

1983

## Secondary Consumer Boycotts Under the NLRA's Publicity Proviso

Macia Organ

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Macia Organ, *Secondary Consumer Boycotts Under the NLRA's Publicity Proviso*, 14 Loy. U. Chi. L. J. 797 (1983).  
Available at: <http://lawcommons.luc.edu/lucj/vol14/iss4/6>

This Note is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# Secondary Consumer Boycotts Under the NLRA's Publicity Proviso

## INTRODUCTION

A particularly effective union weapon in a dispute with management is the secondary consumer boycott.<sup>1</sup> A union engages in secondary consumer boycott activity when it urges the public not to patronize a company which is not involved in a dispute with the union so that the neutral company will pressure the union's employer to give in to union demands.<sup>2</sup> The employer with whom the union has a dispute is referred to as the primary employer, and the company against whom secondary boycott activity is directed is the neutral, or secondary, employer.<sup>3</sup>

Because secondary consumer boycotts often inflict severe economic damage on neutral employers, Congress enacted section 8(b)(4) of the National Labor Relations Act ("NLRA")<sup>4</sup> to prohibit such boycotts. An exception to the general prohibition against coercive secondary boycotts was created by section 8(b)(4)'s proviso, often referred to as the publicity proviso. The publicity proviso allows a coercive secondary consumer boycott

---

1. See, e.g., Zimmerman, *The Changing Arsenal of Economic Weapons: Consequences for Section 8(b)(4), The Board and the Courts*, 107 LAB. REL. REP. (BNA) 173 (June 29, 1981).

2. Senator Goldwater stated, "A secondary consumer, or customer, boycott involves the refusal of consumers or customers to buy the products or services of one employer in order to force him to stop doing business with another employer." 105 CONG. REC. 16,208 (1959) (definition of terms used in debate over labor legislation introduced by Sen. Goldwater), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1386 (1959) [hereinafter cited as 2 1959 LEG. HIST.].

Judge Learned Hand described a secondary boycott as follows:

The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.

*International Bhd. Elec. Workers Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951).

3. For detailed discussions of the dichotomy between primary and secondary union activity, see generally Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Levin, "Wholly Unconcerned": *The Scope and Meaning of the Ally Doctrine Under Section 8(b)(4) of the NLRA*, 119 U. PA. L. REV. 283 (1970).

4. Labor-Management Relations Act of 1947, § 8(b)(4), 61 Stat. 136, 141-142 (1947) (codified as amended at 29 U.S.C. § 158(b)(4) (1976)).

only when the primary employer is a producer of products distributed by a secondary employer, and the boycott is achieved through publicity other than picketing.<sup>5</sup> The National Labor Relations Board and the courts have held that Congress intended the producer-distributor<sup>6</sup> language of the proviso to be broadly construed in determining whether union activity falls within its protection.<sup>7</sup> Such construction has resulted in the exemption of many union secondary consumer boycotts from section 8(b)(4)'s prohibition.<sup>8</sup>

---

5. Section 8(b)(4) provides in relevant part:

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

....

(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—

....

(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 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. . . .

....

*Provided*. . . nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution. . . .

NLRA, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

Section 8(b)(4) only prohibits coercive secondary boycotts. Non-coercive boycotts are not covered by the statutory proscription. This note does not address the issue of what types of secondary boycotts are, or are not, coercive.

6. In this note, the term "producer-distributor" refers to the language in the proviso, "a product or products are *produced* by an employer with whom the labor organization has a primary dispute and are *distributed* by another employer." *Id.* (emphasis added).

7. In this note, the term "producer" refers to the language in the proviso, "a product or products are *produced* by an employer with whom the labor organization has a primary dispute." *Id.* (emphasis added).

8. See *infra* notes 30-31.

Recently, two United States Courts of Appeals were confronted with the issue of whether the term producer in the proviso includes a primary employer who has not worked directly on any products distributed by the secondary employer. In *Pet, Inc. v. NLRB*,<sup>9</sup> the Eighth Circuit held that the term producer could not be read so broadly, while the Fourth Circuit in *Edward J. DeBartolo Corp. v. NLRB*<sup>10</sup> held that such a producer fell within the scope of the publicity proviso. The United States Supreme Court granted certiorari in *DeBartolo* to resolve this issue.

This note will analyze the scope of protection afforded to union secondary consumer boycott activity by the publicity proviso. First, it will trace the legislative history of the enactment of section 8(b)(4). Next, the National Labor Relations Board and judicial constructions of the scope of the producer-distributor language in the publicity proviso prior to *Pet* and *DeBartolo* will be reviewed. Interpretations of prior case law and the legislative history of section 8(b)(4) found in *Pet* and *DeBartolo* will then be discussed and analyzed. Finally, this note will consider why *Pet's* interpretation of the producer-distributor language best advances the congressional goals in enacting section 8(b)(4) and its proviso.

## BACKGROUND

### *Legislative History of Section 8(b)(4)*

Section 8(b)(4) of the Taft-Hartley Act<sup>11</sup> amended the NLRA<sup>12</sup> by declaring the secondary boycott an unlawful labor practice.<sup>13</sup> Its purpose was to protect neutral employers from suffering

9. *Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

10. *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *cert. granted*, 103 S. Ct. 205 (1982).

11. Labor-Management Relations Act of 1947, § 8(b)(4), 61 Stat. 136, 141-142 (1947) (codified as amended at 29 U.S.C. § 158(b)(4) (1976)).

12. National Labor Relations Act of 1935, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151-166 (1976)).

13. Senator Taft, sponsor of the bill, stated:

It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

93 CONG. REC. 4198 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1106 (1948) [hereinafter cited as 1947 LEG. HIST.].

A statement issued by the House Managers explained the purpose of § 8(b)(4) as follows:

severe economic damage<sup>14</sup> due to controversies which were not of their own making,<sup>15</sup> and which they were powerless to resolve. Section 8(b)(4) left intact labor's legitimate use of boycotts and strikes against employers directly involved in the primary dispute.<sup>16</sup>

In 1959, the House passed the Landrum-Griffin bill which

[S]trikes 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 [the employer with whom the union has the dispute]. Similarly, it would be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B.

*Id.* at 4198, 1947 LEG. HIST. at 547.

14. The following statement by Senator Goldwater reflects congressional and public concern with the economic damage suffered by secondary employers as the result of secondary boycotts:

Many small main street businessmen were forced to their knees by the use of these tactics [i.e., secondary boycotts] and were either forced out of business or else succumbed to the unions' demands. . . . The people of this country have reacted to this sordid condition and have expressed themselves in no uncertain terms in one of the greatest avalanches of mail from irate constituents Representatives and Senators have ever received. The demand is uniform—they want immediate relief from this exercise of coercive power.

The House Bill carried out this mandate by closing up the loopholes in secondary boycotts. . . .

105 CONG. REC. 16,419 (1959), 2 1959 LEG. HIST. at 1437.

15. Senators Goldwater and Dirksen reported to the Senate that "[t]he basic justification for banning secondary boycotts is to protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer." 105 CONG. REC. 78 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 474 (1959) [hereinafter cited as 1 1959 LEG. HIST.].

16. Labor's right to boycott primary employers and "allies" is consistent with the NLRA's "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951). *See also* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); United Steelworkers of Am. v. NLRB, 376 U.S. 492 (1964); Local 761, Int'l Elec., Radio & Mach. Workers v. NLRB, 366 U.S. 667, 673 (1961).

Nor did § 8(b)(4) protect "allies" of the primary employer against union strikes and boycotts. Senator Taft explained this aspect of § 8(b)(4) as follows:

[T]he law was [not] intended to apply. . . where the secondary employer is so closely allied to the primary employer as to amount to an alter ego situation or an employer relationship.

....

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

amended the Taft-Hartley Act.<sup>17</sup> These amendments closed certain loopholes in the language of section 8(b)(4) which allowed unions to engage in secondary boycotts without violating the statute's prohibition.<sup>18</sup> A major loophole in the statute enabled labor unions to involve neutral employers in their labor disputes by direct coercion. Although the Taft-Hartley Act prohibited a union from encouraging an employee work stoppage at the secondary's business, it did not prevent the union from directly threatening the secondary employer with this prohibited activity.<sup>19</sup> Similarly, the Taft-Hartley Act did not prevent a union from coercing a secondary employer by encouraging a total consumer boycott of that employer's business.<sup>20</sup>

---

unable to do because of the strike.

95 CONG. REC. 8709 (1949). For a detailed explanation and analysis of the ally doctrine, see generally Asher, *Secondary Boycotts—Allied, Neutral, and Single Employers*, 52 GEO. L.J. 406 (1964); Levin, *supra* note 3, at 283; Meyer, "Ally" or "Neutral"—*The Secondary Boycott Dilemma*, 34 TUL. L. REV. 343 (1960).

17. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, § 704 (a), 73 Stat. 541, 542-543 (1959) (codified at 29 U.S.C. § 158(b)(4) (1976)).

