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Safeco and Secondary Product Picketing

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NOTES

Safeco and Secondary Product Picketing

In *NLRB v. Retail Store Employees Local 1001 (Safeco)*,[1] the Supreme Court held that primary product picketing at a neutral secondary retailer's place of business that can be reasonably expected to threaten the neutral party with ruin or substantial loss is prohibited by section 8(b)(4)(i,ii)(B) of the National Labor Relations Act (NLRA).[2]

Safeco Title Insurance Company (Safeco) is a California corporation engaged in the operation of a title insurance company in Seattle, Washington.[3] Safeco employees were represented in the collective bargaining

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1. 100 S. Ct. 2372 (1980).

2. National Labor Relations (Wagner) Act § 8(b), 29 U.S.C. § 158(b) (1976) provides in relevant part:

> 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 any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . . .
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> (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 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

3. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 226 N.L.R.B. 754, 93 L.R.R.M. 1338 (1976), *enforced*, 99 L.R.R.M. 3330 (D.C. Cir. 1978), *rev'd*, 627 F.2d 1133

process by the Retail Store Employees Union Local 1001, Retail Clerks International Association, AFL-CIO.[4] Negotiations between Safeco and the union reached an impasse in November of 1974, and on November 18, 1974 the union commenced a strike against Safeco's Seattle offices.[5] A few months later, the strikers began picketing five independently operated Washington title insurance companies that issued policies underwritten exclusively by Safeco.[6] The five independent title companies derived ninety to ninety-five percent of their total income from the issuance of the Safeco title insurance policies.[7] Safeco owned varying stock interests in each of the five Washington companies[8] and also had one of its own officers serving as an officer and member of the board of directors of each land title company.[9] The Land Title Company of Pierce County and Safeco filed charges with the National Labor Relations Board (Board) contending that the union's picketing of the title companies violated section 8(b)(4)(ii)(B) of the Act.[10]

The Board determined that the title companies were neutral and separate employers with respect to Safeco's dispute with the union.[11] The

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(D.C. Cir. 1979), *rev'd*, 100 S. Ct. 2372 (1980).

4. The union was certified as the collective bargaining representative of Safeco employees in July of 1974. 226 N.L.R.B. at 754, 93 L.R.R.M. at 1338.

5. *Id.* at 755, 93 L.R.R.M. at 1338.

6. *Id.*, 93 L.R.R.M. at 1338-39. Striking employees picketed at each of the five companies on various dates between February 19, 1975 and April 15, 1975. The pickets requested the public not to buy Safeco title insurance. The employees also distributed handbills that requested consumers to cancel their existing policies.

7. *Id.*, 93 L.R.R.M. at 1339. Title searches and escrow services provided the remainder of the revenue.

8. The percentage of stock owned by Safeco in each of the various title companies varied from 12% to 53%. *Id.*

9. Two officers of Safeco serve on the board of directors of Land Title Co. of Clark County, one of whom is also secretary of the latter company. *Id.* at 755 n.4, 93 L.R.R.M. at 1339 n.4.

10. *Id.* at 754, 93 L.R.R.M. at 1338. The charges also alleged that the union had violated 29 U.S.C. § 158(b)(4)(i) (1976). The text of this subsection appears at note 2 *supra*. The Board declined to rule on the § 8(b)(4)(i) allegation because neither the complaint nor the briefs contained any facts or contentions to support the allegations. 226 N.L.R.B. at 757 n.16, 93 L.R.R.M. at 1341 n.16.

11. 226 N.L.R.B. at 756, 93 L.R.R.M. at 1340. Employers who are not neutral are allies of the primary employer. Unions are permitted to picket allies of the primary employers without violating the National Labor Relations Act. The factors or circumstances that the Board considers in determining whether two or more employers are allies are: (1) the degree of common ownership; (2) the common control of day-to-day operations, including labor relations; (3) the extent of integration of business operations; and (4) the dependence of one employer on the other for a substantial portion of its business. NLRB v. Local 810, Steel & Hardware Fabricators (Sid Harvey, Inc.), 460 F.2d 1, 5 (2d Cir.), *cert. denied*, 409 U.S. 1041 (1972); Graphic Arts Local 262 (London Press, Inc.), 208 N.L.R.B. 37, 39, 85 L.R.R.M. 1196, 1196-97 (1973). Employers have been held to be allies by performing struck work, NLRB v.

