ORIGINAL

In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

V.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, ETC.,

RESPONDENT.

No. 79-672

Washington, D. C.
April 15, 1980

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NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 79-672
RETAIL STORE EMPLOYEES UNION, LOCAL 1001, ETC., Respondents.	:	

Washington, D. C.,

Tuesday, April 15, 1980.

The above-entitled matter came on for oral argument at 2:09 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20570; on behalf of the Petitioner

LAURENCE GOLD, ESQ., 815 - 16th Street, N. W., Washington, D. C. 20006; on behalf of the Respondents

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 79-672, National Labor Relations Board v. Retail Store Employees Union.

Mr. Come, you may proceed.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COME: Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the District of Columbia Circuit which, sitting en banc and dividing five-to-four, denied enforcement of the Board's order against the union, a local of the Retail Clerks International, which the Board found had engaged in secondary picketing in violation of section 8(b)(4)(iiv) of the National Labor Relations Act.

This section makes it an unfair labor practice for a labor organization to threaten, coerce or restrain any person for an object of forcing him to cease dealing in the products of or otherwise to cease doing business with any other person. A proviso to this section excepts publicity other than picketing for the purpose of truthfully advising the public that the product or products are produced by an employer with whom the union has a primary dispute and are distributed by another employer.

The question of whether the picketing here violates section 8(b)(4)(iiv) turns on an application of the principles enunciated by this Court in the Tree Fruits decision in 1964. The relevant facts --

QUESTION: It turns on the basis of the statute, doesn't it, and naturally the cases in this Court interpret the statute, but the basic criteria is the statutory language.

MR. COME: That is correct except that in Tree Fruits, as I will indicate, the Court did interpret that language as applied to picketing of this general character. But at the bottom we do get back to the interpretation of the statute and that was what Tree Fruits attempted to do.

The union has is the certified bargaining representative of certain employees of Safeco Title Insurance Company, and it called a strike following an impasse in negotiations over an initial contract. In addition to picketing Safeco's office, striking employees also engaged in picketing of five land title companies that sell only Safeco title insurance policies. The signs carried by the pickets stated that Safeco is non-union and did not have a contract with the union and the handbills which were distributed to the general public requested that members of the public boycott Safeco insurance.

The union's activities at the land title companies

did not cause any work stoppages or interference with deliveries.

Now, from 90 to 95 percent of the income of the land title companies is derived from the issuance of Safeco title insurance policies. The remaining 5 to 10 percent comes from title research and escrow services. Each land title company operates under an agency contract with Safeco, under which Safeco underwrites all of its title insurance and the land title company agrees not to act as an agent for any other title insurance company.

Safeco owns stock in all of the land title companies; 53 percent in one and amounts ranging from 18 to 38 percent in the other four. The remaining stock is held by various individuals.

An officer of Safeco serves as a member of the board of directors of each land title company, and two serve on the board of the company in which Safeco owns 53 percent of the stock. However, each land title company independently establishes its own wages, hours, and other terms and conditions of employment for its own employees, and there is no interchange of employees between the land title companies and Safeco.

Based upon these facts, the board concluded that despite the land title companies' economic dependence on Safeco for the underwriting of the title insurance, each

land title company retained control over their own labor relations policies and their day-to-day operations, and therefore they were independent companies and not allied or part of Safeco. The court of appeals sustained this finding and the union does not challenge it here. So for purposes of this case, the land title companies are neutral employers, for purposes of Section 8(b)(4)(B) of the statute.

The board then considered the application of Tree Fruits, where this court ruled that Section 8(b)(4)(iiv) permits a union to engage in consumer picketing at the site of a secondary employer directed only at the struck product, but outlaws a union appeal at a secondary site which has the effect of causing consumers not to trade at all with the secondary employer. And the board with two members dissenting concluded that although the union's secondary site picketing was limited to Safeco's products, picketing violated 8(b)(4)(iiv) because it was reasonably calculated to induce customers not to patronize the neutral title companies at all. Since virtually all of their business consisted of Safeco title insurance, the picketing, if successful, would necessarily result in a total boycott of the title company's business.

Because of the proviso to 8(b)(4)(B) which I alluded to earlier, the union's handling of the title

companies was neither alleged nor found to be a violation of the statute. The only thing that was interdicted was the picket line in front of the title companies.