18. Prior to its amendment by the Landrum-Griffin Act in 1959, § 8(b)(4) prohibited inducing or encouraging "the employees of any employer" to strike or engage in a "concerted" refusal to work. The Landrum-Griffin amendments changed the words "the employees of any employer" to "any individual employed by any person engaged in commerce or in an industry affecting commerce" because the definition of "employee" in § 2(2) and "employer" in § 2(3) of the Act [29 U.S.C. § 152(2), (3) (1976)] rendered § 8(b)(4) inapplicable to inducements of agricultural laborers, supervisors, employees of interstate railroads, governmental employees, and employees of nonprofit hospitals. The word "concerted" was deleted because it had been interpreted to limit § 8(b)(4) to inducements of two or more employees. While these amendments expanded the coverage of § 8(b)(4), the type of conduct condemned was not expanded. See *NLRB v. Servette, Inc.*, 377 U.S. 46, 50-53 (1964).

19. The Taft-Hartley Act only prohibited unions from inducing the employees of a secondary employer to refuse to perform work. Therefore, prior to the 1959 amendments courts held that unions did not violate § 8(b)(4) if union pressure was applied directly to the secondary employer and none of his employees were unlawfully induced to strike. See, e.g., *Local 1976, United Bhd. of Carpenters v. NLRB* ("Sand Door"), 357 U.S. 93 (1958); *NLRB v. Business Mach. Mechanics Bd.*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956); *Rabouin v. NLRB*, 195 F.2d 906, 911-12 (2d Cir. 1952). See also Speech by Congressman Griffin (Oct. 12, 1959), *reprinted in* 26 VIT. SPEECHES DAY 113, 116 (1959). The Landrum-Griffin amendments made it unlawful for unions "to threaten, coerce, or restrain any person engaged in commerce." This provision protects secondary employers from direct coercion by the union because secondary employers are included within the definition of "person." NLRA, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

20. Section 8(b)(4) of the Taft-Hartley Act only prohibited secondary boycotts achieved by inducing secondary employees to refuse to perform work. Therefore, unions were not prevented from encouraging secondary boycotts by inducing customers not to patronize the neutral's business. Labor-Management Relations Act of 1947, § 8(b)(4), 61 Stat. 136, 141-142 (1947) (amended 1959).

An amendment to section 8(b)(4) passed by the House prohibited secondary union activity that "threaten[ed], coerce[d], or restrain[ed] any person in commerce."<sup>21</sup> Thus, under the House amendment, a neutral employer was protected from union coercion achieved through a consumer boycott of the secondary employer's customers or through a work stoppage by his employees. In addition, the amendment prohibited a union from threatening a neutral employer with a consumer or employee boycott.

Many members of the Senate opposed the broad language of the House bill. They believed that if all secondary boycotts were prohibited, labor would be deprived of its traditional right to appeal to consumers for support in labor disputes.<sup>22</sup> They were also concerned that the outlawing of all secondary boycotts would in some situations leave unions powerless to engage effectively in disputes with management.<sup>23</sup> In addition, some senators stated that a blanket ban on secondary boycotts would violate the first amendment right of free speech.<sup>24</sup>

For the above reasons, every proposal to outlaw all secondary boycotts was defeated in the Senate.<sup>25</sup> A Conference Committee was convened to enable the House and Senate to resolve their

---

21. The House proposal to deal with secondary boycotts was originally adopted by the House on August 13, 1959, in H.R. 8342, 86th Cong., 1st Sess. (1959). The Senate previously had adopted its own bill with a much more limited proscription on secondary boycotts in S. 1555, 86th Cong., 1st Sess. (1959) (Kennedy-Ervin bill), which was referred out of the Senate to the House on April 29, 1959. On August 14, 1959, the House by motion struck all the language in S. 1555 after the enacting clause and substituted the rest of H.R. 8342. 105 CONG. REC. 14,541 (1959), 2 1959 LEG. HIST. at 1702.

22. See 105 CONG. REC. 5580-81 (1959), 2 1959 LEG. HIST. at 1037-38 (statements of Sen. Humphrey); *id.* at 15,900, 2 1959 LEG. HIST. at 1377 (statements of Sen. Kennedy); *id.* at 16,397, 2 1959 LEG. HIST. at 1426 (statements of Sen. Morse).

23. Senator Kennedy, in addressing the question of why the Senate should not pass a blanket ban on secondary boycotts, stated: "In connection with other industries, . . . in some cases the economic power of the union is greater, and in other cases the economic power of the employer is greater." 105 CONG. REC. 5972 (1959), 2 1959 LEG. HIST. at 1195. Senator Kennedy further asserted that by prohibiting all secondary boycotts the balance of power between management and labor would be upset so that in some circumstances unions would be unable to obtain decent wages for their members. *Id.* at 5972-73, 2 1959 LEG. HIST. at 1195-96.

24. See 105 CONG. REC. 5580-81 (1959), 2 1959 LEG. HIST. at 1037-38 (statements of Sen. Humphrey); *id.* at 16,397-98, 2 1959 LEG. HIST. at 1426-27 (statements of Sen. Morse); *id.* at 5953, 2 1959 LEG. HIST. at 1176 (statements of Sen. Ervin).

25. Senators Dirksen and McClellan both introduced amendments to S. 1555 (Kennedy-Ervin bill) which used language similar to House bill H.R. 8342. Both proposals were defeated on the Senate floor. 105 CONG. REC. 5771 (1959), 2 1959 LEG. HIST. at 1086; *id.* at 5975, 2 1959 LEG. HIST. at 1198.

differences through compromise.<sup>26</sup> The conferees adopted the House version of section 8(b)(4) with the addition of a proviso intended to accommodate both the Senate's concern for preserving the rights of labor, and the House's desire to protect secondary employers.<sup>27</sup> Both the Senate and the House subsequently adopted the compromise.

The product of this compromise, the publicity proviso, exempts secondary consumer boycotts from section 8(b)(4)'s proscription if the boycotts are urged through nonpicketing publicity and are engaged in "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."<sup>28</sup> In addition, the publicity cannot have the effect of inducing any secondary employee to refuse to perform work.<sup>29</sup>

*National Labor Relations Board and Court Decisions Prior to  
Pet, Inc. v. NLRB and Edward J. DeBartolo Corp. v. NLRB*

Since the enactment of the publicity proviso in 1959, the National Labor Relations Board ("Board")<sup>30</sup> and the courts<sup>31</sup>

26. The bill referred to the Conference Committee was S. 1555 with everything after the enacting clause being the text which had been included in H.R. 8342. See *supra* note 21. The Senate conferees were Senators Kennedy, McNamara, Morse, Randolph, Goldwater, Dirksen and Prouty. 105 CONG. REC. 14,608 (1959), 2 1959 LEG. HIST. at 1351. The managers from the House appointed to the Conference Committee were Representatives Barden, Perkins, Landrum, Thompson, Kearns, Ayres and Griffin. *Id.* at 14,555, 2 1959 LEG. HIST. at 1702.

27. See *supra* note 5.

28. *Id.* Senator Kennedy, the chairman of the Conference Committee, explained the intended operation of the publicity proviso as follows: "Workers would not be denied under the [publicity proviso] the traditional right to ask the public not to patronize one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute." 105 CONG. REC. 15,900 (1959), 2 1959 LEG. HIST. at 1377.

29. NLRA, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

30. See, e.g., Florida Gulf Coast Bldg. Trades Council ("Edward J. De Bartolo Corp."), 252 N.L.R.B. 702 (1980), *enforced* Edward J. De Bartolo Corp. v. NLRB, 662 F.2d 264 (4th Cir. 1981), *cert. granted*, 103 S. Ct. 205 (1982); United Steelworkers of Am. ("Pet, Inc."), 244 N.L.R.B. 96 (1979), *enforcement denied*, Pet., Inc. v. NLRB, 641 F.2d 545 (8th Cir. 1981); American Fed'n of Television & Radio Artists, San Francisco Local ("Great W. Broadcasting Corp."), 150 N.L.R.B. 467 (1964), *enforced*, Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966); United Plant Guard Workers of Am. ("Houston Armored Car Co."), 136 N.L.R.B. 110 (1962); Local 154, Int'l Typographical Union ("Ypsilanti Press, Inc."), 135 N.L.R.B. 991 (1962); Electrical Workers Local 73 ("Northwestern Constr. of Washington, Inc."), 134 N.L.R.B. 498 (1961); International Bhd. of Elec. Workers, Local 712 ("Golden Dawn Foods"), 134 N.L.R.B. 812 (1961);

have broadly construed the producer-distributor language of the proviso, finding that certain primary employers are producers of products distributed by certain secondary employers, thereby exempting nonpicketing secondary consumer boycotts from section 8(b)(4)'s prohibition. The leading Board decision analyzing the use of the term producer in the publicity proviso is *Milk Drivers and Dairy Employees, Local 537 ("Lohman Sales")*.<sup>32</sup> In *Lohman Sales*, a union was engaged in a dispute with Lohman, a wholesale distributor of tobacco, candy, and other related products.<sup>33</sup> The union handbilled in front of retail stores, urging consumers to boycott the products delivered by Lohman.<sup>34</sup> The union was charged with violating section 8(b)(4) by attempting to threaten, coerce, and restrain retailers from doing business with Lohman.

