Moorpark, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent, and THE CAREAU GROUP dba EGG CITY; AND TIM LUBERSKI dba HIDDEN VILLA RANCH, Charging Parties.	Case Nos . 86-CL-14-SAL(OX) 86-CL-14-l-SAL(OX) 86-CL-21-SAL 15 ALRB No. 10

DECISION AND ORDER

On January 15, 1988, Administrative Law Judge (ALJ) Marvin J. Brenner issued the attached Decision and Order in this proceeding. Thereafter the United Farm Workers of America, AFL-CIO (UFW or Union), the Careau Group dba Egg City (Egg City), and General Counsel each filed exceptions to the proposed Decision and Order together with supporting briefs. General Counsel and Egg City also filed reply briefs to the Union's exceptions.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the ALJ insofar as consistent with the decision herein, and to adopt his proposed Order, with modifications.

Background

This case represents the first instance in which the Board is called upon to construe and apply the secondary boycott

provisions of the Agricultural Labor Relations Act (ALRA or Act)[1/] The Board certified the Union as the exclusive bargaining agent for all of the agricultural employees at Julius Goldman's Egg City on July 1, 1978 (see certification order in Case No. 75-RC-21-M), which certification continued in effect at the time of the purchase of Egg City by the Careau Group in May, 1985. The picketing and threats at issue arose out of a labor dispute between the Union and Egg City that followed the expiration of a collective bargaining agreement between those parties in

[1/] A secondary boycott is the application of economic pressure upon a person with whom the union has no dispute regarding terms of employment in order to induce that person to cease doing business with another employer with whom the union does have such a dispute. (German, Basic Text on Labor Law (1976), p. 240.) The relevant provisions are Labor Code §§1154(d)(i)(2) and (ii)(2):

> It shall be an unfair labor practice for a labor organization or its agents to do any of the following:
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> * * *
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> (d)(i) To engage in, or to induce or encourage any individual employed by any person to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or (ii) to threaten, coerce, or restrain any person; where in either case (i) or (ii) an object thereof is any of the following:
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> * * *
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> (2) Forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees. Nothing contained in this paragraph shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

All subsequent statutory references are to the Labor Code unless otherwise indicated.

September, 1985. Following unsuccessful attempts to negotiate a new collective bargaining agreement, the Union commenced a strike against Egg City in June, 1986. Egg City replaced its striking employees and, as of the issuance of the ALJ's Decision (ALJD) herein, no further negotiations had occurred.

The General Counsel alleged that the Union engaged in numerous incidents of illegal picketing, threats, and other proscribed secondary conduct in furtherance of its primary dispute with Egg City, covering the period October 23, 1986 through January 26, 1987. Before examining these individual incidents in detail, we will set out the statutory criteria by which we will determine whether they were lawful.

Secondary Conduct under the ALRA

The secondary boycott provisions of our Act are in many ways similar, if not identical, to the corresponding provisions of the National Labor Relations Act (NLRA or national act), and to that extent are to be construed in conformity with the precedents interpreting those provisions of the national act. (Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal.Sd 60, 73-74, [160 Cal.Rptr. 745] since language of section 1154(d) almost parallels language of NLRA section 8(b)(4), command of section 1148 that Board follow applicable precedents of NLRA requires conclusion that when Legislature adopted section 1154(d) it

intended a construction of that section in conformity with precedents interpreting NLRA section 8(b)(4).)[2] These provisions

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[2] The relevant portions of the NLRA are as follows:
8(b) It shall be an unfair labor practice for a labor organization or its agents--

(fn. 2 cont. on p. 4)

of our Act differ most notably, however, from the national act in the structure of the "publicity provisos" which, as in the national act, play an important role in the operation of the statute.[3/]

(fn. 2 cont.)

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

[3/] The publicity proviso of the NLRA reads as follows: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, 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. (Section 8(b)(4) of the NLRA.)

The ALRA publicity provisos are: [First Proviso] Nothing contained in this subdivision (d) shall be construed to prohibit publicity,

(fn. 3 cont. on p. 5)

Based on the following analysis, we find that, despite these structural differences, the underlying intent of our statute can be established with sufficient clarity to demonstrate fundamental conformity with the federal approach.

We note in the first instance that both statutes start from the same position, i.e., the banning of the "hard" or employee boycott in which a labor organization attempts to force other employers to curtail or cease business contacts with the employer(s) with whom it has its actual labor dispute by persuading employees of those other employers to withhold their services

(fn. 3 cont.)

including picketing for the purpose of truthfully advising the public, including consumers, that a product or products or ingredients thereof are produced by an agricultural 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, and as long as such publicity does not have the effect of requesting the public to cease patronizing such other employer. (Section 1154(d).)

[Second Proviso] However, publicity which includes picketing and has the effect of requesting the public to cease patronizing such other employer, shall be permitted only if the labor organization is currently certified as the representative of the primary employer's employees. (Section 1154(d).)

[Third Proviso] Further, publicity other than picketing, but including peaceful distribution of literature which has the effect of requesting the public to cease patronizing such other employer, shall be permitted only if the labor organization has not lost an election for the primary employer's employees within the preceding 12-month period, and no other labor organization is currently certified as the representative of the primary employer's employees. (Section 1154(d).)

[Fourth Proviso] Nothing contained in this subdivision (d) shall be construed to prohibit publicity, including picketing, which may not be prohibited under the United States Constitution or the California Constitution. (Section 1154(d).)

until compliance with the labor organization's wishes is obtained.[4/] This legislative policy choice with respect to agricultural labor relations represents a dramatic departure from the common law rule in California permitting secondary boycotts. (See, e.g., Pierce v. Stablemen's Union Local 8760 (1909) 156 Cal. 70, 77 [103 P. 324]; see also In Re Blaney (1947) 30 Cal.2d 643 [184 P.2d 892]; and see Petri Cleaners, Inc. v. Automotive Employees, Laundry Drivers and Helpers Local No. 88 (1960) 53 Cal.2d 453 [2 Cal.Rptr. 470].) The Legislature has thus seen fit to deviate from the general rule in California in order to create conformity with the federal scheme in the single area of agricultural labor relations. Clearly, if the Legislature had intended to permit an agricultural labor organization unlimited power to coerce secondary employers, it would not have banned outright the "hard" or employee boycott.

We conclude, therefore, that our Legislature, like Congress, intended to protect secondary employers from unlimited

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[4/] Then-Secretary of Agriculture and Services Rose E. Bird testified before the Senate Ways & Means Committee on May 27, 1975, that "[w]hat they call the hard boycott, and that's where you go to a secondary employer's employees and you ask them not to handle a grower's goodfs] because you have a dispute with that grower [,] [t]hat is totally prohibited under our bill." (Tr. of Hearing at p. 14.) She testified before the Assembly Labor Relations Committee on May 12, 1975, to the same effect: "We have restricted secondary boycotts, the hard boycott is prohibitive [sic] totally." (Tr. of Hearing at p. 5.) Assemblyman Herman, a principal sponsor of the legislation, commented in the same vein: "The traditional hard secondary boycott that we have come to know and love or hate, depending on your perspective, is a boycott which is directed at the employees of the secondary employer to attempt to pressure that employer to get the primary employer to do certain things, particularly sign a contract favorable to the primary union. We prohibit that boycott completely." (Id. at p. 50.)

coerced participation in agricultural labor disputes not of their own making. Yet our Legislature/ again like Congress, was concerned that agricultural labor organizations have the ability to communicate the substance of their primary disputes to the consuming public, and to urge the public to support them in those disputes. The Legislature, therefore, following the federal model, created a complex statutory scheme intended to balance these competing interests, viz., the secondary employer's interest in avoiding entrapment in a labor dispute in which it is an unwilling, often times totally unaware, participant, and the labor organization's interest in appealing to the public, including consumers, to support it against the primary employer with whom it has its actual dispute.

The Legislature accomplished this balancing of interests by creating an ordered sequence of permissible publicity techniques which enable an agricultural labor organization to communicate its information to the consuming public, while limiting the application of those techniques to prevent undue economic coercion of a secondary employer. Thus, our first publicity proviso declares that <u>all</u> publicity, including picketing, concerning a labor organization's primary dispute is legal <u>provided that</u> such publicity (1) truthfully advises the public of the existence and nature of the union's primary labor dispute and the relation of the targeted secondary entity (e.g., the employer that is being subjected to picketing, leafletting, or media advertisements) to that dispute; (2) results in no proscribed secondary effects such as causing work stoppages or

interruptions in pick-ups and deliveries among employees of an employer other than the one with whom the union has its actual labor dispute; and (3) does not request the consuming public to withdraw its patronage entirely from the entity that is the target of the union's secondary conduct.

Our second publicity proviso continues this balancing process while recognizing the additional interest that attaches to a labor organization that has been certified as an exclusive collective bargaining representative under our Act. A currently certified labor organization enjoys a relationship of such recognized stability and bargaining responsibility under the ALRA that the Legislature granted it an ability to publicize its primary dispute that is not afforded under the NLRA. Under this proviso, a currently certified labor organization may engage in all forms of publicity permitted under the first proviso, and may in addition request that the public withdraw its patronage from the entity that is the target of its secondary conduct. To do so, however, it must continue to observe the applicable limitations set out in the first proviso; there must be no proscribed secondary effects on employee activity, and the publicity must truthfully advise the consuming public of the nature of the primary dispute and the targeted secondary employer's relationship to it.

Two final adjustments were added by the Legislature to its balancing of labor organizations' and neutral employers' interests in secondary conduct. The third publicity proviso to our Act's ban on secondary boycotts allows labor organizations in

an "intermediate" relationship to a unit of agricultural employees to apply a correspondingly intermediate level of pressure on secondary employers. Thus, a labor organization that is not certified but has not lost a representation election within the preceding 12-month period may, if no other labor organization is the certified representative of the agricultural employees on whose behalf the first labor organization is conducting secondary activities, engage in all forms of publicity as permitted under the terms of the first proviso and, in addition, may request that the public withdraw its patronage from the entity that is the target of its secondary conduct so long as that conduct is not picketing. The labor organization is not allowed to utilize the most coercive form of permissible secondary conduct as it does not occupy the most protected and responsible relationship recognized by our Act to the primary employer's agricultural employees. Finally, our fourth proviso re-emphasizes the Legislature's commitment to permit labor organizations the widest possible latitude in publicizing their primary disputes consistent with the protections granted secondary employers.

The foregoing statutory construction requires an understanding that the "truthfully advising" requirement in the first proviso applies not merely to picketing publicity, as the Union suggests in its exceptions, but to all forms of publicity within that proviso, and to the picketing and non-picketing publicity found in the second and third provisos as well. We adopt this reading of the statute for several reasons. First, to accept the Union's reading, which confines the "truthfully advising" requirement to picketing publicity in the first proviso,

would be to follow slavishly a mere punctuational difference between our Act and the national act when we are not compelled to do so. (1A Singer, Sutherland on Statutes and Statutory Construction (Sands 4th ed. 1985) §21.15, Punctuation, pp. 134-35.) Second, the Union's construction renders the entire phrase "including picketing ... by another employer" surplusage, since such restricted publicity would, if the "truthfully advising" language applies solely to picketing, be logically contained in the general publicity which is the principal subject of the proviso. Such redundancy is unfavored and to be avoided. (People v. Wesley (1988) 198 Cal.App.3d 519, 522 [243 Cal.Rptr. 785].) Third, to confine the "truthfully advising" requirement to the picketing publicity in the first proviso is to distinguish between the publicity that is the subject of that proviso and the publicity that is the subject of the second and third provisos. While such a construction is grammatically possible since the clauses containing the word "publicity" in the four provisos are structurally independent units, it is not necessary. (See Zeltner, Secondary Boycotts and the Employer's Permissible Response under the California Agricultural Labor Relations Act (1977) 29 Stan.L.Rev. 277, 282, n. 28.) Moreover, if the publicity in the second and third provisos is not the same publicity as that found in the first proviso, neither are the limitations on the publicity found in the first proviso applicable to the publicity in the second and third provisos. The result of such an interpretation would be that certified unions could engage in any picketing publicity without a truthfully advising

requirement and without requirements that the publicity not induce work stoppages or prevent deliveries or pickups. In other words, such an interpretation would operate to reinstate the "hard" employee boycott that the framers of the legislation specifically intended to ban. We will not adopt such an interpretation.

Given the clear intent of our statute to limit an agricultural labor organization's ability to involve secondary employers in disputes not of their own making, and further considering the carefully Grafted structure of our Act's publicity provisos, we will uphold the ALJ's determination that under our statute a certified labor organization may engage in secondary picketing publicity that asks the public to cease patronizing the secondary employer as long as the publicity truthfully advises the public of the nature of the primary labor dispute and the secondary employer's relationship to it. (Central Indiana Building and Construction Trades Council (K-Mart) (1981) 257 NLRB 86, 88 [107 LRRM 1463], Hospital and Service Employees Union, Service Employees International Union, AFL-CIO, Local No. 399 (Delta Airlines) (1982) 263 NLRB 996, 997 [111 LRRM 1159], aff'd in part and rev'd in part and remanded sub nom. Hospital & Service Employees Union, Local 399, Service Employees International Union, AFL-CIO v. NLRB (Delta Airlines) (9th Cir. 1984) 743 F.2d 1417, 1422 [117 LRRM 2717].)

Our interpretation of the ALRA's secondary boycott provisions accommodates both the Legislature's expanded conception of permissible secondary activity for certified unions under the ALRA, and recognizes the competing policy, given more weight under

the national act, that seeks to prevent the unlimited coerced participation of neutral secondary employers in labor disputes not of their own making. We believe that this is the balance the Legislature intended to strike. [5]

Having concluded that our statute and its publicity provisos permit a certified labor organization to engage in secondary picketing publicity that truthfully advises the public, including consumers, of the nature of the primary dispute and the secondary's relationship to that dispute, and that such qualified picketing publicity may then request that the public withdraw its patronage from the picketed secondary, we will now set forth guidelines for such permissible secondary conduct. Initially, we reject Egg City's contention that all elements of information necessary to truthfully advise the public as indicated above must appear on each and every picket sign employed by a picketing labor organization. Such a contention is without support in the federal cases, and does not reflect the realities of normal informational

[5] We conclude that the balance under our Act has thus been struck more generously in favor of labor organizations' rights to publicize labor disputes than is the case under the national act. (Cf. NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits) (1964) 377 U.S. 58 [84 S.Ct. 1063, 55 LRRM 2961] labor organizations may engage in picketing publicity directed against product of primary employer distributed by secondary, but may not employ picketing publicity to request consumer boycott of secondary.) However, that balance was the product of compromise, and labor organizations' expanded publicity opportunities were obtained at the price of compliance with the condition normally imposed on protected picketing, i.e., truthfulness. (See Levy, The Agricultural Labor Relations Act of 1975--La Esperanza de California para el Future, 15 Santa Clara Lawyer 783, 792-93; see also Magill Bros., Inc. v. Building Service Employees International Union (1942) 20 Cal.2d 506 [127 P.2d 542] untruthful picketing may be made unlawful without violating constitutional free speech protections.)

picketing.

We adopt the ALJ's correct statement of the federal law on the adequacy of the information provided by a labor organization to truthfully advise the public. The union (1) must disclose the existence and nature of its primary dispute, and (2) must indicate the secondary employer's relationship with that primary dispute. (Delta Airlines, supra, at p. 1422.) The union's information disclosure will be found adequate if there is no substantial departure from fact, and no intent to deceive can be inferred from the circumstances of the informational presentation. (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local 537 (Lohman Sales) (1961) 132 NLRB 901, 906 [48 LRRM 1429].)[6] While the union thus need not insure that the contents of its publicity are 100 percent correct (Lohman Sales, supra, at p. 906), it may not avoid its duty to provide adequate information to the public. (Atlanta Typographical Union Local No. 48 (1970) 180 NLRB 1014, 1016 [73 LRRM 1241].) Information that the union knows to be false, or which it supplies to the public in reckless disregard of its truthfulness, or for which it produces no proof of the reasonable basis for its belief, will not meet the truthfully advising requirement of the provisos.

[6] The Lohman Sales adequacy determination is applied to test the sufficiency of the information provided by the union to inform the public of the existence of the primary dispute and the secondary's involvement with that dispute. (Delta Airlines, supra.) The Lohman Sales standard is thus not an alternative to the Delta Airlines factors, nor does it negate the necessity of those factors being present.

(Hoffman v. Cement Masons Union Local No. 337 (9th Cir. 1972) 468 F.2d 1187, 1191 [81 LRRM 2641].) The ultimate criterion is the consumer's understanding of the information conveyed. (Id. at p. 1192.)

We must reject, however, the ALJ's totality of the circumstances approach to the determination of the adequacy of the Union's informational disclosure. (See ALJD at pp. 72-73.) While union flags, chanting, and picket signs all constitute independent channels of communication available for the Union's comoliance with our provisos' truthfully advising requirement (Local 248, Meat & Allied Food Workers (1977) 230 NLRB 189, 206 [96 LRRM 1221]), the various informational components of these media cannot be haphazardly aggregated so that "picket signs may clarify chanting and flags just as chanting and flags may clarify picket signs." (ALJD at p. 73.) The various media may, indeed, be scrutinized to determine the overall primary or secondary intent of the union's conduct. (Los Angeles Typographical Union, Local No. 174 (1970) 181 NLRB 384, 388 [73 LRRM 1390.) Where a labor organization relies on multiple communications media, as is the case here, at least one such medium must furnish all the necessary informational elements independently of the other media, while the remaining media must refrain from false or misleading information as indicated above. Thus, if a union uses chanting alone to demonstrate compliance, that chanting must furnish sufficient information to inform the public of the existence of the primary dispute and the secondary's relationship to that dispute. (See Local 248, Meat & Allied Food Workers, supra oral

statements of picketers and handbillers are publicity within federal proviso, and must meet federal truthfully advising standard.) The same rule applies to other media such as flags and picket signs.[7/]

We now examine those incidents of secondary conduct in which our determination differs from that of the ALJ.[8/]

Secondary Picketing Incidents [9/]

We affirm the ALJ's resolution of all the incidents of

[7/] The Board is unaware of any federal case that has attempted to determine the relationship between the "public" to which the provisos are specifically addressed, and "consumers" who form part of that public. We will require that a labor organization's publicity, in order to protect its secondary activity, must adequately inform consumers and potential consumers within a reasonable zone of commercial involvement.

[8/] As a final observation on the parameters of legal secondary consumer picketing under our Act, we reject Egg City's suggestion that the Union may not directly solicit a consumer's withdrawal of patronage from a picketed secondary because our publicity provisos permit only publicity having the effect of such a request. The federal cases impose no such restriction (see, e.g., Honolulu Typographical Union Local No. 37 v. NLRB (D.C.Cir. 1968) 401 F.2d 952, 957, n. 11 [68 LRRM 3004]), nor will we.

[9/] We affirm the ALJ's resolution of the hearsay challenges by Egg City and General Counsel to the Union's proof of picket sign content. The Act's provision that permissible publicity must "truthfully advise" the public concerning the existence of the primary dispute and the secondary's relationship to that dispute creates a requirement of adequate notice that the entity being picketed is not the entity with which the union has a labor dispute. Proof whether notice has been given entails no violation of the hearsay rule. (See 1 Witkin Cal. Evidence (3d ed. 1986) The Hearsay Rule, §591, p. 563 [words of notice not made inadmissible by hearsay rule]; accord People v. Rosson (1962) 202 Cal.App.2d 480, 486-87 [20 Cal.Rptr. 833].) Moreover, the fact that the adequacy of the attempted notice is tested under Delta Airlines, supra,and Lohman Sales, supra, does not change the non-hearsay character of such proof. We likewise affirm the ALJ's reception of the Union's testimonial secondary proof of picket sign content in satisfaction of the best evidence rule. As will be shown below, however, we reject that proof where the required foundational proof of picket sign loss or destruction has not been established.

secondary picketing except those occurring at Country Eggs on December 5 and 6, 1986, and that occurring at United Catering on December 3, 1986. In these incidents the ALJ received the Union's testimonial proof of picket sign content without the proper foundational proof of sign loss or destruction required by the best evidence rule.[10/] Since the Union was clearly capable of producing foundational proof as to other incidents in which picket signs were used/ we see no reason to apply different rules to similar cases where no such proof was presented. Where the Union has failed to lay the proper foundation for the receipt of secondary testimonial proof of picket sign content, we will disregard such secondary proof. (People v. Wojan (1984) 150 Cal.App.3d 1024, 1030-31 [198 Cal.Rptr. 277].)

However, disregarding the Union's testimony as to sign content concerning the December 5 and 6 incidents at Country Eggs forces us to decide whether the General Counsel's proof is sufficient to support a finding of a violation even in the absence of proof from the Union. The ALJ discredited General Counsel's witness Joseph Zaritsky, the owner of Country Eggs, because of asserted prior inconsistent statements, indifference or hostility to the truth-finding process as demonstrated in a cavalier

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[10/] Evidence Code §1501 provides: "A copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." Evidence Code §1505 provides: "If the proponent does not have in his possession or under his control a copy of a writing described in Section 1501, 1502, 1503, or 1504, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule. This section does not apply to a writing that is also described in Section 1506 or 1507 [public record or other document in custody of public entity]."

attitude to sworn statements outside of the hearing, and his asserted hostility to the Union's secondary activities. (ALJD at pp. 95-97.)

We, however, are not prepared to discredit Zaritsky as the ALJ has done. In the first instance, we place no reliance on the purported incidents of hostility to the Union's secondary activities. The cases are legion demonstrating that picket line conduct, or conduct occurring during other concerted activities for that matter, is not to be judged by the proprieties of drawing room conduct. We do not condone the use of obscene language or gesture, and we condemn out of hand any racial epithets that may have been used by either side. (See David Freedman Co. (1989) 15 ALRB No. 9.) Zaritsky, however, is not to be discredited in the hearing room merely because of his response to the perceived unfairness of being forced to participate in a disruptive labor dispute not of his making.

Secondly, we cannot infer from Zaritsky's naive expression of frustration with the declaration preparation process and his inapposite invocation of the Fifth Amendment that he had a "total lack of respect for his sworn word" sufficient to "cast serious doubt about the veracity of his entire testimony." (ALJD at p. 96.) The record reflects that Zaritsky did point out inaccuracies in his declaration when he became aware of them. (Reporter's Transcript at vol. V, pp. 139-40.) And, in fact, he did read at least one of his declarations, since the declaration received in evidence shows his initialled correction on the first page. (Respondent's Exhibit No. 1 at p. 1.) We will not find a

lack of truthfulness in a layman's untutored irritation with legal process.

Finally, although there is undoubtedly inconsistency between Zaritsky's in-court testimony as to sign content on December 5 and 6, 1986, and his statement given to a representative of the Board on January 14, 1987, we do not find such facial inconsistency dispositive of Zaritsky's overall veracity. The sworn declaration was given some five weeks after the events at issue, not the "short time after the picketing" mentioned by the ALJ. (ALJD at p. 95.) Moreover, Zaritsky's testimony as to the sign content on December 5 and 6 is not wholly incompatible with his uncontradicted testimony as to the sign content on November 21 and 22, 1986, which was corroborated in significant part by General Counsel's other witness. (See ALJD at p. 86.) In sum, we do not find Joseph Zaritsky unbelievable. We find, rather, that his incomplete and varying testimony as to the content of the Union's signs used at his establishment on December 5 and 6, 1986, is insufficient to establish a prima facie case of illegal secondary picketing under our Act. We will, therefore, dismiss this portion of the complaint.

A similar result obtains with respect to the Union's conduct on December 3, 1986, at the warehouse of United Catering. As in the above incident at Country Eggs, we must disregard the secondary testimony of UFW picket captain Avila as to sign content in the absence of foundational proof of loss or bona fide destruction as required by the best evidence rule. However, we agree with the ALJ that the testimony of Charles A. Blanck, president of United Catering's parent corporation, and that of

Tim Luberski of Hidden Villa Ranch, were lacking in reasonable certainty as to sign content. In the absence of credible evidence from General Counsel's witnesses sufficient to state a prima facie case, a violation is not established.[11/]

Illegal Threats

We affirm the ALJ's finding that no illegal threat was contained in the telephoned warning given by the Union representative Alberto Escalante to Zaritsky on October 24, 1986. Escalante warned that, because the Union was aware of Zaritsky's continuing business dealings with Egg City, the Union was going to follow Zaritsky's trucks to determine who his customers were, and, having discovered his customers, would then engage in informational picketing to inform them of their and Zaritsky's role in the Egg City dispute. Such a statement merely warns the secondary of the labor organization's intention to engage in conduct legal under our Act. The Board cannot find such a warning an impermissible threat because to do so would impinge on the legal conduct of which the statement warns. (NLRB v. Servette, Inc. (1964) 377 U.S. 46, 57 [84 S.Ct. 1098, 55 LRRM 2957].)

[11/] The Board notes that the secondasry activity at issue in this incident occurred at the neutral employer's warehouse, a location not usually amenable to proper consumer informational picketing. While a location for picketing, or timing thereof, that renders the pickets' message unlikely to reach a consumer audience can be evidence of an improper motive to induce work stoppages or other unauthorized interference with a neutral's business (see, e.g., Local 500 Millmen & Cabinet Makers (Steiner Lumber Co) (1965) 153 NLRB 1285 [59 LRRM 1622], enf'd (9th Cir. 1966) 367 F.2d 953 [63 LRRM 2328], Teamsters Local 327 (American Bread Co.) (1968) 170 NLRB 91 [67 LRRM 1427], enforcement den. on other grounds (6th Cir. 1969) 411 F.2d 147, 154-55), the failure of the parties to fully litigate this question prevents the Board from resolving it on the record now before us.

We must reject, however, the ALJ's determination that Escalante made no threat, when, later in the same telephonic conversation, he stated that the Union would continue to picket Zaritsky's customers even if Zaritsky substituted eggs from suppliers other than Egg City. Zaritsky's testimony was uncontradicted (Escalante did not testify), and must be accepted unless there is some reasonable basis for not doing so. (Martori Brothers Distributors v. ALRB (1981) 29 Cal.Sd. 721, 728 [175 Cal.Rptr. 626].) Although Zaritsky's testimony on this point was elicited by counsel for Egg City, rather than by the direct questioning of General Counsel, we do not believe that fact furnishes such a reasonable basis for disbelief. Moreover, the ALJ generally credited Zaritsky on the contents of his telephone conversations with Escalante. We therefore find that Escalante threatened Zaritsky with the comment that, even if he furnished non-Egg City eggs to his picketed customers, the Union would continue to picket them. Such a statement threatens illegal conduct inasmuch as it warns of picketing not within our publicity provisos because, if no eggs furnished by the primary employer Egg City are present at the picketed secondary employers' places of business, there then exists no producer/distributor relationship between the primary and secondary employers as required by the provisos. A threat to engage in illegal conduct is an illegal threat. (San Francisco Labor Council (Ito Packing Co.) (1971) 191 NLRB 261, 265-266 [77 LRRM 1593], enf'd (9th Cir. 1973) 475

F.2d 1125 [82 LRRM 3078].)[12/]

We also affirm the ALJ's finding that Escalante's statement to Richard Carrott, Chief Executive Officer of Egg City, on November 22, 1986, during the Union's picketing at Country Eggs, was not rendered illegal by the secondary boycott provisions of our Act. Escalante told Carrott that if Egg City did not immediately reinstate striking members of the UFW, dismiss its replacement workers, and recommence negotiations, the Union would picket Country Eggs' customers. Even if such picketing conduct were illegal, the fact that the statement threatening such picketing was made to the primary employer, rather than to a neutral secondary, removes it from the secondary boycott provisions of our Act.[13/] Likewise we adopt the ALJ's finding that Escalante did not state to Carrott that even if Zaritsky ceased supplying Egg City eggs to his customers the Union would continue to picket Country Eggs.

We find, however, that the UFW violated the Act when Escalante informed Zaritsky that the picketing would continue as long as Country Eggs continued to receive eggs from Egg City. When this statement was made on November 22, 1986, the Union was

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[12/] We affirm the ALJ's determination that Escalante's direct request to Zaritsky not to do business with Egg City is protected Such a request, without more, is a mere solicitation to exercise managerial discretion, and therefore does not constitute prohibited threats, coercion, or restraint. (NLRB v. Servette, Inc., supra, at p. 51.)

[13/] Such a result is consonant with the explicit exemption of primary conduct from liability under §1154(d): "Nothing contained in this paragraph shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." (Section 1154(d)(2).)

engaged in illegal secondary picketing inasmuch as the picket signs employed by the Union on that date failed to adequately inform the public, including consumers, of the existence of the primary dispute and Country Eggs' relationship to that dispute. We reject the ALJ's conclusion that "it cannot be assumed that the 'threat[1] to continue picketing was a threat to continue unlawful picketing." (ALJD at p. 91.) Neither, however, can it be assumed that it was not. The test of legality is the probable effect on percipient consumers. (Hoffman v. Cement Masons Union Local No. 337, supra, at p. 1192.) The threat, when made to Zaritsky, could only have been perceived as a threat to continue the conduct then occurring, i.e., illegal conduct. If a labor organization fails to adequately communicate that it intends to engage in legal picketing, it thereby creates the impression that it may resort to illegal methods, and thereby violates the Act. (San Francisco Labor Council, supra.) When a union warns that it will continue picketing that is ongoing, it assumes the risk that the picketing that is occurring may be illegal. Here the Union must bear the consequences of threatening to continue illegal picketing.

As to the statements made by UFW picket captain Miguel Camacho to the manager of Coco's Restaurant and to Tim Luberski on November 26, 1986, during the picketing of Coco's, we uphold the ALJ's determination that Camacho's threat to picket even in the absence of Egg City eggs at Coco's violates the Act as a threat to engage in illegal conduct. However, we also find all other warnings and statements by Camacho found permissible by the ALJ to

be violative of the Act. We reject in toto the ALJ's analysis that threats to continue picketing at Coco's and at other customers of Hidden Villa as long as those businesses continued to deal with Hidden Villa really meant that picketing would continue as long as they received Egg City eggs from Hidden Villa. Both Escalante and Camacho had made threats to secondaries indicating that the object of the Union's picketing was to pressure Hidden Villa, not merely to pressure Egg City by exerting influence on its customers.[14/] We will not place the burden on secondaries to demonstrate that they were unaware the warnings were directed at parties other than themselves when the statements are facially clear that they are aimed at the secondaries rather than the primary. The best that can be said of Camacho's statements to Luberski and Coco's manager Blanchette is that they are ambiguous as to the extent of the Union's intended picketing. Ambiguous threats, however, will be construed against the union. (Butchers Union Local 506 (Coors Distributing Co.) (1983) 268 NLRB 475, 478 [115 LRRM 1024].) We therefore find that Camacho's warnings illegally threatened picketing independent of a producer/distributor relationship between Egg City and Hidden Villa or between Egg City, Hidden Villa, and Hidden Villa's customers such as Coco's.[15/]

[14/] The ALJ found that even UFW official Ben Maddock had made a similar, but uncharged, threat to Hidden Villa. (ALJD at p. 113, n. 54.)

[15/] We find Camacho's demand for a signed letter stating that Coco's would cease doing business with Hidden Villa violative

(fn. 15 cont. on p. 24)

We adopt the ALJ's findings and conclusions as to all other charged and/or litigated violations of the secondary boycott provisions of our Act.[16]

Subsequent Legal Questions

The Board provided the parties the opportunity, after exceptions had been filed, to brief two additional legal questions

(fn. 15 cont.)

of the Act for the same reason. The fair implication of the letter demand is that picketing would continue, even in the absence of Egg City products at Coco's, until Coco's ceased doing business with Hidden Villa. Such a condition for picket line withdrawal threatens illegal picketing and violates the Act.

[16] Although we approve the ALJ's exposition of the limits on an administrative agency's competence to engage in constitutional adjudications (see ALJD at pp. 25-26), we will address the Union's "constitutional argument" based on the fourth proviso to the secondary boycott provisions of our Act. Simply put, the Union argues that any regulation of its picketing is forbidden by the fourth proviso's ban on the prohibition of constitutionally protected publicity, including picketing. The Union's argument, however, goes completely against the case law interpreting the regulation of picketing. Picketing, because of its non-speech components, is not the legal equivalent of pure speech. (Hughes v. Superior Court (1950) 339 U.s. 460, 464-65 [70 S.Ct. 718, 26 LRRM 2072].) Picketing, in fact, is clearly entitled to less First Amendment protection than a pure speech form of publicity such as leafletting. (Florida Gulf Coast Building Trades Council, AFL-CIO, v. NLRB (llth Cir. 1986) 796 F.2d 1328, 1332 [123 LRRM 2001].) Picketing publicity that asks consumers to boycott secondary employers may be banned without running afoul of the First Amendment. (Tree Fruits, supra.) Although a state could, if it so desired, regulate picketing as if it were identical to pure speech, it need not do so if the picketing is done in an illegal manner or for an illegal purpose. (Hughes, supra, at pp. 465-66.) The State of California will find unlawful and enjoin picketing that is untruthful. (Magill Brothers, Inc., supra, at pp. 508-09.) Such regulation of picketing does not violate constitutional free speech protections. (Id. at p. 512.) Thus we do not abridge the Union's state or federal free speech rights by requiring that its picketing publicity requesting the public to boycott secondary employers truthfully advise that public of the nature of the primary labor dispute and the secondary's relationship with it.

that arose subsequent to the close of the hearing and the issuance of the ALJ's Decision. The first concerns the effect of the U.S. Supreme Court's decision in Edward J. DeBartolo Corporation v. Florida Gulf Coast Building and Construction Trades Council, AFL-CIO and the National Labor Relations Board (DeBartolo) (1988)

___ U.S. ___ [108 S.Ct. 1392, 128 LRRM 2001] on the legality of the conduct at issue herein. The Union argues that DeBartolo makes picketing publicity under the ALRA, considered as the equivalent of non-picketing publicity under the NLRA, immune to statutory regulation. In DeBartolo the court determined that peaceful, truthful leafletting, not within the publicity proviso of the national act, was nevertheless not intended to be regulated by §8(b)(4) of the national act. The court, following the analysis of the Court of Appeals, found that the legislative history of that section revealed no concern to prohibit such conduct. We find DeBartolo inapplicable to the conduct we have found violative of the secondary boycott provisions of our Act.