Board based its finding of neutrality primarily on the lack of common control.[12] There had been no interchange of employees between Safeco and the five title companies.[13] Despite the common officers and board members, Safeco had no control over the labor relations policies of the title companies, except for the Land Title Company of Clark County.[14] The Board held that, because of the potential economic impact that successful picketing would have had on the title insurance companies, defendant's activity violated the Act.[15] Since Safeco products constituted between ninety and ninety-five percent of the secondary employer's business, the boycott of the primary product would result in a boycott of the secondary employer entirely.[16] The potential and predictable economic impact that a successful picket would have had upon the neutral title companies gave the union's efforts a prohibited objective: that of forcing the secondary employer to cease doing business with the primary employer.[17]

The Board issued a cease and desist order,[18] which the union appealed. A three-judge panel upheld the Board's decision, with Judge Robb dissenting. The panel reasoned that since the only other services that the title companies provided were ancillary to the Safeco policies, a boycott of the policies was essentially a boycott of the secondary employer.[19] The

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Business Mach. Local 459 (Royal Typewriter), 228 F.2d 553, 557-58 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956), or when the primary and secondary employer are really a single employer, *Sid Harvey*, 460 F.2d at 6.

12. 226 N.L.R.B. at 756, 93 L.R.R.M. at 1340. Even though there was evidence of economic dependence, this factor alone is not a sufficient basis upon which to deprive the secondary employer of his neutral status. Local 14055, United Steelworkers (Dow Chem. Co.), 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), *enforcement denied*, 524 F.2d 853 (D.C. Cir. 1975), *vacated*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302, 96 L.R.R.M. 1090 (1977). *See also* United Tel. Workers v. NLRB, 571 F.2d 665, 667 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978); NLRB v. Local 3, IBEW, 542 F.2d 860, 865-66 (2d Cir. 1976) and Carpet Layers, Local 419 v. NLRB, 467 F.2d 392, 400-01 (D.C. Cir. 1972).

13. 226 N.L.R.B. at 756, 93 L.R.R.M. at 1340.

14. *Id.*

15. *Id.* at 757, 93 L.R.R.M. at 1341.

16. *Id.* In NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits), 377 U.S. 58 (1964), the Supreme Court held that consumer picketing that persuades consumers to stop all trade with a secondary employer is prohibited by § 8(b)(4)(i,ii)(B) of the NLRA. Consumer picketing that persuades consumers to refrain from purchasing only the struck product does not violate the Act. In Local 14055, United Steelworkers (Dow Chem. Co.), 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), *enforcement denied*, 524 F.2d 853 (D.C. Cir. 1975), *vacated*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302, 96 L.R.R.M. 1090 (1977), the Board held that the *Tree Fruits* doctrine is not applicable when the picketing is reasonably calculated to induce customers not to patronize the neutral party at all.

17. 226 N.L.R.B. at 757, 93 L.R.R.M. at 1341.

18. *Id.* at 757-58.

19. 99 L.R.R.M. at 3333-34.

panel relied upon the integrated products cases to support its reasoning.[20] The court of appeals, sitting en banc, upheld the finding of neutrality by the Board and the three-judge panel but reversed the finding that the picketing was illegal.[21] According to the en banc court, the test is whether the secondary picketing is closely confined to the primary dispute.[22] So long as picketing at the secondary site is restricted to the primary product, the same pressures would result upon the secondary employer that a successful picket of the primary employer would have applied.[23] The en banc court rejected the potential and predictable economic consequences test for determining the presence of coercion espoused by the Board and the en banc dissents.[24] The en banc majority applied a strict test; picketing of the primary *product* at the secondary site would be permitted, while picketing of the secondary *employer* would be forbidden.[25] In June of 1980, the Supreme Court reversed the court of appeals and remanded the case with directions to enforce the Board's order.[26]