The Board rejected the contention that the union's handbilling was unprotected by the publicity proviso because Lohman, the primary employer, distributed, but did not produce the products.<sup>35</sup> The Board held that an employer who provides middleman services by handling goods manufactured by others is a producer under the publicity proviso.<sup>36</sup> Relying on a dictionary definition of the term production, the Board concluded:

[L]abor is the prime requisite of one who produces. A wholesaler, such as Lohman, need not be the actual manufacturer to add his labor in the form of capital, enterprise, and service to the product he furnishes the retailers. . . . A contrary view would attach a special importance to one form of labor over another. . . .<sup>37</sup>

---

Plumbers Local 412 ("Shop-Rite Foods, Inc."), 133 N.L.R.B. 307 (1961); Wholesale Delivery Drivers Union, Local 848 ("Servette, Inc."), 133 N.L.R.B. 1501 (1961), *enforcement denied*, *Servette, Inc. v. NLRB*, 310 F.2d 659 (9th Cir. 1962), *rev'd*, 377 U.S. 46 (1964); Local 622, Radio & Television Eng'rs ("Middle S. Broadcasting Co."), 133 N.L.R.B. 1698 (1961); Milk Drivers & Dairy Employees, Local 357 ("Lohman Sales Co."), 132 N.L.R.B. 901 (1961).

31. *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981), *cert. granted*, 103 S. Ct. 205 (1982); *Great W. Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966); *Servette, Inc. v. NLRB*, 377 U.S. 46 (1964).

32. 132 N.L.R.B. 901 (1961).

33. *Id.* at 902.

34. The handbills read in part: "The Cigarettes, Tobacco and Candies on sale in this store are distributed by Lohman Sales Co. PLEASE HELP US IN OUR STRUGGLE FOR FAIR WAGES AND WORKING CONDITIONS. . . DON'T PURCHASE ANY CIGARETTES, TOBACCO OR CANDIES IN THIS STORE!'" *Id.* at 916.

35. *Id.* at 906.

36. *Id.*

37. *Id.* at 907. The Board noted that the effect of limiting the definition of the word

In reviewing the legislative history of the proviso, the Board reasoned that if Congress had intended to limit a producer to one who manufactures, the language of the proviso would have reflected this intent.<sup>38</sup> The Board found no indication that Congress, while permitting "truthful publicity with respect to products derived from manufacturers, . . . was unconcerned with such publicity as it affected products from other wholesalers, such as Lohman."<sup>39</sup> The Board accordingly held the union's handbilling of retail stores exempt from the secondary boycott prohibition of section 8(b)(4).<sup>40</sup>

Shortly after the *Lohman Sales* decision, the Board reexamined the producer-distributor language of the proviso in *Local 662, Radio and Television Engineers ("Middle South Broadcasting")*.<sup>41</sup> There, a union circulated leaflets<sup>42</sup> advocating a consumer boycott of secondary employers who advertised their products on the primary employer's radio station. Concluding that a radio station is a producer of the products it advertises, the Board held that the publicity proviso protected such activity.<sup>43</sup> The Board applied the *Lohman Sales* definition of producer in deciding that the radio station, by adding its labor in the form of capital, enterprise, and service to the products it advertised,

---

producer to one who manufactures a tangible good would mean that a vast number of companies produce nothing, including, for example, "companies [who] engage in the assembly of machine parts; the soft drink bottling industry; [and] communications, such as newspapers, magazines, and T.V. stations, which produce products of an abstract rather than physical nature." *Id.*

38. The Board compared the language of the publicity proviso to that contained in § 8(e) of the NLRA, 29 U.S.C. § 158(e) (1976) which grants specific exemptions to the "construction industry" and the "apparel and clothing industry" and concluded that if the publicity proviso were only to apply to the "manufacturing industry" Congress would have so stated. 132 N.L.R.B. at 907-08.

39. *Id.* at 908.

40. NLRA, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

41. 133 N.L.R.B. 1698 (1961).

42. The leaflets were circulars asking the public not to buy the products of the primary and the secondary employers. *Id.* at 1701.

43. The Board reversed the administrative law judge's decision that the publicity proviso did not offer the union immunity against violating § 8(b)(4) because the radio station did not produce any products but rather sold a service. The administrative law judge concluded that Congress knew the difference between product and service and if Congress intended to include a service-type situation within the ambit of the proviso, the statute or legislative history would have reflected such intent. *Id.* at 1711. The administrative law judge also stated that where a producer-distributor relationship exists, the publicity proviso allows a total consumer boycott of the secondary employer's business and not merely a boycott of the product involved in the primary dispute. The Board agreed that allowing a total consumer boycott in such circumstances was supported by the legislative history of the proviso. *Id.* at 1705.

became one of the producers of those products. The Board stated that the radio station was "a very important producer in the intermediate stage leading toward the ultimate sale or consumption of the product[s]" it advertised.<sup>44</sup>

The Board reached a similar conclusion in *American Federation of Television and Radio Artists, San Francisco Local* ("Great Western Broadcasting"),<sup>45</sup> when it held that a television station became a producer of secondary employers' products by advertising them.<sup>46</sup> The Ninth Circuit Court of Appeals disagreed with the Board's interpretation of the proviso, refused to enforce the order, and remanded the case to the Board.<sup>47</sup> The court noted that the term producer was restricted in section 8(b)(4)'s prohibition against secondary boycotts which describes product in connection with a "producer, processor, or manufacturer."<sup>48</sup> The court maintained that the association of these words established that Congress considered only those engaged in a physical, crea-

44. *Id.*

45. 134 N.L.R.B. 1617 (1961), *enforcement denied*, *Great W. Broadcasting Corp. v. NLRB*, 310 F.2d 591 (9th Cir. 1962). The union handbilled consumers, and also threatened to handbill consumers and urge them to boycott the secondary employers' businesses. The union sent a letter to the secondary employers which read in part:

A long, bitter and mean strike has started at KXTV. Any advertiser on this station while it is being operated by strike breakers will give the impression of taking sides in the dispute.

... We are about to launch an intensive campaign to bring the facts behind this dispute to the attention of the entire population, covered by this station. We are sure you recognize the obvious fact that many members of organized labor and their families, and those sympathetic to the cause of organized labor, will have long-lasting resentment against any product or sponsor who takes sides in this dispute by advertising on this station during the course of this worthy strike.

If you are currently advertising for clients on this station, or have any advertising projected for the next six months, we are sure you will wish to change your plans to avoid the inevitable adverse reaction.

134 N.L.R.B. at 1623-24.

The Board stated that the union's threats of distributing handbills, like the handbilling itself, were designed to coerce the secondary employers by inflicting economic injury and were not merely designed to peacefully convey the facts of the primary dispute to the public. Nevertheless, the Board concluded that threatening to handbill is also protected by the proviso. *Id.* at 1620.

46. *Id.* at 1617.

47. 310 F.2d 591 (9th Cir. 1962).

48. NLRA, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). § 8(b)(4) made it unlawful to force "any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer." *Id.*

tive process to be producers,<sup>49</sup> and concluded that the term producer in the publicity proviso had the same restrictive meaning. Thus, the court held that a union's secondary boycott activity directed against businesses who had their products advertised on the primary employer's television station was unprotected by the publicity proviso because the television station was not involved in the physical creation of the products it advertised.<sup>50</sup>

The Supreme Court has considered the scope of the producer-distributor language of the proviso only once. In *NLRB v. Servette, Inc.*<sup>51</sup> the Court rejected a literal reading of the term producer. The Court found that the use of the term producer in the publicity proviso did not imply that the primary employer actually had to manufacture or process a tangible good.<sup>52</sup> Rather, the term was broad enough to include wholesale distributors as well. *Servette* presented a fact situation similar to *Lohman Sales*. *Servette*, the primary employer, was a wholesale distributor of grocery products to retail supermarkets. The union handbilled, and threatened to handbill, the secondary employers' customers to encourage a boycott of the products delivered to the secondary employers by *Servette*. The Court held that the union's handbilling was protected by the publicity proviso because products "produced by an employer" include products distributed by a wholesaler involved in the primary dispute.<sup>53</sup>

The Court stated that "the proviso was the outgrowth of a profound Senate concern that the union's freedom to appeal to the public for support of their case be adequately safeguarded,"<sup>54</sup> and that restricting the meaning of producer to a manufacturer or processor would frustrate this objective.<sup>55</sup> The Court rejected the conclusion that section 8(b)(4)'s proscription against "forcing or requiring any person to cease dealing in the products of any other producer, processor or manufacturer"<sup>56</sup> established Congress's intent to limit the meaning of producer to one engaged in the physical creation of goods.<sup>57</sup> Instead, the Court reasoned that producer in the phrase, "producer, processor or manufac-

---

49. 310 F.2d at 598.

50. *Id.*

51. 377 U.S. 46 (1964).

52. 377 U.S. at 55-56.