Now, we submit that the board's application of Tree Fruits is a reasonable application of that -- of the principles articulated in that decision.

The union in Tree Fruits, as the court will recall, picketed neutral Safeway stores to persuade Safeway's customers to boycott Washington State apples, in support of a dispute that the union had with the packers and distributers of those apples. Rejecting the board's ruling that all such secondary picketing was violative of the statute, the board determined that in enacting Section 8(b)(4)(iiv), the court had meant to outlaw peaceful consumer picketing employed to persuade the customers of the secondary employer -- I am quoting from the court -- "to cease trading with them in order to force him to put pressure upon the primary employer," but that Congress did not intend to outlaw picketing, which as in the case before it, only persuades the neutral customers not to buy the struck product.

The court explained that 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. But on the other hand, when consumer

picketing is employed to persuade customers not to trade at all with the secondary employer, the union does more than merely follow the struck product, it creates a separate dispute with the secondary employer.

Now, the facts of Tree Fruits permitted a clear distinction between picketing limited to persuading customers not to buy the struck product and picketing aimed at the secondary's patronage generally, because apples occupy but a small portion of Safeway's retail shelves, and the union could urge Safeway's customers to refrain from buying the apples without asking that they cease trading with Safeway altogether.

Here such a sharp distinction cannot be made, because although the picketing is directed at the struck product, that product constitutes virtually all the neutral's business, and in these circumstances, the picketing necessarily, if successful, would result in a boycott of the neutral's total business. And in that kind of a situation, one interest must yield; either the union's interest in maximizing pressure on the primary, or the neutral's interest in avoiding a boycott of his total business.

And we submit that in the light of the legislative history of the 1959 amendments to the act, which is set forth at length in the various opinions in Tree Fruits, this history would show the desire on the part of Congress

to protect neutral employers from secondary picketing, at least where it calls for a boycott of neutral's total business.

The board was not unreasonable in striking the balance here in favor of the neutral employer.

QUESTION: Were these neutral employers?

MR. COME: They were on the finding of the board that was sustained by the court of appeals.

QUESTION: The fact is, they were owned or partially owned by the producer of the boycotted product, weren't they?

MR. COME: That is correct, but under the established principles that are applied with respect to determining neutrality, you look at a number of factors. The degree of common ownership and control, degree of economic interdependence, also the degree of control over labor relations in the day to day operations of the entity. The board found that looking at all of these factors, they predominated in favor of the finding of neutrality, because although there was some common ownership and some representation of sharing of directors, in terms of the actual control over the labor relations, Safeco had no control over that. And that is the key --

QUESTION: Mr. Come, could there possibly be a difference between the branch which was 53 percent owned

and the other end of the spectrum, 17 percent owned? The board did not consider that, did it?

MR. COME: The board did consider that one as well as the others --

QUESTION: But did it address itself to that distinction?

MR. COME: Yes, it found that despite the fact that there was more ownership in that case, there was still no showing that there was any, that that additional amount of stock ownership had resulted in any greater interference or control by Safeco over the labor relations policies of the land title companies. And therefore, in terms of the finding of neutrality, there was no difference because the essence of what makes a neutral for 8(b)(4)(B) purposes is whether or not the neutral is powerless to resolve the underlying dispute with the primary, other than by ceasing to do business with the primary. The board found, and the court of appeals sustained its finding, that that was the situation of the land title companies here, even the one with the 53 percent.

QUESTION: What you are saying is that the title company could, Safeco could control the five or six retailers, as it were, but the retailers couldn't control Safeco?

MR. COME: That is correct.

Our second point is that if the board's interpretation of the statute as applying to, as interdicting this type picketing is upheld, we do not believe that as the union urges, that a substantial constitutional problem is presented. The union has devoted a substantial portion of its brief to this contention.

We believe that the constitutional phase of this case was settled by this court many years ago in Hughes v. Superior Court, and which principles have been followed as recently as several months ago in Babbitt v. Farm Workers. The nub of the point is that, as we read the cases, it is settled law that picketing is a mode of communication that is inseparably -- that while picketing is a mode of communication, it's inseparably something more and different. It is more than free speech, since it involves patrol of a particular locality, and since the very presence of a picket line may induce action of one kind or another quite different from the nature of the ideas which are being disseminated, and that --

QUESTION: Wouldn't that go all the way back to Thornhill v. Alabama, that picketing is free speech plus?

