

to the Agent without settlement having been made, the Agent must, before delivery, obtain settlement according to the rules of the Company. If any such policy is not delivered, it may be returned to the Company within thirty days from the date of issue, but not after that time. If the Agent retains the policy for a longer period than thirty days, or does not make remittance within that time, he is responsible for the premium and must immediately remit the same. If the policy is returned, the Agent is liable for the fees and charges, according to the rules of the Company.

The Company does not issue "C.O.D." or "Approval" business and no policies will be issued without full settlement, except extra policies.

Whenever a policy is returned as "Not Delivered" it must be accompanied by the following:

- I. A statement of the reason why delivery was not made.
- II. The binding receipt must be taken up and attached to the policy.
- III. The settlement must have been returned to the applicant and a statement by the Agent that such has been done.

Whenever a policy is issued at a standard premium and is sent to the Agent for delivery and is returned within the thirty days allowed for delivery, the Agent will be charged with the medical examiner's fee, and the inspection fee.

If an application is written in violation of any of the rules of the Company, the Agent will be charged with the fees, as above stated, whether the policy is issued or not. A policy cannot be returned as "Not Delivered," nor any credit given after the thirty days allowed for delivery. Under no circumstances can this rule be violated.

32. If there has been any change in the health, habits, or occupation of the Insured, or if the Agent has received information which leads him to believe that the risk has become impaired or is less desirable than was represented, he must withhold the policy and return it immediately to the Home Office with a full statement of the conditions which made the withholding of the policy necessary.

33. The Agent must never allow a policy sent to him for delivery to go out of his hands unless the premium required by the same has been paid during the lifetime and good health of the Insured. Policies cannot be left with the Insured or any one else for examination or for any other purpose unless the premium has been paid. This rule is absolute.

REMITTANCES

34. All settlements of premiums must be remitted as soon as received. An Agent is not permitted to hold settlements in any form.

INSURANCE OF WOMEN

35. The application of a married woman will not be considered unless the husband carries an equal or greater amount of insurance on his own life, provided that he is insurable.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local 537 and Jack M. Lohman, d/b/a Lohman Sales Company. Case No. 27-CC-47 (formerly 30-CC-47). August 10, 1961

DECISION AND ORDER

On June 6, 1960, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent did not engage in certain other unfair labor practices

and recommended that the complaint be dismissed with respect thereto. Thereafter, the Respondent, the General Counsel, and the Charging Party filed exceptions to the Intermediate Report and supporting briefs. On December 21, 1960, all parties participated in oral argument held before the Board at Washington, D.C.¹

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the additions and modifications noted below.

In furtherance of its primary dispute with Lohman Sales Company, herein called Lohman, which is engaged at Denver, Colorado, in the wholesale distribution of cigarettes, cigars, other tobacco products, candy, and related products, the Respondent approached the individual owners of Parker Pharmacy, Hatch Drug, Staab-Sherman Plaza Drug, and Columbine Pharmacy, all Denver customers of Lohman. Each owner was informed of the primary dispute between the Respondent and Lohman and was requested not to buy from Lohman until the dispute was settled. The owner of Parker was threatened with the distribution of handbills outside his store if he did not stop buying from Lohman, and the owner of Staab-Sherman was told, "We'll have to do something about that," when he refused to cooperate with the Respondent's request not to buy from Lohman. The Respondent distributed handbills outside Hatch Drug and Staab-Sherman. The handbills, which are set forth in full in the Intermediate Report, stated that the employees of Lohman were on strike and that "The cigars, cigarettes, tobacco and candies on sale in this store are distributed by Lohman Sales Co.," and urged, "DON'T PURCHASE ANY CIGARS, CIGARETTES, OR CANDIES IN THIS STORE!!"²

Handbilling also occurred at the three Denver stores of Owl Drug Company. Respondent approached Edwin Adler, president and co-owner of Owl Drug, and requested him not to buy from Lohman. Adler said he would speak to Lohman and was handed a copy of one of the handbills. Gladys Gioia, a cashier at one of the stores, was given a handbill by the Respondent as she was entering the store and was asked "not to order" merchandise from Lohman. She replied that she took no part in the selection of suppliers, that this decision was made by management. Gioia orders products from suppliers designated by Adler as they are needed.

¹ Chairman McCulloch and Member Brown have read the transcript of this oral argument

² Some handbills substituted "TOBACCO" for "CIGARS."

All the above-mentioned drugstores purchased from Lohman varying amounts of the products referred to in the handbills, but they also purchased similar products from other wholesale distributors.

Finally, Furr's, Incorporated, which operates a 59-store food chain in 3 States, with 5 stores in Denver and 4 in Colorado Springs, Colorado, was also handbilled as appears below. Furr's purchased all of its cigarettes from Lohman, but no other product. Respondent approached the following Denver personnel of Furr's and asked each of them not to buy from Lohman:

Eldon McGuire, general merchandise supervisor in charge of the nine Colorado stores. He stated that he would discuss the matter with Furr's five-man purchasing committee which decides upon selection of suppliers.

John Moore, drug department manager at the Sheridan store, who supervises two subordinates and places orders for merchandise, but does not select the distributors. He responded that he makes no decision as to buying. This store was handbilled on one occasion.

Alfred Crow, manager of West 38th Street store, who orders goods from Lohman, replied that he would check with his superiors. He notified the Respondent that the handbill being distributed was incorrect, because Furr's purchased only cigarettes from Lohman. Immediately thereafter, Respondent changed the language on the handbills distributed at all Furr's stores. All references to Lohman's products other than cigarettes were deleted.

William Thompson, while store manager at the South Broadway store, replied that he had no authority to cease buying from Lohman and recommended that the main office be contacted. He was given one of the original handbills, but no distribution was made at this store. At a later date, corrected handbills were distributed at Furr's 77th and Federal Street store, while Thompson was manager of that store.

In order to stop the distribution of handbills, Furr's decided to cease making any further purchases from Lohman. Furr's five-man buying committee, composed of Dent, a branch manager, and others who are unidentified, made the decision to stop doing business with Lohman.

1. The Trial Examiner found that Respondent's oral appeals to Owl Drug employee Gioia and Furr's employees McGuire, Moore, Crow, and Thompson not to buy or order Lohman products was in violation of Section 8(b)(4)(i)(B) of the Act. We agree with this conclusion. For it is plain that Respondent's conduct constituted inducement of the aforementioned individuals³ not to perform a

³ The Trial Examiner's finding that Owl Drug and Furr employees involved were "individuals" within the meaning of Section 8(b)(4) is not excepted to by the Respondent and we adopt it *pro forma*. This is not to be construed as agreement on our part with the Trial Examiner's definition of "individual" within the meaning of Section 8(b)(4)(1). See *Local Union No. 505, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al., (Carolina Lumber Company)*, 130 NLRB 1438.

service they were hired to perform,⁴ and this for the purpose of forcing their neutral employers to cease doing business with Lohman.

