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"It Takes More Than Money to Fly Delta. It Takes Nerve.": Union Secondary Boycott Publicity and the First Amendment: Delta Air Lines

In December of 1976, Delta Air Lines terminated a contract for janitorial services with a union subcontractor. Delta replaced the union firm with Statewide Building Maintenance Corporation, a non-union employer. Because of the loss of Delta's business, the terminated firm was forced to lay off five of its six employees who had worked at Delta's offices. All were members of the respondent Service Employees Union. In September of the following year, the union began to distribute leaflets calling for a consumer boycott of Delta. Members of the Service Employees Union distributed handbills to the public at Delta's facility at the Los Angeles International Airport and in front of the company's downtown ticket office.

The union's campaign consisted of a sequence of four handbills distributed over a six month period. In the case which later arose from these events, the National Labor Relations Board labelled the handbills A, B, C, and D for the sake of clarity. Handbills A and B were nearly identical. Handbill A asked the public not to fly Delta because the company was "unfair" and did not "provide AFL-CIO conditions of employment." The other side of the handbill contained the assertion that "[i]t takes more than money to fly Delta. It takes nerve." In support of this contention, the union set forth Delta's accident record for the preceding thirteen years and listed the number of monthly consumer complaints and letters Delta had

2. Id.
3. Id. The parties to the case that arose from Delta's actions stipulated that following the layoff the union had a primary dispute with Statewide, the non-union employer, but no primary dispute with Delta Air Lines. Id.
4. Id. at 3, 111 L.R.R.M. (BNA) at 1160.
5. Id.
6. Id.
7. Id.
received between July, 1976 and July, 1977. The union correctly identified the sources of the information as the National Transportation Board and the Civil Aeronautics Board. Handbill B did not contain the consumer complaint material but was otherwise identical to A. Neither handbill mentioned the fact that the union's primary labor dispute was with Delta's janitorial subcontractor, rather than with Delta itself.

Handbill C, however, did call attention to this important fact. It asked the public to boycott Delta because Delta had caused union members to lose their jobs. In their place Delta had hired "a maintenance company" that did not provide union wages and standards. On the back, the handbill contained the same accident and complaint material as had Handbill A. Handbill D was similar to C. This handbill, however, named the maintenance company as Statewide. It also introduced the accident and complaint material by stating that the union was bringing this information to the public's attention "to publicize our primary dispute with... Statewide." The union also announced the boycott to its own membership. It published Handbill A in the September editions of its two newspapers, and Handbill C in the October editions.

The case came before a National Labor Relations Board Administrative Law Judge on stipulated facts. The fact stipulation contained no reference to any effect, economic or otherwise, that the union's campaign had on Delta. The complaint charged the union with a violation of section 8(b) (4) (ii) (B) of the National Labor Relations Act. The Administrative Law Judge found all four handbills and both newspaper publica-

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8. 263 N.L.R.B. No. 153, slip op. app. IV at 4-5.
9. Id. at 5.
11. See 263 N.L.R.B. No. 153, slip op. app. IV at 3-8, setting forth the information contained in the handbills.
13. Id.
14. Id.
15. Id.
18. Id. at 6, 111 L.R.R.M. (BNA) at 1161.
19. Id. at 2, 111 L.R.R.M. (BNA) at 1160. Section 8(b) (4) (ii) (B), in pertinent part, makes it an unfair labor practice for a labor organization to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is... forcing or requiring any person... to cease doing business with any other person." 29 U.S.C. § 158(b) (4) (ii) (B) (1976) (emphasis added).
tions unlawful. The National Labor Relations Board affirmed, holding that the publicity campaign constituted a secondary boycott prohibited by section 8(b)(4)(ii)(B). The union had undertaken the boycott with the forbidden secondary "object" of forcing Delta to cease doing business with Statewide, and the publicity had also "threaten[ed], coerc[ed], or restrain[ed]" Delta to that end. Moreover, no element of the campaign was protected by the so-called "publicity proviso" to section 8(b)(4), which exempts some union messages from the broad ban on secondary boycotts. The proviso allows a union to circulate secondary boycott publicity in a form "other than picketing" if the union does so "for the purpose of truthfully advising the public" of its primary labor dispute. Here, the Board concluded, the Service Employees had not informed the public of Delta's accident record for this protected "purpose." Rather, they had done so solely to bring economic pressure on Delta. The publicity proviso therefore did not protect any element of the union's campaign. Having found a violation of the Labor Act, the Board majority refused to consider the union's claim that its publicity was protected by the first amendment.


21. Id.
22. Id. at 6, 111 L.R.R.M. (BNA) at 1161.
23. Id. at 5-6, 111 L.R.R.M. (BNA) at 1161.
24. Id. at 7-8, 111 L.R.R.M. (BNA) at 1161. The publicity proviso allows a union to engage in "coercive" conduct otherwise proscribed by § 8(b)(4) if it takes the form of "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." 29 U.S.C. § 158(b)(4) (1976) (emphasis added). The parties in Delta stipulated that the union's publicity had not had "an effect of inducing any individual . . . to refuse to . . . perform any services." 263 N.L.R.B. No. 153, slip op. at 6, 111 L.R.R.M. (BNA) at 1161. Therefore, the case did not involve the final portion of § 8(b)(4).
27. Id. at 8-12, 111 L.R.R.M. (BNA) at 1161-62.
28. Id. at 13-14, 111 L.R.R.M. (BNA) at 1163. The majority stated: "Since we have found that Respondent's conduct is unlawful under Section 8(b)(4) because it is coercive and engaged in for a secondary object, and is not saved by the publicity proviso, we shall presume that our finding of a violation here is in accordance with the Constitution . . . ." Id.
Congress added the provisions of the Labor Act at issue in *Delta Air Lines* in 1959 as part of the Labor-Management Reporting and Disclosure Act, commonly known as the Landrum-Griffin amendments. These modifications of section 8(b)(4) were largely the result of a congressional attempt to plug "loopholes" in the secondary boycott provisions of the earlier Taft-Hartley Act. A secondary boycott in the most general sense is an organized attempt to gain a concession or advantage from one business by pressuring other businesses that trade with it, usually through a concerted refusal to deal with the latter firms. Thus defined, the problem is not a new one, and at common law such boycotts were generally illegal when engaged in by organized labor.

The early federal labor acts had the effect of relaxing common law restrictions on secondary boycotts. The Norris-La Guardia Act greatly restricted the power of the federal courts to issue injunctions in labor disputes. The Supreme Court held that federal courts were therefore prevented from enjoining secondary boycotts by labor unions. The Wagner Act con-
tained no union unfair labor practice provisions at all. Although unions remained liable for damages resulting from secondary boycotts, and some state courts retained the power to enjoin them,\(^3\) in 1947 Congress decided that these employer remedies were insufficient. Congress therefore enacted the Taft-Hartley Act that made union "secondary boycotts" a federal unfair labor practice.\(^3\) Section 8(b)(4) of Taft-Hartley prohibited unions from inducing a strike for the forbidden secondary "object" of compelling an employer to cease doing business with another.\(^3\)

The Taft-Hartley prohibition proved in practice to be rather narrow. A wide variety of secondary pressures by unions remained lawful, as a number of unions discovered. Some strike activities were quite clearly within the spirit of the Taft-Hartley prohibition, but not within its language.\(^3\) Other forms of secondary pressure that did not involve a call to strike were also beyond the reach of Taft-Hartley\(^4\) but were less obviously the

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37. Comment, supra note 31, at 725.


39. The Taft-Hartley Act, for example, only prohibited a union from calling a strike by the "employees" of an "employer" for a secondary object. 29 U.S.C. § 158(b)(4) (1976). Unions therefore remained free to induce secondary strikes by workers who were employees as defined by the dictionary, but not the Labor Act. Thus, because workers subject to the Railway Labor Act and those employed in agriculture were not "employees" under the NLRA, 29 U.S.C. § 152(3) (1976), secondary strikes by these workers were not prohibited. Comment, supra note 31, at 737. See generally Note, "Legal" Secondary Boycotts: Effect of the General Definitions Section of the Taft Hartley Act on the Secondary Boycott Section, 41 Minn. L. Rev. 452 (1957).

Furthermore, unions were not precluded from encouraging a single employee to cease work, because § 8(b)(4) forbade only the inducement of "concerted activities." NLRB v. International Rice Milling Co., 341 U.S. 665, 671 (1951); Joliet Contractors Ass'n v. NLRB, 202 F.2d 606, 608-09 (7th Cir. 1953). Finally, Taft-Hartley did not outlaw direct pressure on a secondary business itself, even by means of threatening to call out its employees, as long as the union did not "induce" the employees themselves to job action. Local Union 49, Sheet Metal Workers Int'l Ass'n, (Driver-Miller Plumbing & Heating Corp.), 124 N.L.R.B. 888, 892 (1959); Local 1976, United Bhd. of Carpenters, (Sand Door & Plywood Co.), 113 N.L.R.B. 1210, 1215 (1955), enforced, 241 F.2d 147 (9th Cir. 1957), rev'd on other grounds, 357 U.S. 93 (1958). See Comment, supra note 31, at 725.

40. Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958) (Frankfurter, J.). Justice Frankfurter stated:

Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of "secondary boycotts" and the desirability of outlawing them, it is clear that no such
result of loopholes in the law. It was not illegal, for example, for a union to appeal solely to customers to refuse to buy the products of a struck primary employer. Nor did the Act forbid a union from calling a consumer boycott of a secondary firm because it continued to deal with the disfavored primary firm. In 1959, some members of Congress believed that the Act should also prohibit these secondary boycott appeals directed at the general public. The sponsors of the Landrum-Griffin bill in the House of Representatives proposed to deter these union activities by adding a new subsection (ii) to section 8(b)(4) of the Act. This addition would make it unlawful for a union to "threaten, coerce, or restrain any person engaged in commerce" with the forbidden secondary "object" of compelling any business to cease trading with any other business.

Much of the congressional debate over Landrum-Griffin focused on a sweeping prohibition that was in fact enacted in § 8(b)(4)(A). The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . . [Section 8(b)(4)] aimed to restrict the area of industrial conflict . . . by prohibiting . . . the coercion of neutral employers . . . through the inducement of their employees to engage in strikes or concerted refusals to handle goods.


41. If the union expressed its appeal in the form of a picket line, the Board usually found it a per se "inducement" of secondary employees. Teamsters Local No. 795 (Grant-Billingsley Fruit Co.), 127 N.L.R.B. 50, 61 (1960); Dry Cleaning Drivers Local No. 928 (Southern Service Co.), 118 N.L.R.B. 1435, 1437, enforced, 262 F.2d. 617 (9th Cir. 1958). The burden was then on the union to show that its appeal was directed solely at customers. If the union did so, even a picketing appeal did not violate Taft-Hartley. NLRB v. Local 50, Bakery Workers, 245 F.2d 542, 546-49 (2d Cir. 1957). See Segal, supra note 34, at 200, 208; Comment, supra note 31, at 730-31.

42. Comment, supra note 31, at 726-27.

43. Congressman Griffin explained the mischief at which his bill was directed in the following terms:

We are concerned about [union] picketing at a store where the [struck product] is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.

[Under the proposed Landrum-Griffin bill], [i]f the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.

105 CONG. REC. 15,673 (1959) (quoted in Lewis, Consumer Picketing and the Court—The Questionable Yield of Tree Fruits, 49 MINN. L. REV. 479, 494-95 (1965)).

cused on the bill's first amendment implications. Supporters of Landrum-Griffin and similar bills concentrated on the problem of union picketing at a secondary employer's place of business. They argued that a picket line around the facility of an employer who had nothing to do with the union's dispute was unfairly "coercive" and should be banned. Opponents, on the other hand, thought the language of the bill was sufficiently broad to outlaw all union publicity that had a secondary object. They believed that secondary boycott appeals in the form of handbills, newspaper or radio advertisements, or in any other form might constitute unlawful "coerc[ion] or re-strain[t]" of the secondary business. The opposition considered such an extensive prohibition a "basic infringement upon freedom of expression." They also believed the prohibition went far beyond the plugging of loopholes in existing law and added a new and remarkably broad restriction on union speech that Taft-Hartley had never contemplated.

If the opponents of Landrum-Griffin were correct in concluding that the bill reached beyond picketing and banned all forms of secondary boycott publicity, their constitutional concerns were well founded. The Supreme Court had allowed much greater legal restraint on labor picketing than other publicity in the form of "pure" speech. Despite the broad protection initially accorded to picketing in the Supreme Court's decision in *Thornhill v. Alabama,* the view that labor picketing is something "more" than free speech rapidly gained

45. See, e.g., supra note 43. See also 105 CONG. REC. 6428 (1959) (remarks of Senator Goldwater), 6666-67 (remarks of Senator McClellan).
46. Congressmen Udall and Thompson, opponents of the bill, added their analysis to the formal record:

The bill provides that a union may not restrain an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts, and newspaper advertisements, thereby interfering with freedom of speech.

[A]s I understand it, one of the acknowledged purposes of [the proposed § (ii) of Landrum-Griffin outlawing "coercion or restraint" of secondary firms] is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute.

This is a basic infringement upon freedom of expression.