In the first instance, DeBartolo concerns leafletting, not picketing as is the issue herein. Both the Supreme Court and the Court of Appeals sharply distinguished the protection available to picketing from that relevant to non-picketing publicity. (DeBartolo, supra, at p. 1400; Florida Gulf Coast Building and Construction Trades Council v. NLRB (llth Cir. 1986) 796 F.2d 1328, 1332-1334 [123 LRRM 2001].) Secondly, neither §8(b)(4) of the national act nor the legislative history thereof, demonstrates an intention to reach and prohibit the leafletting at issue in DeBartolo. It is, however, completely different with the

picketing at issue in this case. Our Act clearly indicates that "do not patronize" picketing is prohibited unless specified conditions are met, and establishes that only under such conditions is such conduct permitted. (See First and Second Provisos in footnote 3, supra.) Thus DeBartolo, which establishes the legality of non-picketing "do not patronize" publicity, for which there is no indication that such conduct was intended to be reached by the national act, is inapposite to the picketing "do not patronize" publicity which our Act specifically prohibits in the absence of conditions that establish the exclusive grounds for its use. In any case, we construe DeBartolo as applicable to truthful publicity. (See, e.g., Storer Communications, Inc. v. National Association of Broadcast Employees and Technicians, AFL-CIO (6th Cir. 1988) 854 F.2d 144, 146 [129 LRRM 2129], United Steelworkers of America, AFL-CIO (Pet, Inc.) (1988) 288 NLRB No. 133 [128 LRRM 1161].) Thus, even if DeBartolo were applicable to the Union's picketing herein, it would not prevent a finding of violation based on a failure to truthfully advise the public as required by statute.

The second legal issue on which the Board received briefing subsequent to the filing of exceptions concerns the effect of the results of the decertification election held at Egg City on November 3, 1986. The tally of ballots issued by the Regional Director on April 22, 1988, showed the Union to have lost the election. Egg City claims that since only a "currently certified" labor organization may engage in do not patronize publicity under the second proviso of our secondary boycott

statute, the election loss as of November 3, 1986, renders the Union's picketing subsequent to that date illegal. Egg City also argues that the Union's ability to engage in do not patronize picketing lapsed with its initial certification year, citing Kaplan's Fruit & Produce Co., Inc. (1977) 3 ALRB No. 28.

We reject the latter argument based on the Board's decision in Nish Noroian Farms (1982) 8 ALRB No. 25 which provides that a union is certified until decertified even after the expiration of the initial certification year. (Id. at pp. 14-16.) Although we find merit in Egg City's argument that the "at your peril" doctrine adopted in Nish Noroian, supra, should be properly extended to a labor organization that engages in secondary activities (for which it must be certified) after a decertification election, we find that the "relation back" aspect of that doctrine is properly applied at the time of the tally of ballots, not at the date of the election.[17/] It is only at that time that a labor organization can assess the closeness of the

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[17/] The "at your peril" rule, sometimes called the "Mike O'Connor" rule from Mike O'Connor Chevrolet-Buick-GMC Co, Inc. (1974) 209 NLRB 701 [85 LRRM 1419], enforcement den. on other grounds sub.nom. NLRB v. Mike 0*Connor Chevrolet-Buick-GMC Co., Inc. (8th Cir. 1975) 512 F.2d 684 [88 LRRM 3121], states that an employer who refuses to bargain, or makes unilateral changes, following a loss by an incumbent union in a decertification or rival-union election and pending resolution of the union's election objections does so at his own risk. If the union's objection are dismissed, no liability results as the Board's decertification order "relates back" to the time of the employer's conduct. If the union's objections are sustained, the employer's conduct results in liability since the Board's order setting aside the election retrospectively validates the bargaining relationship then existing. (See, e.g., Nish Noroian Farms (1982) 8 ALRB No. 25 at pp. 11-14, and see also Dow Chemical Co. Texas Division v. NLRB (5th Cir. 1981) 660 F2d 637, 654 [108 LRRM 2924].)

election and the relative likelihood of prevailing on its objections. (Id. at p. 16.) Applying the relation back portion of the "at your peril" doctrine in this case would make any subsequent Board decertification order effective only from the date of the tally of ballots. Since the Union engaged in no secondary conduct of record after that date, the application of that doctrine cannot affect the outcome of this case.

Remedy

We find merit in Egg City's exception to the ALJ's failure to provide for the mailing of notice to affected agricultural employees insofar as the exception requests that the remedy be tailored to the General Counsel's prayer. We find no reason for entirely omitting a mailing requirement, especially inasmuch as the mailing requirement is now among the Board's "usual requirement[s]" for disseminating information about its remedial actions. (Ukegawa Brothers (1982) 8 ALRB No. 90 at p. 66.) We will limit the mailing of notice, however, to those agricultural employees who were employed by Egg City during the occurrence of the unfair labor practices at issue here. (M. B. Zaninovich, Inc. (1980) 6 ALRB No. 23 at p. 2.)

While we do not find, in this case of first impression, factors in the Union's conduct that would justify imposing the publication requirements urged by Egg City, i.e., in the Union's members' magazine and local newspapers, (cf., e.g., Newspaper and Mail Deliverers' Union of New York (Raritan Periodical Sales) (1985) 277 NLRB 576 [120 LRRM 1338], and NLRB v. Electrical Workers (IBEW) Local 3 (2d Cir. 1984) 730 F.2d 870 [115 LRRM 3436]), we do find it appropriate to direct the Union also to mail

copies of the notice herein to employers with respect to whom the Union's conduct was found to be violative of the Act. Such a mailing serves the necessary function of informing the most directly affected entities of our resolution of issues never previously addressed by the Board.

We also find merit in Egg City's exception to the ALJ's failure to recognize a damages remedy under the ALRA for illegal secondary boycott activity. We are unpersuaded by the ALJ's rejection of the damages remedy based solely on the absence of an explicit mention of such a remedy in section 1160.3 and the omission of a damages cause of action in our Act similar to that provided in section 303 of the NLRA. (ALJD at p. 162.) The California Supreme Court has already indicated that the absence of specific authorization for a remedy employed by the Board is not dispositive of the propriety of that remedy. (Harry Carian Sales v. ALRB (1985) 39 Cal.3d 209, 229 [216 Cal.Rptr. 688] absence of specific statutory authorization for bargaining order based on NLRB v. Gissel Packing Co. (1960) 395 U.S. 575 [89 S.Ct. 1918] does not prevent Board from imposing such order in appropriate cases.) The limiting criterion for the imposition of remedial measures by the Board is whether any such remedy is reasonably necessary to effectuate the policies of the Act. (Harry Carian Sales, supra, at p. 227, n. 10.) We therefore find the absence of specific authorization for a damages remedy in section 1160.3 not controlling if that remedy is otherwise appropriate on the

facts of any given case.[18] Where our Act's proscription of illegal secondary conduct is advanced by protecting the public's and parties' interests in deterrence and compensation, the awarding of purely compensatory damages is within the Harry Carian Sales rule.[19]

Nor do we find controlling the absence from the ALRA of a cause of action for damages for illegal secondary conduct as provided by section 303 of the national act. The legislative history of section 303 indicates that the section was added in furtherance of interests in compensation and deterrence because federal legislators of that time did not believe the national board could administer a damages remedy.[20] The structure of the

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[18] Recent appellate court decisions in Maggio v. ALRB (1987) 194 Cal.App.3d 1329 [240 Cal.Rptr. 195] and Sam Andrews' Sons v. ALRB (1988) 47 Cal.3d 157 [253 Cal.Rptr. 30] are not to the contrary. In Maggio, legislative history, specific statutory language, and the principle of avoiding the creation of surplus language in a statute prevented the awarding of the makewhole remedy for a labor organization's bad faith bargaining. (Id. at pp. 1332-1334.) In Sam Andrews' Sons the Supreme Court found the absence of specific authorizing language in section 1160.3 as required by Code of Civil Procedure section 1021 prevented the Board's imposition of attorney's fees and costs. (Id. at pp. 171-73.) Such concerns do not operate in this context to prevent the Board from awarding damages for illegal secondary conduct.

[19] The Board, of course, has no jurisdiction to impose punitive damages under our remedial authority. (See, e.g., William DalPorto & Sons, Inc. v. ALRB (1987) 191 Cal.App.3d 1195, 1204 [237 Cal.Rptr. 206].) To leave egregious violations of the Act without significant sanction, however, would likewise defeat, not promote, the policies of the Act. (Harry Carian Sales, supra, at pp. 223-224.)

[20] Senator Taft of Ohio, principal sponsor of the National Labor Relations Act, stated that, "We considered making it [i.e., an action for compensatory damages] a procedure through the National Labor Relations Board also, but it is not felt I think by any of

(fn. 20 cont. on p. 31)

ALRA, however, demonstrates no such reluctance to allow the Board to administer a damages remedy under appropriate circumstances. The availability of the makewhole remedy against employers who engage in bad faith bargaining that causes a loss in pay to their agricultural employees demonstrates that the legislators who created the ALRA harbored no doubts as to the Board's ability to determine the financial losses caused by the employer's bad faith bargaining. We thus have no reason to defer to an assessment of our technical competence that was not shared by the framers of our Act.

Moreover, it is clear under controlling principles of preemption law that, if the Board does not afford persons injured by illegal secondary activities a forum to demonstrate and recover their losses, no such recovery will be available in the civil courts of the State of California. This is because conduct that is arguably either protected or prohibited under our Act is within the exclusive jurisdiction of the Board. (Kaplan's Fruit & Produce Co. v. Superior Court, supra, at pp 67-68, citing San Diego Building Trades Council v. Garmon (1959) 359 U.S. 236 [43 LRRM 2838].)[21/] The conduct that causes economic damage to

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(fn. 20 cont.)

those on the other side of these questions that the Labor Board is an effective tribunal for the purposes of trying to assess damages in such a case. I do not think anyone felt that that particular function should be in the Board. So, if such remedy is to be provided at all, if there is to be any recourse for financial losses caused by unions, it must be by direct suit, as proposed by the amendment..." (2 Legislative History of the Labor Management Relations Act, 1947 (50th anniversary edition, 1985) at p. 1371.)

[21/] Our exclusive jurisdiction over conduct amounting to an unfair labor practice is made explicit by section 1160.9: "The procedures set forth in this chapter shall be the exclusive method of redressing unfair labor practices." (Emphasis added.)

secondary employers enmeshed in a labor dispute not of their own making is precisely the conduct prohibited by section 1154(d) of our Act. Therefore no California civil court would have jurisdiction to hear a damages claim for conduct violative of that section. (Kaplan's, supra, at p. 74 injunction against picketing that blocks access obtainable since Board's authority to prevent coercive picketing provides insufficient relief; see also El Rancho Unified School District v. National Education Association (1983) 33 Cal.3d 946 [192 Cal.Rptr. 123] school district's tort action for damages arising from illegal strike preempted by Public Employment Relations Board's exclusive jurisdiction to determine legality of strike.) To deprive secondary employers of a purely compensatory damages remedy in either the civil courts or before this Board would, however, create precisely the situation condemned by the Harry Carian Sales court, viz., it would leave potentially egregious violations of our statute without significant sanction. (Harry Carian Sales, supra, at pp. 223-224.) We will not adopt an interpretation of our Act repugnant to its underlying principles and policies.

Therefore, since neither the absence of specific statutory authorization nor the absence of a specific statutorily created cause of action in our Act prevents the Board from applying a remedy that will effectuate the policies underlying the proscriptions of illegal secondary boycott activity in our Act, we will allow any person injured in his or her business or property by reason of conduct in violation of section 1154(d) of our Act to participate, by intervention if necessary, in the compliance

proceedings which shall follow our liability determination herein in order to determine the extent of the compensatory damages, if any, to which he or she may be entitled from the Union. No damages shall be awarded, however, for any conduct which was not proved to be in violation of section 1154(d) in these liability proceedings. The Regional Director shall implement this provision of our Order in conformity with the procedures and practices set out in Title 8, California Code of Regulations, section 20290, et. seq.[22/]

ORDER

Pursuant to Labor Code section 1160.3, Respondent, United Farm Workers of America, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any individual employed by the Federal Transportation/Federal Produce Co., the Long Beach Terminal, and the Metropolitan Stevedore Company at Terminal Island or any other person to engage in a refusal in the course of his/her employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services with the object of forcing or requiring any person to cease using, selling, transporting, or

[22/] The Regional Director upon receipt of our decision herein shall notify Federal Transportation/Federal Produce Co., the Long Beach Terminal, the Metropolitan Stevedore Co. at Terminal Island, Country Eggs, Sam's Produce, Coco's Restaurant, Hughes Market, Lucky Market and Bob's Big Boy Restaurant of their potential interest in future compliance proceedings in order to facilitate the preparation of any damages specification that may be required in those proceedings.

otherwise dealing in the products of The Careau Group, dba Egg City or Tim Luberski, dba Hidden Villa Ranch, or to cease doing business with The Careau Group, dba Egg City or Tim Luberski, dba Hidden Villa Ranch.

(b) Threatening, coercing, or restraining Tim Luberski, dba Hidden Villa Ranch, Country Eggs, Sam's Produce Co., Coco's Restaurant, Hughes Market, Lucky Market, and Bob's Big Boy, as found herein, or any other person, with an object of forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of The Careau Group, dba Egg City or Tim Luberski, dba Hidden Villa Ranch, or to cease doing business with The Careau Group, dba Egg City or Tim Luberski, dba Hidden Villa Ranch.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Compensate any person who has been injured in his or her business or property by reason of conduct found to be in violation of section 1154(d) of the Act herein which occurred between October 23, 1986 and January 26, 1987.

(b) Post at its offices and meeting halls copies of the attached notice. Copies of said notice, on forms provided by the Salinas Regional Director, after being duly signed by Respondent Union's representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not

altered, defaced, or covered by any other material.

(c) Mail copies of the attached notice, in all appropriate languages, within 30 days of issuance of this Order, to all agricultural employees of The Careau Group, dba Egg City from October 23, 1986, to January 26, 1987.

(d) Mail copies of the attached notice, in all appropriate languages, within 30 days of issuance of this Order, to the companies, businesses, or individuals named in paragraph 1 above, for posting, if they desire to do so, at any of the sites involved in this proceeding.

(e) Notify the Salinas Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

The Second Amended Complaint is dismissed as to those portions in which Respondent has not been found to have violated the Act.

DATED: August 7, 1989

BEN DAVIDIAN, Chairman[23]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

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[23] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority.

NOTICE TO ALL MEMBERS

Pursuant to the Order of the Agricultural Labor Relations Board, and in order to effectuate the policies of the Agricultural Labor Relations Act, we hereby inform you that:

WE WILL NOT induce or encourage any individual employed by the Federal Transportation/Federal Produce Co., the Long Beach Terminal, and the Metropolitan Stevedore Company at Terminal Island, or any other person to refuse in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services with the object of forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of The Careau Group, dba Egg City or Tim Luberski, dba Hidden Villa Ranch, or to cease doing business with The Careau Group, dba Egg City or Tim Luberski, dba Hidden Villa Ranch.

WE WILL NOT threaten, coerce, or restrain Tim Luberski, dba Hidden Villa Ranch, Country Eggs, Sam's Produce Co., Coco's Restaurant, Hughes Market, Lucky Market, and Bob's Big Boy, or any other person, with an object of forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of The Careau Group, dba Egg City or Tim Luberski, dba Hidden Villa Ranch, or to cease doing business with The Careau Group, dba Egg City or Tim Luberski, dba Hidden Villa Ranch.

WE WILL COMPENSATE any person who has been injured in his or her business or property by reason of conduct which has been found by the Agricultural Labor Relations Board to be in violation of section 1154(d) of the Act which occurred between October 23, 1986, and January 26, 1987.

DATED: UNITED FARM WORKERS OF AMERICA, AFL-CIO

By: ______________________________
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California. The telephone number is (408) 443-3161.

This is an official notice of the Agricultural Labor Relations Board, an Agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

United Farm Workers
of America, AFL-CIO
(The Careau Group, dba Egg City)

15 ALRB No. 10
Case Nos. 86-CL-14-SAL(OX)
86-CL-14-1-SAUOX)
86-CL-21-SAL

Background

Following the collapse of contract negotiations, the United Farm Workers of America, AFL-CIO (UFW or Union) commenced strike action against The Careau Group dba Egg City (Egg City or Charging Party). In conjunction with that strike activity, the Union engaged in secondary conduct against sellers and distributors of Egg City's products. The Union picketed numerous commercial entities including restaurants, food stores, and intermediate distributors requesting the public to withdraw its patronage from the picketed entities. In conjunction with these picketing activities, Union agents made statements to agents or representatives of the picketed entities warning that picketing would continue in the absence of actions specified by the Union. The Union also followed trucks containing Egg City products to the Long Beach Terminal and Terminal Island, and picketed Egg City products at those locations.

ALJ Decision

The ALJ found that the legislative intent of the secondary boycott provisions of the Agricultural Labor Relations Act (ALRA or Act) was to balance labor organizations' interest in publicizing as widely as possible their primary labor disputes and appealing to consumers to support them in those disputes, with the interest of secondary entities to avoid undue entanglement in labor disputes not of their own making. The publicity provisos of the Act create an ordered sequence of publicity techniques that accommodate both interests. The ALJ therefore found that a certified labor organization, such as the Union herein, could engage in picketing publicity that requests the public to withdraw its patronage from picketed entities as long as that publicity truthfully advises the public of the existence and nature of the Union's primary labor dispute and the relationship of picketed secondary entities to that dispute. Where the publicity adequately disclosed the required information, the ALJ found no violation; where the Union's informational disclosure was inadequate, the ALJ found violations. The ALJ also determined that statements by the Union's agent to picketed secondary employers that informational picketing would continue while the secondaries continued to receive Egg City products was protected under the ALRA as a warning to engage in legal consumer picketing. The Union agent's threat to continue picketing secondaries even in the absence of Egg City products at the picketed sites was found by the ALJ to violate the Act. The Union's conduct at the Long Beach Terminal and Terminal Island, which resulted in members of the longshoremen's union refusing to load Egg City products, was found by the ALJ to violate the Act as illegal work stoppage inducements

The ALJ also found that the Union illegally threatened the driver of a delivery truck carrying Egg City products to the Long Beach Terminal, and illegally threatened the manager of the Terminal Island facility with an illegal work stoppage.

Board Decision

The Agricultural Labor Relations Board (ALRB or Board) adopted the ALJ's interpretation of the legislative balance struck by the secondary boycott provisions of the ALRA, and affirmed his finding of violations. The Board, however, rejected the ALJ's totality of the circumstances test for determining the adequacy of a labor organization's information disclosure under the Act's publicity provisos. The various channels of communication used by the union, e.g. picket signs, chanting, and union flags, cannot be aggregated to create one composite acceptable message. Rather, at least one channel of communication must contain all elements of information necessary to meet the truthfully advising requirement of the statute, while other media used by the union must abstain from false or misleading statements. The Board, while finding in two instances that the General Counsel had failed "to establish a prima facie case, also rejected the ALJ's reliance on the Union's testimonial proof of picket sign content in the absence of foundational proof of sign loss or destruction as required by the best evidence rule. The Board found additional instances of illegal threats when it credited a witness discredited by the ALJ who stated that the Union's agent had warned of continued picketing even in the absence of Egg City's products at the secondary's customers' businesses, when the agent stated that illegal picketing would continue in the absence of compliance with the Union's demands, and when the agent warned that picketing would continue as long as secondaries did business with a particular intermediate distributor even in the absence of receipt of Egg City products. The Board rejected the Charging Party's arguments that all information used by the Union to truthfully advise the public had to be contained on each and every picket sign used, that the Union could only make indirect appeals to the public to withdraw its patronage from picketed entities, and that the Union's ability to engage in do not patronize picketing lapsed at the end of the Union's initial certification year. The Board also rejected the Union's argument that its picketing was absolutely protected under the federal and California constitutions as guaranteed by the fourth publicity proviso of the Act. In addition to ordering the Union to cease and desist from its illegal conduct, the Board ordered the Union to mail copies of its remedial notice to workers employed by Charging Party during the illegal conduct, and to secondary employers as to whom the Union's conduct was found to violate the Act. The Board also ordered the Union to compensate any person injured in his or her business or property by reason of conduct found to have violated the secondary boycott provisions of the Act.

* * *

This Case Summary is furnished for information only and is not an official statement of the case or of the ALRB.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:		
UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent,	)	Case Nos. 86-CL-14-SAL(OX)
and	)	86-CL-14-l-SAL(OX)
THE CAREAU GROUP, dba EGG CITY; TIM LUBERSKI dba HIDDEN VILLA RANCH, Charging Parties.	)	86-CL-21-SAL

Appearances:

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Ned Dunphy
Dean Beer
United Farm Workers of
America, AFL-CIO
P. 0. Box 30
Keene, California

Before: Marvin J. Brenner
Administrative Law Judge

DECISION OF ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Judge: This case was heard by me on 10 hearing days from March 23 - April 7, 1987 in Los Angeles, California. The original Complaint was based on charged filed by The Careau Group dba Egg City (hereafter referred to as "Egg City") and Tim Luberski dba Hidden Villa Ranch (hereafter referred to as "Hidden Villa") between October 20 and December 16, 1986.[1] A Second Amended Complaint was filed on February 18, 1987. During the hearing, on March 24, 1987, General Counsel filed an "Amendment to Second Amended Complaint." Upon the entire record,[2] including my observations of the demeanor of the witnesses and after careful consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent (also referred to as the "UFW" or the "Union") admitted, and I so find, that it is now and at all material times

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[1]Unless otherwise designated, all dates refer to 1986.

[2]Hereafter, General Counsel's exhibits will be identified as "G.C. ___", Respondent's exhibits as "Resp's ___", and Charging Parties' as "C.P. ___". References to the Reporter's Transcript will be noted as (Volume: page). References to General Counsel's Post-Hearing Brief will be "G.C.'s Post-Hearing Brief, p. ___", Charging Parties' as "Egg City's Post-Hearing Brief, p. ___" or "Hidden Villa's Post-Hearing Brief, p. ___," and Respondent's as "Resp's Post-Hearing Brief, p. ___."

has been a labor organization within the meaning of Labor Code section 1140.4(f). Respondent also admitted, and I so find, that Karl Lawson and Alberto Escalante were at all times mentioned in the Second Amended Complaint its representatives and agents.

Respondent withdrew its affirmative defense which had alleged that the ALRB did not have any jurisdiction to hear any matters presented in the case. (II: 102)

Charging Party Egg City admits, and I so find, that it is now and has been at all material times an agricultural employer within the meaning of Labor Code section 1140.4(c).

II. Certified Bargaining Representative

I find that Respondent UFW is the certified bargaining representative for Egg City's agricultural employees. I take administrative notice of the fact that on July 7, 1978 and in Case No. 75-RC-21-M the ALRB certified the UFW as the bargaining agent for all of Egg City's agricultural employees employed at its egg producing facility located in Moorpark, California and its hatchery and routing operation located in Arroyo Grande and Nipomo, California.

III. Dismissals

On April 2, 1987 I allowed the General Counsel to dismiss Paragraphs 11, 29, and 30 from the Second Amended Complaint (VIII: 16-17).

IV. The Alleged Unfair Labor Practices

The Second Amended Complaint generally alleges two types of violations. First, it alleges that Respondent through its

agents established picket lines at various restaurants and supermarkets in the Los Angeles area urging a boycott of Egg City products against whom it was on strike but failed to identify for the sake of consumers the true nature of the labor dispute between Egg City and Respondent or the relationship between the restaurant or supermarket and Egg City and/or its distributors.

Second, the Complaint alleges that Respondent followed Egg City products to Long Beach and Terminal Island docks, where they had gone to be exported, and established picket lines in order to encourage and induce employees of said docks to refuse to handle or perform services on the Egg City products.

Respondent is alleged to have violated sections 1154(d)(i) (2) and 1154(d) (ii)(2) of the Agricultural Labor Relations Act (hereafter "ALRA" or "Act.")

V. Evidentiary Rulings

A. The Hearsay Dispute

A number of General Counsel's witnesses testified without objection regarding the content of the UFWs picket signs utilized at the various locations set forth in the Second Amended Complaint. General Counsel and Charging Party Egg City assert that though this was hearsay evidence, it was admissible, either as an admission of a party (Evidence Code section 1220) or as an authorized admission (Evidence Code section 1222). (See G.C.'s Post-Hearing Brief, p. 38; Egg City's Post-Hearing Brief, p. 46). However, when Respondent attempted to present evidence through

testimony as to what the picket signs said (testimony that would often differ substantially from that of witnesses presented by the General Counsel), the existence of symbols or other statements on the UFW flags at the picket sites, and what the pickets may have been chanting, both the General Counsel and Charging Parties timely objected on the grounds that such evidence was being offered for the truth, was therefore hearsay, and as there was no exception covering it, should be excluded.[3] (IX: 48, 54) As argued by the General Counsel: "Since section 1154(d)(2) does not prohibit truthful picketing, then the words on the picket signs would go to prove the matter stated, and that is what is at issue. Consequently, the Hearsay Rule excludes such testimony." (Emphasis added) (G.C.'s Post-Hearing Brief, p. 37.) (See also discussion at IX: 105-117)

I initially overruled the objections and allowed the testimony to come into evidence for the limited purpose of showing that in fact, statements were made. (IX: 50-51, 53-54, 104-106, 114). I emphasized that my ruling was tentative, and I invited the parties to discuss the legal issues involved in their post-hearing briefs after which I would make a final ruling. (X: 42-44) In the meantime, I granted General Counsel's and Charging Parties' request that they be deemed to have continuing objections to any further testimony of this nature. (IX: 53; X: 42-44)

[3] At the same time it was argued that the "Best Evidence Rule" also warranted the exclusion of this testimony, infra.

Ruling

I decline to exclude this evidence because *I* do not regard it as hearsay. As stated by Witkin: "'There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay but as original evidence.' (People v. Henry (1948) 86 C.A.2d 785, 789, 195 P.2d 478. In these situations, the words themselves, written or oral, are 'operative facts, and an issue in the case is whether they were uttered or written." 2 Witkin, Cal. Evidence, (3d ed. 1986) The Hearsay Rule, section 588, pp. 561-562 (Citations Omitted.) See also Jefferson, 2 Cal. Evidence Benchbook (2d ed.) (Cont.Ed. Bar 1982) section 1.6, p. 76, section 3.2, p. 156.

There are numerous California cases applying the operative facts principle. See e.g., Greenblatt v. Munro (1958) 161 Cal.App.2d 596, 601, 326 P.2d 929 (law enforcement officer's statement that a woman asked him to buy a "mist" which she described as containing alcohol was admitted not for the truth of whether the drink contained alcohol but for whether an act of solicitation had been made); People v. Patton (1976) 63 Cal.App.3d 211, 219, 133 Cal.Rptr. 533, 538 (witness was allowed to testify about a conversation in which defendant encouraged her to become a prostitute; the conversation was said to be non-hearsay as

defendant's statements were not being offered for the truth but constituted the substantive offense of pandering and therefore, were operative facts); People v. Montgomery (1976) 61 Cal.App.3d 718, 132 Cal.Rptr. 558 (in bribery case, the Court held that it was error to exclude the statements of a police officer to another person who was cooperating in gathering evidence against the defendant because they went to prove a central issue in the case — whether the accused had a preexisting unlawful intent or whether the police officer was trying to implant in the defendant's mind the idea of bribery); Rogers v. Whitson (1964) 228 Cal.App.2d 662, 675, 39 Cal.Rptr. 849 (where bills submitted to defendant were not being offered to show that the work was performed but that the language of the bills was that of an independant contractor relationship and not one of an agent/principal); Young v. Benton (1913) 21 Cal.App. 382, 390, 131 P. 1051 (where the issue was whether defendant had agreed to a novation, it was proper (and not hearsay) to show what defendant said and did in reference to the novation proposition).

It has been held that any evidence of a declarant's statement constituting words of instruction, command, or order is not hearsay and is relevant merely because the words were spoken as an issue or part of an issue in the case. See e.g., People v. Rosson (1962) 202 Cal.App.2d 480, 486-487 (where since the giving of notice or demand to another was an issue in the case, statements to that effect were admitted because the very fact in

controversy was whether certain things were said or done and not whether these things were true of false); In re Robert W. (1977) 68 Cal.App.3d 705, 712, 137 Cal.Rptr. 558 (proffered testimony was that police officer during lineup instructed or ordered defendant to put on coat belonging to victim).

In People v. Reyes (1976) 62 Cal.App.3d 53, 67, 132 Cal.Rptr. 848, a witness testified that she heard persons talking to defendant and relating a series of numbers in combinations of three. After stating the three numbers, these persons asserted money to the defendant. The Court allowed this testimony on the grounds that it was not offered for the truth of any matter asserted by the statements but for the relevant non-hearsay purpose of showing directions to the defendant to use the money to place bets in accordance with the numbers stated. "A declarant's words of direction or authorization do not constitute hearsay since they are not offered to the truth of any matter asserted by such words." 62 Cal.App.3d at 67

An example of the application of the operative facts concept in a labor law context appeared in the Ninth Circuit case of NLRB v. G.W. Thomas Drayage and Rigging Co. (9th Cir. 1953) 206 F.2d 857. There the National Labor Relations Board (hereafter "NLRB") General Counsel had charged a labor organization with attempting to cause a company to discriminate against a worker because he belonged to another union in violation of Section 8(b)(1) and (2) of the National Labor Relations Act (hereafter

"NLRA"). The testimony of witnesses as to the statements of the union's business agent to the worker was held to be admissible as direct evidence as to events perceived by the witness and not hearsay. In NLRB v. H. Koch & Sons (9th Cir. 1978) 578 F.2d 1287 the testimony of the Leatherworkers[1] Union business agent as to statements made to him by the Machinists' Union representative concerning the acceptance of a severance benefits agreement with the employer was admissible as verbal conduct to show that words of assent were uttered not as to their truth. See also McCormick on Evidence (3d ed. 1954) section 249, p. 732.

Other federal cases have admitted such testimony, as well. In U.S. v. Gibson (9th Cir. 1982) 690 F.2d 697, cert, denied 103 S.Ct. 1446 defrauded investors were allowed to testify as to statements made to them by representatives of defendant's corporation in order to prove the existence of a scheme and not for their truthfulness. The purpose of the testimony was solely to establish the fact the statements were made and was relevant to the government's allegation that a scheme existed. In United States v. Jones (5th Cir. 1981) 663 F.2d 567 an exerpt from a transcript of threats made to a judge and prosecutor at a sentencing was admitted as it was offered because it contained the operative words of the criminal action -- the threats against officers of the federal courts — and was therefore, not hearsay.

The UFW's picket signs, chanting, and flags at the various secondary locations are not elements in the determination

of whether, in fact, for example, Hidden Villa bought eggs from Egg City or whether Bob's Big Boy bought eggs from Hidden Villa. The signs are irrelevant in that respect as there is no linkage between the signs and the proof of the case. Testimony as to the contents of the signs was admitted for a totally non-hearsay purpose; whether what was written on the signs was true or not makes no difference to this issue. The very fact in controversy here was whether certain things were said and not whether the things that were said were true or false.[4] As such, the words themselves were operative facts of the case. See 2 Witkin, supra, Cal. Evidence (3d ed. 1986) The Hearsay Rule, section 588, pp. 561-562.

B. The Best Evidence Rule Dispute

The General Counsel and Charging Parties argue that the "Best Evidence Rule" applies to Respondent's witnesses' testimony regarding what the signs said and that since the picket signs themselves were not preserved and introduced into evidence, all such testimony should be stricken from the record as secondary. (See generally, G.C.'s Post-Hearing Brief, pp. 39-57); Egg City's Post-Hearing Brief, pp. 45-50) (See also discussion at IX: 105-117)

[4] A different test, of course, is involved in the question of whether these words met the statutory definition of truthfully advising the public of the nature of a labor dispute. See infra,

As in the case of the hearsay question, I overruled General Counsel's and Charging Parties' timely objections and allowed Respondent's witnesses to testify as to the contents of the picket signs, pointing out that my ruling was not final and that the matter could be later briefed should the parties so desire. (IX: 50-51, 53, 105-106, 114) *I* also made it clear that the General Counsel and Charging Parties had a continuing best evidence objection. (IX: 53, 42-44)

Ruling

Respondent's picket sings would fall within the Evidence Code's definition of a "writing" as such is defined quite broadly. Section 250 of the Code provides: "'Writing' means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof." Writings have been held to include motion picture films, videotapes, discs and tapes. 2 Witkin, Cal. Evidence, supra, (3d ed. 1986) The Best Evidence Rule, sections 924-925, pp. 884-885.

Section 1500 of the Evidence Code states that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." A best evidence rule objection prevents a party from proving the contents of a writing by oral testimony or by a copy, if the original writing itself is available. The rule is designed

to prevent possible erroneous interpretations of a writing by requiring the production of the original writing when available. (2 Cal. Evidence Benchbook (Cont.Ed.Bar 1982, 2d ed.), supra, section 31.1, page 1,083.

