allow the buyer's amortization of the allocation to the restrictive covenant. The court made reference to this when it stated that "where a loss of tax revenues from one taxpayer cannot be retrieved entirely from another because of differentials in tax brackets or other factors the Commissioner may challenge the allocation as not reflecting the substance of the transaction."[22] It would seem that this ought to be the only situation in which the Commissioner can attack an allocation in a contract for sale of a business. If the amount of taxes that will be collected from both parties when their contract is cast in economically unreal form is not less than the amount that would have been collected if the contract were cast in an economically real form, there is no reason for the Commissioner to deny a taxpayer the tax benefits of the economically unreal form. If the Commissioner were to deprive him of these benefits and at the same time require the other party to the contract to bear the tax burdens of the unrealistic form, then the Commissioner would be collecting more taxes than he would have collected if the contract had been cast in a form which had economic reality. Therefore, to prevent such a result, a rule that the Commissioner can disregard the form of a taxpayer's contract only when the taxpayer's tax savings are greater than the increased taxes assessed upon the other party to the contract is a necessary complement to the court's rule in *Danielson*.

GERALD J. HOENIG

Labor Law—Labor Management Relations Act—Section 8(b)(4)(ii)(B)—Limitations on Product Picketing.—*Honolulu Typographical Union No. 37.*[1]—Hawaii Press Newspaper, Inc. publishes a group of newspapers, one of which is the Waikiki Beach Press. Since June, 1963, a labor dispute involving a strike and picketing has existed between Hawaii Press and the Honolulu Typographical Union No. 37. At least six shops in the International Market Place, a privately owned shopping center consisting of fifty to sixty shops, are regular advertisers in the Waikiki Beach Press. On three separate dates, the Union in support of its dispute with Hawaii Press picketed and distributed handbills to the public at the entrance to the shopping center. Each of the pickets carried a placard identifying one of the five shops located in the Market Place. The placard stated that the named shop advertised in the struck Waikiki Beach Press and requested the public not to buy any of the shop's products advertised in the Press. Four of these five shops were restaurants which advertised their entire business, rather than a particular product. Hawaii Press charged that this picketing was a violation of Section 8(b)(4)-(ii)(B) of the National Labor Relations Act.[2] The National Labor Relations Board HELD: (4-1) Picketing by a striking newspaper union of a service establishment which advertises its whole business in the struck newspaper is not allowable secondary activity under section 8(b)(4)(ii)(B).[3]

[22] 378 F.2d at 778.

[1] 167 N.L.R.B. No. 150, 66 L.R.R.M. 1194 (1967).
[2] 29 U.S.C. § 158(b)(4)(ii)(B) (1964).
[3] 167 N.L.R.B. No. 150, at 3, 66 L.R.R.M. at 1195.

In evaluating and analyzing the rationale and effect of the Board's decision it is necessary to consider the applicable statute, section 8(b)(4)-(ii)(B), the publicity proviso thereto[4] and the judicial interpretation of the statute.[5] In relevant part, the statute provides that:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . .
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> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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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 . . . .
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> . . .
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> . . . *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 . . . 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 . . . .[6]

The 1959 Amendments to the Labor Management Relations Act, of which this section is a part, were designed to close loopholes which had developed in the application of Section 8(b)(4) of the Taft-Hartley Act of 1947.[7] The 1947 legislation was intended to prohibit secondary picketing, but subsequent interpretations enabled unions to engage in a wide range of secondary activities.[8] Congress amended section 8(b)(4) to extend the statute's application to prohibit union pressure imposed directly on the secondary employer.[9]

The amended statute was extensively examined and interpreted by the Supreme Court in *NLRB v. Fruit & Vegetable Packers, Local 760*[10] (hereinafter *Tree Fruits*). In *Tree Fruits*, the union called a strike against the Fruit Packers and Warehousemen who distributed apples to a supermarket chain. The union, in the course of its primary dispute with the Fruit Packers, instituted a consumer boycott in support of its strike. It picketed the customer entrances at each of the stores operated by the chain. The pickets, usually two in number, wore placards and distributed handbills to the supermarket's customers and to the general public. The union urged the public to refrain from buying the apples produced by the struck employer. Apples handled by

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[4] 29 U.S.C. § 158(b)(4) (1964).

[5] NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964); NLRB v. Servette, Inc., 377 U.S. 46 (1964); Great Western Broadcasting Corp. v. NLRB, 356 F.2d 434, 61 L.R.R.M. 2364 (9th Cir. 1966).

[6] 29 U.S.C. § 158 (1964).

[7] NLRB v. Servette, Inc., 377 U.S. 46, 51 (1964).