47. 105 CONG. REC. 15,540 (1959). See also id. at 6232-33 (remarks of Senator Humphrey).
48. See supra note 46.
49. See infra note 72.
50. 310 U.S. 88, 101-05 (1940).
ground on the Court soon after that case was handed down. While the government's power to restrict "pure" speech based on its content remained strictly limited, state power over picketing steadily expanded. Picketing, the Court found, involved conduct as well as speech. It had a force that did not depend on the cogency of the ideas the picket signs expressed and "signalled" action on the part of others no matter what message appeared on the placards. The Court also expressed the view that some "secondary" picketing in particular involved "little, if any, 'communication.' " Thus, regulation of labor picketing was not subject to the stringent first amendment requirements which apply to most other forms of expression. In *Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe*, a case of great significance for the Landrum-Griffin bill, the Court also held that a state could validly ban secondary picketing in order to "insulate from [a labor] dispute an establishment which industrially has no connection with the dispute."

If the bill reached beyond picketing to other forms of publicity, however, it confronted far stricter constitutional requirements. Under modern first amendment doctrine, the government may forbid expression in the form of "pure" speech only in very limited circumstances. Proponents of such restrictions bear a particularly heavy burden when "pure" speech is prohibited because of its content rather than the "time, place, or manner" in which it is presented. In general,

53. The classic rationale for the distinction between picketing and other forms of publicity was that supplied by Justice Douglas:

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

55. See supra notes 51-54. Cf. infra text accompanying notes 58-68.
56. 315 U.S. 722 (1942).
57. Id. at 727.
the first amendment embodies the principle that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." 61

There are two exceptions to this general rule. One is based on the category of speech the government seeks to regulate or prohibit. Thus, a relatively modest showing of need may justify a content-based restriction if the type of expression in question is considered less favored in the general scheme of first amendment values. 62 Examples of these categorical exceptions include obscenity, "fighting words," 63 and purely commercial speech such as product advertising. 64

The other exception to the rule against content-based restrictions finds its justification solely in the adverse consequences that may flow from particular forms of speech in particular circumstances. Thus, even if the expression in question is of a type that normally receives strict first amendment protection, it may be restricted when the evils likely to follow from it are relatively certain, immediate, and serious. 65 This form of regulation is premised on the notion that the government may suppress some messages because of the effect they are likely to have on their hearers, and thus may indirectly control conduct by regulating the information and ideas available to the public. This justification is especially suspect under the first amendment because of its obvious potential for government abuse. 66 Consequently, any such restraint must be narrowly drawn 67 and must serve a compelling state interest. 68

61. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
63. Id. 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words.'"
64. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). The Court has had some difficulty in defining "commercial speech," as well as in determining its constitutional status under the first amendment. The Court has variously defined such speech as that which does "no more than propose a commercial transaction," that which "propose[s] a commercial transaction," and "expression related solely to the economic interests of the speaker and its audience." Comment, Standard of Review For Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego, 66 MINN. L. REV. 903, 919 n.84 (1982).
68. The general rule in such cases is stated as follows by Professor Tribe:
Opponents of the Landrum-Griffin bill were therefore rightly concerned that the broad scope of the bill's prohibition would violate the first amendment. If the bill proscribed non-picketing union publicity as unlawfully "coercive," it was clearly a content-based restriction.\(^6^9\) It applied to union publicity in any form, and thus could not have come within the "labor picketing" exception as a regulation of the "manner" of expression.\(^7^0\) Finally, it was not clear that the state's interest in protecting neutral employers was sufficient to outlaw "pure" union publicity. On the contrary, at least one member of the Supreme Court had suggested that peaceful secondary boycott appeals by unions were *fully* protected by the first amendment.\(^7^1\)

Congressional debate on union free speech and other issues continued in the House-Senate conference. The Senate's Democratic conferees attempted to narrow the bill's ban on union publicity.\(^7^2\) The conference committee eventually agreed on a compromise version of the bill. New section 8(b)(4)(ii) re-

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In order to establish that particular expressive activities are not protected by the first amendment, the defenders of a regulation which is aimed at the communicative impact of the expression have the burden of either coming within one of the narrow categorical exceptions [such as obscenity, "fighting words," etc.] or showing that the regulation is necessary to further a "compelling state interest."


\(^6^9\) See infra notes 210-13 and accompanying text.

\(^7^0\) See supra notes 52-57 and accompanying text.

\(^7^1\) Senator Humphrey, an opponent of Landrum-Griffin, quoted the dicta of Justice Stone in *United States v. Hutcheson*. From the floor, he said:

I ask the Senate to hold with Chief Justice Stone that the "publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him [or her] is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress."


\(^7^2\) Senator Kennedy characterized the response of the Senate's Democratic conferees to the original Landrum-Griffin bill:

I speak respectfully of the bill which was passed by the other body, but it seems to me that there were serious shortcomings in the reform bill which passed the House, and the conferees on the Democratic side . . . shared my view that we could not under any circumstances have voted for the Landrum-Griffin bill.

When we view the significant provisions of the Landrum-Griffin bill . . . in my opinion we must admit that they go far beyond reform . . . [T]he House bill would have prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant.

We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language
tained the original House language that made it unlawful for a union to "threaten, coerce, or restrain any person engaged in commerce" for the forbidden secondary "object" of forcing one business to cease trading with another.73 Appended to section 8(b) (4), however, was a "publicity proviso," which directed that nothing contained in [section 8(b)(4)] 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.74

The drafters of the publicity proviso were unable to convince proponents of the original bill to allow secondary consumer picketing.75 They were able to secure some protection for secondary "publicity, other than picketing,"76 but that protection seemed quite narrow. The proviso's protection extended only to non-picketing appeals informing the public that a secondary employer distributed the products of a disfavored primary producer. In any case, the conference had clearly recognized the important distinction between picketing and other forms of publicity. The Act's new prohibition extended to secondary consumer picketing, at least where it was "coerc[ive]." The general ban on coercion or restraint, however, did not outlaw union publicity in other forms that met the requirements of the proviso.

The threshold question in any case arising under a statute forbidding coercion or restraint is, of course, whether the challenged conduct falls within the fair reach of those terms. The now famous Tree Fruits case77 is central to an understanding of the approach of the Board and of the courts to the concept of "coercion" under the Landrum-Griffin amendments. In Tree Fruits, the union had engaged in consumer picketing in support of its strike against a group of fruit packers and warehousemen.78 Union members picketed Safeway food stores in

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74. Id. § 158(b)(4).
75. See id. "We were not able to persuade the House conferees to permit picketing in front of [the] secondary shop." 105 Cong. Rec. 17,898-99 (1959) (remarks of Senator Kennedy).
78. 132 N.L.R.B. at 1174-76.
Seattle, Washington, because Safeway sold the "struck product," Washington State apples. The union's picket signs and handbills carefully asked only that consumers refuse to buy the struck product, and not that they refrain from shopping at Safeway. The question before the Board was whether such "product picketing" calling only for a boycott of the struck product amounted to "coercion" of the secondary retailer that sold it. The case came before the Board entirely on stipulated facts. The stipulation included no information concerning the actual effect the picketing may have had on Safeway's retail business generally, or even on its apple sales. The complaint alleged, inter alia, a violation of new section 8(b)(4)(ii), forbidding the direct "coerce[d] or restrain[t]" of the secondary employer.

The Board held that the union had violated this new section. It had "coerce[d] or restrain[ed]" Safeway directly because the "natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of [Washington State] apples." Because the union had intended this result, it had violated Landrum-Griffin's prohibitions on secondary picketing.

On a petition to enforce the Board's order, the circuit court rejected what it termed the Board's "per se" approach to coercion or restraint under section 8(b)(4)(ii). Although picketing had traditionally been subject to far stricter regulation than handbilling or other "pure" speech, the court doubted that Congress could constitutionally forbid all secondary picketing.

79. The union pickets wore placards that read: "TO THE CONSUMER: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON." Id. at 1175. The union also distributed handbills that told consumers that the 1960 Washington State apple crop was being packed by non-union firms. Id. The union gave written instructions to all pickets directing them not to interfere with any deliveries or with Safeway's employees. They were not to state to anyone that Safeway was on strike or unfair, nor were they to ask any consumer not to shop at Safeway. Id. at 1174-75.

80. Id. at 1177.

81. Id. at 1172-76.

82. Id. at 1173.

83. Id. at 1177.

84. Id. at 1177-78.


on the theory that it constituted per se "coerc[ion] or restrain[t]" of the secondary firm. The court suggested that the Board could ban even peaceful picketing when it had caused or was likely to cause substantial economic injury to the secondary employer. This, however, was a matter of fact requiring proof, and the Board had taken no evidence on this issue. The court therefore remanded the case to the Board with instructions that the Board take evidence on whether the picketing had coerced or restrained Safeway "in fact."

On appeal, the United States Supreme Court rejected both conclusions reached below. The Court agreed that the statute raised potentially serious first amendment problems and stated that it would not infer a congressional intent to impose a "broad ban" on peaceful picketing absent the "clearest indication in the legislative history" of such an intent. The Court instead ascribed to Congress a policy of dealing narrowly with "isolated evils" in this "sensitive area." The majority then concluded that consumer picketing which limited its boycott appeal to the struck or disfavored product did not present the secondary "abuses" that Congress had sought to outlaw. While such picketing was clearly "secondary" in nature, it was nonetheless "closely confined to the primary dispute" because the public was asked "only to boycott the primary employer's goods."

The Court also decided, based on a somewhat tortured reading of the legislative history, that the requisite

87. 308 F.2d at 316. The court noted that the union had taken successful steps "to prevent its picketing from having the customary 'signal' effect" on the employees of the secondary. Id. (emphasis in original). The picketing in Tree Fruits may therefore have been "closer to the core notion of constitutionally protected free speech than the picketing the Supreme Court has held may be banned," because such an appeal was directed solely at the general public. Id. See supra notes 40-41.

88. 308 F.2d at 317.

89. Id. at 318.

90. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 63 (1964) (quoting NLRB v. Drivers, Local Union No. 639 (Curtis Bros.), 362 U.S. 274, 284 (1960)).

91. 377 U.S. at 63-64.

92. Id. at 72.

93. Id. at 63.

94. The Court noted that Congressman Griffin had not listed consumer picketing among the evils his bill was directed at when he first introduced it. Id. at 67 (citing 105 CONG. REC. 15,531-32 (1959)). When Congressman Griffin later addressed the issue he referred only to picketing that called for a total boycott of the secondary firm. 377 U.S. at 67-68 (citing 105 CONG. REC. 15,673 (1959)). See supra note 43. Thus, the Court attributed to Congress a clear intent only to ban picketing that asked the public not to do any business with the secondary firm. 377 U.S. at 70-71. The Court then confronted the argument that the language of the publicity proviso, specifically excluding picketing from the
clear intent to ban such picketing had not emerged.\textsuperscript{95} Therefore, the Court held that consumer picketing limited to the disfavored product did not “threaten, coerce, or restrain” the secondary business and fell entirely outside the proscription of section 8(b)(4)(ii).\textsuperscript{96} Such picketing did not depend, as it hardly could have, on the publicity proviso for protection.\textsuperscript{97}

The three dispositions of the \textit{Tree Fruits} case explored the three major possible approaches to “coerc[ion] or restrain[t]” under section 8(b)(4)(ii). A union’s campaign could be coercive per se, as the Labor Board had concluded; its coerciveness could depend on the facts of the case, as the District of Columbia Circuit had suggested; or, as the Supreme Court declared, it could be non-coercive per se.

The Supreme Court in \textit{Tree Fruits} narrowed the reach of the statute’s ban on “coercion” expressly to avoid the constitutional problems a broad reading might present. The Board, however, refused to extend this reasoning beyond the facts of that case. Picketing appeals that followed the struck product were allowed only if, as in \textit{Tree Fruits}, consumers could boycott the primary product without boycotting the secondary employer altogether. Thus, where the secondary firm depended in large part on the primary product for its revenue,\textsuperscript{98} or the primary area of protection, indicated that Congress considered all secondary picketing coercive. In meeting this argument the Court relied on a statement of Senator Kennedy. The proviso, he said, preserved “[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.” \textit{Id.} at 70 (quoting 105 \textsc{Cong. Rec.} 17,898 (1959) (emphasis added by the Court)). The Court concluded that the proviso could have been added in order to protect nonpicketing publicity that asked consumers to boycott both the struck product and the secondary firm that sold it. \textit{377 U.S.} at 70-71. The proviso’s wording did not compel the conclusion that Congress found all secondary picketing coercive. It only meant that secondary picketing calling for a total boycott of the secondary was within the congressional definition of “coercion or restraint.” \textit{Id.} Dissenting Justice Harlan thought the majority, in emphasizing the word “and” in Senator Kennedy’s remark, was “grasping at straws, if indeed the phrase relied on may not equally well lend itself to a disjunctive reading.” \textit{Id.} at 87 (Harlan, J., dissenting).

\textsuperscript{95} \textit{377 U.S.} at 71.

\textsuperscript{96} \textit{Id.} at 71-73.

\textsuperscript{97} The proviso protects only publicity “other than picketing.” See supra note 24.

