

DETERMINATION OF DISPUTE

Upon the basis of the foregoing and the entire record in this case, the Board makes the following determination of dispute, pursuant to Section 10(k) of the Act.

1. Employees classified as laborers, currently represented by Construction and General Laborers Local 190, International Hod Carriers, Building and Common Laborers Union, AFL-CIO, are entitled to the work of installation of the cast-iron waterpipe and related work, namely, the lowering into the ditch, the leveling, the aligning and making of the joint of the cast-iron water mains, and the installation of the hydrants in the South Mall Redevelopment Area, Albany, New York.

2. Local No. 7, Albany, New York and Vicinity, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, is not entitled by means proscribed by Section 8(b) (4) (D) of the Act, to force or require Employer to assign the above work to plumbers who are represented by Local No. 7, Albany, New York, and Vicinity, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

3. Within 10 days from the date of this Decision and Determination, Local No. 7, Albany, New York, and Vicinity, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry shall notify the Regional Director for Region 3, in writing, whether it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b) (4) (D) of the Act, to assign the work in dispute to plumbers rather than laborers.

American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55 and Great Western Broadcasting Corporation d/b/a KXTV. Case No. 20-CC-234. December 16, 1964

SUPPLEMENTAL DECISION

On December 27, 1961, the Board issued a Decision and Order in the instant case¹ finding that the Respondent Unions had not violated Section 8(b) (4) (ii) (B) of the Act, as alleged. The Board held, in substance, that Respondents' conduct was protected by the so-called publicity proviso to that section.

¹ 134 NLRB 1617.

150 NLRB No. 46.

Thereafter, the Charging Party filed a petition to review the Board's Order. On November 9, 1962, the Court of Appeals for the Ninth Circuit reversed the Board,² holding that the television advertising services of the primary employer, television station KXTV, were not "a product or products" within the meaning of that term in the proviso to Section 8(b)(4). The court remanded the case to the Board for consideration of two issues which were not reached by the Board in its original decision.³

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Fanning].

The first issue set forth in the remand is:

Whether the conduct engaged in by the Respondents constituted threats, coercion, or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act.⁴

In setting forth the conduct which it wished the Board to evaluate, the court pointed out that Respondents:

(1) Had committees of the unions call upon all advertisers who used KXTV for the purpose of requesting them to discontinue their patronage of the station and assist the unions in their cause against KXTV.

(2) Had a committee call upon Capital Studebaker Company for the same purpose, in the course of which this advertiser was told that if it continued to advertise on KXTV the Labor Council would undoubtedly print the name of Capital in the Labor Bulletin as not supporting the strike.

² *Great Western Broadcasting Corporation d/b/a KXTV v. N.L.R.B., et al.*, 310 F. 2d 591 (C.A. 9).

³ On February 8, 1963, the Charging Parties' motion to remand for the taking of additional evidence was denied by the Board and the American Civil Liberties Union was granted leave to file an *amicus curiae* brief.

⁴ Section 8(b)(4)(ii)(B) provides, in pertinent part, as follows:

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

* * * * *

... (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . 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 . . .

* * * * *

... *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

(3) Mailed to all KXTV advertisers a letter setting forth the background of the strike and requesting discontinuance of advertising over the station, warning that failure to do so would bring an adverse economic reaction.

(4) Printed and distributed 4,000 handbills listing KXTV as "unfair," and naming Geer Chevrolet Company, Rainbo Baking Company, Shell Oil Company, and Burgermeister Brewing Corporation as advertisers who nevertheless continued to utilize the services of the station, such distribution being made in front on KXTV, at the Sacramento Labor Temple, and at various Sacramento grocery stores which handled Rainbo bread and Burgermeister beer.⁵

(5) Sent a letter to the San Francisco Labor Council asking the Council to return its Shell credit card to that company and to request the members of affiliated unions to do likewise.

(6) Sent a later letter to the San Francisco Labor Council listing 14 companies who were then advertising on station KXTV, with the observation that "any aid" the Council and its affiliated members "can give in this sponsor area" would be appreciated.

(7) Showed to the president of Handy Andy, with an appeal to stop advertising on KXTV, a copy of the newly printed leaflet which gave the background of the labor dispute with KXTV, named Handy Andy as a company which continued to do business with KXTV, and added the comment: "We think you will agree that this continued association is contrary to the best interests of working people and the public."

(8) Telephoned the general manager of Geer and, in conjunction with an appeal to have Geer cease advertising on KXTV, informed him that a new leaflet was being printed naming Geer as a sponsor still advertising on KXTV and that if Geer continued to do business with the station, this leaflet would be passed out in front of Geer's establishment, among other places.