Respondent's contention that it is not responsible for the conduct of the striking employees is rejected as having no merit. Its secretary-treasurer testified that he instructed Fred Jones, a conceded agent of Respondent, to visit customers of Lohman, inform them of the primary dispute with Lohman, and request their cooperation by not buying from Lohman until the strike was settled. It is admitted that the striking employees were told that they were "free to see anybody and talk to anybody" and to seek the support of Lohman's customers not to buy merchandise from Lohman until the dispute was settled. Clearly, therefore, Respondent must be charged with the unlawful conduct herein.

2. The complaint alleges, and the General Counsel excepts to the Trial Examiner's failure to find, that the above-mentioned oral appeals constitute restraint and coercion within the meaning of clause (ii) of Section 8(b)(4)(B) and that Respondent therefore also violated that provision of the Act. But we do not find in these oral remarks addressed to the individuals such a direct effect upon their secondary employers as would constitute coercion or restraint of them under Section 8(b)(4)(ii)(B).⁵ Accordingly, we find no such violation as here contended for by the General Counsel.

3. The Trial Examiner found that the Respondent's distribution of handbills to consumers in front of the several retail stores which purchased goods from Lohman was not violative of Section 8(b)(4)(ii)(B) of the Act, as alleged in the complaint. While such conduct otherwise might constitute restraint and coercion, we agree with the conclusion of the Trial Examiner that Respondent's handbilling in this case was protected by the proviso to Section 8(b)(4).

The proviso to Section 8(b)(4) protects "publicity, *other than picketing*, for the purpose of truthfully advising the public, including consumers and members of labor organizations, 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 em-

⁴ See *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, Local No. 88 (Swift and Company)*, 113 NLRB 275, 277, *enfd.* 237 F. 2d 20 (C.A.D.C.), cert denied 352 U.S. 1015.

⁵ As was explained by Representative Griffin, subsection (ii) "closes loophole which permitted secondary boycott through coercion applied directly against secondary employer (instead of his employees)" 105 Congressional Record 17181 (September 9, 1959). It is noteworthy that 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 (ii), for, as Senator Dirksen explained, that subsection ". . . makes it 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 handling its goods." 105 Congressional Record A8274 (September 18, 1959).

ployer 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." [Emphasis supplied.]

The Charging Party contends that handbilling is tantamount to picketing and, therefore, does not constitute "publicity, other than picketing," within the meaning of the foregoing proviso. Assuming that handbilling is a form of "publicity" permitted by the proviso, it further contends that the handbilling herein was not protected by the proviso because it did not satisfy other prerequisites specified therein. The General Counsel concedes that handbilling is covered by the proviso, but contended at the oral argument that Respondent's handbilling was not protected by it because the handbills were not truthful.

Apart from the language of the proviso itself, the legislative history makes it abundantly clear that mere handbilling is not picketing but is embraced by the term "publicity" which is protected by the proviso. For example, Senator Kennedy, in explaining Joint Conference changes, stated :

We are not able to persuade the House conferees to permit picketing in front of that secondary shop, but we are able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio and can carry on all publicity short of having ambulatory picketing in front of a secondary site.⁶

And Representative Thompson explained a major change as follows :

2. Consumer appeals: The right to publicize nonunion goods to customers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will also be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. All appeals for a consumer boycott would have been barred by House bill.⁷

Contrary to the Charging Party, therefore, we find that such handbilling as occurred in this case is "publicity" within the meaning of the proviso.

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 hand-

⁶ 105 Congressional Record 16414 (September 3, 1959).

⁷ 105 Congressional Record 16635 (September 4, 1959).

bills 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.

We cannot agree with our dissenting colleague that the handbilling in this particular case is not protected by the proviso to Section 8(b)(4) because of the fortuitous circumstance that Lohman, the primary employer, is a distributor rather than the actual manufacturer of the cigarettes and other commodities, which comprise its stock in trade. It is argued that Lohman does not "produce" a product, that this employer, with whom the Union has a primary dispute, merely "handles" a product "produced" by others and thereby provides a middleman's service for the retailers, who, in turn, sell the product to the ultimate consumer.⁸

The question involved is one of statutory construction. It is axiomatic that the words of a statute do not stand alone and must be construed in connection with other parts or sections so as to produce a harmonious whole.⁹ Where the result is not absurd, incongruous, or in conflict with other provisions, the plain meaning of words used by Congress should be given that interpretation. Here the issue revolves around the meaning of two words, "product" and "produced." Apparently, our dissenting colleague believes that a "product" can only be a material object and can be "produced" only by one who physically engenders it. The natural meaning of these two words, however, cannot be so limited. *Webster's* defines "product" as: "Anything produced, as by generation, growth, labor or thought."¹⁰ Similarly, the word "production" is defined in its economic meaning as: "The creation of economic value; the making of goods available for human wants."¹¹ The adjective "productive" means: "Yielding or devoted

⁸ The specific language of the proviso permits a union to advertise to the public that "a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . ."

⁹ Sutherland, *Statutory Construction*, 3d edition, Horack, vol. 2, p. 336.

¹⁰ A Merriam Webster, *Webster's New Collegiate Dictionary*, 1959.

¹¹ *Ibid*

to the production of, a net return of wealth.”¹² *Black's Law Dictionary*¹³ offers a more comprehensive explanation of the term “production” as follows:

In political economy. The creation of objects which constitute wealth. The requisites of production are labor, capital, and the materials and motive forces afforded by nature. Of these, labor and the raw materials of the globe are primary and indispensable. Natural motive powers may be called in to the assistance of labor and are a help, but not an essential, of production. The remaining requisite, capital, is itself the product of labor. Its instrumentality in production is therefore, in reality, that of labor in an indirect shape. Mill, Political Economy; Wharton.

From the foregoing it seems clear that, so far as human effort is concerned, *labor* is the prime requisite of one who produces. A wholesaler, such as Lohman, need not be the actual manufacturer to add his labor in the form of capital, enterprise, and service to the product he furnishes the retailers. In this sense, therefore, Lohman, as the other employers who “handled” the raw materials of the product before him, is one of the producers of the cigarettes distributed by his customers. A contrary view would attach a special importance to one form of labor over another and attempt to isolate fabricators of products from those who otherwise add to its value. Excluded as non-producers might be those companies engaged in the assembly of machine parts; the soft drink bottling industry; communications, such as newspapers, magazines, and TV stations, which produce products of an abstract rather than physical nature. If our dissenting colleague is right, vast numbers of our working population produce nothing. Their thought, labor, or business enterprise is not a “product.” We do not believe that the plain meaning of the words “product” and “produced” requires the Board to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled.