The best evidence rule applies only when the contents of a writing are at issue. Hewitt v. Superior Court (1970) 5 Cal.App.3d 923, 85 Cal.Rptr. 493. The best evidence of the contents of a writing, of course, is the writing itself. Division of Labor Law Enforcement v. Standard Coil Products Co. (1955) 136 Cal.App.2d Supp. 919, 288 P.2d 637.

But there are exceptions to the rule. Section 1501 of the Evidence Code states that "[a] copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." And Section 1505 of the Evidence Code states that "[i]f the proponent does not have in his possession or under his control a copy of a writing described in Section 1501, 1502, 1503, or 1504, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule." Thus, where a copy is not available, oral testimony of a lost writing's content, if relevant to the issues in dispute, is admissible. People v. Kirk (1974) 43 Cal.App.3d 921, 117 Cal.Rptr. 345. If an instrument in writing is lost, its contents may be proved by any witness who has read it. Delger v. Jacobs (1912) 19 Cal.App. 197, 125 P. 258. Where oral testimony is

allowed, it is sufficient to give the substance of the terms of the writing; verbal accuracy is not required. People v. Goulet (1971) 21 Cal.App.3d Supp. 1, 4, 98 Cal.Rptr. 782.

The proponent of the testimony must show that a reasonable and diligent search has been made for the original without success. Sylvania Electric Producs Inc. v. Flanagan (1st Cir. 1965) 352 F.2d 1005, 1008.

The party who offers secondary evidence of the contents of a document alleged to be lost must go further than just showing that it is doubtful whether or not the document exists; he must demonstrate that although it once existed, it cannot be found despite a diligent and unsuccessful search and that there is no reasonable probability that it has been designedly withheld or suppressed. Sellmayer Packing Co. v. Commissioner of Internal Revenue (4th Cir. 1944) 146 F.2d 707, 710. A reasonable search shall be made in the place where the writing was last known to have been and if such search does not discover it, then inquiry should be made of persons most likely to have its custody or who have some reason to know where it is. 2 Witkin, Cal. Evidence, supra (3d ed. 1986) The Best Evidence Rule, section 932, p. 891.

There is no universal or fixed rule that determines the sufficiency of the proof required to show that a reasonable or diligent search has been made. Each case is governed in large measure by its own particular facts and circumstances. What is a reasonable search is such search as the nature of the case would

suggest. 2 Witkin, Cal. Evidence, supra, p. 891. A document may be lost for all practical purposes of the trial when it cannot be found after diligent search, and yet it may exist. The reasonable diligence in making the search does not require the exploration of all possible places where the instrument might be. (1907) King v. Samuel 7 Ct.App. 55, 66-67, 93 P. 391.

It has been held that the sufficiency of the proof of the loss is a question of law addressed to the sound discretion of the trial court; and unless there is an abuse of such discretion, its determination will not be disturbed on appeal. King v. Samuel, supra at p. 67; Cotton v. Hudson ((1941) 42 Cal.App.2d 812, 110 P.2d 70, 71. After a sufficient showing of loss has been made, the contents may be proved by secondary evidence addressed to the trier of facts. Ibid; Waring v. Pitcher (1934) 135 Cal.App. 493, 27 P.2d 397,399.

Secondary evidence was allowed where a witness testified that she placed a letter in a waste basket and burned its contents the following day. Such evidence constituted sufficient proof of the loss and the destruction of the letter. People v. Guasti (1952) 110 Cal.App.2d 456, 243 P.2d 59, 63. In In re Levy's Estate and Guardianship (1955) 137 Cal.App.2d 237, 290 P.2d, 320, 328 a woman testified that she had destroyed all letters she had received in the Philippines preparatory to returning to the United States because of baggage limitations. The court found this explanation of the letters' destruction to be satisfactory and

allowed the oral testimony. In another case, the recipient of a letter who testified that he had lost it, that he had looked for it a great deal, that he thought at one time that he might have left it at the office of his attorney, and that he had looked for it there and had been unable to find it was said to have established the letter's loss. Samonset v. Mesnager (1895) 105 Cal. 354, 41 P. 337. In Woods v. Jensen (1900) 130 Cal. 200, 62 P. 473 an individual who testified he placed a note and mortgage in his pocket, thought he had given them to his attorney, and had not been able to find them since though he had looked everywhere among his papers was said to have shown that the note could not be found as the testimony was sufficient to include all probable places where the papers would likely be found. And where the original document, a vehicle registration slip, was destroyed by a police officer, that officer was allowed to testify as to the contents of the slip as recorded in the property report. People v Peterson (1967) 272 Cal.App.2d 684, 77 Cal.Rptr. 669.

To sustain his mining claim a notice was posted on a tree. But a witness testified that he could not produce the notice because when he last saw it, a part of it had been torn off and the residue was so defaced that he thought it could not be read. The Court held that this "....sufficient to warrant the admission of the evidence objected to, and we think that greater strictness of proof ought not to be required in such cases. The notice was necessarily placed in an exposed position, and it is

reasonable to infer that the part torn off had been carried away or destroyed by the elements. The failure to produce the part remaining was sufficiently excused by the statement of the witness as to its illegible condition...." Dunning v. Rankin (1862) 19 Cal. 640

Certainly then, as a general proposition of law, Respondent may offer proof by secondary evidence of the lost or otherwise unavailable original writing, i.e., picket signs, provided that it can show that the original has become unavailable otherwise than through its fault and that a reasonable search has been made for it. See Sylvania Electric Products Inc. v. Flanagan, supra (1st Cir. 1965) 352 F.2d 1005.

During Respondent's presentation of its case and at the time that one of the best evidence objections was being made (following the testimony of picket captain Henry Avila and during the testimony of picket captain Jose Morales), I mentioned to Respondent's counsel that in order to fall within an exception to the best evidence rule, Respondent might want to consider establishing whether each picket sign was lost, destroyed, or otherwise not in its possession. (IX: 103, 108). Thereafter, through the testimony of picket captain Miguel Camacho, Respondent put on evidence of destruction, infra, which concerned the allegations of unlawful picketing described in Paragraphs 16, 17, 20, 22, 24, 25, 26, 28, 31, 34, 35, and 36 of the Second Amended Complaint. The following discussion is a summary of Camacho[1]s

testimony as it relates to what happened to the various picket signs following their use at numerous picket locations referred to in the above Paragraphs.

Miguel Camacho was a full-time volunteer for the UFW who became involved in the boycott against Egg City products in late November, 1986. His duties included following Egg City's trucks to determine where the eggs were going and to be a picket captain which meant being responsible for picketing activities, attempting to keep the activity peaceful, making picket signs,[5] and making sure that they contained the proper information with respect to primary and secondary employers. (X: 4-5, 66-67) He was also the custodian of the picket signs used during the boycott. Camacho testified that the signs he prepared were made of thin cardboard and that he made as many as 10 signs a week for 3 or 4 months because of their constant wear and tear. Often by the end of the day the signs might have been stepped on, rained on, ripped or wrinkled. In addition, the average life expectancy for such a sign was only 4-5 days. Camacho testified that he would throw these signs out about once a week because part of his job was to see to it that they were neat and clean so that the public could read them. (X: 6-7, 20-21, 23, 58, 65) On the other hand, if the signs were not wrinkled or ripped, they might be used again so

[5] Camacho testified he made his own signs. (X: 51)

long as they were relevant to the next place where the picketing was to occur. (X: 66-67).

Each day after the picketing, the pickets would put their signs back into Camacho's van where they remained overnight. Camacho did not actually count the signs each evening or take inventory of what signs there were from the night before. Instead, acting on instructions from his superior, Ben Maddock, infra, he would make sure there were signs stating, "Egg City Workers On Strike" and then prepare the individual secondary employer signs. (X: 73-78).

Spire's Restaurant - November 25, Paragraph 16

Camacho testified that he authorized the signs used at Spire's, e.g., "Boycott Spire's, They Buy From Hidden Villa," to be thrown away 3 or 4 days later because there was no reason to save them since Spire's had stopped purchasing eggs from Hidden Villa.6 However, not all of them were thrown out since some, e.g., "Egg City Workers On Strike" could still be used again at other locations.[7] (X: 15-16, 18-19, 22)

Coco's - November 26, Paragraph 17

Camacho testified that none of the picket signs used at Coco's were still in existence and that he personally threw the

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[6] Camacho testified that, in fact, all "Boycott Hidden Villa" signs had been thrown away. (X: 37)

[7] Camacho testified that some Of the Spire's signs, e.g., "Egg City Workers On Strike," Boycott Hidden Villa, They Buy Eggs From Egg City" were probably used at Coco's Restaurant, infra.

signs away in the trash bin outside the UFW Office in Moorpark after he stopped boycotting Coco's[8] because he had no further use for them.[9] Camacho testified that he did not make any search to determine whether any of the Coco's picket signs were still around, but he knew they weren't in the van where the signs and flags were always placed and kept after any picketing activity. (X 48-50, 52-57)

Bob's Big Boy in Glendale - December 4, 5, 6 and 8, Paragraphs 20, 22, 24 and 25

Camacho testified that the picket signs used in the 3 or 4 days of picketing at Bob's Big Boy in Glendale were no longer in existence as he had personally thrown them into the Moorpark UFW office trash bin because of their wear and tear. (Some of those signs had been used before). (X: 62-65) He did not conduct a search of the van for the signs prior to his testimony. (X: 65)

Hughes Market - December 12, Paragraph 26

Camacho at first testified he made the signs and later personally disposed of them in the trash (X: 82) But later he testified that he couldn't specifically recollect throwing those

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[8] While it is true that Camacho originally testified that he didn't "specifically" know what happened to the signs, (X: 48) I credit his later testimony that he threw them away. He could have meant he didn't know what happened to the signs after he threw them away.

[9] Camacho testified he kept the "Egg City Workers On Strike" signs but later threw them away when they got old. (X: 57)

signs away but must have as it was part of his job and past practice to do so. He testified that the "chances are 99 percent" that he threw them away. (X: 87) He also testified he made no search for them in the van or Moorpark UFW office prior to his testimony. (X: 86-87)

Lucky Market - January 12, Paragraph 28

Camacho testified that he made the picket signs which said "Boycott Lucky[1]s; the remaining signs he took to the site had been used on prior occasions. Camacho further testified that 3 or 4 days later he threw the signs away in the trash can behind the Moorpark UFW office because they had become old, wrinkled, and had been stepped on. He based this testimony not on his actual recollection of the event but because it was his experience that the signs deteriorated, and this would have been his normal course of conduct. Finally Camacho testified he did not search the van, or the Moorpark or La Paz UFW offices prior to his testimony as he said he knew those signs would not be there. (X: 91-96)

International House of Pancakes - January 26, 1987, Paragraph 31

Camacho testified that as it was raining on the day of the picketing (thereby cutting short the time spent there), he remembered the ink running off the signs and recalled throwing them away in the trash can behind the Moorpark UFW field office the next day. Camacho acknowledged he did not search the vans or the offices for the signs prior to testifying. (X: 99-105)

Bob's Pasadena Big Boys - November 19, 21, and 22,
Paragraphs 34, 35, and 36

Camacho testified that once the January picketing of the Bob's Big Boy Pasadena locations was over, he threw all the signs away with the possible exception of the "Egg City Workers On Strike" one. They were thrown away in the trash can at the Moorpark UFW office. (X: 109-112, 125-126) In addition, there were no more Hidden Villa signs. As Hidden Villa had stopped buying Egg City eggs, there was no reason not to dispose of those signs. (X: 118-119) He did not search the van or the UFW offices for the signs prior to testifying. (X: 111)

Camacho testified in an honest, calm and convincing manner about what most likely happened to all the picket signs. I credit his testimony. He has established both through his recollections and his description of his normal practices with respect to the signs that these cardboard picket signs were usually thrown away in a matter of days following their use. There was no need for him to check the van or UFW offices in a futile attempt to satisfy some kind of a search requirement General Counsel and Charging Parties would impose on him. I thus look upon Camacho's evidence that the signs were thrown away as an exception to the best evidence rule. (See Evidence Code sections 1501 and 1505.) Therefore, in arriving at a determination as to what the picket signs actually said, I shall consider, along with the other evidence, the testimony of Camacho.

However, this ruling would seem to cover only those picketing incidents in which there was testimony of what

ultimately happened to the picket signs. What about the fact that Respondent failed to present any evidence of what became of the picket signs, despite my earlier suggestion, that were used at locations described in Paragraphs 12, 13, 15, 18, 19, 21 and 23 of the Second Amended Complaint? Under ordinary circumstances the result of this failure would be to find that Respondent did not prove an exception to the best evidence rule and to exclude Respondent's evidence (the testimony of Avila and Morales) as to what the picket signs said on those occasions. But I decline to do so and will consider this evidence, as well, because to do otherwise would be unfair as it would be tantamount to shifting the burden of proof to Respondent. It occurs to me that it is very unusual that such a dispute as this should arise in the first place, and my research of numerous NLRB secondary boycott cases reveals that the issue simply never comes up. This is because of the fact that as the question of what the picket signs say is so important, in virtually every case the NLRB General Counsel and/or Charging Parties — who have, after all, the burden of proving the allegations — either present photographic evidence of exactly what the signs and flags said on the days the secondary picketing took place or stipulate with opposing counsel to same. Though there may be authenticity objections as to time and place regarding the photos, the issue of what exactly was contained on the signs does not arise in secondary boycott cases under the

NLRB[10] But here, in this case, there was no attempt to submit photographic evidence by the General Counsel or Charging Parties and no explanation of why no such attempt was ever made.[11] Yet, despite the absence of this kind of crucial evidence as part of their burden of proof, General Counsel and Charging Parties would have me accept the testimonial evidence of their witnesses (as admissions of Respondent) while excluding similar testimonial evidence of Respondent's witnesses (as hearsay or as improper secondary evidence). Because I believe it is fair and proper under the circumstances for me to do so, I shall consider all the evidence presented to me as to the contents of the picket signs.

As regards the objections that were made to the testimony of Respondent's witnesses regarding the presence of UFW flags at the picket locations, this issue brings into play the question of whether "inscribed chattels" such as the flags were writings and therefore, subject to the constraints of the best evidence rule.

People v. Mastin (1981) 115 Cal.App.3d 978, 985, 171 Cal.Rptr. 780, held that inscribed chattels were writings given the broad definition contained in Evidence Code Section 250 but then went on to approve of the federal rule announced in United States v. Duffy (5th Cir. 1972) 454 F.2d 809 where the trial judge was given wide

[10] This explains why there is such a dearth of case law concerning this subject matter, and no supporting authorities were presented by any of the parties.

[11] The only photographs introduced were by the Respondent (Resp's 6 and 7) in an attempt to impeach the testimony of one of General Counsel's witnesses regarding what the picket signs actually said at one of the Lucky stores. These photos had previously been

discretion on whether the chattel was actually required to be produced. In Duffy, the Court held that the testimony of law enforcement agents regarding a white shirt imprinted with a laundry mark containing the first three letters of the defendant's last name was admissible despite the defendant's objection that the shirt itself should have been produced. Though the Court declined to find the laundry mark a "writing", its reasoning has some application to the matter at hand:

> "....When the disputed evidence, such as the shirt in this case, is an object bearing a mark or inscription, and is, therefore, a chattel and a writing, the trial judge has discretion to treat the evidence as a chattel or as a writing.... In reaching his decision, the trial judge should consider the 'policy consideration behind the Rule". In the instant case, the trial judge was correct in allowing testimony about the shirt without requiring the production of the shirt. Because the writing involved in this case was simple, the inscription 'D-U-F', there was little danger that the witness would inaccurately remember the terms of the 'writing.' Also, the terms of the 'writing[1] were by no means central or critical to the case against Duffy...." 454 F.2d at 812.

I consider the UFW flags to be inscribed chattels, and as they were simple implements and easy to remember, there is no danger they would not be accurately described. The objections

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(Footnote 11 Continued)

turned over to the ALRB by Lucky"s and then, pursuant to Respondent's request, given to Respondent. (VI: 154-159). In addition, Hidden Villa's owner, Tim Luberski, testified that he personally took photographs of the picket signs at United Catering on December 3 and Bob's Big Boy in Glendale between December 4-8. (III: 103, 108, 197). There was no explanation by General Counsel or Charging Parties of what happened to these photographs.

are overruled, and the testimony about the flags will be admitted into evidence.

VI. Respondent's Constitutional Argument

Respondent takes the position that Section 1154(d) makes it clear that the Act may not prohibit publicity, including picketing, that may not be prohibited under the California and U.S. Constitutions; and that since the law does not prohibit the act of picketing, any restrictions as to the content of its publicity, which is pure speech, would be unconstitutional and therefore, null and void. (See Resp's Post-Hearing Brief, pp. 6-11). I need not decide this issue as under the California Constitution, Article III, section 3.5, enacted in 1978, an administrative agency does not have the power (1) to declare a statute unenforceable on the basis of its being unconstitutional, (2) to declare a statute unconstitutional, or (3) to declare a statute unenforceable on the basis of its premption by federal law. An appellate court determination of unconstitutionality or preemption is required. Cal. Administrative Hearing Practice (Cont. Ed. Bar 1984) section 4.75, p. 272. The reasons for this are logically explained in the case law. In State of California et al. v. Superior Court (1974) 12 Cal.3d 237, 250, 115 Cal.Rptr. 497, 505, 524 P. 2d 1281, real party was permitted to challenge the constitutionality of a statute creating an administrative agency even though it failed to make such a challenge before the agency. The Court commented that since an administrative agency

is not the appropriate forum in which to challenge the constitutionality of the basic statute under which it operates, there seemed to be little reason to require a litigant to raise the issue in proceedings before the agency as a condition for raising that issue in the courts. Thus, a litigant is not required to raise an issue in a forum that does not have the power to decide the issue. Hand v. Board of Examiners in Vet. Med. (1977) 66 Cal. App.3d 605, 619, 136 Cal.Rptr. 187, 195-196, hg. den. April 28, 1977.

As the ALRA is a legislatively created administrative agency, I shall presume the Act's constitutionality. Building Trades Counsel (De Bartolo Corp.) (1985) 273 NLRB No. 172, 118 LRRM 1175. In any event, judicial review of the ALRB's ultimate decision in this case is available to Respondent in the courts of appeal. See Labor Code section 1160.8. Appellate proceedings thus provide the opportunity for Respondent to raise its constitutional issues at a later date.[12]

VII. The Business Operations

A. Egg City

Richard Carrott is the chief executive officer of the Careau Group doing business as Egg City. He has ultimate responsibility for all activity of the Company. Egg City is a producer and processor of eggs and egg products and employs

[12] LiKewise, neither the General Counsel nor the Charging Parties need fear that their failure to argue the constitutional question in their post-hearing briefs somehow failed to preserve the issue for appeal. Thus, my denial on or about September 8, 1987 of

between 320-350 workers, who are employed either in the egg gathering unit, the hatchery, the rearing and raising of chicken unit or in the processing plant. (VI: 18-19).

The Careau Group purchased Egg City in May of 1985. At that time the UFW represented all the bargaining unit employees, but at some point in 1986, the union withdrew its interest in representing the processing employees. At the time the Careau Group took over Egg City there was a contract with the UFW which lapsed on September 1, 1985. Negotiations for a new contract commenced in August, 1985; but when no new contract was reached, a strike began on June 24, 1986. All the striking employees were notified by the Company that they were going to be permanently replaced over the next 30-45 days, and in fact, they were replaced. There were no negotiations going on between the UFW and Egg City at the time of the hearing. The last meeting was either in August or September, 1986. (VI: 19-22)

B. Hidden Villa Ranch

Timothy Luberski is the owner of Hidden Villa Ranch, an open market buyer of commodity food products, including eggs. Hidden Villa buys these food products at current prices without

(Footnote 12 Continued)

Charging Party Egg City's August 25, 1987 "Request for Permission to File Additional Legal Arguments in Post-Hearing Brief" (on the constitutionality of the ALRA's secondary boycott provisions) is not prejudicial to the rights of any party to subsequently raise the matter in a later proceeding, if desired.

any particular long term contractual agreements, and then sells and distributes these commodities to various customers, including restaurants, institutions, and manufacturers. At times, it also sells to retail stores such as supermarkets. As a rule, however, it does not sell to consumers. Hidden Villa is the largest egg distributor on the West Coast and one of the largest in the country. (III: 54-56, 143)

Luberski testified that during 1986 when he was buying eggs from Egg City, he became aware of its labor problems because some of his own customers had become involved. At that point he decided he would like to hear the Union side of the argument so at his invitation a meeting was arranged at his warehouse in early July between him and UFW representatives. Luberski testified that one of those representatives, Karl Lawson, explained what the Union hoped to achieve from the strike and asked that Hidden Villa refrain from buying Egg City eggs. Luberski testified he told Lawson that he would think about it but later, in the latter part of July, decided to keep the "status quo", (III: 58-60, 63 65, 67, 122-125; IV: 72-73).

In fact, subsequent to this meeting, his purchases of Egg City eggs dramatically increased.[13] (III: 146, 120-121) Luberski continued to buy eggs from Egg City until December 11,

[13] Carrott testified that prior to June of 1986, he did little business with Hidden Villa (VI: 23).

1986 when he ceased such purchases entirely [14] because, according to his testimony, his customers were being picketed. He then advised the UFW of his action. (III: 68-70, 72)

VIII. The Union's Strategy

In order to obtain a collective bargaining contract with Egg City, the UFW engaged in a strategy designed to put pressure on Egg City by picketing its customers and/or the customers of its distributors, customers who, at some point in the distribution network, would be selling Egg City products to consumers. In this manner, the Union hoped that its efforts would have the ultimate effect of causing Egg City's customers to cease or diminish their purchases of Egg City products, thus putting pressure on Egg City to bargain with it for a labor agreement. (II: 70-71; VIII: 38-42; IX: 37-38)

UFW official Ben Maddock testified that he believed that the only way he would ever be able to get Egg City to the bargaining table was to apply pressure on Hidden Villa through its customers and that it was the Union's position that it would apply pressure on Hidden Villa until they quit buying Egg City eggs. (IX: 38-39)

To effectuate the boycott it was necessary to find out who the Egg City customers were. Most commonly, Lawson was

[14] However, it was still possible that after that date, eggs supplied by egg brokers to Hidden Villa were still Egg City eggs. (IV: 50)

instructed to see to it that Egg City and Hidden Villa trucks were followed to determine where they were going. Once trucks carrying the Egg City product were found to have arrived at their destinations, Maddock would instruct Lawson to commence picketing at that location the next day. (VIII: 53) If the eggs were transported to Hidden Villa or its customers, Lawson and others began to direct their picketing activities towards Hidden Villa and those customers. (II: 42-43, 72-73) But the effort to find Egg City customers was not confined to following trucks. Maddock testified that he had obtained a list of Egg City customers from the NLRB during those proceedings before it and that sometimes a supplier would accede to the Union's request and provide that information. (VIII: 35, 87) Lawson testified that UFW representatives also performed store checks, physcially checking various retail outlets to see if there were any Egg City eggs present at those locations. (II: 76)

IX. Instructions to Pickets; Requirements on Signs

Maddock testified that he specifically recalled giving instructions to Miguel Camacho and Henry Avila, picket captains, concerning what the picket line signs should or should not say. According to Maddock, he emphasized that the signs should make it clear that the Union was on strike against Egg City and who was buying eggs from Egg City. Maddock further testified that either through telephone calls or at meetings, there were discussions regarding the contents of the picket signs. However, it was rare

that Maddock would have been contacted before the picketing and specific instructions would not have been relayed on those occasions. (VIII: 49, 51; IX: 31, 36)

Camacho testified that when he first came to work on the Egg City boycott in late November, 1986, he received instructions from Maddock as to what to put on the signs. Also present at this time were Avila and UFW attorney, Dean Beer. According to Camacho, Maddock's instructions were that the signs must state who the primary employer was, e.g., "Egg City Workers On Strike," mention the distributor, e.g., "Boycott Hidden Villa, They Sell Egg City Eggs," and a third sign was to identify the customer, e.g., "Boycott Bob's Big Boy, They Receive Eggs From Hidden Villa." (X: 8-9)

Avila also testified about the above meeting in which Maddock gave him instructions as to what the signs should say and what the pickets could or could not do, but his testimony was much more general than Camacho's, stating that Maddock told him to make sure that some kind of an explanation was made on the signs so that it was clear what the boycott was about. (IX: 54, 67-68, 74-75, 77, 88)

X. The Meetings Between the Parties

A. The Meeting At Solly's Restaurant in Woodland Hills

Luberski testified that as a result of picketing activities at the businesses of some of his customers, he arranged another meeting with UFW representatives but this time to include

Carrott to see if some of the problems could be worked out. This meeting took place in mid-August at a restaurant, Solly's, in Woodland Hills, and present were Maddock, Lawson, Carrott, Ron Paul, a business associate of Luberski's, and Luberski. (III: 81; VIII: 37)

According to Luberski, the main thing he could remember about the meeting was that he explained to Maddock and Lawson that unfortunately for them, the customers they were picketing did not have any Egg City eggs but that Maddock replied that it didn't matter, that as long as Luberski continued to purchase Egg City eggs, his customers would be picketed. (III: 81-83, 129)

Carrott's version of these remarks is quite different. Carrott testified that what Maddock said was that if Hidden Villa could not force Egg City to sign a contract on the UFWs terms, the Union would put Hidden Villa out of business (after putting Egg City out of business) so it didn't matter if Hidden Villa stopped doing business with Egg City. (VI: 101-102, 29)

Following the meeting at Solly's, Carrott testified about a private meeting with Maddock around the end of August. According to Carrott, Maddock stated at that time that he would devote whatever it took to negotiate a contract but that he also said that if Egg City was not serious about it, the Union was prepared to accelerate the boycott activity against Hidden Villa, to drive it away as a customer of Egg City, and to form an allegiance with the longshoremen to keep Egg City from being able

to export its product. Carrott also testified that Maddock further stated he would drive Hidden Villa's customers away from it in order to force it out of business so that this would serve as a lesson to others who dealt with the UFW in the industry. (VI: 31-33)

Maddock and Lawson denied that anyone told Luberski that even if Hidden Villa stopped purchasing eggs from Egg City or stopped sending Egg City eggs to customers, those customers would still be picketed. (II: 31-32) Maddock denied telling Carrott that the Union's intention was to put Egg City out of business or to shut Egg City down if it didn't sign a contract or to serve as an example to the egg industry. Maddock also denied saying that through the Union's pressure, it would drive away Egg City's customers. Maddock and Lawson also denied that Maddock had threatened to close Hidden Villa regardless of whether it stopped buying Egg City eggs in order that it too serve as an example to the rest of the industry. Maddock denied telling Luberski that he would not leave him alone because Hidden Villa had purchased eggs in the past from Egg City. (IX: 5-6, 27-28; VIII: 38) According to Maddock, it was not the intention of the Union to picket Hidden Villa if they weren't carrying any of the boycotted eggs. (IX: 39)

B. The Meeting At The White House Restaurant In Valencia

Carrott testified that as a result of increased activity against Hidden Villa, Luberski requested another meeting, which

was held in Valencia at the White House Restaurant. In attendance were Luberski, Paul, Maddock, Lawson, members of the UFW Ranch Committee, Jerry Rosen, president of the Careau Group, and Carrott. (VI: 37) According to Carrott, Maddock again stated that unless Luberski was successful in bringing pressure upon Egg City to enter into a contract under terms agreeable to the UFW, the Union would continue its boycott activity. Luberski supposedly challenged this position pointing out that it was Egg City that was a party to the dispute and he was were being the good guy in trying to get the parties together. Haddock's response was that he saw no alternative but to put Egg City out of business to serve as a lesson to the other ranches that he was intending to organize. (VI: 37-38.)

On cross-examination Carrott added that Maddock also said that unless Hidden Villa got Egg City to sign a UFW contract, the Union would continue to picket in order to drive Hidden Villa out of business as well. (VI: 104-105)

Luberski's testimony did not confirm any of these alleged statements. Luberski did testify that Maddock wanted him to stop buying eggs from Egg City in order to pressure Egg City to negotiate a contract.

Maddock and Lawson again denied that Maddock had made any statement to the effect that he was going to put Egg City or Hidden Villa out of business to serve as a lesson or as an example for the rest of the industry. They also again denied that

Maddock had said that he was going to put Hidden Villa out of business regardless of whether or not it bought Egg City eggs. (IX: 6-7, 17, 28-29). Lawson further testified that no one at the meeting or in any telephone conversation had ever told Luberski or Paul that even if Hidden Villa stopped buying Egg City eggs or stopped distributing Egg City eggs to its customers, those customers would still be picketed. (II: 33-34)

Lawson did testify that Luberski asked for some kind of a moratorium on picketing and that Maddock responded that he would not give one because Hidden Villa was still purchasing Egg City eggs and therefore, would not reduce the activities being directed against Egg City. (IX: 22-24)

Maddock acknowledged that he told Luberski that he would be picketing his customers so long as he (Luberski) continued to buy Egg City eggs and that he turned down Luberski's request to hold back on such activity until another negotiating session was held. (VIII: 41-45)

XI. The Secondary Boycott and Its History Under the National Labor Relations Act, As Amended

A secondary boycott may generally be described as an economic tactic utilized by a labor organization and directed against an innocent employer with whom that labor organization has no dispute (the secondary or neutral employer) in order to coerce that employer to stop doing business with the employer with whom the labor organization does, in fact, have a dispute (the primary employer). The secondary boycott may result in the non-delivery

of the primary employer's goods to the secondary employer, may cause the secondary employer's employees to refuse to come to work, and may discourage all consumer trading with the secondary employer who sells the primary employer's goods. (Pocan, "California's Attempt To End Farmworker Voicelessness: A Survey Of The Agricultural Labor Relations Act Of 1975" (1976) 7 Pacific L.J. 197, 223-224). The idea behind the tactic is to place maximum pressure on the primary employer and thus force it to concede to union demands in the labor dispute. The implications are clear-union disruptions of the secondary employer's operations would cease when the secondary employer stopped dealing with the primary employer or when the secondary pressure helped effectuate the union's bargaining demands. Of course, a completely successful strike, causing cessation of a primary employer's operations, would obviate the need for pressures designed to compel secondary employers to cease dealing with the primary employer. However, where the primary employer was able to maintain production despite a strike, secondary pressure could be an auxiliary weapon to achieve cessation of dealings between the primary and secondary employers. Zeltner, "Secondary Boycotts And The Employer's Permissible Response Under The California Agricultural Labor Relations Act" (1977) 29 Stan. L.Rev. 277, 279-280.

Prior the their prohibition by the 1947 Taft-Hartley Act

amendments to the NLRA,[15] an secondary boycott activities were lawful. However, following World War II, the clamor for revision of the law

> "was fueled by accounts of perishable foods and milk rotting when unions refused to handle nonunion products, of small businessmen and farmers being driven into bankruptcy by the effects of secondary boycotts, and of laborers being denied the right to choose their representative freely when union leaders imposed jurisdictional strikes which were sometimes enforced by boycotts.
>
> The result was the addition of Section 8(b)(4) to the National Labor Relations Act in the 1947 Taft-Hartley amendments. Section 8(b)(4)(A) received the familiar label of the 'secondary boycott provision,' although this term nowwhere appears in the statutory language. In fact, the legislative scheme was to outlaw only specific types of conduct, not all secondary boycotts as such. Many forms of secondary activity remained lawful.
>
> The thrust of the Taft-Hartley amendments was expressed in terms of prohibiting union conduct intended to induce strikes or concerted work stoppages by employees in the course of their employment (the prohibited conduct), where an object was to force any employer or person to cease doing business with another employer or person (the prohibited object)...." [2 Morris, The Developing Labor Law (2nd ed. 1983) pp. 1133-34.

But as the secondary boycott provisions were applied in practice, it became obvious to many employers that certain "loopholes" were preventing the enforcement of the law according

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[15]National Labor Relations Act, ch. 372, sections 1-13, 49 Stat. 449 (1935) (current version at 29 U.S.C. sections 151-168 (1970)). In 1947 the NLRA was amended and became section 101 of the Labor Management Relations Act, 29 U.S.C. sections 141-197 (1970). 29 U.S.C. section 167 (1970) authorizes continued use of the title, "National Labor Relations Act," for the amended act as it appears in the Labor Management Relations Act.

to what they claimed had originally been intended. As a result of these complaints, Congress amended the boycott provisions in 1959 in the "Labor-Management Reporting and Disclosure Act."[16] The changes were effected by dividing Section 8(b)(4) into two subsections. Subsection (i) substituted the phrase "any individual employed by any person" for the phrase "the employees of any employer," and subsection (ii) was added, making it unlawful "to threaten, coerce or restrain any person" for the proscribed objectives. Subsection (A) was renumbered (B). 2 Morris, The Developing Labor Law, supra, p. 1135.

The key portions of the amended section read as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> --
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce...to engage in a strike or a refusal in the course of his employment to use,...or otherwise handle or work on any goods,...or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce...,where in either case an object thereof is.....
>
> (B) forcing or requiring any person to cease using...or otherwise dealing in the products of any other producer,...or to cease doing business with any other person...:Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing...."[17]

It has been remarked that the passage of Taft-Hartley and Landrum-Griffin reflected Congress[1] conclusion that the public's

[16]The law is commonly known as the Landrum Griffin Act. (Pub. L. No. 86-257, section 704(a), 73 Stat. 519, 542-43 (1959).

[17]The pertinent text of section 8(b)(4) now reads as follows:

(Footnote 17 Continued)

"It shall be an unfair labor practice for a labor organization or its agents -

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8 (e) ;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, 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."

interest in preventing the extension of labor disputes to neutral employers outweighed the union's interest in maintaining the secondary boycott as an auxiliary bargaining weapon. Zeltner, Secondary Boycotts And The Employer's Permissible Response under the California Agricultural Labor Relations Act, supra, p. 280.