The problem that the lower courts had in deciding *Safeco* stemmed from their differing interpretations and applications of the Supreme Court's decision in *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*.[27] In *Tree Fruits*, the local union was picketing at the neutral Safeway stores, asking consumers not to buy apples supplied by Washing-

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20. *Id.* The integrated products cases include Local 399, United Bhd. of Carpenters (K & K Constr. Co.), 233 N.L.R.B. 718, 96 L.R.R.M. 1575 (1977), *rev'd*, 592 F.2d 1228 (3d Cir. 1979); Cement Masons Local 337 (California Ass'n of Employers), 190 N.L.R.B. 261, 77 L.R.R.M. 1255 (1971), *enforced*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); Teamsters Local 327 (American Bread Co.), 170 N.L.R.B. 91, 67 L.R.R.M. 1430 (1968), *enforced*, 411 F.2d 147 (6th Cir 1969); and Honolulu Typographical Union No. 37 (Hawaii Press Newspapers, Inc.), 167 N.L.R.B. 1030, 66 L.R.R.M. 1194 (1967), *enforced*, 401 F.2d 952 (D.C. Cir. 1968). *See also* Note, *Retail Store Employees Union Local 1001 v. NLRB (Safeco Title Insurance Co.): Extending Tree Fruits to Protect Picketing of Predominant Product Secondaries*, 74 NW. U.L. REV. 970 (1980) and Comment, *Consumer Picketing and the Single-Product Secondary Employer*, 47 U. CHI. L. REV. 112 (1979).

21. 627 F.2d at 1142-48.

22. *Id.* at 1144 (quoting *Tree Fruits*, 377 U.S. at 72):

> [t]he Court [in *Tree Fruits*] took a very different approach in order to determine whether picketing "threaten[s], coerce[s], or restrain[s];" the critical inquiry the Court undertook, simply and solely, was whether the "picketing is employed only to persuade customers not to buy the struck product." That was because, in that event, "the union's appeal is closely confined to the primary dispute," and while the picketing is extended to the secondary employer's premises, if the union's effort is successful the secondary employer's purchases "are decreased only because the public has diminished its purchases of the struck product."

23. 627 F.2d at 1144.

24. 627 F.2d at 1148-51. Judges Robb, Tamm, MacKinnon, and Wilkey dissented.

25. 627 F.2d at 1145.

26. 100 S. Ct. 2372 (1980).

27. 377 U.S. 58 (1964).

ton State growers.[28] The Washington State apples comprised only an insubstantial portion of each Safeway's total business.[29] The Board determined that the picketing was in direct violation of section 8(b)(4)(ii)(B) of the Act and ordered the union to cease its unfair labor practices.[30] The Board held that the proscribed objectives of section 8(b)(4)(ii)(B) could be inferred from the consumer picketing in front of a secondary establishment if "[t]he natural and forseeable 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."[31]

The court of appeals reversed, holding that section 8(b)(4)(ii)(B) only banned consumer picketing which "*in fact* threatens, coerces or restrains secondary employers."[32] Thus, the Act did not prohibit all secondary picketing.[33] Since the actual effect of the picketing did not cause a work stoppage nor interfere with deliveries (the picketing was peaceful), the picketing did not violate the Act absent a showing that the picketing had resulted in or was likely to result in a "substantial economic impact"[34] upon the secondary employer.

The Supreme Court reversed the court of appeals and approved of picketing that follows only the struck product, as opposed to picketing aimed solely at the secondary employer himself.[35] The Court rejected the court of appeals' test for coercion, which had depended upon "whether Safeway suffered or was likely to suffer economic loss."[36] In reaching its decision, the Court examined the purpose for the Landrum-Griffin secondary boycott provision, section 8(b)(4)(ii)(B). The Landrum-Griffin Amendments[37] were intended to limit the labor union's rights to exert

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28. *Id.* at 60.