Apart from the difficulties of defining, without statutory direction, a particular classification of producer covered by the proviso, there is no suggestion either in the statute itself or in the legislative history that Congress intended the words “product” and “produced” to be words of special limitation. In this respect, it may be noted that the provisos to Section 8(e) specifically grant exemptions to the “construction industry” and to the “apparel and clothing industry.” Had Congress intended to limit truthful publicity, which did not affect deliveries or services, to those employers doing business directly with

¹² *Ibid.*

¹³ Fourth edition, West Publishing Co., 1951, pp. 374-375.

employers in the "manufacturing industry," certainly the language used would have reflected this intent, as it does in the provisos to Section 8(e). While it is true that the legislative history gives the familiar example of "one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute,"¹⁴ this is hardly an indication that no other producer is covered by the proviso.¹⁵ It is most significant, in our opinion, that the Landrum-Griffin bill, as it was passed by the House, did not contain the publicity proviso. It was added by the Senate and House conferees and explained by the then Senator Kennedy as follows:¹⁶

. . . the House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant.

We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper.

Under the language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth.

Reading the statute as a whole, there is not the slightest reason to conclude that Congress was concerned with permitting truthful publicity with respect to products derived from manufacturers, but was unconcerned with such publicity as it affected products from other wholesalers, such as Lohman. Nor, as indicated above, is there any reason to suppose from the legislative history that an arbitrary and purposeless distinction of this type was intended. Accordingly, we shall accord the words "product" and "produced" their natural and accepted interpretation set forth above.

The Charging Party also argues against the applicability of the proviso herein on the ground that the handbills had the effect of inducing "individuals" employed by a person other than the primary employer to refuse to perform services in the course of their employment. But, as conceded by the General Counsel at oral argument, the

¹⁴ 105 Congressional Record 15906 (August 28, 1959).

¹⁵ For example, as previously noted, Representative Thompson, in explaining the proviso to the House, stated that employees will be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. Consistent therewith is Senator Dirksen's report to the Senate that the conference-approved measure bars "a union from picketing a retail store to advertise that the store is handling the goods of a firm the union was striking, but permits other forms of such advertising—handbills, for example. . . ." 105 Congressional Record A8275 (September 18, 1959, daily).

¹⁶ *Id.*, at pp. 16254-16255 (September 2, 1959).

record does not support this contention. The only effect of the hand-billing disclosed by the record is the decision made by the Furr's buying committee, of which Branch Manager Dent is a member, to cease purchasing from Lohman. However, as it does not appear that Dent and the other members of the buying committee are "individuals" within the meaning of the proviso, we must reject this last ground urged by the Charging Party for denying the protection of the proviso to Respondent.

For the reasons given, we adopt the Trial Examiner's conclusion that Respondent's handbilling did not violate the Act.¹⁷

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local 537, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce, other than Lohman Sales Company, 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, where an object thereof is to force or require said person to cease doing business with Lohman Sales Company.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its office and meeting hall at Denver, Colorado, copies of the notice attached hereto marked "Appendix."¹⁸ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being signed by Respondent's representative, be posted by Respondent 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 to insure that such notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for the Twenty-seventh Region signed copies of the notice attached hereto marked "Appendix," for posting by Lohman Sales Company, Owl Drug Company, Furr's

¹⁷ Having found that Respondent's handbilling was a protected form of activity, we also adopt the Trial Examiner's finding that Respondent's threat to handbill was not a violation of the Act.

¹⁸ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Incorporated, they being willing, at places where they customarily post notices to their employees.

(c) Notify the Regional Director for the Twenty-seventh Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed, insofar as it alleges that the Respondent has violated the Act otherwise than as found herein.

MEMBER RODGERS, dissenting in part:

The facts in this case are relatively uncomplicated and are accurately summarized in my colleagues' opinion. What is essentially involved is the question whether the Respondent Union, by virtue of certain oral appeals, threats to engage in handbilling, and the actual conduct of an extensive handbilling campaign, violated Section 8(b) (4) (i) and (ii) (B) of the Act.

My colleagues and I are in agreement as to some of the legal conclusions to be drawn from the factual findings. Thus, we agree that the Respondent's various oral appeals to employees of neutral employers not to buy or order products distributed by Lohman constituted unlawful inducement of an "individual" not to perform a service within the meaning of Section 8(b) (4) (i) (B) of the Act. We also agree that these same oral appeals, which, in the particular circumstances of this case, at best had but an indirect effect upon the neutral employers, are legally insufficient to constitute restraint and coercion within the meaning of Section 8(b) (4) (ii) (B) of the Act. Finally, we agree that Respondent's handbilling "constitutes restraint and coercion as used in the Act" and is therefore unlawful, unless such conduct qualifies for the protection afforded by the second proviso to Section 8(b) (4).¹⁹ However, it is in this latter regard, that I disagree with my colleagues. For I would hold, in the circumstances of this case, that Respondent's handbilling failed to satisfy the requirements of the proviso.

I think it is clear that Congress unmistakably limited the application of the 8(b) (4) proviso to the presence of certain requirements or expressed conditions; and unless all of the enumerated conditions are met in every respect, the proviso cannot be relied upon to save what would otherwise be unlawful. One of the conditions specified in the

¹⁹ The second proviso in Section 8(b) (4) states:

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, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. [Emphasis supplied.]

proviso is the publicity must involve "a product or products . . . produced" by an employer with whom there is a primary dispute, and which "are distributed by another employer." Here Lohman, the primary employer, concededly produces nothing; on the contrary, it distributes the products which are produced by others. Accordingly, by its explicit language the proviso cannot stand as a defense, and consequently Respondent's handbilling should be declared unlawful.²⁰

My colleagues have characterized the foregoing interpretation as "highly literal." They state that Congress could not have intended "to draw such an arbitrary distinction." Certainly, I am reading the language of the proviso literally; and indeed I am drawing a distinction. But the distinction is not an arbitrary one. Rather it is the one that is engrafted in the statute itself. For where, as here, there is neither legal precedent nor conclusive legislative history²¹ upon which the Board can rely in interpreting the proviso, there is no alternative but to resort to the specific language which the Congress has enacted into law—and this language leaves no doubt as to what was intended.

As previously noted, the proviso expressly states that publicity, if it is to be protected, must be "for the purpose of truthfully advising the public . . . that a *product or products are produced by an employer* with whom the labor organization has a primary dispute and are distributed by another employer. . . ." [Emphasis supplied.] In the face of this explicit language, it is my colleagues who draw arbitrary lines of distinction and distort the natural meaning of the words involved.²² It is they who read the italicized phrase as

²⁰ As I reach the conclusion that the Respondent's handbilling was not protected by the proviso to Section 8(b)(4), I would also find that the Respondent's threat to handbill the owner of Parker Pharmacy to be violative of Section 8(b)(4)(i)(B) of the Act. Similarly, the threat to the owner of Staab-Sherman Plaza Drug following his refusal to cooperate with the Respondent in its boycott of Lohman, and especially in view of the subsequent handbilling of those premises, constitutes a further violation of Section 8(b)(4)(ii)(B).

