Federal Labor Laws

Paul K. Rainsberger, Director
University of Missouri – Labor Education Program
Revised, March 2004

XXIX. Consumer Appeals and Boycotts

A. Secondary Pressure Directed at Consumers

1. If an employer markets products under its own name to the general public, it may be subject to pressure directed at consumers of the final product. Appeals to consumers to boycott the final product of a primary employer are subject to unique NLRB rules.

    a. Consumer boycotts do not fit under the normal classifications of secondary pressure because they attempt to affect the behavior of union members and supporters as consumers rather than as workers. Therefore, the normal rules of secondary strikes and pickets cannot apply.

    b. However, secondary boycott rules under Taft-Hartley are designed to accomplish the same goals as rules applied to other forms of secondary pressure. The regulatory goal is to insulate "neutral" employers from the effects of a boycott.

    c. Issues of freedom of speech limit the ability of the Board to regulate certain appeals to consumers. Although the Constitutional status of picketing and handbilling is uncertain, there is broad recognition that handbilling is a "purer" form of speech than picketing. Therefore, less stringent rules apply to handbilling campaigns than to consumer picketing.

2. The starting point for regulation of consumer appeals under Taft-Hartley is the ability of a boycott to apply secondary pressure on the primary employer.

    a. The goal of a consumer boycott is the same as the goal of a secondary strike directed at the customer of the primary employer. If the demand for the goods of the primary employer is curtailed, leverage is applied toward forcing a settlement of the underlying dispute.

    b. In general, consumer boycotts tend to be much less efficient than other forms of secondary pressure. Many employers are immune from effective boycott pressure because they are not readily identifiable by the product they manufacture or because they make products under so many different names that an effective consumer boycott demands extensive consumer discipline.

3. An important restriction on boycott activities is the risk that a consumer boycott could trigger a secondary strike by employees of the retailer or an implied hot cargo agreement between the retailer and the employees of the retailer.

4. The critical section of Taft-Hartley concerning the legality of consumer appeals is § 8(b)(4) which generally outlaws secondary pressure applied in a labor dispute. The two following limitations included in that section have forced an important distinction between picketing to enforce a boycott and other forms of publicity.

   a. There is a publicity proviso in § 8(b)(4) which states that section does not prohibit publicity, *other than picketing*, used for the purpose of informing the public that the secondary retailer is distributing the product of a primary employer with which the union has a dispute.

   b. Section 8(b)(4) applies only to secondary activity. Therefore, the picketing exception to the publicity proviso only applies to efforts of a union to use a secondary boycott to accomplish its goals.

B. Direct Appeals to Consumers and Retailers

1. It is legal for a union to make a direct appeal to a retailer to stop selling the goods of a primary employer with whom the union has a dispute.[1] Such an appeal is a request to managers to exercise their managerial functions with discretion, not a request that they strike in support of the primary union.

2. Direct appeals to union members as consumers are specifically included in the publicity proviso of § 8(b)(4). Media campaigns, "do not patronize" lists and other efforts to inform consumers that certain products are being boycotted are legal.[2] It is also legal to identify secondary employers that distribute the boycotted goods.

3. The publicity proviso requires that consumer information campaigns be truthful. If the union indicates a business relationship between the primary employer and another employer which distributes the disputed product, it should take affirmative steps to assure the accuracy of the information.[3]

4 The reading of section 8(b)(4)(B)(ii) so as not to reach secondary consumer handbilling (or newspaper and other media appeals), has

---

[1] NLRB v. Servette, Inc., 377 U.S. 46, 55 LRRM 2957 (1964).

[2] *See, e.g.*, Honolulu Typographical Union, No. 37 (Hawaii Press Newspapers, Inc.), 401 F2d 952, 68 LRRM 3004 (D.C. Cir. 1968).