\textsuperscript{98} But see \textsuperscript{Local 14055, United Steelworkers v. NLRB (Dow Chemical Co.), 524 F.2d 853, 857 (D.C. Cir. 1975), (“In our view the \textit{[Tree Fruits]} decision . . . may not be limited in its application to a factual situation in which the struck product constitutes only a small part of the business of the secondary retailer . . . ”), vacated and remanded, 429 U.S. 807 (1976). This problem had been anticipated by Justice Harlan in his \textit{Tree Fruits} dissent. See \textit{377 U.S.} at 83 (Harlan, J., dissenting). The Supreme Court finally settled the issue in NLRB
mary product became "merged" with that of the secondary,\textsuperscript{99} picketing of the secondary remained illegal because a successful boycott of the primary product would have the same effect as a total boycott of the secondary firm. Significantly, the Board refused to treat non-picketing secondary boycott publicity any differently. The Board saw no difference between picketing and other publicity as a matter of "coerc[ion] or restrain[t]." All secondary publicity as defined by the Act remained coercive per se in cases beyond the narrow holding of the Supreme Court in \textit{Tree Fruits}.\textsuperscript{100}

While the Board's conclusion on the issue of "coercion" generally has been predictable, the reasoning used to reach it has rarely been clear. In \textit{Middle South},\textsuperscript{101} for example, the Board found the union's campaign coercive because it "threatened economic retaliation against the [secondary] firms by seeking to induce individuals not to trade with the listed firms."\textsuperscript{102} The fact that a few such firms acted in accord with union wishes "demonstrated" the existence of coercion.\textsuperscript{103} This reasoning is ambiguous because it is not clear whether the actual effects on the secondary firms are relevant to the determination. The Board may have held the union's campaign

\textsuperscript{99} See, e.g., American Bread Co. v. NLRB, 411 F.2d 147, 154 (6th Cir. 1969); Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952, 955-57 (D.C. Cir. 1968).

\textsuperscript{100} The Ninth Circuit reversed the Labor Board's first \textit{Great Western} decision, and remanded the case to the Board for elaboration, inter alia, of the meaning of "coercion or restraint" under the Act. Great W. Broadcasting Corp. v. NLRB, 310 F.2d 591, 600 (9th Cir. 1962). \textit{See infra} note 113. The union in \textit{Great Western} had distributed leaflets calling for a secondary boycott and had warned other firms that their names would be added to the boycott list if they continued to deal with the primary employer. The union did not, however, engage in any picketing. American Fed'n of Television & Radio Artists, Local 55 (Great W. Broadcasting Corp.), 150 N.L.R.B. 467, 468-69 (1964). The Board, on these facts, found the actions coercive, and employed several verbal formulations of the per se test in explaining why this was so. The Board found that the union's activities were coercive because they were "part of a campaign calculated to bring economic pressure upon" the secondary firms, \textit{id.} at 469, because the activities were "directed toward the institution of a boycott," \textit{id.} at 471, and because the union's "object was the institution of a total boycott," \textit{id.} at 470. \textit{See also} International Union of Operating Eng'rs, Local 139 (Oak Constr. Inc.), 226 N.L.R.B. 759, 765 (1976) (union's handbilling campaign coercive because it was "designed to harass" the secondary firm).

\textsuperscript{101} Local 662, Radio & Television Eng'rs (Middle S. Broadcasting Co.), 133 N.L.R.B. 1698 (1961).

\textsuperscript{102} \textit{id.} at 1714.

\textsuperscript{103} \textit{id.}
coercive because the foreseeable and likely effects on the secondary businesses, such as significant economic loss, made it so. If this reading of the case is correct, the fact that a number of firms ceased trading with the primary is relevant to the issue of what those foreseeable effects were. The union had "threatened" economic loss in fact, because its campaign was likely to cause such loss. On the other hand, the union may have violated the Act merely by "seeking to induce" a boycott. If so, the actual effects of its campaign would be irrelevant; it would suffice that the union had circulated publicity with a forbidden secondary "object" or intent.\textsuperscript{104}

The Board's analysis in Tree Fruits\textsuperscript{105} presents this ambiguity in a slightly different form. The Board found the challenged picketing coercive because its "natural and foreseeable result, if successful,"\textsuperscript{106} would be to compel some action on the part of the secondary. This reasoning appears to emphasize the foreseeable effects of the union's campaign. The further qualification for "success," however, indicates that this apparent emphasis is misleading. The Board did not find the union campaign coercive in the case before it. Rather, it found that a hypothetical "successful" campaign would be coercive. One may assume, of course, that unions always intend their campaigns to be successful. Just as clearly, some of them will in fact fail. The Board's reasoning in Tree Fruits thus suggests that it is the union's aim which makes its actions coercive, rather than the foreseeable effects of those actions themselves.\textsuperscript{107} The distinction between an "effects" and an "intent" test has important ramifications for a case like Delta Air Lines, where at least a portion of the union's campaign was unlikely to have more than a negligible economic impact on the secondary's business.\textsuperscript{108}

105. See supra text accompanying notes 83-84.
106. 132 N.L.R.B. at 1177.
107. The view that the statute outlaws boycotts that would be coercive "if successful," and therefore bans all picketing that has a secondary "object," was expressly adopted by the Sixth Circuit in Kroger Co. v. NLRB, 647 F.2d 634, 639 (1980). The circuit court reversed a Board holding that partly relied on a lack of economic effect on the secondary to find that the primary employer's product had not become "merged" with that of the secondary. See United Paperworkers Int'l Union, Local 832 (Duro Paper Bag Mfg. Co.), 236 N.L.R.B. 1525, 1527 (1978). The Court stated that the Board should have ignored the actual effect of the picketing, and "should have restricted its inquiry to the likely result of the union's appeal if it had accomplished its object, a boycott of the [primary product]." 647 F.2d at 639.
108. See infra note 140 and accompanying text.
If the Board finds that union conduct constitutes "coercion" forbidden by the statute, it must then decide whether the publicity proviso protects any portion of the union's campaign. The publicity proviso makes the form of the union's appeal crucial. It exempts from the statute's broad ban on union coercion only "publicity, other than picketing."\(^{109}\) Such publicity will normally take the form of "pure" speech, however, and thus should be entitled to full first amendment protection.\(^{110}\) Because Landrum-Griffin's ban on "coercion" aims at the content of union expression,\(^{111}\) its restrictions on non-picketing publicity must be narrowly drawn to serve a compelling state interest.\(^{112}\) The scope of the proviso's protection is therefore critical to the constitutionality of section 8(b)(4)(ii)(B). The Board has often expressly recognized this.\(^{113}\) While continuing to label all secondary boycott publicity not covered by *Tree Fruits* coercive per se, the Board has

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110. *See supra* notes 50-71 and accompanying text.
111. *See infra* note 200.
112. *See supra* notes 65-68 and accompanying text.
113. In American Fed'n of Television & Radio Artists, Local 55 (Great W. Broadcasting), 150 N.L.R.B. 467 (1964), the Board found a secondary boycott of the customers of a struck radio station protected by the proviso. *Id.* at 472. The Board stated that "*Tree Fruits* demonstrated the propriety of avoiding the constitutional problem in this difficult area, if possible. Our interpretation of the proviso does so." *Id.* at 472 n.14. The Board reiterated this view in United Steelworkers, AFL-CIO (Pet, Inc.), 244 N.L.R.B. 96, 102 n.33 (1979).

The circuit courts have expressly endorsed the Board's practice of construing the proviso broadly in order to avoid first amendment problems. Indeed, in at least two cases under the proviso, the circuit courts ordered the Board to consider the first amendment issue. Those courts, at least, thought the Constitution applied to administrative law, unlike the Board majority in *Delta Air Lines*, *see infra* notes 162-63 and accompanying text. The Ninth Circuit initially rejected the Board's broad reading of the publicity proviso announced in the first *Great Western* decision. *See* American Fed'n of Television & Radio Artists, Local 55 (Great W. Broadcasting Corp.), 134 N.L.R.B. 1617, *rev'd sub. nom.* Great W. Broadcasting Corp. v. NLRB, 310 F.2d 591 (9th Cir. 1962). The circuit court remanded the case to the Board to elaborate on the statutory meaning of "coercion," and also indicated that the Board should consider whether the union's activities were protected by the first amendment. 310 F.2d at 600. Before the Board rehearing occurred, the United States Supreme Court rendered its decision in NLRB v. Servette, Inc., 377 U.S. 46 (1964). That decision tended to support an expansive interpretation of the proviso. *Id.* at 54-56. Indeed, the Court stated that the proviso was as broad as "the prohibition to which it is an exception," thus apparently allowing unions to conduct any type of secondary boycott through non-picketing publicity. *Id.* at 55. The Board on remand therefore reaffirmed its holding that the publicity in *Great Western* fell within the proviso's protection, and found it unnecessary to reach the first amendment issue. "That issue would rise only if we found the actions were coercive and not protected by the proviso to [§ 8(b)(4) of] the Act." American Fed'n of Television & Radio Artists, Local 55 (Great W. Broadcasting Corp.), 150
The Board has often suggested that its broad reading of the proviso is based on the legislative intent underlying the proviso's somewhat confusing language. Some of the Board's holdings under the proviso seem to reflect that intent. Others, however, would be anomalous as a matter of statutory interpretation were the Board not consciously attempting to avoid grave first amendment issues.

114. See supra note 113. See also infra notes 118-30 and accompanying text.

115. See Local 662, Radio & Television Eng'rs (Middle S. Broadcasting Co.), 133 N.L.R.B. 1698, 1704-05 (1961).

116. In Middle South, the Board held that the proviso protects a nonpicketing appeal for a total consumer boycott of the secondary firm. The trial examiner quoted Senator Kennedy's request that the Senate instruct him and his fellow Senate conferees to insist on some "necessary limitations" on the reach of Landrum-Griffin. Among these was that "[w]orkers would not be denied... the traditional right to ask the public not to patronize one who sells nonunion goods of a manufacturer engaged in a labor dispute." 133 N.L.R.B. at 1716 (quoting 105 Cong. Rec. 17,334 (1959) (emphasis added by the trial examiner)). Senator Kennedy also later explained to the Senate that "the Senate conferees insisted that the report secure the following rights:... (c) The 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." 133 N.L.R.B. at 1716 (quoting 105 Cong. Rec. 17,898 (1959) (emphasis added by the Board)).

117. Senator Kennedy rather clearly stated his belief that the proviso protected only appeals to the public involving "goods made by nonunion labor." 105 Cong. Rec. 17,898 (1959). This is supported by the language of the proviso, which is expressly limited to appeals that advise the public that certain "products" are "produced" by the primary and "distributed" by the secondary. 29 U.S.C. § 158(b)(4) (1976). The Board, however, has not read the proviso to impose this limitation. See infra notes 118-28 and accompanying text. In Middle South, the Board held that the proviso protected a call to boycott all secondaries who advertised on a struck radio station. 133 N.L.R.B. at 1705-06. Plainly the primary radio station did not, at least in a traditional sense, "produce" a
The language of the proviso only allows a union to circulate publicity "for the purpose" of informing the public of its primary dispute and the secondary's relationship to that dispute. Nevertheless, the Board has consistently held that the proviso protects an appeal for a total boycott of the secondary firm. It is difficult to see how such an appeal could be "for the purpose of truthfully advising the public" of anything. The proviso expressly protects only a union's assertion that certain "products" are "produced" by a primary firm and are "distributed" by another. Yet the Board has found publicity campaigns lawful where the primary employer "produces" no "product," as well as where the secondary employer "distributes" none.

Despite the proviso's limitation to "truthful" publicity, the Board has long held that 100 percent accuracy is not required. The union's handbills need only be substantially truthful and distributed without an "intent to deceive." Handbills may even "advise" the public of the primary dispute when they fail to name the primary firm altogether. Apparently, the publicity must only make it relatively clear that the union's dispute is secondary in nature. Before Delta Air Lines, the definitive reading of the proviso appears to have

"product" "distributed" by all the secondary firms that advertised on it. One dissenting member of the Board was moved to mixed metaphor in response. He accused the majority of "add[ing] fuel to their fire of statutory emasculation." Id. at 1708 (Rodgers, M., dissenting).

118. 29 U.S.C § 158(b)(4) (1976).
120. 29 U.S.C. § 158(b) (4) (1976).
121. See supra note 117.
123. Id. at 920.
125. Two members of the Board in Delta Air Lines cast doubt on the continued validity of this rule. Chairman Van de Water and Member Hunter agreed that the union publicity in Delta was unlawful because in contained coercive and unrelated information about the secondary firm. 263 N.L.R.B. No. 153, slip op. at 11 n.13, 111 L.R.R.M. (BNA) at 1182 n.13. They therefore found it unnecessary to consider whether Handbill C, which failed to name the primary employer, sufficiently identified the primary labor dispute. Id. They also stated they did not have occasion to "pass on the Board's holdings in" The Edward J. DeBartolo Corp., 252 N.L.R.B. 702 (1980), or K-Mart Corp., 257 N.L.R.B. 86 (1981).
been that announced by the Board in *Oak Construction, Inc.* and recently reaffirmed in *K-Mart Corp.* The proviso permits "truthful publicity, other than picketing, which persuades customers of a secondary employer to stop trading with it ...." While this interpretation is supportable as a matter of free speech, it rather clearly writes a number of the proviso's words of limitation entirely out of the Act.