²¹ As in most instances where resort is made to legislative history, while statements may be gathered which appear to support one interpretation, counterstatements can be found which will support a different interpretation. For example, my colleagues refer to statements by Representative Thompson and Senator Dirksen as supporting a conclusion that the proviso was not intended to distinguish between manufacturers and others who handle goods. But there are in fact references in the legislative history which indicate a contrary intention, i.e., that Congress intended to permit only the publicizing of disputes between a union and a *primary manufacturer*: for example 105 Congressional Record 15905, 15907 (August 28, 1959); 16397 (September 3, 1959); 3511 (March 11, 1959); 14517 (August 13, 1959). Thus Senator, now President, Kennedy stated: "There is to be no prohibition on truthful appeals to customers not to patronize an establishment, or not to buy goods, because the *manufacturer* is involved in a labor dispute." (*supra*, p. 15906), and elsewhere "Workers would not be denied the traditional right to ask the public not to patronize one who sells nonunion goods or goods of a *manufacturer* engaged in a labor dispute" (*supra*, p. 15907). [Emphasis supplied.]

²² My colleagues and I are in agreement that in the instant case we are involved in a problem of statutory construction and, in an effort to reach the solution which Congress had in mind, we should give to the words selected by that body their plain and obvious meaning. However, in their haste to run to the dictionary to find the *plain* meaning of the words "product . . . produced," my colleagues overlooked the basic reference point from which all research should embark—the statute itself. Thus, Congress expressly stated in the proviso involved herein that a union may, to a limited extent, advertise

though it said "products handled by, transported by, or made available by an employer." If the Congress actually intended such an interpretation, I cannot believe that it would have been expressed so inartfully. For elsewhere in Section 8(b) (4), and indeed in the proviso itself, Congress employed such terms as "services," "distribute," "distribution," "transport," and "transportation"—thus carefully delineating the scope of the sections coverage, and distinguishing various phases of economic activity. Thus, had Congress actually intended to extend the protection of the proviso to labor organizations in general, rather than reserving it solely for the benefit of those which are engaged in disputes with employers who *produce* products, Congress no doubt could have made this clear by employing appropriate language. The fact is that it did not.²³

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 supplied] Neither extensive searching nor elaborate stretching can displace the plain and compelling distinction which Congress has engrafted—a distinction which clearly draws a line between an employer who is engaged in producing a product and some other employer who is engaged in distributing the product so produced. And in the context in which these words appear, being also a proviso which limits the extent of the section's sweep, it is clear that publicity other than picketing may be allowed to continue against the former employer, but not against the other employer engaged in distribution. Consequently, since Lohman, to borrow my colleagues' description, "is a distributor rather than the actual manufacturer of the cigarettes and other commodities," he qualifies under the proviso *only as that other employer* engaged in the distribution of another's products. Such qualification, however, is of no avail to the Respondent—not so much because my colleagues, by an exercise in semantics, would conclude that no distinction should be drawn between a "producer" and a "distributor," but rather, because the Congress clearly and explicitly displayed their intention by making the distinction appear plainly on the face of the proviso.

However, for whatever influence they may have on my colleagues' thinking, the following two definitions of the word "distribution" are offered:

1. "*Distribution*: Includes all of the activities involved in the passage of goods from the *producer to the consumer*. In *economic theory* the term is usually employed to connote the division of the *product* among the factors of production." [Emphasis supplied] The Economic Almanac, p. 569 (National Industrial Conference Board—1960).

2. "*Distribution*: The amount of goods and services which each worker, employer, or economic group gets from the total *produced*. Distribution, in *this sense*, does not refer to the *physical marketing or circulation of goods, which is part of the process of exchange . . .*" [Emphasis supplied.] The Columbia Encyclopedia, p. 546(1), 2d ed. (Columbia Univ. Press—1952).

²³ In this regard, I deem it highly significant that during the evolution of the 1959 amendments a provision which would have expressly supported the conclusion reached by my colleagues was suggested as a proviso to Section 8(b) (4). The suggestion, however, was not adopted. At the time the Senate and House conferees were attempting to resolve differences between their respective bills, the then Senator Kennedy, introduced to, and had placed upon the calendar of, the Senate, a resolution which instructed the Senate conferees to insist upon the inclusion of certain provisions in the conference agreement. Included in the provisions dealing with amendments to Section 8(b) (4) was the following proviso:

Provided, That nothing contained in this subsection (b) shall be construed . . . to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operated, or goods are produced or *distributed* by an employer engaged in a labor dispute [Emphasis supplied] 105 Congressional Record 15906 (August 28, 1959).

Since the preceding proviso was not adopted, and Congress ultimately approved a proviso which includes the more limited terminology "products . . . produced," there is, in my opinion, no doubt that Congress envisioned the proviso as affording only a restrictive scope to secondary publicity campaigns. Cf. the Board's reliance upon comparable reason-

Moreover, my colleagues' interpretation is inconsistent with one of the major underlying purposes which the Congress sought to achieve by the enactment of the 1959 amendments, namely, to strengthen the proscriptive provisions of Section 8(b)(4). Under the new Section 8(e), for example, Congress outlawed, and made unenforcible and void, "hot cargo" agreements. At the same time, however, Congress amended clause (A) of Section 8(b)(4) so as to make it a separate unfair labor practice for a labor organization to force or require an employer "to enter into any agreement which is prohibited by Section 8(e)." In addition, Congress broadened the basic provisions of Section 8(b)(4) to include within its proscriptive reach certain "individuals" and "persons" who, because of prior Board and court interpretations, had been excluded. Thus, Congress closed the loophole regarding inducements to "concerted" action by changing the word "employees" to "individual" and by omitting the word "concerted." By such revision, the inducement of a single individual was made illegal. And Congress further sought to curb the extent to which pressures had hitherto been allowed against secondary employers by enacting Section 8(b)(4)(ii), which makes unlawful any threats, restraint, or coercion against "any person engaged in commerce."

The foregoing is merely illustrative of the concern which Congress expressed over matters involving Section 8(b)(4); but it does serve to point up the fact that Congress took great pains to insure that the language it selected adequately reflected its basic purpose, which was to curtail even further the permissible limits for secondary activity.²⁴ And this is exemplified by the very proviso involved in the instant proceeding for, by carefully articulating the conditions under which "publicity, other than picketing" might be conducted, Congress left no doubt that unless the activity strictly conformed to the requirements set forth therein, the proviso was to be unavailing as a defense.²⁵ By giving the broadest possible reading to the phrase "products . . . produced," my colleagues are administratively reversing these congressional purposes, and are, therefore, failing to give effect to the basic aims of Section 8(b)(4).

In short, my colleagues have emasculated the underlying purposes of Section 8(b)(4) by extending the proviso, as they do, to permit

ing in interpreting Section 8(b)(7), *Chefs, Cooks, Pastry Cooks and Assistants, Local 89, Hotel and Restaurant Employees Union, AFL-CIO; et al. (Stork Restaurant, Inc.)*, 130 NLRB 543

²⁴ "In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy" *Mastro Plastics Corp., et al v NLRB*, 350 U S 270, 285.

