

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1985

TITLE

EDWARD J. DeBARTOLO CORP., Petitioner
v.

PLACE

NATIONAL LABOR RELATIONS BOARD, ET AL.
Washington, D. C.

DATE

March 22, 1983

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 EDWARD J. DeBARTOLO CORP., :
4 Petitioner :
5 v. : No. 81-1985
6 NATIONAL LABOR RELATIONS BOARD, :
7 ET AL. :

8 - - - - -x
9 Washington, D.C.
10 Tuesday, March 22, 1983

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 2:00 p.m.

14 APPEARANCES:
15 LAWRENCE M. COHEN, Esq., Chicago, Illinois;
16 on behalf of the Petitioner.
17 NORTON J. COME, Esq., National Labor Relations Board,
18 Washington, D.C.; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear argument
3 next in the case of DeBartolo versus NLRB. Let's just
4 give the crowd a minute or two to evaporate, Mr. Cohen.

5 Mr. Cohen, I think you may proceed whenever
6 you are ready.

7 ORAL ARGUMENT OF LAWRENCE M. COHEN, ESQ.,
8 ON BEHALF OF THE PETITIONER

9 MR. COHEN: Mr. Chief Justice, may it please
10 the Court.

11 In 1959 the Congress amended the National
12 Labor Relations Act. They had two objectives. One
13 fundamental purpose was to strike from the prohibitions
14 against secondary boycotts, close loopholes it had
15 developed under the prior act, to preclude, as this
16 Court indicated in Tree Fruits, coercion whether by
17 picketing or otherwise, of a secondary employer to force
18 him to cease doing business with the primary employer
19 with whom a union had a labor dispute.

20 At the same time, however, Congress also
21 sought to ensure that unions could appeal to the public
22 for support. That they could disseminate information
23 about a labor dispute, and that they could continue to
24 place pressure not only on a primary employer, but on
25 those secondary employers who chose to intertwine their

1 fate, who had a unity of interest with the primary on
2 the chain of production.

3 The result as it was in many other labor parts
4 -- portions of the labor law -- was a compromise. Some
5 picketing was allowed, some picketing was prohibited.
6 Some coercion was allowed, some collusion was
7 prohibited. And some handbilling and other publicity
8 was permitted, and some handbilling and other publicity
9 was prohibited. This was spelled out in the publicity
10 proviso, the Section 8(b)(4).

11 Under that proviso handbilling could take --
12 or any other publicity besides picketing is permitted if
13 three conditions are met. First, the handbilling cannot
14 be misleading. It must be for the purpose of truthfully
15 advising the public. Secondly, it cannot result in a
16 work stoppage at a secondary site. And finally, there
17 must be a producer/distributor relationship between the
18 primary and the secondary. If those conditions are met,
19 and notwithstanding that the union's conduct is
20 coercive, it's protected by the proviso.

21 If any of those conditions are not met,
22 however, and the prohibitions of Section 8(b)(4) would
23 otherwise be applicable, then there's an unlawful
24 secondary boycott.

25 The issue in this case is whether an integral

1 component of that compromise, a carefully established
2 congressional balance, the producer/distributor
3 relationship of the proviso is to be respected, and if
4 it is respected, whether that deference is compatible
5 with the First Amendment.

6 The facts of this case are generally
7 stipulated and not in dispute and they're relatively
8 simple. We here have a company, a general contractor by
9 the name of High, who is engaged to build a department
10 store for a retailer by the name of Wilson.

11 The store is to be built as an addition to an
12 existing shopping center that's already in operation,
13 and it's owned by the Petitioner, DeBartolo. The center
14 has an 85 tenant stores. It has two or three major
15 retailers, Wards, Penneys, Belks, and Wilson's is going
16 to be the fourth.

17 The union does not have any dispute with any
18 of those tenants, does not have any dispute with
19 DeBartolo. Its dispute is with High, because High is
20 not paying union standard wages and benefits. In order
21 to pressure High, the union passes out handbills at all
22 the entrances to the center and at various entrances to
23 some of the tenant stores.

24 The handbills are not directed at High's.
25 They're not directed at Wilson's. They're not confined

1 to informing the public about the dispute the union has
2 with High. Instead, what they ask is that the consumers
3 boycott all the stores at the center, in big bold
4 capital letters at the top of the handbill which is at
5 page 84, the Joint Appendix. It says, don't shop at
6 East Lake Square Mall.

7 The handbill specifically asks the customers
8 not to patronize the tenant stores. The board in the
9 Court below held that that handbill was protected by the
10 proviso, that even though it was otherwise a
11 impermissible attempt to coerce secondaries, the tenant
12 stores, it fell within the producer/distributor language
13 of the proviso.