53. *Id.*

54. *Id.*

55. *Id.*

56. NLRA, § 8(b)(4), 29 U.S.C. 158(b)(4) (1976).

57. 377 U.S. at 56.

turer" in section 8(b)(4)'s prohibition against secondary boycotts must be given a broader reading than "processor or manufacturer" so as not to be superfluous. Therefore, the term producer in the proviso to section 8(b)(4) must also have a broader meaning than one who is a manufacturer or processor.<sup>58</sup> In this regard, the Court stated: "[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, and we see no basis for attributing such an incongruous purpose to Congress."<sup>59</sup> In concluding that Congress intended the term producer to have an expansive meaning under section 8(b)(4) and its proviso, the Court likened the term producer under section 8(b)(4) to the term "produced" under the Fair Labor Standards Act,<sup>60</sup> which defined it as "manufactured, mined, handled, or in any other manner worked on."<sup>61</sup> Under the Fair Labor Standards Act, the term had always been held to include the wholesale distribution of goods.<sup>62</sup>

Shortly after the Supreme Court handed down its decision in *Servette*, the Board reconsidered *Great Western Broadcasting*<sup>63</sup> on remand from the Ninth Circuit. The Board interpreted *Servette* as supporting its original holding that a television station is a producer of the products it advertises.<sup>64</sup> This time, the Ninth Circuit affirmed the Board's decision, stating that there is no meaningful distinction between providing the intangible service of advertising tangible products and providing the intangible service of distributing tangible products.<sup>65</sup>

## DISCUSSION

*Lohman Sales* and its progeny established the Board's posi-

---

58. *Id.* at 55-56.

59. *Id.*

60. 29 U.S.C. § 201 (1976).

61. 29 U.S.C. § 703(j) (1976).

62. 377 U.S. at 55-56. *See, e.g.,* Kirshbaum v. Walling, 316 U.S. 517 (1942); Mitchell v. Pidcock, 299 F.2d 281 (5th Cir. 1962); McComb v. Wyandotte Furniture Co., 169 F.2d 766 (8th Cir. 1948); McComb v. Blue Star Auto Stores, 164 F.2d 329 (7th Cir. 1947); Walling v. Friend, 156 F.2d 429 (8th Cir. 1946); Walling v. Mutual Wholesale Food & Supply Co., 141 F.2d 331 (8th Cir. 1944).

63. American Fed'n of Television & Radio Artists, San Francisco Local ("Great W. Broadcasting Corp."), 150 N.L.R.B. 467 (1964), *enforced*, Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966).

64. 150 N.L.R.B. at 472.

65. 356 F.2d 434, 436 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966).

tion that a primary employer is deemed a producer of a secondary employer's products where the primary employer adds labor to such products, in the form of capital, enterprise, and service.<sup>66</sup> In two recent Board decisions, *United Steelworkers of America* ("Pet")<sup>67</sup> and *Florida Gulf Coast Building Trades Council* ("DeBartolo"),<sup>68</sup> the Board expanded the definition of producer as used in the proviso even further by holding that a primary employer who in some manner enhances the value of the secondary employer's business becomes a producer of all the secondary employer's products. On appeal, however, the Eighth Circuit in *Pet* and the Fourth Circuit in *DeBartolo* disagreed as to whether the Board's expanded interpretation was proper in light of the proviso's legislative history, the Supreme Court's construction of the proviso in *Servette*, and prior case law.

### *Pet, Inc. v. NLRB*

#### The Board's Decision

In *United Steelworkers of America* ("Pet"), the Board considered the issue of whether a subsidiary is a producer of all the products of the conglomerate of which it is a part, even though the subsidiary does not work on products other than its own.<sup>69</sup> Pet, Inc., a diversified billion-dollar conglomerate operating nationwide consists of twenty-seven operating divisions, each of which engages in separate lines of business.<sup>70</sup> The Board found that these divisions operate essentially autonomously.<sup>71</sup> Most divi-

---

66. *United Plant Guard Workers of Am.* ("Houston Armored Car Co."), 136 N.L.R.B. 110 (1962); *Local 154, Int'l Typographical Union* ("Ypsilanti Press, Inc."), 135 N.L.R.B. 991 (1962); *Electrical Workers Local 73* ("Northwestern Constr. of Washington, Inc."), 134 N.L.R.B. 498 (1961); *International Bhd. of Elec. Workers, Local 712* ("Golden Dawn Foods"), 134 N.L.R.B. 812 (1961); *Plumbers Local 142* ("Shop-Rite Foods, Inc."), 133 N.L.R.B. 307 (1961).

67. 244 N.L.R.B. 96 (1979), *enforcement denied*, *Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

68. 252 N.L.R.B. 702 (1980), *enforced*, *Edward J. DeBartolo Corp. v. NLRB*, 622 F.2d 264 (4th Cir. 1981), *cert. granted*, 103 S. Ct. 205 (1982).

69. 244 N.L.R.B. at 100-02.

70. *Id.* at 97.

71. The Board stated:

The various divisions of Pet operate essentially as independent business entities. No division exercises any determination, control, or influence over the administration or operation of any other division. Each division maintains a separate financial system and bank account from which it pays employees, prepares its own budget and financial statements, sets its profit targets, and pays its own bills, including payments to the Pet corporate office for reimburse-

sions are segregated into four groups for administrative, operational and accounting purposes.<sup>72</sup> Hussman Refrigerator Corp. is a wholly-owned subsidiary of Pet which manufactures commercial refrigeration equipment and other commercial and industrial equipment.<sup>73</sup> Hussman is one of the four Pet groups and consists of three divisions. The Hussman commercial division operates a manufacturing plant in Bridgeton, Missouri. The United Steelworkers of America represented the plant's 1,500 employees.<sup>74</sup>

On May 1, 1977, the Bridgeton plant's collective bargaining agreement expired and the employees went on strike.<sup>75</sup> The president of the United Steelworkers announced that in support of the strike there would be a national boycott of Pet's food products, retail stores and commercial refrigeration equipment by the union's 1.4 million members.<sup>76</sup> Shortly thereafter, the union placed advertisements in local newspapers urging consumers to boycott Pet stores and products. The union also distributed similarly worded handbills in O'Fallon, Illinois and in St. Louis and University City, Missouri.<sup>77</sup> Pet then filed an unfair labor charge against the union claiming it had violated section 8(b)(4) by calling for a secondary consumer boycott.<sup>78</sup>

The Board never addressed the issue of whether the union's conduct constituted "restraint and coercion" within the proscription of section 8(b)(4) because it held that the union's activity was immunized by the publicity proviso.<sup>79</sup> After reviewing prior

---

ment of services rendered by it. Policies regarding product line, pricing, and advertising, as well as market strategies, are determined by the divisions. Division presidents are vested with complete authority over the day-to-day operation of their respective divisions and are accountable for their divisions' profitability. They have complete authority over division labor relations and employment policies for represented and unrepresented employees and can negotiate, execute, and administer collective-bargaining agreements without prior approval from Pet's corporate offices.

*Id.* at 97-98.

72. *Id.* at 97.

73. *Id.*

74. *Id.*

75. *Id.* at 99.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 100 n.23. In addition, the Board assumed, without deciding, that the union's secondary boycott of Pet's products and the products of its subsidiaries and divisions was directed against a "neutral" employer, and not an ally. See *supra* note 16. The Board and courts have generally held that corporate subsidiaries and unincorporated divisions are

interpretations of the term producer under the publicity proviso,<sup>80</sup> the Board purportedly applied the rationale first enunciated in *Lohman Sales*<sup>81</sup> to characterize Hussman's role as a producer. The Board noted that Hussman supplied capital, enterprise, and service in the form of diversification, profits and goodwill to Pet, its subsidiaries and its divisions.<sup>82</sup> The Board reasoned that Hussman, a subsidiary comprising three divisions of Pet, contributed to the enterprise as a whole thereby allowing it to withstand economic hardship incurred by any of its individual operations.<sup>83</sup> The Board found that the subsidiary and each division enhanced the value and economic viability of the conglomerate by contributing profits,<sup>84</sup> and enhanced the reputation of the parent corporation and the other subsidiaries and divisions by creating goodwill.<sup>85</sup>

Inasmuch as Hussman contributed capital, enterprise, and service to Pet and its subsidiaries and divisions, it was deemed a producer of all the products of the entire conglomerate.<sup>86</sup> The Board accordingly dismissed Pet's complaint and ruled that the union's handbilling and other nonpicketing publicity which advocated a secondary consumer boycott of all Pet's products was protected by the publicity proviso.<sup>87</sup>

---

separate persons within the meaning of § 8(b)(4). *See, e.g.*, *Local 69, Los Angeles Newspaper Guild* ("San Francisco Examiner"), 185 N.L.R.B. 303 (1970), *enforced*, *Local 69, Los Angeles Newspaper Guild v. NLRB*, 443 F.2d 1173 (9th Cir. 1971); *American Fed'n of Television & Radio Artists, Washington-Baltimore Local* ("Hearst Corp."), 185 N.L.R.B. 593 (1970), *enforced*, *American Fed'n of Television & Radio Artists, Washington-Baltimore Local v. NLRB*, 462 F.2d 887 (D.C. Cir. 1972). Therefore, they are eligible for treatment as neutral employers entitled to protection from the labor disputes of other subsidiaries and divisions. For further discussion see Siegal, *Conglomerates, Subsidiaries, Divisions and the Secondary Boycott*, 9 GA. L. REV. 329 (1975).

80. 244 N.L.R.B. at 101 (citing *American Fed'n of Television & Radio Artists, San Francisco Local* ("Great W. Broadcasting Corp."), 150 N.L.R.B. 467 (1964), *enforced*, *Great W. Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966); *Wholesale Delivery Drivers Union, Local 848* ("Servette, Inc."), 133 N.L.R.B. 1501 (1961), *enforcement denied*, *Servette, Inc. v. NLRB*, 310 F.2d 659 (9th Cir. 1962), *rev'd*, 377 U.S. 46 (1964); *Local 662, Radio & Television Eng'rs* ("Middle S. Broadcasting Co."), 133 N.L.R.B. 1698 (1961); *Milk Drivers & Dairy Employees, Local 537* ("Lohman Sales Co."), 132 N.L.R.B. 901 (1961)).