Given the Board's prior application of the coercion prohibition and the publicity proviso of section 8(b)(4), *Delta Air Lines* is significant for several reasons. In dealing with the issue of the "coerciveness" of consumer boycotts under section 8(b)(4)(ii)(B), the Board's attempt to explain and justify the traditional approach to this issue resolves to some extent the ambiguities that infused the earlier decisions. The Board's strict reading of the publicity proviso in *Delta Air Lines*, on the other hand, represents a dramatic departure from prior law. In connection with its narrow reading of the proviso, the Board announced a perplexing new attitude toward construction of the statute to avoid constitutional issues. The issues of "coercive" publicity and the proviso's protection of it are, of course, related. In *Delta Air Lines*, the Board's narrow construction of the proviso focuses attention on its traditional, broad approach to coercion or restraint. The case raises serious first amendment questions about the Board's rule that all secondary union publicity, even in the form of "pure" speech, "coerc[es] or restrain[s]" secondary employers.

The majority in *Delta Air Lines* took the Board's traditional approach to the issue of statutory "coercion" in the consumer boycott area. The majority had little trouble finding all the handbills and both newspaper advertisements presumptively "coercive" of Delta, the secondary firm. They did, however, have some difficulty in explaining precisely why this was so. The majority initially stated that the publicity had coerced the airline because it was "designed to bring economic pressure on Delta" for a secondary object. This is clearly a union intent.

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129. See infra text accompanying notes 200-10.
130. See supra note 117.
131. See supra text accompanying notes 101-08.
132. See supra notes 118-30 and accompanying text.
133. See infra notes 162-64 and accompanying text.
134. 263 N.L.R.B. No. 153, slip op. at 6, 111 L.R.R.M. (BNA) at 1161.
standard. The union coerced Delta because its campaign was “designed” to do so.\textsuperscript{135}

In a later footnote, however, the majority asserted that a union coerces or restrains an employer when it “imposes economic pressure against [the] secondary firm.”\textsuperscript{136} This is rather plainly an “effects” standard. Under this test a union’s campaign would have to succeed in imposing some palpable economic pressure before it could be outlawed. Finally, in explaining specifically why the boycott messages in the union’s own newspapers were coercive, the majority employed yet a third formulation. The advertisements coerced Delta because they were “part of” the union’s effort to institute a boycott.\textsuperscript{137} “[B]y publishing Handbills A and C and carrying its appeal to a broader segment of the public, [the union] clearly expanded the scope of the primary dispute. Since the effect of the newspaper advertisements is to enmesh Delta in the primary dispute between [the union] and Statewide,” the majority concluded that the union had coerced Delta Air Lines within the meaning of the Act.\textsuperscript{138}

Member Jenkins dissented from the majority’s holding that the publication of Handbills A and C in the union’s internal newspapers was coercive. He rejected the majority’s “union intent” approach. In his view the question of coercion went “not to Respondent’s motives ‘but to the nature and foreseeable consequences of the pressure which the union actually placed’ on Delta.”\textsuperscript{139} Member Jenkins believed that the advertisements were unlikely to have more than a “trivial” effect on Delta’s business. Indeed, the majority did not argue the contrary.\textsuperscript{140} Therefore, Member Jenkins would have held that the publications were not “attended by the abuses at which the statute

\textsuperscript{135} Id. See also supra note 100.

\textsuperscript{136} Id. at 12 n.14, 111 L.R.R.M. (BNA) at 1162 n.14.

\textsuperscript{137} Id.

\textsuperscript{138} Id.

\textsuperscript{139} Id. at 30, 111 L.R.R.M. (BNA) at 1167 (Jenkins, M., concurring in part and dissenting in part) (quoting Soft Drink Workers Union Local 812 v. NLRB (Monarch Long Beach Corp.), 657 F.2d 1252, 1263 (D.C. Cir. 1980)).

\textsuperscript{140} Id. at 12 n.14, 111 L.R.R.M. (BNA) at 1162 n.14. The majority found Member Jenkins’s view “contrary to both the statute and reality.” Id. The newspaper advertisements had coerced Delta because they “expanded” the dispute and “enmeshed” Delta in it. Id. Because these concepts merely restate the Board’s legal conclusion, see infra text accompanying notes 169-72, the role played by “reality” in this discussion is not clear. The Board majority did not, at any rate, argue that the newspaper ads were likely to cause any significant economic harm to Delta Air Lines.
was directed, 141 and thus did not "coerce or restrain" Delta within the meaning of the Act. Although the issue was one of statutory construction, he also felt that a proper adherence to first amendment principles compelled his narrower approach. 142

The second major issue in the case was whether the union's campaign was to any extent protected by the publicity proviso to section 8(b)(4). 143 All members of the Board agreed that neither Handbill A nor B was protected. These handbills contained only the assertion that Delta was unfair, together with the claim that it took "nerve" to fly on one of the company's planes. At a minimum, however, the statutory language required that such publicity inform the public of the union's primary dispute. 144 Because neither of these handbills did so, neither was protected. 145

The Board majority, with member Zimmerman dissenting, held that Handbills C and D were similarly unprotected. While both may have sufficiently identified the primary dispute, they also contained the accident and consumer complaint information about Delta which was unrelated to that dispute. 146 Delta failed to support its claim before the Board that its safety record was as good as that of any other airline. The Board therefore assumed not only that the information was truthful but that it was not even misleading as to the relative safety of Delta's flights. 147 Nevertheless, the union had violated the Act because it had not distributed the information "for the [protected] purpose of truthfully advising the public" of the primary labor dispute. 148 The Board held that a union may circulate what it called "coercive information" only for this "purpose." 149 Although the Board did not define "coercive information," union messages "attacking a secondary employer on grounds . . . unrelated to the primary dispute" were within the definition and prohibited. 150

141. 263 N.L.R.B. No. 153, slip op. at 30, 111 L.R.R.M. (BNA) at 1167 (Jenkins, M., concurring in part and dissenting in part).
142. Id. at 31, 111 L.R.R.M. (BNA) at 1167 (Jenkins, M., concurring in part and dissenting in part).
144. 263 N.L.R.B. No. 153, slip op. at 6, 111 L.R.R.M. (BNA) at 1161.
145. Id. at 7, 111 L.R.R.M. (BNA) at 1161.
146. Id. Cf. supra note 125.
147. Id. at 5 n.7, 111 L.R.R.M. (BNA) at 1160 n.7.
148. Id. at 10, 111 L.R.R.M. (BNA) at 1161.
149. Id. at 9, 111 L.R.R.M. (BNA) at 1162.
150. Id. at 9, 111 L.R.R.M. (BNA) at 1161.
In support of its holding the majority noted the similarity between the union handbills in *Delta Air Lines* and those at issue in the Supreme Court's *Jefferson Standard* decision. In *Jefferson Standard*, the union had attacked a primary employer's product in handbills that contained no reference to the ongoing labor dispute. The employer fired those responsible in retaliation. The Board and the Supreme Court refused to find the dismissals to be an unfair labor practice. The Supreme Court held that the union's publicity campaign had constituted "such detrimental disloyalty" to the business that it was "good cause" for discharge, and beyond the pale of the Act's protection in section 7 for "concerted activities." In *Delta Air Lines*, the Board read *Jefferson Standard* to hold that union publicity is not protected by section 7 of the Act in the absence of a "nexus" between the content of the publicity and a labor dispute. The handbills in *Delta* were not protected by the publicity proviso because the information about Delta Air Lines lacked this nexus.

Member Zimmerman dissented from the holding that Handbills C and D violated the Act. He argued that the proviso required only that the union identify the primary dispute. Once that "purpose" was fulfilled, the union could add what information it chose in support of its boycott appeal, at least where such information was truthful. Handbills C and D informed the public of the primary dispute and contained only truthful information. Their distribution and Handbill C's publication were therefore within his reading of the publicity proviso. Member Zimmerman found support in the legislative history for this reading. He also thought the first amend-

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152. 94 N.L.R.B. 1507, 1511 (1951).
153. 346 U.S. at 477.
154. Id.
156. 263 N.L.R.B. No. 153, slip op. at 11 n.12, 111 L.R.R.M. (BNA) at 1162 n.12.
157. Id.
158. Id. at 34, 111 L.R.R.M. (BNA) at 1168 (Zimmerman, M., concurring in part and dissenting in part).
159. Id. at 50, 111 L.R.R.M. (BNA) at 1172 (Zimmerman, M., concurring in part and dissenting in part).
160. Id. at 35-42, 111 L.R.R.M. (BNA) at 1168-70 (Zimmerman, M., concurring in part and dissenting in part). Member Zimmerman noted that "the legislative history of the publicity proviso is limited essentially to two statements by then Senator John F. Kennedy." Id. at 35, 111 L.R.R.M. (BNA) at 1168. One states that the House bill reached non-picketing publicity and "thereby interfer[ed] with freedom of speech." Id. (citing 105 CONG. REC. 16,591 (1959)). The other
The majority refused to consider the first amendment issues raised by *Delta Air Lines*. The majority noted that as an administrative agency, the Board must presume the constitutionality of the statute it is charged with administering. The Board therefore stated that it would also presume the constitutionality of its own finding of a violation of that statute in the case before it. The majority responded to the union's first amendment arguments by ignoring them. Both Member Jen-

contains the assertion that the publicity proviso allows unions to "carry on all publicity short of having ambulatory picketing in front of a secondary site." *Id.* at 36, 111 L.R.R.M. (BNA) at 1168 (quoting 105 CONG. REC. 17,899 (1959)).


162. *Id.* at 13, 111 L.R.R.M. (BNA) at 1163.

163. *Id.* The Board majority's approach to this issue borders on the incomprehensible. Courts have, of course, traditionally denied administrative agencies the power to declare statutes unconstitutional. See Note, The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 HARV. L. REV. 1682, 1682 n.1 (1977) and cases cited therein. The duty of an agency to consider constitutional claims properly before it, however, and the power to construe statutes to avoid constitutional issues has rarely been questioned. See *id.* at 1688 n.34 and cases cited therein. In at least two cases under the section of the Labor Act at issue in *Delta Air Lines*, the circuit courts have expressly endorsed the view that the Board should consider the Constitution in interpreting the Act. See supra note 113. Indeed, it would have been surprising had they done otherwise. In both of these cases, as well as in others under this section, the Board explicitly responded by construing the publicity proviso broadly to avoid potential constitutional conflict. See supra note 113. Indeed, in a case arising under another section of the Act, the Board went so far as to refuse to reach an unconstitutional result even though it thought the "mandatory language" of the Act required that result. *Bekins Moving & Storage*, 211 N.L.R.B. 130, 139 (1974). By contrast, the majority in *Delta Air Lines* simply refused to consider the matter. 263 N.L.R.B. No. 153, slip op. at 14, 111 L.R.R.M. (BNA) at 1163. They stated explicitly that they "shall presume that our finding of a violation here is in accordance with the Constitution." *Id.*

The majority rightly asserted that an administrative agency should presume the constitutionality of the statute it is charged with administering. *Id.* at 13, 111 L.R.R.M. (BNA) at 1163. But it does not follow that it may also "presume" the constitutionality of its own holding. The Board here bluntly stated that it will refuse to consider the Constitution when it finds a violation of the Act. The doctrine that statutes should be construed to avoid constitutional issues, however, only comes into play when there has arguably been a violation of law. No tribunal needs to resort to such a doctrine where clearly no party before it has violated any statute. If the Board intends to "presume" that every violation of law it pronounces accords with the Constitution, it is difficult to see what is left of this rule of statutory construction. The Board nowhere explained why it apparently feels at liberty to disregard the Constitution until squarely overruled by a federal court. This attitude is, however, very nearly lawless.
kins and Member Zimmerman, on the other hand, believed that the Constitution imposes constraints on the Board's construction of the statute.\textsuperscript{164}

The majority's analysis of statutory "coercion" in the consumer boycott area is revealing. The Board stated that a union engages in coercion when it "imposes economic pressure" on a secondary firm.\textsuperscript{165} The majority then asserted that the union had done so in \textit{Delta Air Lines}.\textsuperscript{166} This would surely be an acceptable definition of coercion had it been announced in a different case. If the Board finds on evidence that a union has caused economic injury to a secondary firm, it may indeed conclude that coercion or restraint is present. Unfortunately, however, the Board in \textit{Delta} simply knew nothing about whether the Service Employees Union "imposed economic pressure" on Delta Air Lines or anyone else. The parties produced no evidence on this issue, and the Board required none.\textsuperscript{167} Thus it is misleading to imply, as this passage does, that a violation of the Act turned on the "effect" of the union's campaign on Delta's business.\textsuperscript{168}

The Board was less misleading in explaining why the advertisements in the union's newspapers coerced Delta. They did so because they "enmeshed" Delta in the union's primary dispute.\textsuperscript{169} Again, however, this is true regardless of whether the union caused any economic injury to the secondary, or even whether any economic harm was likely. Since the Board requires no such showing of palpable harm, it may easily find that any true "secondary" boycott publicity has unlawfully "enmeshed" the secondary firm in the union's dispute in a metaphysical or emotional sense.