MR. COMB: Well, I think it does. Thornhill, of course, held that a blanket ban on all picketing would be unconstitutional and --

QUESTION: But it also recognized that picketing

was in --

MR. COME: Well, certainly since Rowell, which came a year or two after Thornhill, and Ritterer's Cafe, which followed Rowell, and then we moved to the -- this was in the early '40's, and then we moved up to the early '50's with Hughes and Gazzam and --

QUESTION: Giboney is the one I seem to remember.

MR. COME: Well, Giboney --

QUESTION: The ice company?

MR. COME: That is the ice company. Now, it is argued here that Giboney is distinguishable because in Giboney, the picketing sought an action which was itself made unlawful under a state law, namely it was the support of an objective that would violate the state antitrust laws. It's argued here that the objective sought by this picketing is not unlawful in that sense, because there's nothing unlawful for a consumer to boycott a title company or a retail store for reasons of his own, nor by virtue of the publicity proviso to 8(b)(4) would it be unlawful for a union by the publicity other than picketing to seek to induce such a boycott.

We submit, however, though, that Hughes shows that you don't have to have an objective that is unlawful in that sense for a state or the Federal Government to restrict its attainment by a form of coercion such as is

represented by secondary picketing. In the Langer case, the court sustained the constitutionality of a ban on picketing that (iv) imposed against peaceful picketing that induced employees, secondary employees, to strike in furtherance of a secondary boycott objective. The court held that Congress in furtherance of its legitimate objective of avoiding interferences to interstate commerce, which are caused by bringing coercive pressures on neutrals in labor disputes that they are powerless to resolve, could restrict that form of secondary picketing in furtherance of that legitimate governmental objective.

Similarly, we submit that Congress could likewise proscribe secondary consumer picketing, at least, whereas here it calls for a total boycott of the neutral's business in furtherance of its objective of freeing neutrals from these pressures.

And indeed, in the Farm Workers v. Babbitt case, in which this court, to be sure, was interpreting, was considering the state statute, the Arizona farm labor statute, and they had a publicity proviso there and the question was whether it was unconstitutional, the court in setting aside the lower court's holding of unconstitutionality indicated publicity stood on a different footing than picketing, that Hughes had recognized that picketing was more than publicity, and that it would certainly be

constitutional to prescribe picketing that would cut off the entire business of a neutral employer.

QUESTION: Mr. Come, in Safeco's brief here, there is a suggestion, and indeed more than a suggestion, that we reconsider Tree Fruits. You stop short of that recommendation, I take it?

MR. COME: We do. The board has lived with Tree Fruits for 16 years. It feels that it can continue to live with it, but it feels that this case is distinguishable from the situation in Tree Fruits, and is asking for affirmance on that basis.

QUESTION: Mr. Come, is there any question but what, if in Tree Fruits the picketing had said, instead of don't buy apples, but don't deal with Safeway because they are buying apples from a bad person, would that picketing have been secondary?

MR. COME: As I read the decision, it would be.

QUESTION: Is there some, are there some other cases here that say that would be -- I guess the board certainly would say that that was illegal secondary picketing, right?

MR. COME: Yes.

QUESTION: Are there any cases here that say that it would be? Except by negative inference from Tree Fruits?

MR. COME: I don't --

QUESTION: Or Justice Harlan's dissent in Tree Fruits?

MR. COME: Well, as to whether the dissent accurately interpreted the majority opinion, of course, is the question that we have now. Judge Friendly once put it, dissents often are more accurately reflective of Cassandra's gloom than her accuracy.

But the board since, after Tree Fruits, was not faced with a single product situation. The way the progression developed was, the first cases that we got, the board got, involved so-called merged product situations, where for example you had a dispute with a bread company and you'd picket a restaurant and ask the patrons not to use the bread when they went to the restaurant, and the board held and the courts uniformly agreed that in that kind of a situation, you couldn't separate out the struck product, and therefore you necessarily were calling for a total boycott of the business.

And the court below accepted the merged product distinction in an earlier case on a little typographical union, but it balked at carrying what we feel is the logical progression of merged product cases to situations such as we have here, where the struck product constitutes the neutral's entire business.

QUESTION: Very well.