29. *Id.*

30. 132 N.L.R.B. 1172, 1178, 48 L.R.R.M. 1496, 1499 (1961), *rev'd*, 308 F.2d 311 (D.C. Cir. 1962), *rev'd*, 377 U.S. 58 (1964).

31. *Id.* at 1177, 48 L.R.R.M. at 1499.

32. 308 F.2d 311, 315 (D.C. Cir. 1962)(emphasis added).

33. *Id.* at 317.

34. *Id.*

35. 377 U.S. at 72.

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute . . . . On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.

Id.

36. 377 U.S. at 72.

37. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub.

pressures on secondary employers who were neutral to the primary labor disputes.[38] The amendments were passed to close up gaps left by the Taft-Hartley Amendments of 1947.[39] These loopholes allowed unions to boycott at secondary sites in an appeal to get secondary customers to cease patronizing the secondary employer.[40] The majority in *Tree Fruits* pronounced that the Landrum-Griffin Amendments did "not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites."[41] Three Justices believed that the secondary boycott provision prohibited all secondary consumer picket-

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L. No. 257, 73 Stat. 519.

38. 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1568 [hereinafter cited as 2 LEGISLATIVE HISTORY (1959)]. An analysis submitted by the bill's sponsors explained that the purpose of the amendment was to prevent unions from engaging in secondary boycotts. 105 CONG. REC. 14, 347 (1959), *reprinted in* 2 LEGISLATIVE HISTORY (1959), at 1522-23; 105 CONG. REC. 15,531-32 (1959). In adopting subsection (ii) of the bill, the conference committee understood that the subsection would reach only threats, restraints, or coercion of the secondary employer. 105 CONG. REC. 19,829, *reprinted in* 2 LEGISLATIVE HISTORY (1959), at 1823.

> Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B.

H.R. REP. No. 510, 80th Cong., 1st Sess. 43, *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 569 [hereinafter cited as 1 LEGISLATIVE HISTORY (1947)]. *See also* 105 CONG. REC. 17,898 (1959) (remarks of Sen. Kennedy—"The chief effect of the conference agreement . . . will be to plug loopholes in the secondary boycott provisions of the [Taft-Hartley Act]") and 105 CONG. REC. 17,904 (1959) (remarks of Sen. Goldwater—"The [Landrum-Griffin] bill . . . closed up every loophole in the boycott section of the [Taft-Hartley Act] including the use of a secondary consumer picket line"). Similar comments can be found in 105 CONG. REC. 17,908 (1959) (remarks of Sen. Curtis); *Id.* at 3951 (remarks of Sen. McClellan); and an address by President Eisenhower (Aug. 6, 1959), *reprinted in* 105 CONG. REC. A8488 (1959). For further discussion on the legislative history of the National Labor Relations Act and its secondary boycott provisions, *see* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967), and NLRB v. Servette, Inc., 377 U.S. 46 (1964).

39. *National Woodwork*, 386 U.S. at 633. The Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, § 8(b)(4)(A), 61 Stat. 141 (current version at 29 U.S.C. § 158(b)(4) (1976)) prohibited unions from engaging in or inducing employees to engage in a strike to force an employer to cease doing business with another person.

40. *See National Woodwork*, 386 U.S. at 623-27; *Tree Fruits*, 377 U.S. at 51-54. *See also* United Wholesale & Warehouse Employees Local 261 v. NLRB, 282 F.2d 824, 827 (D.C. Cir. 1960); NLRB v. International Union of United Brewery Workers, 272 F.2d 817, 818-19 (10th Cir. 1959); NLRB v. Business Mach. Local 459 (Royal Typewriter), 228 F.2d 553, 559-61 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

41. 377 U.S. at 63.

ing,[42] a view equally expressed by opponents of the bill,[43] commentators,[44] and the NLRB.[45]