²⁵ Thus, Congress conditioned the protection of the proviso upon the existence of the following facts: The activity must be "publicity, other than picketing": the purpose of such publicity being to advise the public; such publicity must be truthful; the publicity must be to advise the public that a product or products are produced by an employer with whom the union has a primary dispute, and these products must be distributed by another employer. And even if all of these conditions are met, if *an effect* of the publicity is to induce a secondary employee to cease picking up, delivering, or transporting any goods, or not to perform any services, the publicity is unlawful.

the handbilling of any "employer who contributes to making a product available to the ultimate consumer." The net result of this interpretation is to sanction the indiscriminate handbilling of virtually any business. The obvious legislative intent of confining the permissive area of the secondary activity (handbilling) to those businesses that handle a product produced by another, is now overridden by the fiat of my colleagues. By thus extending the area of the "primary dispute," my colleagues have necessarily increased the number of targets of permissive secondary action. Today drugstores are handbilled because of a primary dispute involving a distributor of sundry goods. Tomorrow, under my colleagues' interpretation, these stores, or myriad others like them may lawfully be handbilled because of a primary dispute perhaps involving a railroad, perhaps a truckline, or perhaps a television station.

Undoubtedly, the Board's decision in this case will continue to simplify the handling of future cases involving the proviso to Section 8(b)(4). But it is nevertheless bad law.

For the foregoing reasons, I would find that the Respondent's handbilling and threats to handbill are not protected by the second proviso to Section 8(b)(4), and would, accordingly, order the Respondent to cease and desist from engaging in such conduct in the future.

APPENDIX

NOTICE TO ALL OUR MEMBERS

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce, other than Lohman Sales Company, 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, where an object thereof is to force or require said person to cease doing business with Lohman Sales Company.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, MILK DRIVERS AND
DAIRY EMPLOYEES LOCAL 537,

Labor Organization.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding was heard at Denver, Colorado, on March 1 and 2, 1960, on a complaint by the General Counsel that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local 537, herein called Respondent, had engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(B) and Section 8(b)(4)(ii)(B) of the Act. Briefs have been submitted by all parties.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Jack H. Lohman, d/b/a Lohman Sales Company, herein called Lohman, is engaged at Denver, Colorado, in the wholesale distribution of cigarettes, cigars, tobaccos, candy, and sundries. Lohman purchases 95 percent of its merchandise from outside the State of Colorado and its out-of-State purchases of the above-named commodities in 1959 were valued in excess of \$2,000,000. I find that the operations of Lohman affect commerce.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local 537, is a labor organization admitting to membership the employees of the Company.

III. THE UNFAIR LABOR PRACTICES

A. Introduction; the issues

In November 1959, the Union was certified as the bargaining representative of the drivers and warehouse employees of Lohman. Five negotiating meetings proving to be fruitless, a strike against Lohman for improving working conditions commenced on December 2, 1959, and is still underway with Respondent maintaining a "picket line," in the commonly used sense of the term, at the premises of Lohman.

Attacked herein by the complaint is certain alleged conduct at the premises of customers of Lohman including the distribution of handbills and requests of customers and their personnel to cease using, handling, or selling products distributed by Lohman. This handbilling commenced in December and is apparently still being carried on, although the evidence herein is limited chiefly to December 1959 and January 1960. The further contention is made that the content of the handbills was untruthful. This is predicated on the ground that Lohman, a wholesale distributor of a full line of cigarettes, cigars, [smoking] tobacco, and candy, was not the exclusive source of supply in some categories of merchandise and supplied no merchandise in one or more of these categories to its customers.

The complaint alleges violations by the Union of Section 8(b)(4)(i) and (ii)(B) of the Act. This section so far as pertinent herein, provides that it shall be an unfair labor practice for a labor organization or its agents—

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

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, . . .

* * * * *

. . . 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;

B. Sequence of events

It is conceded that Fred Jones, an organizer for Joint Council of Teamsters No. 54, was an agent of Respondent during this dispute as was one Friedman, a business of Local 547. The testimony of Secretary-Treasurer Paul Ashcraft of Respondent is undisputed, and I find, that he instructed Jones to visit Lohman customers, inform them of the dispute between Respondent and Lohman, and to request their co-operation by not buying Lohman merchandise until the strike was settled. Ashcraft conceded that the striking employees were told that they were "free to see anybody and talk to anybody" and to seek the support of Lohman customers in not purchasing merchandise until the dispute was settled. Ashcraft in behalf of Respondent personally drafted the language of certain handbills which Respondent's agents distributed and also made the decision as to where the distribution would be made.

The General Counsel has introduced evidence of activity at the premises of seven retailers.

(1) Parker Pharmacy purchases approximately 90 percent of its cigarettes, less than 1 percent of its cigars, and approximately 60 percent of its candies from Lohman. Charles Parker, its owner, who was vague as to dates, testified that less than 6 months before Christmas 1959, Jones appeared at his store, ascertained that Parker did business with Lohman and asked him to cease buying merchandise from Lohman. Jones further said that if Parker did not comply with the request "they would place a man with handbills outside the store." Handbills were never distributed at the Parker store and there have been no work stoppages or refusals by Parker personnel to handle Lohman merchandise. It may be noted that in *all of the cases* described below, there have been no failures or refusals by employees or personnel to process or perform any services in connection with Lohman merchandise.

(2) Hatch Drug Store purchases approximately 90 to 95 percent of its cigarettes, 15 percent of its cigars, 50 percent of its tobacco, and 10 percent of its candy from Lohman. On December 9, 1959, two striking Lohman delivery men entered this store and spoke with owner Francis Hatch. They stated that they were conducting a "strike at Lohman Sales" and asked Hatch if he would discontinue buying merchandise from Lohman. Hatch refused and the men left. About 2 minutes later, Hatch observed them distributing leaflets outside the store. Leaflets were distributed by other Lohman strikers at this location on 10 or 12 occasions, approximately every other day, for 4 or 5 weeks. While Hatch in his testimony referred to the distributors of the handbills as being engaged in "picketing" it is clear, and I find, that there was no picketing in the customary sense of the term, in that there is no evidence of *patrolling* by the leaflet distributors or of the carrying of *placards*. There is also no contention made that there was any undue massing of handbill distributors in any of these incidents so as to warrant a conclusion that they were engaged in *patrolling*.

Hatch testified that the handbills distributed at his premises read as follows:

Employees of LOHMAN SALES CO.
ON STRIKE

For decent wages and hours!

We cannot support our families on \$1.00 per hour

. . . The Cigarettes, Tobacco and Candies on
sale in this

store are distributed by Lohman Sales Co.

PLEASE HELP US IN OUR STRUGGLE FOR
FAIR WAGES AND WORKING CONDITIONS

. . . DON'T PURCHASE ANY CIGARETTES,
TOBACCO OR CANDIES IN THIS STORE!!

Thank you!-----

The Employees of Lohman Sales Co.,
acting through Milk Drivers Local 537

This handbill is not directed against any
person or firm other than Lohman Sales Co.