[8] See NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 64 (1964).

[9] See NLRB v. Servette, Inc., 377 U.S. 46, 53-54 (1964).

[10] 377 U.S. 58 (1964).

the struck employer constituted only a small part of the business of the supermarket chain, since it was only one of the many products handled by the chain.

The issue presented to the Court was whether picketing of a secondary employer urging that employer's customers to refrain from purchasing the product of the employer with whom the union has a labor dispute is a violation of section 8(b)(4)(ii)(B).[11] The Court held that secondary picketing of retail outlets limited to persuading the public to refrain from purchasing the product of a primary employer is not the type of secondary picketing condemned by section 8(b)(4), even if the picketing caused a reduction in the secondary employer's sales of the primary employer's product.[12] Emphasizing congressional intent in enacting the 1959 amendments and alluding to possible constitutional infirmities flowing from a broad ban on peaceful picketing,[13] the Court refused to conclude that all peaceful picketing at the secondary situs was proscribed. Instead, the Court found that the "specific end" against which Congress legislated in 1959 was the use of picketing, peaceful or otherwise, to persuade the customers of the secondary employer to cease *all* dealings with it in order to force the secondary employer to stop dealing with the primary employer.[14]

The Court then distinguished picketing intended to shut off all trade with the secondary employer from picketing which is directed against only the products of the primary employer which are sold at the secondary situs. While the former type of picketing was prohibited because it attempts to secure the secondary employer's cooperation in the union's dispute with the primary employer, the picketing of the product of the primary employer at the secondary situs was allowed because the union's appeal to the public is confined to its dispute with the primary employer. This latter type of secondary consumer appeal was considered to be a form of direct action against the primary employer, similar in purpose and effect to consumer picketing which could legally be conducted at the primary employer's own business situs since it seeks only to reduce the public's purchases of the struck product, not the business of the secondary employer generally.[15]

In light of section 8(b)(4) and the peaceful consumer picketing exception thereto delineated in the *Tree Fruits* decision, the Board in the *Honolulu Typographical Union* case was confronted with the issue whether the consumer-picketing privilege of *Tree Fruits* protects picketing at the situs of a secondary employer which utilizes the advertising services of a primary employer, where the picketing requests the public to refrain from purchasing the products advertised and those products comprise the entire business of

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[11] Id. at 59.

[12] Id. at 72.

[13] The *Tree Fruits* Court balanced the Government's right to regulate labor relations with the union's right to engage in picketing, a form of free speech explicitly protected by the guarantees of the first amendment. Apparently, the Court recognized that if the union's right to picket is a protected form of speech, any regulation thereof should be only for an overriding public purpose, such as the prevention of violence in a labor dispute. Cf. Thornhill v. Alabama, 310 U.S. 88, 102-05 (1940).

[14] 377 U.S. at 70-72 (1964).

[15] Id. at 72.

the secondary employer. In holding that such picketing is not protected consumer picketing but rather a violation of section 8(b)(4)(ii)(B), the Board had to interpret the *Tree Fruits* distinction between prohibited secondary picketing which seeks to persuade customers of the secondary employer to cease trading with him in order to coerce him to stop dealing with the primary employer, and allowable consumer picketing which is aimed solely at the products of the primary employer being sold at a secondary situs.[16] On the facts of the instant case involving a secondary employer which sold only one item, its culinary services, and which advertised that one item in the struck newspaper, a majority of the Board felt that picketing requesting the public to refrain from patronizing the restaurant was a total consumer boycott of the secondary employer designed to coerce it to cease utilizing the advertising services of the primary employer.

The majority then considered whether picketing which urges the customers of the secondary employer to refrain completely from dealing with it is protected by the publicity proviso to section 8(b)(4). The Board refused to hold that the activity is protected by the proviso, relying on the following language in *Tree Fruits*:

> The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him . . . . On the other hand, picketing which persuades the customers of the secondary employer to stop all trading with him was. . . . to be barred.[17]

The Labor Board concluded that the right to handbill at the secondary situs and the right to picket at the secondary situs are not equivalent and synonomous. On the contrary, while the union may urge the public by handbill to cease all dealings with the secondary employer, it cannot do so by picketing. Therefore, secondary consumer picketing must not be evaluated in terms of the publicity proviso, but rather in terms of whether it imposes the type of pressure on the secondary employer that Congress intended to prohibit.[18]