A. Secondary Consumer Picketing Under the NLRA, As Amended and Tree Fruits

Following the passage of the Landrum-Griffin amendments, the NLRB and the courts viewed all peaceful secondary consumer picketing at the premises of the secondary employer as a per se violation of Section 8(b)(4)(ii). The "publicity proviso," infra, was construed only to allow the distribution of information at the secondary site via publicity "other than picketing." (See e.g., United Wholesale Employees, Local 261 (Perfection Mattress and Spring Co.) (1960) 129 NLRB 1014; Brewery and Beverage Drivers, Local Union No. 67 (D.C. Cir. 1955) 220 F.2d 380; NLRB v. Upholsterers Frame and Bed Workers, Twin City Local 61 (8th Cir. 1964) 331 F.2d 561.

This restricted view of consumer picketing under the NLRA was rejected in NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760 et al., (hereafter "Tree Fruits") (1964) 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed 2d 129, 59 LRRM 2961. In Tree Fruits, the question was whether the respondent unions had

violated section 8(b)(4)(ii)(B) of the NLRA as amended, by limiting their secondary picketing of retail stores to an appeal to the customers of the stores not to buy the products of certain firms against which one of the respondents was on strike. The struck firms sold Washington State apples to the Safeway chain of retail stores in the Seattle area. The unions instituted a consumer boycott against the apples in support of the strike which consisted of placing pickets in front of the entrances to the Safeway stores. These pickets wore placards and distributed handbills which asked Safeway customers and the public generally to refrain from buying Washington State apples which were, of course, only one of numerous food products sold at Safeway.

The U.S. Supreme Court, tracing the legislative history, disagreed that the phrase "other than picketing" in the publicity proviso revealed a congressional purpose to outlaw all picketing directed at customers at a secondary site because such a conclusion rested on the untenable finding that Congress had determined that such picketing always threatened, coerced, or restrained the secondary employer. The Court held that Congress did not clearly express an intention that section 8(b)(4) should prohibit all consumer picketing. "[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." 84 S.Ct. at 1070.

The Court went on to say:

> "....When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." 84 S.Ct. at 1071 (Fn omitted)

An interpreting Tree Fruits the NLRB in Honolulu Typographical Union No. 37 (Hawaii Press Newspapers, Inc.) (1967) 167 NLRB 1030, 66 LRRM 1194 enfd. (D.C. Cir. 1968) 401 F.2d 952 stated:

> "....The Court pointed out that 'peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer is poles apart from such picketing which only persuades his customers not to buy the struck product.[1] In the latter situation, the union does not request the public to withhold its patronage from the secondary employer but only to boycott the primary employer's goods. Thus, the union's appeal to the public is confined to its dispute with the primary employer. An appeal to the public at the secondary site not to trade with the secondary employer at all, however, goes beyond the products of the primary employer and seeks the public's aid in forcing the secondary employer to cooperate with the Union in its primary dispute...." 167 NLRB at 1030

It can be said then that the U.S. Supreme Court in analyzing the intent of section 8(b)(4) concluded that Congress had prohibited picketing intended to prevent

customers from patronizing the secondary employer but had allowed picketing intended to persuade consumers to cease purchasing the products of the primary employer sold by the secondary employer. In other words, under federal labor law, a union may not lawfully request that the public cease patronizing all the products of the neutral for this creates a separate dispute with the neutral employer, but the union may lawfully request that the public not buy the struck product even if this has an adverse economic impact on the secondary establishment or results in a consumer boycott of the neutral's entire business.[18] Farkas v. Columbus Building and Construction Trades Council (S.D. Ohio. 1973) 83 LRRM 2929; United Steelworkers of America, (Pet Incorporated) (1979) 244 NLRB 96, revd. on other grounds (8th Cir. 1981) 641 F.2d 545

Thus, the kind of picketing to be avoided under the NLRA - the "isolated evil" Tree Fruits refers to at one point - is where the public interprets the union's pleas as a request not to patronize the neutral employer at all. An employer threatened with ruin or substantial loss is likely

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[18] The Supreme Court in Tree Fruits did not question that the object of the picketing was to force Safeway to cease dealing in struck Washington apples by making it unprofitable to do so. See Honolulu Typographical Union No. 37 v. NLRB (D.C. Cir. 1968) 401 F.2d 952, 955, fn. 7.

to be economically coerced into joining a battle not of its own making on the side of the union to bring pressure upon the primary employer in order to save itself. And since this extra pressure the union places on the neutral causes more interference with the latter's business than it would suffer as a natural consequence of the union's success in its primary controversy, it falls within the Congressional ban. See Teamsters Local 812 v. NLRB (Monarch Long Beach Corp.) (D.C. Cir. 1980) 657 F.2d 1252, 105 LRRM 2658, 2667, 2674.

On the other hand, the distinguishing characteristic of a lawful consumer boycott under the NLRA is that the union appeal influences the secondary employer not by interrupting his internal operations (his employees remain on the job, deliveries to and from continue to be made, and the business continues to function), but by conveying information to his customers which is aimed at eliminating consumer demand specifically for one or more of the products sold at his establishment.[19]

As stated by a New York court:

> "....Where the union importunes persons to cease completely doing business with the retailer, a customer might turn away from the picketed premises, not because he or she agrees with the speech message expressed, but from reluctance to incur the picketers' disfavor. Product picketing, however, which is aimed at the primary employer's goods 'acquiesces in the crossing of

[19]ln the pre-ALRA case of Farm Workers v. Superior Court (1971) 4 Cal.Sd 556, 94 Cal.Rptr. 263, 77 LRRM 2208, an agricultural union's secondary boycott efforts to follow the struck

the picket line but merely urges that the consumer be selective on the inside.[1] Since no request is made to refrain from entering the store/ the customer is relieved from the necessity of responding at the point of contact where the very presence of the picketers may be influential and is therefore freer to react based on the persuasiveness of the speech content of the union's message. It follows that product picketing, in comparison to other forms of picketing, is more closely akin to pure speech and thus more fully protected under the First Amendment." (Fns. omitted) Waldbaum Inc. v. Farm Workers, (Sup. Ct. 1976) 87 Misc 2d 267, 383 N.Y.S.2d 957, 92 LRRM 2661 at 2668

B. The NLRA's Publicity Proviso

The NLRA's publicity proviso states in relevant part 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.... that....products are produced by an employer with whom the labor organization has a primary dispute...." (Emphasis added) (Parenthesis added) The phrase "publicity other than picketing" was the outgrowth of a "profound U.S. Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded." Florida Gulf Coast Building and Construction Trades Council v. NLRB., (hereafter "Fla. Gulf Coast") (11th Cir. 1986) 796 F.2d 1328, 1341, quoting NLRB v. Servette, Inc. (1964) 377 U.S. 46, 55,

(Footnote 19 Continued)

agricultural products of various growers was held to be non-enjoinable under the California Jurisdictional Strike Act. The Court noted that the product boycott did not have the same coercive effect that a general boycott of all a company's stores might have.

84 S.Ct. 1098, 1104. The proviso was not designed to restrict communicative activity; only the prohibitions of section 8(b)(4) do that. Ibid at fn. 19. Thus, the proviso operates as an exemption from the prohibitions of section 8(b)(4). Honolulu Typographical Union No. 37, supra (1967) 167 NLRB 1030, 66 LRRM 1194, enfd. (D.C. Cir. 1968) 401 F.2d 952. This exemption was intended to be given as broad an application as the statutory prohibition to which it was an exception. NLRB v. Servette, supra. See also Great Western Broadcasting Corp. (1964) 150 NLRB 467, 58 LRRM 1019, enfd. 356 F.2d 434, 61 LRRM 2364. In some cases, truthful, non-picketing publicity appeals would be unlawful section 8(b)(4) restraint and coercion[20] but for the publicity proviso. Ibid. That is to say that the proviso does protect truthful, non-picketing publicity appeals that would otherwise violate section 8(b)(4) as being coercive.[21]

For example, handbilling which called upon the public to defer paying 20 percent of their phone bills until the secondary employer (telephone company) ceased doing business with the primary employer (a nonunion subcontractor engaged in constructing manholes and underground telephone conduits) was

[20] A coercive appeal is one that encourages consumers to completely boycott the neutral employer rather than just the product of the primary employer. Tree Fruits, supra, 377 U.S. 69, 84 S.Ct. 1063, 1070.

[21] Of course, appeals limited to the struck product were held by the Supreme Court in Tree Fruits not to violate section 8(b)(4) so that respondents there did not need the protection of the proviso. As set forth in Local 248, Meat & Allied Food Workers (1977) 230 NLRB 189, 96 LRRM 1221:

protected by the proviso (so long as it was truthful) in that "publicity other than picketing" which persuaded customers to stop trading with the secondary was lawful. Operating Engineers Local 139 (Oak Constuction, Inc.) (1976) 226 NLRB 759, 93 LRRM 1385. As stated by the NLRB:

> "....The second proviso to Section 8(b)(4) exempts from the reach of that section truthful publicity, other than picketing, which persuades customers of a secondary employer to stop trading with it except to the extent that such publicity has the effect of cutting off his deliveries or inducing his employees to cease work. It is settled law that the protection of this 'publicity' proviso extends to service as well as product boycotts. Moreover, the legislative history establishes that the 'publicity' proviso was intended to permit a consumer boycott of a secondary employer's entire business and not merely a limited boycott of the product or services involved in the primary dispute." 93 LRRM at 1386 (Fns. omitted)

And in Allentown Racquetball & Health Club, Inc. v. Building & Construction Trades Council of Lehigh & Northampton

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(Footnote 21 Continued)

> "The restrictions on product picketing spelled out in Tree Fruits are designed to limit the activity to what is in effect truly primary picketing of a product and thus outside the basic prohibition of Section 8(b)(4)(B).

Although the Court in Tree Fruits did not characterize consumer picketing as primary, and thus protected as such by another proviso to section 8(b)(4), it did stress that the picketing involved was closely confined to the primary dispute. Insofar as Safeway was pressured by the picketing, that pressure was limited to that portion of Safeway's business that would have been disrupted in any event by a primary strike. Honolulu Typographical Union No. 3_7 v. NLRB, supra (D.C. Cir. 1968) 401 F.2d 952, 955, fn 7.

Counties (E.D. Pa. 1981) 525 F.Supp. 156 newspaper ads urging a complete boycott of a business were found to be lawful even though the primary employer was not mentioned on the grounds that the proviso existed to protect appeals which otherwise might have violated section 8(b)(4).

Several other federal courts have likewise distinguished picketing from non-picketing and held that the publicity proviso makes it lawful to seek the object of a total consumer boycott (and not merely the limited boycott of products or services involved in primary disputes) by publicity other than picketing, e.g., handbilling or advertising.[22] Honolulu Typographical Union No. 37 v. NLRB, supra (D.C. Cir. 1968) 401 F.2d 952, 957, fn 11, 68 LRRM 3004 enfg. (1967) 167 NLRB 1030, 66 LRRM 1194. See also NLRB v. Servette, supra. (1964) 377 U.S. 46, 84 S.Ct. 1098 and Local 537, International Brotherhood of Teamsters (Lohman Sales Co.) (1961) 132 NLRB 901 (hereafter ("Lohman Sales"). The only limitations imposed by the proviso are that the publicity truthfully advise the public[23] and not contain any of the

[22] But product picketing violates section 8(b)(4) if an object thereof is to stop all trade with such secondary employer. San Francisco Typographical Union No. 21 (1971) 188 NLRB 673, 679, enfd. 465 F.2d 53; Los Angeles Typographical Union No. 174 (White Front Stores, Inc.) (1970) 181 NLRB 384, 388.

[23] For example handbills that did not clearly specify the target of the boycott were held to be misleading in Honolulu Typographical Union Local 37, supra (1967) 167 NLRB 1030, 66 LRRM 1194, enfd. (D.C. Cir. 1968) 401 F.2d 952, 68 LRRM 3004.

proscribed effects, i. e., the cutting off of deliveries or inducing a secondary employer's employees to cease doing their work.[24] Local 732, Teamsters (Servair Maintenance) 229 NLRB 392, 402, 96 LRRM 1128, citing Tree Fruits, supra, and Local Union No. 54, Sheet Metal Workers International Association, AFL-CIO (Sakowitz, Inc.) (1969) 174 NLRB 362. See also, Edward J. DeBartolo Corp. v. NLRB (1983) 463 U.S. 155, 103 S.Ct. 2926, 2931, 113 LRRM 2953 and Operating Engineers, Local 139, (Oak Construction Inc.), supra (1976) 226 NLRB 759, 93 LRRM 1385. If the publicity is not truthful or if it has a proscribed effect, the publicity proviso is inapplicable. United Steelworkers of America (Pet. Incorporated, supra (1979) 244 NLRB 96, revd. on other grounds (8th Cir. 1981) 641 F.2d 545.

The reasons for the distinction between picketing and non-picketing publicity is that under the NLRA and federal case law, it is settled that labor picketing is entitled to less First Amendment protection than pure speech. Such treatment is based on the concept that picketing includes elements in addition to speech. These additional elements justify restrictions on picketing which would not be permitted vis-a-vis pure speech. As stated by the Eleventh Circuit in Fla. Gulf Coast, supra, (llth Cir. 1986) 796 F.2d 1328:

> "[W]hile picketing is a mode of communiction, it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves

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[24] If the publicity proviso does not apply, the General Counsel and Charging Parties must then prove that the union's conduct fell within the terms of section 8(b)(4). As set forth in Edward J.

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.[1] [Bakery & Pastry Drivers & Helpers Local v. Wohl, 315 U.S. 769, 775, 776 [62 S.Ct. 816, 819, 86 L.Ed. 1178] (Douglas, J., concurring)].... Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word....

.....A State may constitutionally permit picketing despite the ingredients in it that differentiate it from speech in its ordinary context.... And we have found that because of its element of communication picketing under some circumstances finds sanction in the Fourteenth Amendment.... However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent" 796 F.2d at 1333.

The Court found that the NLRA's publicity proviso was clearly drafted to cover non-picketing labor publicity and to only

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(Footnote 24 Continued)

DeBartolo Corp. v. NLRB (1983) 463 U.S. 155, 103 S. Ct. 2926, 113 LRRM 2953:

"The Board and the union correctly point out that DeBartolo cannot obtain relief in this proceeding unless it prevails on three separate issues. It must prove that the union did 'threaten, coerce, or restrain[1] a person engaged in commerce, with the object of 'forcing or requiring' someone to cease doing business with someone else - that is to say, it must prove a violation of Section 8(b)(4)(ii)(B). It must also overcome both the union's defense based on the publicity proviso and the union's claim that its conduct was protected by the First Amendment." 103 S.Ct. at 2931.

prohibit consumer picketing. See also concurring opinion of Mr. Justice Stevens in NLRB v. Retail Clerks, Local 1001 (Safeco Title Ins. Co.) (1980) 447 U.S. 607, 104 LRRM 2567, 2571.

This distinction between picketing and non-picketing publicity was recognized by Congress early on and incorporated into the original NLRA. As we have seen, the statute provided in its proviso that "....nothing contained in such paragraph (section 8(b)(4)) shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public.... that a product or products are produced by an employer with whom the labor organization has a primary dispute...." (Emphasis added) (Parenthesis added).

XII. Secondary Consumer Picketing Under the Agricultural Labor Relations Act; The Agricultural Labor Relations Act's Publicity Proviso

The ALRA bans the secondary boycott with the original language of the NLRA's section 8(b)(4) and has imposed certain restrictions on secondary activities of agricultural labor organizations. However, the consumer boycott under the ALRA, unlike the NLRA, is nearly unrestricted. Section 1154(d) of the ALRA reads that it shall be an unfair labor practice for a labor organization or its agents:

> "(d) To do either of the following: (i) To engage in, or to induce or encourage any individual employed by any person to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or (ii) to threaten, coerce, or restrain any person; where in either case (i) or (ii) an object thereof is any of the following:

(2) Forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees. Nothing contained in this paragraph shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

Nothing contained in this subdivision (d) shall be construed to prohibit publicity, including picketing for the purpose of truthfully advising the public, including consumers, that a product or products or ingredients thereof are produced by an agricultural 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, and as long as such publicity does not have the effect of requesting the public to cease patronizing such other employer.

However, publicity which includes picketing and has the effect of requesting the public to cease patronizing such other employer, shall be permitted only if the labor organization is currently certified as the representative of the primary employer's employees.

Further, publicity other than picketing, but including peaceful distribution of literature which has the effect of requesting the public to cease patronizing such other employer, shall be permitted only if the labor organization has not lost an election for the primary employer's employees within the preceding 12-month period, and no other labor organization is currently certified as the representative of the primary employer's employees.

Nothing contained in this subdivision (d) shall be construed to prohibit publicity, including picketing, which may not be prohibited under the United States Constitution or the California Constitution."

The ALRA, unlike the federal Act, makes no distinction between picketing and non-picketing. Quite the contrary in fact,

as the statute's proviso asserts that "[n]othing contained in this subdivision (d) shall be construed to prohibit publicity, including picketing for the purpose of truthfully advising the public, including consumers, that a product or products — are produced by an agricultural employer with whom the labor organization has a primary dispute...." (Emphasis added)

In view of this significant statutory change in the ALRA's publicity proviso from that of the federal labor law, it appears that the State Legislature intended for it to make no difference whether the agricultural union's publicity involved handbilling, newspaper ads, picketing or combinations of these categories; all such activities - including appeals (through picketing) for the complete boycott of a secondary employer's business - are exemptions from the prohibitions of section 1154(d) so long as they are truthful and do not produce either an interference with pickups or deliveries or work stoppages by employees of any employer other than the firm engaged in the primary labor dispute. The Legislature made this choice even though it knew that a non-speech element such as picketing could have the effect of applying pressure, sometimes immense, on consumers not to patronize the secondary employer's business and even though it knew that under federal law picketing has less legal protection than handbilling or advertising.

In short, what the national Act prohibits, the California Act specifically provides for - secondary labor picketing designed

to request consumers not to patronize the secondary employer. The ALRA permits an agricultural labor organization to publicize its disputes through picketing and other means in such a way that the public may be discouraged from buying the particular product of a primary employer and also permits such a boycott even where the effect is to encourage the public to cease all trading with the secondary employer, so long as the labor organization has been certified by the ALRB as the representative of the primary employer's employees.[25] This statutory change on the part of the California Legislature has been seen as a major departure from the NLRA's intent. Pocan, "California's Attempt To End Farmworkers Voicelessness" (1976) 7 Pacific L.J. 197, 224-225.

Another commentator has stated:

> "Although the new legislation did not go as far as unions would have desired in permitting the use of the secondary boycott to bring pressure on the primary employer, it does, go beyond what is permitted by the NLRA: it provides agricultural unions with an additional bargaining tool by allowing the unions, under the conditions specified in the Act, to bring indirect pressure on a primary employer by requesting that the public not partronize the neutral who is doing business with the primary. The agricultural unions, pursuant to the Act's specific limitations, could not only tell the public that a particular supermarket is selling lettuce produced by a farmer with whom it has a primary labor dispute and request the public not to buy that product, but the union could also ask the public not to partronize that particular supermarket at all. According to decisions under the NLRA, a union whose publicity is directed to inducing the public not to patronize the neutral business establishment would be in violation of the law." Levy, "The Agricultural Labor Relations Act Of 1975 - La Esperanza De California Para

[25] During the legislative hearings leading to the passage of the ALRA, Assemblyman Herman indicated that "do not patronize" requests on the part of a labor union were lawful as long as the

El Futuro" (1975) 15 Santa Clara L. Rev. 783, 793-794

In analyzing the question of the lawfulness of Respondent's conduct in the context of the specific language of the ALRA's proviso, it is important to bear in mind that so long as the publicity activities carried on by Respondent are found to be exempt under the proviso, it is unnecessary to consider whether the consumer appeals would have otherwise constituted secondary restraint and coercion, as prohibited by section 1154(d). See Honolulu Typographical Union No. 37, supra (1967) 167 NLRB 1030, 1031, 66 LRRM 1194. Secondary consumer picketing must be

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(Footnote 25 Continued)

union was certified by the ALRB:"

> Antonovich: "What is the difference between the secondary boycott and picketing for publicity?" Herman:...."Now as to consumer activity, we have divided into really three separate areas. There is a certain kind of consumer activity, that is leafleting with respect to a particular product, which is quite clearly constitutionally protected. For instance, don't buy grapes, a leaflet in front a supermarket to consumer don't buy grapes. That's constitutionally protected and as I know you indicated by your own concerns here today, you are concerned with the constitutional rights — we don't aggregate those here. Secondly, as to the kind of boycott which is directed at don't patronize boycott, say directed at for example Safeway, we prohibit unless the union is certified, the picketing don't patronize Safeway because they handle 'nonunion grapes.' We prohibit the leafleting don't patronize Safeway where another.-union is certified where the union that is engaging the activity has lost the election. In those situations we prohibit that leafleting." (sic) Labor Relations Committee Hearing, May 12, 1975, p. 50, copy on file in ALRB Archives.

evaluated initially in terms of the proviso's exemptions and not in terms of whether such picketing constituted restraint and coercion.

Truthfully Advising the Public

The ALRA (and the NLRA) contains language in its proviso to the effect that nothing contained in the statute should be construed as prohibiting publicity "....for the purpose of truthfully advising the public, including consumers, ...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...." (Emphasis added)

One scholar has interpreted this language to mean:

> "The only possible substantive limitation on a certified union's right to engage in secondary activity may be gleaned from the requirement in the first proviso that any 'publicity* communicate truthful notice to the public of a primary labor dispute. While the statutory language of the second proviso does not require this reading, the interests of fairness dictate that this proviso also should obligate certified unions truthfully to advise the public, so that those actually influenced by what the picket signs say will not be misled into believing that the secondary employer is the primary employer with whom the dispute originated. Furthermore, if the picketed secondary employer carried products or ingredients thereof that are produced by other agricultural employers whose employees are not represented by the picketing labor organization or with whom the labor organization does not have a primary dispute, truthful designation of the primary employer might be required to dispel the inference that the labor organization is engaging in prohibited recognitional picketing." Zeltner, "Secondary Boycotts and the Employer's Permissible Response Under the California Agricultural Labor Relations Act, supra (1977) 29 Stan. L. Rev. 277, 282.

It would seem logical from the language of the statute that the Legislature, by providing for the necessity of truthful

information, was balancing a union's need for free expression with a neutral's need to be free from coercion.[26] see Fla. Gulf Coast, supra (llth Cir. 1986) 796 F.2d 1328, 1332-33. The Legislature was concerned that neutrals not be enmeshed in the dispute of the primary employer and that the only way to keep this from happening, as federal labor law experience had shown, was to promote the concept of truthfully advising the consumer so that he/she could make an informed choice as to what his/her position was going to be with respect to the dispute. Thus, it provided that any certified union's publicity, including picketing, was protected, even though same had the effect of requesting the public to cease patronizing a neutral employer, so long as the public was truthfully advised as to the true nature of the labor dispute. This was because otherwise, any consumer approaching an area where pickets were demonstrating would naturally assume that the dispute was between that business and those pickets. As this was not always the case, a labor organization must inform the consumer that he/she was not being asked to boycott this business because of any dispute the union was having with it but rather because it had a dispute with another business—an agricultural employer—whose products were being supplied to and/or distributed, either directly or indirectly, by the business where the pickets were.

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[26] lt is worthy of note that in the California Supreme Court's (pre-ALRA enactment) decision in Farm Workers v. Superior Court, supra (1971) 4 Cal.3d 556, 571, 94 Cal.Rptr. 263, 77 LRRM 2208, the Court found that the state could not constitutionally enjoin

Thus, the reason for the necessity to truthfully advise is clear. The consumer must be afforded the opportunity to make an intelligent choice of whether, in the case of neutrals, to decline to do business with the establishment because of its indirect connection to the primary labor dispute, enter the establishment and do business but boycott the particular struck product, or ignore the union's request entirely and enter the business to do any and all business. Without the necessary information to assist the consumer in making this decision, his/her response cannot be based upon reason but rather upon the emotional factor any person may experience in confronting a picket line.

In the present matter, it is clear then that section 1154(d) permits the Respondent UFW to participate in secondary picketing (at Hidden Villa, infra, Country Eggs, infra, etc. and/or their customers and other retail establishments) calling for a total boycott even if the effect of this picketing ultimately causes such entities a loss of business. However,

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(Footnote 26 Continued)

truthful efforts to communicate the facts of a labor dispute to the public. On the other hand, the Court also determined that a labor union could be enjoined from making false and untruthful statements in connection with that dispute. See also Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 910, 153 Cal.Rptr 854, 592 P.2d 341 where the California Supreme Court held that though California may provide greater protection than the First Amendment provides in protecting speech and petitioning (at shopping centers that are privately owned), nevertheless, such a right must be "reasonably exercised."

Respondent, in so doing must make sure that the public is truthfully advised as to the nature of the labor dispute. The difficulty in all this, of course, is in determining exactly what is required to adequately advise the public.

The General Counsel and Charging Parties argue that on each occasion when the UFW picketed a secondary site, infra, three essential facts needed to be stated on the legends of the picket signs in order for Respondent's conduct to fall within the protection of the proviso to section 1154(d) of the ALRA as follows: 1) the nature of the labor dispute, i.e., the existence of a primary dispute between Egg City and the UFW; 2) the identity of the struck product, i.e., what the product being struck was and 3) the relationship between the secondary and the primary employer, i.e., that, for example, Hidden Villa or Hidden Villa's customers served as a distributor of eggs from Egg City. For this proposition the General Counsel and Charging Parties cite the case of Service Employees Local 399 v. NLRB (Delta Air Lines) (hereafter "Delta" or "Delta Air Lines") (9th Cir. 1984) 743 F.2d 1417, 117 LRRM 2717. In that case, Delta subcontracted janitorial work at the Los Angeles airport to National Cleaning Company, and National signed a contract with a union. Delta then lawfully terminated its subcontract agreement with National, and made a new contract with the Statewide Maintenance Company, a nonunion company. Owing to its loss of business, National released 5 of its 6 union employees and transferred the 6th to another job.

The union, in furtherance of its primary dispute with Statewide, began distributing handbills at Delta's airport and downtown facilities. (Delta thus became the secondary employer), The union distributed 4 different handbills which the NLRB referred to as handbills "A, B, C, and D." They were as follows

Handbill "A", first side

"Please do not fly Delta Airlines. Delta Airlines unfair. Does not provide AFL-CIO conditions of employment. Hospital & Service Employees Union, Local 399, AFL-CIO."

Handbill "A", second side

"It takes more than money to fly Delta. It takes nerve. Let's look at the accident record." The handbill then listed 55 accidents involving Delta that had occurred during the period of January 13, 1963, to May 27, 1976, their locations, the type of aircraft involved, the degree of damage, and whether there had been injuries or deaths. This side of handbill "A" also provided the total number of deaths and injuries in these accidents and stated that the information was obtained from the National Transportation Board (NTB), Washington, D.C. Finally, it listed the numbers of the letters and complaints that Delta received monthly from July 1976 to July 1977, and stated that this information was obtained from the Civil Aeronautics Board (CAB), Washington, D.C."

Handbill "B"

This handbill contained all of the information set forth on side two of handbill "A". It did not list, however, the information pertaining to the letters and complaints received by Delta.

Handbill "C", first side

"Please Do Not Fly Delta Airlines. This airline has caused members of Service Employees Union, Local 399, AFL-CIO, at Los Angeles International Airport, to become unemployed. In their place they have contracted with a maintenance company which does not provide Local 399 wages, benefits and standards. We urge all union members to protest Delta's action to the Delta office in your region. If you are concerned about the plight of

fellow union members....Please Do No Fly Delta Airlines."

Handbill "C", second side

This handbill used the identical accident and consumer complaint information as that contained on side two of handbill "A".

Handbill "D"

This handbill was similar to handbill "C", except that on side one it identified the "maintenance company" as Statewide, and on side two, before listing Delta's accident and consumer complaint records, it included the following prefatory statement.

"As members of the public and in order to protect the wages and conditions of Local 399 members and to publicize our primary dispute with the Statewide Building Maintenance Company, we wish to call to the attention of the consuming public certain information about Delta Airlines from the official records of the Civil Aeronautics Board of the United States Government."

The Court began its analysis by noting that in order for Delta to obtain relief it had to prevail on three separate issues: 1) it had to prove that the union did "threaten, coerce, or restrain" Delta with the object of "forcing or requiring" Delta to cease doing business with Statewide. (That is to say that Delta had to prove a violation of section 8(b)(4)(ii)(B)); 2) it had to overcome the union's defense based on the publicity proviso; and 3) it had to overcome the union's defense based on the First

Amendment.[27]

Addressing the publicity proviso first, the Court asserted that at the very least the union's handbills must have identified the nature of the union's dispute with Statewide and Delta's relationship with it. In view of the fact that neither handbill "A" nor "B" identified Statewide as the employer with whom the union had a primary labor dispute and because neither handbill explained Delta's relationship to the union's primary dispute with Statewide, both handbills were not protected by the publicity proviso. (Handbills "A" and "B" only stated that Delta was unfair and then listed Delta's accident and consumer complaints).

Handbills "C" and "D", on the other hand, did meet the minimum requirement, as each one identified the primary dispute on one side.[28] However, the Court affirmed the NLRB that the proviso did not protect these handbills either because the other side of each handbill included the accident and consumer information which were unrelated to the primary labor dispute. The Court held as follows:

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[27] Ultimately , the above issues 1 and 3 were not addressed. Instead, the Court, after finding that the proviso did not apply, infra, remanded the case to the Board to clarify the standard for determining the existence of "coercion." If there were more than one interpretation of "coercive" available under the statute, the Court instructed the Board to select the interpretation that did not "create" constitutional problems. 743 F.2d at 1428, 117 LRRM at 2726.

[28] Delta contended that handbill "C" did not identify the primary dispute because it failed to name Statewide specifically and stated only that Delta had contracted with a "maintenance company"

"....The proviso states that publicity 'for the purpose of truthfully advising the public' about the primary labor dispute may not be prohibited. 29 U.S.C. section 158(b)(4). The Delta consumer complaint and accident information, however, cannot be said to fulfill this protected purpose. As the Union admits, this information is totally unrelated to the primary dispute.

"The proviso's language does not support the Union's interpretation of it. The 'for the purpose of' language does not suggest that the publicity may include additional information once the primary dispute is identified. If Congress had intended this interpretation, the proviso could have provided explicitly that the publicity only need to identify the primary dispute rather than be 'for the purpose of' advising the public about the primary dispute. The proviso protects only publicity that falls within the protected purpose. To interpret the language otherwise would ignore its plain meaning." 117 LRRM at 2723.

The Delta case analyzed the union's conduct in the context of the NLRA's proviso (since it was handbilling that was involved) and not in the context of a Tree Fruits situation (involving the picketing of a struck product). However, cases that rely upon Tree Fruits principles[29] also direct that the union make clear to the consuming public what product it is requesting it to boycott. Thus otherwise legal consumer boycotts of struck or disfavored products do "threaten, coerce, or restrain" neutral employers if they fail to distinguish between

(Footnote 28 Continued)

which did not provide union wages and benefits. The Court concluded, however, that this side of handbill "C" sufficiently described the nature of the primary dispute, citing Central Indiana Building and Construction Trades Council (K-Mart Corp.) (1981) 257 NLRB 86, 88-89, 107 LRRM 1463, in that it was clear that a maintenance company, not Delta, was directly responsible for hiring nonunion labor.

[29] There is, of course, a serious question as to whether the main emphasis of Tree Fruits - that the picketing must be limited to the product, i.e., eggs in the present case, - has any application in the context of the ALRA's proviso since appeals to boycott

favored and disfavored products with sufficient clarity. Thus, a union's appeal to consumers to boycott specific products sold by a neutral employer must be no more than an expression of its legitimate campaign to advance its interest against its direct antagonist. It must closely confine any appeal on the site of the neutral business to the scope of that original campaign by giving consumers sufficient information to recognize the disfavored product. If the appeal is not so confined, it may cause consumers to boycott products about which the union is indifferent or even those which the union favors, and thus may subject the neutral to economic pressure and harm which exceed the scope of the union's

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(Footnote 29 Continued)

neutral businesses under the Act (given the satisfaction of certain conditions) do not violate section 1154(d). In Tree Fruits, the NLRB had ruled that the NLRA's proviso revealed a Congressional purpose to outlaw all picketing directed at neutral employers and that Congress determined that such picketing always threatened, coerced or restrained a neutral, i.e., was a violation of section 8(b)(4) of the NLRA. In reversing, the U.S. Supreme Court held that there was nothing in the legislative history to suggest that Congress intended that section 8(b)(4) prohibit all consumer picketing and that product picketing was not barred by said section because it did not threaten, coerce, or restrain the neutral. The NLRB proviso was inapplicable to the case as picketing was not covered by the proviso. Thus, the Tree Fruits limitations on product picketing set forth in the Supreme Court's ruling are inapplicable to other forms of publicity permitted by the federal proviso such as advertising and handbilling. See Local 248, Meat Allied Food Workers, supra (1977) 230 NLRB 189, 205, 96 LRRM 1221; Florida Gulf Coast, supra (11th Cir. 1986) 796 F.2d 1328. Similarly, Tree Fruits would seem to have limited application to the ALRA where the publicity permitted by the proviso includes (not excludes) picketing and therefore legalizes secondary picketing.

legitimate campaign. Teamsters Local 812 v. NLRB (Monarch Long Beach Corp.), supra, (D.C. Cir. 1980) 657 F.2d 1252, 105 LRRM 2658, 2666-2667. See also Local 732 Teamsters (Servair Maintenance, supra, (1977) 229 NLRB 392, 96 LRRM 1128; Local 248 Meat & Allied Food Workers, supra (1977) 230 NLRB 189; 96 LRRM 1221; Atlanta Typographical Union (1970) 180 NLRB No. 164, 73 LRRM 1241; San Francisco Typographical Union No. 21 (1971) 188 NLRB 673, enfd. 465 F.2d 53.