81. *Milk Drivers & Dairy Employees, Local 537* ("Lohman Sales Co."), 132 N.L.R.B. 901 (1961). *See supra* notes 32-40 and accompanying text.

82. 244 N.L.R.B. at 101.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 102.

### The Eighth Circuit's Decision

On review, the Eighth Circuit reversed the Board's decision and remanded the case for further proceedings.<sup>88</sup> While it acknowledged the general rule that the Board's construction of a statute, if reasonably defensible, should not be rejected merely because the court might prefer another interpretation,<sup>89</sup> the court stated that in this instance the Board's interpretation was "unreasonable and must be rejected."<sup>90</sup> The court found that neither the Board's prior interpretations of producer,<sup>91</sup> nor the Supreme Court's decision in *Servette* supported the Board's rationale in *Pet*. The court found the Board's construction of producer totally inconsistent with any ordinary interpretation of the term.<sup>92</sup> To say that Hussman contributes profits to Pet did not mean, in the court's view, that Hussman produces the products of that enterprise.<sup>93</sup> To illustrate that there is at best a "highly attenuated"<sup>94</sup> relationship between Hussman and the products of Pet, the court noted that "[s]hould Pet sell Hussman tomorrow, Pet would manufacture, distribute, and promote its products the same way it is doing now."<sup>95</sup>

Additionally, the court maintained that the cases relied upon by the Board to support a broad reading of the proviso were distinguishable from the *Pet* case.<sup>96</sup> The court noted that in *Lohman Sales* and *Servette*, the primary employer was deemed a producer by being directly involved in distributing the secondary employers' products.<sup>97</sup> In *Great Western Broadcasting* and *Middle South Broadcasting*, the primary employer became a producer through direct involvement in the promotion of the secondary employers' products.<sup>98</sup> In each case, the primary worked on specific products of the secondary. Hussman, in contrast, never worked on any specific Pet products.<sup>99</sup>

---

88. *Pet, Inc. v. NLRB*, 641 F.2d 545 (8th Cir. 1981).

89. *Id.* at 549 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

90. *Id.* at 549.

91. *See supra* note 30.

92. 641 F.2d at 549.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 548-49.

97. *Id.* at 549.

98. *Id.*

99. *Id.*

Furthermore, the court stated that *Servette* supported its conclusion rather than the Board's because *Servette* equated Congress's use of "produced" in the proviso to its use of "produced" in the Fair Labor Standards Act where a producer includes only those who work directly on products.<sup>100</sup> Having determined that no producer-distributor relationship existed between Hussman and Pet, the court held that the publicity proviso did not protect the union from an unfair labor practice charge under section 8(b)(4).<sup>101</sup>

### *Edward J. DeBartolo Corp. v. NLRB*

#### The Board's Decision

The issue in *Florida Gulf Coast Building Trades Council ("DeBartolo")*<sup>102</sup> was whether a construction company which built a store connected with a shopping mall was a producer of the entire mall enterprise. Edward J. DeBartolo Corp. ("DeBartolo"), owns East Lake Square Mall, a shopping center located in Tampa, Florida, which leases space to tenant businesses.<sup>103</sup> DeBartolo and H. J. Wilson Co. ("Wilson"), executed a lease under which Wilson agreed to construct and operate a department store within the mall. Wilson contracted with High Con-

---

100. *Id.* The court noted in particular the Supreme Court's comment that "[t]he term 'produced' in other labor laws was not unfamiliar to Congress. Under the Fair Labor Standards Act, the term is defined as 'produced, manufactured, mined, handled, or in any other manner worked on.'" "Hussman does not work on any products of Pet." *Id.* (citation omitted).

101. The court remanded the case to the Board to determine three issues: first, whether the union's activity was a violation of § 8(b)(4) because it coerced and restrained the secondary employer through a boycott of its products; second, whether Pet was an ally of Hussman; and third, whether restricting the union's handbilling activity violated the union's first amendment rights. *Id.* at 549-50.

A dissenting judge disagreed with both the court's and the Board's interpretation of the publicity proviso. The dissent reviewed the legislative history and concluded that the congressional intent in enacting the proviso was to allow all forms of nonpicketing publicity that inform the public of a labor dispute, regardless of whether a producer-distributor relationship exists. *Id.* at 550-51 (McMillian, J., dissenting). Furthermore, the dissent reasoned that even if a producer-distributor relationship is required, the proviso still protected the union's activities. The dissent agreed with the Board that Hussman added goodwill, profits, and diversification to the Pet conglomerate, and concluded that this contribution indirectly helped the production of Pet's other products. Therefore, in the dissent's view, Hussman was a producer of Pet's products. *Id.* at 552.

102. 252 N.L.R.B. at 704-05.

103. *Id.* at 703 (1980). The center has approximately 85 tenant-merchants who operate

struction Co. ("High"), a general building contractor, to construct the store. High had no contract or business relationship with DeBartolo or any tenant except Wilson.<sup>104</sup>

In late 1979 and early 1980, a labor dispute between High and the Florida Gulf Coast Building Trades Council over alleged substandard wages and benefits paid to High's employees resulted in handbilling by the union at all entrances to the East Lake Square Mall. The handbills urged consumers to boycott the mall and its tenants.<sup>105</sup> DeBartolo thereafter filed an unfair labor practice charge against the union which alleged a violation of section (8)(b)(4).<sup>106</sup> DeBartolo claimed that although the secondary boycott activity directed against Wilson's store was probably protected by the publicity proviso, the handbilling directed against DeBartolo and the other tenants was not immunized from section 8(b)(4) because no producer-distributor relationship existed between High and DeBartolo or High and any other tenant except Wilson.<sup>107</sup>

Relying on its decision in *Pet*, the Board held that the publicity proviso protected such union activity.<sup>108</sup> *Pet* held that a union's handbilling advocating a total consumer boycott of a neutral employer is lawful when the primary and secondary employers support and contribute to each other's welfare.<sup>109</sup> The Board found the situation in *DeBartolo* analogous to that in *Pet*. High's mutually dependent and beneficial relationship with DeBartolo and the mall tenants derived from their shared presence at the shopping center.<sup>110</sup> The contribution High made to the mall was "as an employer which applie[d] its labor to a product, i.e., the

retail establishments. *Id.*

104. *Id.*

105. *Id.* The heading of the handbill stated, "PLEASE DON'T SHOP AT EAST LAKE SQUARE MALL PLEASE." *Id.*

106. *Id.* at 704.

107. *Id.*

108. *Id.* At the time the Board decided *DeBartolo*, the Eighth Circuit had not yet considered the Board's decision in *Pet.*

109. *Id.* at 705.

110. *Id.* To illustrate the benefits that each tenant would derive from High's product, i.e., Wilson's store, the Board noted that the tenants' leases with DeBartolo Corp. recognized that each tenant contributes to and depends upon the others for financial success. The pertinent lease provisions provide:

[1] Each tenant agrees to operate its premises in a way that will not injure the reputation of the shopping center or interfere with the operations of other tenants. [2] All tenants pay a proportionate share of the costs of operating, maintaining, and repairing the common areas of the mall, and each tenant's share is reduced each time a new tenant opens business. [3] Each tenant's lease,

Wilson store, from which DeBartolo and its tenants [would] derive substantial benefit."<sup>111</sup> Wilson's store, the Board determined, would attract customers to the mall who would then purchase products from other tenants, and conversely, Wilson's sales would be greater because of its proximity to the other stores.<sup>112</sup>

High's contribution of value to the mall enterprise, in the form of capital, enterprise, and service led the Board to conclude that High was a producer within the meaning of the publicity proviso as interpreted in *Pet* and *Servette*.<sup>113</sup> Thus, the Board held that the union's handbilling directed against all the mall stores and their products was protected under the publicity proviso. Accordingly, the Board dismissed the complaint.<sup>114</sup>

#### The Fourth Circuit's Decision

On appeal, the Fourth Circuit affirmed the Board's decision holding that the required producer-distributor relationship existed between High and DeBartolo and between High and the mall's tenants.<sup>115</sup> In reviewing the Board's conclusion the court deferred to the Supreme Court's instruction to "accord great respect to the expertise of the Board when its conclusions on a mixed question of fact and law are rationally based on articulated facts and consistent with the [NLRA]."<sup>116</sup> The court found that the Board's broad interpretation of producer was rational and consistent with the proviso's language in light of prior Board and judicial constructions of the term which were based in part upon the proviso's legislative history.<sup>117</sup>

The court concurred with the Board's reasoning that High was a producer of Wilson's store because the construction of Wilson's

---

in recognition of the fact that new stores will enhance the value of existing stores, provides that the minimum rent will increase 10% when new stores open at the mall. [4] Finally, each tenant is obligated to join the shopping center's merchants association and to participate in its joint advertising projects.

*Id.* at 705.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264, 268 (4th Cir. 1981), *cert. granted*, 103 S. Ct. 205 (1982).

116. *Id.* at 269 (quoting *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980)).