Dissenting Member Jenkins, however, was of the opinion that the picketing herein involved should have been allowed.[19] To understand fully the rationale and effect of his opinion it is necessary to consider *NLRB v. Servette, Inc.*[20] and *Great Western Broadcasting Corp. v. NLRB*,[21] which he relied on as supporting, if not requiring, this conclusion. In *Servette*, the union struck Servette, Inc., an independent wholesale distributor of specialty merchandise sold by retail food chains. In support of its primary dispute the union distributed handbills at the retail outlets which refused to discontinue Servette's line of goods. The handbills urged customers not to buy certain named items distributed by Servette and sold by the retailers. The lower

[16] 167 N.L.R.B. No. 150, at 2-3, 66 L.R.R.M. at 1195.
[17] 377 U.S. at 70-71 (1964).
[18] 167 N.L.R.B. No. 150, at 5, 66 L.R.R.M. at 1196.
[19] Id. at 9, 66 L.R.R.M. at 1197 (dissenting opinion).
[20] 377 U.S. 46 (1964).
[21] 356 F.2d 434, 61 L.R.R.M. 2364 (9th Cir. 1966).

court held that since Servette was not directly involved in the physical process of creating the products it was not a "producer" and hence the publicity proviso did not apply to protect the handbilling.[22] The Supreme Court rejected this narrow construction of the word "producer" and accepted instead a prior Board determination that "products produced by an employer" included products distributed by a wholesaler with whom the union has a primary dispute. Consequently, the wholesaler-distributor is a producer of the products distributed within the meaning of the statute. The Court went on to conclude that "[t]here is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception . . . ."[23] The *Servette* decision was the first judicial step toward a holding that the supplier of a service may be a "producer" within the meaning of that word in the LMRA. Since the instant case involves not one, but two service establishments—the restaurant and the newspaper—the dissent must bring them within the coverage of the statute before it concludes that their activity is allowable thereunder. Furthermore, if the *Tree Fruits* rationale is to be applicable the secondary employer must be involved in some way with a *product* of the primary employer. *Great Western* adds some interpretation to the Supreme Court's statements in *Servette*.

The *Great Western* case involved a labor dispute between a union and a television station. In the course of this dispute the union utilized consumer appeals that were virtually identical to those in the instant case, both in nature and content, except that their medium was handbilling rather than picketing.

In the first *Great Western* decision,[24] the Ninth Circuit Court of Appeals rejected the Labor Board's decision that the handbilling was protected by the publicity proviso. The Board had reasoned that the advertising service of the television station standing alone was not the "product" within the meaning of the publicity proviso, but rather the item being advertised by the station. The television station was to be one of the producers of the items advertised because it added its labor in form of capital, enterprise and service to such items.[25] The court of appeals rejected this broad interpretation of the publicity proviso, reasoning that the television advertising service, standing alone, was not a "product" within the meaning of the publicity proviso since the only products referred to by the proviso must be capable of being "distributed" by another employer, and the advertising service rendered by a television station was not capable of being so distributed, least of all by an employer whose only relationship with the station is that of an advertiser.[26] Further, the court explicitly rejected the Board's broad view of the term "producer" and held that "producer" refers to one who deals with tangible items, one who is engaged in a physical creative activity, that is, one directly involved in the

[22] Servette, Inc. v. NLRB, 310 F.2d 659, 51 L.R.R.M. 2621 (9th Cir. 1962).

[23] 377 U.S. at 55 (1964).

[24] Great Western Broadcasting Corp. v. NLRB, 310 F.2d 591, 51 L.R.R.M. 2480 (9th Cir. 1962).

[25] AFTRA, San Francisco Local, 134 N.L.R.B. 1617, 49 L.R.R.M. 1391 (1961).

[26] Great Western Broadcasting Corp. v. NLRB, 310 F.2d 591, 596-97, 51 L.R.R.M. 2480, 2482-83 (9th Cir. 1962).

physical process of creating the products, not one who advertises the product.[27] Following remand by the court, the Board again dismissed the complaint on the ground that the union's conduct was protected by the publicity proviso.[28] The Board did so on the basis of its conclusion that the Supreme Court, in *Tree Fruits* and *Servette*, had rejected the court's interpretation of the statute and confirmed the Board's reading of the proviso.[29] The court was faced with a determination of the same issues when this Board decision was appealed, but with the additional guidelines afforded by *Tree Fruits* and *Servette*.