On the other hand, there is abundant case law to the effect that the publicity does not require the satisfaction of any set, factual formula as to what "truths' need to be stated; and in fact, what passes as truthful information need not necessarily be totally accurate. For example, the handbilling case of Lohman Sales Co., supra, (1961) 132 NLRB 901, made it clear that the message need not be 100 percent accurate and that what really mattered was that there be no intent on the part of the union to deceive or no substantial departure from the requirements of the proviso. The Board held:

> "Like the Trial Examiner, we find no merit in the General Counsel's contention that the Respondent's handbilling activities were not protected by the proviso because the handbills were not truthful. As noted above, the handbills urged consumers not to buy cigarettes, cigars, tobacco, and candies at the retail stores. Even if these handbills were susceptible of an interpretation that the store handbilled purchased all the items listed thereon from Lohman, which was not the case, they were substantially accurate in their representations, as appears from the Intermediate Report. And when Furr's notified the Union that the handbill was not altogether accurate in its case, the Union promptly remedied the matter. Subsequently, a new handbill was distributed by Respondent at all Furr's stores merely requesting consumers not to purchase cigarettes delivered by

Lohman. We agree with the Trial Examiner that the proviso does not require that a handbiller be an insurer that the content of the handbill is 100 percent correct, and that where, as here, there is no evidence of an intent to deceive and there has not been a substantial departure from fact, the requirements of the proviso are met. Accordingly, we find that Respondent's handbills were 'for the purpose of truthfully advising the public' within the meaning of the proviso." 132 NLRB at 905-906.

Accord, United Steelworkers of America (Pet, Incorporated), supra (1979) 244 NLRB 96, revd. on other grounds (8th Cir. 1981) 641 F.2d 545.

In Edward J. DeBartolo Corp. v. NLRB (4th Cir. 1981) 662 F.2d 264, 108 LRRM 2729, vacated and remanded on other grounds (1983) 463 U.S. 147, 103 S.Ct. 2926, 113 LRRM 2953, a shopping center owner entered into a contractual arrangement with a tenant, Wilson's Department Store, to build a store at the center. The tenant hired High, a nonunion construction firm. A labor organization, then engaged in a labor dispute with High, distributed handbills to consumers asking for a total boycott of the shopping center but failed to specifically identify High as the primary employer.[30] The Fourth Circuit held that this fact did not make the publicity surrounding the labor dispute untruthful as there was no substantial departure from fact and no intent to deceive.[31] Relying on the NLRB language in Lohman Sales, supra (1961) 132 NLRB 901, 906, the Court stated:

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[30]The handbills stated that "....Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits."

[31]This case appears to be in conflict with Delta Air Lines, supra

> "The Board correctly applied the Lohman Sales standard to the facts of this case. Omission of High's name in the handbill is, standing alone, not evidence of an intent on the Union's part to deceive the public about the labor dispute and does not, in any sense, depart from fact. Indeed, to hold otherwise would be tantamount to imposition of a per se requirement that the name or names of primary employer or employers appear in the handbills. This we will not do, in light of the Board's reluctance to make the statutory truthfulness requirement more stringent than its current expression in Lohman Sales and the dubious benefits to the public of such a rule. We therefore uphold the Board's conclusion that the handbill's message was a truthful one." 662 F.2d at 268 (fn omitted)

See also Allentown Racquetball & Health Club v. Building & Construction Trades Council of Lehigh & Northampton Counties,

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(Footnote 31 Continued)

(9th Cir. 1984) 743 F.2d 1417, 117 LRRM 2717. I have chosen to follow the Fourth Circuit's reasoning, where applicable, in DeBartolo because though I believe the ALRA's publicity proviso requires that a labor organization make it clear to the public that the neutral employer is not the one involved in the labor dispute, I am not convinced that the ALRA absolutely requires the organization to identify the primary employer with whom it is having a dispute. As pointed out by Zeltner in his law review article, there is a great deal of uncertainty over this point:

> "....The word 'publicity' in the second proviso, which begins with 'However,' probably refers to the publicity of the first proviso, which is qualified by the phrase 'truthfully advising the public.[1] The two provisos also may be read separately, though the first proviso ends with a period rather than a semicolon, and 'However' begins with an upper rather than a lower case 'h'. Furthermore, while the first proviso refers to 'such publicity[1] twice, the second proviso does not so modify the word 'publicity.[1] Because of this ambiguity, the extent to which a union must identify the primary employer with whom it has a dispute while picketing or using other publicity to dissuade the public from patronizing the secondary employer is uncertain." Zeltner, "Secondary Boycotts and the Employer's Permissible Response Under the California Agricultural Labor Relations Act," supra (1977) 29 Stan. L. Rev. 277 at 282, fn. 28.

supra (E.D. Pa. 1981), 525 F.Supp. 156, 162-163 where the absence of the name of the primary employers was said not to deprive the union of the protection of the proviso. The Court justified requiring less than total accuracy in a publication by holding that a newspaper ad concerning a primary dispute over the alleged payment of substandard area wages was protected by the publicity proviso as long as there was a 'reasonable belief' at the time of publication that wages meeting area standards were not being paid.

The Board also broadly interpreted the proviso's truthfulness requirement in Central Indiana Building and Construction Trades Council (K-Mart Corp.), supra (1981) 257 NLRB 86, 107 LRRM 1463. Waldorf, a general contractor entered into a contract with K-Mart to construct a new K-Mart store. Waldorf then entered into a contract with Frash, a nonunion construction company. The union, pursuant to its primary labor dispute with Frash, picketed K-Mart facilities with the following handbills that read, in part:

"K-Mart is building a new store"

"K-Mart is going to build it's (sic) new Indianapolis
store with nonunion construction companies*
DON'T SHOP K-MART
*FRASH EARTH WORK BUILDING & CONSTRUCTION TRADES
COUNCIL"

The General Counsel for the NLRB contended that the

publicity was untruthful as it implied that K-Mart itself was constructing the new store and was therefore directly responsible for the selection of the nonunion contractor and failed to mention either Waldorf specifically or the existence of any general contractor for that matter. The General Counsel argued that while the union achieved technical accuracy by naming the primary employer (Frash), the handbills remained substantively inaccurate through the omission of any reference to the general contractor.

Relying on the Board decision in the previously cited case, Florida Gulf Coast Building Trades Council, AFL-CIO (Edward J. DeBartolo Corporation), (1980) 252 NLRB 702, enfd. in Edward J. DeBartolo Corp. v. NLRB, supra (4th Cir. 1981) 662 F.2d 264, 108 LRRM 2729, the Board found no violation. The handbills' statement that K-Mart was going to build a store with nonunion construction companies was said to adequately describe the relationship between the primary and secondary employers, especially since the primary, unlike what happened in DeBartolo, was at least mentioned. Even if the handbills had created the impression that K-Mart had hired the nonunion company, it did not follow that the public would think that the union's primary labor dispute was with K-Mart.

In Teamsters Local 150 (Coca Cola Bottling Co. of Sacramento) (1965) 151 NLRB 734, 58 LRRM 1477, a labor union, wishing to publicize its claim that the Coca Cola Company was guilty of unfair labor practices, picketed various grocery stores that carried their product. The picket signs used bore the legend:

TEAMSTER LOCAL 150
PROTESTS
UNFAIR LABOR
PRACTICES
OF
COCA COLA
BOTTLING CO.
PLEASE DO NOT PARTRONIZE
International Brotherhood
of Teamsters Local No. 150

The NLRB's General Counsel contended that the language on the picket signs implied that the public was requested not to patronize the stores in front of which the picketing was taking place because the picket signs contained the line reading, "Please do not patronize." The ALJ, whose recommendation was accepted by the Board, rejected this argument in the following language:

> "To give to the Respondent's appeal not to patronize the Charging Party's product a meaning of boycotting the secondary or neutral employers, however, would be to take the picket sign request not to patronize entirely out of context. Except for that one line, no one could have misunderstood that the whole message on the sign was concerned with Coca-Cola, which words were printed in the largest type used on the sign. Nothing on the picket sign identified in any way the store in front of which picketing was taking place. Although the Respondent might better have chosen an appeal in terms not to buy Coca-Cola rather than not to patronize it, *I* believe that the meaning of the message on the picket signs would be strained by giving it the General Counsel's interpretation. I find, therefore, that the wording of the legend on the picket signs does not distinguish this case from the facts in the Tree Fruits case." 151 NLRB at 739.

The union's distribution of a "Do Not Patronize" list urging a consumer boycott of secondary employers who were said to be still advertising on a radio station with whom the union had a

primary dispute was protected by the publicity proviso and therefore, not a violation of the NLRA. Local No. 662, Radio and Television Engineers, affiliated with International Brotherhood of Electrical Workers (Middle South Broadcasting Co.) (1961) 133 NLRB 1698, 49 LRRM 1042.

Finally, a California case has said:

> It has been held that the information disseminated by the pickets must be truthful. (Magill Bros, v. Bldg. Service etc. Union, supra; Park & T.I. Corp v. Int. etc, of Teamsters, supra.) But in that connection the use of such words as "unfair" or "unfair to organized labor" is not a falsification of facts and "to use loose language of undefined slogans that are part of the conventional give-and-take in our economic and political controversies - like 'unfair' or 'fascist' - is not to falsify facts." (Cafeteria Employees Union v. Angelos, supra; see, Park & T.I, v. Int etc, of Teamsters, supra.)" In re Blaney (1947) 30 Cal.2d 643, 20 LRRM 2645 at 2648.

In analyzing Respondent's truthfulness at each of the multiple picketing occurrences involved in this case, three further considerations ought to be kept in mind. First is that ultimately, the dispositive factor is always going to be the probable effect of the picketing on the consumer. Hoffman v. Cement Masons Union Local 337 (9th Cir. 1972) 468 F.2d 1187, 1192, citing NLRB v. Twin City Carpenters District Council (8th Cir. 1970) 422 F.2d 309, 314. See also Kaynard v. Independent Routemen's Association (2nd Cir. 1973) 479 F. 2d 1070; Waldbaum Inc. v. Farm Workers, supra (1976) 383 N.Y.S.2d 957, 92 LRRM 2661, 2668; Solien v. Carpenters Dist. Council of St. Louis (D.C. Mo. 1985) 623 F.Supp. 597.

Second, the labor organization must take reasonable precautions that the picketing have a reasonably direct impact on the primary employer and not be designed to inflict general economic injury on the business of the neutral. Laundry, Dry Cleaning Dye House Workers, Local No. 259 (California Laundry & Linen Supply) (1967) 164 NLRB 426, 428, 65 LRRM 1091. Statements which recklessly disregard the truth are not privileged under the publicity proviso. Cement Masons Union Local 337 (1971) 190 NLRB 261, 266, enfd. Hoffman v. Cement Masons Union Local 337, supra (9th Cir. 1972) 468 F.2d 1187, 1191. But the labor organization need only establish a reasonable basis for the information contained in the publicity. Solien v. Carpenters Dist. Council of St. Louis, supra (D.C. Mo. 1985) 623 F.Supp. 597, citing Allentown Racquetball & Health Club v. Building & Construction Trades Council of Lehigh & Northampton Counties, supra (E.D. Pa. 1981) 525 F.Supp. 156.

Finally, in considering the truthfulness of the publicity I shall look to not only the picket signs but also to the chanting (oral statements) of the pickets and the presence of UFW flags (repeatedly so indentified by witnesses because of their commonly recognized red and black colors and UFW writing or symbols, e.g., an eagle). The oral statements and flags are, like picketing or handbills, "publicity, including picketing" within the publicity proviso. But, like all forms of publicity, they must be limited to truthfully informing the public of the union's primary dispute

with the producer of products being distributed by the secondary. Local 248 Meat & Allied Food Workers, supra (1977) 230 NLRB 189, 208, 96 LRRM 1221. In this case the chanting and flags alone do not tell the whole truth but taken in conjunction with the picket signs, they may, as a whole, establish lawful publicity. In this sense, picket signs may clarify chanting and flags just as chanting and flags may clarify picket signs. In Los Angeles Typographical Union, Local 174 (White Front Stores, Inc.), supra (1970) 181 NLRB 384, 388 the NLRB held that "....where handbilling and literature distribution accompany picketing,and particularly picketing with signs that lack clarity and specificity...., the intent and purpose of the picketing can be and must be interpreted by statements that accompany it."

I shall now proceed to review each of the various incidents of UFW picketing against Egg City's products that occurred at various restaurants and grocery stores in the Los Angeles area. As a preliminary matter, it should be pointed out that there is no evidence that any of the picketing of the restaurants, grocery stores or wholesale outlets involved in this case occurred at any time other than when the stores were open to the public and customers were present. There is also no indication that the picketing occurred in areas that were exclusively reserved for the employees of any of these establishments or at any delivery service entrances, loading docks, or general offices that may have been set aside for them.

A. Country Eggs

1. The October 24 Picketing -- Paragraph 10 of Second Amended Complaint

Joseph Zaritsky is the owner of Country Eggs, a wholesale distributor of fresh and frozen egg products, in Compton, California. Zaritsky is an open market buyer, which means he buys the eggs from many different sources and sells them to retail customers, often markets, restaurants, and hospitals or to other wholesale distributors. Zaritsky also runs a small retail establishment himself on the same premises. Between June and December of 1986 he purchased eggs from Egg City. (V: 56-59)

Zaritsky testified that in late September, 1986 Alberto Escalante contacted him, told him he knew Country Eggs had been buying eggs from Egg City, that Egg City was involved in a labor dispute with the UFW, and asked him to stop purchasing such eggs. According to Zaritsky, Escalante also told him that if no agreement could be reached between them, he would go out and talk to some of Country Eggs' major accounts. (V: 60-62)

Zaritsky further testified that on October 24, Escalante again called to tell him that he (Escalante) knew that he was still buying eggs from Egg City (which Zaritsky admitted to him) and that if he was not going to stop doing so, then Union representatives were going to start picketing his premises, following his trucks to see where they were delivering the eggs, and speaking to his customers. Escalante told him that he would explain to his customers that the UFW was on strike at Egg City,

that Country Eggs was handling Egg City's products, and that they (the customers) shouldn't be dealing with any products from Egg City. (V: 63-64) Zaritsky testified that he responded: "Just do what you have to do."[32] (V: 63)

Analysis and Conclusions of Law

In NLRB v. Servette Inc., supra (1964) 377 U.S. 46, 55 LRRM 2957 union representatives had approached various supermarket managers and requested that they discontinue handling merchandise supplied by Servette, the struck employer. In most instances, these representatives also warned that handbills asking the public not to buy named items distributed by Servette would be passed out in front of those stores which refused to cooperate. In upholding the NLRB,[33] the U.S. Supreme Court held such conduct lawful. The Court held that the warnings which threatened handbilling in

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[32] Much later in his testimony (after General Counsel had ended his direct examination and during the examination of Charging Party Egg City) Zaritsky changed his testimony to add for the first time: "So I said, 'Well, that's fine and dandy. I'll just send other eggs to those accounts', and he said, 'Well, it wouldn't make any difference if I did or I didn't' you know, that he was 'just going to go forth with what he had to do.[1]" (V: 113-114). I give no weight to this change in testimony in that I don't believe it, mainly because it was only elicited the second time around. In fact, Respondent's "asked and answered" objection to the question propounded by Charging Party Egg City was overruled on the representation by counsel that it was "preliminary" and only leading to another question. (V: 113)

[33] The NLRB had found that it was proper that the executives of the neutral could decide, as a part of managerial discretion, whether to continue doing business with the primary employer in the face of threatened or actual handbilling.

front of noncooperating stores were not prohibited "threats" within the meaning of section 8(b)(4)(ii), reasoning that "the statutory protection for the distribution of handbills would be undermined if a threat to engage in protected conduct were not itself protected." 377 U.S. at 57

The NLRB has held that, absent accompanying acts of coercion, the secondary boycott provisions of the Act are not violated by a mere request of a union addressed to a neutral employer that the neutral withhold patronage from an employer with whom the requesting union has a primary labor dispute. American Federation of TV & Radio Artists 150 NLRB 467, 469. See also, Truck Drivers & Helpers Local Union No. 592, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Estes Express Lines, Inc.) (1970) 181 NLRB 790, 73 LRRM 1497. In Estes Express Lines the union representative's announcement that it intended to start picketing if the primary employer's truck remained on the neutral's property and that its picketing would last as long as the primary employer's truck was on the premises was held to be nothing more than a legitimate expression of the union's intention to exercise its unquestioned right to engage in lawful secondary picketing. Thus, oral appeals made directly to a secondary employer to stop doing business with a primary employer are protected inducement or persuasion and not unlawful threats, restraint or coercion under subsection 8(b)(4)(ii) as under that subsection it is only an

unfair labor practice for a union to try to coerce or threaten an employer directly (but not to persuade or ask him) in order to get him to stop doing business with another firm or from handling its goods. Lohman Sales Co., supra (1961) 132 NLRB 901, 904, fn. 5.

Prior to picketing, the union's agents had told the neutrals' owners or manager that if they accepted the delivery of Coca-Cola, the boycotted product, in their stores, the union would establish an informational picket there but would not picket if the store managers discontinued buying such product. This was found to be lawful conduct in Teamsters Local 150 (Coca Cola Bottling Co. of Sacramento), supra (1965) 151 NLRB 734, 740, 58 LRRM 1477, citing NLRB v. Servette, Inc., supra (1964) 377 U.S. 46, 55 LRRM 2957. "Thus, to the extent that the verbal appeals to the store managers in this case were limited to an attempt only to cause the managers to exercise their voluntary discretion to cease stocking Coca-Cola, no violation may be found." 151 NLRB at 739.

Similarly, no threat was found where union agents informed the secondary employer (a hotel) that one of the contruction companies working on its property was nonunion and that if such situation was not rectified, the union would engage in some type of responsive concerted activity. Farkas v. Columbus Building and Construction Trades Council, supra (S.D. Ohio 1973) 83 LRRM 2929.

On the other hand, a labor organization must be careful to make sure that the limited nature or extent of the lawful

picketing it has in mind is made clear to the secondary employer when it announces its intent. In San Francisco Labor Council (Ito Packing Co.) (1971) 191 NLRB 261, 77 LRRM 1593, enfd. (9th Cir. 1973) 475 F.2d 1125, 82 LRRM 3078, there had been a dispute between the United Farmworkers Organizing Committee (UFWOC) and various growers and shippers of California table grapes. The San Francisco Labor Council, a central labor body, aided UFWOC's efforts to boycott table grapes by meeting with officials from Safeway, Lucky's Diamond Properties, and other retail establishments. At one of these meetings, union representatives threatened the picketing of retail outlets as a likely consequence of the neutrals' failure to remove table grapes from sale, but the representatives also declined to define the character of the picketing and conveyed the possibility that the picketing might be more than informational in nature.

This was found to be a violation of section 8(b)(4)(ii)(B) in that the union went beyond a mere request for cooperation and gave no assurance that the picketing would be limited to appeals to consumers. The NLRB held that though a mere request that a neutral withhold patronage from an employer with whom the requesting union has a primary labor dispute was not unlawful, it became so when the union threatened picketing without limitation.

Here Zaritsky's undisputed[34] testimony was that Escalante asked him to stop purchasing Egg City eggs but that

[34] Escalante did not testify. An administrative board must accept as

if he continued to do so, Escalante intended to find out where the Egg City products were going after they left Country Eggs, to then speak to those customers, to explain the labor dispute to them, and to ask for their support by not purchasing that product. Escalante also told Zaritsky that he might picket his premises if County Eggs continued to purchase eggs from Egg City. In either case, Escalante made it clear that the appeals for boycott would be limited to consumers. All of this conduct is authorized by section 1154(d) of the Act and is lawful. See NLRB v. Servette Inc., supra (1964) 377 U.S. 46, 55 LRRM 2957. I recommend that this allegation be dismissed.

2. The November 21 Picketing - Paragraph 12 of Second Amended Complaint

According to Zaritsky 13-18 pickets carrying the traditional UFW flag (a red and black flag with an eagle) showed up at his business on November 21, chanting "boycott Country Eggs" and with picket signs that read: "Don't Buy Country Eggs", "Eggs Are Too Old", and "Check Your Dates". Zaritsky recalled no sign that stated, "boycott Egg City eggs". (V: 64-66)

(Footnote 34 Continued)

true the intended meaning of uncontradlcted and unimpeached evidence...."[W]hen a party testifies to favorable facts, and any contradictory evidence is within the ability of the opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it." Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.Sd 721, 728.

Analysis and Conclusions of Law

The evidence again is undisputed that on November 21 picket signs at Country Eggs only called for a boycott of Country Eggs. There is no evidence that any sign mentioned a labor dispute with Egg City or the relationship between such a labor dispute and Country Eggs. I have no retional basis for disbelieving Zaritsky's testimony on this point.[35] Therefore, I find that the probable effect of this picketing was to create in the mind of the consumer that there was a labor dispute between the UFW and Country Eggs, a neutral employer. Hoffman v. Cement Masons Union Local 337, supra, (9th Cir. 1972) 468 F.2d 1187, 1192. As such, Respondent failed to truthfully advise the public as to the facts of the labor dispute; Respondent's conduct was not covered by section 1154's publicity proviso.

One additional fact leads to this conclusion. The legends that stated, "Eggs Are Too Old" and "Check Your Dates" are not protected by the proviso to section 1154(d) because they contain information regarding Country Eggs which is totally unrelated to the primary labor dispute, and it is only publicity which advises the public about the primary labor dispute that may not be prohibited. Delta Air Lines, supra (9th Cir. 1984) 743

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[35] Although I accept Zaritsky's testimony here and for the facts of the preceding allegation, I have generally found him to be an untrustworthy witness, infra.

F.2d 1417, 117 LRRM 2717. This limitation applies regardless of whether the unrelated information is truthful or even if the publicity identified the dispute with the primary employer. Solien v. Carpenters Dist. Council of St. Louis, supra (E.D. Mo. 1985) 623 F.Supp. 597, 604.

Having found that the publicity proviso does not protect Respondent's conduct here, the next question is whether such conduct was threatening, coercive, or restraining. Section 1154(d) of the ALRA provides, inter alia, that a labor organization commits an unfair labor practice by threatening, coercing, or restraining any person (the secondary employer) if an object thereof if to force or require that secondary employer to stop dealing in the products of or to cease doing business with any other person (the primary employer). It has been held that the wording of the statute essentially creates two separate requirements for a Board finding of an unfair labor practice on the part of a union: (1) the challenged union conduct must have as an object the forcing or the requiring of a neutral business to cease doing business with another business; and (2) the union must pursue its object by threatening, coercing, or restraining the neutral business. Teamsters Local 812 v. NLRB (Monarch Long Beach Corp.), supra (D.C. Cir. 1980) 657 F.2d 1252, 105 LRRM 2658, 2664. Once it is shown that the object of the boycott was to force the secondary employer to cease doing business with the primary employer, then the remaining question must be how the

union pursued its object.[36] And this question goes not to the motive of the boycott but to the nature of and the foreseeable consequences of the pressure which the union actually placed on the secondary employer. Ibid.

The leading NLRA case on the meaning of "threaten, coerce, or restrain" remains Tree Fruits, supra, (1964) 377 U.S. 58, 55 LRRM 2961. There, the Court concluded that only consumer picketing aimed at the secondary employer was prohibited. In finding no violation under Section 8(b)(4)(ii)(B), it distinguished "peaceful consumer picketing to shut off all trade with the secondary employer," which created "a separate dispute with the secondary employer," from picketing that "only persuades his customers not to buy the struck product" and was "closely confined to the primary dispute." Recognizing that section 8(b)(4) was usually applied in relation to the object of the picketing rather than to its effect, the Court rejected a test that would be dependent on the possibility of economic loss to the secondary employer for determination of whether he had been threatened. 2 Morris, The Developing Labor Law, supra, (2nd ed. 1983) p. 1141. Under the standards set forth in Tree Fruits, if the consumer appeal against a specific product succeeds, it simply induces the neutral retailer to reduce his orders for the product or to drop it as a poor seller. Such an appeal was not considered

[36] Under federal labor law not all secondary activity necessarily constitutes coercive activity within the meaning of section 8(b)(4). Tree Fruits, supra, 377 U.S. at 71-72, Delta Air Lines, supra, (9th Cir. 1984) 743 F2d 1417, 117 LRRM at 2727. But the

"attended by the abuses at which the statute was directed." The decline in sales attributable to consumer rejection of the struck product puts pressure upon the primary employer, and the marginal injury to the neutral retailer is purely incidental to the product boycott. The neutral therefore has little reason to become involved in the labor dispute. If, on the other hand, the appeal is directed against the secondary employer, he stops buying the struck product not because of a failing demand, but in response to pressure designed to inflict injury on his business generally. In such a case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer, which was precisely one of the evils that Congress intended to prevent by the enactment of section 8(b)(4)(ii)(B). See NLRB v. Retail Clerks, Local 1001 (Safeco Title Ins. Co.) 447 U.S. 607, 104 LRRM 2567, 2569.

As the Teamsters Local 812 court put it:

> "The Tree Fruits Court held the picketing in front of Safeway legal, not because it lacked the unlawful object described by Section 8(b)(4)(ii)(B), but because it did not exhibit the other key element proscribed by the statute: it did not seek to achieve its object by 'threatening], coercfing], or restraint ing]' Safeway in the sense intended by Congress. The Tree Fruits Court directed all its statutory analysis to this second element of Section 8(b)(4)(ii)(B), construing 'threaten, coerce, of restrain' as essentially a term of

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(Footnote 36 Continued)

distinction between what is and what is not coercive quite often depends on whether the activity is handbilling or picketing, id. But under the ALRA, since the statute permits picketing, the distinction between coercive and non-coercive is not so clearly defined.

Congressional art designed to describe certain types of union behavior that posed special harm to commerce and labor peace; the Court simply held that picketing that only urged customers to boycott a 'struck product[1] without urging a general boycott of the secondary employer's business was not that sort of behavior." Teamsters Local 812 v. NLRB (Monarch Long Beach Corp.) supra (D.C. Cir. 1980) 657 F.2d 1252, 105 LRRM 2658 at 2666.

It is, of course, not always possible to apply Tree Fruits principles to the ALRA, as has been shown. (See for example footnotes 29, supra and 37, infra. Here, however, it would be appropriate to define threats, coercion, and restraint, as in Tree Fruits, as unlawful pressure against the secondary employer to inflict injury on his business generally to the extent that a separate dispute is thus created. Therefore, the standard to be applied in determining if a threat, coercion, or restraint has occurred in violation of the ALRA will first of all recognize that under the statute, a labor organization may make a direct appeal by picket signs for consumers not to patronize a secondary employer (as opposed to an appeal only to the product as under the NLRA). But it will also recognize that this appeal must be accompanied by truthful (and sufficient) information so consumers can make a reasoned choice. If the truthful information falls short of what is required, the appeal will be deemed threatening, coercive or restraining if, from the totality of circumstances, it appears to be directed primarily against the secondary employer in such a way as to improperly involve it in the primary employer's labor dispute.[37]

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[37] It is, of course, likewise true that an attractive alternative

(Footnote 37 Continued)

argument can be made that it was because state legislators knew that federal law distinguished between handbilling (and other forms of non-picketing publicity) and picketing that they deliberately included picketing in the proviso, thereby evidencing an intent not to distinguish it from the other kinds of publicity. It would then follow that since the ALRA permits unions to publicize their disputes through picketing, as well as handbilling, advertising, etc., that the Legislature intended that the "threaten, coerce, or restrain" standard, being as it is a restriction on communicative activity, be construed very narrowly. See NLRB v. Catholic Bishop of Chicago (1979) 440 U.S. 490, 507, 99 S.Ct. 1313, 1322. In this light, attention should be drawn to Fla. Gulf Coast, supra (11th Cir. 1986) 796 F.2d 1328, 1335 where a federal appeals court for the first time dealt with the question of whether the NLRA's statutory prohibition against threats, coercion or restraint applied to permitted non-picketing conduct, such as handbilling. The Court found that handbilling, even though outside of the publicity proviso's protection, was not threatening, coercing, or restraining consumers because the handbilling was peaceful and orderly, there was no indication that the handbillers were pressuring or harassing any of the neutral's customers, and said customers were free to act in agreement with the ideas presented in the pamphlets or to refuse to do so. Of course, since the NLRA excludes picketing, unlike the ALRA, from its statutorily permitted avenues of publicity, the Court also added that the handbilling did not involve any "of the non-speech elements, e.g., patrolling which justify restrictions on picketing." If Fla. Gulf Coast's reasoning were applied to the ALRA's sanctioned publicity picketing, it could be argued that the only kind of threats, coercion or restraint envisioned by the Legislature was conduct of the nature of pressuring or harassing consumers, or other kinds of conduct apart from communicative activity. See Fla. Gulf Coast, id, 796 F.2d at 1334, fn 6, 1340, fn 14, 1344, fn 19. Other examples of coercive conduct might include picketing, violence on the picket line, blocking of egress or ingress, interferring with the delivery or transport of the primary's product at the neutral's location, making threatening or intimidating statements, and trespass or damage to the neutral's property. However, I choose not to extend Fla. Gulf Coast to this case. Because of the apparent lack of legislative history on the point in question, in order to conclude that Respondent's picketing conduct, even though not covered by the publicity proviso, was not the kind of threat, coercion or restraint the Legislature intended to outlaw, it would be necessary to discuss this case in the context of the First Amendment and the California Constitution. This would be particularly appropriate since section 1154 clearly states: "Nothing contained in this subdivision (d) shall be construed to prohibit publicity, including picketing, which may not be prohibited under the United States Constitution or the California Constitution." [Emphasis

In the circumstances of the November 21 picketing at Country Eggs, I find that Country Eggs was not identified with a primary employer and was aimed at Country Eggs exclusively. As such, it was not covered by the proviso, and it did "threaten, restrain, and coerce" Country Eggs within the meaning of section 1154(d)(ii)(2) of the ALRA. I recommend that Respondent be found to have violated the Act.

3. The November 22 Picketing and Threat - Paragraph 13 and 14 of Second Amended Complaint

Zaritsky testified that on Saturday, November 22, the same day that Richard Carrott was in attendance, as many as 100 pickets, including Escalante, showed up and began marching back and forth at his building chanting, "boycott Country Eggs". Six to ten picket signs were carried and they stated: "Zaritsky is a Racist," "Don't Buy Country Eggs", "Eggs Too Old."[38] (V: 75-81)

Carrott placed the number of picket closer to 50 and testified that one sign read: "Joe Zaritsky Is A Racist" and that his name (Carrott's) had been added to the sign. Other signs he saw stated, "Hey Joe, Check The Date" and "Boycott Country Eggs."

(Footnote 37 Continued)

added] However, as an adminstrative law judge, I am barred from passing on the constitutional aspects of this case. (See discussion in section VI, supra.

[38] As a result of that picketing, Zaritsky sought and obtained a temporary restraining order the following Tuesday. (G.C. 21) (VI 78-79)

Carrott testified there were no signs describing the labor dispute with his company, and none of the chanting mentioned Egg City. (VI: 52-54, 62)

Carrott also testified about a conversation he had with Escalante that Zaritsky later joined. According to Carrott, Escalante told him that if Egg City did not hire back the workers, fire the strikebreakers, and immediately get back to negotiations, the Union would picket Country Eggs' customers. At that point, Zaritsky joined the group and told Escalante that he wasn't buying Egg City eggs right now.[39] Escalante supposedly responded that that didn't matter as Zaritsky had bought Egg City eggs before and that he (Escalante) had been told to boycott Country Eggs' customers to put the company out of business if it didn't put pressure on Egg City.[40] According to Carrott, when Zaritsky asked Escalante to come into his store to look over his inventory, Escalante told him that he didn't care what he had inside as he (Escalante) had been following his trucks and had received a list of his customers from people who would be happy to see him go out of business. (II: 54-58)

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[39] In fact, this was a false statement as Carrott testified that he had shipped a partial load of eggs to Zaritsky the day before. (VI: 85)

[40] Carrott did not assert such a claim in his Declaration, and in fact, stated that what Escalante had said to Zaritsky was that the Union would picket his customers until he stopped buying Egg City eggs. (VI: 87-88, 90)

Carrott further testified that in this same conversation Zaritsky told Escalante that he was prepared to enter into an agreement right then that he would cease dealing with Egg City completely if the UFW would promise to no longer boycott his customers. Escalante said he would have to check with Maddock and then get back to him. (VI: 58)

Zaritsky, for his part, could confirm very little of Carrott's above description of this conversation. Zaritsky testified that he was present during the discussion but was not involved in it, did not speak, and that its only importance was that he heard Escalante say that the picketing at Country Eggs would continue until he ceased purchasing eggs from Egg City. (VI: 97, 83)

Analysis and Conclusions of Law

The picketing on November 22 was unlawful for the same reasons as that of November 21. The picket signs did not truthfully advise the public about the labor dispute, and some of the picket signs were totally unrelated to Respondent's dispute with the primary employer. Respondent's conduct was also coercive because it was aimed exclusively at the neutral. I recommend that Respondent be found to have violated section 1154(d)(ii)(2) of the Act.