MR. COME: Thank you.

QUESTION: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GOLD: Mr. Chief Justice, and may it please the court:

The point of agreement between the board and ourselves is that this case raises an issue which is a variation on that considered in the Tree Fruits case, and that in deciding Tree Fruits, the court construed Section 8(b)(4)(ii)(B) and stated its construction and the meaning of that statutory provision at 377 US 72.

QUESTION: Mr. Gold, do you have any doubt that on the record before us the union in this case violated the literal language of the prohibition?

MR. GOLD: Yes, I do have a doubt of that and the reason is stated in Tree Fruits. The literal language says that you can't restrain and coerce. Tree Fruits tells us that at least some picketing designed to get consumers not to purchase a struck good is not the same as coercion within the meaning of those words. Those words don't have one meaning, and the court accorded them the meaning that it believed was fairest and most rational, given --

QUESTION: But what if Tree Fruits had never been

decided? Would you still say that there is a great deal of room for argument that the union did not violate this statute as written?

MR. GOLD: Obviously, the argument was made and accepted as an initial proposition. It has to be an initial proposition at some stage. After the statute was passed, the argument was made and eventually it was accepted that those words don't include product struck picketing. Obviously, I believe that that construction is both rational and possible. I am confirmed in that as I stand here by the fact that a majority agreed with it, but before that was true, the argument had to be made based on the language, the general meaning of those words, the legislative history of the statute, the overall approach towards construing the statute, and that was done.

QUESTION: Yes, but what I was asking was the enacted will of Congress, as Holmes put it at one time, the language that Congress actually enacted, apart from legislative history or anything else.

MR. GOLD: I would answer that question by saying that the words "restrain" and "coerce" are not self-defining words and that if we had no legislative history, I would certainly agree with you that it's possible to include peaceful picketing by a single person asking a consumer not to buy a product, but if I were charged with

interpreting the statute, I would not so construe it. And as I say, the court did not so construe it.

QUESTION: What about the question I asked Mr. Come: Is there any question that if in Tree Fruits the picketing had been directed at Safeway generally, saying to consumers, "Don't deal with Safeway because Safeway is dealing with the apple grower," that would be an illegal --

MR. GOLD: Yes. We understand the statement of the rule in the case to be that the, that Section 8(b)(4)(ii) was intended to cover picketing persuading customers of the secondary employer to cease all trading with him. That is the statement of the rule in the case.

QUESTION: Yes, but if you picket Safeway, you are asking consumers, "Don't deal with Safeway," and then you say because you're asking consumers generally not to deal with Safeway, you say that's enough of a pressure on Safeway not to deal with the apple grower to amount to restraint and coercion within the meaning of the section; is that it?

MR. GOLD: That is the construction of the statute as I understand it. In other words, and this was the point I was going to get to, and I believe it's responsive to the question you're asking now: Both in our brief and in the board's brief we set out in full, in our brief at pages 16 and 17, the ultimate rationale of the

court from 377 US 72. We start at the same place; we end at the same place, and there are no elisions in either brief.

What that passage says, we believe, is not simply that picketing aimed at the secondary's patronage generally is unlawful, but it also explains why it's unlawful, and thereby provides a basis for deciding future cases.

QUESTION: And would you say that that kind of an application of the statute that I just proposed would be constitutional?

MR. GOLD: No.

QUESTION: I beg your pardon?

MR. GOLD: No.

QUESTION: So your constitutional argument says that even if you picketed Safeway generally and said, "Don't deal with Safeway generally because Safeway is dealing with the apple grower" -- you say that's unconstitutional?

MR. GOLD: Yes. I want to make it clear that I can imagine a path of decision very much like the common law which would distinguish between what was called fair persuasion limited to the goods and going beyond that, for the reasons I will express. We will suggest that such a line is unsound on a constitutional basis --

QUESTION: How can you justify your answer to

Mr. Justice White's question in the light of Giboney?

MR. GOLD: Well, there are several justifications. First of all, in Giboney, the union was seeking two unlawful objects: It was a crime under the law of the state, under the law of Missouri, for the picketed employer to refuse to deal, to join a concerted boycott. In addition, it was a crime for employees to engage in concerted refusals to work.

QUESTION: But that just makes the tail follow the dog. The state in effect decides what is protected and what isn't protected under the First Amendment.

