secondary would avoid this anomaly. Under this proposed approach the permissibility of consumer picketing in situations differing from the chain pattern of *Tree Fruits* would be determined by evaluating the overall relationship between the primary and the secondary employer rather than by applying a per se rule against "total" boycotts.¹⁴¹

Adopting this more flexible approach to consumer picketing would not be inconsistent with the language of the statute or the *Tree Fruits* decision. As the *Tree Fruits* Court reasoned, "Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable."¹⁴² The "specific end" that Congress found undesirable was harm to "wholly unrelated" third parties.¹⁴³ There is already the well-established exception to the prohibitions of section 8(b)(4) where the primary and the secondary employer are "so intimately and inextricably united as to constitute them one employer."¹⁴⁴ The consumer picketing allowed by *Tree Fruits* could be viewed as a compromise between the permissible unrestricted picketing of an "ally" and the unlawful picketing of a "neutral." Limited secondary picketing should be permitted under certain narrowly prescribed circumstances in order to accommodate Congress' twin purposes of protecting concerted activities and shielding unrelated third parties.

*B. Application of the Ally Approach:
Assessing Interdependence and Impact*

Adopting the ally approach to test the secondary employer's neutrality in consumer picketing situations provides useful criteria for

NLRB v. *Typographical Local 21* (California Newspapers, Inc.), 465 F.2d 53, 80 L.R.R.M. 3076 (9th Cir. 1972); *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968); cases cited in note 139 *supra*.

141. It is unclear how many rules are operating to limit *Tree Fruits* and how they are to be stated. Though *Honolulu Typographical* is cited for an "integrated products" doctrine, it could also be said to stand for a "no tangible product" doctrine. Cases like *Cement Masons* that refer to a "total boycott" imply that they are making a straight forward application of *Tree Fruits*, but, as our discussion of the economic impact argument has shown, the *Tree Fruits* Court did not adopt such a distinction.

142. 377 U.S. at 62.

143. See text accompanying notes 117-19 *supra*.

144. *Bachman Machine Co. v. NLRB*, 266 F.2d 599, 605, 44 L.R.R.M. 2104, 2109 (8th Cir. 1959).

deciding hard cases. The ally doctrine cases provide several helpful factors. First, common ownership of the secondary and the primary,¹⁴⁵ though neither necessary¹⁴⁶ nor sufficient¹⁴⁷ to establish an ally relationship, has been an important factor in the "straight-line" ally cases. Common ownership need not be total; substantially the same ownership is enough.¹⁴⁸ Also, who holds legal title is not controlling; ownership may be attributed.¹⁴⁹ Second, the extent to which the two companies are under common control is an important factor.¹⁵⁰ Common control on a day-to-day basis is strongly probative, but an ally relationship may be found even where such close control is lacking, on the theory that neutrality should be decided on a common sense evaluation of all the facts.¹⁵¹ Third, the business dealings of the primary employer and the secondary may be so entwined that the secondary employer forfeits its neutrality. The strongest case is where two companies are vertically integrated as "one straight line operation,"¹⁵² but an ally relationship has been found where the interconnection was not so complete. For example, a long-term agreement may bind employers in a nonneutral relationship,¹⁵³ or the dependence of one employer on another for a

145. See, e.g., *Milwaukee Plywood Co. v. NLRB*, 285 F.2d 325, 47 L.R.R.M. 2291 (7th Cir. 1960) (parent-subsidary); *Madden v. Teamsters Local 810*, 222 F. Supp. 635, 54 L.R.R.M. 2368 (N.D. Ill. 1963) (Chicago plant picketed because of dispute at company's Long Island plant).

146. See *Truck Drivers Local 728 v. Empire State Express, Inc.*, 293 F.2d 414, 48 L.R.R.M. 2702 (5th Cir.), cert. denied, 368 U.S. 931 (1961); *Teamsters Local 107 (Sterling Wire Prods. Co.)*, 137 N.L.R.B. 1330, 50 L.R.R.M. 1403 (1962).

147. See *Television & Radio Artists v. NLRB (Hearst Corp.)*, 462 F.2d 887, 80 L.R.R.M. 2001 (D.C. Cir. 1972); *Pressmens Local 16 v. NLRB (Knight Newspapers, Inc.)*, 322 F.2d 405, 53 L.R.R.M. 2629 (D.C. Cir. 1963); *Teamsters Local 639 (Poole's Warehousing, Inc.)*, 158 N.L.R.B. 1281, 62 L.R.R.M. 1197 (1966).

148. See *Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 87 N.L.R.B. 54, 25 L.R.R.M. 1092 (1949).

149. For example, ownership has been attributed in situations where both companies were owned by members of the same family (*Squillacote v. Teamsters Local 695*, 60 L.R.R.M. 2057 (W.D. Wisc. 1965) (family ownership and common directors); *Decision of the General Counsel, No. Sr-1164*, 47 L.R.R.M. 1578 (1961) (husband owned manufacturing company, wife held distributorship)), where the relationship was that of parent and subsidiary corporation (*Drivers Local 89 v. American Tobacco Co.*, 258 S.W.2d 903 (Ky. Ct. App. 1953) (processing subsidiary)), and where the parties were partners in a joint venture (*Decision of the General Counsel, No. SR-2427*, 1962 CCH NLRB ¶ 11,968).

150. Common ownership without actual common control will not support a finding of an ally relationship. *Television & Radio Artists v. NLRB (Hearst Corp.)*, 462 F.2d 887, 80 L.R.R.M. 2001 (D.C. Cir. 1972); *Teamsters Local 639 (Poole's Warehousing, Inc.)*, 158 N.L.R.B. 1281, 62 L.R.R.M. 1197 (1966).

151. *NLRB v. Teamsters Local 810 (Sid Harvey, Inc.)*, 460 F.2d 1, 6, 80 L.R.R.M. 2417, 2420 (2d Cir. 1972).