14 The reasoning was that the product that was
15 produced by High, the Wilson store, was not only being
16 distributed by Wilson, it was being distributed by all
17 the other tenant stores that were part of the shopping
18 center.

19 Now we don't dispute here and have never
20 disputed that Wilson's was distributing a product
21 produced by High. But under Servette that's a -- and
22 the other cases the board has decided since Servette --
23 that was a distribution, the union could have properly
24 passed out its handbill urging customers not to
25 patronize Wilson's. They could of course have picketed

1 High. That would have been primary picketing. They
2 could have engaged in any kind of non-coercive activity
3 they wanted, to publicize their dispute because then you
4 would not have been under section 8(b)(4) at all. Our
5 disagreement is with the conclusion that the union could
6 coercively handbill the tenant stores.

7 QUESTION: What is coercively handbilling?

8 MR. COHEN: Coercively handbilling is saying
9 do not patronize this store.

10 QUESTION: Who is --

11 MR. COHEN: Do not shop --

12 QUESTION: Who is it coercing?

13 MR. COHEN: It's coercing the tenant stores to
14 force them to stop doing business, presumably, or put
15 pressures somehow on Wilson's and through Wilson's on
16 High. The object is to --

17 QUESTION: Why don't they, instead of using
18 that language, they had carefully explained everything
19 that was going on?

20 MR. COHEN: We would have had no dispute with
21 the handbill and it wouldn't have fallen under section
22 8(b)(4).

23 QUESTION: Why -- their bottom line would have
24 been, please do not -- please do not patronize this
25 shopping center.

1 MR. COHEN: No. The difference is when you
2 inflict economic injury.

3 QUESTION: Well, their bottom line is still --
4 their aim is to get people out of the shopping center.
5 And they just don't -- they just explain why.

6 MR. COHEN: The distinction that's been drawn
7 for the statute -- the statute uses the word coerce,
8 restraint and threaten, section 8(b)(4).

9 The way those terms have been defined, and I
10 think it's explained at footnote 11 in Servette, is
11 where you're making a request, where you're asking
12 somebody voluntarily to do something. Here's our
13 dispute. And that's all that the union was doing was
14 disseminating information about its dispute, then that
15 wouldn't have been coercive. But the type of activity
16 where you say, do not patronize, as in every Board case
17 -- they are cited at note 8 of our principal brief, note
18 14 of our reply brief -- every case, do not patronize
19 language has been considered coercive. It falls within
20 the proviso because now you're putting economic pressure
21 on. If you were saying, we had a dispute with High, and
22 that's all the union was saying, then that would be
23 permissibly disseminating --

24 QUESTION: Well, let's say we have a dispute
25 with High and here's why and therefore do not shop in

1 this shopping center.

2 MR. COHEN: It's the do not shop language that
3 then becomes coercive under the act, because now there's
4 economic pressure being put on the secondary. And
5 that's, I don't think, disputed by any of the parties in
6 the case. No one's ever claimed that this was not
7 coercive handbilling, within the meaning. They've only
8 claimed, that even though it's coercive, it fell within
9 the proviso.

10 QUESTION: But, who's the victim of the
11 coercing?

12 MR. COHEN: The victims are the tenant stores
13 --

14 QUESTION: Pardon me, the tenant stores?

15 MR. COHEN: The victims are the tenant stores
16 who are losing patronage because of a dispute that they
17 have nothing to do with whatsoever. They are losing
18 patronage because of customers who get the handbill and
19 do not shop at the tenant stores, therefore, cost them
20 business. The store, the tenant, the Belks or the store
21 --

22 QUESTION: Normally when you coerce someone --
23 if you're coercing the tenant store, you're trying to
24 get the tenant store to do something.

25 MR. COHEN: That's right.

1 QUESTION: Now, what do you want to tenant
2 store to do?

3 MR. COHEN: That's the problem of the case.
4 We don't know --

5 QUESTION: That's why it doesn't seem like
6 coercion.

7 MR. COHEN: The coercion -- they're putting
8 pressure on the tenant store. And normally in a
9 secondary case if the pressure's put on the secondary
10 because the secondary has some leverage over the
11 primary, the secondary --

12 QUESTION: But, this is not a normal case.

13 MR. COHEN: That's -- and that's why Congress
14 forbid it. If it was a normal case --

15 QUESTION: They forbid it if it's coercion.

16 MR. COHEN: They forbid it if it's coercion --

17 QUESTION: Now, how can it be coercion if you
18 put the pressure on somebody who's totally unable to do
19 anything relevant to the controversy?