There is evidence from Ashcraft, however, that this handbill, which is identified in the record as General Counsel's Exhibit No. 3, was not prepared until January 1960,

and that the first handbill was General Counsel's Exhibit No. 4 which is identical in content except for the addition of one word to the designation of the merchandise, viz, "cigars." While it would seem that Respondent commenced with one handbill and changed the wording as indicated, this does not affect a resolution of the issues herein. It is to be noted, as will appear below, that Respondent has made still other changes in the content of the handbills.

(3) Staab Sherman Plaza Drug purchases no cigars, one-third or slightly less of its cigarettes, and less than one-third of its candy from Lohman. Rudolph Staab, its proprietor, testified that Jones visited him between January 1 and 5, 1960; announced he was representing Respondent and that Lohman's wage scales were inadequate; and asked Staab "to cooperate with us and quit buying from Lohman." Staab replied that he could not promise to do this and Jones then stated, "Well, we'll have to do something about that."

In the following week, handbills were distributed by Lohman strikers outside Staab's premises on one occasion and this was repeated about 1 week later. Staab was uncertain as to which handbills he saw, originally testifying that he did not know whether he saw General Counsel's Exhibit No. 3 or General Counsel's Exhibit No. 4. The former, it will be recalled, refers to *cigarettes, tobacco and candies*, and General Counsel's Exhibit No. 4, while otherwise identical, adds *cigars* and states:

The cigars, cigarettes, tobacco and candies on sale at this store are distributed by Lohman Sales Co.

* * * * *

**DON'T PURCHASE ANY CIGARS, CIGARETTES, OR
CANDIES IN THIS STORE!!**

Staab also recalled seeing General Counsel's Exhibit No. 2, addressed only to *cigarettes*, being distributed outside his store after the Jones visit. And, in cross-examination, he testified that he originally saw General Counsel's Exhibit No. 3 and later General Counsel's Exhibit No. 2 being distributed outside his store. As is apparent, neither General Counsel's Exhibit No. 3 nor General Counsel's Exhibit No. 2 refers specifically to cigars, a product which Staab purchased from distributors other than Lohman. Staab never complained to Respondent that the handbills were inaccurate in any way.

(4) The Columbine Pharmacy, owned by William Hartman, purchases all of its cigarettes, 40 percent of its candy, and no cigars from Lohman. On December 2 or 3, four of the Lohman strikers, whom Hartman knew by sight, entered the store and spoke with Hartman. They stated that they were on strike against Lohman and that they would appreciate it if Columbine did not purchase "any cigarettes or anything" from Lohman until the strike was settled; Hartman made no definite commitment.

About 1 week before Christmas, one of the four, Pinkerton, entered the store; handed a handbill to Hartman; stated that it was not intended as a threat; and left. While this handbill referred to *cigars, cigarettes, tobacco and candies*, Hartman admitted, and I find, that no handbills were ever distributed at or near his place of business.

(5) The Owl Drug Company operates three drugstores in Denver. It purchases cigarettes, tobacco products other than cigars, and candy from Lohman who supplies 85 to 90 percent of this concern's total tobacco purchases. Ten to twelve percent of the candy purchased is supplied by Lohman.

Handbilling has occurred at all three Owl Stores, commencing in December 1959, and primarily at its West Mississippi store. On the first occasion, two Lohman employees, who were known to President Edwin Adler of Owl Drug, came to the company office located at the Santa Fe Drive store. One of the two, Villa, informed Adler that there was a strike against Lohman and asked him to stop purchasing merchandise from Lohman. Adler replied that he would speak to Lohman personally in their behalf. Villa then handed a copy of General Counsel's Exhibit No. 3 to Adler and the two strikers left.

The content of the handbills has varied, with some referring to cigarettes, candy, and tobacco, viz, General Counsel's Exhibit No. 3, and others referring to cigarettes alone, viz, General Counsel's Exhibit No. 2. On cross-examination, Adler repeated that General Counsel's Exhibit No. 3 was the first handbill he observed and that he was not certain whether or not General Counsel's Exhibit No. 2, referring only to cigarettes, was distributed. While Adler once pointed out to handbiller Villa that deliveries had been made that very day of cigarettes, tobacco, and candy by a distributor other than Lohman, he apparently has never claimed in any way that the handbills were inaccurate.

Day Cashier Gladys Gioia, a nonsupervisory employee assigned to the West Mississippi store, orders tobaccos, candy, cigars, and cigarettes, as needed, from

suppliers previously designated by her superior. She testified that she saw a handbill referring to candy and cigarettes being distributed outside the store shortly prior to Christmas. One was also handed to her by striker Villa as Gioia entered the store, Villa stating that they were on strike and asking that she not order merchandise from Lohman. Gioia replied that she played no part in the selection of suppliers, this decision being made by management.

(6) Considerable testimony was adduced concerning Respondent's conduct with respect to Furr's, Incorporated, a 59-store food chain operating in three States with five stores in Denver and four in Colorado Springs, Colorado. This chain purchased only cigarettes from Lohman and on an exclusive basis. In the first or second week of December 1959, striker Villa and another striker called at the office of Eldon McGuire, who is general merchandise supervisor for Furr's in charge of the nine Colorado stores. They requested that he cease buying merchandise from Lohman, in view of Respondent's strike for higher wages. McGuire stated that he would take this up with the five-man buying committee which decides on such matters as the selection of suppliers; no handbills were displayed on this occasion.

On December 8, a group of six strikers called upon John Moore, who was the drug department manager at the Sheridan store. Moore is a supervisory employee with two subordinates, and places orders for merchandise but does not select the distributors, that decision also being made by the five-man purchasing committee. The group asked Moore to stop purchasing cigarettes from Lohman. Moore replied that this decision was not for him to make and the men left. Either that day or several days later, Moore observed General Counsel's Exhibit No. 4 being distributed in front of the store, apparently on one occasion only.

On December 15 or 16, five or six strikers called upon Alfred Crow, the manager of the West 38th Street store, and asked him to stop buying cigarettes from Lohman. Crow, who placed his purchase orders with Lohman pursuant to designation by the five-man buying committee, replied that he would check this with his superiors. About 1 week later, Crow noticed General Counsel's Exhibit No. 4 being distributed on one occasion. He proceeded to inform the handbillers that the leaflet was in error, because the store did not purchase any *candy* from Lohman. Crow observed hand-billing on one later occasion and by then the handbill had been replaced by General Counsel's Exhibit No. 2.

It may be noted at this point that the handbill was changed to General Counsel's Exhibit No. 2 because of the protest by Crow. According to the uncontroverted testimony of Secretary-Treasurer Ashcraft, and I so find, the handbill distributors at Crow's store promptly reported Crow's complaint to Ashcraft who immediately ordered a corrected handbill in the form of General Counsel's Exhibit No. 2 to be printed. This was substituted for General Counsel's Exhibit No. 4 at the store on the following day. Thereafter, this handbill alone was used at all Furr's stores being handbilled and it may be noted that no other Lohman customer has made any complaint to Respondent that the content of the handbills may be erroneous.