152. *Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 87 N.L.R.B. 54, 56, 25 L.R.R.M. 1092, 1094 (1949).

153. See *Truck Drivers Local 728 v. Empire State Express, Inc.*, 293 F.2d 414 (5th Cir. 1959), cert. denied, 368 U.S. 931 (1961); *Teamsters Local 107 (Sterling Wire Prods. Co.)*, 137 N.L.R.B. 1330 (1962).

substantial portion of its business may support such a finding.¹⁵⁴

If a true ally relationship were found to exist between two employers, there would be no need to consider separately the lawfulness of consumer picketing at the secondary because unrestricted picketing directed not only at customers, but also at employees and delivery personnel, would then be permitted. A lesser degree of interconnection should support the right to engage in consumer picketing directed only at the customers of the secondary. To determine whether such interconnection exists, the extensiveness of the impact on the secondary should be compared to the degree of interdependence between its operations and interest and those of the primary.

The proposed ally approach—comparing the interdependence of the primary and secondary with the impact of consumer picketing on the secondary—applied to the situation exemplified in *Tree Fruits* would permit consumer picketing at the secondary. Under this analysis secondary consumer picketing should be permitted where: (1) the primary and secondary stand in the chain relationship of manufacturer or distributor and seller; (2) the product picketed is a small portion of the secondary's business; and (3) the boycott can be effectively confined to that product. The chain relationship between primary and secondary shows some integration of their operations and identity of interests. The impact of consumer picketing on the secondary employer will be minimal and will merely reflect the portion of his business attributable to the relationship with the primary.

In situations that depart from the *Tree Fruits* paradigm, the proposed approach will permit consumer picketing in some cases where the courts to date have not. For example, where the secondary business sells primarily or exclusively the product of the primary, as in the *Dow Chemical* case, the proposed ally approach would permit consumer picketing. Although the impact of picketing on the secondary's business is greater in the *Dow Chemical* than in the *Tree Fruits* situation, the large trade in the struck product shows a strong identity of interests and interdependence. The seller in such a situation may be further connected with the primary through a lease or franchise arrangement. The primary who is the manufacturer or distributor may also exercise other forms of de facto control. For example, in a case like *Dow Chemical* the primary may in effect set the pricing policy for the gasoline stations. As a practical matter a boycott of the struck product could amount to a total boycott, but this effect would only

154. See *NLRB v. Teamsters Local 810 (Sid Harvey, Inc.)*, 460 F.2d 1, 80 L.R.R.M. 2417 (2d Cir. 1972), discussed in text following note 130 *supra*; *Teamsters Locals 249 & 250*, 120 N.L.R.B. 155 (1958) (exclusive distributorship).

reflect the high degree of economic interdependence in the relationship.

In the absence of a chain relationship or where the product of the primary is integrated into the product of the secondary, whether consumer picketing should be permitted would depend on the form of the picketing and the relationship of the two employers. If the union fails to limit its appeal to the product involved in the dispute, the secondary may be harmed more than its involvement with the primary warrants. For example, in *American Bread Co. v. NLRB*¹⁵⁵ the union had a dispute with a bakery and picketed restaurants that served the bakery's bread as part of their meals. The signs read: "To the Customer. Sunbeam Bread is sold here. Local 327." The appeal could have been interpreted as a request that customers cease purchasing the item by stopping all trade with the restaurant. Since the impact on the secondary was greater than the secondary's dependence on the primary warranted, the proposed test would have prohibited the picketing. The signs could have instead requested that customers ask for no bread with their meals, an appeal whose lesser impact would correspond permissibly with the restaurant's low degree of interdependence on the primary.

If the union cannot effectively limit its appeal where it seeks to bring economic pressure against a secondary either who is not in a chain relationship with the primary or who integrates the primary's product into its own product, a stronger showing of interdependence should be required because the impact of consumer picketing is likely to be greater.

Two recurrent situations, the typographical and construction industry cases, best illustrate this proposition. In the typographical union cases¹⁵⁶ the unions picketed stores that advertised in a struck newspaper. Applying the ally approach to test the neutrality of the stores, it appears that such picketing should rarely, if ever, be permitted since the stores being picketed and the paper being struck have neither a chain relationship nor common ownership or control between them.

Since the purpose of advertising may be more to bring customers into the store than to sell the particular product advertised, there is a practical difficulty in limiting the scope of the appeal.¹⁵⁷ If the union

155. 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969). This case is usually cited as an "integrated products" case.

156. *NLRB v. Typographical Union (California Newspapers, Inc.)*, 465 F.2d 53, 80 L.R.R.M. 3076 (9th Cir. 1972); *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 68 L.R.R.M. 3004 (D.C. Cir. 1968); *Los Angeles Typographical Union (White Front Stores)*, 181 N.L.R.B. 384, 73 L.R.R.M. 1390 (1970); *Atlanta Typographical Unions (Times-Journal, Inc.)*, 180 N.L.R.B. 1014, 73 L.R.R.M. 1241 (1970).

157. In *NLRB v. Typographical Union (California Newspapers, Inc.)*, 465 F.2d

asks the public only to boycott a clearly identified product, potential customers who have not seen the advertisement also may join the boycott. Consequently, the impact of the picketing may be high even though the store's dependence on advertising in the struck paper is minimal. Finally, a boycott may have an economic impact on a manufacturer or distributor of the product who had no hand in the decision to advertise.