In *Safeco*, the Court examined the merged product cases, a series of decisions that further interpreted and applied the *Tree Fruits* doctrine. The merged product rule, as announced by the Board in *Cement Masons Local 337* (California Ass'n of Employers),[46] is that "a violation of [section 8(b)(4)(ii)(B)] occurs when a struck product is so merged with other products that the only way for a customer to boycott the struck product is to cease patronizing the picketed place of business."[47] The merged product rule is applied when the struck product of the primary employer becomes incorporated or merged with a service or product of the secondary employer. In *Cement Masons*, the labor dispute was between a cement masons union and a general contractor. The general contractor was engaged by the secondary employer (the owner and developer of a housing project) to construct houses. The union alleged that the contractor employed cement masons at sub par wage standards. The constructed houses were treated as the struck product, which resulted in a total boycott of the developer's business as well. The Ninth Circuit upheld the Board's order that the picketing was a violation of the Act.[48] Whereas in *Tree Fruits* the picketing was addressed to only one of many items carried by the secondary employer,[49] the picketing in *Cement Masons* related to the only item carried by the secondary employer.[50]

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42. *Id.* at 76, 92.

43. 105 CONG. REC. 17,882-83 (1959) (remarks of Sen. Morse); *Id.* at 17,898-99 (remarks of Sen. Kennedy) (1959). However, the Supreme Court stated in *Tree Fruits* that it is the sponsors of the legislation that the Court should look to as a guide for the construction of legislation, and not the fears and doubts of the opposition. 377 U.S. at 66. *See also* United States v. Calamaro, 354 U.S. 351, 357 n.9 (1957); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 (1956); and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951).

44. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1114 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 274 (1959); Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 CORNELL L.Q. 724, 731 (1960).

45. Upholsterers Frame & Bedding Workers Local 61 (Minneapolis House Furnishing Co.), 132 N.L.R.B. 40, 43-44, 48 L.R.R.M. 1301, 1305-06 (1961), *enforcement denied*, 331 F.2d 561 (8th Cir. 1964).

46. 190 N.L.R.B. 261, 77 L.R.R.M. 1255, *modified*, 192 N.L.R.B. 377, 77 L.R.R.M. 1825 (1971), *enforced*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

47. 190 N.L.R.B. at 266.

48. 468 F.2d 1187 (9th Cir. 1972) (*citing* American Bread Co. v. NLRB, 411 F.2d 147, 152 (6th Cir. 1969) and Honolulu Typographical Union No. 37 v. NLRB (Hawaii Press Newspapers, Inc.), 401 F.2d 952, 957 (D.C. Cir. 1968)).

49. 377 U.S. at 60.

50. 468 F.2d at 1191.

In the next merged products case, *American Bread Co. v. NLRB*,[51] the primary product was bread produced by the American Bread Company. The secondary employers were restaurants who incorporated the primary product, American Bread, into their meals. Because a boycott of the bread would expand the labor dispute to products other than those produced by the primary employer, the Sixth Circuit held that the picketing violated section 8(b)(4)(ii)(B).[52] The primary product (bread) had become incorporated into the secondary product (meal), which resulted in a total boycott of the secondary product and the secondary employer. *Tree Fruits* would seem to prohibit such a total boycott and permit instead only "incidental injury to the neutral [as a] natural consequence of an effective primary boycott."[53] Indeed, "such an expansion of [the] labor discord was one of the evils that Congress intended 8(b)(4)(ii)(B) to prevent."[54]

Finally, in *Honolulu Typographical Union No. 37 v. NLRB*,[55] employees of the primary newpaper picketed restaurants that advertised in the primary newspaper, asking the public not to patronize the restaurants. The court of appeals inferred that the real purpose of the picket was to dissuade customers from doing any business at all with the secondary employer.[56] The court held that this action would effect a total boycott of the secondary employer and, therefore, was prohibited by the 1959 amendments to the NLRA.[57]

> Congress chose protection of the neutral from this sort of disruption as the interest more deserving of protection. Indeed, the Supreme Court so stated in *Tree Fruits* when it characterized as one of the "isolated evils" barred by section 8(b)(4)(ii)(B) "picketing which persuades the customers of a secondary employer to stop all trading with him."[58]

