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When Can A Union Ask Consumers Not To Shop At A Shopping Mall?

By Jay E. Grenig

Edward J. DeBartolo Corp.
v.
**Florida Gulf Coast Building and
Construction Trades Council, AFL-CIO**
(Docket No. 86-1461)

Argued January 20, 1988

ISSUES

This case presents the difficult question of what restrictions can be placed on a labor union's practice of passing out handbills asking customers not to patronize a shopping mall.

FACTS

For a short time in 1979 and 1980, the Florida Gulf Coast Building and Construction Trades Council (Union) passed out handbills to customers at a shopping mall owned by the Edward J. DeBartolo Corporation, asking the customers not to patronize the stores in the mall because High Construction Company was building a department store for a tenant there and allegedly paying substandard wages. The handbills asked customers not to shop at any of the stores in the mall "because of the mall ownership's contribution to substandard wages."

DeBartolo filed unfair labor practice charges, alleging that the Union was engaging in a secondary boycott in violation of section 8(b)(4)(ii)(B) of the National Labor Relations Act. Although the Board's General Counsel issued a complaint, the National Labor Relations Board dismissed the complaint on the ground that the handbilling was protected by the publicity proviso exception to section 8(b)(4).

The United States Court of Appeals for the Fourth Circuit affirmed the Board's action (662 F.2d 264 (1981)), but the Supreme Court reversed (463 U.S. 147 (1983)). The Supreme Court held that the publicity proviso did not protect the Union's handbilling. The case was returned to the Board to determine whether the handbilling was proscribed by the Act and, if so, whether the Act violated the First Amendment.

Subsequently, the Board concluded that the Union had engaged in coercive conduct which Congress had "intended to proscribe" and that "this proscription accords with the

Constitution." The United States Court of Appeals for the Eleventh Circuit disagreed with the Board, determining that if the Act were construed to prohibit handbilling "serious constitutional issues will arise," that there was "no affirmative intention of Congress clearly expressed to prohibit [handbilling or other] nonpicketing labor publicity" and that absent such intent, the Act only prohibited picketing (796 F.2d 1328 (1986)).

BACKGROUND AND SIGNIFICANCE

Section 8(b)(4)(ii)(B) of the National Labor Relations Act prohibits a union from engaging in certain secondary activity. The secondary boycott provisions of section 8(b)(4)(ii)(B) are among the most difficult in the Act to interpret and apply.

Secondary activity includes a union's use of coercion against an employer (neutral employer) to further the union's objectives in a labor dispute with another employer (primary employer). In a secondary boycott, the union's purpose is to coerce a neutral employer to cease doing business with the secondary employer.

A union having a dispute with a primary employer sometimes desires to encourage consumers not to purchase the primary employer's goods distributed by neutral employers. The publicity proviso to section 8(b)(4) allows a union to engage in publicity other than picketing (such as passing handbills), truthfully advising the public that a good produced by a primary employer with whom the union has a dispute are distributed by a neutral employer.

If the Supreme Court holds that the handbilling was protected by the Act or the First Amendment, this could result in neutral retailers becoming enmeshed in labor disputes over which they have no control or influence. On the other hand, if the Court holds the handbilling was unprotected, then unions will be deprived of an important means of asking the public for support in labor disputes.

Because this case raises the question of what limits the First Amendment places on Congress' power to regulate economic activity, the Supreme Court's decision may have an impact on the issue of regulating cigarette and alcoholic beverage advertising.

ARGUMENTS

For the Edward J. DeBartolo Corp. (Counsel of Record, Laurence M. Cohen, 233 S. Wacker Drive, Suite 7818, Chicago, IL 60606; telephone (312) 876-0500)

1. The prohibition of section 8(b)(4)(ii)(B) encompasses

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coercive secondary conduct not protected by the publicity proviso.

2. The regulation of coercive unprotected secondary conduct imposes no impermissible restriction upon constitutionally protected speech.

For the National Labor Relations Board Supporting the Edward J. DeBartolo Corp. (Counsel, Glen D. Nager, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)

1. A union "threatens, coerces, or restrains" a neutral employer within the meaning of the National Labor Relations Act when it distributes handbills urging a total consumer boycott of a neutral employer's business.
2. The Act, as applied to the union's handbilling, does not violate the First Amendment.

For the Florida Gulf Coast Building and Construction Trades Council (Council of Record, Laurence Gold, 815 16th Street, NW, Washington, DC 20006; telephone (202) 637-5390)

1. Section 8(b)(4)(ii)(B) should be interpreted as limiting secondary messages through means, such as picketing, deemed to exert a coercive influence independent of the

communication's content.

2. If section 8(b)(4)(B) were construed to provide for a restraint on non-picketing communications by unions truthfully informing members of the general public about a labor dispute and urging the public to take lawful action in that dispute, the statute would violate the First Amendment.

AMICUS ARGUMENTS

In Support of the Edward J. DeBartolo Corp.

The Chamber of Commerce of the United States filed a brief arguing that consumer boycotts are coercive and may be prohibited, whether induced by handbilling or otherwise. According to another *amicus*, the American Retail Federation, handbilling by a labor union as a part of a secondary boycott is not entitled to the same protection as political speech lying at the core of the First Amendment.

In Support of Florida Gulf Coast Building Trades Council, AFL-CIO

The American Civil Liberties Union Foundation filed a brief asserting that handbilling urging a secondary boycott by consumers is speech protected by the First Amendment.