During the first week of January 1960, Store Manager William Thompson of the 72d and Federal Street store observed handbills being distributed on two occasions and these were identical with General Counsel's Exhibit No. 2. Thompson had previously managed the store at 2190 South Broadway prior to January 2, 1960. Four of the strikers had visited him at that location, handed him a handbill similar to General Counsel's Exhibit No. 2 and asked that he stop purchasing cigarettes from Lohman; there was no distribution of handbills at this store.

William Dent, branch manager for Furr's in Denver and Colorado Springs, happened to observe the distribution of General Counsel's Exhibit No. 2 at the 72d and North Federal location on one occasion. He approached Union Representative Jones who was the distributor, announced that Furr's had decided to cease purchasing cigarettes from Lohman and asked which union representative to contact. Jones supplied Dent with a name already familiar to Dent and later that day Dent notified the Union that Furr's was ceasing the purchase of cigarettes from Lohman. One or two additional purchases were made and Furr's then ceased all purchases of cigarettes from Lohman. Dent uncontrovertedly testified, and I find, that the reason for his decision was to eliminate the distribution of the handbills on Furr's parking lots. According to Dent, Furr's was not concerned with the content of the handbill but was reluctant to have its customers receive them.¹

¹ Because of insufficient identification of the spokesman, objection was sustained to the receipt of evidence concerning a contact of the proprietor of Jack's Rexall Store by a purported representative of Respondent.

C. Analysis and conclusions

The complaint alleges that Respondent engaged in conduct violative of Section 8(b)(4)(i)(B) of the Act by inducing or encouraging individuals employed by seven customers of Lohman to cease handling, using, selling, or performing services in connection with Lohman merchandise. It further alleges violations of Section 8(b)(4)(ii)(B) of the Act by the foregoing, by requests of the seven customers to stop handling Lohman merchandise, by threatening to handbill these stores, by handbilling them, and by untruthfully handbilling them.

(1) Turning first to the alleged threat to handbill the Lohman customers and the subsequent handbilling, it is readily apparent that this conduct is controlled by the language of Section 8(b)(4) of the Act providing 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."

This reference to "publicity, other than picketing" would manifestly seem to embrace handbilling and the legislative history of the recent amendments to the Act so discloses. Senator Kennedy, in his explanation to the Senate of changes in the original bill, made it clear that Congress intended that handbilling activity should fall within this proviso to Section 8(b)(4). He stated:

We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site. (Congressional Record, September 3, 1959, p. 16414)

And Congressman Griffin, one of the House conferees on the bill, inserted in the Congressional Record a Summary Analysis of the Conference Agreement on the amendments to the Act wherein it is stated that the Conference Agreement had adopted a House provision prohibiting secondary customer picketing "with the clarification that other forms of publicity are not prohibited." (Congressional Record, September 3, 1959, p. 16539.)

It follows, therefore, that there was a congressional intent to expressly protect the dissemination of information under these circumstances, whether it be oral or in printed form. This, of course, is entirely consistent with a long line of cases holding that ordinances restricting the distribution of handbills are unconstitutional as an invasion of civil liberties.

For example, in *Talley v. California*, 362 U.S. 60, 63, the Supreme Court recently struck down an ordinance prohibiting the distribution of anonymous handbills protesting what were alleged to be discriminatory practices of certain manufacturers and urging a boycott of other merchants who carried products so manufactured under allegedly discriminatory conditions. The Court therein cited an earlier decision holding that "one who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion . . . by handbills and literature as well as by the spoken word. *Jamison v. Texas*, 318 U.S. 401, 416."

Thus, the distribution of handbills at the premises of the retailers handling Lohman products urging consumers not to purchase same would fall squarely under the protection of the cited proviso to Section 8(b)(4) of the Act. This would include the handbilling at the Hatch Drug Store, Staab Sherman Plaza Drug Store, Furr's, and at Owl Drug Store. See *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Peyton Packing Company, Inc.)*, 125 NLRB 531; and *Dallas General Drivers, Warehousemen & Helpers, Local No. 745, AFL-CIO (Associated Wholesale Grocery of Dallas, Inc)*, 118 NLRB 1251.

(2) By the same token, this disposes of the claim that the threat to distribute these handbills was violative of Section 8(b)(4)(ii)(B) of the Act, as alleged, or even of Section 8(b)(4)(i)(B) of the Act. If the Act protects the right to distribute handbills under these circumstances, I fail to see how a threat to engage in this protected activity can be violative of the Act.

(3) This presents the contention of the General Counsel that this proviso to Section 8(b)(4) protects only, as stated by the proviso, "truthfully advising the public" of the nature of the dispute and his further contention that the content of these handbills was not truthful. A consideration of the respective situations does disclose some disparities between the handbill content and the actual fact.

Hatch Drug Store, as set forth, purchases 90 to 95 percent of its cigarettes, 15 percent of its cigars, 50 percent of its tobacco, and 10 percent of its candy from Lohman. After proprietor Francis Hatch refused a request by the strikers to discontinue buying merchandise from Lohman, agents of Respondent engaged in peaceful and orderly distribution of handbills outside his store on 10 or 12 occasions over a 4- to 5-week period.

The handbills clearly identifies the strike as an economic one by employees of Lohman, announcing that Lohman distributed the "Cigarettes, Tobacco and Candies on sale in this store." It further stated "Don't Purchase Any Cigarettes, Tobacco or Candies in this store" and pointed out that there was no dispute with any concern other than Lohman. The thrust of the General Counsel's claim herein is that the handbill was untruthful to the extent that other distributors supplied those percentages of the named products to Hatch which were not provided by Lohman.

Staab Sherman Plaza Drug purchases part of its cigarettes and candy, an undisclosed percentage of tobacco and none of its cigars from Lohman. The handbill distributed there was identical with that set forth above, although Proprietor Rudolph Staab was uncertain whether it listed cigars together with cigarettes, tobacco and candy. While Staab's testimony does not permit a finding that the handbill referred to cigars, the General Counsel does attack, as above, the fact that Lohman was not the exclusive supplier to this retailer of cigarettes and candy.

Owl Drug Company purchases the major portion of its tobacco products, a small percentage of candy and no cigars from Lohman. Its three stores have been handbilled with a handbill directed to cigarettes, tobacco, and candy. Here, the General Counsel also attacks the fact that Lohman was not the exclusive supplier of these last-named products.

Furr's is a large chain operating five stores in Denver and four in Colorado Springs, Colorado, which purchased solely cigarettes on an exclusive basis from Lohman. The record discloses that a handbill referring to cigars, cigarettes, tobacco, and candy was distributed on one occasion at Furr's Sheridan Store in Denver. An additional handbill was distributed at the West 38th Store and when the store manager directed the attention of the handbillers to the fact that no candy was purchased from Lohman, Respondent immediately printed and substituted a corrected handbill referring only to cigarettes. This revised handbill was used exclusively thereafter at all Furr's stores until Furr's decided to cease purchasing cigarettes from Lohman.