The Board has reviewed the eight items of conduct enumerated in the court of appeals remand. We find that item 1, a mere request to neutral employers unaccompanied by any coercive acts, did not involve prohibited activity within the meaning of Section 8(b) (4) (ii) (B).⁶ However, with respect to the other seven items, we find that the acts were part of a campaign calculated to bring economic pressure upon the producers and distributors of products advertised on KXTV for the purpose of forcing the producers to cease advertising on KXTV. The acts complained of may be char-

⁵ Copies of this leaflet were also found stuffed between loaves of bread at a supermarket supplied by Rainbo. The leaflet carried this note:

This statement is directed to customers of the above advertisers. It is not a request to employees to refuse to pick up, deliver or transport, or to refuse to perform any service.

⁶ See *Servette, Inc. v. N.L.R.B.*, 377 U.S. 46, 50-54.

acterized as threats to distribute, and the actual distribution of, leaflets and letters⁷ announcing that the named companies were continuing to advertise on KXTV, and appealing to consumers to support Respondent in its dispute with KXTV. The Respondent made no attempt to limit consumer response to a boycott of only the particular product or products advertised, and it is plain from a reading of the leaflets and letters, and from the threats made to advertisers, that Respondent's object was the institution of a total boycott of all products produced by companies advertising on KXTV. With respect to Handy Andy, Geer Chevrolet, Capital Studebaker, and Shell Oil Company, Respondent sought a total boycott of their retail establishments. With respect to Rainbo Baking Company, and Burgermeister Brewery, Respondent appealed to consumers to refrain from buying any of their products sold in retail establishments without regard to whether the particular product was advertised on KXTV.

Other than its dispute with KXTV, Respondent had no dispute with any producer or distributor of products advertised on KXTV, and the question presented is whether Respondent's activities, described above, constitute restraint or coercion within the meaning of Section 8(b)(4)(ii) of the Act. The Supreme Court has held that picketing appeals to customers of a large retailer, which were limited to requesting customers to refrain from purchasing the particular product of the primary employer with whom the union had a primary dispute, did not constitute coercion as defined in this section of the Act.⁸ The Court drew a distinction in this regard between consumer picketing in support of a product boycott and consumer picketing which sought to enforce a total boycott of the neutral employer's premises:

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 employers' 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 cus-

⁷ In making our findings with respect to item No 5 (request to the San Francisco Labor Council to return Shell credit cards (we note, as stated in our original opinion, 134 NLRB 1617, 1618, that as a result of this request Shell received numerous letters enclosing Shell credit cards. We further note that as a result of item No. 6 (letter to the San Francisco Council observing that "any aid" from the Council would be appreciated) a synopsis of the Labor Council minutes of the meeting of January 6, 1961, was mailed to everyone on the mailing list, including member unions and individual members, in which it was requested that the recipients discontinue purchases of the products or use of the services of specified companies who were still advertising on KXTV.

⁸ *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760, et al. (Tree Fruits Labor Relations Committee)*, 377 U.S. 58, at 72.

tomers 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.

In the present case, Respondents' activities were directed toward the institution of a consumer boycott of all products distributed by the companies it listed as advertising on KXTV. In these circumstances, it is clear that its appeals and related conduct were not limited to the product in dispute, whether that product be viewed as the physical product advertised over the facilities of KXTV,⁹ or as merely the advertising component added to the product by KXTV's efforts.¹⁰ By failing to limit its activities to the product in dispute, Respondent exceeded the limited privilege to engage in product boycotts which the *Tree Fruits* decision recognized. Accordingly, apart from the consideration of the effect of the publicity proviso discussed hereafter, we find that such conduct clearly constitutes threats, restraint, or coercion within the meaning of Section 8(b)(4)(ii) of the Act.

Having found that the actions previously described are coercive, we now consider whether they were protected by the proviso to Section 8(b)(4), and conclude, as we did in our earlier decision, that they were so protected.

Since the remand by the Court of Appeals for the Ninth Circuit, the Supreme Court has considered the scope of the proviso in *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46. In *Wholesale Delivery Drivers & Salesmen's Union, Local No. 848 (Servette, Inc.)*,¹¹ we had followed our earlier ruling in *Lohman Sales Co.*, 132 NLRB 901, that products "produced by an employer" included products distributed by a wholesaler with whom the primary dispute existed. The Court of Appeals for the Ninth Circuit, applying its decision in the instant case that the proviso only covered the manufacturer of a physical product, reversed the Board (310 F. 2d 659). The Supreme Court, in turn reversed the Ninth Circuit, and approved of the Board's interpretation pointing out that:

. . . The proviso was the outgrowth of a profound Senate concern that the union's freedom to appeal to the public for support of their case be adequately safeguarded . . . It would fall far short of achieving this basic purpose if the proviso applied only in

⁹ Compare the discussion, *infra*, as to the nature of the product produced by KXTV for purposes of applying the proviso to 8(b)(4).