The construction industry factual patterns are more diverse. Both the significance of the product or services of the primary to the business of the secondary and the intertwining of their business operations must be examined. In those construction industry cases in which the primary and the secondary employers have had an ongoing relationship as builder and major supplier¹⁵⁸ or as contractor and developer,¹⁵⁹ the relationship between the primary and the secondary constitutes nearly a single, vertically integrated operation. Their relationship would not be so characterized if their business dealings were confined to the construction of a single building.¹⁶⁰

A reanalysis of *Hoffman v. Cement Masons (California Association of Employers)*¹⁶¹ according to the proposed approach produces a different result. The union had a dispute with the contractor who had built homes in a subdivision. The homes were owned and sold by the developer, who also had homes and apartments for sale elsewhere, only some of which had been built by the same contractor. On weekends, when no employees of the contractor were present, the union picketed the entrance to the subdivision, requesting consumers not to purchase homes there. The court held the picketing unlawful: "A union may 'follow the struck product' into the secondary establishment, however, only if such secondary boycott does not attempt to influence customers to completely cease *all* transactions with the neutral employer."¹⁶²

53, 80 L.R.R.M. 3076 (9th Cir. 1972), the union attempted to identify the struck product to the public by attaching copies of the advertisements to their picket signs. This attempt was found inadequate because the advertisements could not be read by shoppers without undue difficulty.

158. *E.g.*, *NLRB v. Millmen Local 550 (Steiner Lumber Co.)*, 367 F.2d 953, 63 L.R.R.M. 2328 (9th Cir. 1966).

159. *E.g.*, *Hoffman v. Cement Masons (California Ass'n of Employers)*, 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Alton-Wood River Bldg. & Constr. Trades Council*, 154 N.L.R.B. 982, 60 L.R.R.M. 1067 (1965).

160. *E.g.*, *Kroger Co. v. NLRB*, 477 F.2d 1104, 83 L.R.R.M. 2149 (6th Cir. 1973); *NLRB v. Salem Bldg. Trades Council*, 388 F.2d 987, 67 L.R.R.M. 2512 (9th Cir.), *cert. denied*, 391 U.S. 965 (1968).

161. 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

162. *Id.* at 1190, 81 L.R.R.M. at 2642 (emphasis in original).

Applying the proposed ally approach, a different result is reached. First, the connection here between the primary and the secondary was quite strong. They had an extensive and ongoing relationship and divided functions often combined in a single enterprise. The primary's services constituted the major portion of the product that the secondary offered for sale. Second, although the impact of a successful consumer boycott on the secondary's business would have been considerable, it would have reflected the secondary's high degree of interdependence with the primary. The money the primary saved through nonunion wages and working conditions was likely to be reflected in the developer's prices. Further, the developer was undoubtedly aware of this factor when he contracted for the construction of the houses, and it may have been an important consideration in his decision to do business with the primary. Finally, the court's assertion that the union's picketing called for a total boycott of the secondary's business was inaccurate. The developer had homes and apartments for sale elsewhere that were not being picketed; the total boycott of this particular subdivision reflected the fact that the primary had built all the homes in it.

If the primary had constructed only a few of the many homes in the subdivision, the case for permitting picketing would have been less compelling.¹⁶³ In such a case it is likely that the operations of the primary and the secondary would have been less integrated, and the secondary's relationship with the primary would not have warranted a boycott of the entire subdivision. Similarly, the case would have been less compelling if the primary had supplied only building materials¹⁶⁴ or kitchen cabinets.¹⁶⁵

In situations in which third parties totally unrelated to the dispute are affected, the proposed ally approach, as well as the existing law, would curtail the union's right to picket. For example, in *NLRB v. Salem Building Trades Council*¹⁶⁶ the union picketed the customer entrances of several stores to protest the owner/developer's use of non-union contractors for their construction. The court properly affirmed the Board's finding of a violation. First, because no product of the primary (the contractor) was being offered for sale to the public, the

163. *E.g.*, *Alton-Wood River Bldg. & Constr. Trades Council*, 154 N.L.R.B. 982, 60 L.R.R.M. 1067 (1965).

164. *Cf.* *NLRB v. Millmen Local 550 (Steiner Lumber Co.)*, 367 F.2d 953, 63 L.R.R.M. 2328 (9th Cir. 1966).

165. *See* *Twin City Carpenters Council (Red Wing Wood Products, Inc.)*, 167 N.L.R.B. 1017, 66 L.R.R.M. 1242 (1967), *enforced*, 422 F.2d 309, 73 L.R.R.M. 2371 (8th Cir. 1970). Conceivably, the union could have limited the scope of its appeal by requesting the public to demand homes without cabinets installed. It is doubtful, however, as a practical matter, that this recourse would have effectively confined the impact of the picketing.

166. 388 F.2d 987, 67 L.R.R.M. 2512 (9th Cir. 1968).

object of such picketing could not be confined. Second, the tenants of the buildings, whose only connection with the primary was their renting space from the secondary, would have felt the brunt of the impact of the picketing.

As the law now stands, consumer picketing has been prohibited in nearly all cases that vary significantly from the *Tree Fruits* pattern. Often courts have found violations of the Act on the basis of the principle, enunciated in *Honolulu Typographical*, that *Tree Fruits* is inapplicable "where the struck 'product' has become an integral part of the retailer's entire offering, so that the product boycott will of necessity encompass the entire business of the secondary employer."¹⁶⁷ Little consideration has been given to the unique facts of *Honolulu Typographical*, though the *Honolulu Typographical* court was well aware of how broadly the facts of the case before it differed from those of *Tree Fruits*.¹⁶⁸ Yet, accepting the rule as stated, the courts and the Board have not always required that the boycott encompass the entire business of the secondary before finding that *Tree Fruits* does not apply. As noted above, the secondary employer in *Cement Masons* had homes for sale elsewhere, not built by the primary and not picketed.¹⁶⁹ In the *Salem Building Trades* case the developer owned other property not picketed.¹⁷⁰ In these cases the courts did not discuss what constitutes the "entire business" of the secondary; nonetheless, they concluded on a largely intuitive basis that picketing encompassed it.¹⁷¹