The Board also found the advertisements coercive because they "expanded the scope of the primary dispute" by "carrying [the union's appeal] to a broader segment of the public."\textsuperscript{170} As Member Jenkins pointed out in dissent, however, it seems strange to say that a communication between parties to a dispute broadens its scope.\textsuperscript{171} The union and its membership

\begin{itemize}
\item \textsuperscript{164} 263 N.L.R.B. No. 153, slip op. at 31, 111 L.R.R.M. (BNA) at 1167 (Jenkins, M., concurring in part and dissenting in part); \textit{id.} at 45, 111 L.R.R.M. (BNA) at 1171 (Zimmerman, M., concurring in part and dissenting in part).
\item \textsuperscript{165} \textit{id.} at 12 n.14, 111 L.R.R.M. (BNA) at 1162 n.14.
\item \textsuperscript{166} \textit{id.}
\item \textsuperscript{167} See \textit{supra} note 18 and accompanying text.
\item \textsuperscript{168} 263 N.L.R.B. No. 153, slip op. at 12 n.14, 111 L.R.R.M. (BNA) at 1162 n.14.
\item \textsuperscript{169} \textit{id.}
\item \textsuperscript{170} \textit{id.} at 13 n.14, 111 L.R.R.M. (BNA) at 1163 n.14.
\item \textsuperscript{171} \textit{id.} at 30, 111 L.R.R.M. (BNA) at 1167 (Jenkins, M., concurring in part}
were clearly parties to the primary labor dispute in the case. On the other hand, the majority's reference to the "public" indicates a concern that the newspapers might fall into the hands of non-members as well. This may of course happen. If it does, the publication will have broadened the dispute beyond what it would have been without the publication. That, however, is true of every communication of a boycott message. This analysis therefore does little more than restate the majority's initial conclusion that any and all secondary boycott publicity "coerces" the targeted secondary business.

Thus it seems that the majority's analysis of "coercion" ends where it began: the union's campaign coerced Delta because it was part of an effort "designed" to induce a boycott. The union intended to reduce Delta's business, and therefore coerced or restrained an international air carrier. The conclusion seems inescapable that mere publication of a boycott call with the requisite intent will violate federal law, unless the message falls within the protection of the publicity proviso. While there must surely be a limit to this rationale, it is not at all clear where that will be. Perhaps the circulation of a boycott message among members of a union's executive committee would not be illegal. If the same message were communicated to the union's members at a general membership meeting, let alone at a large meeting on the national level, a union might pass the line of legality. Surely one could argue that such communications "enmeshed" the secondary firm or expanded the dispute, given the application of those concepts in Delta Air Lines. There is in principle no obvious stopping point to the Board's rationale.

Despite these questions about the reach of the Board's "union intent" view of coercion, that analysis has to an extent dispelled the confusion created by the earlier cases. The Board traditionally at least discussed the "foreseeable" or "likely" effects of a union's campaign on the secondary business, even if the part these concepts played in the decisions was never very clear. By contrast, the majority in Delta Air Lines appears unconcerned with the actual effects of union propaganda. Their analysis, when stripped of its legal labels,

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172. Id. at 6, 111 L.R.R.M. (BNA) at 1161. See also supra note 100.
173. See supra notes 101-08 and accompanying text.
makes "coercion" of the secondary employer turn entirely on the intent of the union.175 Any secondary publicity as the Act defines it will be coercive per se. This approach is admittedly more straightforward than some earlier formulations of the coercion standard. The Board's position, however, is wholly unacceptable on both statutory and constitutional grounds.

Legally, "coercion" means the use of some power to overbear the will of another.176 "Restraint" is the abridgement of liberty.177 The Board should read the terms "coerce" and "restrain" in section 8(b)(4)(ii)(B) in their normal legal sense unless it clearly appears that Congress intended another meaning.178 On this view a union would "coerce" a secondary business only if imposed, or was likely to succeed in imposing, sufficient economic harm to compel a reasonable employer to take some action against its will. Surely some secondary publicity, such as the union newspaper notices in Delta Air Lines, would not have this effect. While a company may not like what union newspapers say about the firm, it cannot claim to have been "coerced" by the union's words merely because it has been displeased or embarrassed by them.

The Board may believe, however, that Congress indeed intended the terms "coerce" and "restrain" to have other than their normal meanings. Lurking behind the Board's analysis may be the view that because Congress exempted some "publicity" from its ban on "coercion," Congress considered all secondary publicity coercive. If this form of statutory interpretation in fact underlies the Board's position,179 how-

175. See supra notes 165-72 and accompanying text.
178. "The law uses familiar legal expressions in their familiar legal sense." Henry v. United States, 251 U.S. 393, 395 (1920) (Holmes, J.). "Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism." Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 537 (1947).
179. In support of its holding that the union's newspaper advertisements coerced Delta, the Board points out that "[t]he publicity proviso expressly provides that for the purposes of section 8(b)(4) the term 'public' includes members of a labor organization." 263 N.L.R.B. No. 153, slip op. at 13 n.14, 111 L.R.R.M. (BNA) at 1163 n.14. Although the Board does not make clear what relevance it believes this has, it seems that the language of the publicity proviso could support the Board's view of coercion only via the opposite inference outlined in the text. The majority here seems to assert that because publicity within the proviso's protection when directed at "members of a labor organization" is protected, publicity outside that area directed at them is prohibited. If this is indeed the inference the majority draws from the proviso's language, its
ever, it is open to a number of criticisms.

This reading of the statute is in no way compelled by the statutory language itself. The publicity proviso's exception does indicate that Congress thought some secondary publicity might be coercive. It does not follow from this that Congress believed all such publicity was coercive. Moreover, to the extent that the Board relies on the proviso to define "coercion," it relies on the meaning ascribed to that term by the opponents of Landrum-Griffin. The strongest support for the Board's view in the legislative history also comes from those who opposed the entire section. The "fears of the opposition" are hardly authoritative sources for the interpretation of the "coerce or restrain" clause. Absent a clearer indication of Congressional in-

authors would probably be unpleasantly surprised. It seems far more reasonable to suppose that the proviso's Senate drafters wanted merely to insure that the word "public" was not read to exclude union members, and thus to deny protection to any publicity directed at them. The irony in the Board's use of this language is apparent. The Supreme Court properly rejected this artificial approach to statutory interpretation in Tree Fruits: "[I]t does not follow from the fact that some coercive conduct was protected by the proviso, that the exception "other than picketing" indicates that Congress had determined that all consumer picketing was coercive." 377 U.S. at 69. Although the Court's treatment of the legislative history concerning labor picketing in Tree Fruits is strained, see Kroger Co. v. NLRA, 647 F.2d 634, 640 (6th Cir. 1980) (Merritt, J., dissenting), its rejection of this form of interpretation seems well warranted.

180. See supra note 72 and accompanying text.
181. See supra notes 46, 72. A statement of Congressman Griffin, explaining the effect of his bill on "coercion" for a recognition objective, although not clear, lends some support to the Board's view:

We must look to the purpose of the picketing in the particular situation . . . where an object of the picketing is [recognitional], then the picketing in that case would be illegal . . . . This is subject, however, to the constitutional right of free speech. Unless the picketing is for the coercive purpose indicated, [that of compelling the employer to coerce its employees to join the union] it would not be affected by this language. In other words, whether it is the handing out handbills [sic] or putting an ad in the paper or picketing, if it is done in such a way as clearly to be nothing more than an exercise of free speech, then the provision would not be violated.

105 CONG. REC. 15,673 (1959). This could be read to mean that if handbilling or newspaper advertisements had a secondary purpose, they would be "more than an exercise of free speech" and would then be unlawful. On the other hand, the Congressman's reference to the "way" in which such messages are circulated indicates that perhaps some genuinely coercive effects are needed before such campaigns become "more than . . . free speech." In any event, Congressman Griffin appears to have shared the view of many in Congress that labor picketing was the very essence of "coercion." See supra notes 43, 45. Senator McClellan introduced a bill that would have made it unlawful for a union to "exert or attempt to exert any economic or other coercion against" any business for a forbidden object. This proposal, however, was not adopted. See 105 CONG. REC. 6666 (1959) (emphasis added). Cf. id. at 19,849 (remarks of Senator Dirksen).
tent, the Board should not ascribe this unusual meaning to the term "coerce."

Even if the Board's interpretation of "coercion" is an accurate reflection of Congressional intent, serious constitutional problems with this reading remain. This construction of Landrum-Griffin imposes content regulation on all union secondary publicity, and outlaws all that fails to comply. These burdensome restrictions on speech are constitutional only if they directly and narrowly serve the state's interest in protecting neutral businesses from actual coercive harm. In labelling all secondary publicity unlawfully "coercive," the Board ignores this constitutional constraint. Plainly some union publicity, such as the union's newspaper advertisements in *Delta Air Lines*, does not reasonably threaten significant economic harm to anyone. The state has no interest in regulating speech where this is true. The Board's approach leads it to suppress union speech on the mere complaint of any business. The Board's per se rule is therefore unconstitutional because in a substantial number of cases it leads to suppression of union speech where the state has no interest, or an insufficient interest, in the prohibition.

Not only does the Board's approach to "coercion" run afoul of the first amendment; its narrow reading of the proviso fails to mitigate that unconstitutional result. Of course even a broad reading of the proviso will not protect all publicity that the state has no interest in prohibiting. Under the Board's rule that all secondary publicity is per se coercive, some publicity that does not actually threaten neutral businesses with significant economic harm will be banned no matter what reading of the proviso is adopted. Nevertheless, a broad interpretation of

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184. See *Delta Air Lines*, 263 N.L.R.B. No. 153, slip op. at 30-31, 111 L.R.R.M. (BNA) at 1167 (Jenkins, M., concurring in part and dissenting in part). As noted above, the majority in *Delta Air Lines* did not disagree with Member Jenkins's factual conclusion that the internal union newspaper messages there were unlikely to cause significant losses to Delta. See *supra* text accompanying note 140. In *Oak Constr., Inc.*, 226 N.L.R.B. at 759, it was proved that the union's campaign asking customers to refuse to pay part of their phone bill had imposed permanent economic harm on the Wisconsin Telephone Company of about thirty dollars. The primary employer was the charging party. *Id.*
the proviso can substantially reduce the burden on union free speech imposed by the Act. It also seems clear that the Board's traditional broad approach to the publicity proviso has contributed substantially to Landrum-Griffin's constitutional survival.

In this context, the Board's refusal to consider the Constitution in deciding *Delta Air Lines* is troubling. Their reliance on *Jefferson Standard* demonstrates the sincerity of this refusal, even if it demonstrates little else. The two cases differ fundamentally, however. The *Jefferson Standard* holding that some pure speech may be grounds for dismissal from private employment in no way implies that the same speech, for the same reasons, may also violate federal law. Private employers are simply not subject to the constraints of the first amendment. At least before *Delta Air Lines*, the federal government was bound by the Constitution. The Supreme Court's holding in *Jefferson Standard* is therefore wholly irrelevant to the issues presented in *Delta*. Only the Board's total disregard for the Constitution explains its failure to see this crucial distinction.

In addition to offending first amendment values, the Board's narrow reading of the publicity proviso in *Delta Air Lines* is unsupportable purely as a matter of statutory construction. Legislative compromise, of course, often presents difficulties for those who must interpret its products, and section 8(b)(4) presents this truth in stark fashion. When

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186. Most obviously, the often crucial element of state action is missing in the former case. See, e.g., Hudgens v. NLRB, 424 U.S. 507, 513-21 (1976).

187. Id.

188. Senator Kennedy presented the bill to the Senate unenthusiastically: 
"[N]o one is fully satisfied with the product of compromise. . . . This bill is a compromise. . . . [W]e have before us . . . what I believe to be the only bill that it is possible to obtain under all the circumstances." 105 Cong. Rec. 17,898 (1959). See also Rosado v. Wyman, 397 U.S. 397, 412 (1970) (Harlan, J.):

The background of § 402(a)(23) [of the Social Security Amendments of 1967] reveals little except that we have before us a child born of the silent union of legislative compromise. Thus, Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding. Our chief resources in this undertaking are the words of the statute and those common-sense assumptions that must be made in determining direction without a compass.

189. "We are hardly original in recognizing that the meaning of § 8(b)(4)(ii)(B) is neither obvious nor intuitive." Soft Drink Workers Union Local 812 v. NLRB (Monarch Long Beach Corp.), 657 F.2d 1252, 1261 (D.C. Cir. 1980).
read literally, the proviso appears to create a vacuous exception. Section 8(b) (4) (ii) (B), in conjunction with the publicity proviso, makes it unlawful for a union to coerce an employer for a secondary "object," so long as this coercion does not take the form of publicity for a single protected "purpose." The problem, however, is that the only protected "purpose" is one that is inconsistent with the previously discovered "object." Thus the statute outlaws union campaigns that seek to compel one firm to cease doing business with another. The publicity proviso then commands that the Board exempt from that class those campaigns that seek only to truthfully advise the public of the primary labor dispute. If this were in fact a campaign's only objective, however, it would not have been unlawful in the first place, since the campaign could then not have had "an object" of forcing one business to cease trading with another.

There are two ways in which the Board might have avoided draining the proviso of its content. One way would have been to find publicity itself possessed of "purpose," separate from that of the union disseminating it. The other would have been to admit that a strict reading of the proviso is impossible, and to interpret it to allow a union to circulate publicity that in fact informs the public of the primary dispute, even though the union's real "purpose" is secondary. Prior Board cases followed the second alternative, allowing the union to disseminate truthful publicity that persuaded the public to boycott the secondary firm, as long as the union identified the dispute. The Board in Delta rejected that approach, yet did not adopt the first alternative either. Clearly the Board found the union's purpose to be controlling, since it held the Service Employees in violation of the Act because they "included" the information on Delta for a "purpose" other than that of advising the public. The use of the definite article in the proviso's "for the purpose" clause indeed suggests, as the Board here found, that

190. 29 U.S.C. § 158(b) (4) (ii) (B) (1976).
191. Id.
193. 263 N.L.R.B. No. 153, slip op. at 7, 111 L.R.R.M. (BNA) at 1161. The impossibility of the Board's reading of the proviso is demonstrated by its interesting treatment of Handbill D. In that handbill the union asserted that it was bringing the information about Delta to the public's attention in order "to publicize our primary dispute with Statewide." Id. at 4, 111 L.R.R.M. (BNA) at 1160. The union here had obviously attempted to come within the proviso by asserting that it was circulating its appeal for the "purpose" of publicizing its primary dispute. Far from having that effect, however, the Board took this statement of the union's as an admission of a forbidden secondary "object." Id. at 7-8, 111 L.R.R.M. (BNA) at 1161.
only publicity circulated solely for "the" protected purpose is saved by the proviso. This strict reading, however, threatens to write the proviso entirely out of the Act, because no campaign that had a secondary object would ever be rehabilitated by it.