[3] *See, e.g.*, Meat Cutters, Local 248 (Milwaukee Independent Meat Packers Assoication), 230 NLRB 189, 96 LRRM 1221 (1977).

effectively been the near disappearance of cases in which the union has raised the publicity proviso as a defense. It is now sufficient for the union to show that its consumer appeal took some form other than picketing, so that it therefore lies outside the statutory ban upon threats, coercion and restraints directed against secondary companies.[4]

5. The terms "production" and "distribution" of goods under the publicity proviso have been broadly defined. However, there must be a business connection between the primary employer and the secondary "distributor" identified.

   a. The "producer" of goods for purposes of the publicity proviso is the primary employer. The goods produced may be a service.[5] In the *Servette* case cited, the primary "producer" was a wholesale distributor of goods, while the "distributor" was a retail food chain.

   b. If the connection between the two employers becomes too remote, the union may lose its right to inform the consumer of the connection. The fact that two stores are in the same shopping mall is not sufficient to have one considered a "distributor" of goods "produced" by the other.[6]

C. Picketing to Enforce a Product Boycott

1. Consumer picketing does not enjoy the same protection as other forms of consumer appeals. Because the proviso of § 8(b)(4) applies only to publicity *other than picketing*, picketing must be confined to primary pressure.

2. The limits of legal primary product picketing at a secondary site were defined in the important 1964 *Tree Fruits* case.[7]

   a. In *Tree Fruits*, the union was on strike against a group of employers in the business of packaging Washington state apples.

   b. The union called for a consumer boycott of the struck apples and established pickets at forty-six grocery stores that sold the struck apples in the Seattle area.

---

[4] Kohn v. Southwest Regional Council of Carpenters, 289 F.Supp.2d 1155 (C.D. Cal. 2003).

[5] NLRB v. Servette, Inc., *supra* at note 1.

[6] DeBartolo v. NLRB, 463 U.S. 147, 113 LRRM 2953 (1983). For the continuing story of this dispute, see Section E concerning the possible Constitutional issues raised by publicity campaigns.

[7] NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760 [Tree Fruits], 377 U.S. 58, 55 LRRM 2961 (1964).

c. The pickets urged consumers not to buy the struck apples. In addition, the union informed the store managers that the boycott was limited to the struck apples and instructed the pickets not to interfere with any customers of the store. The pickets kept away from delivery and employee entrances and made no requests that individuals refuse to patronize the stores.

3. The Supreme Court ruled that this was legal primary picketing even though it was conducted on the site of a secondary employer. Because the pickets clearly confined the dispute to the primary product and made no effort to induce a secondary strike or total boycott of the retailer, the activity was legal.

4. Legal primary product picketing loses its protection if the effect of the picketing is a near total boycott of the secondary employer.[8]

5. The right to engage in primary product picketing at the secondary site is also inapplicable in cases involving "merged" products. For example, a picket could not be used to urge consumer of a grocery store to refuse to buy grocery sacks from a grocery store. The sack is a component of the services sold by the retailer.[9]

D. Handbilling to Enforce a Total Boycott

1. The restrictions on product picketing do not apply to handbilling or other publicity campaigns designed to encourage secondary boycotts.

2. Generally, a handbilling campaign may be used to urge a total boycott of a secondary employer. As a result, the consumer may be urged to boycott a secondary employer because of its distribution of the primary goods.

3. In some cases, it is unlawful for a legal handbilling campaign to be tied to a legal picketing campaign. For example, if a union used picket signs to urge a product boycott, but at the same time distributed handbills urging a total boycott, the activity would be regarded as picketing to enforce a total boycott.[10]

4. If a handbilling campaign designed to induce a total boycott of a secondary employer contains erroneous or extraneous information about the secondary employer, it may lose its protection.[11]

---

[8] NLRB v. Retail Store Employees Local 1001 [Safeco], 447 U.S. 607, 104 LRRM 2567 (1980).

[9] Kroger Co. v. NLRB, 647 F.2d 634, 105 LRRM 2897 (6th Cir. 1980).

[10] E.g., Service Employees, Local 254 (University Cleaning Co.), 64 LRRM 2858.