Perhaps the case most similiar to the problems presented by *Safeco* would be *Local 14055, United Steelworkers (Dow Chemical)*.[59] In *Dow Chemical*, the Board held that picketing of a struck product at a secondary site when the struck product represented a majority of the neutral's

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51. 411 F.2d 147 (6th Cir. 1969).
52. *Id.* at 154.
53. 100 S. Ct. at 2377 (*citing* 377 U.S. at 72-73).
54. *Id.* (*citing* 377 U.S. at 63-64).
55. 401 F.2d 952 (D.C. Cir. 1968).
56. *Id.* at 954 n.4.
57. *Id.* at 957.
58. *Id.* at 956 (quoting *Tree Fruits*, 377 U.S. at 71).
59. 211 N.L.R.B. 649, 86 L.R.R.M. 1381 (1974), *enforcement denied*, 524 F.2d 853 (D.C. Cir. 1975), *vacated*, 429 U.S. 807 (1976), *dismissed as moot*, 229 N.L.R.B. 302, 96 L.R.R.M. 1090 (1977).

total income would be prohibited boycotting of a secondary employer.[60] The struck product was gasoline produced by the Dow Chemical Company. The secondary employers were six gasoline stations deriving their major revenues from the sale of Dow's gasoline. Striking employees of Dow Chemical picketed the secondary gas stations, requesting that customers boycott only the named gasoline refined by the Dow Chemical Company.[61] The Board applied the *Tree Fruits* test of whether "the picketing was reasonably calculated to induce customers not to patronize the neutral parties. . . . "[62] According to the Board, when the primary product constituted most of the secondary employer's business, and the secondary employer would thereby "predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply,"[63] the predictable impact satisfied the *Tree Fruits* test of customer inducement with an unlawful objective.[64] The court of appeals denied enforcement of the Board's decision in *Dow Chemical* and instead imposed a stricter application of the *Tree Fruits* requirement that picketing be limited to the struck product.[65] The Supreme Court granted certiorari in *Dow Chemical,* but vacated the court of appeals' decision and remanded the case to the Board in view of subsequent intervening circumstances.[66]

The language in *Tree Fruits* suggesting that secondary picketing against a neutral party was permitted as long as the picketing was directed only against the primary product could no longer apply.[67] For in *Safeco,* the neutral employer and the struck product had become one and the same. The merged product cases and *Dow Chemical* illustrate the critical difference between the boycotting in *Safeco* and the boycotting in *Tree Fruits.*[68] In *Tree Fruits,* the picketed item was only one of several items being sold by the secondary employer.[69] A successful boycott in *Tree Fruits* resulted in only "incidental" damage (lost business) to the neutral employer.[70] A response by the neutral employer would be either to reduce orders for the struck product, or to drop the product altogether,

60. 211 N.L.R.B. at 652, 86 L.R.R.M. at 1384.
61. *Id.* at 649, 86 L.R.R.M. at 1384.
62. *Id.* at 651, 86 L.R.R.M. at 1383. *See Tree Fruits,* 377 U.S. at 63.
63. 211 N.L.R.B. at 651, 86 L.R.R.M. at 1383.
64. *Id.* at 651-52, 86 L.R.R.M. at 1383.
65. 524 F.2d 853 (D.C. Cir. 1975), *vacated,* 429 U.S. 807 (1976), *dismissed as moot,* 229 N.L.R.B. 302, 96 L.R.R.M. 1090 (1977).
66. The Respondent union was dissolved during the appeal process. 229 N.L.R.B. at 302, 96 L.R.R.M. at 1091.
67. 377 U.S. at 70.
68. 100 S. Ct. at 2376.
69. 377 U.S. at 60.
70. *Id.* at 72-73.