The Board's strict construction of the proviso is also at odds with obvious industrial reality. The Board is surely correct in concluding that the union here did not distribute the challenged information on Delta "for the purpose of truthfully advising the public" of its primary labor dispute. It is equally clear, however, that the union did not call for a boycott of Delta for that "purpose" either. Unions publicize their disputes in order to bring the pressure of organized labor and its supporters to bear on "unfair" employers and to make it less attractive for others to deal with them. The union in Delta Air Lines acted for this "purpose" both when it called for a boycott and when it distributed truthful information about Delta to support it. Yet the boycott call by itself would be lawful despite this "purpose," while the other publicity renders the whole campaign unlawful because of it. The Board made no attempt to reconcile its reading of the proviso with the line of cases protecting secondary boycotts, or with the plain facts of industrial life.

The majority's approach to both the issues of statutory "coercion" and the scope of the publicity proviso suggests that a reappraisal of the law in this area is necessary. Any attempt to reform this area of the law must serve at least three purposes. It must protect "neutral" secondary businesses from serious economic harm to the extent constitutionally permissible; it must do so in a way that comports with labor's right to free speech; and it must seek to integrate this area of the law more fully into the broader "system of freedom of expression."

The Labor Act's broad restrictions on union speech often

194. The Administrative Law Judge below felt that the appeal to boycott Delta on the ground that it was "unfair" and did not "provide AFL-CIO conditions of employment" was "basically not out of line." 263 N.L.R.B. No. 153, slip op. app. IV at 3. The Board did not take issue with this.
195. 263 N.L.R.B. No. 153, slip op. at 8, 111 L.R.R.M. (BNA) at 1161.
196. The case that established the rule that the publicity proviso protects a call for a total boycott of the secondary firm is Middle S. Broadcasting Co., 133 N.L.R.B. 1698 (1961). The Board has consistently reaffirmed the rule in the intervening years. See supra notes 118-28 and accompanying text.
197. This, of course, was clearly the intent of Congress in § 8(b)(4)(ii)(B). See supra notes 45-46 and accompanying text.
198. See supra notes 58-68 and accompanying text.
seem at war with developed first amendment doctrine, and the two have yet to be wholly reconciled. The Supreme Court has upheld broad restrictions on labor picketing on the theory that picketing involves more than speech. Picketing is also conduct, as well as a "signal" to action on the part of others. This "signal" is said to have effects unrelated to the ideas expressed in the picket signs. At least where handbilling or other publicity does not "amount to picketing," these rationales are plainly unavailable. Handbills and newspapers rely entirely on their ideas for their force, and leave the recipient of the publicity completely free to act in accord with those ideas, or to refuse to do so. Yet because the courts have not integrated the restraints placed on "pure" union speech by section 8(b)(4) into modern first amendment theory, unions find themselves subject to restraints that would probably be unconstitutional if applied to other organizations. Professor Emerson has suggested that the law's hos-

200. In §8(b)(4)(ii)(B) cases, the Board must examine the content of the publicity, as well as the circumstances of its distribution, to determine whether it has a forbidden secondary "object." See Delta Air Lines, 263 N.L.R.B. No. 153, slip op. at 7, 111 L.R.R.M. (BNA) at 1161. The prohibition of §8(b)(4) is not triggered unless this object is found. The Act protects "neutral" firms by prohibiting unions from communicating boycott messages. This makes the restriction one clearly "intended to control the content of speech." Cf. Konigsberg v. State Bar, 366 U.S. 36, 50 (1961). Compare Tribe's statement of the general rule in cases involving content-based regulations of speech, supra note 68, with the language in Delta Air Lines, stating that the rule that all union secondary publicity must relate to the primary dispute serves the congressional purpose in §8(b)(4) because it limits a union's ability to "enmesh neutrals in other employers' labor disputes . . . as much as possible." 263 N.L.R.B. No. 153, slip op. at 9, 111 L.R.R.M. (BNA) at 1162. Member Zimmerman refused to construe the proviso to prohibit publicity that was merely misleading because he was unwilling to "step . . . beyond a content-based restriction . . . ." Id. at 51 n.78, 111 L.R.R.M. (BNA) at 1172 n.78 (Zimmerman, M., concurring in part and dissenting in part). A dissenting judge in Kroger noted that "five members of the [Supreme] Court in Safeco . . . appear to believe even more strongly [than the Safeco plurality] that secondary boycott cases such as this one in which the restriction . . . is content-based raise 'difficult First Amendment issues.'" 647 F.2d at 640.

201. See T. EMERSON, supra note 199, at 434.


204. Under §8(b)(4), handbilling does not amount to picketing unless the handbillers wear placards or march in front of the secondary site. See Lohman Sales Co., 132 N.L.R.B. at 905; C. MORRIS, THE DEVELOPING LABOR LAW 563 (1971).

205. See NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins., Co.), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

206. See, e.g., Talley v. California, 362 U.S. 60, 63-65 (1960) (state may not re-
tility to secondary boycotts developed before modern first amendment doctrine, and that much of the law applicable to boycott publicity is a holdover from a time when free speech was not vigorously protected in any area.\textsuperscript{207} This may be the only explanation for the anomalous treatment of speech under section 8(b)(4).

A proper adherence to the constitutional principle of free expression requires a court to carefully scrutinize this section of the Landrum-Griffin amendments. The statute outlaws union "coercion" even where the coercion takes the form of speech.\textsuperscript{208} The statute also imposes content regulation on "coercive" speech even in the form of pure union publicity.\textsuperscript{209} Therefore, both the Board's definition of "coercion" and the regulations it imposes under the publicity proviso must withstand exacting constitutional scrutiny.\textsuperscript{210} The initial question of the "coerciveness" of union speech, of course, presents different issues than does the statutory regulation of speech under the proviso. These two questions may require different first amendment standards for their resolution. The purpose of this Comment is to suggest answers to both these questions that would respect the expressive rights of organized labor.

As applied to section 8(b)(4)(ii)(B), first amendment doctrine requires a two-step analysis. At the first level of inquiry, Landrum-Griffin's regulation of "coercive" publicity must invoke the highest level of first amendment scrutiny because the Act's restraints are content-based.\textsuperscript{211} Regulation is triggered only when the union's publicity urges a "secondary boycott."\textsuperscript{212}

\begin{footnotes}
207. See T. Emerson, \textit{supra} note 199, at 448-49.
209. See cases cited \textit{supra} notes 122-28 and accompanying text.
210. See, e.g., Kroger Co. v. NLRB, 647 F.2d 634, 640 (1980) (Merritt, J., dissenting) ("[S]econdary boycott cases such as this one in which the restriction . . . is content-based raise 'difficult First Amendment issues' . . . requiring the Court 'to determine whether the method or manner of expression, considered in context, justifies the particular restriction.'" (citing NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 447 U.S. 607, 617-18 (Blackmun, J., concurring), 618 (Stevens, J., concurring)).
211. See \textit{supra} text accompanying notes 58-61; \textit{supra} note 200.
212. See \textit{supra} text accompanying notes 30-44.
\end{footnotes}
Publicity in any form that contains this message is either subjected to content regulation or is banned outright. The Act restricts such expression because of its potential "communicative impact" on members of the public. The Act prevents the impact by suppressing the message, unless it takes a form "other than picketing" and conforms to the Board's most recent interpretation of the publicity proviso. Clearly, lowered scrutiny is not justified because the speech is that of a labor union, or because the expression urges a boycott. Nor may Landrum-
Griffin escape strict review because it only regulates pure union publicity, and does not totally ban it. And surely Congress can gain no greater power over "speech" by the expedient of relabelling it "coercion." Therefore, at this initial level of scrutiny, the Act’s proscription of union “coercion” is constitutional only if it is narrowly drawn to serve a compelling state interest. Where a firm is truly neutral, the government

panied by violence, [by a union] of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress) (citing Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940)). See also NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 447 U.S. 607, 617-19 (1980) (Blackmun, J., concurring) (Congress could constitutionally ban picketing because picketing coerces "neutral employers, employees, and consumers."). (Stevens, J., concurring) (Congress may ban picketing because it is a mixture of conduct and expression: the conduct provides a "persuasive deterrent to third persons about to enter a business establishment," while handbills by contrast "depend entirely on the persuasive force of the idea."). In NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982), the Court suggested that secondary boycotts by unions could be stopped in order to prevent the "coerced participation" of "neutral employers, employees, and consumers" in industrial strife. Id. at 3425-26. This dicta rather clearly recites a rationale applicable only to labor boycotts conducted by picketing. See NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 447 U.S. at 619 (Stevens, J., concurring). For a discussion of the contention that labor boycotts that are likely to be coercive in fact may receive less constitutional protection than other boycott appeals, see infra text accompanying notes 237-57.

216. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (invalidating Florida statute that required newspapers to give political candidates space in the paper to reply to editorial attacks: "The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant [newspaper] to publish specified matter . . . . [It] exacts a penalty on the basis of the content of a newspaper" and thus violates the first amendment); Talley v. California, 362 U.S. 60, 64-65 (1960) (opinion of Black, J.), 66-67 (Harlan, J., concurring).

217. It does not appear that the label "coercion," deserves to fare any better than other legislative labels in the area of first amendment freedoms.

[W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law . . . [like] insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.


218. Talley v. California, 362 U.S. at 65-67 (Harlan, J., concurring) (invalidating state requirement that handbills contain the identity of group distributing them: "state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling"). See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 51 U.S.L.W. 4165, 4167 (Feb. 23, 1983) ("For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state
may indeed have a compelling interest in protecting it from serious economic harm flowing from labor disputes that do not concern it. The state may pursue this goal, however, only by narrowly regulating that speech which is likely to cause this harm.\textsuperscript{220} The Board's very broad, per se approach to coercion must fail at the first level of inquiry, because it burdens all

\textsuperscript{220} See supra note 183.
union secondary publicity whether the appeal is likely to cause serious harm to the neutral firm or not.

As the history of the *Tree Fruits* case demonstrates, there are basically three approaches to the initial issue of "coercion or restraint" under section 8(b)(4)(ii). Of these, only the approach taken by the circuit court appears to present a standard that can be broadly applied to "pure" secondary boycott publicity consistently with both the statute and the Constitution. The state interest supporting the Labor Act's restraint on union speech is the prevention of actual and substantial coercive harm to neutral businesses. The Labor Board may neither simply presume the existence of harm in every case, nor presume that harm to be serious. For the prohibition on coercive harm to be constitutional, the likelihood of such harm must be found as a fact. Therefore, as the circuit court suggested in *Tree Fruits*, the Board may not constitutionally find a union liable for "coercion or restraint" unless its publicity has caused, or is likely to cause, substantial economic harm to the secondary business.

Moreover, there must be an exception to this general rule. Internal union propaganda directed solely at union members should never be labelled unlawfully "coercive." The actual coercive effects of such materials, even when widely distributed within a large union, are likely to be minimal. The state's interest in suppression is clearly outweighed by important rights of unionists, both statutory and constitutional. Section 7 of the Labor Act gives all employees the statutory right to form, join, and assist labor organizations, and to engage in other concerted activities for their mutual aid and protection. The Act also declares that employees shall enjoy "full freedom of associa-

221. *See supra* notes 77-97 and accompanying text.
224. *Cf.* NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 447 U.S. at 611-15; Fruit & Vegetable Packers, Local 760 v. NLRB, 308 F.2d at 317.
225. 29 U.S.C. § 157 (1976): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . " The term "employee" includes "any employee, and [is] not . . . limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." 29 U.S.C. § 152(3) (1976). The Labor Act policy statement also expresses Congress's intent that the Act shall protect "full freedom of association" for workers. 29 U.S.C. § 151 (1976).
tion." \(^{226}\) Effective concerted activity is not possible unless a union may communicate freely with its membership. Even if the Labor Act did not exist, the constitutional right to free association would forbid the government from interfering with the internal communications of labor unions except when an important government policy would otherwise be greatly impeded, and no less intrusive methods for promoting that policy are available. \(^{227}\) It could hardly be contended that suppression of internal union communications is the least intrusive means of protecting neutral businesses.