[11] Hospital & Service Employees Union, SEIU Local 399 [Delta Airlines], 263 NLRB 996, 111 LRRM 1159 (1982).

a. In the cited case, the union had a primary dispute with company which provided maintenance services for Delta Airlines. In urging a boycott of Delta, the union used handbills which contained information about the safety record of Delta.

b. The Board ruled that the extraneous information about Delta took the handbilling campaign out of the publicity proviso. Even though the information was accurate, it had nothing to do with the primary dispute.

c. The 9th Circuit Court of Appeals refused to enforce the order of the Board. Because of the possibility of a Constitutional issue of freedom of speech, the court ruled that a different standard had to be applied to determine whether handbilling is coercive as compared to the standards applied in picketing cases.[12]

E. Constitutional Issues of Free Speech in Handbilling Campaigns

1. The Constitutional status of handbilling has been raised in a number of recent cases. Because the Board and several circuit courts have taken different approaches to resolving the question, it is likely that the Supreme Court will soon determine whether noncoercive handbilling enjoys Constitutional protection.

   a. If noncoercive handbilling is regarded as Constitutionally protected free speech, the Board would be prevented, as a governmental agency, from enforcing the law in a way which would infringe upon the right of handbillers exercise their right of free speech. The Board could no longer look at the content of the handbill to determine the legality of the boycott urged.

   b. Picketing has been regarded as something other than pure speech for Constitutional purposes. Although the Supreme Court has overturned specific state laws which attempt to restrict peaceful picketing[13] and which attempt to limit picketing to primary labor disputes,[14] it has not afforded Constitutional protection to picketing *per se*.

   c. The predominant pattern of Court decisions concerning picketing has been to accept an "ends/means" test, similar to that of the 19th century limitations on the criminal conspiracy doctrine. If picketing represents speech plus coercive activity (patrolling, intimidation, etc.), it may be limited.

---

[12] Hospital & Service Employees Union, SEIU Local 399 v. NLRB, 743 F.2d 1417, 117 LRRM 2717 (9th Cir. 1984).

[13] Thornhill v. Alabama, 310 U.S. 88, 6 LRRM 697 (1940).

[14] AFL v. Swing, 312 U.S. 321, 7 LRRM 307 (1941).

Moreover, picketing for goals which the Court does not sanction may also be regulated.[15]

2. The NLRB has assumed that the limitations on handbilling and other forms of publicity regulated under § 8(b)(4) are Constitutional. In the *Delta Airlines* case cited above, the Board specifically avoided answering the issue of whether its regulation of secondary handbilling campaigns wass Constitutional.[16] However, the issue has arisen in a series of recent cases. The Supreme Court has limited the ability of the Board to restrict secondary handbilling, but has not ruled the handbilling is Constitutionally protected free speech.

3. The case in which the Constitutional issue has been most directly addressed is the *DeBartolo* case, discussed in Section B(4), above.

   a. In *DeBartolo*, the owner of a single store in a shopping mall used nonunion labor for some renovation work. To protest this work, the Building Trades Council engaged in a peaceful handbilling campaign designed to encourage consumers to boycott the entire mall.

   b. The Board and courts ruled that a boycott of all stores in a shopping mall was unlawful if the union had a dispute with only one. Neutral stores could not be considered distributors of the goods of the primary employer simply because they shared space in a mall.

   c. After losing the case under the principles of § 8(b)(4), the unions challenged the order on the grounds that the peaceful, non-coercive handbilling was Constitutionally protected free speech. The Eleventh Circuit Court of Appeals agreed with this argument, ruling that the Board had no power to restrict this form of free speech.[17]

4. The Supreme Court reviewed the *DeBartolo* case and issued an important ruling which still falls short of resolving the Constitutional issue. The Court held that § 8(b)(4) does not prevent peaceful handbilling to encourage a secondary boycott even if the target of the boycott is not a distributor of the goods of a primary employer.

   a. The effect of the Supreme Court decision is to remove peaceful, non-coercive handbilling from the Board's

---

[15] International Brotherhood of Teamsters Local 695, AFL v. Vogt, Inc., 354 U.S. 284, 40 LRRM 220 (1957). This case includes a very thorough discussion of the history of Supreme Court decisions on picketing, which clearly demonstrates the Court's distinction between the protection of picketing in general but the limitation on picketing because of its objectives or tactics.

[16] Hospital & Service Employees Union, SEIU Local 399 [Delta Airlines], *supra* at note 11.