This Comment suggests an approach that requires a more particularized inquiry in order to evaluate the role of the struck product or services in the business of the secondary and the impact consumer picketing would have in light of the overall business relationship of the primary and secondary employers. What portion of the secondary's business would be affected by a consumer boycott is not the sole determining factor. Moreover, the use of this approach would result in administratively workable standards. Adoption of the factors employed in the ally doctrine cases as indicators of neutrality or involvement and the weighing of these against the foreseeable impact of picketing pro-

167. 401 F.2d at 955, 68 L.R.R.M. at 3006. See, e.g., *Hoffman v. Cement Masons* (California Ass'n of Employers), 468 F.2d 1187, 81 L.R.R.M. 2641 (9th Cir.), cert denied, 411 U.S. 986 (1973); *NLRB v. Typographical Union* (California Newspapers, Inc.), 465 F.2d 53, 80 L.R.R.M. 3076 (9th Cir. 1972); *American Bread Co. v. NLRB*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969).

168. 401 F.2d at 954, 68 L.R.R.M. at 3005.

169. See text following note 163 *supra*.

170. 163 N.L.R.B. 33, 34 (1967).

171. See, e.g., *American Bread Co. v. NLRB*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969), discussed in text accompanying note 155 *supra*.

vide more definite criteria than those available in determining whether picketing is "closely confined to the primary dispute." As elsewhere in the labor law, rules would develop for recurrent situations. Further, the proposed approach may reconcile "the tradition and economic realities of Union pressure" with the logical delineations of the law.¹⁷² Substituting particularized factual analysis for the application of labels like "integrated product" or "total boycott" may create some uncertainty in the short run, but in the long run should result in a more predictable and logically coherent law of consumer picketing.

IV

CONSUMER PICKETING UNDER THE ALRA: TOWARD ADOPTION OF THE NEUTRALITY ANALYSIS

California's new Agricultural Labor Relations Act [ALRA]¹⁷³ affords broader protection to consumer boycott picketing than does national law. The arguments presented in both the California¹⁷⁴ and federal¹⁷⁵ legislative hearings on the application of labor laws to agri-

172. *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 956, 68 L.R.R.M. 3004, 3007 (D.C. Cir. 1968).

173. CAL. LAB. CODE §§ 1140-67 (West Supp. 1976).

174. *Joint Interim Hearings of the Assembly Comm. on Agriculture and the Assembly Comm. on Labor Relations*, California Legislature 4 (1969) [hereinafter cited as *Assembly Hearings*].

175. *Hearings on S. 8 and S. 1808 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *1969 Senate Hearings*]. These federal hearings are useful for determining the factual premises underlying the California Act because the federal legislation being considered at the time, S. 8 and S. 1808 (the Murphy Bill), was primarily a response to labor disputes in California agriculture, and many of the same speakers and organizations presented their views at both hearings. In the California hearings, the advisability of federal, as opposed to state, legislation was discussed, and several speakers mentioned the Murphy Bill. *E.g.*, *Assembly Hearings*, *supra* note 174, at 72-73, 103, 171.

Neither the *Assembly Hearings*, *supra* note 174, nor the *1969 Senate Hearings*, *supra* note 175, provides a contemporaneous record from which the intent of the framers of the ALRA can be discerned. No such record is available. Both are merely persuasive as to what factual arguments the legislators were aware of.

There have been additional Congressional hearings held on the subjects of migrant labor and applying national labor laws to agriculture, but these do not add appreciably to the discussion of secondary boycotts contained in the *1969 Senate Hearings*, *supra* note 175. These other hearings include: *Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess. (1970); *Hearings on H.R. 5010 and Related Bills Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. (1971); *Hearings on H.R. 4407, H.R. 4408, & H.R. 7513 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. (1973); *Hearings on H.R. 5010 and Related Bills Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. (1972); *Hearings on S. 2070 and S. 3202 Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974).

culture indicate that this broader protection may reflect a legislative judgment that the high degree of vertical integration prevalent in modern agribusiness¹⁷⁶ requires a reevaluation of the concepts of "secondary" and "neutral." Such an appraisal by the legislature may encourage the courts to undertake their own case-by-case analysis of the factual circumstances of individual cases in the manner suggested by this Comment. It also may reflect, more generally, California's policy toward labor picketing, which traditionally has been more liberal than that of the national law.

California case law expressly approves both primary and secondary boycotts.¹⁷⁷ The early California case of *Fortenbury v. Superior Court*¹⁷⁸ held secondary consumer picketing at a poultry market to be lawful:

One who sells a product of a merchant or manufacturer engaged in a labor dispute with his employees, inescapably becomes an ally of the employer. He has a direct unity of interest with the one against whom labor's complaint is directed.¹⁷⁹

Although these cases are old, they have never been overruled or limited on these points. The California Supreme Court has characterized California's approach to labor-management relations as "laissez-faire."¹⁸⁰ Until the passage of the ALRA, California's only statutory restriction on secondary boycott activity was the Jurisdictional Strike Act,¹⁸¹ which makes unlawful a strike or concerted interference with business if it arises out of a dispute between two unions over representation rights. This statute has been employed to enjoin consumer boycott picketing arising out of a jurisdictional strike,¹⁸² but has been declared inapplicable if the employer is not neutral in the jurisdictional dispute.¹⁸³

Since the enactment of Taft-Hartley, the California law regarding secondary boycotts has not been of great significance because the

176. The term "agribusiness" is used to describe the large corporate farming operations that now dominate American commercial agricultural production. See generally U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REP. No. 209, CORPORATIONS WITH FARMING OPERATIONS (1971); WESTERN AGRICULTURAL ECONOMICS RESEARCH COUNCIL, VERTICAL INTEGRATION IN AGRICULTURE: PROCEEDINGS OF THE CONFERENCE, REP. No. 3 (1959).