¹⁰ Respondent's activities were not and could not have been confined to a boycott of only the advertising component.

¹¹ 133 NLRB 1501.

situations where the union's labor dispute is with the manufacturer or processor . . . There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception. . . . (377 U.S. 46, at 55.)

While *Servette* and *Lohman* both involved wholesalers of a physical product, we are of the opinion that the Supreme Court's decision in *Servette* sustains our holding, enunciated in *Lohman*, that "producer," as used in the proviso, encompasses anyone who enhances the economic value of the product ultimately sold or consumed; i.e., for the purposes of the proviso, no distinction is drawn between processors, distributors, and those supplying services. Since the Court has stated that the protection of the proviso is not "any narrower in coverage than the prohibition to which it is an exception," and since the prohibition of Section 8(b) (4) (B) covers the performance of services as well as processing or distribution of physical products, it follows that the proviso likewise applies to the performance of services.

Accordingly, with all due respect to the Ninth Circuit's contrary view in this case,¹² we adhere to our original conclusion that KXTV, by the addition of its services (advertising) to the products involved here, is a "producer" within the meaning of the proviso. Thus, even though the handbilling and related conduct calling for a consumer boycott of secondary employers was coercive, it nevertheless was protected by the proviso to Section 8(b) (4) of the Act.¹³

Having concluded that the intervening decisions of the Supreme Court in *Servette* and *Tree Fruits* support our original holding, with all due respect to the Court of Appeals, we find it unnecessary to reach and pass upon the second question raised in its remand, namely, whether or not the actions were protected by the free-press and free-speech provisions of the first amendment to the Constitution. That issue would arise only if we found the actions were coercive and not protected by the proviso to that section of the Act.¹⁴

¹² In a decision issued October 29, 1964, *N.L.R.B. v. Joint Council of Teamsters, No. 58, et al. (California Assn. of Employers)*, 338 F. 2d 23, footnote 3, the Ninth Circuit has itself recognized that the Court's decision in *Servette* extends the proviso to encompass "services."

¹³ Our conclusion is buttressed by the Supreme Court's observation in *Tree Fruits* that by the proviso, Congress authorized:

. . . publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him, but not such publicity which has the effect of cutting off his deliveries or inducing his employees to cease work. (377 U.S. 58, at 70-71.)

¹⁴ The Board has consistently taken the position that as an administrative agency created by Congress it will presume the constitutionality of the Act it is charged with administering, absent binding court decisions to the contrary, *Milk Drivers and Dairy Employees, Local Union No. 537 (Sealtest Foods, etc.)*, 147 NLRB 230; *Chauffeurs, Teamsters, and Helpers "General" Local Union No. 200, etc. (Milwaukee Cheese Company)*, 144 NLRB 826; *Truck Drivers Union Local No. 413, et al. (The Patton Warehouse, Inc.)*, 140 NLRB 1474. Moreover, the Court in *Tree Fruits* demonstrated the propriety of avoiding the constitutional problem in this difficult area, if possible. Our interpretation of the proviso does so.

In summary, we have found that, with but one exception, Respondents' conduct did constitute threats, restraint, or coercion within the meaning of Section 8(b)(4)(ii)(B) of the Act, but that it is not violative of the Act because of the protection afforded by the publicity proviso. We accordingly reaffirm our original dismissal of the complaint.

James L. Bernoudy, d/b/a Marvel Electric Company and International Brotherhood of Electrical Workers, Local 11, AFL-CIO and District 50, United Mine Workers of America, Party of Interest and Party to the Contract. *Case No. 21-CA-5350.*
December 16, 1964

DECISION AND ORDER

On August 11, 1964, Trial Examiner Eugene K. Kennedy issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and counsel for the General Counsel filed an answering brief to the Respondent's exceptions, cross-exceptions, and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and for the reasons set forth below has decided to dismiss the complaint in its entirety.

The critical facts in the case are not in substantial dispute. The Respondent, James L. Bernoudy, is the sole owner and manager of Marvel Electric Company, a contracting firm engaged in the installation of electrical wiring on commercial, residential, and industrial construction projects in the Los Angeles, California, area. Marvel's business office was situated at the rear of Bernoudy's residence prior to March 16, 1961, when Bernoudy established Rite-Way Electric Company, at which time Marvel's office was removed to larger quar-