There are, of course, objections to the use of the "substantial harm" test in all other cases of secondary publicity. It would, for example, increase the Board's administrative burden by requiring it to find, on the basis of a showing in every case, that the campaign was likely to cause substantial economic injury. The Board's expertise in this area should, however, enable it to handle this burden. \(^{228}\) Section 303 of the Act \(^{229}\) also


\(^{227}\) See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (Harlan, J.):

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

\(^{228}\) See NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 447 U.S. 607, 614-15 (1980), holding that secondary picketing of the Tree Fruits type which merely "follows the struck product" may nevertheless be outlawed where the Board finds that the appeal "is reasonably likely to threaten the neutral party with ruin or substantial loss." The Court added,
provides a strong incentive to the secondary firm to aid the
general counsel in collecting relevant evidence. That section
gives the injured firm a cause of action against a union for busi-
ness lost due to violations of section 8(b)(4). More fundamen-
tally, of course, administrative convenience is not itself
sufficient reason for abridging the fundamental right of free speech.\emph{230}

It has also been argued that this approach is unacceptable
because it would outlaw only successful boycotts.\emph{231} This argu-
ment may point up the constitutional problems inherent in the
statutory scheme, but it hardly presents a justification for label-
ling all union publicity coercive per se. Only campaigns that
are likely to succeed are likely to "coerce." There is no valid
state interest in suppressing any others. In practice,
moreover, adoption of the "substantial harm" test would not
restrain only successful boycotts. It would burden all those
that the Labor Board prospectively found "likely" to succeed.

This last point, however, raises perhaps the most serious
objection to the use of the "substantial harm" criterion. The
test is at best imprecise, and thus fails to give much firm gui-
dance to the Board, or to provide courts with a clear standard
against which to measure Board decisions. Courts should not
adopt a reading of a legislative delegation that would grant
agencies broad discretion to abridge constitutional rights, at
least where another reading is fairly possible.\emph{232} A revival of

\begin{quote}
"Resolution of the question in each case will be entrusted to the Board's exper-
tise." \emph{Id.} at 615-16 n.11.
\emph{230.} \emph{Cf.} Craig v. Boren, 429 U.S. 190, 198 (1976) ("administrative ease and
convenience" insufficient justification for abridging the right to equal protection
of the laws); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (same); Stanley v.
\emph{231.} \emph{See, e.g.,} T. \emph{Emerson, supra note} 199, at 447; Note, \emph{supra} note 227, at
1208.
\emph{232.} In a leading case, Kent v. Dulles, 357 U.S. 116, 129 (1958), the Court nar-
rowly construed a legislative delegation to the Secretary of State so as not to
permit the Secretary to deny passports to those who refused to sign a non-
Communist affidavit. The legislative delegation was in terms extremely broad,
permitting the Secretary to "grant and issue passports . . . under such rules
as the President shall designate and prescribe." \emph{Id.} at 123. The Court stated:

\begin{quote}
We . . . hesitate to impute to Congress . . . a purpose to give [the
Secretary] unbridled discretion to grant or withhold a passport from a
citizen for any substantive reason he may choose . . . . [T]he right of
exit is a personal right included in the word "liberty" as used in the
Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant
to the lawmaking functions of Congress . . . . And if that power is
degraded, the standards must be adequate to pass scrutiny by the ac-
cepted tests . . . . [W]e will construe narrowly all delegated powers
that curtail or dilute [protected "liberties"]
\end{quote}

\end{quote}
the "constitutional fact" doctrine, moreover, is not an attractive solution to this problem.\textsuperscript{233} If the Board were to adopt the "substantial harm" criterion for "coercion" under section 8(b)(4), its discretion would best be controlled by court-imposed rules of decision based on the statute and on the Constitution itself.\textsuperscript{234} Thus, a court should impose clear rules under the publicity proviso to ensure that the Board respects the free speech rights of unions and their members. On the other hand, if the Board continues to follow its present, broad approach to coercion or restraint, the publicity proviso's "exception" takes on even greater constitutional significance. Section 8(b)(4) cannot constitutionally be interpreted to give the Labor Board "unbridled discretion"\textsuperscript{235} to suppress all union secondary publicity that fails to conform to any regulations the Board imposes. A court must examine those regulations to determine if they conform with the Constitution.\textsuperscript{236} Therefore, no matter what reading of "coercion" the Board adopts, its regulation of

\textit{Id.} at 128-29. \textit{See also} Hampton v. Mow Sun Wong, 426 U.S. 88, 103-05 (1976); L. Tribe, \textit{supra} note 58, at 1137-46.

233. The "constitutional fact doctrine" was articulated in Crowell v. Benson, 285 U.S. 22, 56-57 (1932). The doctrine held that an article III court in reviewing an administrative factual conclusion must try de novo all facts decisive of constitutional rights. \textit{See Strong, The Persistent Doctrine of "Constitutional Fact," 46 N.C.L. Rev. 222, 222 (1968).} The doctrine has been severely criticized because it makes the agency's factfinding irrelevant and because "no one has ever succeeded in ascertaining the difference between fundamental . . . facts and other facts." K. Davis, \textit{Administrative Law Text}, § 29.08 (3d ed. 1972). The doctrine now appears to have "earned a deserved repose." \textit{Id.} (quoting Estep v. United States, 327 U.S. 114, 142 (1946) (Frankfurter, J.).) The modern rule appears to be that "\textit{de novo} review is appropriate only where there are inadequate factfinding procedures in an [agency's] adjudicatory proceeding." Camp v. Pitts, 411 U.S. 138, 142 (1973), (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971)). An agency's factfinding will generally be upheld if supported by substantial evidence. K. Davis, \textit{supra}, § 29.01. Specifically, the Labor Act directs that a reviewing court shall uphold the factual conclusions of the Board if supported by substantial evidence on the whole record. 29 U.S.C. § 160(e) (1976). \textit{See Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).}

234. \textit{See supra} note 232. \textit{See also} Freedman v. Maryland, 380 U.S. 51, 58 (1965) (State Board of Censors may suppress films for obscenity only if a judicial determination in an adversary hearing is promptly sought in which the constitutional standard for obscenity will be applied); Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

235. \textit{See Kent v. Dulles, 357 U.S. at 128. See also} Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) ("Invariably, the Court has felt obliged to condemn systems in which the exercise of [censoring] authority was not bound by precise and clear standards . . . . [T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.").

236. \textit{See supra} notes 232-35; \textit{infra} text accompanying notes 255-57.
"coercive" publicity must itself be subject to judicial scrutiny under the first amendment.

Congress added the publicity proviso in order to protect the expressive liberties of organized labor.237 The Labor Board has traditionally read the language of the proviso broadly so that it might effectively serve this function.238 The Board, Congress, and the Supreme Court239 have recognized that even "coercive" boycott publicity is entitled to some constitutional protection. In order to determine how much protection the first amendment affords such speech, however, courts must attempt to place the public boycott appeals of labor unions within the larger system of free expression. This is a task that they have yet to perform.

Union speech as such clearly cannot be subjected to greater restrictions than the speech of other private organizations.240 Nevertheless, when a union calls for a boycott and its message is "coercive," unions fall under far stricter regulation than do organizations that boycott in support of social or political goals.241 The Supreme Court, for only the vaguest of reasons, has recently suggested in dicta that this differential

237. See supra notes 72-75 and accompanying text.
238. See supra notes 118-30 and accompanying text.
239. NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982), involved a civil rights boycott in which boycott supporters, among other things, wrote down the names of boycott violators and published them in local community newspapers. The names were also read aloud in the local churches. Id. at 3424. Without dissent, the Supreme Court found these actions protected by the first amendment. "Petitioners admittedly sought to persuade others to join the boycott through social pressure and 'threat' of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." Id. In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Court held that employer speech likely to coerce employees in the choice of a bargaining agent may be outlawed by the Board. Id. at 619-20. The rationale for the Gissel rule is that employees are economically dependent on the employer and thus are easily coerced by an employer's expression. Id. at 617-18. Moreover, the employer's first amendment rights had to be weighed against the right of employees to freedom of association. Id. at 617. But Gissel seems distinguishable from the case of secondary union boycott publicity on a far more fundamental level. The Gissel rule is part of the Board's effort to maintain "laboratory conditions" in the conduct of elections by strictly regulating the campaign speech of the antagonists. See Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962). Whatever the merits of the Board's stringent control of the electioneering of the parties, surely the Board is not empowered to impose "laboratory conditions" on the entire society in order to protect secondary firms from merely emotional pressure.
240. See, e.g., Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (Government "may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas.'").
treatment of speech is constitutional. If so, this must be because union boycott appeals are a form of economic expression. Such union appeals are primarily aimed at inducing private economic decisions that would promote the economic rather than the political goals of the speaker. This is perhaps the reason courts tend to draw an analogy between speech in the labor context and "commercial speech," and grant the state far more power to regulate industrial disputes than political ones. If so, the courts should make that analogy explicit, examining it carefully and candidly to determine the extent to which it truly supports the restrictions found in the Labor Act. Only by doing so can courts integrate labor law fully into modern first amendment doctrine.

The analogy between union boycott appeals and commercial speech is in some ways an attractive one. As Professor Cox has pointed out, both promotional advertising and union boycott messages urge some action on the part of the consumer that would promote the speaker's economic interests. Of course the fact that a speaker's motivation is partly economic does not, standing alone, lower the status of expression under the first amendment. Where, however, that motivation dominates and the speaker's conduct is likely in fact to cause some

242. Id. at 3425-26. See supra note 215; infra note 246.
244. Id.
246. See Claiborne Hardware Co., 102 S. Ct. at 3425-26. In seeking to distinguish labor boycotts and picketing from political or social boycotts, the Court stated that restrictions on such labor activities were justified partially by "the strong governmental interest in certain forms of economic regulation." Id. at 3425. Part of the rationale was that such activity "may have a disruptive effect on local economic conditions." Id. That, however, seems a far better description of the activity the Court protected in Claiborne than the labor picketing condemned in Safeco. See NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 447 U.S. 607, 614-15 (1980).
248. See supra note 245. In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 580 (1980) (Stevens, J., concurring), Justice Stevens emphasized that a speaker's economic motivation should not "qualify his constitutional protection." According to Stevens, "Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment." Id. at n.2 (quoting Farber, Commercial Speech and First Amendment Theory, 74 NW. U. L. Rev. 372, 382-93 (1979) (bracketed material added by Justice Stevens)).
harm the state may avert, the balance of interests appears to shift in favor of the government's regulatory power.

A number of factors, however, counsel against the wholesale application of the "commercial speech doctrine" to union boycott publicity. Labor unions do not exist purely to raise their members' wages the way corporations exist to increase the income of their shareholders. Unions also express the social, political, and economic viewpoint of wage earners. Their boycott messages are usually explicit appeals for solidarity within the labor movement. Thus, only those portions of a boycott appeal that directly touch the private economic interests of the union and its adversary may be regulated under a commercial speech rationale. Union expression that attacks an employer's product as shoddy, dangerous, or otherwise economically unattractive should be subject to regulation under commercial speech standards. Here the analogy between corporate advertising and union counter-advertising is a close one. On the other hand, expression of the political, social, or economic grievances of organized labor, even where the speech attacks an employer's business or labor policies in the process, should not be subject to such regulation. Thus, if a union accuses an employer of contributing to high unemployment or of union busting or of using "scab" products, such expression should be subject to no stricter standard than that announced in *New York Times v. Sullivan*. Where a union seeks to

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249. *See supra* text accompanying notes 56-57.

250. In *Delta Air Lines*, 263 N.L.R.B. No. 153, slip op. app. III, the union asked the public not to fly Delta "[i]f you are concerned about the plight of fellow union members." *See also Oak Constr., Inc.*, 226 N.L.R.B. at 762, where the union complained in its handbills:

> [W]hen large "consumers" of construction services like WISCONSIN TELEPHONE COMPANY gives [sic] their business to non-union contractors like OAK CONSTRUCTION, INC. the entire trade union movement is threatened. Because OAK workers do not have wages and working conditions guaranteed by union contract, OAK can promise "flexibility" and reduced costs—at the expense of workers, of course.

> If construction work for large companies moves toward non-union outfits, union workers will have to dilute contract standards or face unemployment—already at outrageous levels in this community.

*See also The Edward J. DeBartolo Corp.*, 252 N.L.R.B. at 703, where the union suggested that low, nonunion wages might be justified if the secondary firms were willing to lower the prices in their stores in accord with the low wages.


252. 376 U.S. 254 (1964). More recently, the Supreme Court has held that the *New York Times* standard is not the appropriate one to apply to defamation suits by private persons against the media, even where the allegedly defamatory statements occur in connection with the discussion of public issues. *See*
make an employer's product politically rather than economically unattractive, the first amendment and the Labor Act contemplate robust and wide open debate. Thus the Board in such cases may suppress only defamatory or disparaging material published with reckless disregard of the truth.

The Supreme Court has recently formulated a test for commercial speech that outlines an "intermediate" level of scrutiny for government regulation of advertising. Because the analogy between corporate advertising and some labor counter-advertising is a close one, this intermediate level of scrutiny should be applied to the Board's regulation of speech under the publicity proviso. Under the standards announced in Central Hudson Gas & Electric Corp. v. Public Service Commission, a regulation of the commercial aspects of corporate speech will be valid.