117. *Id.*

added to the store's value.<sup>118</sup> Further, Wilson's store added value to the entire mall enterprise by attracting shoppers, contributing to the maintenance of common mall areas, and participating in mall advertisements.<sup>119</sup> Therefore, the court concluded that High by constructing Wilson's store enhanced the value of the entire mall and thus was a "producer" of the entire mall enterprise.<sup>120</sup> In equating High's enhancement of the value of Wilson's store and the mall enterprise with the application of capital, enterprise, and service to those products, the court granted an expansive interpretation to the proviso's language.<sup>121</sup> Such an interpretation, the court stated, was justified by the Supreme Court's approval of the *Lohman Sales* rationale and the Court's interpretation of the legislative history of the publicity proviso in *Servette*.<sup>122</sup>

The court found additional support for its holding in prior Board decisions which applied the publicity proviso in the context of the construction industry.<sup>123</sup> In each of those decisions, the primary employer, a contractor, was held to be a producer of the building to which it added its service.<sup>124</sup> Analogizing those cases to the East Lake Square Mall dispute, the court held that a nonpicketing secondary boycott of the entire mall was permissible.<sup>125</sup>

The *DeBartolo* court noted and expressly disagreed with the Eighth Circuit's decision in *Pet*, finding Judge McMillian's dissent and the *Pet* Board's reasoning more persuasive.<sup>126</sup> The

---

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 270.

122. *Id.* The court reasoned that the Supreme Court's statement 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," compelled finding a producer-distributor relationship between a primary and secondary employer. *Id.* (quoting *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964)). To find otherwise would "often defeat [the proviso's] clear purpose of protecting labor's ability to publicize by means other than picketing its grievances to consumers." *Id.* The court found support for a broad reading of the proviso because of the Senate's concern with a union's ability to exercise free speech. *Id.*

123. *Id.* (The court cited *Electrical Workers Local 73 ("Northwestern Constr. of Washington, Inc.")*, 134 N.L.R.B. 498 (1961); *International Bhd. of Elec. Workers, Local 712 ("Golden Dawn Foods")*, 134 N.L.R.B. 812 (1961); *Plumbers Local 142 ("Shop-Rite Foods, Inc.")*, 133 N.L.R.B. 307 (1961)).

124. *Id.* at 270-71.

125. *Id.* at 271.

126. *Id.* at 272. *See supra* note 101.

court concurred with the Board in *DeBartolo* and held that the publicity proviso immunized the union's handbilling activity at the mall.<sup>127</sup>

#### ANALYSIS

The definitions of the term producer set forth in *Pet* and *DeBartolo* are inconsistent. *Pet* held that a producer is one who manufactures, processes, distributes, promotes, services, or directly works on a product in any other manner in the product's chain of production or distribution. *DeBartolo* defined producer as one who adds to the value of a product in any manner. A primary employer produces a secondary employer's products, under the *DeBartolo* definition, by indirectly enhancing the value of the secondary employer's business. Although both decisions cited the same case law to support their conclusions, *Pet* properly construed the rationale of these prior decisions and the *Pet* decision best advances the congressional purpose in enacting section 8(b)(4).

#### *The Use of Case Law in Pet, Inc. v. NLRB and in Edward J. DeBartolo Corp. v. NLRB*

In *Lohman Sales*, the Board reasoned that when Congress enacted the publicity proviso it intended to allow limited secondary boycott activity whenever a union had a labor dispute with

---

127. *Id.* In dissent, Judge Britt distinguished *DeBartolo* from prior decisions which found a producer-distributor relationship. He reviewed what he considered significant stipulated facts which weighed against finding a producer-distributor relationship between High and DeBartolo and High and the mall's businesses. These included: First, Belk's, a competitor of Wilson's located in a separate structure within East Lake Square Mall, but not a tenant of the mall, was handbilled by the union at its customer entrances. Second, DeBartolo, the tenants of the mall and Belk's had no control over Wilson's labor relations, nor did they have the power to remove High as Wilson's general contractor for construction of its store. Third, pursuant to the lease, Wilson's was completely responsible for the construction of its store and would own the structure. Fourth, DeBartolo, the mall tenants other than Wilson's, and Belk's had no business relationship with High. *Id.* at 273 (Britt, J., dissenting).

On the basis of these facts, the dissent concurred with the conclusion of the Eighth Circuit in *Pet* that a primary employer is not a producer of a secondary employer's products simply because the primary indirectly benefits the neutral's company. *Id.* at 274. The dissent concluded that although it was undisputed that the handbilling of Wilson's was proper, it required a strained interpretation of the statute to hold that High was a producer of the mall enterprise. *Id.* Presumably, the dissent emphasized the relationship Belk's had with High to exemplify the attenuated relationship that may exist between a

its employer.<sup>128</sup> The Board was concerned, therefore, that if the term producer was limited to one who manufactures a product, then employers who provide services but manufacture nothing tangible would be arbitrarily immunized from any secondary pressures.<sup>129</sup> For this reason, *Lohman Sales* stands for the proposition that all employers produce some product and that producer should be broadly defined to include anyone who applies labor to a product in the form of capital, enterprise and service.<sup>130</sup>

The court in *DeBartolo* and the Board in *Pet* purported to adhere to the definition of producer enunciated in *Lohman Sales* and determined that one of the effects of adding capital, enterprise, and service to a product is to add value to that product and to the business which sells it. Both the court and the Board, therefore, equated "adds value to a business or its products" with "applying capital, enterprise, and service to a product."<sup>131</sup> In *Lohman Sales*, however, the Board defined a producer as one who adds his *labor* to a product in the form of capital, enterprise, and service to insure that all employers who were not manufacturers but who added labor to a product would be included in the term producer.<sup>132</sup> By equating "capital, enterprise, and service" with "adds value to," the Fourth Circuit in *DeBartolo* did not require proof that High added its labor to the entire mall when, in fact, High added its *labor* only to Wilson's store. In contrast, the Eighth Circuit in *Pet* properly applied the *Lohman Sales* definition of producer by finding that Hussman did not produce Pet's products. Hussman applied its *labor* only to its own products and to no other products within the Pet conglomerate.

The Fourth Circuit asserted in *DeBartolo* that *Servette* supported its conclusion for several reasons. First, the court stated that the Supreme Court decision in *Servette* approved of the *Lohman Sales* rationale.<sup>133</sup> However, the Supreme Court never

---

primary and secondary employer under the majority's definition of producer.

128. See *supra* text accompanying notes 38-39.

129. *Id.*

130. Milk Drivers & Dairy Employees, Local 537 ("*Lohman Sales Co.*"), 132 N.L.R.B. 901, 907 (1961).

131. See *supra* notes 80-82 and 111-14 and accompanying text.

132. The Board noted specific examples of companies which would be non-producers if the term producer was given an unduly restrictive meaning: assemblers of mechanical parts, the soft drink bottling industry, and communication companies such as a television company. 132 N.L.R.B. at 907.

133. The court stated that "[t]he Supreme Court approved the *Lohman Sales* decision

discussed the *Lohman Sales* reasoning; it merely affirmed the holding that a distributor is a producer under the publicity proviso.<sup>134</sup> Second, to support its definition of producer, the Fourth Circuit isolated the statement made by the Court in *Servette* that "the protection of the proviso was [not] intended to be any narrower in coverage than the prohibition to which it is an exception."<sup>135</sup> From this statement, the *DeBartolo* court concluded that because section 8(b)(4)'s prohibition covers all secondary boycotts, then section 8(b)(4)'s exception, the publicity proviso, allows secondary consumer boycotts whenever they are achieved through nonpicketing publicity.<sup>136</sup> However, in construing this statement out of context the Fourth Circuit misinterpreted its meaning. The *Servette* opinion stated that the term producer was not restricted to one who processes or manufactures merely because of the association of the words "producer, processor or manufacturer" in section 8(b)(4)'s prohibition against secondary consumer boycotts.<sup>137</sup> The Supreme Court concluded that the term producer under the publicity proviso was likewise not restricted to one who engages in the physical creation of goods because the term producer in the proviso was not intended to be any narrower in definition than the term producer in section 8(b)(4)'s prohibition.

*Servette* does not support the conclusion in *DeBartolo* that the Supreme Court regarded the publicity proviso as protecting all secondary consumer boycotts achieved through nonpicketing publicity whether or not a producer-distributor relationship exists between the primary and secondary employer. Moreover, the *DeBartolo* court's interpretation of *Servette* gives the term producer a limitless reach, and thereby eliminates the need to find a producer-distributor relationship between the primary and secondary employer. Such a reading of the proviso negates efforts to find a producer-distributor relationship both in *DeBartolo* and in

---

and rationale in *NLRB v. Servette, Inc.*" *Edward J. DeBartolo Corp. v. NLRB*, 662 F. 2d 264, 270 (4th Cir. 1981), cert. granted, 103 S. Ct. 205 (1982).

134. The Supreme Court reversed the decision of the Ninth Circuit and stated that "[t]he Board on the other hand followed its ruling in *Lohman Sales Co.* that products 'produced by an employer' included products distributed, as here, by a wholesaler with whom the primary dispute exists. We agree with the Board." 377 U.S. 46, 55 (1964) (citation omitted).

135. *Id.*

136. See *supra* note 122 and accompanying text.

137. 377 U.S. at 55-56.