177. *C.S. Smith Metropolitan Market Co. v. Lyons*, 16 Cal. 2d 389, 106 P.2d 414 (1940); *McKay v. Retail Auto. Salesmen's Union*, 16 Cal. 2d 311, 106 P.2d 373 (1940).

178. 16 Cal. 2d 405, 106 P.2d 411, 7 L.R.R.M. 700 (1940).

179. *Id.* at 409, 106 P.2d at 413, 7 L.R.R.M. at 701.

180. *Petri Cleaners, Inc. v. Automotive Employees Local 88*, 53 Cal. 2d 455, 469, 349 P.2d 76, 85, 2 Cal. Rptr. 470, 479 (1960).

181. CAL. LAB. CODE §§ 1115-20 (West 1971).

182. *UFWOC v. Superior Court*, 4 Cal. 3d 556, 483 P.2d 1215, 94 Cal. Rptr. 263 (1971). The court, however, was careful to distinguish picketing from other informational activity. *Id.* at 572 n.31, 483 P.2d at 1227 n.31, 94 Cal. Rptr. at 275 n.31.

183. *Englund v. Chavez*, 8 Cal. 3d 572, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).

NLRB has exclusive jurisdiction over activity arguably subject to sections 7 or 8 of the National Labor Relations Act.¹⁸⁴ "Agricultural employees," however, are expressly excluded from the Act's definition of employees.¹⁸⁵ Thus section 8(b)(4) is not applicable to a farm labor union composed exclusively of agricultural employees.¹⁸⁶ In recent years labor disputes in agriculture have become a major source of controversy arising under California labor law. Consumer boycotts have been a key tactic in these disputes, especially for the United Farmworkers [UFW] and accordingly have been a focal point of the controversy. In 1975 the California legislature enacted a comprehensive Agricultural Labor Relations Act,¹⁸⁷ patterned after the National Labor Relations Act, which now supersedes all other state law in regulating labor activities in California agriculture.¹⁸⁸ The ALRA contains a provision similar to section 8(b)(4) of the national Act.¹⁸⁹ The publicity proviso of section 1154(d), however, expressly grants significantly broader protection to consumer picketing than does the present national law.¹⁹⁰

The UFW initially argued that two concerns justified a less restrictive treatment of secondary activity in agricultural labor disputes than that found in the Taft-Hartley amendments. First, agricultural unions struggling to establish themselves need broader protection in order to compensate for their weakness vis-à-vis the large corporations that control agribusiness. Second, a high degree of vertical integration in agriculture between processors, sellers, and growers renders fictional any notion of the secondary's "innocent neutrality."¹⁹¹ The final provisions of the ALRA indicate that each contention found some acceptance in the legislature. The finding that the broader protection for consumer picketing rights included in section 1154(d) was a response to vertical integration and economic interdependence between growers, processors, and sellers supports this Comment's suggested approach to the application of *Tree Fruits*.

184. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

185. 29 U.S.C. § 152(3) (1970).

186. *DiGiorgio Fruit Corp. v. NLRB*, 191 F.2d 642, 28 A.L.R.2d 377 (D.C. Cir.), *cert. denied*, 342 U.S. 869 (1951).

187. CAL. LAB. CODE §§ 1140-67 (West Supp. 1976).

188. *Id.* § 1166.3(b).

189. *Id.* § 1154(d).

190. Section 1154(d) tracks the language of section 8(b)(4), 29 U.S.C. § 158(b)(4) (1970), quoted in note 1 *supra*, until the proviso. The portion of the proviso concerning the refusal of any person to cross a lawful picket line is included in the ALRA as a separate subsection, CAL. LAB. CODE § 1154(i) (West Supp. 1976). The only significant departure from section 8(b)(4) is contained in the publicity proviso of section 1154(d). Its text appears in note 197 *infra*.

191. See 1969 *Senate Hearings*, *supra* note 175, at 16, 22-23, 26 (statement of Cesar Chavez and testimony of D. Huerta).

The traditional economic weapons of the labor movement, strikes and primary picketing, are less effective in agriculture than in other industries. A strike in agriculture can effectively pressure an employer only if it occurs at peak season. Yet most farmworkers have low incomes¹⁹² and are heavily dependent economically on the harvest season. If a strike is called, strike breakers usually are available. Because many farmworkers are geographically and culturally isolated and must constantly migrate, according to the various harvesting seasons, to areas in which work can be found, a grower can nearly always hire new workers who have not yet been organized.¹⁹³ Thus the hardships and risks faced by farmworkers in attempting to wage an effective strike are great, and the rewards are quite uncertain. Because of the difficulties in conducting an effective strike, the UFW has relied heavily on the consumer boycott to apply pressure to growers. Although the union can now compel employer recognition through the election machinery of the ALRA, economic weapons are still needed to obtain favorable contracts. The ALRA's broad protection for consumer picketing reflects these economic realities.

Vertical integration in agriculture has diminished the power of farmworkers to affect their terms of employment at the local level. Agricultural production is increasingly concentrated in large farm operations, often with ties to large corporations.¹⁹⁴ The growth of agri-

192. In 1973 nearly 1.6 million persons did wage farmwork only. They were employed an average of 123 days and earned \$1,850, or an average of \$15.00 per day. Of the 1.1 million persons who did both farm and nonfarm wagework, they averaged 118 days of nonfarmwork and 55 days of farmwork. Their total earnings averaged \$3,097 and their farmwork earnings averaged \$14.40 per day. U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REP. NO. 265, THE HIRED FARM WORKING FORCE OF 1973 (1974).