[17] Florida Gulf Coast Building Trades Council v. NLRB, 796 F.2d 1328, 123 LRRM 2001 (1986).

regulatory powers under § 8(b)(4) because the activity is not an attempt to threaten, coerce or restrain any person.

b. The Court specifically avoided answering the Constitutional issue because its interpretation of § 8(b)(4) was determinative of the case.[18]

5. All of these issues are compounded in shopping malls which are private property but open to the public. In a series of cases, the Supreme Court has addressed the right of access to public areas of private property.

a. The Court has ruled that the Constitution does not give workers the right to enter private property to engage in picketing or handbilling activity, even though the property is open to the public. The private owner must be engaged in some function which is commonly associated with the public sector before the property becomes "quasi-public."[19]

b. The Supreme Court sent the *Hudgens* case back to the Board to determine whether Taft-Hartley gave to workers a right of access to the private property. The Board ruled that workers have a right to publicize their primary dispute which may outweigh the property rights of the owner, if the only way workers can publicize the dispute is to go on the private property.[20]

F. Tactical Problems in Conducting Effective Boycotts

1. In conducting boycott campaigns, the most serious problem is a practical one, not a legal issue. Even if consumers are willing to support a boycott, an effective campaign requires tremendous discipline.

a. Few employers are dependent upon a single product or type of product for their profits. A limited boycott may have marginal impact on the aggregate demand for the goods or services of the employer.

b. Employers which market their product under numerous names are difficult to boycott because the employer is not readily identifiable by the product name. Procter & Gamble, for example, markets a wide range of products under a number of different names which are more recognizable than the name of the parent company. Efforts of the Steelworkers

---

[18] DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568**,** 128 LRRM 2001 (1988).

[19] Hudgens v. NLRB, 424 U.S. 507, 91 LRRM 2489 (1976).

[20] Scott Hudgens, 230 NLRB 414, 95 LRRM 1351 (1977).

to boycott Procter & Gamble in the 1980's led to little success.

c. In some cases, the production of a consumer good is so concentrated that an effective boycott requires extensive sacrifice by the consumer. If the boycotted employer makes the vast majority of products sold, it is very difficult for the consumer to seek out alternative purchases.

2. To consider the logistical problems of boycott campaigns, consider **Case XXIX-A: Consumer Boycotts** which illustrates some of these problems.

Case XXIX-A: Consumer Boycotts

Three important products of Megalomania Industries are its wickles, whirlies, and whippets. These products are distributed to the following companies:

GAMMA General Stores buys Megalomania whippets which it sells to the general public through its two retail department stores. One store is in downtown Showmeville and the other is located in the DELTA Mall.

ALPHA Assemblies buys whickles from Megalomania which it uses as a key component of ALPHA wompots. Among many other places, consumers may buy ALPHA wompots at the GAMMA General Stores in Showmeville.

OMEGA Retailers is a franchise shop for distribution of Megalomania whirlies. While OMEGA sells some related merchandise, 85% of its retail business consists of sales of Megalomania whirlies.

During a labor dispute with Megalomania Industries, the Extrusion Workers' Creative Works Committee wants to develop the most effective consumer boycott of Megalomania products it can without leaving Showmeville. To what extent may the Extrusion Workers use either pickets or handbills to appeal to customers at the two GAMMA Stores and the local OMEGA franchise?

a. The union may make a direct appeal to the manager of each Gamma store to stop selling Whippets and those Wompots which include struck Whickles.

b. The union may also picket at the Gamma stores, if the pickets make it clear that their dispute is with Megalomania and do not disrupt deliveries or employee entrances. The pickets must ask only that consumers not buy struck Whippets.

c. The union cannot use a product picket to urge Gamma customers to boycott Alpha Wompots. The struck product loses its identity under the merged products doctrine once it is assembled into Alpha's product.

d. The union cannot establish a product boycott at Omega, because the effect of boycotting the Megalomania Whirlies would be a near total boycott of Omega.

e. Handbills could be used to urge a total boycott of either Omega or Gamma under the publicity proviso of § 8(b)(4). Both retailers are distributors of the goods of Megalomania.

f. At the mall, the union must be careful in the wording of the handbill and the methods of its distribution. A campaign using handbills which urged a total boycott of Gamma would be legal. Moreover, a total boycott of the mall because Gamma sells boycotted products will probably be legal, under the Supreme Court's *DeBartolo* ruling, as long as it remains peaceful and noncoercive.

g. In each case, the pickets or handbillers may be required to remain on public property. The two types of campaigns must be kept separate. An effort at Gamma to use a product picket and a total boycott handbill will be regarded as a picket to enforce a total boycott.