*Servette*, and directly contravenes the plain wording of the statute. By defining producer as one who enhances the value of another's business or products, the *DeBartolo* court stripped the term of any meaning. Any business, after all, has the potential to add value to other businesses, even if the businesses have no connection with each other.<sup>138</sup>

The Eighth Circuit in *Pet* correctly applied the *Servette* decision in concluding that Hussman was not a producer of Pet's products because Hussman did not work on any of Pet's products. The court relied on *Servette's* analysis that in enacting the proviso Congress was aware that existing labor laws defined a producer as one who works on products. Thus, Congress intended the term producer to have a similar meaning in section 8(b)(4) and its proviso.<sup>139</sup>

*Comportment with Legislative  
Intent in Pet, Inc. v. NLRB and  
in Edward J. DeBartolo Corp. v.  
NLRB*

The legislative history of the statute reveals that *Pet's* definition of the term producer best achieves the congressional intent underlying section 8(b)(4) and its proviso. Construing the legislative intent is difficult, however, because the publicity proviso was drafted by the Conference Committee and the language of the proviso was not debated on the floor of either the Senate or the House of Representatives.<sup>140</sup> The congressional record merely contains examples of the type of union boycott activity that the members of Congress thought the proviso covered, and thus is not dispositive of the extent to which Congress intended to protect secondary consumer boycott activity under the proviso. For example, the *Report to the House of Major Changes Made in Griffin-Landrum Bill by Conference Committee* stated:

The following changes safeguarding the rights of work-  
ingmen were made upon the insistence of conferees: . . . 2.

---

138. For example, using *DeBartolo's* definition, High could be deemed a producer of a gasoline station on the same street as the mall and a producer of the station's products. Just as more customers would shop at the mall because of Wilson's, more customers would use the thoroughfare to reach the shopping mall and stop to purchase gasoline. Therefore, High would indirectly add to the value of the gasoline station's business and thus be a producer of the station and its products.

139. See *supra* note 100 and accompanying text.

140. 105 CONG. REC. 16,354, 16,540-41 (1959), 2 1959 LEG. HIST. at 1400, 1713-14.

Consumer appeals: The right to publicize nonunion goods to consumers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will also be entitled to publicize, without picketing, *the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute.*<sup>141</sup>

Nonetheless, this report and similar remarks made by members of Congress<sup>142</sup> all discuss a producer in the context of one who directly works on a product, as did the Eighth Circuit in *Pet*. Moreover, there are no statements by any members of Congress that support the expansive interpretation given to the producer-distributor language by the Board in *Pet* and by the Fourth Circuit in *DeBartolo*.

In an argument that went unanswered by the majority in *Pet*, Judge McMillian's strongly worded dissent contended that in enacting the publicity proviso Congress intended to protect all forms of coercive, nonpicketing publicity. Judge McMillian stated that the purpose of the proviso was to preserve first amendment rights and therefore the question of whether a producer-distributor relationship existed between *Pet* and Hussman was

141. *Id.* at 16,635, 2 1959 LEG. HIST. at 1720 (emphasis added) (A conference report was not issued in the Senate.)

142. Senator Kennedy, the Conference Committee chairman, reported as follows concerning the effect of the proviso:

The [proviso protects] [t]he right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

....

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress.

105 CONG. REC. 16,414 (1959), 2 1959 LEG. HIST. at 1432. See also remarks of Senator Kennedy, *id.* at 15,900, 2 1959 LEG. HIST. at 1377. Senator Goldwater, a conferee, similarly indicated that the words producer and distributor were inserted into the proviso as words of limitation: "[T]he union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B the distributor—the secondary employer—is distributing goods produced by company A, the producer with whom such labor union has a primary dispute. *Id.* at A8523, 2 1959 LEG. HIST. at 1857. Representative Thompson reported to the House that these amendments secured "[t]he right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by non-union labor and to refrain from trading with a retailer who sells such goods." *Id.* at 16,636, 2 1959 LEG. HIST. at 1721. Representative Libonati commented that "[u]nions can only advertise against an establishment selling unfair goods." *Id.* at 16,649, 2 1959 LEG. HIST. at 1734. See also remarks of Representative Hogan: [A] union in conflict with a manufacturer could use publicity to advise the public that a particular store han-

irrelevant.<sup>143</sup> The court in *DeBartolo*, while not expressly adopting the reasoning of the *Pet* dissent, also cited the first amendment to support its decision and admitted that it found the rationale of the *Pet* dissent persuasive.<sup>144</sup>

Admittedly, the Senate was concerned that a blanket ban on all publicity would violate the first amendment.<sup>145</sup> However, neither logic nor the legislative history indicates that the Senate believed the only constitutional option was to allow all nonpicketing publicity, regardless of its coercive effect on the secondary employer.<sup>146</sup> The Senate clearly believed that coercive publicity

---

dles goods produced in a struck shop." *Id.* at A8248, 2 1959 LEG. HIST. at 1818.

143. *Pet, Inc. v. NLRB*, 641 F.2d 545, 550-53 (8th Cir. 1981) (McMillian, J., dissenting).

One commentator unequivocally asserts that the producer-distributor language in the publicity proviso was not intended to define a relationship that must exist between a primary and secondary employer for the publicity proviso to protect a union's secondary boycott activity achieved through nonpicketing publicity. See Kamer, *The § 8(b)(4) Publicity Proviso and NLRB v. Servette: A Supreme Court Mandate Ignored*, 16 GA. L. REV. 575 (1982).

144. *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264, 272 (4th Cir. 1981), cert. granted, 103 S. Ct. 205 (1982).

145. Senator Kennedy and Representative Thompson prepared a joint analysis of the Senate and House bills which was introduced in the House. This analysis indicates concern that the House bill's prohibition against all nonpicketing publicity would violate the first amendment. 105 CONG. REC. 1522 (1959), 2 1959 LEG. HIST. at 1708.

146. Congress's decision to describe the scope of protection the publicity proviso affords unions against the secondary boycott prohibition in terms of "a product or products . . . produced by an employer with whom the labor organization has a primary dispute and . . . distributed by another employer" is significant in interpreting the legislative intent. Logic dictates the conclusion that the terms produced and distributed were used in the statute for the purpose of defining a relationship which must exist between the primary and secondary employer in order to permit coercive publicity affecting the secondary employer. If Congress had intended to allow publicity which coerced a secondary employer, regardless of the relationship between a primary and secondary employer, it knew how to make its meaning clear as evidenced by § 8(c) of the NLRA which provides for explicit protection of all non-coercive publicity. § 8(c) reads:

The expressing of any views, arguments or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

NLRA, § 8(c), 29 U.S.C. § 158(c) (1976).

The Supreme Court has recognized that congressional intent with respect to the meaning of the publicity proviso may be inferred from Congress's inclusion or exclusion of certain language in the statute when the context of such inclusion or exclusion supports such an inference. See *NLRB v. Fruit & Vegetable Packers, Local 760* ("Tree Fruits"), 377 U.S. 58 (1964). In *Tree Fruits* the Supreme Court resolved the issue of whether secondary picketing was per se unlawful under § 8(b)(4). The Court noted that § 8(b)(4) banned "coercive" secondary conduct and that Congress's inclusion of that term meant that it was to be given effect. The Court stated that "[w]hen Congress meant to bar picketing per

could be regulated to some extent without violating the first amendment.<sup>147</sup> To expand the scope of the producer-distributor language to conform with a speculative view of the Senate's concern with first amendment rights is unwarranted, especially since the Senate never expressed its viewpoint as to the reach of the first amendment in the proviso.

Another aspect of the legislative history which the Eighth Circuit in *Pet* did not discuss, but the Fourth Circuit in *DeBartolo* recognized and cited in support of its broad interpretation of the term producer was Congress's concern with preserving labor's traditional right to appeal to the public to gain support for its position in a labor dispute.<sup>148</sup> The legislative history does indicate that the Senate's opposition to a blanket ban on secondary boycotts was motivated in large part by its concern that such a ban would deprive labor of this traditional right. Congress recognized that such public appeals are effective, and that at times they provide the only leverage a union may have in its attempts to gain concessions from an employer.<sup>149</sup> In *DeBartolo*, the Fourth Circuit explained that prior cases had expanded the term producer because economic realities necessitated a broad reading of the term to preserve labor's traditional right to appeal to the public.<sup>150</sup>

Because the public rarely deals directly with the primary employer, often the only means of expressing public support for labor is by boycotting products at a secondary site. The Board and the courts accordingly have interpreted the term producer to mean more than a manufacturer so that each primary employer

---

se, it made its meaning clear [as evidenced by § 8(b)(7) of the NLRA] which makes it an unfair labor practice, 'to picket or cause to be picketed.' " Therefore, the Court held that secondary picketing which did not coerce the secondary employer did not violate § 8(b)(4). 377 U.S. at 68.

147. Senator Kennedy who presided over the Conference Committee and is regarded as the "chief architect" of the publicity proviso apparently believed that restrictions could be placed on nonpicketing publicity which is coercive because the latter portion of the proviso exempts from its protection publicity that has the effect of inducing employees of the secondary employer to refuse to "pick up, deliver, or transport any goods, or not to perform any services at the establishment of the [secondary] employer." NLRA, § 8(b)(4), 29 U.S.C. 158(b)(4) (1976).