Gertz v. Robert Welsh, Inc., 418 U.S. 323, 339-48 (1974). A number of factors, however, make Gertz inapplicable to the case of labor boycott propaganda that attacks an employer's labor policies and practices. A major rationale for the Gertz decision was the view that private individuals are far more vulnerable to injury than public officials, because private persons do not have the ready access to the media that such officials enjoy. Id. at 344. At least in cases such as Delta Air Lines, the corporation clearly has such access and generally uses it as often as possible to tout the advantages and the attractiveness of its product. Labor boycott messages urging rejection of products tend to be continuously and skillfully countered by the corporate advertising that urges acceptance of those products. Moreover, one of the major reasons that any defamation law is constitutional is that defamatory statements usually form "no essential part of any exposition of ideas," Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), and thus are entitled to less constitutional protection. Professor Tribe has suggested that another reason may be that defamation law is "ideologically neutral" in that the compensation of individuals for defamation does not turn on "whether the government approves or disapproves of the content of the message." L. Tribe, supra note 58, at 641. Obviously neither of these reasons supports relaxation of the New York Times standard in the labor area. Where a union urges a boycott because of an employer's labor policies or because the employer has chosen to deal with labor's opponents, that message is at the very core of its appeal to the public for solidarity in labor's cause. In addition, the government here is clearly not ideologically neutral. It has forbidden the exposition of certain ideas by one party to an economic dispute, and has to that extent taken sides. Finally, part of the Court's rationale in Gertz may be that the "chilling effect" of the possibility of tort suits against the media is not so great as to warrant increasing the exposure of private persons to media defamation. 418 U.S. at 390-92 (White, J., dissenting). This rationale for lowered first amendment protection is plainly not justified where the "chill" on expression stems not from the remote possibility of a court suit, but from the near-certain suppression of particular messages by the federal government.

253. See Linn v. United Plan Guard Workers, 383 U.S. 53, 60-61 (1966), where the Court noted that the Board "has allowed wide latitude to the competing parties" in the area of speech, and "tolerates intemperate, abusive and inaccurate statements." The Labor Act, however, did not preempt state libel actions when statements fell afoul of the New York Times standard. Id. at 65.

254. Id.

only if such regulation "directly advances" a substantial government interest, and "is not more extensive than is necessary to serve that interest."\footnote{256} Applying this analysis to the publicity proviso to section 8(b)(4), the issue becomes whether the regulations imposed by the Board under the proviso directly serve the state interest in protecting neutral firms, and are "narrowly drawn"\footnote{257} to do so.

The first major requirement the proviso imposes on pure union publicity is that the union inform the public of the secondary nature of its dispute.\footnote{258} The union must identify relatively clearly the role the secondary firm has played. The state's interest in protecting neutrals from secondary consumer boycotts rests largely on considerations of fairness.\footnote{259} The content-based identification requirement directly serves the state's interest in protecting neutral businesses from unfair union tactics by compelling the union to inform the public of the neutrality of the targeted firm. Neutrals are thus protected to the extent that the public sympathizes with their interests. This is all the secondary firm can demand on grounds of fairness. The union is nevertheless allowed to make its appeal and explain its position. Consumers and members of the general public are then left free to make an informed choice and are not, as is sometimes charged, compelled by state-imposed ignorance to enter the fray on the side of the employer.\footnote{260} Moreover, no less restrictive means of ensuring that the public is informed of the true nature of the labor dispute, at the moment

\footnote{256. \textit{Id}.\footnote{257. 477 U.S. at 565. This is true not because "overbroad" legislation may "chill" some protected speech, but simply because government regulation of even purely commercial speech must go no further than necessary to serve the state's interest. \textit{Id}. at 565 n.8. \textit{See also} Bates v. State Bar, 433 U.S. 350, 381 (1977).\footnote{258. The proviso directs that "nothing . . . shall be construed to prohibit publicity . . . for the purpose of truthfully advising the public" of the nature of the union's primary dispute. 29 U.S.C. § 158(b)(4) (1976).\footnote{259. \textit{See} Cox, \textit{supra} note 182, at 38-39.\footnote{260. We take a long and backward step when we illegalize consumer picketing. It is not enough to say that the union can make its appeal by newspaper advertisements and leaflet distribution. Advertisements are expensive, and both may be ineffective to quickly and dramatically catch the public's eye. Picketing is usually the only effective way of reaching the consumer at the only place where it matters—where the product is sold and at the time that the customer is interested in buying it. When we prohibit consumer picketing we compel the public, through ignorance of the situation, to side with the employer rather than the union. We prevent the consumer from making his [or her] own choice.\textit{105 CONG. REC. 17,883 (1959) (remarks of Senator Morse).}}}.
when it is important that they be informed, seems available. The Supreme Court has recognized that affirmative regulations of this sort may be imposed on commercial speech where they directly serve the state interest asserted, and that such restrictions are far less burdensome than repression. Such regulations serve the state's interests without harming the public's interest in full, free, and informed discussion. Thus the proviso's identification requirement is narrowly drawn to serve the state's interest, and does so without restricting the free flow of ideas. It therefore appears to pass constitutional muster.

The second major requirement that the proviso imposes on union publicity is that it be "truthful." This requirement may clearly be imposed on commercial advertising, and advertising may be prohibited even where it is merely "misleading." The application of the latter branch of the commercial speech doctrine to union publicity, however, reveals a weakness in the analogy. The constitutionality of bans on "misleading" advertising appears to turn on two related considerations. One is that the manufacturer or seller of a product is intimately familiar with its characteristics, and that both the seller and the legal system itself may verify claims about products or services objectively. Obviously the same cannot be said about claims made for political candidates, for example. Secondly, Professor Daniel Farber has suggested that these restrictions on commercial advertising comport with the first amendment because they are simply an outgrowth of familiar contractual principles. When a commercial speaker "proposes a commercial transaction" it implicitly warrants that

261. Cf. L Tribe, supra note 58, at 799 (suggesting that political campaign literature identification requirements should be constitutional partly because "the interest in providing voters with information that will permit them better to assess campaign literature . . . is not . . . readily protected by other means").

262. See Central Hudson, 447 U.S. at 570-71, where the Court struck down a ban on all advertising intended to stimulate demand for utility services. The Court noted that among the "more limited regulation[s]" available was a "requirement that the advertisements include information about the relative efficiency and expense of the offered service." Id. at 571. See also Bates v. State Bar, 433 U.S. 350, 383 (1977).


264. See L. Tribe, supra note 58, at 799.

265. See supra note 258.


269. Farber, supra note 249, at 386-87.

270. Central Hudson, 447 U.S. at 562.
its claims about a product are true. The speaker must stand ready to answer in damages if an offeree is, as a reasonable person, induced to purchase a product on misleading premises. Thus, regulation of this form of commercial speech is plainly constitutional because it relates only to the "contractual function of speech." The use of speech to form a contract is thus "not the sort of 'speech' to which the first amendment applies."

To the extent these are the reasons that bans on misleading advertising are constitutional, the analogy between boycott appeals and pure commercial speech fails. Although facts about products may be objectively verifiable, this is of little help to a speaker who has no access to the relevant data. Employers cannot normally be expected to turn over business data to their labor adversaries, and unions will therefore generally be denied access to them. Moreover, in proposing that the public refuse to enter a commercial transaction, unions make no implied warranty that their appeal has not "misled" anyone to that refusal. The Board has implicitly recognized this in the past, holding that the union is in no way an "insurer" of the 100 percent accuracy of its assertions. Finally, the term "misleading" is vague and potentially very broad, thus reviving problems of agency discretion. Therefore the strictest standard of truthfulness that the Board may impose on union secondary publicity consistently with the first amendment seems to be embodied in the Board's traditional definition of "truthfulness." The Board may not suppress union publicity that is "substantially accurate" and not distributed with an "intent to deceive." This requirement protects secondary firms from unfair disparagement without restricting the flow of substantially true information. Because the rationale supporting the constitutionality of very strict bans on "misleading" advertising does not apply to union messages, however, the Board may not impose this further requirement.

Finally, the Board's rule in Delta Air Lines must be examined under the standards set out above. The Board's read-

271. Farber, supra note 248, at 387.
272. Id. at 389.
273. Id. at 387.
274. The case that established this principle is Teamsters, Local 537 (Jack Lohman d/b/a/ Lohman Sales Co.), 132 N.L.R.B. 901, 905 (1961).
275. See supra notes 232-36 and accompanying text.
276. Lohman Sales Co., 132 N.L.R.B. at 905-06.
277. See supra text accompanying notes 265-76.
ing of the proviso led it to suppress wholly truthful information about a commercial service that the Board assumed was not even misleading as to Delta's relative safety. The union did not ask consumers to do anything unlawful, nor did it seek to compel unlawful action by the secondary firm.\textsuperscript{278} Suppression of the truth in such circumstances can only be justified by appeal to the "benefits of public ignorance."\textsuperscript{279} No court can allow such an appeal to succeed unless some very grave social consequences would follow from free expression.\textsuperscript{280} The danger of a boycott is not the sort of social emergency that might justify repression.\textsuperscript{281} Moreover, the state has no valid interest in keeping the public ignorant of Delta's safety record. On the contrary, the Constitution assumes that the public interest is best served by the free flow of commercial information.\textsuperscript{282} Thus, even as applied to purely commercial advertising, the

\textsuperscript{278} In \textit{Safeco Title Ins. Co.}, 447 U.S. at 616, the Supreme Court dismissed the union's claim that its consumer picketing was protected by the first amendment by simply stating that bans on "picketing in furtherance of... unlawful objectives" does not offend the first amendment. As Professor Cox has pointed out, the "object" of union secondary boycotts such as those in \textit{Safeco} and \textit{Delta Air Lines} is "'unlawful' only in a Pickwickian sense." Cox, \textit{supra} note 182, at 38. There are a number of ways in which a union's "object" may be unlawful. It may ask consumers to do something they may not lawfully do, \textit{cf. Oak Constr., Inc.}, 226 N.L.R.B. at 759-60, or it may seek to compel unlawful action on the part of the secondary employer, \textit{cf.} \textit{Giboney v. Empire Storage & Ice Co.}, 336 U.S. at 501-03. In cases like \textit{Delta Air Lines} and \textit{Safeco}, however, the union's object is not unlawful in either of these senses. Congress has not forbidden one firm to "cease doing business with another." 29 U.S.C. § 158(b) (4)(ii)(B) (1976). Nor is it illegal for consumers to withhold patronage from a secondary employer. Where the union neither requests nor seeks to compel unlawful action on the part of anyone, its claims to first amendment protection are far more substantial than in other cases. \textit{See Note, supra} note 227, at 1208-11.


\textsuperscript{280} In \textit{Linmark Associates, Inc. v. Willingboro}, 431 U.S. 85 (1977), the Court struck down a ban on the display of "For Sale" and "Sold" signs in a residential area that had been imposed to prevent racial "block busting," despite the circuit court's findings that a "fear psychology" and "incipient' panic selling" had developed. \textit{Id.} at 91, 95-98. The Court cited with approval the famous Brandeis concurrence to \textit{Whitney v. California}, 274 U.S. 357, 377 (1927): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." \textit{See also} Virginia State Bd. of Pharmacy, 425 U.S. at 770.


\textsuperscript{282} \textit{See Central Hudson Gas & Elec. Corp.}, 447 U.S. at 562 (quoting Virginia State Bd. of Pharmacy, 425 U.S. at 770): "'[P]eople will perceive their own best
first amendment presumes that some truthful information is better than none at all. Any principled application of first amendment doctrine, whether that applicable to product advertising or the modified form of that standard proposed by this Comment, leads to a rejection of the Board's approach in *Delta Air Lines* and a reaffirmation of the free speech rights of labor.

Applying the analysis suggested above to the facts of *Delta*, the Board clearly had no evidence on the threshold issue of whether the union's handbilling "coerced" Delta. The Board sought no evidence tending to show whether the union's campaign caused or was likely to cause substantial economic injury to Delta, and the airline produced none. The case should have been remanded for evidence on this issue. The advertisements in the union's newspapers, however, should have been found non-coercive per se and thus beyond the reach of section 8(b)(4)(ii)(B). Clearly the Board should not have suppressed the union's newspaper messages on these facts.283

If the Board were to find the union's campaign "coercive" under the proposed test, however, the distribution of Handbills A and B would be unlawful. These handbills failed to identify the primary dispute and thus could not claim the protection of the publicity proviso. Handbills C and D, however, should have received that protection. They identified the primary dispute and contained only "truthful" information. The Service Employees Union could hardly be accused of acting with "an intent to deceive" in publishing material they received from the federal government. The fact that the handbills and newspaper advertisements "attacked" Delta Air Lines does not supply sufficient justification for the suppression of truthful information about products or services.284

This approach to secondary boycott publicity in the form of pure speech would help integrate labor law into modern first amendment doctrine. It would respect the rights of labor organizations and their members to free expression, and protect neutral business from injurious falsehood to the extent constitutionally permissible.285 First amendment principles presup

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interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them." 283. *Cf.* New York Times v. United States, 403 U.S. 713, 714 (1971); Near v. Minnesota, 283 U.S. 697, 718-20 (1931).


pose a mature population capable of recognizing interested communications and acting on them as they think best. The Board and the courts should reaffirm this faith in the public in consumer boycott cases, because the identification requirement will give the public the tools they need to make just such an evaluation. When the Board suppresses messages and information merely because “the group in power”\textsuperscript{286} would rather they were not heard, it charts a course that was rejected two hundred years ago by those who saw where it would lead. The choice “between the dangers of suppressing information, and the dangers of its misuse if it is freely available” is, in the last analysis, one “that the First Amendment makes for us.”\textsuperscript{287}

\textsuperscript{286} Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940):
Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. . . . We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [an Alabama statute that prohibited all “[1]oitering or picketing . . . with intent of influencing, or inducing other persons not to . . . have business dealings” with another].

\textsuperscript{287} Virginia State Bd. of Pharmacy, 425 U.S. at 770.