It is a different story, however, as to the alleged threat that was made on this occasion. The General Counsel argues that Escalante threatened Zaritsky by telling him that unless he

(Zaritsky) put pressure on Egg City, Respondent would boycott Country Eggs until it was forced to go out of business. (G.C.'s Post-Hearing Brief, p. 12) I do not credit Carrott that such a statement was made by Escalante for two main reasons. First, it is incredible to me that a statement of such import would be left out of his Declaration. This is not just a case where the subject matter was neglected and not addressed. On the contrary, Carrott specifically stated what it was that Escalante allegedly said at that time, and it did not include any threat to shut down Country Eggs' business. It is well worth noting that what Escalante was alleged to have said according to Carrott's Declaration was the same thing Zaritsky testified Escalante had said to him. Second, Zaritsky, no friend of Respondent's judging by his demeanor, infra, did not confirm such a threat in his testimony. Had such an intimidating statement been made, certainly the owner of the business at whom it was directed would have remembered it.

The question next arises as to whether there was any threat to Carrott here. The answer is that even if there were, a threat made to a primary employer is fundamentally different from one made to a neutral. In Local 732, Teamsters (Servair Maintenance), supra, 229 NLRB 392, 399-400, 96 LRRM 1128 a statement by a union representative to an officer of the primary employer that he would "picket the ass off" of the primary and secondary employers and do anything necessary to break up their relationship, though evidence of an unlawful secondary object, was

not an unlawful threat since addressed to the primary employer only.

This leaves for resolution the question of whether Escalante's statement (I credit Zaritsky and Carrott that it was made) that the picketing at Country Eggs would continue until Zaritsky ceased purchasing eggs from Egg City was an unlawful threat.

It has already been pointed out (see analysis of October 24 Country Eggs picketing) that the NLRB has held to be lawful a union agent's statement that picketing would last as long as the primary employer's trucks were on the secondary employer's premises and that such a statement was nothing more than a legitimate expression of the union's intention to exercise its unquestioned right to engage in lawful picketing. Estes Express Lines, Inc., supra (1970) 181 NLRB 790, 73 LRRM 1497. See also Sheet Metal Workers International Local No. 284 (1968) 169 NLRB 1014 (where the union representative's statements to a secondary employer that "[i]f Quality Roofing (the primary employer) goes to work, we'll have pickets on your job within five minutes" and "when Herring's (owner of Quality Roofing) employees left the job, the picket would also leave" (parenthesis added) were held to be lawful).

In the present matter, whenever a secondary employer observed a picket line and signs at his premises and Respondent's agent told him that it was because he was carrying Egg City eggs

and requested that he discontinue such purchases, was it not logical that he should conclude that the pickets and signs would be gone as soon as he ceased carrying the boycotted product? In Freight, Construction, General Drivers, Warehousemen and Helpers Union Local 287 (Buck's Butane Propane Service, Inc.) (1970) 186 NLRB 187 the NLRB held:

> Accordingly, if the Union, in essence, is making a statement which amounts to pressure or a threat when coupled with a picket to get the secondary employer to do something but which has no different impact than the picket alone without the statement should the result be different?

Though I have found the November 22 picketing to be unlawful, it cannot be assumed that the "threat" to continue picketing was a threat to continue unlawful picketing. The General Counsel contends that the statement itself was a violation of section 1154(d)(ii) of the Act. From that standpoint, I must conclude that the statement, in and of itself, was not unlawful. I recommend the dismissal of this allegation.

4. The December Picketing

a) December 4 - Paragraph 19 of Second Amended Complaint

b) December 5 - Paragraph 21 of Second Amended Complaint

c) December 6 - Paragraph 23 of Second Amended Complaint

Zaritsky testified on direct examination that on December 4, UFW pickets showed up with flags, chanting, "boycott Country Eggs," and carrying signs that read: "Boycott Country Eggs," "Eggs Too Old." On December 5 he was picketed again, and the pickets chanted "boycott Country Eggs"; but the picket signs

this time only stated, "Boycott Country Eggs." Finally, on December 6, the picket signs, according to Zaritsky, also only stated, "Boycott Country Eggs." Zaritsky testified he saw all the signs and was positive of what they said. He also testified that no sign ever said anything about Egg City. (V: 99, 102-105, 131)

However, this testimony was impeached on cross-examination by evidence of a prior sworn statement Zaritsky had made on January 14, 1987 to ALRB attorney Robert Schoenburg, approximately five weeks after the events in question. In his ALRB Declaration (Resp's 1), Zaritsky stated that on December 4, 5 and 6, 1986 UFW pickets carried signs which read: "Don't Buy Egg City Eggs," "Don't Buy Country Eggs", and Eggs Are Old" and that they chanted "Boycott eggs" "and other statements in that nature" (sic). Despite this Declaration, Zaritsky continued to deny the picket signs said anything about not buying Egg City eggs. (V: 39, 142). He explained the inconsistency by asserting that he either never read the Declaration or only read it partially.

> "Whoever wrote it, I didn't have time to read it. I just signed it. I didn't read it completely, I made about ten declarations and I never read them, any of them. (V: 133)

On redirect examination, Zaritsky testified for the first time that he might have heard some of the picket chanting, "don't buy Egg City eggs" but then changed his mind and stated that this was not the case after all. (V: 140, 151)

UFW representative Henry Avila agreed that pickets chanted "boycott Egg City eggs" but testified that though he

established a picket line of eight, there were no picket signs on December 4 (there were flags), as the pickets had just come from another picket site and were not prepared to picket Country Eggs. The pickets did carry the red and black flag with an eagle. (IX: 55-57).

But there were picket signs the following day, December 5 and also on the day after, December 6, which, according to Avila, stated: "Egg City Workers On Strike", "Boycott Egg City Eggs", "Boycott Country Eggs, They Buy From Egg City". The pickets also carried UFW flags on both days. (IX: 57-59)

Avila denied that any of the signs referred to the age of the eggs or that the dates should be checked. (IX: 78)

Avila further testified that on December 6, Zaritsky placed a sign on his door indicating he was closing up his store when in fact, this was merely a ploy to get the pickets to leave because shortly thereafter, he reopened. When the pickets came back, Zaritsky began "flipping" them "off". (IX: 59-61). He then faked another closing. When the pickets again returned, they were sprayed with water. At one point he hurled obscenities at Avila, including an ethnic slur. (IX: 61-64)

Analysis and Conclusions of Law

December 4

There is no need to resolve the conflict in testimony between Zaritsky (who testified as to what the picket signs supposedly stated) and Avila (who testified there weren't any

picket signs at all). The fact is that by either account insufficient information was conveyed to the public. By Avila's own account, a picket line was established but no picket signs were used so that the only thing that consumers heard was a request (chant) to boycott Egg City eggs, and the only thing they saw were UFW flags. Thus, a picket line existed in which no message at all was conveyed by picket signs, clearly a failure to inform the public of the labor dispute. The verbal request to boycott Egg City products and the UFW flags, standing alone, were not enough; they needed to be linked up in some way with Country Eggs.[41] As the probable effect of the chanting and flags and of a picket line without accompanying picket sign information in front of Country Eggs was to make the consumer think there was a UFW dispute with Country Eggs, I find that Respondent did not take sufficient steps to keep the neutral from becoming involved. Therefore its conduct was coercive, and I recommend that it be found to have violated section 1154(d)(ii)(2) of the Act as set

[41] As mentioned previously, the UFW flags and chanting (or oral statements) could be said to constitute "publicity" (just like handbilling and picketing) within the publicity proviso. However, they must be limited to truthfully informing the public of the union's primary dispute with the producer of products distributed by the secondary. The proviso does not constitute a blanket license for a union to enmesh secondary employers in its primary disputes. Local 248, Meat & Allied Food Workers, supra (1977) 230 NLRB 189, 206, 96 LRRM 1221.

forth in Paragraph 19 of the Second Amended Complaint. [42]

December 5 and 6

There is a conflict in testimony as to what the picket signs said and what was chanted in December 5 and 6. Zaritsky testified that the signs only stated "Boycott Country Eggs" on both days and that "boycott Country Eggs" was chanted only on December 5. Avila testified the signs stated: "Egg City Workers On Strike", "Boycott Egg City Eggs", "Boycott Country Eggs, They Buy From Egg City". Avila was not asked about and did not testify about any chanting on either day.

I can give no weight *to* Zaritsky's testimony for several reasons. First, he testified that he saw all the signs and was positive of what they said only to be impeached by his own Declaration signed and sworn to only a short time after the picketing which had declared that a sign mentioning Egg City was used as well as signs calling for *a* boycott of Egg City eggs and Country Eggs and that the chanting also requested a boycott of eggs. His Declaration also stated that one of the signs read" "Eggs Too Old", but he testified that the only sign was the one which read, "Boycott Country Eggs".

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[42] Pickets lined up at an entry with union flags, even though they carry no signs, are still pickets, and their presence may call for the "automatic response to a signal, rather than a reasoned response to an idea." Mr. Justice Stevens concurring in NLRB v. Retail Clerks, Local 1001 (Safeco Title Ins. Co.) supra, 447 U.S. at 618-619, 100 S.Ct. at 2379-80, 104 LRRM 2571.

Second, his explanation for the inconsistency between his testimony and his Declaration - "I made about ten declarations and I never read them, any of them" -- is totally unacceptable, showing, as it does, his own total lack of respect for his sworn word and betrays his real attitude towards the fact finding process to such an extent as to cast serious doubt about the veracity of his entire testimony.

Third, his conduct on December 6 consisting of making it appear that he was closing up shop early in order to get rid of the pickets, "flipping off" the pickets, spraying water on them, and making obscene and ethnic slurs at picket captain Avila is indicative of a hostile attitude towards Respondent. Further hostility was shown in his testimony describing the picketing; he appeared to me to be quite upset that Respondent's pickets had chosen his place of business for their activities. At one point, he said he wanted to take the Fifth Amendment rather than answer a question about who had paid his attorney fees when he sought a temporary restraining order against Respondent (G.C. 21), three days after the November 22 picketing on his premises. He ultimately answered that he did not know who paid the fee. (V: 128-130)

In contrast, Avila was articulate, low key, well mannered and possessed a good memory. I credit his testimony both in terms of Zaritsky's conduct on December 6 and in terms of what the legends of the picket signs said on both days.

Having credited Avila, the next question if whether the picket signs he used on December 5 and 6 were protected by the ALRA's publicity proviso so as to be exempt from the prohibitions of section 1154(d)(i) and (ii). Honolulu Typographical Union No. 37, supra (1967) 167 NLRB 1030, 66 LRRM 1194, enfd. (D.C. Cir. 1968) 401 F.2d 952.

Respondent's signs were protected by the publicity proviso because they (along with the UFW flags) identified a strike with the primary employer, Egg City, identified the struck product by calling for a boycott of eggs from Egg City, and explained the relationship between Egg City and the secondary Employer, Country Eggs, by explaining that because Country Eggs bought its eggs from Egg City, it too should be boycotted. These signs also would seem to fulfill the necessary requirements spelled out by counsel for Egg City who stated during the hearing:

> Mr. Roy: "Your Honor, for our perspective, it seems to me that what would be acceptable would be Egg City workers are on strike or something to that effect, noticing what the primary dispute is. Secondly, showing the relationship between the neutral and the primary employer. Lucky Stores buys Egg City eggs, and thirdly, don't buy Egg City eggs. Okay. I think that would be sufficient to put the consumer on notice of the fact that a primary dispute relationship and what they're asking of the consumer...." (sic) (VI: 172-73)

I recommend that the allegation contained in Paragraphs 21 and 23 of the Second Amended Complaint be dismissed.

B. Spire's Restaurant - The November 25 Picketing - Paragraph 16 of Second Amended Complaint

Though unable to identify the date with any precision, Manuel Bernardo testified that Spire's Restaurant in Lawndale,

California, of which he was the manager, was picketed. On direct examination, Bernardo testified that UFW pickets carried 3 or 4 signs but that he could only recall one of them, "Poor Farmers, Don't Buy Egg City Eggs". Bernardo also testified that the pickets chanted those same words. On cross-examination, Bernardo added that he recalled that another sign had said: "Boycott This Place" (IV: 7-8, 10-11, 17-19)

Miguel Camacho testified that he was the picket captain at Spire's, that the pickets carried red flags with a black eagle imprinted, some of which said "UFW", and picket signs which read: "Egg City Workers On Strike," [43] "Boycott Spire's, They Buy Eggs From Hidden Villa," and "Boycott Hidden Villa, They Buy Eggs From Egg City." (X: 14, 46). The pickets, led by Camacho, chanted "Boycott Egg City eggs", boycott Spier's (X: 46).

Analysis and Conclusions of Law

Though Bernardo tried to recall the events as best he could, I was struck by his admitted lack of recollection and the fact that he couldn't remember all the signs. Bernardo acknowledged that he couldn't remember much about the incident because it had occurred so long ago. (IV: 29-30) So concerned was General Counsel about Bernardo's lapse of memory that he apologized for it in his brief: "....In fact, it was obvious from

[43] Camacho testified that the sign, "Egg City Workers On Strike" was used on every occasion he picketed. (X: 103)

his demeanor, while testifying, that he may not have remembered everything clearly, but he definitely remembered one sign, 'Poor farmers, don't buy Egg City eggs.'"[44] (G.C.'s Post-Hearing Brief, p. 86) And even this one sign stretches my belief as there was no other testimony from any of General Counsel's many witnesses to all the other incidents in the Second Amended Complaint to the effect that any sign appealing to "poor farmers" was used at any time. Moreover, there is no basis for believing that the UFW would be particularly interested in appealing to poor farmers for their support during an egg boycott, especially when the restaurant's clientele appeared to be mainly factory workers. (IV: 32-33)

On the other hand, *I* found Camacho to be an excellent witness, knowledgeable, articulate, alert, answering right up; yet, at the same time, polite, fair, restrained, and not prone to exaggerate. Overall, I found his demeanor to be consistent with truthfulness. I credit him here, as I have done consistently throughout, infra.

In addition, Camacho actually made the signs used at Spire's (X: 45), which means that his recollection of what their contents were would be more vivid than the casual observer. I recognize, of course, that he is not exactly a totally

[44] Actually, Bernardo remembered two signs, the other one being, "Boycott This Place".

disinterested witness, being the representative of a party, but I still believe he is telling the truth.[45]

Finally, I also credit his testimony that in making up the picket signs, he used as a guide the instructions he had received in November from Ben Maddock in the presence of UFW attorney, Dean Beer:

> "Ben instructed us that we had to have signs stating the primary, the secondary boycott, the secondary and the secondary (sic), that's what we called it. Primary being Egg City workers on strike. We had to have that on the signs. We had to have the distributors like Hidden Villa, 'Boycott Hidden Villa, They Sell Egg City Eggs.' And then the third one will be identifying the customer of Hidden Villa. So let's say at Bob's or whatever store or restaurant we went to, you know, let's say Bob's, it would say, 'Boycott Bob's, They Receive Eggs From Hidden Villa.'" (X: 9)

Respondent's picket signs, flags, and chanting, all taken in conjunction, were protected by the publicity proviso. Together, they explained that there was a strike at Egg City, that eggs were the struck product, that Spire's, through Hidden Villa, was buying the struck product, and, as a result, called upon the public to boycott Spire's. While it is true that the signs may not have explained the labor dispute as neatly and cleanly or been as logically structured, as for example, Charging Party Hidden Villa suggests was absolutely necessary (see Hidden Villa's Post-Hearing Brief, pp. 32-35), the information was still there for all to see and capable of being understood by the average consumer. Lohman

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[45] While it is true that generally speaking many of the witnesses who testified in this case, e.g., the restaurant and grocery store managers at the various sites where the picketing took place, did not have the interest in its outcome as a Camacho or Avila would,

Sales Co., supra (1961) 132 NLRB 901. Essentially then, the public was informed of a strike at Egg City, that Spires' had eggs from Egg City, and that they had received these eggs from Hidden Villa. The public also understood that it was being called upon to participate in a boycott.

I recommend the dismissal of this allegation.

C. Sam's Produce - The November 24 Picketing - Paragraph 15 of Second Amended Complaint

The parties stipulated to the following facts: On November 24, 1986 at about 3:40 p.m. UFW pickets arrived at Sam's Produce located in Paramount, California. Said pickets chanted, "boycott Egg City eggs" for about ten minutes at which time the pickets were advised that there were no Egg City eggs at that location, and they then left. (II: 168)

Carol Penn, the controller of Sam's Produce Company, recalled an incident on November 24 in which pickets showed up at her place of business carrying signs. One said "Boycott Egg City Eggs", and the other, "Do Not Shop Here". There was also continuous chanting of "boycott Egg City eggs, boycott Egg City

(Footnote 45 Continued)

so too is it true that the manager's attention was not always to the number of or the specifics of what the picket signs said but rather directed to whether their particular store might have been mentioned. (See for example, the testimony of Bob's Big Boy manager, Robert Cox, infra, (VII: 16)) In some cases the store manager might not have ever heard of Egg City or even Hidden Villa and thus paid little attention to their being mentioned on a picket sign.

eggs" (VI: 165-166). Penn also testified that at this time the company was purchasing eggs through suppliers and that one of them was Hidden Villa, from which she obtained medium sized eggs. Penn testified that none of the egg boxes delivered by Hidden Villa ever had the words, "Egg City" on them. (VI: 165, 167)

Analysis and Conclusions of Law

From these facts it is apparent that the consuming public would not understand from Respondent's picket signs or chanting that there was any connection between Egg City (or even that there was a strike there) and the neutral employer, Sam's Produce. The probable effect of this picketing was to make the consumer think the dispute was with Sam's. As Respondent did not take sufficient steps to keep the neutral from becoming involved in this labor dispute, its conduct was threatening, coercive, and restraining. I recommend that Respondent be found to have violated section 1154(d)(ii)(2) of the Act.

Respondent argues that no violation should be found because the fact that its pickets left immediately upon being satisfied that no Egg City eggs were on the premises shows it good faith. Assuming arguendo that Respondent's good faith is a defense to this charge, Respondent's conduct does show that it had no interest in boycotting a neutral employer unless the products of the primary employer could be found on the premises. While Respondent's good faith argument may be worthy of some consideration, there is another element in this; but no evidence

concerning it was provided. It was incumbent upon Respondent to offer testimony as to what specific steps it took to ascertain, prior to picketing, whether Egg City eggs were, in fact, present on the Sam's Produce premises at that time.

Respondent also argues that even if a violation were found, it would constitute de minimus conduct. Presumably, Respondent would support this argument by reference to the short duration of the picketing and the fact that the pickets left after being informed that none of the primary employer's product was on the premises. I do not believe this was de minimus conduct as the threats, coercion and restraint outlawed by the statute contain no minimum time limit. Further, no case authority is cited by Respondent that would support the proposition that its conduct was de minimus in this instance.

D. Coco's Restaurant - The November 26 Picketing - Paragraph 17 of Second Amended Complaint

The General Manager of Coco's in Compton, California, Phillip Blanchette, testified that on November 26 he was approached by a UFW representative[46] who explained the grievances the Union had against Egg City and asked him from whom he received eggs. When Blanchette told him that Coco's got its eggs from Hidden Villa, the representative indicated that because Hidden

[46] It was stipulated that this representative was Miguel Camacho. (VIII: 11)

Villa bought its eggs from Egg City, Coco's would be picketed. (VIII: 5) Thereafter, picket signs went up. Blanchette couldn't recall exactly what they said but testified that there were 3-5 signs, that each said different things, and that "....one said something about United Farm Workers having a dispute with or on strike or something with Egg City. One sign said something about don't eat eggs here." He could not recall what the other signs said. (VIII: 6, 13) He did not see any signs mentioning Coco's or Hidden Villa. The pickets also chanted, "don't eat eggs here." He recalled no flags. (VIII: 7, 13)

Blanchette testified he called Hidden Villa to report this activity and that Luberski arrived. Both Luberski and he talked to Camacho. According to Blanchette, Camacho said that the UFW was picketing because Coco's dealt with Hidden Villa which dealt with Egg City and that if Coco's continued to deal with Hidden Villa, the pickets would be maintained. Camacho is also alleged to have requested a signed statement that Hidden Villa be dropped as an egg supplier. (VIII: 9)

Luberski, after having received a call from Blanchette, drove to the site where he observed pickets with a flag and signs, but he could not recall what the signs said.[47] (III: 93-98) Luberski spoke to Camacho, told him that there were no Egg City

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[47] After reference to his December 11 Declaration, he testified that one of the signs said, "Boycott This Shop" (III: 96-98).

products at this restaurant, and asked him to come in and see for himself.[48] According to Luberski, Camacho responded that it didn't matter whether there were Egg City eggs there or not because the UFW was boycotting Hidden Villa and would continue to boycott other customers of Hidden Villa until those customers quit Hidden Villa. (III: 99-100).

Miguel Camacho testified that 15 pickets carried flags with the words, "UFW" at the top and 5 or 6 signs. The signs read: "Boycott Coco's, They Buy From Hidden Villa," "Boycott Hidden Villa, They Buy Eggs From Egg City," and two signs that said "Egg City Workers On Strike." Camacho made the signs himself. The pickets also chanted "boycott Coco's, boycott Egg City eggs." (X: 47-49, 59)

Analysis and Conclusions of Law

Paragraph 17 of the Second Amended Complaint alleges that Camacho made certain statements to Blanchette and Luberski which had the effect of threatening and attempting to coerce them. There was evidence from Blanchette and Luberski, whose testimony on this point I have no reason to question,[49] that there were four statements made by Camacho that were arguably coercive.

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[48] At this same time eggs were being removed from Coco's kitchen and being stored in a van. (VIII: 14). Luberski did not deny that Hidden Villa had sold Coco's eggs that had come from Egg City around this time. (III: 193)

[49] Camacho was not asked about and therefore did not deny any of these statements attributed to him.

Statement No. 1

Camacho told Blanchette that the UFW was picketing because Coco's dealt with Hidden Villa which dealt with Egg City and that if Coco's continued to deal with Hidden Villa, the pickets would be maintained.

Prior to this statement, Camacho had explained Respondent's labor problems with Egg City to Blanchette. He then learned from Blanchette that Coco's received its eggs from Hidden Villa, and he told Blanchette that because Hidden Villa got its eggs from Egg City, Coco's would be picketed. The General Counsel's position is that the threat existed because Blanchette was not asked or told to stop buying Egg City eggs but because he was told, in effect, to stop buying Hidden Villa eggs. (G.C.'s Post-Hearing Brief, p. 92) The General Counsel states: "As the UFW could not lawfully picket Coco's solely because Coco's distributed eggs supplied by Hidden Villa, the threat to engage in such conduct without making it contingent upon the distribution by Coco's of Egg City products supplied to it by Hidden Villa makes this threat unlawful under the Act." (G.C.'s Post-Hearing Brief, p. 94)

But Camacho did not tell Blanchette he was boycotting Coco's because it traded with Hidden Villa. What he said, after first explaining the labor dispute between the UFW and Egg City, was that Hidden Villa received its eggs from Egg City and that since Coco's received its eggs from Hidden Villa, it (Coco's) would be picketed if it continued receiving these eggs. This is the logical meaning of Camacho's words. The General Counsel,

however, by placing a strictly literal interpretation on those words, takes them out of context and denies them their natural meaning by imputing to them a meaning that was clearly not intended - the idea that Camacho was interested in picketing Coco's because it traded with Hidden Villa irrespective of whether Hidden Villa continued to purchase eggs from Egg City. Certainly, Blanchette would not have understood the words to mean that.

Another problem with General Counsel's position (and that Chargting Party Egg City, as well) is that taken to its utlimate conclusion, it would mean that lawful consumer publicity by a labor organization pursuant to the ALRA's publicity proviso could be defeated anytime by the fortuitous business happenstance that one producer utilized a middleman/distributor while another sold directly to the store or restaurant. Certainly, the legislative scheme formulated to deal with consumer boycotts was not intended to be dependent upon how a retail enterprise received the goods it eventually sold to the public. Under General Counsel's and Charging Party Egg City's restrictive construction, a request to a restaurant or grocery store that bought eggs through wholesale distributors - very common in the industry - to refrain from purchasing Egg City eggs (without mention of the wholesale distributor) would be meaningless and totally ineffective as such establishments do not purchase their eggs from Egg City; they purchase them from wholesale distributors such as Hidden Villa, Country Eggs etc., who have purchased them from Egg City.

I find that Camacho's statement was not the type of threat, coercion or restraint prohibited by the statute but was merely the expression of protected conduct -- the intent to picket so long as a struck product continued to be handled by a neutral. The "threat" to engage in protected conduct is itself protected.[50] See NLRB v. Servette Inc., supra (1964) 377 U.S. 46, 55 LRRM 2957 (See also legal discussion, supra regarding October 24 and November 22 picketing at Country Eggs).

Statement No. 2

> Camacho told Blanchette that he needed a signed statement from Coco's to the effect that Hidden Villa was being dropped as an egg supplier

I think it would be proper to assume (though Blanchette did not report that Camacho said so) that what Camacho meant was that before he would remove any of the picket signs, he needed written assurances that the neutral would no longer trade with a distributor of the primary's goods.

In support of its argument, the General Counsel cites Electrical Workers (IBEW) Local 441 (Rollins Communication, Inc.) (1974) 208 NLRB 943, 85 LRRM 1262. In Rollins the union representative told the neutral owner/builder that a picket line would be removed if he would sign a letter stating that the

[50] Apparently, Charging Party Hidden Villa does not dispute that Statement No. 1 was protected conduct. (See Hidden Villa's Post-Hearing Brief, p. 36)

primary employer's (Rollins) workers sent over to the neutral's construction project would not be allowed to work unless they were paid the prevailing wage. The neutral refused to sign the letter. Later the union representative told the neutral that if Rollins[1] men were removed from the job, the picketing would cease which was what eventually happened.

The Board found a violation because the union presented specific conditions for getting rid of the pickets and no choice was left to the neutral employer. It pointed out that the union representative was not predicting the occurrence of primary picketing at a neutral location which would either result in a cessation of business with Rollins or else a significant disruption in their relationship. The NLRB stated:

> "In L. G. Electric[51] and in the instant case, the secondary employer, as a condition for getting rid of the pickets, was required by the union to take specific affirmative action—the choice of action was not left to the secondary employer. In these circumstances, in both L. G. Electric and in the instant case, the secondary was being enmeshed by the union in a dispute not his own. In the instant case Addington's insistence on a letter of commitment from Carter was clear and convincing evidence that an object of Respondent's picketing was to cause a disruption in Carter's business relationship with Rollins or a cessation of business between Carter and Rollins." 208 NLRB at 944

Respondent's conduct in this instance, unlike the announcement of an intent to picket a struck product as long as

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[51] International Brotherhood of Electrical Workers, Local Union No. 11, AFL-CIO (L.G. Electric Contractors, Inc.) 154 NLRB 766.

necessary, is more akin to coercion as it unnecessarily entangles the neutral by conditioning the removal of pickets from its place of business on some specifically designated, affirmative act on its part, e.g., the signed guarantee. The key seems to be the degree of free choice left open to the neutral. The neutral must be free to decide whether to cut off a business relationship with the primary; a list of demands requiring some affirmative act on its part detracts from that free choice as it places the neutral to too large an extent in the center of the dispute.[52]

I recommend that the Board find Statement No. 2 to have been threatening, coercive and restraining in violations of section 1154(d)(ii)(2) of the Act.

Statement No. 3

> Camacho told Luberski that Respondent would continue to boycott other customers of Hidden Villa until those customers quit Hidden Villa.[53]

Statement No. 3 is essentially not very different from the statement made on October 24 at Country Eggs, supra, where

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[52]Although Rollins applies to this situation, it does not apply, despite General Counsel's attempts, to all situations where Respondent has announced its intention to picket a neutral who is purchasing eggs from Egg City, e.g., where the union agent states that picketing will continue until the neutral ceases purchasing eggs from Egg City or its distributors.

[53]Though Blanchette was present when Luberski and Camacho spoke, he did not confirm that Statement No. 3 was spoken. Nevertheless, I credit Luberski that it was, as I have found him generally to have been a truthful witness.

Escalante told Zaritsky on one occasion that if no agreement could be reached between them, he would go out to talk to some of Country Eggs' major accounts and on another occasion when Escalante told Zaritsky that he if would not stop purchasing Egg City eggs, his premises would be picketed, his trucks followed, and his customers told that they ought not be dealing with Egg City products. I have found this conduct to be lawful. I find that the assertion that other customers of Hidden Villa would be boycotted until they took their business elsewhere (meaning until Hidden Villa stopped purchasing eggs from Egg City) was the expression of intended conduct that would have been protected by the publicity proviso. See NLRB v. Servette, Inc., supra (1964) 377 U.S. 46, 55 LRRM 2957. (See legal discussion, supra, regarding October 24 and November 22 picketing at Country Eggs) (See also legal discussion, supra, regarding Statement No. 1). The statement here merely announces that Respondent intends to picket other Hidden Villa customers, just like Coco's. Some of the difficulty with the statement comes in the crudeness of the boastful, wishful remark "....until those customers quit Hidden Villa." Nevertheless, if as a result of the lawful picketing of Hidden Villa's customers, they were to terminate their relationship with Hidden Villa, there would be no violation of the Act; hence a statement to that same effect would likewise be lawful. See Buck's Butane Propane Service, Inc., supra (1970) 186 NLRB 187.

I recommend that no violation be found regarding Statement No. 3.

Statement No. 4

> At the same time Statement No. 3 was made Camacho also told Luberski that it didn't matter whether there were any Egg City eggs at Coco's because the UFW was boycotting his company, Hidden Villa, because they were purchasing Egg City eggs.

There is no violation of the Act if Respondent had engaged in lawful consumer picketing against Egg City eggs, consumers bought fewer eggs or did not patronize the establishment at all and as a consequence of the decline in sales, one of Hidden Villa's customers, Coco's for example, ceased doing business with Hidden Villa. Nor would it be a violation if Hidden Villa, faced with declining purchases from its customers, decided to keep Egg City eggs from certain customers or reduced its purchases of Egg City eggs or even ceased doing business with Egg City entirely. But where, as here, Hidden Villa's owner is told that even if there were no Egg City eggs at Coco's (presumably meaning that even if, at Coco's request, Hidden Villa no longer sent Egg City eggs to Coco's), Coco's would still be picketed because Hidden Villa had continued to supply other restaurants or grocery stores with the product, then Respondent has gone beyond the scope of permissible activity and has attempted to enmesh the neutral in the labor dispute. The neutral now must respond to the labor dispute (e.g., put pressure on Egg City) not based upon the declining sales of it or its customers but rather out of fear that

all of its customers will be boycotted regardless of what it does save ceasing all business with Egg City.

I recommend that Statement No. 4 be found to be threatening, coercive, and restraining in violation of section 1154(d)(ii)(2) of the Act.[54]

Paragraph 17 of the Second Amended Complaint does not allege that the UFW pickets failed to identify the nature of the primary labor dispute between the UFW and Egg City or failed to establish the relationship of Coco's to that dispute. However, evidence of the content of the signs was allowed to enter the record without objection from Respondent. Therefore, I shall consider the matter as if it had been plead. See Gramis Brothers Farms, Inc., and Gro-Harvesting, (1983) 9 ALRB No. 60.

Though Blanchette testified there were 3-5 signs with each one saying different things, he could only name what two of the signs said — a sign explaining that there was a labor dispute between Egg City and the UFW and another sign requesting that the public not buy eggs here (meaning at Coco's).

The only other person who had any recollection of what the signs said was Camacho who had made them himself. (Luberski had no real recollection of what any of the signs had stated). I believe Camacho's testimony and find that the signs used that day explained the UFW labor dispute (as Blanchette had also testified),

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[54] A similarly coercive statement was made by Maddock to Luberski at the meeting at Solly's Restaurant in Woodland Hills in mid-August. I credit Luberski, whose testimony I found to be sincere and forthright, that Maddock told him that it didn't matter if his

indicated the chain of distribution from Egg City to Hidden Villa to Coco's and requested a boycott of Coco's (as Blanchette had also testified) because of its use of Egg City eggs. I credit Camacho for the same reasons as previously stated. In addition, it is logical to assume that the signs which Blanchette could not remember were the signs dealing with Hidden Villa. Why else would Camacho, before the picketing commenced, ask questions of Blanchette to try to determine if Coco's received its eggs from Hidden Villa? (And after the picket signs went up, Blanchette called his main office and then called Hidden Villa). (VIII: 8) Furthermore, if Blanchette could only name two of the 3-5 signs which all said different things, it is most likely that the information about Hidden Villa buying from Egg City and then Coco's buying from Hidden Villa was included in this information. While it is true that Blanchette testified he could not recall a sign saying anything about Hidden Villa (VIII: 7), he also testified there were no flags which was contradicted by both Luberski and Camacho. I think he was just mistaken about the

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(Footnote 54 Continued)

customers carried Egg City eggs; that as long as Luberski continued to purchase Egg City eggs, his customers would be picketed. This too was coercive as it was an attempt to enmesh the neutral squarely in the middle of the labor dispute, which is beyond the scope of permissible activity. As in the case of the Camacho statement, it threatened a primary labor dispute directed at Luberski. I do not, however, credit Carrott's description of Haddock's statements at either the Woodland Hills or Valencia meetings which were not confirmed by Luberski. Carrott's version seemed farfetched and exaggerated.

Hidden Villa signs; I note that he began his testimony stating he was "not exactly" sure what any of the signs said.[55] (VIII: 6)

In summary, I find that Respondent truthfully advised the public about the existence of the labor dispute at Coco's and that such conduct was protected by the proviso. I recommend that this allegation be dismissed.