148. 662 F.2d at 270-71.

149. See *supra* note 23 and accompanying text. See also 105 CONG. REC. 5580-81 (1959), 2 1959 LEG. HIST. at 1037-38 (Sen. Humphrey's statement); *id.* at 16,397, 2 1959 LEG. HIST. at 1426 (Sen. Morse's statement); *id.* at 16,414, 2 1959 LEG. HIST. at 1432 (Sen. Kennedy's statement).

150. 662 F.2d at 270.

becomes the producer of a product capable of being boycotted.<sup>151</sup> By construing producer this broadly, the Board and the courts have preserved the union's right to appeal to the public in every reported case decided thus far.<sup>152</sup>

The building construction cases cited in *DeBartolo* to support expanding the definition of producer exemplify the Board's attempts to preserve the traditional right to appeal to the public.<sup>153</sup> In these decisions, the Board held that contractors were producers of stores they constructed, thus preserving the union's traditional right to appeal to consumers to boycott such stores. If *DeBartolo* had held that High was a producer of Wilson's store because it worked on the structure then the union could have appealed to the public for a secondary consumer boycott limited to Wilson's store.<sup>154</sup> *DeBartolo's* expansion of the term producer beyond one who works on a product may not be justified on the basis of the Senate's concern for preserving the traditional right to appeal to the public because this right is adequately protected by the narrower definition of the term producer as one who directly works on a product.

Not only is *DeBartolo's* expansive reading of the term producer unwarranted, it also fails to recognize that the proviso was a result of compromise between congressional concerns for preserving a union's right to appeal to the public and for protecting neutral employers who were suffering grave economic damage through secondary boycotts.<sup>155</sup> When interpreting the term producer in the proviso, both congressional concerns should be considered. Ideally, the term should be read broadly enough to preserve a union's right to appeal to the public and narrowly enough to prevent as many neutral employers as possible from being economically damaged by secondary boycott activity.

---

151. See *supra* notes 30-31.

152. *Id.*

153. 662 F.2d at 270-71. Cases relied on by the court included: Nashville Bldg. & Constr. Trades Council ("Castner-Knott Dry Goods Store"), 188 N.L.R.B. 470 (1971) (contractor held to be producer of entire mall because it supplied heat and air conditioning for entire mall); International Bhd. of Elec. Workers, Local 712 ("Golden Dawn Foods"), 134 N.L.R.B. 812 (1961) (installer of grocery store's refrigeration system and electrical contractor held to be producers of store); Plumbers Local 142 ("Shop-Rite Foods, Inc."), 133 N.L.R.B. 307 (1961) (installer of grocery store's refrigeration system held to be producer of store).

154. See *Id.*

155. See *supra* notes 14-16 and 21-27 and accompanying text.

The definition of producer set forth in *Lohman Sales and Servette* and followed in *Pet* as one who works on a product in its chain of production or distribution addresses both congressional concerns. By placing such a limitation on the term producer, the secondary employers who do not distribute the products which the primary employer has worked on are protected from involvement in labor disputes not of their own making. At the same time, labor's traditional right to appeal to the public is preserved because the primary employer is always the producer of some end product that is capable of being boycotted. Thus, while the scope of nonpicketing secondary activity would be limited, such a limitation would not deprive a union of its right to appeal to the public.

#### CONCLUSION

The conflicting interpretations in *Pet* and *DeBartolo* of the scope of protection the publicity proviso affords unions that urge secondary consumer boycotts through nonpicketing publicity are irreconcilable. *DeBartolo's* conclusion that a producer is one who enhances the value of the secondary employer's business or products either directly or indirectly negates the intent of Congress to protect neutral employers from suffering economic damage from the labor disputes of others. Although the *DeBartolo* decision was prompted by a recognition of Congress's concern that labor's right to appeal to the public for support in its disputes not be entirely eliminated, adoption of the *DeBartolo* definition would needlessly widen labor strife. In contrast, the Eighth Circuit's conclusion in *Pet* that a producer is one who works directly on a product in its chain of production or distribution is a better definition of a producer. *Pet's* definition is supported by prior case law and satisfies the congressional objective of preserving a union's traditional right to appeal to the public while protecting as many neutral employers as possible from the economic damage wrought by a secondary consumer boycott.<sup>156</sup>

MARCIA ORGAN

---

156. As this article was going to press, the Supreme Court issued an opinion in

*DeBartolo*. Edward J. DeBartolo Corp. v. NLRB, 51 U.S.L.W. 4984 (U.S. June 24, 1983), *vacating and remanding*, 622 F.2d 264 (4th Cir. 1981). In a brief and unanimous opinion, the Court concluded that the union's primary employer, H.J. High Construction Co. did not produce any products distributed to the public by Edward J. DeBartolo Corp., the owner of the mall, or the mall's tenants. The Supreme Court held that the Board therefore erred in finding that the union's handbilling was protected by the publicity proviso.

The Court reviewed its decision in *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964), the only other case in which the Court had analyzed the producer-distributor language of the publicity proviso. The Court stated that in reaching its decision in *Servette*, it had noted that one of the primary concerns of Congress, revealed by the legislative history of the Labor-Management Reporting and Disclosure Act of 1959, was the secondary boycott activity of the Teamsters Union. 51 U.S.L.W. at 4986. Accordingly, the Court had concluded that the Teamsters' boycott activities were obviously intended to be covered by the 1959 amendments which had "simultaneously strengthened the secondary boycott prohibition and added the publicity proviso" to the National Labor Relations Act. *Id.* Because the Teamsters Union principally represents employees of motor carriers, which do not produce goods but provide a service, the Court in *Servette* concluded that the term producer in § 8(b)(4)'s prohibition against secondary boycott activities includes employers who provide a service. Likewise, producers under the publicity proviso include employers of truck drivers and others who provide a service because "[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, and we see no basis for attributing such an incongruous purpose to Congress." *Id.* (quoting *Servette*, 377 U.S. at 55). See *supra* notes 135-37 and accompanying text.

Significantly, the Court stated that because the term producer is broad enough to include one who provides a service, the publicity proviso's coverage is broad enough to include nearly any primary labor dispute which results in prohibited secondary boycott activity. *Id.* The Court's analysis is thus consistent with the conclusion of this note that the term producer should be interpreted broadly enough so that each primary employer is the producer of an end product, thereby preserving a union's right to appeal to the public in every dispute. See *supra* notes 148-55 and accompanying text.

Despite the broad interpretation given to the term producer, the Court rejected the Board's expansive interpretation of the secondary activity protected by the publicity proviso. *Id.* at 4986. The Court stated that it was convinced that the publicity proviso's requirement that the primary employer's products be distributed by the secondary employer was included by Congress because of its concern in "shielding . . . unoffending employers and others from pressures in controversies not their own." *Id.* (quoting *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951)). The Court stated that the Board failed to find that DeBartolo or any of Wilson's cotenants distributed the products of High, but merely found that the union's handbilling was protected by the publicity proviso because DeBartolo and Wilson's cotenants would receive a substantial benefit from High's work. *Id.* The Court maintained that if a secondary employer by receiving a benefit from the work of a primary employer is considered to be a distributor of that primary employer's products, as the Board had concluded, then the distribution requirement of the publicity proviso "will be satisfied by virtually any secondary employer that a union might want consumers to boycott." *Id.* See *supra* note 142 and accompanying text. The court reasoned that the publicity proviso would not have contained a distribution requirement if it had been Congress's intent to allow all nonpicketing peaceful publicity to fall within the publicity proviso's protection. 51 U.S.L.W. at 4986.

In rejecting the Board's decision, the Court concluded that although High, the primary employer, may be a producer of the products distributed by Wilson's, it has no business relationship with DeBartolo or any other mall tenants "[n]or do they sell any products whose chain of production can reasonably be said to include High." *Id.* Similarly, this note concludes that High was not a producer of the products of DeBartolo and Wilson's cotenants because High did not perform work on their products in any manner in the

products' chains of production and distribution. *See supra* note 155 and accompanying text.

The Court noted that for DeBartolo to obtain relief in this action, it must prevail on three issues. 51 U.S.L.W. at 4985. The first issue, which was resolved in DeBartolo's favor by the Court, was whether the publicity proviso protected the union's handbilling. The Supreme Court limited its decision to this issue because neither the Board nor the Fourth Circuit reached the other two issues, because both found that the union's activity was protected by the publicity proviso. *Id.* The union, however, raised two other issues as defenses to the unfair labor practice charge filed by DeBartolo. The union also argued that it had not violated Section 8(b)(4)'s prohibition against coercive secondary boycotts because its activities were not coercive. *Id.* Additionally, the union defended its activities on the grounds that its handbilling was protected by the first amendment.

In vacating and remanding the decision of the court of appeals, the Court stated that resolution of the constitutional issue is premature until the issue of whether the union engaged in coercive activity prohibited by section 8(b)(4) is decided. *Id.* at 4986. The Court also noted that the Board could not invoke the prudential policy of interpreting acts of Congress so as to avoid unnecessarily deciding a serious constitutional question because that doctrine may only be invoked when the construction of a statute is "fairly possible." *Id.* (quoting *Cromwell v. Benson*, 285 U.S. 22, 62 (1932)). The Court concluded that the Board's broad interpretation of the publicity proviso did not meet that standard. *Id.*