193. The constant influx of illegal immigrants from Mexico aggravates this problem. See 1969 Senate Hearings, *supra* note 175, at 18-19 (testimony of Jerry Cohen, General Counsel for the United Farmworkers). The UFW has discovered instances where striking employees of one employer have gone to work as strikebreakers for another employer out of economic necessity or lack of knowledge of the second dispute. Koziara, *Collective Bargaining in Agriculture: The Policy Alternatives*, 24 LAB. L.J. 424 (1973). The physical size of most ranches insulates strikebreakers from contact with union pickets. The geographic isolation of the workplace from the residences of many employees (who frequently do not have telephones) and their inaccessibility through the English-speaking media make influencing strikebreakers difficult. Employer hostility and the time constraints of the harvest season further complicate the problem.

194. See generally U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REP. NO. 209, CORPORATIONS WITH FARMING OPERATIONS (1971); WESTERN AGRICULTURAL ECONOMICS RESEARCH COUNCIL, VERTICAL INTEGRATION IN AGRICULTURE: PROCEEDINGS OF THE CONFERENCE, REP. NO. 3 (1959).

Although small farms remain numerically significant in American agriculture, they contribute relatively little to total production and they employ few farmworkers. In

business has produced interlocking interests among landowners, food processors, food marketers, and other supporting industries. The result has been that the farmworker's liability to influence the terms and conditions of employment through direct pressures on the immediate employer has diminished, while the disinterestedness of food processors and merchandisers has become increasingly suspect.¹⁹⁵

The very provisions of the ALRA constitute the best argument that the legislature reassessed the national law of consumer picketing in light of the vertical integration of agriculture and the special role the consumer boycott has played in the struggle to organize the fields.¹⁹⁶ The publicity proviso of section 1154(d) expressly grants broad protection to consumer picketing,¹⁹⁷ while rejecting the integrated products

1969 there were over 1 million farms in the United States that had farm produce sales of less than \$2,500. Though these constituted 37.7 percent of all farms, they produced only 2.2 percent of farm sales. In contrast, farms with sales of \$100,000 or more represented only 3 percent of the numerical total, but they accounted for 34.4 percent of all agricultural product sales. 2 U.S. DEP'T OF COMMERCE, CENSUS OF AGRICULTURE, ch. 1, at v. (1969) [hereinafter cited as 1969 CENSUS OF AGRICULTURE]. Farms with sales of \$100,000 or more accounted for 56 percent of all recorded expenditures for contract labor; California was the leading state in amount spent. Farms with \$40,000 or more in sales accounted for 39.2 percent of all expenditures for machine hire and custom work. Again, California was among the leaders in amount spent. 1969 CENSUS OF AGRICULTURE, *supra* ch. 4, at 89.

195. The Presbyterian Ministry created a commission to compile a report on the farm labor situation. A spokesman testifying at the Assembly hearings summarized some of its findings:

Farms are getting larger and fewer than they have been in previous years. Food processors and food merchandisers are playing a larger role in determining the return received by the grower and the price paid by the consumer It is more accurate to speak of agri-business; in the context of this Commission, this term reflects the interlocking interests of landowners, food processors, food marketers, banks making agricultural loans, food transporters, the pesticide industry, the farm machine industry, the universities, and others engaged in agricultural research. . . . There is reason to believe that the future will see increasing absentee corporate operation of branches as part of economic empires, including oil or manufacturing or other enterprises. The increasing size, mechanization, agri-business market control, all put the squeeze on two groups, the small grower and the farm worker.

Assembly Hearings, supra note 174, at 115-16.

196. There are no generally available sources from which the legislative history of California statutes can be drawn. The many alternative farm bills submitted to the legislature do not help to crystallize the issues here because they were so far apart in what they contained. For example, A.B. 1, as introduced, contained no union unfair labor practice sections; A.B. 393, as introduced, contained no employer unfair labor practice sections. Probably, the bills initially introduced were intended as bargaining positions. Thus the analysis must rely primarily on the language of the statute, though some of the factual arguments that may have informed the legislative judgment will also be noted.

197. The publicity proviso of CAL. LAB. CODE § 1154(d) (West Supp. 1976) states:

Nothing contained in this subdivision (d) shall be construed to prohibit publicity, *including picketing* for the purpose of truthfully advising the public,

doctrine that has emerged from interpretations of the federal statute.¹⁹⁸ It also permits picketing that requests customers not to patronize a secondary employer, provided that a jurisdictional dispute is not involved. Other provisions of the ALRA as well appear to be designed as a response to the effects of vertical integration on the collective bargaining relationship.

By rejecting the language "other than picketing" of the NLRA's publicity proviso for "including picketing," the legislature squarely affirmed the right to engage in consumer picketing. Arguably no such change was needed. *Tree Fruits* held that picketing closely confined to the primary dispute falls outside the proscription of that Act; and section 1148 of the ALRA requires the Agricultural Labor Relations Board [ALRB] to follow applicable NLRA precedent. Nonetheless, the change serves three purposes. First, it assures that consumer picketing directed at agricultural products or products containing ingredients produced by agricultural employees will be held lawful by the California courts regardless of any changes in the federal labor law. Second, the express language of the statute creates protection for consumer picketing. Thus it circumvents the potential conflicts between statutory language, constitutional concerns, and the legislative history that led the *Tree Fruits* Court to its particular construction of section 8(b)(4). Third, it invites the ALRB and the California courts

including consumers, that a product or products *or ingredients thereof* are produced by an agricultural 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, *and as long as such publicity does not have the effect of requesting the public to cease patronizing such other employer.*

However, publicity which includes picketing and has the effect of requesting the public to cease patronizing such other employer, shall be permitted only if the labor organization is currently certified as the representative of the primary employer's employees.

Further, publicity other than picketing, but including peaceful distribution of literature which has the effect of requesting the public to cease patronizing such other employer, shall be permitted only if the labor organization has not lost an election for the primary employer's employees within the preceding 12-month period, and no other labor organization is currently certified as the representative of the primary employer's employees.