E. United Catering - The December 3 Picketing - Paragraph 18 of Second Amended Complaint

United Catering is a trucking company that prepares lunches, places them aboard its trucks, and then transport same on a regular route to industrial sites and office buildings where the food is sold (III: 179-181). Charles A. Blanck, president of CGB Enterprises, parent corporation to United Caterers, testified that on December 3 he observed union pickets carrying UFW flags and signs that read: "Boycott Hidden Villa" and "Boycott Egg City." (III: 169-170) Blanck admitted purchasing eggs from Hidden Villa. (III: 173)

Luberski testified that after receiving a call from United Catering, he drove there and observed several pickets carrying signs which said: "Boycott United Caterers, They Buy From Hidden Villa." Some of the other signs had "Egg City" written on them, but he couldn't specifically remember what they

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[55] Blanchette testified that none of the signs mentioned Coco's (VIII: 7) but that was only literally correct as he also testified that one of the signs advised consumers not to eat eggs "here."

said. Luberski testified he then spoke to the picket leader and asked that the pickets go home, which they did. (III: 102-103, 105, 107, 109)

Avila testified that the union officials decided to picket United Caterers because about a week before the picketing he had followed a Hidden Villa truck to the United location and observed that the Egg City boxes were being unloaded at the only entrance. (IX: 99-102)

On December 3 Avila returned with 12 pickets and formed a line in the parking lot adjacent to the entrance where the United Catering truck went in and out. According to Avila, the pickets chanted "Boycott Egg City," "Boycott Hidden Villa, they buy from Egg City," and "boycott United Catering, they buy from Hidden Villa" (IX: 54-55). The pickets carried UFW flags (none had any lettering) and four picket signs. (IX: 48). The contents of the signs were as follows: "Egg City Workers On Strike," "Boycott Egg City Eggs," "Boycott Hidden Villa, They Buy Eggs From Egg City," "Boycott United Catering; They Buy From Hidden Villa." (IX: 53-54, 98)

Analysis and Conclusions of Law

Neither Blanck nor Luberski could testify with reasonable certainty as to the number or content of the signs. Blanck could not recall if there were more than two picket signs and was clearly focusing on one sign that mentioned "Hidden Villa" as he did not know what Egg City was (III: 173-174).

Luberski, who remembered more about the signs than Blanck, ("Boycott United Caterers, They Buy From Hidden Villa," something about "Egg City"), was honest enough once again to admit that he could only generally say but not specifically say what the contents of the signs were.

In contrast, Avila, as before, was direct and articulate and possessed a good memory. I credit his testimony and find that the signs (as well as the chanting and flags) truthfully advised the public of the existence of the labor dispute and were protected by the publicity proviso.

I recommend that Paragraph 18 be dismissed.

F. Bob's Big Boy Picketing

1. The Glendale Restaurants

a. December 4, Paragraph 20 of Second Amended Complaint

Glendale manager Shelly Soto testified that on December 4 UFW pickets showed up at Bob's Big Boy (hereafter referred to, at times, as "Bob's") in Glendale, California, began chanting, and carried UFW flags and picket signs which read: 1) "Egg City On Strike,"[56] 2) "Boycott This Place, They Use Egg City Eggs," 3) "Boycott This Place, They Buy From Hidden Villa," 4) "Don't Shop Here, They Buy From Hidden Villa," and 5) "Don't Eat Here, They Buy From Hidden Villa.[57] (VII: 74-78, 91)

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[56] No doubt she meant to say the sign read: "Egg City Workers On Strike," a sign that had been used by Respondent on several other occasions.

[57] Ms. Soto's recollection of signs 2, 3, and 5 above was refreshed by reference to her sworn Declaration.

Luberski was informed about the Glendale Bob's picketing and went there more than once, possibly as much as three times beginning either on December 4 or December 5, infra. On those occasions, he could not specifically recall what any of the signs said except for the ones that stated: "Boycott This Shop, They Buy Eggs From Hidden Villa" and "Boycott Hidden Villa, They Buy Egg City Eggs". Though he could not state precisely what the signs said, he did recall one sign which definitely referred to a labor dispute at Egg City and another which asked for support for the Egg City strikers. (III: 111-115, 196)

Camacho testified that he used flags (some of which had "UFW" printed on them) and picket signs on December 4 which bore the following legends: "Egg City Workers On Strike", "Support Egg City Workers On Strike", "Boycott Hidden Villa, They Buy Eggs From Egg City", and "Boycott Bob's, They Buy Eggs From Hidden Villa." (X: 60-61, 70, 72). During the picketing, pickets would chant "boycott Bob's, boycott Egg City eggs." (X: 68-69)

Camacho further testified that he used the same picket signs and flags and chanted the same slogans on all the 3 or 4 days of picketing at Bob's in Glendale,[58] Infra.

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[58] Camacho could not clearly recall if the Bob's picketing in Glendale was for 3 or 4 days. (X: 72) As he made it clear that he used the same signs, flags, and chants for each day of the picketing, *I* conclude that they were used on December 4, 5, 6, and 8.

b. December 5, Paragraph 22 of Second Amended Complaint

Soto testified that the pickets returned the next day bringing the same flags and picket signs which stated the same things as the day before. (VII: 79-80)

But another one of Glendale Bob's managers with an overlapping shift with Soto, testified slightly differently. According to Tim Berg, on December 5[59] he observed 3-4 pickets with UFW flags and signs which read: "Egg City Workers On Strike", "Don't Buy Here, They Buy Their Eggs From Hidden Villa," and "Boycott This Place" (VII: 96-98, 106, 109-110).

c. December 6, Paragraph 24 of Second Amended Complaint

Berg testified that the pickets came the next day with UFW flags and 3-4 signs which carried the same message as the day before. (VII: 100-102)

Richard Carrott testified that he responded to a phone call from Luberski and went to the restaurant where he heard pickets chanting "boycott Bob's" and where he observed signs that read: "Boycott Bob's," "Boycott Bob's, They Buy From Hidden Villa," "Boycott Hidden Villa, They Buy Eggs From Egg City. (VI:

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[59] Berg testified that this event occurred on December 6 (VII: 96) and that a second incident occurred the following day, Saturday. (VII: 100) Berg was mistaken. The first incident he was involved with occurred on Friday, December 5, 1986 and the second was Saturday, the 6th. (VII: 102)

59-60, 106-109, 125) He could not recall any sign saying "Egg City Workers on Strike." He denied seeing any sign that said "Support Egg City Strikers." He testified there were no signs about the labor dispute. (VI: 60-61, 106-109)

UFW full-time volunteer Jose Morales testified that he was present at Bob's on December 6 assisting picket captain Miguel Camacho and that the pickets carried UFW flags with lettering on them. (IX: 104, 119). The picket signs contained the following messages: "Egg City Workers On Strike," "Boycott Egg City Eggs," "Hidden Villa Buys Eggs From Egg City," "Boycott Hidden Villa", and "Bob's Big Boy Buys From Hidden Villa, Boycott Bob's" (IX: 115, 121). Morales admitted that no sign stated that the UFW was on strike against Egg City, and that there was no reference to the UFW on the "Egg City Workers On Strike" sign. (IX: 121, 128) Morales also testified that it was Camacho who told him what to write on the signs, and that he just followed Camacho's directions, (IX: 125)

Finally, Morales also testified that the pickets chanted "Boycott Egg City Eggs", "Boycott Bob's", "Boycott Bob's Big Boy", and "Boycott Hidden Villa" (IX: 117) There was no chanting to the effect that the UFW was on strike against Egg City. (IX: 123)

d. December 8, Paragraph 25 of Second Amended Complaint

Again pickets with flags showed up at the Glendale Bob's Big Boy. Soto testified that the signs said exactly the same things that she testified that they had said on December 4 and 5

except for one sign which originally appeared on December 8 as "Don't Eat Here" but which was later changed while the pickets were there to "Don't Eat Here, They Buy From Hidden Villa."[60] (VII: 83-85, 91)

Analysis and Conclusions of Law

December 4 Picketing

I credit Camacho's testimony as to the content of the signs for the same reasons that I have credited him before. Moreover, this testimony was largely corroborated by Luberski,61 whom I would also credit. Both witnesses indicated that the signs spoke of the UFW strike with Egg City, and how the struck product, through Hidden Villa, arrived at Bob's Big Boy. The chanting and the flags also contributed to the public's knowledge.

I have previously found similar legends to have passed the truthfulness test (See factual discussion and legal analysis regarding Coco's Restaurant, Part D, *supra* and United Catering, Part E, *supra*). I again find that these signs were protected by the publicity proviso, and I recommend the dismissal of Paragraph 20 of the Second Amended Complaint.

But even if I were to reject the testimony of Camacho and

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[60] Actually, this was not a new sign, as Soto had previously testified that these same words were used on a sign on December 4 and 5. (VII: 77, 90-91)

[61] Luberski testified he may have been present on December 4 or 5, possibly both days.

Luberski and rely solely on the testimony of Soto,[62] as General Counsel would have me do, I would reach the same result. The General Counsel's argument seems to be that despite Soto's rather elaborate description of the contents of each sign, the signs do not show the relationship of Bob's Big Boy to the labor dispute. "While she testified that one sign stated 'Boycott this place, they use Egg City eggs', the signs failed to state that such eggs were obtained through Hidden Villa" (G.C.'s Post-Hearing Brief, pp. 87-88).

This is certainly an incorrect analysis. Looking only at Soto's testimony about the content of the signs, it would appear that those signs would have indicated to the general public that there was a labor dispute between the UFW and Egg City and that Bob's was using eggs from Egg City and that as a result, Bob's should be boycotted. Implicit in the 3 signs regarding Hidden Villa was that Bob's was buying Egg City eggs from a middleman. Granted there was no sign which specifically stated that Hidden Villa purchased eggs from Egg City and then sold them to Bob's. But such a requirement is not necessary as long as the main

[62] I believe Soto sincerely tried to tell the truth, and I can credit her generally over some of the other witnesses like Berg, infra. Still, she recognized that she was tired and needed her memory refreshed from her Declaration. She also became confused at one point and testified that a new sign appeared on December 8 which in fact, according to her earlier testimony, had been used on December 4.

message was conveyed that there was a labor dispute at Egg City (and not at Bob's) over eggs and that Bob's was "using", i.e., selling the struck product. This adequately described the relationship between the primary and secondary employers. There is no reason to believe that the public would think that the UFWs primary labor dispute was with Bob's Big Boy. See Central Ind. Bldg. & Constr. Trades Council (K-Mart Corp.) supra (1981) 257 NLRB 86, 107 LRRM 1463.

In short, though Camacho's testimony differs somewhat from Soto's,[63] his testimony is essentially consistent with hers and establishes that the public was duly informed through picket signs, chanting, and flags of the nature of the labor dispute. In both cases the proviso has been complied with.

December 5 Picketing

The interesting thing about the December 5 picketing is that there is a conflict in testimony between two of the witnesses for the General Counsel as to the contents of the picket signs on that date. The key difference is that Soto testified one of the signs read: "Boycott This Place, They Use Egg City Eggs", and Berg testified that the sign just read: "Boycott This Place."

Presumably, General Counsel would have me resolve this conflict, in favor of Berg. Yet, it appears that General Counsel does not rely on the Berg testimony as he makes no reference to it

[63] Soto testified one of the signs stated "Boycott This Place, They Use Egg City Eggs." Camacho did not confirm this in his testimony. Camacho testified that one of the signs stated "Boycott Hidden Villa, They Buy Eggs From Egg City." This was not

in his post-hearing Brief's analysis of the event. (See G.C.'s Post-Hearing Brief, pp. 19-20, 87-89).

I shall apply the same analysis to the picketing on December 5 as I just did to December 4. Either by accepting the testimony of Soto[64] or that of Camacho and Luberski as to the contents of the signs, both versions establish that the public was duly informed of the nature of the labor dispute. I recommend that the allegations contained in Paragraph 22 be dismissed.

December 6 Picketing

There were five witnesses that testified as to the contents of the pickets signs on December 6, Berg, Carrott, Luberski,[65] Morales, and Camacho. From this five, it is surprising that there was as much agreement on what the signs said as there was. For example, all, except for Carrott, agreed that there was a sign stating: "Egg City Workers On Strike." [66]

(Footnote 63 Continued)

confirmed by Soto. Nevertheless, as discussed above, in both cases the message conveyed - whether one accepts Soto's version or Camacho 's - was that there was a UFW/Egg City dispute over eggs, that Bob's Big Boy carried the product and that Hidden Valley was involved as a middleman. The consumer understood that Bob's was not the primary employer.

[64] In any event, I would not credit Berg over Soto as I found the latter to be more mature, conscientious, precise, and believable.

[65] Though Luberski testified he visited the picket site probably three times, he could not be certain as to the dates. I am including his testimony in the analysis of the December 6 activity, as I am assuming he went to the picket location three times in a row.

[66] Luberski could not recall the precise words but definitely remembered one sign which referred to a labor dispute at Egg City and another which asked for support for the Egg City strikers.

Carrott, Luberski, Morales and Camacho all agreed that there was another sign which read (or words to this effect): "Boycott Hidden Villa, They Buy Eggs From Egg City.

And all five agreed that a third sign stated (or words to this effect): "Boycott Bob's, They Buy Eggs From Hidden Villa."

Thus, there is agreement on the essential message conveyed to the public by Respondent. The only question is — as it has always been — whether that message could be said to have truthfully advised the public of the nature of the labor dispute so as to protect Respondent from the allegations that it has violated section 1145(d)(ii) of the Act. As in the case of Coco's, United, Catering, and the Bob's Big Boy incidents heretofore discussed, supra, I believe that the contents of the picket signs used on December 6 were protected by the proviso. I recommend the dismissal of Paragraph 24 of the Second Amended Complaint.

December 8 Picketing

This is the same factual situation that was present in the picketing that took place on December 4. Its legal analysis will be treated in the same way. (See factual discussion and legal analysis of December 4 picketing, supra.). As such, the picketing signs complied with the proviso, and I shall recommend that Paragraph 25 be dismissed from the Second Amended Complaint.

2. The Pasadena Restaurants

a. January 19, 1987, Paragraph 34 of Second Amended Complaint

On January 19, 1987 UFW representative Miguel Camacho informed Bob's manager, Robert Cox, of the reasons why Respondent

intended to picket. Thereafter, a picket line was formed in front of the restaurant, located on East Colorado Boulevard in Glendale, California. According to Cox, through he could not recall how many signs there were, or the content of all the signs, he did remember two of them, "On Strike Against Egg City" and "Don't Eat At Bob's, They Buy From Hidden Villa." (VIII: 8-12, 16). Cox stated that he did "....remember those two because they....one of them did mention Bob's so that's what caught my eye." (VII: 16) Cox also testified that there was chanting requesting customers not to eat at Bob's and possibly other chanting, which he could not recall. (VII: 12)

Camacho testified that the picket signs he used on January 19 were the same he used at the other Bob's Big Boy locations on January 21 and 22, infra, and that he made them himself. (X: 109-111, 137) They read as follows: "Egg City Workers On Strike," "Boycott Hidden Villa, They Buy From Egg City," Boycott Bob's, They Buy Eggs From Hidden Villa." The pickets also chanted "Boycott Bob's and Boycott Egg City eggs." Flags were also carried, some with "UFW" letters on them. (X: 137-139)

b. January 21, 1987, Paragraph 35 of Second Amended Complaint

Kathleen Harris, Bob's Pasadena North Lake Avenue restaurant manager, testified that on January 21 ten pickets with UFW flags (one had "UFW" printed on it) and picket signs showed up. Those signs read as follows: "Boycott Hidden Villa Ranch,

They Buy From Egg City", "Hidden Villa Ranch Buys From Egg City", and Boycott Bob's, They Buy From Egg City.[67] There was chanting in which the pickets were asking customers not to eat at Bob's Big Boy. (VII: 55-58, 67, 72-73).

c. January 22, 1987, Paragraph 36 of Second Amended Complaint

Harris also testified that on January 22 around fourteen pickets arrived with UFW flags (one with "UFW" printed on it), and that the picket signs said: "Egg City Farm Workers On Strike," State Farm Workers On Strike," "Don't Eat At Bob's, They Buy From Egg City", "Boycott Hidden Villa Ranch, They Buy From Egg City," and "Boycott Bob's, They Buy From Hidden Villa". The pickets were also chanting, "boycott Bob's, don't eat at Bob's." (VII: 61-64, 69-73)

3. The Existence of Egg City Eggs on the Premises on January 19, 21, and 22

When Camacho arrived at Bob's on January 19, 1987, he told Cox that Bob's would be picketed because there was a labor dispute and that Bob's was purchasing large eggs from Egg City through Hidden Villa. (VII: 9, 14) According to Cox, however, there were only small eggs on the premises and to the best of his knowledge, no Egg City eggs were among them. Cox also testified that Bob's

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[67] Ms. Harris did not recall this sign until after she read her Declaration. (VII: 67-68)

eggs were obtained exclusively from the Marriott Corporation which bought them from Hidden Villa. (VII: 14-18)

Luberski testified that Bob's was a subsidiary of the Marriott Corporation, that Marriott supplied eggs to Bob's, that he, i.e., Hidden Villa, had 100 percent of Marriott's business, and that Marriott purchased only medium and large eggs. (III: 135-137)

Luberski testified that as of December 11, 1986, he no longer placed any purchase orders with Egg City[68] and that around that same time he advised the UFW he was no longer doing business with Egg City. (III: 68-70, 72, 138; IV: 50.) In addition, Luberski testified that to the best of his knowledge he did not supply the Bob's Big Boy on East Colorado Street or the Bob's Big Boy on North Lake Avenue on January 19, 21 or 22 and that the reason that he specifically knew that was because he or his subordinates made extensive checks of his orders for those days to see where his medium eggs were originating and determined that the egg purchases had come from Roseacre Farms (a non-broker), an Indiana corporation. (III: 134-137; IV: 56-57) Still, he could not state to an absolute certainty that Bob's had not been supplied with Egg City eggs from Hidden Villa or that Marriott did

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[68] He also testified that it was possible that Hidden Villa received eggs supplied by egg brokers that had come from Egg City after December 11 but only up to January 18. (IV: 50)

not have Egg City eggs on its premises on those January dates. (IV: 60-63)

Analysis and Conclusions of Law

Once again I credit Camacho who impressed me with his memory, knowledge and honest demeanor. I credit his version of the contents of the picket signs which he testified were used on all three days of picketing at the Pasadena Bob's Big Boys. I also note that the signs used on those occasions were similar in content to those Camacho used at the Bob's Big Boy restaurant in Glendale in early December, supra.

As to the January 19 picketing, I feel Cox was trying very hard to be truthful, but his memory was not good and he simply could not remember the chanting or what all the signs said.[69] The two signs he could remember were pretty close to those testified about by Camacho ("Egg City Workers On Strike" and "Boycott Bob's, They Buy Eggs From Hidden Villa"). The key sign he couldn't remember was identified by Camacho as stating: "Boycott Hidden Villa, They Buy From Egg City".

Similarly, Harris' memory was faulty and her testimony confusing, particularly as regards the January 21 picketing. At

[69] So concerned was General Counsel with Cox's lack of memory, that he specifically makes reference to it in his post-hearing Brief but then asks me to pretend it's not a problem: "....As to January 19, since Mr. Cox does not recall what all the signs said, Mr. Camacho's credibility would have to be assumed, if his testimony was to be accepted. (G.C.'s Post-Hearing Brief, p. 91)

one point during cross-examination she could only remember what one sign said (VII: 72); at another point in her testimony she confused "Boycott Bob's, They Buy From Hidden Villa" with "Boycott Bob's, They Buy From Egg City." (VII: 69-70). Despite concentrating a long time on how to answer the question about the content of the signs, she ultimately had to refer to her Declaration to refresh her recollection. Ironically, the only signs she and Camacho could agree upon — "Boycott Hidden Villa, They Buy From Egg City" — was the very sign Cox could not recall from the picketing two days before.

As regards, the picketing on January 22, Harris' testimony as to the content of the picket signs is virtually identical to that of Camacho's on the essential points.

On the surface then, it would appear from this analysis that these three Pasadena picketing incidents were basically no different from those which occurred at the Glendale Bob's Big Boy and that I should find here, as I did there, that Respondent's publicity was protested by the proviso.

There is a large difference however. Here, in the Pasadena picketing, the evidence is uncontroverted that there were no Egg City eggs present on the premises on any day on which the picketing took place. I credit Luberski's testimony. Though Luberski could not be absolutely sure there were no Egg City eggs at Bob's, his testimony was that there were none to the best of his knowledge based not on speculation but on a review of his own records and conversations with subordinates.

Following Luberski's crucial testimony on this point, the burden then shifted to Respondent either to show that Luberski's testimony was false or that it was mistaken. Even if the testimony were true, it was incumbent upon Respondent to show that it at least, had a good faith belief that the boycotted product was in fact being distributed to Bob's Big Boy by Hidden Villa or could be found on Bob's premises. But Respondent offered no testimony as to how on January 19, 21, and 22 it determined that Hidden Villa was distributing Egg City eggs to the two Bob's locations in Pasadena. No evidence was produced of the UFW's attempts to ascertain the distribution network of the product; no testimony was adduced regarding the following of trucks.

Counsel for Respondent was certainly aware of its burden and stated so on the record:

> "[F]irst let me paraphrase what I understand the General Counsel's position with regards to the illegality of our boycotting - it's the General Counsel's position that Egg City eggs must be on the premises at the moment that we're picketing at a particular location. If they're not there, it's a violation regardless of the truthfulness of the nature of the picketing. It's our contention that we certainly have a burden to make every effort to ascertain whether or not Egg City products are on the premises. We made numerous efforts and that kind of evidence will be brought forth in our case in chief. (Ill: 155-156)

Furthermore, publicity announcing that a neutral is distributing or selling a boycotted product when in fact it is not is not an insubstantial departure from the requirements of the proviso. Cf. Lohman Sales Co., supra (1961) 132 NLRB 901.

Respondent was not truthfully advising members of the public as to the nature of the labor dispute inasmuch as Egg

City's eggs were not being distributed by Hidden Villa and were not being sold at Bob's Big Boy. Thus, Respondent's picketing activities were not protected by the publicity proviso as the primary product was not actually present at the premises of the secondary employer at the time of the secondary picketing. I recommend that Respondent be found to have violated sections 1154(d)(ii)(2) of the Act.

G. Hughes Market — The December 12, Picketing, Paragraph 26 of Second Amended Complaint

Norval Twitchell is the store manager of Hughes Market in Moorpark. He recalled an incident on December 12 in which five or six persons came to the store and told him that he was carrying Egg City eggs and that they were going to picket. Twitchell responded that Hughes only carried Traficanda and Hughes brands. The assembled group disagreed and soon began to walk around outside in a circle carrying UFW flags. There were no picket signs, but the group did chant, "boycott Hughes" and then later, "boycott Egg City". At the time, Hughes was not purchasing Egg City eggs. (V: 5-6, 9)

Camacho testified that pickets carried flags (some of which carried the designation "UFW") and signs. The signs, which he had prepared stated: "Egg City Workers On Strike," "Boycott Traficanda, They Buy Egg City Eggs," and "Boycott Hughes." (X: 82-83)

Analysis and Conclusions of Law

I credit Camacho that picket signs were used at Hughes Market. However, those signs failed to truthfully advise the

public as to the nature of the labor dispute because they neglected to state what the relationship was between the Traficanda Company and Hughes Market. Presumably, Hughes bought its eggs from Traficanda, but this information was not conveyed in any form to the public. The net result was that the signs were confusing, and the probable effect of the picketing was to put in the minds of the Hughes customer the idea that the UFW was having some kind of a labor dispute with Hughes. Thus, I find that Respondent's publicity was aimed at the neutral generally. As such, this publicity did "threaten, coerce, or restrain." I recommend that Respondent is found to have violated section 1154(d)(ii)(2) of the Act.

H. Lucky Market - The January 12, 1987 Picketing, Paragraph 28 of Second Amended Complaint

Phillip Kochis was the Lucky manager on January 12, 1987 when he observed the arrival of UFW pickets led by Camacho. According to Kochis, the pickets carried UFW flags and picket signs, which bore legends, as follows:

Sign 1, 1st side - "Boycott Lucky Stores, Boycott Egg City"

Sign 2 - 2nd side - "Don't Shop At Lucky", "Boycott Lucky Stores, Don't Shop At Lucky"

The pickets also chanted, "don't shop at Lucky Stores, boycott Lucky stores".[70] (VI: 149-150)

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[70] This chanting was in Spanish. As Kochis does not speak Spanish, he would not have understood what was being said. However, he testified he asked Camacho and this is what Camacho told him. (VI: 135) Camacho testified that on one occasion the manager of Lucky asked him what the pickets were saying to customers.

Kochis denied that any sign was present that had indicated any strike or labor problem with Egg City. (VI: 131, 146). However, on cross-examination it was revealed that a photograph, taken either by Kochis or someone else at the market, had been turned over to the ALRB which had illustrated that, in fact, a sign had been used on the premises of the Lucky store on the date in question which had read: Egg City Farmworkers on Strike.[71] (Resp's 6)

Carrott testified he arrived at the Lucky Market around the January 12 date[72] and observed flags and signs. The signs read "Don't Buy Eggs" (in Spanish) and "Boycott Lucky." He observed no signs saying anything about a labor dispute with Egg City. (VI: 62) There was no chanting or yelling. (VI: 110-111)

Camacho was not asked about and gave no testimony

According to Camacho, he did not translate precisely what was being said at that moment but instead summarized what was being expressed generally - that the farmworkers were on strike, the reasons for the strike, and that Lucky was being boycotted. (X: 90) I give no weight to this evidence.

[71]Kochis admitted taking one of the photographs introduced into evidence (Resp's 7) but could not recall taking the one which showed this particular sign. (Resp'6) (VI: 146-149) He did testify that it was possible that someone else at the store took the pictures with the same camera. (VI: 152) As both photos contained the same serial number, showing that they came from the same roll, and as both were turned over by the General Counsel to Respondent pursuant to the latter's request for photographic evidence of the picketing at Lucky's on January 12, 1987, both were admitted into evidence. (VI: 147-148, 159)

[72]Although Carrott testified he was at Lucky around January 12, *I* doubt that he was there on that specific date. Kochis did not see him there on this occasion even though the pickets were present for three hours. (VI: 149-151) Camacho could not recall seeing him there either (X: 89) But even more important is the fact that

regarding what the picket signs had said at Lucky.[73] He previously testified that one sign, "Egg City Workers On Strike" was used at all picket locations." (X: 103)

Analysis and Conclusions of Law

These signs failed to truthfully advise the public about the labor dispute as they left out an important ingredient. Though the signs explained there was a UFW/Egg City labor dispute and called upon consumers to boycott Egg City and Lucky, they failed to inform the public of the relationship between Egg City and Lucky. Thus, they called for a boycott of Lucky but did not make clear that the reason for the boycott was because Lucky was purchasing eggs from Egg City. Without this explanation, how would the consumer understand Lucky"s connection to the boycotted product and thereby make a reasoned choice as to which course of action to follow? As the probable effect of the picketing was to cause consumers to think that they were being asked to boycott Lucky because of some kind of dispute it was having with the UFW, Lucky was thereby being exposed to economic pressure and harm

(Footnote 72 Continued)

when the General Counsel examined Carrott, he asked him if he recalled being present at the Lucky Market on December 12 (not January 12), and he replied that "it was in that time frame." (VI: 61). As discussed, supra, the Second Amended Complaint (Paragraph 26) alleges a picketing incident on December 12 at the Hughes Market, not the Lucky Market.

[73] Camacho testified that there was one sign which stated "Boycott Lucky, They Buy From Egg City" (X: 36), but there is no testimony that that sign was used on this occasion.

which exceeded the scope of the union's legitimate strike activity. Teamsters Local 812 v. NLRB (Monarch Long Beach Corp.), supra, (D.C. Cir. 1980) 657 F.2d 1252, 105 LRRM 2658, 2666-67; Hoffman v. Cement Masons Union Local 337, supra (9th Cir. 1972) 468 F.2d 1187, 1192. As such, I find Respondent's conduct to have been threatening, coercive, or restraining in violation of section 1154(d)(ii)(2) of the Act and will so recommend to the Board.

I. International House of Pancakes - The January 26, 1987 Picketing, Paragraph 31 of the Second Amended Complaint

Joseph Lupica is the owner/manager of the International House of Pancakes in Canoga Park, California. Prior to January 26, according to his testimony, Lupica received a phone call from a UFW representative asking if he was purchasing eggs from Hidden Villa. When Lupica admitted that he was, this individual stated that there was a labor dispute going on and requested that Lupica consider buying eggs from somebody else. Lupica testified that he told him that he had been buying eggs from Hidden Villa for a long time and that it would take him considerable time to get another supplier. Some weeks later a gentleman showed up at the restaurant, identified himself as the person who had previously called about Hidden Villa, and asked if Lupica was still purchasing eggs from there. When Lupica replied "yes", he was informed there would be picketing.[74] Shortly thereafter, pickets

[74] This incident occurred after Luberski had decided not to do any more business with Egg City. However, Luberski did not know if there were any Egg City products supplied by him to the International House of Pancakes at this time. (III: 117-119, 137-138; IV: 63) In any event, the question of whether Hidden

showed up with 4-5 flags and 4-5 signs. Lupica could not recall what the signs said other than the fact that one had the initials "I.H.O.P". Lupica could not recall if any sign mentioned Egg City or Hidden Villa. Lupica also did not hear any chanting because he was inside the restaurant the whole time. (V: 23-27, 29-30, 33)

Camacho testified that the picket signs used that day stated, "Egg City Workers On Strike," "Boycott IHOP, They Buy Hidden Villa Eggs," and "Boycott Hidden Villa, Hidden Villa Sells Egg City Eggs" (X: 108, 102-103). The pickets also chanted "boycott IHOP," "boycott Egg City eggs," and UFW flags were carried with the name, "UFW," written on some of them. (X: 97-98)

Analysis and Conclusions of Law

I again credit Camacho[1]s testimony. The signs used on this occasion were very similar to those I have previously found to be covered by the provisio, e.g., Coco's, United Catering, Bob's Big Boy. [75] Lupica's testimony is wholly unreliable as he could recall (barely) only one sign out 4-5.

(Footnote 74 Continued)

Villa had supplied Egg City eggs to the International House of Pancakes on January 26, unlike the picketing that took place at the Pasadena Bob's Big Boy around this time, supra, is not an issue in the case, and General Counsel makes no suggestion that it is .

[75] There is no significance to the fact that the signs at the IHOP stated: "Boycott Hidden Villa, Hidden Villa Sells Egg City Eggs", and the signs at the other locations stated: "Boycott Hidden Villa, They Buy Eggs From Egg City."

The General Counsel also argues, as he did in the case of Coco's Restaurant, that Respondent's conduct was a violation because Camacho did not tell Lupica specifically not to buy Egg City eggs. I disagree. As in the case of Coco's, Camacho did not tell Lupica he was picketing the House of Pancakes because it traded with Hidden Villa. Instead, his prior discussions and his picket signs made it clear that the problem was that Hidden Villa received its eggs from Egg City and then sold them to the House of Pancakes. And Lupica, of couse, understood this precisely, testifying that he had "heard about the situation that existed between Egg City and that there was a problem" (sic) (V: 26). Thus, I find that the same reasoning applies here as in the previous situation. (See discussion regarding Coco's, section XIII, part D, Statement No. 1, supra. There is no violation.

I find that Respondent truthfully advised the public about the labor dispute at the International House of Pancakes and that such conduct was protected by the proviso. I recommend that Paragraph 31 be dismissed.

XIV. The Allegations Concerning the Transporting of Egg City Products To The Docks And The Subsequent Handling Of Those Products

A. The Factual Setting

1. The October 23 and 24 Events - Paragraphs 6, 7, and 9 of Second Amended Complaint

The Federal Produce/Federal Transportation Company, a container export/import company, was hired on October 23 by the Okura Company, a food exporter to Japan, to transport egg products

from Egg City to Pier A at the Long Beach container terminal. Jack Lilley, who had been working exclusively for the Federal Produce Company/Federal Transportation Company as an owner/operator truck driver since August 15, 1986 was given this job. On October 23, Lilley went to pick up the Egg City load at Egg City's facilities at Moorpark. As he commenced doing this, Alberto Escalante called to him, introduced himself as a UFW representative, and asked him who the buyer was and where the container was going. Lilley testified he refused to reveal this information, telling Escalante that he just had a pickup and delivery order and did not know who the buyers were. (II: 137-140, 158, 105-106)

When the load was ready, Lilley left the premises, [76] stopping at a restaurant where Escalante again approached him (this time accompanied by three others) and told him that "they were trying to keep Egg City from turning in containers to the port" and that "he was going to follow him (Lilley) all the way to the port and try not to get this container turned in." (II: 141-142)

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[76] At that point, the eggs apparently became the property of Okura, The uniform bill of lading showed Okura to be the owner of the load. In addition, egg sales to the Okura Company were made "F.O.B." (free on board) "Egg City", meaning in commercial trade that title changed hands at the loading point where the truck picked up the goods. Thus, the eggs became Okura"s product from the point they left the Egg City dock and went onto the truck. (VI: 44-45, 73-77)

Lilley went to Pier A in Long Beach to deliver the load; Escalante and the others had followed him there. Lilley drove past the guard shack into the secondary inspection area where there was a large shed with truck scales near a second gate. At that point Escalante came up to where Lilley was and started to wave UFW flags. Also present at the second gate were 8-10 trucks along with drivers and clerks. Lilley overheard a clerk telling Escalante that he couldn't stand there waving flags and would have to go inside and talk to the chief clerk to get permission, which Escalante did. Escalante then came out accompanied by guards who told Lilley that they were in sympathy with the strike and that he would have to leave. Lilley testified that he heard Escalante tell the guards that he was trying to get workers' jobs back, but he did not hear anything said about not handling the load. Lilley then left and was followed back to Federal Produce. (II: 142-144, 152-154, 166)

Dino Rossi is Vice President of Labor Marketing at the Long Beach Container Terminal, a company that provides services to steamship lines. The employees at the terminal belong to the International Longshoremen and Warehousemen Union (hereafter "ILWU"). Rossi testified that his first contact with the UFW occurred on August 20 when pickets showed up carrying UFW flags and signs stating "Unfair UFW."[77] One of the pickets told him

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[77]This incident is not part of the Second Amended Complaint,

that he had a container from Egg City that was being struck and that they (the pickets) didn't want him to touch it. According to Rossi, as he was interested in keeping the terminal open, he allowed two UPW pickets inside alongside the container. Rossi testified that had he allowed them to picket outside the main gate, the pier would have been shut down. (VII: 24-25)

Rossi further testified that on October 23, he was informed that an Egg City container would be coming through the terminal and that at the same time, he observed UFW pickets at the site with signs. After consultation with steamship personnel, he was informed not to receive the container. Rossi then saw to it that the container was removed. Shortly thereafter, the UFW pickets left the premises. (VII: 28-31)

The next day, October 24, Lilley attempted to deliver the load again. He was met at the office by Richard Carrott who drove with him to Long Beach. They arrived at Pier A and again went past the guard shack into the inspection area around the second gate. They did not see any UFW representatives. Carrot got out of the truck and spoke to a guard while Lilley waited in the truck. Carrott then went into the terminal building to speak to the head clerk. Carrott testified that the guard told him he could not accept the load and that the manager, Rossi, told him that he (Rossi) had no financial responsibility towards him and that he should leave the docks. A security guard then advised Lilley to get the truck out of the area and that an escort would

be provided. Lilley left and later placed the load in cold storage. (II: 145-149; VI: 40-42, 47-51)

According to Rossi, on October 24 when the truck containing the Egg City load once again tried to pass through the entrance gate, he observed UFW pickets close to that entrance. Rossi was again told by the steamship personnel not to receive the load after he had informed them that the pickets were present. Rossi testified he then informed Carrott, who was present at his office, of these instructions. (VII: 31-34, 39-40) Rossi further testified that he refused the container because he had been instructed to do so owing to the fact that as a service business, one of his company's most important functions was to keep the terminal open at all times; and in his view, allowing the container in would have resulted in a shutdown of the entire dock. (VII: 43)

Robert Lee Fowler, Federal Transportation Company's general manager, testified that on this occasion he observed a gathering of people at the terminal, including Carrott, clerks, guards and the press; he did not see Escalante[78] or any pickets.