Relying on the broad reading of the statute rendered by the Court in *Servette*, the Ninth Circuit Court of Appeals felt itself constrained to hold, despite its prior contrary opinion, that a television station which advertises tangible items manufactured by another is a "producer" of the advertised products.[30] The court also held that an advertiser is a "producer" of *services* which it advertises as well. On the basis of his analysis of *Servette, Great Western* and *Tree Fruits*, dissenting Member Jenkins concluded the consumer picketing in the instant case was allowable. He reasoned that these decisions established two fundamental principles: first, a supplier of advertising services participates in the production of the goods and services which it advertises and thus, such a supplier is a "producer" of those goods and services within the meaning of the publicity proviso; second, peaceful consumer picketing to persuade the public to refrain from purchasing the products of a struck primary employer is allowable at the situs of the secondary employer. Synthesizing these principles, Member Jenkins concluded that if the secondary employer advertises all of its goods and services, the supplier of the advertising service is a "producer" of all those goods and services. Consequently, peaceful consumer picketing by the employees of the primary employer at the situs of the secondary employer urging the public to refrain from purchasing any of the advertised goods and services should be allowed because it is merely product picketing of the *Tree Fruits* variety. Thus, a union in the course of a labor dispute with a supplier of advertising services, here a newspaper, could lawfully picket all the goods and services of a secondary employer advertised by the service, even if this would have the effect of initiating a total consumer boycott of the secondary employer.

The importance of the *Honolulu Typographical Union* decision lies in the fact that the majority opinion appears to impose a limitation on the scope of the allowable secondary consumer product picketing by not extending this privilege to a case where the struck and picketed product comprises the entire business of the secondary employer, rather than a minute portion, a single product sold by a multiproduct secondary employer, as in *Tree Fruits*. This limitation on the privilege of consumer product picketing is supported by the legislative history of the LMRA, the Board's construction of

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[27] Id. at 598, 51 L.R.R.M. at 2483.

[28] 150 N.L.R.B. 467, 58 L.R.R.M. 1019 (1964).

[29] Id. at 470-71, 58 L.R.R.M. at 1021.

[30] Great Western Broadcasting Corp. v. NLRB, 356 F.2d 434, 436, 61 L.R.R.M. 2364, 2365 (9th Cir. 1966).

section 8(b)(4) and the publicity proviso prior to the *Tree Fruits* decision, and perhaps more importantly, by a consideration of *Tree Fruits* itself.

Despite the apparently strained interpretation of the legislative history of the statute rendered by the Court in *Tree Fruits* it is evident that the Congress was directly concerned with the specific problem of secondary union activity. Senator Kennedy in his statement of the purpose of the proviso said that the proviso preserved

> the right to appeal to consumers by methods other than picketing asking them to refrain from buying goods . . . and to refrain from trading with a retailer who sells such goods. . . . We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop . . . and can carry on all publicity short of having ambulatory picketing . . . .[31]

This would seem to indicate that the statute was intended at least to limit some, if not all, forms of consumer picketing.

Further, the Board itself on numerous occasions construed section 8(b)(4) as imposing an absolute ban on all types of secondary picketing, product or otherwise. The Board reasoned that "by literal wording of the proviso [to section 8(b)(4)] as well as through the interpretive gloss placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited."[32] *Tree Fruits* rejected this interpretation as imposing too broad a ban on the union's right to publicize its dispute at a secondary situs. However, it is important to note that the Court only determined that peaceful consumer product picketing was neither prohibited nor protected by the publicity proviso; it failed to hold explicitly that consumer product picketing was allowable in all circumstances. The Court emphasized that *only* publicity which does not fall within that area of secondary consumer picketing which Congress did prohibit under section 8(b)(4) is allowable. Thus it is clear that some forms of consumer product picketing may still be prohibited by section 8(b)(4).

The determinative inquiry is a delineation of what precisely is to be included within that area of secondary picketing which is so prohibited. The prohibitions of section 8(b)(4) are keyed to the coercive nature of the union conduct in its impact upon the neutral secondary employer.[33] Activity which constitutes a threat to, or a restraint upon the secondary employer aimed at forcing it to cease dealing with the struck primary employer is specifically prohibited.[34] In *Tree Fruits* the Court said that consumer picketing aimed at shutting off all trade with the secondary employer unless he aids the union in its dispute with the primary employer is entirely different from picketing

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[31] 105 Cong. Rec. 17, 898-99 (1959).

[32] Upholsterers Frame & Bedding Workers Twin City Local No. 61, 132 N.L.R.B. 1172, 1177, 48 L.R.R.M. 1301, 1305 (1961).

[33] NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 68 (1964).