Nothing contained in this subdivision (d) shall be construed to prohibit publicity, including picketing, which may not be prohibited under the United States Constitution or the California Constitution.

A comparison with the publicity proviso of section 8(b)(4), 29 U.S.C. § 158(b)(4) (Emphasis supplied.) A comparison with the publicity proviso of section 8(b)(4), 29 U.S.C. § 158(b)(4) (1970), quoted in note 1 *supra*, may prove helpful.

198. *E.g.*, *American Bread Co. v. NLRB*, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969); *Laundry Workers Local 259 (Morrison's of San Diego)*, 164 N.L.R.B. 426, 65 L.R.R.M. 1091 (1967).

to reexamine and rearticulate the rationale underlying the right to engage in consumer picketing in light of conditions peculiar to labor relations in agriculture.

By protecting picketing directed at "ingredients" as well as "products," the legislature rejected national precedent prohibiting consumer picketing directed at a secondary's product that incorporates the primary's product. Thus pickets may request consumers to boycott the product of a food processor (or a winery) that utilizes fruit or vegetables grown by an agricultural employer embroiled in a labor dispute.

The statute therefore includes among primary products also those products that contain ingredients produced by a primary employer. Recognizing the "traditions and economic realities" unique to union pressure in agriculture,¹⁹⁹ the ALRA abandoned the integrated products doctrine. Wine producers, for example, may grow their own grapes or purchase them from other growers. They may even purchase and blend bulk wines, depending on the preferences of the individual winemakers and the accidents of the annual harvest and sales. If the integrated products doctrine were applicable to agriculture, consumer picketing of wine for the purpose of influencing a dispute in the fields would be permissible only if the grower manufactured his own wine and marketed it under his own label. Thus, had that doctrine not been rejected, many farm workers would have lost their most effective economic weapons, and growers resistant to labor organizing would have been able to circumvent a lawful boycott through contractual devices.²⁰⁰

The second and third paragraphs of the publicity proviso²⁰¹ permit, under certain circumstances, appeals to consumers to cease patronizing the business of the secondary. If the union is certified as the representative of the primary employer's employees,²⁰² it may request the public by various means, including picketing, to cease patronizing the seller of the primary's product. If there is no certified representative and the labor organization has not lost an election at the primary employer within the preceding 12-month period, the organiza-

199. Cf. *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952, 956, 68 L.R.R.M. 3004, 3007 (D.C. Cir. 1968).

200. The remaining changes in the first paragraph of section 1154(d)—the words deleted after "consumer" and "members of a labor organization"—have been of no special importance in litigation under the national law. The probable reason for their omission is to avoid any claims that the legislature has infringed on the exclusive jurisdiction of the NLRB.

201. See note 197 *supra*.

202. The certification process is described in Chapter 5 of the Act, CAL. LAB. CODE

tion may request the public to cease patronizing the secondary employer by means other than picketing.

The statute distinguishes between secondary consumer picketing as a means of obtaining recognition and as a means of applying pressure on behalf of economic demands. The sole method of achieving recognition as the representative of employees under the ALRA is through the election machinery of the ALRB.²⁰³ Consequently, recognition picketing is banned.²⁰⁴ Two of the major dangers of secondary activity that concerned the framers of Taft-Hartley were jurisdictional strikes, in which an employer is caught in the middle of a struggle between two competing unions,²⁰⁵ and the use of secondary pressures to impose a union on unwilling employees from the top down.²⁰⁶ Similar concerns have been expressed about the use of secondary boycotts in agriculture.²⁰⁷ These dangers are not present if a union has been certified, and thus the need for restrictions on secondary consumer picketing is lessened. When the union's representative status is still an open question, the statute adopts a middle ground between the rights conferred upon a certified union and the rights afforded even a union that has been defeated in a representation election.

That the boycott provisions adopted by the California legislature are less restrictive than national law in itself indicates some acceptance of the argument that the vertical integration of the agricultural industry requires a reevaluation of the secondary employer's neutrality. Other provisions of the ALRA as well show an awareness of the problem of

§§ 1156-59 (West Supp. 1976). For a discussion of these provisions, see Lewin, "Representatives of Their Own Choosing:" *Practical Considerations in the Selection of Bargaining Representatives for Seasonal Farmworkers*, 64 CALIF. L. REV. 732 (1976), reprinted in 1 INDUS. REL. L.J. 55 (1976).

203. CAL. LAB. CODE § 1156 (West Supp. 1976) states:

Representatives designated or selected by a secret ballot for the purpose of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives

Section 1159 provides that only a labor organization certified pursuant to sections 1156-59, can make legally valid collective bargaining agreements.

204. *Id.* § 1154(h).

205. See notes 15-16 *supra*.

206. The drafters of Taft-Hartley were concerned with the use of secondary boycotts as a top-down organizing technique. H.R. REP. NO. 245, 80th Cong., 1st Sess. 4 (1947), reprinted in LMRA LEG. HIST., *supra* note 11, at 294; 93 CONG. REC. 5147 (1947) (remarks of Sen. Ball), reprinted in LMRA LEG. HIST., *supra* note 11, at 1497. The frequently cited examples of this abuse all involved the Teamsters. See, e.g., 93 CONG. REC. 3533-34 (1947) (remarks of Rep. Hartley), reprinted in LMRA LEG. HIST., *supra* note 11, at 613; 93 CONG. REC. 3559-60 (1947) (remarks of Rep. Buck), reprinted in LMRA LEG. HIST., *supra* note 11, at 658-59. For a discussion of Teamster top-down organizing techniques in use before the passage of Taft-Hartley see R. JAMES & E. JAMES, *HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER* (1965).