MR. GOLD: Well, I think that's always true. It seems to me that the tail wags the dog if you don't begin that way. If the conduct isn't unlawful, to ask for conduct would seem to be protected by the First Amendment, for us it's difficult to understand what the First Amendment is about. On the other hand, the First Amendment doesn't protect me if I threaten to punch somebody in the nose or invite somebody to engage in the crime of murder, and that has been understood ever since Fox v. Washington. There is a class of verbal acts which are unlawful.

But it is a very strange First Amendment, I would suggest to you, that bars a request to a member of the general public to do something which under state law he has every right to do.

And indeed, as I intend to argue, under Virginia Pharmacy Board and cases like Linmark, the First Amendment has been recognized to protect the right of individuals to truthfully state a fact which is relevant to a buying decision, price or the fact that it was made under struck conditions, at least so long as the recipient of that message, the consumer, is free to take it into account or not, and we don't understand how it could be otherwise. We don't understand how there could be a rational distinction in terms of the right of the unions to state such a message, and the right of pharmacists to state the price at which they sell goods.

QUESTION: What about the message to the employees of the secondary?

MR. GOLD: Well, that --

QUESTION: Picketing to the employees of the secondary employer? Just giving them information?

MR. GOLD: Well, if they have a right not to work, I would be up here making precisely the same argument. If they had the right to engage in a concerted refusal to work. But I understand that Congress and the states have the right to regulate concerted refusals to work. That's been understood for a very long time. That's certainly regulating conduct, and I would not argue otherwise. And if conduct is regulated and within the limits of the

imminent danger test of Brandenberg, if you invite those employees to engage in an illegal act or if, as cases all have been, in effect ordering them to do so on pain of union discipline, can be made unlawful compatible with the First Amendment, just the way conspiracy can, invitations to engage in a murder, or any other unlawful activity.

So to that extent, we don't believe that unions or anyone else are protected by the First Amendment. But what we find and what we suggest to be the novel and important issue here is whether a communication to members of the general public under at least, under non-coercive circumstances, can be interdicted even though the request made contains truthful information and asks for an entirely lawful response. We don't understand how it can be, and we would suggest that there has not yet been a case in this court which says that it can be or that it should be.

QUESTION: Where were these pickets stationed? Were they all on some sort of public --

MR. GOLD: They were all on public thoroughfares which, ever since Hague v. CIO has been recognized as a public forum in business areas where problems of privacy and so on, which you were discussing in this morning's case, are not present.

QUESTION: Well, certainly not all public property is a public forum?

MR. GOLD: No, but the streets, the parks --

QUESTION: You say here all the pickets were stationed at places which would be public forums under our cases?

MR. GOLD: Yes.

To return, if I could, to the statutory argument, which as Mr. Justice White has pointed out is far narrower than the constitutional argument that we make, the court at 377 US 72, which as I noted is set out at pages 16 and 17 of our brief, not only stated that picketing carried out at the-- picketing aimed at the secondary's patronage generally is unlawful, but also stated what it meant by that term.

The board approach in this case assumes that that phrase was uttered and that the court did not explain at all what it meant. We think that that's an unfair reading of the opinion. It seems to us that what the opinion says, it's own words, is, quote, "On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product not because of a falling demand, but in response to pressure designed to inflict injury on his business generally."

In other words, if the union goes beyond the product and asks people not to buy other products sold by

that employer, it has widened the dispute and in that sense has acted improperly for statutory purposes.

QUESTION: Where do we find, Mr. Gold, the language that the customers are not very analytical when they see the picket sign to decide whether you're picketing a particular brand of oleomargarine or apples, or whether they're just picketing, picketing generally?

MR. GOLD: I believe on the next page the court dealt with that and said that be that as it may, if the union is meeting its obligation, namely to fairly advise the public what its dispute is, that it is within the statute.

As we point out in our brief, the situation is not different from the line drawn in so-called common situs situations where a union does or does not violate law, depending on whether it fairly advises the limits of the dispute and who the dispute is with. I think the theory of the opinion is that the wrong is if the union extends the dispute, not if people choose to ignore what the sign says and go beyond it.