[34] Id. at 70-71.

which only persuades his customers not to buy the struck product.[35] The former is a secondary restraint and coercion which falls within the proscriptions of section 8(b)(4) while the latter is protected. This distinction becomes tenuous, however, if the picketed secondary employer depends largely or entirely on sales of the struck product. Consider the difficulties presented if the union appeal to customers in the form of picketing only requests that the public refrain from purchasing the struck product, yet that struck product constitutes the entire business of the secondary employer. If, for example, an independent filling station owner sells petroleum products produced by Texaco, would he feel less threatened, restrained, or coerced by picket signs which proclaim, "Do not buy Texaco gasoline" than by placards which stated "Do not patronize this station."? This would seem to be an appeal for a total consumer boycott of the secondary employer which by its very nature would be an attempt to pressure the secondary employer to cease dealing with the primary employer. As such, this type of conduct would amount to secondary restraint and coercion even though all that the union is ostensibly doing is merely following the struck product. The probable coercive effect of the product picketing would seem to be more likely where a single-product secondary employer is involved, yet even in the case of a multiproduct secondary employer the probability of the picketing having a coercive effect seems to be present because due to the

> very nature of picketing there may be numbers of persons who will refuse to buy at all from a picketed store, either out of economic or social conviction or because they prefer to shop where they need not brave a picket line. Moreover, the public can hardly be expected always to know or ascertain the precise scope of a particular picketing operation. Thus in cases like this, the effect on the secondary employer may not always be limited to a decrease in his sales of the struck product. And even when that is the effect, the employer may, rather than simply reducing purchases from the primary employer, deem it more expedient to turn to another producer whose product is approved by the union.[36]

The effects of picketing on a business were undoubtedly considered by the Supreme Court in *Tree Fruits* before it decided that the neutral secondary employer will have to endure some economic detriment in the intrests of an effective national labor relations policy. The *Tree Fruits* result was no doubt reached by a balancing of the detriments to the national policy and to the secondary employer, with the balance in that case weighing in favor of the policy considerations. When, however, a secondary employer will be severely harmed by a policy allowing secondary activity, the balance of interests may swing in favor of restricting the secondary activity of the labor unions. It must be remembered that other forms of informational activity, such as handbilling, are still available.

Despite the possible benefits of fair treatment for the secondary employer accruing from the picketing limitation imposed by the instant case,

[35] Id.

[36] Id. at 82-83 (dissenting opinion).

the primary flaw in this decision is its failure clearly to draw the line between allowable and prohibited product picketing and to delineate some standards which would guide this determination in situations where the struck product comprises less than all of the secondary employer's business. It would seem that by allowing product picketing of a multiproduct secondary employer but not of a single-product secondary employer that the standard for determining the allowability of such product picketing is the nature of the secondary employer's business and the possible economic impact thereon. Still undetermined by this decision is the situation where the union pickets products comprising 80 percent of the secondary employer's business. In such a case, the union is not requesting customers to boycott the entire business, only 80 percent. Yet the possible loss of 80 percent of one's business necessarily coerces the secondary employer to cooperate with the union and cease dealing with the primary employer. Again even if the picketed products comprise 70 percent, or 60 percent, or 50 percent of the secondary employer's business, the question still remains: where to draw the line and on what basis. The present case presents the first limitation on the *Tree Fruits* product-picketing privilege. Only future Board and court opinions will determine the ultimate extent of this privilege with the only apparent test being whether, in the context of each case, the picketing is in the nature of secondary restraint and coercion.

PETER A. AMBROSINI

Labor Law—Labor Management Relations Act—Section 14(c)—State Court Jurisdiction over Labor Dispute.—*Stryjewski v. Local 830, Brewery & Beer Distrib. Drivers.*[1]—Plaintiff beer distributor is a Pennsylvania business concern composed of husband and wife. Under existing business conditions, plaintiff purchased its supply of beer from an "importing distributor," who imported beer from outside the state. A Teamsters Union affiliate, which had a collective-bargaining contract with some importing distributors, picketed the plaintiff's premises. The purposes of the picketing, according to the union, were to advertise the fact that plaintiff was nonunion and to attempt to organize plaintiff's employees. Because employees of the importing distributors would not cross the picket line to make deliveries to the plaintiff, the picketing precluded all shipments of beer supplies from those distributors. Plaintiff did not, initially, seek relief from the National Labor Relations Board. Instead, it brought suit in the local court of common pleas against the union seeking damages and asking for injunctive relief to restrain the picketing. After a hearing, the court refused to issue a preliminary injunction on the ground that the matters at issue were arguably within the exclusive jurisdiction of the NLRB.[2]

Plaintiff appealed to the Supreme Court of Pennsylvania. Central to the controversy was Section 14(c) of the Labor Management Relations Act.[3] This

[1] 426 Pa. 512, 233 A.2d 264 (1967).

[2] Id. at 515, 233 A.2d at 266.

[3] 29 U.S.C. § 164(c) (1964). This section states:

(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to