207. N.Y. Times, Dec. 13, 1968, at 22, col. 4.

vertical integration. Section 1154.5,²⁰⁸ patterned after section 8(e)²⁰⁹ of the national Act, bans "hot cargo" agreements, contractual provisions in which an employer agrees to refuse to use or handle the goods of another employer with whom there is a labor dispute. The section, however, contains two exceptions. First, a labor organization may enter into such an agreement with an employer relating to a supplier of ingredients for a product the employer produces or distributes, where the labor organization is certified as the representative of the supplier's employees but has no contract with the supplier.²¹⁰ This exception ac-

208. CAL. LAB. CODE § 1154.5 (West Supp. 1976) provides:

It shall be an unfair labor practice for any labor organization which represents the employees of the employer and such employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains, or agrees to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be, to such an extent, unenforceable and void. Nothing in this section shall apply to such an agreement between a labor organization and an employer relating to a supplier of an ingredient or ingredients which are integrated into a product produced or distributed by such employer where the labor organization is certified as the representative of the employees of such supplier, but no collective bargaining agreement between such supplier and such labor organization is in effect. Further, nothing in this section shall apply to an agreement between a labor organization and an agricultural employer relating to the contracting or subcontracting of work to be done at the site of the farm and related operations. Nothing in this part shall prohibit the enforcement of any agreement which is within the foregoing exceptions.

Nor shall anything in this section be construed to apply or be applicable to any organization in its representation of workers who are not agricultural employees. Any such labor organization shall continue to be governed in its intrastate activities for nonagricultural workers by Section 923 and applicable judicial precedents.

209. 29 U.S.C. § 158(e) (1970) 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 handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

210. This provision presents possible preemption problems if an agricultural labor organization also has nonagricultural employees as members. For example, an agricul-

cords with the policy operating in the boycott provisions of permitting a certified representative greater leeway in its economic tactics. Like the insertion of the words "or ingredients thereof" in the publicity provisions of section 1154(d), the inclusion of the supplier exception reflects a concern that the union be free to apply limited economic pressures to a legally separate but nonneutral secondary employer who does not qualify as an ally, as that term is ordinarily employed in labor law. Second, the ban on hot cargo agreements does not apply to any agreement relating to the contracting-out of work. This exception is patterned after the garments-industry exemption contained in section 8(e) of the national Act,²¹¹ which also sought to prevent the use of the law's restrictions on secondary activities to defeat labor organizing in an industry characterized by vertical integration of relatively small employers.²¹² The contracting-out exception of section 1154(d) relates closely to section 1140.4(c),²¹³ which defines "agricultural employer" and which provides that an employer engaging a labor contractor, and not the contractor, shall be deemed the employer for purposes of the ALRA. Again, these provisions reflect a concern that employers, through the use of contractual arrangements with separate legal entities, may attempt to insulate themselves from the operation of the statute through use of the provisions regarding secondary activities.

tural local of the Teamsters might enter an agreement with an employer specifying that all ingredients and supplies be delivered by union truck drivers. If the supplier of an ingredient is not an agricultural employer, the question of the validity of this agreement should fall within the exclusive jurisdiction of the NLRB.

211. The garment industry exception of section 8(e), 29 U.S.C. § 158(e) (1970), reads:

That for the purposes of this subsection (e) and subsection (6) of this section the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

212. See *Employing Lithographers v. NLRB*, 301 F.2d 20, 49 L.R.R.M. 2869 (5th Cir. 1962).

213. CAL. LAB. CODE § 1140.4(c) (West Supp. 1976) provides:

The term "agricultural employer" shall be legally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part.

They should not be able to do so when the realities of economic dependence make it just that the union apply pressures to obtain its demands.

Thus the provisions of the ALRA, as well as the legislative hearings that preceded its enactment, show awareness of the problem of vertical integration agriculture and its impact on the economic realities of labor organizing and collective bargaining. The consumer picketing provisions of the ALRA, less restrictive than present national labor law, support the suggestion of this Comment that the Board and the courts should examine the overall relationship between the primary and secondary employer in determining when consumer picketing will be permitted.

CONCLUSION

The current law governing consumer picketing has failed to articulate clearly the rationale underlying the determination whether a particular instance of consumer picketing is prohibited. The rule of the *Tree Fruits* decision—that picketing is protected so long as it is “closely confined” to the primary dispute—is an empty formula. Notwithstanding the Court’s own plea that the “isolated evil” to be overcome by the statute be considered, the Court failed to provide an applicable principle capable of deciding cases that differ from the factual pattern of *Tree Fruits*. This Comment has suggested that the Board and the courts reexamine the premise that the secondary employer who resells the product of a struck employer is a wholly unconcerned neutral party with respect to the primary labor dispute. At present, when courts resolve hard cases, their explanation often appears to be little more than the manipulation of doctrinal labels to achieve the desired outcome. Substituting a particularized factual analysis that balances the foreseeable economic impact of consumer picketing on the secondary employer against the extent of the connection between the secondary and the primary will not only reflect economic equities, but should also result in a more predictable and logically coherent pattern of decision.

California’s new Agricultural Labor Relations Act contains consumer picketing provisions that, though patterned after those in the National Labor Relations Act, extend significantly greater protection to consumer boycott picketing than has their federal counterpart. Analysis of the California statute and the legislative hearings that preceded its passage suggests that this broader protection represents a legislative judgment that vertical integration, creating a close relationship between primary and secondary employers, is highly prevalent in agriculture.

In light of such findings the broad protections in the ALRA should encourage California courts to apply the statute by balancing competing interests in the manner suggested by this Comment. And with respect to the federal labor law, the consumer picketing provisions of the ALRA provide external support for the general proposition that the Board and courts should focus with particularity on the overall relationship between the primary and secondary employer in determining when consumer picketing should be permitted.

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