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[78] In mid-September Escalante had called Fowler in search of information as to which steamship line and pier an Egg City load, in the custody of Fowler's company, would be going. (I: 110) Escalante also made a statement at that time that the load would not be accepted at the pier because the UFW was affiliated with the ILWU and that if he asked the ILWU not to take a container, it wouldn't. (II: 11-113)

Lilley's truck got inside the second gate but never made it to the area when the containers were unloaded. (II: 119, 121, 126)

2. The Berth 233 Terminal Island October Incident - Paragraphs 8 of the Second Amended Complaint

Andreas Hoebich is employed by the Metropolitan Stevedoring Company as terminal manager. In that capacity he manages the container facility on Terminal Island[79] and is responsible for the receiving and delivering of cargo there as well as for the loading or unloading of cargo from vessels. The facility is owned by the Harbor Department of Los Angeles and is leased by two of the facility's customers, Evergreen Line and Japan Line. The majority of the company's employees are members of the ILWU.[80] (III: 5-6, 14-15, 21)

Hoebich testified that his first contact with the UFW was around June or July of 1986[81] when several of its members showed up at the entrance of Berth 233[82] and indicated that there were one or two refrigerated containers at the facility loaded with

[79] Terminal Island, a man made island, is located between San Pedro and Long Beach. (III: 35)

[80] The ILWU consists of two locals, Local 13, the longshoremen, and Local 63, the clerks. The clerks receive and deliver the cargo. The longshoremen load and unload it. (III: 14-15, 21)

[81] The UFWs strike against Egg City commenced on June 24, 1986. (VI: 20-21)

[82] Berth 233 is commonly a reference to the piers at Terminal Island as opposed to those at the Long Beach location. (III: 36)

cargo from the Egg City company where there was a labor dispute and that they intended to picket the terminal entrance. According to Hoebich, either that day or the next day a picket line was put up in front of the terminal which effectively shut the terminal down. Hoebich testified that he allowed the pickets to enter the terminal and sit in front of the Egg City container in order to reopen the terminal. The next day Hoebich arranged with the shipping company to transport the container out of the terminal. (III: 7-9)

According the Hoebich, a similar incident happened some months later[83] when UFW pickets showed up at the terminal and started to picket again. At that time Escalante presented an "arbitration ruling"[84] which purported to represent a legal finding that the UFW picket line was "bonafide." As a result, the UFW pickets were allowed into the terminal, and another container was removed. (III: 10-11, 16-17)

Hoebich further testified that sometime in October, 1986 he observed Escalante and pickets inside the terminal building at the dock and picketing specific Egg City containers with UFW flags and signs that alleged Egg City's unfair labor practices. The containers were not loaded and in fact, were removed from the

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[83] This probably refers to picketing that took place in August. Neither the June nor August picketing are part of the Second Amended Complaint herein.

[84] The Union's defense of its dock picketing originally rested on the authority of an "arbitration award" arrived at under a procedure contained in the ILWU/Pacific Maritime Association collective bargaining agreement for the rapid settlement of disputes over the

docks, as ILWU representatives informed him that the Egg City containers would not be touched as long as the pickets were there. (Ill: 23-24, 31-32)

3. The Berth 233 Terminal Island January, 1987 Incident - Paragraph 27 Of Second Amended Complaint

Hoebich testified that in January two UFW representatives came to his office and told him that once again there were Egg City containers on the premises and that the dock would be picketed unless removed. There were no pickets present on this occasion. Hoebich testified he notified the shipping line but that to the best of his knowledge, the containers were not removed. The UFW representatives did not return. (III: 11-12, 32)

4. The UFW And ILWU Meetings

A few days prior to August 18, Ben Maddock and Karl Lawson met with officials of Local 63 of the ILWU including its

(Footnote 84 Continued)

loading or unloading of disputed containers on the docks. The award in question had held that it was proper for ILWU members to refuse to load Egg City products into awaiting ships. Respondent had argued that Lawson and the pickets had relied upon this award and that this displayed a good faith belief on their part that their conduct was lawful, a factor that should be taken into account by me. But to rely upon this arbitration award, Respondent also had to argue that the picketing at the docks was merely an extension of the primary strike against Egg City and that the activity of the pickets was primary activity. After extensive argument, Respondent indicated it was withdrawing its argument of good faith reliance, its claim that picketing at the docks was an extension of primary picketing, and its Exhibit No. 8. (VIII: 58-78.) The Union relies now on the argument that it had the absolute right to picket. (VIII: 55-56)

president, Tom Warren. Maddock denied that he asked Local 63 members for their support or asked them to respect the UFW picket lines. Instead, Maddock testified that his purpose in seeking the meeting, as well as meeting with representatives of other locals at this time, was to let them know that the UFW would be setting up picket lines in the area. During the course of this meeting, Maddock told Warren that the UFW would establish picket lines somewhere on the docks. (VIII: 80-83)

Around the same time as the Local 63 meeting (around 3 or 4 days prior to August 18), Maddock also met with officials from Local 13 of the ILWU including its president, Lou Loveridge. Maddock denied that he requested Local 13 to honor UFW picket signs that called for a boycott against Egg City products. Instead, he testified that he was in the area, Loveridge was a friend of the UFW's, and he wanted to inform him of the current situation at Egg City. (VIII: 30-33)

Thereafter on August 18, Maddock wrote Loveridge the following letter. (C.P. 1): "Dear Brother Loveridge:

> We are going to be setting up situs picket lines throughout the docks of the Long Beach and Los Angeles harbors wherever we find containers which are an extension of the Julius Goldman's Egg City Company.
>
> Our Union members at Julius Goldman's Egg City have been on strike since June 15th, 1986 because the employer reduced the wages by 30 percent, cut off medical and pension benefits and instituted intolerable working conditions. The Employer has hired strike breakers to staff the jobs that our striking members had performed. We will be establishing picket lines about the premises of the Employer on the cargo that is being worked on by the strike breakers.

If you have any questions about our activities, please call me.

Thank you for your attention.

In Solidarity,

Ben Haddock"

Maddock testified that the purpose of the letter was to advise the ILWU Local 13 members of the existence of the Egg City strike and that the UFW would be establishing picket lines wherever Egg City products were found to be at the docks. But Maddock again denied that the purpose of the letter was to elicit support from the ILWU. (VIII: 28)

Following the issuance of this letter, Maddock testified that the only instructions he gave Karl Lawson were to follow the trucks from Egg City and where they stopped, to picket. In the case of the docks, a picket line would be set up there if that was where the trucks from Egg City's Moorpark facility ended their trip. (VIII: 33, 40) Maddock further testified that Escalante advised him that a picket line had been established on October 23 and 24 and that the Egg City container was not loaded. (VIII: 84)

Lawson acknowledged that part of the Union's strategy was to elicit support from outside organizations to put pressure on Egg City to sign a contract. But he denied that in support of

that strategy, he initiated contact with Hoebich other than to inform him, as the person in charge of the pier, that the UFW intended to picket. (II: 55-57) Lawson also testified that though he engaged in discussions with officials of the ILWU, he did not ask that their members stop handling products of Egg City or that they support the Union's boycott against Egg City products. (II: 57-59) According to Lawson, his talk with the ILWU leaders only concerned "[t]he arbitration, what the nature of our dispute was with Egg City, whether I would testify in the arbitration and if so, to what." (II: 59) B. Analysis and Conclusions Of Law

Section 1154(d)(i)(2) provides, in part, that it is an unfair labor practice "[t]o induce or encourage any individual ....to engage in a strike or a refusal in the course of his employment to use,....process, transport, or otherwise handle or work on any goods....or to perform any services; .... where .... an object thereof is .... [florcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of any other producer .... or to cease doing business with any other person ...." This provision means that agricultural products may not legally be prevented from being delivered and unloaded at the place of business of the retailer. And as in an 8(b)(4)(D) situation, picketing requesting the consumer not to purchase products or goods of the primary employer which has the effect of inducing truck drivers to refuse to

deliver is an unlawful secondary boycott. Pocan, "California's Attempt To End Farmworker Voicelessness: A Survey Of The Agricultural Labor Relations Act Of 1975," supra (1976) 7 Pacific L.J. 197, 224 See also Brewery and Beverage Drivers, Teamsters Local 67 v. NLRB (B.C. Cir. 1951) 220 F.2d 380.

During the legislative hearings leading to the enactment of the ALRA, Assemblyman Herman made it clear that the NLRB's prohibition of secondary activity which induced employees of the secondary employer to refuse to handle goods or perform work was to be prohibited by the new law as illustrated by this statement during the committee hearings:

> Assemblyman Herman: The traditional hard secondary boycott that we have come to know and love or hate, depending on your perspective, is a boycott which is directed at the employees of the secondary employer to attempt to pressure that employer to get the primary employer to do certain things, particularly sign a contract favorable to the primary union. We prohibit that boycott completely. Any boycott activity which is directed at or has the effect of inducing the employees of the secondary employer to cease handling goods, working for, performing for the secondary employer is prohibited under our bill as amended...."
>
> Labor Relations Committee Hearing,
> May 12, 1975, p. 50
>
> (copy on file in ALRB Archives)

The U.S. Supreme Court has held that where a labor organization's ultimate purposes must have included among its objects that of forcing a neutral general contractor into terminating his subcontract with a primary employer, it was an unlawful act whose object was to require the neutral to cease doing business with the primary. The Court emphasized that it was

not necessary to find that the sole object of the strike was to force the cessation of business with the primary. National Labor Relations Board v. Denver Bldg. & Const. Trades Council et al. (1951) 341 U.S. 675, 71 S.Ct. 943 28 LRRM 2108.

In attempting to reconcile the broad prohibitions of section 8(b)(4) of the NLRA with that Act's specific protection of strikes and other concerted activity, the Supreme Court eventually focused on the nature of the work involved in the primary dispute as well as the physical location of the picketing. Inducements or encouragements to withhold services are considered primary if directed at those who normally deal with the disputed work. On the other hand, inducements and encouragements which are directed at other persons are deemed secondary. This is the rather broad principle by which the conduct of the picketing is evaluated in order to ascertain what its true object is. 2 Morris, The Developing Labor Law, supra (2nd ed. 1983), pp. 1143-44.

There are six factors which should be considered in determining whether the Respondent has violated the ALRA in the present situation: 1) where is the picketing occurring, i.e., is the work location a primary, common, or ambulatory site?; 2) are there reserved gates which are properly established and being honored?; 3) is the primary employer located at the situs of the picketing both in terms of its normal business and its physical presence?; 4) have there been any statements or actions by the union which indicate a secondary intent, such as threatening to

shut down the job?; 5) has the union taken steps to minimize the secondary effects of its picketing?; and 6) if the union's conduct is apparently or obviously secondary, is there an "ally" or "related work" defense? 2 Morris, The Developing Labor Law, supra, (2nd ed. 1983) pp. 1174-75.

In the present matter, it was never entirely clear, apart from its constitutional argument, what Respondent's defense was to the allegations involving the transport of Egg City eggs to Long Beach and Terminal Island docks (Paragraphs 6, 7, 8, 9 and 27 of the Second Amended Complaint). The "ally doctrine" (an allied company performing struck work) was abandoned. There was never any credible claim that the docks constituted a primary, common or ambulatory site[85] or that Egg City's normal business was situated at the docks. The business of the docks - handling cargo - was completely different from that of Egg City - the producer and processor of egg products. No employees of Egg City normally performed work at Long Beach or Terminal Island facilities. Egg City's eggs were delivered to the docks not by Egg City truck drivers but by independent contractors hired by a transportation company and paid for by the purchaser of the product.

[85] A "common situs" is a site on which two or more employers are engaged in normal business operations; an "ambulatory situs" is a temporary work location used by the primary employer, such as by a delivery company while its employees and trucks are located at the premises of a retail store. 2 Morris, The Developing Labor Law, supra, p. 1146.

Besides its constitutional argument, the only defense presented by Respondent, virtually as an afterthought, was that its picketing at the docks was purely for informational purposes in order to publicize and seek support of its boycott. (Resp's Post-Hearing Brief, pp. 42-43) But even if this were true, Respondent failed to establish that its publicity at shipping terminals not open to the public was intended to inform a public (if there had been a public present) of the existence of a labor dispute and to truthfully advise this public as to the nature of that dispute.[85] Respondent failed to bring itself within the coverage of the proviso because it could not show that its picketing was directed at the "customers" of the docks and not its employees or that it was not an attempt to restrain or coerce the management of the terminals into ceasing to do business with Egg City. Respondent violated section 1154(d)(i)(2) of the Act. See Local 550 Millmen & Cabinet Makers (Steiner Lumber Co.) (1965) 153 NLRB 1285, 59 LRRM 1622, enfd. (9th Cir. 1966) 367 F.2d 953, 63 LRRM 2328 where picketing at a common entrance to a homebuilding site, in protest over a dispute with a lumber company which was making deliveries to the site, was conducted at such times as to negate its asserted consumer orientation. The picketing coincided with the commencement of construction work $2^{1/2}$ hours before the sales office opened. Furthermore, no picketing occurred on the

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[86] Respondent's only argument that this was informational picketing was that its leafleting and picket signs did, in fact, explain the nature of the labor dispute (Resp's Post-Hearing Brief, p. 42). But it is not clear from Respondent's page reference in support of

weekend when construction workers were also absent but prospective home purchasers were on the site. The Board said:

> "we rely particularly upon the timing of the picketing, the absence of any effort to negate an appeal to employees of the various secondary employers, and the absence of any appeal for specific conduct on the part of consumers in reaching our conclusion that the picketing in this case did not constitute consumer picketing lawful under the Tree Fruits decision."

And in Teamsters Local 327 (American Bread Co.) (1968) 170 NLRB 91, 67 LRRM 1427, enf. denied on other grounds (6th Cir. 1969) 411 F.2d 147, 154-155, the location of the picketing was said to belie a consumer boycott attempt, particularly where the sites selected were not accessible to potential customers. In this case the union had picketed at the premises of an industrial plant where the employer had a concession agreement with a cafeteria that served the primary employer's bread. By placing pickets at gates used by the neutral's construction workers who did not use the cafeteria, the Board held that the union unlawfully brought the dispute to the secondary employer.

(Footnote 86 Continued)

this position (II: 45) that this particular picketing and handbilling even occurred on any of the dates alleged in the Second Amended Complaint. In fact, the only testimony regarding picket signs that were related to any of the allegations in the Complaint was that of Hoebich who testified that he observed UFW pickets carrying signs which alleged that Egg City had committed unfair labor practices. (III: 23-24, 31-32) Respondent also argues that while leafleting at the entrance to one of the terminals, a variety of traffic was seen coming in and out (presumably illustrating that the public at large had access to the area). But Respondent's page reference in support of this position concerns the August 20 picketing at Berth 233 (II: 16-20) (not a part of this Complaint) and not the picketing in October or January.

In point of fact, there was hardly any attempt here to even try to disguise the picketing or threat to picket as consumer oriented. Haddock told Carrott at a negotiating session during the last two weeks of August that "they were prepared through an allegiance that they had formed with the longshoremen to keep Egg City from being able to export any product from the docks in Long Beach and San Pedro ...."[87] (VI: 32) And Escalante told Robert Fowler that the UFW was affiliated with the ILWU and could keep cargo from being handled.[88] These statements served to illuminate Respondent's intent. A revealing statement made by a picketing union is an obvious indication of intent. Teamsters Local 126 (Ready Mix Concrete, Inc.) (1972) 200 NLRB 253, 81 LRRM 1461. The Union's strategy was clearly designed to inform ILWU officials of the labor dispute with Egg City, to alert them to the fact that the UFW would soon be establishing picket lines and in so doing, to encourage the membership of the ILWU locals to refuse to handle or perform services on any Egg City products that showed up at the docks. While it is true that there was no direct

[87] Maddock did not contradict this statement during his testimony. I find that the statement was made. Martori Brothers Distributors v. Agricultural Labor Relations Board, supra (1981) 29 Cal.3d 721, 728.

[88] Escalante did not testify. I also find this statement to have been made. Martori Brothers Distributors v. Agricultural Labor Relations Board, supra, (1981) 29 Cal. 3d 721, 728.

evidence that Haddock actually asked the ILWU officials to observe his picket lines, it is inconceivable that in informing them of the coming picket lines made necessary (from his point of view) by the unfair labor practices of Egg City, he and they did not understand that what was sought here was their cooperation in honoring the UFW[1]s picket lines, the result of which would be that the Egg City product would not be handled. This is so even if Haddock's testimony that he did not specifically ask ILWU officials to honor the picket lines or support the strike is believed. Though there may not be a "smoking gun", none is needed where other evidence points to what Haddock's true intent really was.[89]

Here, Haddock's real intent is shown by the actions of his subordinates. On October 23, Escalante told Lilley, an independent truck driver, that UFW personnel would follow him to the pier and try to keep the Egg City container he was transporting from being handled.[90] This is precisely what he

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[89] Despite a union's claim that there was insufficient evidence of the inducement of employees, a Court of Appeals has held that an NLRB finding need not necessarily be supported by direct evidence and that circumstantial evidence may be sufficient. Amalgamated Heat Cutters ETC. v. NLRB (D.C. Cir. 1956) 237 F.2d 20, 25, 38 LRRH 2289, cert, denied (1957) 352 U.S. 1015, 39 LRRH 2453.

[90] Lilley’s testimony regarding Escalante's statement stands uncontradicted in the record. I accept as having been uttered. Hartori Brothers Distributors v. Agricultural Labor Relations Board, supra (1981) 29 Cal. 3d 721, 728.

did. Though we don't know exactly what Escalante, waving UFW flags, told the chief clerk at the Long Beach terminal, his words can be discerned from the fact that security guards soon thereafter emerged with Escalante and informed Lilley that they were in sympathy with the strike and that he would have to leave. Rossi, whose earlier experience with UFW pickets had shown them to be interested in keeping dock personnel from handling Egg City products, did not receive the container on this occasion having observed UFW picket signs once again at the site.

On the following day, Rossi again refused to accept an Egg City load after he saw UFW pickets close to the entrance gate. In both cases there was an implied threat that so long as Egg City products were at the pier, UFW pickets would induce and encourage ILWU members to refuse to handle those products. Rossi felt that the presence of UFW pickets might also insure the closure of the entire dock.

Similarly, in the October Berth 233 Terminal Island incident, Hoebich saw to it that the Egg City containers were not loaded based upon representations to him by ILWU representatives that the containers would not be handled so long as the UFW pickets were present. Hoebich had also had earlier dealings with UFW picketing of Egg City products, one in June or July which shut down the terminal and another in September in which pickets were allowed to enter the terminal and picket a specific container.

In the case of the January events, though no pickets were present, the threat to picket unless the Egg City containers were

removed was sufficient to bring the conduct within the purview of the Act and to constitute a violation. A threat to picket alone may be coercive, whether or not picketing actually takes place, and if the threat is intended to achieve a proscribed objective, it may violate section 8(b)(4). Teamsters Local 126, (Ready Mix Concrete, Inc.), supra (1972) 200 NLRB 253, 81 LRRM 1461, cited in Packinghouse Workers (Packerland Packing Co., Inc.) (1975) 218 NLRB 853, 854, fn. 5, 89 LRRM 1491.

In addition, Escalante's statement to Lilley that he would follow him to the dock and keep him from delivering his load was an unlawful threat in violation of section 1154(d) (ii)(2). See Service Employees Local 73 (Andy Frain, Inc.) (1978) 239 NLRB 295 99 LRRM 1667.

In summary, it must be said that the testimony and exhibit clearly show that the true object of Respondent in its conduct at both terminals was to stop Egg City from being able to transport its product to dock locations for eventual export by inducing individuals at those locations to refuse to handle those products and to refuse to perform normal services in connection with those products. The ultimate objective was to induce the neutral dock employers to cease doing business with Egg City. I recommend that Respondent be found to have violated section 1154(d)(i) and (ii)2 of the Act.

XV. The Request For Compensatory Damages

Charging Party Egg City takes the position that those secondary activities of Respondent which were unlawful resulted in

a loss of business and requests that appropriate compensatory damages be assessed.[91] (Egg City's Post-Hearing Brief, pp. 89-95) Neither the General Counsel nor Charging Party Hidden Villa[92] makes such a request. Charging Party Egg City's claim rests on no relevant ALRB precedent.[93]

Charging Party has a statutory argument. It argues that Labor Code section 1160.3, which provides the basis for the Board's remedial powers under the Act, contains language which would support its claim. Labor Code section 1160.3 states, in pertinent party, that:

> "....If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part. Where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to

[91] Charging Party Egg City makes no such claim for any secondary boycott activities which are adjudged to be lawful "[s]ince the effect of Egg City losing business clients is something which is a recognized object under the proviso to section 1154(d)(2)...." (Egg City's Post-Hearing Brief, p. 89)

[92] Charging Party Hidden Villa reserved the right to make a claim for such damages (I: 15) but chose not to do so.

[93] Charging Party apparently believes its strongest case (Egg City's Post-Hearing Brief, p. 92) is Marriott Corporation v. NLRB (9th Cir. 1974) 491 F.2d 367, 370-371, 85 LRRM 2257 which was not a

which it has complied with the order...." (Emphasis added)

Charging Party contends that the direct and proximate effect of Respondent's course of action against it was that secondary employers, such as Hidden Villa and Country Eggs, ceased doing business with it, thereby resulting in a loss of business and profits. Charging Party believes that the words of the statute "....and to provide such other relief as will effectuate the policies of this part...." was intended to include a claim for compensatory damages. (Egg City's Post-Hearing Brief, p. 92) This statutory argument is made despite the fact that elsewhere in the Brief, Charging Party acknowledges that an employer's business loss due to secondary activities is irremediable under the Act due to the fact that the Act's drafters specifically left such a remedy out. Charging Party states:

> "Furthermore, unlike the NLRA which provides a method of redress wherein an employer can file a federal civil damage loss suit as a result of a union's secondary activities (29 U.S.C. Section 303), such a provision is conspicuously absent from the Agricultural Labor Relations Act. Apparently the drafters of the Act for no logical, apparent reason, other than to assist labor

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secondary boycott case at all but concerned a hot-cargo agreement under section 8(e) of the NLRA. On the issue of compensatory damages, the Court pointed out that the primary purpose of the Act was to protect the public interest by mitigating the effects of a violation and preventing future violations and that compensation, like any other remedy, should be ordered only when it would serve this primary purpose. The Court then affirmed the NLRB, which had denied the employer's request for compensatory damages, but expressed - and this is apparently what Charging Party finds supportive in the case - no opinion on the power of the Board to award such affirmative relief.

organizations, left such a provision out of the Act. Thus, an employer who suffers lost business as a result of a union's unlawful secondary boycotting activities under the ALRA may not have any specific recourse via a damage action based specifically upon the union's unlawful secondary activities. Nevertheless, the absence of such an express provision under the Agricultural Labor Relations Act should provide further support for the Board's remedy of compensatory damages for lost business." (C.P. Egg City's Post-Hearing Brief, p. 95)

In fact, as Charging Party points out, compensatory damages for lost profits to the primary employer for unlawful secondary activity, which Charging Party seeks here, is specifically available by statute under the NLRA; it is not available under the ALRA. Section 303 of the 1947 Labor Management Relations Act provides a remedy for damages resulting from "any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of the National Labor Relations Act,"[94] and the courts generally apply accepted section 8(b)(4) principles in determining liability. This remedy stands concurrently with the normal cease-and-desist orders available to the Board as remedies for unfair labor practices under section 8(b)(4). A section 303 suit may be brought only against a union, and not against individuals, since the unlawful conduct must be an unfair labor practice committed by a labor organization. Once a right of recovery has been established, recovery of damages is limited to actual compensatory damages, and they must be nonspeculative and

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[94] The full text of section 303 reads as follows: "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in

the direct and proximate result of the proscribed conduct. 2 Morris, The Developing Labor Law, supra (2nd ed. 1983) pp. 1178-1183.

It is evident that the federal Act, unlike the ALRA, clearly spells out two different remedies for the same offense. In Longshoremen & Warehousemen v. Juneau Spruce Corp. (1952) 342 U.S. 857, 29 LRRM 2249, a damage suit under section 303, it was argued that a finding by the NLRB of an unfair labor practice under section 8(b)(4) was required before maintenance of a section 303 suit. The Supreme Court rejected this argument, stating that — "[t]he fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other."

Here the State Legislature made a conscious choice not to follow the NLRA and allow section 303 type damage suits in secondary boycott situations when it failed to provide employers under the ALRA with a remedy that was provided (some 12 years after passage of the Wagner Act) under the NLRA. It can be

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section 8(b)(4) of the National Labor Relations Act, as amended, (b) Whoever shall be injured in his business or property by reason of any violation of subsection(a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the cost of the suit."

assumed that the Legislature felt that the existing remedial language found in section 1160.3 was adequate to deter future unfair labor practices. Any quarrel that Charging Party now has with that legislative choice should be addressed to the Legislature and not to the Board.[95]

I am of the opinion that the Act's statutory language, given its ordinary import and construed in the remedial and not punitive context together with the Legislature's silence on the issue of compensatory damages, compel the conclusion that the Legislature did not intend to grant the ALRB the authority to award compensatory damages. See Dyna-Med, Inc., v. Fair Employment and Housing Commission (1987) 87 Daily Journal D.A.R. 8341, 8344, California Supreme Court, November 2, 1987. If the Legislature had intended that as dramatic a remedy as compensatory damages be assessed against labor unions, then it would have either specifically included it in the list of other remedies mentioned in section 1160.3 of the Act or it would have provided for a section 303 type damage suit in another section of the Act. See United Farm Workers of America, AFL-CIO (Maggio, Inc.) (1986) 12 ALRB No. 16, aff'd 194 C.A. 3d 1329.

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[95] On the one hand, Charging Party complains that its remedies are not sufficient. On the other hand, it recognizes that "[i]t is conceivable that an employer might file a state civil action in tort for tortious interference with a contractual relation which might form the basis of obtaining some form of damage relief as a result of the union's unlawful secondary activities herein." (Egg City's Post-Hearing Brief, p. 95, fn. 21.)

I recommend that the request for compensatory damages be denied.

XVI. The Request For Attorney Fees and Costs

Charging Party Egg City requests that attorney fees and costs be awarded based upon the proposition that Respondent raised a number of frivolous legal defenses at the outset of the hearing which were either struck by the Administrative Law Judge at the pre-hearing conference or were withdrawn by Respondent during the course of the hearing. (Egg City's Post-Hearing Brief, p. 96)

The General Counsel apparently disagrees with Charging Party that Respondent's defenses were frivolous. During the hearing General Counsel stated:

> "....The General Counsel would ask that the record reflect that in the event that the Respondent's litigation posture in this proceeding proves to be frivolous, he will move to amend the complaint to order the Respondent to reimburse the ALRB for its expenses incurred in this investigation, preparation, presentation, and conduct of this case including a reasonable.... including reasonable counsel fees, witness fees, transcript and record costs, printing costs, travel expenses and per diem and other reasonable costs and expenses." (I: 13)

No amendment of the Complaint was ever sought by General Counsel nor does he argue for attorney fees or costs in his post-hearing brief.

Futhermore, the fact that Respondent withdrew some of its defenses as the facts of the hearing unfolded is evidence in support of Respondent's conduct rather than the other way around.

Parties should be encouraged to drop claims[96] or defenses as soon as it is discovered they are without merit.

The UFW's conduct in defense of this case does not warrant the imposition of the extraordinary relief of attorney fees or costs. There is no evidence that in defending itself herein, the UFW has engaged in frivolous litigation. United Farm Workers of America, AFL-CIO (Magqio, Inc.) (1986) 12 ALRB No. 16; Robert H. Hickman (1978) 4 ALRB No. 73; Autoprod, Inc. (1982) 265 NLRB 331, 111 LRRM 1521. In Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms, et al. (1983) 9 ALRB No. 65 the employer had announced that he wanted to drag out the hearing and bankrupt the ALRB and the defense rested in part on the belief that respondent had no need to abide by its contract with the UFW because of what it regarded as the lack of impartiality on the part of the ALRB. The Board found that respondent's conduct did not warrant the imposition of attorney fees or costs in that it presented relevant testimony and nonfrivolous defenses on the whole.

I recommend that the request for attorney fees and costs be denied.

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[96] On the day General Counsel finished his case in chief, he dismissed paragraphs 11, 29, and 30 from the Second Amended Complaint. (VIII: 17)

THE REMEDY

Having found that Respondent has engaged in unfair labor practices proscribed by section 1154(d) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to remedy its unfair labor practices and to effectuate the policies of the Act.

The remedy being proposed is fairly standard in NLRB proceedings of this nature and conforms with the General Counsel's request for a general remedial order. (G.C.'s Post-Hearing Brief, pp. 96-97) There is no evidence that Respondent has demonstrated a proclivity to engage in illegal secondary activity in the past, i.e., prior to the events giving rise to the Second Amended Complaint. Therefore, it is not considered necessary to issue any broader order than has been done or to require any further, specific affirmative acts.

Upon the basis of the entire record, the findings of fact, and the conclusions of law, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent, United Farm Workers of America, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any individual employed by the Federal Transportation/Federal Produce Co., the Long Beach

Terminal, and the Metropolitan Stevedore Company at Terminal Island or any other person to engage in a refusal in the course of his/her employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services with the object of forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of The Careau Group, dba Egg City, or to cease doing business with The Careau Group, dba Egg City.

(b) Threatening, coercing, or restraining Country Eggs, Sam's Produce Co., Coco's Restaurant, Hughes Market, Lucky Market, and Bob's Big Boy, as found herein, or any other person, with an object of forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of The Careau Group dba Egg City, or to cease doing business with the Careau Group dba Egg City.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its offices and meeting halls copies of the attached notice. Copies of said notice, on forms provided by the Salinas Regional Director, after being duly signed by Respondent Union's representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily

posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Upon request of the Salinas Regional Director, supply to him a sufficient number of additional copies of the notices for posting by any employers named in paragraph 1 above, if they desire to do so, at any of the sites involved in this proceeding.

(c) Notify the Salinas Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

The Second Amended Complaint is dismissed as to those portions in which Respondent has not been found to have violated the Act.

DATED: January 15, 1988

MARVIN J. BRENNER
Administrative Law Judge

<u>NOTICE TO ALL MEMBERS</u>

Pursuant to the Recommended Order of an Administrative Law Judge of the Agricultural Labor Relations Board, and in order to effectuate the policies of the Agricultural Labor Relations Act, we hereby notify you that:

WE WILL NOT induce or encourage any individual employed by the Federal Transportation/Federal Produce Co., the Long Beach Terminal, and the Metropolitan Stevedore Company at Terminal Island or any other person to refuse in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services with the object of forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the products of the The Careau Group, dba Egg City, or to cease doing business with the Careau Group, dba Egg City.

WE WILL NOT threaten, coerce, or restrain Country Eggs, Sam's Produce Co., Coco's Restaurant, Hughes Market, Lucky Market, and Bob's Big Boy, or any other person, with an object of forcing or requiring any person to cease using, selling, transporting, or otherwise dealing in the product of The Careau Group dba Egg City, or to cease doing business with the Careau Group dba Egg City.

Dated: UNITED FARM WORKERS OF AMERICA, AFL-CIO

By: ______________________________

(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California. The telephone number is (408)443-3161.

This is an official Notice of the Agricultural Labor Relations Board, an Agency of the State of California.

DO NOT REMOVE OR MUTILATE