Initially, in evaluating this contention by the General Counsel, it is clear and I find that there is no evidence in the record that this handbilling had, "an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pickup, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution"; this manifestly refers to an employee or an individual refusing to perform services in behalf of the secondary employer or distributor. It does not refer to a decision on the part of the secondary employer to cease the business relationship, as was the case with Furr's.

To adopt the position of the General Counsel herein would be tantamount to finding that a handbill is in the position of an *insurer* who warrants that the content of the handbill is 100 percent correct. This is highlighted by the fact, that unlike refusal to bargain cases where a labor organization as a recognized bargaining representative is entitled to obtain wage and other pertinent information to assist it in representing its constituents, here the only issue is whether a labor organization has "truthfully" advised the public of the dispute. This is not the case here where there is no evidence of an intent to deceive and there has not been a substantial departure from fact.

Each case, I believe, must turn on its own facts and, of course, were a labor organization to substantially and wilfully distort facts, an adverse inference would well be warranted.

Here, Respondent prepared handbills which did not specifically state or use words to the effect that suppliers other than Lohman were supplying goods to some of these stores. Significantly, none of these retailers protested the language of the handbill. In all fairness, I believe that the handbill is somewhat equivocal in nature, on the one hand lending itself to an inference that Lohman is an exclusive source of supply and yet, on the other hand, not stating in words that all such merchandise was distributed by Lohman.

What I deem to be significant herein is the effort of Respondent to tailor the handbill accurately and truthfully to the dispute. Manifestly, Furr's was the largest concern by far as to which testimony was developed and it purchased only cigarettes and these on an exclusive basis from Lohman. If Respondent were motivated to stretch the handbill into untruthful publicity, the incentive was great. And yet on being advised that the handbill was inaccurate, Respondent immediately printed a correction and used only the corrected handbills thereafter.

To sum up, on the facts of this case, the errors were slight and unintended and no inference is warranted that the handbills were untruthful. Indeed, several weeks before the instant hearing Respondent devised a new handbill which even more clearly narrowed the dispute to Lohman, this handbill asking that the consumer not purchase any cigarettes delivered to the store by Lohman. I find, therefore, that the evidence developed herein does not support this aspect of the position of the General Counsel.

(4) Turning to the allegation that Respondent threatened, restrained, or coerced customers of Lohman with an object of achieving a cessation of business between them and Lohman, thereby violating Section 8(b)(4)(ii)(B) of the Act, the evidence will not support such a finding. Conceivably, if handbilling were to be equated with picketing a contrary result might follow, but, as previously demonstrated, constitutional questions aside, Congress did not so intend. Moreover, there is no evidence of any threats, restraint, or coercion directed to any areas other than the handbilling.

(5) One troublesome aspect of the allegation of a violation of Section 8(b)(4)(i)(B) of the Act remains. Has Respondent induced or encouraged "any individual" to refuse to process or work on Lohman goods with an object of forcing the enterprise for which he works to cease doing business with Lohman?

Initially, the term "individual" warrants consideration for it is clearly a broader term than employee and deliberately so. The legislative history is replete with references to an intent to reach inducement of supervisors, contrary to the situation under the language of the Act prior to its amendment, where only "employees" were referred to. On the other hand, this clearly does not extend to an entrepreneur or a partner in a venture, because neither is "employed" by another. And it is also readily apparent that top management of a large corporation is well beyond the normal supervisory level in a shop or plant. See *Swift & Company*, 115 NLRB 752; and *American Radiator and Standard Sanitary Corporation (Louisville Works)*, 119 NLRB 1715.

Although it may well be anomalous to hold, for example, that this section of the Act extends to one who is a national sales manager for an automobile manufacturer, assuming he is not a corporate officer, and yet does not extend to the proprietor of a grocery or a pharmacy, one can only apply the language as written.

I am applying the term "individual" herein to any employee or supervisor, but not to one who is an entrepreneur, partner, or corporate officer. This is so because a corporation acts only through its officers and they are on the plane of the entrepreneur or partner. And although a distinction could be made between a supervisor and a top-level representative of management who is not a corporate officer, as appears in one of the instances set forth below, I see no basis for such a distinction in terms of the legislative history or from a literal reading of the Act.

Thus, the requests made upon the proprietors of Parker Pharmacy, Hatch Drug Store, Staab Sherman Plaza Drug Store, and Columbine Pharmacy to cease the Lohman business relationship are not deemed to have been requests to an "individual."² The request of Day Cashier Gioia of Owl Drug Store is on a different plane. She was handed a handbill by an agent of Respondent and asked not to order merchandise from Lohman, this being one of her normal tasks in the course of her employment as an employee of this concern.

Although a similar request was advanced to Edwin Adler of Owl Drug Store, which is apparently a corporation, Adler's testimony discloses that not only is he president, but significantly, that he is one of the owners of the concern. Therefore, primarily in view of the latter consideration, no finding adverse to Respondent is predicated on the contact of Adler.

The record discloses a number of contacts of Furr's personnel, requesting a cessation of purchases of merchandise from Lohman. These included McGuire, a general merchandise supervisor over nine stores who may possibly be of managerial stature under Board policy; Moore, a drug department supervisor in one store; Crow, a manager over one store; and Thompson, a store manager at one store. This discussion, however, is limited to the oral requests made of these individuals

²The record does not disclose whether these concerns are corporations.

and not to subsequent handbilling of Furr's stores which has been treated previously.

I find, as alleged by the complaint, that Respondent has induced and encouraged individuals employed by Owl Drug Company and Furr's to cease handling or using Lohman products with an object of forcing those two concerns to cease using or selling Lohman products and to cease doing business with Lohman, that Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) (B) of the Act, and that Respondent has not otherwise engaged in unfair labor practices.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local 537, is a labor organization within the meaning of Section 2(5) of the Act.

2. By inducing or encouraging individuals employed by persons other than Lohman Sales Company to refuse to use or handle goods distributed by said Lohman with an object of forcing or requiring such other persons to cease using, selling, handling, or dealing in the products of said Lohman, Respondent has engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) (B) of the Act.

3. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not otherwise engaged in unfair labor practices within the meaning of Section 8(b) (4) (i) (B) or 8(b) (4) (ii) (B) of the Act.

[Recommendations omitted from publication.]

U.S. Chaircraft, Inc. and Industrial Workers Federation of Labor, Local 886, Petitioner. *Case No. 21-RC-6588. August 10, 1961*

DECISION AND ORDER

On August 5, 1960, Industrial Workers Federation of Labor, Local 886, herein called Petitioner, filed a petition in the above-entitled case. Thereafter, the Employer and the Petitioner entered into an agreement for consent election. Pursuant thereto an election was held, as a result of which the Petitioner was certified August 22, 1960.

On February 15, 1961, Local 976, International Union, Allied Industrial Workers of America, AFL-CIO, herein called Local 976, filed a motion to vacate the election and certification, upon the ground that the Employer and the Petitioner failed to inform the Regional Director that Local 976 had previously demanded recognition as the bargaining agent of the employees and was or may have been interested in the case.