QUESTION: Well, for nearly 24 years, almost exactly 24 years, I have heard arguments including some of yours, Mr. Gold, at the court of appeals and here, that on these fine shadings the court should rely on the board. Now the board has engaged in all that process here, but

you're telling us that the board's -- I don't think the board expertise appears in your brief there.

MR. GOLD: No, it won't cross my lips today.

QUESTION: No, I didn't think it would.

Now, what's happened to the board's expertise in this very subtle and sophisticated area that we've been told for so long should be the province of the board and not judges?

MR. GOLD: I would argue that what has happened is Tree Fruits. As I understand the nature of judicial review, at the initial stage, the court gives deference to the agency's expertise. But that process is not allowed, I think the term is to slip into inertia, and once the court has acted, the agency's obligation is to fairly read the opinion. Our whole first point --

QUESTION: Well, did I hear you earlier suggest that the literal language of the statute, that the board's construction was consistent with the literal language of the statute here?

MR. GOLD: No more or less than it was in Tree Fruits. But certainly whether it is your opinion in Catholic Archbishop of Chicago or the more recent opinion in the Yeshiva case, the board's expertise has never, obviously never given complete sway, and --

QUESTION: Well, when you're dealing with the

Catholic bishop's case, for example, you're dealing with what is or is not in the statute, not with the nuances and shadings of the language in the statute.

MR. GOLD: Well, but, that is precisely what we are dealing with here. In Yeshiva we were dealing with the nuances of the term "managerial employees" that doesn't even appear in the statute, and the brunt of the opinion, as I understand it, was that the court having treated with that issue in prior cases, the board had an obligation to follow with deference and with respect what the court has said.

We believe quite clearly that the board hasn't fulfilled that most central function to an orderly system of Federal statutory interpretation and elaboration.

As I say, my first reason, our first reason for that is the fact that the board has given no reference to the context in which the critical phrases were used in the opinion and has ignored absolutely the example we set out from the court's opinion on page 17 of our brief, which we think makes its intent absolutely lucid.

In addition, I would like to point out on this portion of the case that the board has indeed adopted the very theory of the Tree Fruits court of appeals rejected in this court. The court of appeals in that case said that the board was wrong, but said also that the

case should be remanded to determine economic impact, possible economic impact, on Safeway.

The heart of the board's theory here and its leading case is that Tree Fruits rests on the minimal impact of the picketing on Safeway, as compared to the predictable economic effect of the picketing here which would cause the agencies to abandon the primary in favor of a new source of supply. That is precisely the test we would suggest that was rejected in Tree Fruits.

I would -- I have ten minutes left -- I would like to discuss both the constitutional arguments that we make.

Interestingly enough, Justice Black concurred in Tree Fruits on the ground not of statutory interpretation, but that, and quoting from his opinion as set out at page 33 of our brief, "While others are left free to picket for other reasons, those who wish to picket to inform Safeway customers of their labor dispute with the primary employer are barred from picketing solely on the ground of the lawful information they want to impart to customers."

The court, of course, eventually in Mosely and then in Erznoznik, Bellotti, the Chief Justice's opinion in City of Madison, has adopted Justice Black's view of the special consideration that has to be given to an anti-discrimination principle in the First Amendment area.

QUESTION: Could I ask you a question?

You distinguished the Hughes case in your brief by quoting at some length from Professor Cox's article, and he in turn draws the distinction between picketing backed by the threat of economic sanctions and picketing which appeals only to reason. In this case, I guess there were no, there was no interference with delivery involved. Now, had you had a situation in which, although your message was precisely the same, the Teamsters cut off delivery because they'd have to cross a picket line. Would that be a different case, or would it be the same case?

MR. GOLD: I would concede it would be a different case. In other words, I don't believe that Congress in regulating signals to organized employees not to engage -- excuse me -- signals to organized employees to engage in a concerted work stoppage need adopt an intent as opposed to an effects test.

But we do argue that labor unions or any other organization in this society, unions have one out of every four working people in their ranks; there are many who aren't even organizable who have no control over the individuals they are appealing to. Can carry a placard, which is the essence of picketing, asking members of the general public to do something they have a right to do.

QUESTION: But the problem I have is, it seemed

to me you might have two cases in which the message is precisely the same in terms it's addressed just to consumers who are around the stores; one of them might produce economic consequences that the other one did not. Would they be equally lawful, or would their legality turn on whether there were adverse economic consequences?