thus resulting in some economic pressure upon the primary employer.[71] The Court in *Tree Fruits* determined this marginal injury to be an acceptable result of the labor dispute.[72] *Safeco* concerned more than just marginal injury to the neutral employer. As in the merged product cases and *Dow Chemical*, it is entirely conceivable that the secondary boycott in *Safeco* would cause financial ruin of the secondary employer.[73] In *Safeco*, the title companies deal for the most part solely in the primary employer's product.[74] If the title companies were to "drop the item as a poor seller"[75] they would be dropping ninety to ninety-five pecent of their entire business. Even though the secondary picketing in *Safeco* "only discourages consumption of a struck product,"[76] financial ruin of the neutral employer would still ensue. When the neutral employers are forced to choose "between their survival and the severance of their ties with [the primary employer,] the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer."[77] According to the Court in *Tree Fruits* and *Safeco*, this expansion of a labor dispute is one of the congressionally determined forbidden evils.[78] As the Board had done in *Dow Chemical*, the Court in *Safeco* interpreted congressional intent to be the protection of neutral employers when the neutral employer's business depended upon the products of the primary employer.[79]

As the Court noted in *Safeco*, the picketing situations presented in *Tree Fruits* and *Safeco* represent two extremes of conduct that are encountered in applying section 8(b)(4)(ii)(B).[80] *Tree Fruits* concerned only one of many products, while *Safeco* concerned the one and only product. The strict *Tree Fruits* test of whether the picketing follows only the struck product has been severely tempered and restricted by the *Safeco* decision. Dicta in *Tree Fruits* could have been interpreted as supporting the *Safeco* decision, long before the *Safeco* litigation developed.[81] Argua-

71. *Id.* at 73.
72. *Id.* at 72-73.
73. 100 S. Ct. at 2377.
74. *Id.* at 2376.
75. 377 U.S. at 73.
76. 100 S. Ct. at 2377.
77. *Id.* at 2376-77 (quoting *Tree Fruits*, 377 U.S. at 72).
78. *Id.* at 2377 (quoting *Tree Fruits*, 377 U.S. at 63-64).
79. *Id.* at 2377 n.8.
80. *Id.* at 2377 n.11.
81. 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. . . . [A] union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer,

bly, the holding of *Tree Fruits* was applicable only to the particular facts of the case.[82] Nevertheless, the *Safeco* decision is a logical extension of the *Tree Fruits* rationale, an extension well foreshadowed in the merged products cases and the Board's decision in *Dow Chemical*. If the true import of the legislative intent was to protect neutral secondary employers from the prohibited coercive effects of secondary boycotts, then *Safeco* implements this legislative intent in a logical manner. Who could doubt the coerciveness of a possible reduction of ninety to ninety-five percent of one's business?

Obviously, an effective economic weapon of labor has been tempered by the *Safeco* decision. A greater burden of investigation accompanies this partially deactivated weapon. The burden is now upon the unions to determine how much of the secondary employer's business is dependent upon the primary product. Nor has the Court in *Safeco* given any guidance or quantitative measures for determining how much dependency a secondary employer must have on the primary product before the *Safeco* restraint will apply. The Court itself acknowledged that it was drawing no fine line for this determination of how much would be too much.[83] The Court expressed the opinion that the determination of the fine line would be made by the Board, depending on the facts of each case.[84] The test that the Board is to apply is whether "the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss."[85]

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and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.

377 U.S. at 63-64 (footnote omitted).

> There is . . . nothing in the legislative history prior to the convening of the Conference Committee which shows any congressional concern with consumer picketing beyond that with the "isolated evil" of its use to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer. . . . [T]he prohibition of § 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise.
>
> . . . .
>
> [P]icketing which persuades the customers of a secondary employer to stop all trading with him was also to be barred.

Id. at 68, 71.

82. "We come then to the question whether the picketing in this case, confined as it was to persuading customers to cease buying the product of the primary employer, falls within the area of secondary consumer picketing which Congress did clearly indicate its intention to prohibit under § 8(b)(4)(ii)." *Id.* at 71.

83. 100 S. Ct. at 2377 n.11.

84. *Id.*

85. *Id.*