MR. GOLD: I would argue that their constitutionality would turn, (a), on whether the conduct that they stimulated has been regulated and banned, and (2), on whether the message can be fairly read as addressed to create a consumer -- I mean to create a concerted work stoppage.

I'm not saying that we will never be here, arguing that it is so unfair to Reed if we won this case, that it's so unfair to Reed, our sign is directed to the employees, that we went up and we pleaded with them, "Let's take that case."

Suppose there's a case where the union officials go up and plead, and the district judge finds in good faith with the employees not to engage in a concerted work stoppage, and nonetheless the picketing is enjoined on a pure effects test. I think that is a difficult constitutional case, if that effect is used to ban all communication to everybody in the area. But I'm many steps from having the luxury of arguing that case to you.

Mr. Cone argues that we can't even appeal to consumers if we don't cause a single illegal consequence.

QUESTION: But it seemed to me that Cox' distinction didn't turn on the legality of the economic sanction. I think, if I understood him correctly, he was suggesting that picketing would be unprotected if it had these economic consequences, even though it were perfectly lawful for the, say the Teamsters to cut off deliveries, because --

MR. GOLD: Well, I don't read his article to get to that point. He -- that portion of his article is arguing against equating picketing for -- picketing addressed to consumers with so-called signal picketing, addressed to workers.

In other portions of his article, he questions cases like Hankle and Gazzam and so on, which we discussed in our brief, which seem to relax the Giboney standard and which suggest that picketing can be banned even though it causes no unlawful end, but only an end in a very strained sense, which is against public policy, even though the public policy doesn't ban the conduct which takes place. That would be like saying that you can ban leafletting, asking people to do something lawful, because you disagree with the ultimate social utility of the message. We think that's an entirely wrong and terribly dangerous

idea.

QUESTION: Well, I wonder if the Hughes case isn't pretty close to that?

MR. GOLD: Well, the Hughes case can be read as being close to that. It may be a case in which there was an unlawful ultimate object. You can read the California cases different ways.

QUESTION: Well, the unlawful ultimate object there is to urge affirmative action, as I remember?

MR. GOLD: Well, that's right, and at that point the supposition was that California could ban affirmative action and the California opinions can be read as either banning it or not. Justice Frankfurter says two different things in two different passages.

We do believe for five separate reasons that Hughes has been passed by, that it's analysis is unsound. We think first of all that without acknowledging it, it expands Giboney to change the requirement from an unlawful object to one which is against public policy in this very unusual use of that term;

That secondly Hughes rests on the proposition that speech which is not an appeal to reason can be banned, a view which is absolutely incompatible, we would suggest, with cases such as Cohen and Spence v. Washington;

Next, Hughes rests on the premise which we think

is absolutely contrary to the test stated in United States v. O'Brien that picketing can be banned because it involves conduct and without regard to whether the ban is absolutely necessary to prevent wrongful conduct and doesn't cut into expressive speech any more than is necessary.

And I want to say something at this point about the meaning of picketing and the meaning of compulsion. Mr. Justice Marshall, in his opinion in the Mosely case, noted that picketing can be an act by a single person walking back and forth with a placard. Now, there can be statements and opinions and statements by the board that that is inherently compulsive, in the sense that it would frighten away somebody from crossing. But we don't think that there is an iota of reality to that. That is no more threatening than going up to someone and asking him if he'll sign a petition. It's no more threatening than going up and asking him if he will take a leaflet.

We ask you to look at the record in No. 88 1964 Term Tree Fruits at two rather dignified ladies picketing in Tree Fruits, and we ask you if it is fair to say that they were engaged in compulsive activity.

QUESTION: Do you have anything further, Mr. Come?

ORAL ARGUMENT BY NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. COME: I just wanted to make one point, and

that is that the distinction between signal picketing and publicity picketing was rejected by the court in Hughes. There Justice Frankfurter, speaking for the court and talking about publicity picketing, said that it no less than signal picketing was speech plus, and it was because of the plus aspects that it could be regulated by the legislature in furtherance of a legitimate, narrow objective, and certainly eliminating coercion on neutrals in labor disputes is an objective within the prerogatives of Congress, as this court has recognized.

I have nothing further to add, unless the court has any questions.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:07 o'clock p.m., the case in the above-entitled matter was submitted.)

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