20 MR. COHEN: Because the effect is the same.

21 The effect is that we lose -- we lose
22 customers. We are being -- we are being coerced even
23 though we can't do anything about the coercion. It has
24 the affect of costing us business as tenant stores, at
25 the same time that we can't correct what is the problem

1 that's giving rise to the union pressure. That's why
2 when Congress drew this producer/distributor language --

3 QUESTION: Let me put it this way, can you
4 make your argument without using the word coercion?

5 MR. COHEN: If it isn't coercion, it doesn't
6 fall under section 8(b)(4).

7 QUESTION: I see.

8 MR. COHEN: And if it doesn't fall under
9 section 8(b)(4) we wouldn't be here. But I --

10 QUESTION: But I agree with Justice Stevens,
11 you're coerced -- if you're coerced, you're coerced for
12 the purpose of making you do something. That's the only
13 way you can be coerced.

14 MR. COHEN: That's right.

15 Now, the board says we're being coerced
16 because we can do something. We can go ahead and tell
17 Wilson's, please get rid of High, and therefore, end the
18 labor problems. The union -- I mean -- the union and
19 the labor board's position is that we can solve the
20 problem. And since we can solve the problem, we fall
21 within the producer/distributor language.

22 QUESTION: So both of you agree that coerce
23 means something that we don't, at least that I don't
24 understand.

25 MR. COHEN: I think there's no dispute here.

1 It has never been argued at any stage of this
2 proceeding, and it has not been argued in any other
3 board case like this. They say they're all cited at
4 note 8 and note 14. It wasn't argued in Servette that
5 conduct of the type involved here fell within the
6 coercion restraint with --

7 QUESTION: There could be a law. It could be
8 destructive. It could be unbelievable. It could be
9 insane, but is it "coercive"?

10 MR. COHEN: As that term has been defined in
11 the National Labor Relations Act.

12 QUESTION: All right, I see --

13 MR. COHEN: And that's -- that's what we --

14 QUESTION: Is it arguable that the tenant
15 stores could put pressure on the mall owner to include
16 contractual requirements that any tenant store that's
17 building has to pay union wages or something?

18 MR. COHEN: Well, it's conceivable that
19 tenants might say, we are losing business, and go to
20 DeBartolo, the owner, and ask DeBartolo then to go to
21 Wilson's. And then ask Wilson's in turn to go to High.
22 But we're many, many stages down the chain and all
23 that's speculative.

24 It was stipulated in the record, here, that
25 neither DeBartolo nor the tenants had any power

1 whatsoever to get rid of Wilson's and to get rid of
2 High, that that was solely Wilson's decision. And that
3 was the stipulation of fact --

4 QUESTION: You argue for some unity of
5 interest theory.

6 MR. COHEN: That's correct.

7 QUESTION: But that isn't spelled out or
8 defined. And I don't know exactly how that would apply
9 or what you really have in mind.

10 MR. COHEN: Let me answer it this way. The
11 reason we use the unity of interest test is because that
12 was the term that was referred to in the Congressional
13 debates arising out of the Goldfinger case. It was the
14 term that was referred to by the contemporary
15 commentators. It was a term that Servette said was the
16 accepted definition at the time.

17 What that test means is that a union follow
18 through the chain of distribution to anyone in that
19 chain who adds to the value of the product, and put
20 pressure on anyone on that chain because they are
21 enhancing the value of what the union is doing -- I
22 mean, what the primary is doing.

23 If somebody adds the value in the terms of the
24 advertising, if somebody adds value in the terms of
25 being a wholesaler like in Servette, they are helping

1 the distribution of the product which the union has its
2 dispute with. So the union follows through the product
3 and is able under the statute to handbill any of those
4 people, and advise the public that they are assisting
5 the practices which the union deems to be unfair.

6 QUESTION: Who would that leave out? Give me
7 some example as to --

8 MR. COHEN: That would leave out, in this
9 case, the tenants who are not --

10 QUESTION: Okay. But how about other
11 examples, because if the Court were to adopt such a
12 test, we'd have to be concerned about other examples.
13 What if the construction were up in New York City at a
14 Bloomingdale's store, could you handbill the
15 Bloomingdale's store in Washington?

16 MR. COHEN: According to the Board -- one of
17 the Board decisions is since there's no situs
18 requirement in the statute, yes, you could.

19 QUESTION: And under your test?

20 MR. COHEN: Under our test, you could. Our
21 test goes to the nature of where you are in the chain of
22 production. The producer/distributor language needs to
23 mean something. Congress put it in. It didn't say all
24 employers, it said producer and distributor. In order
25 to find what that means, we submit that that means any

1 -- as the Board defined it, in the Lohman case and has
2 applied it in every case up to Pet and this case --if
3 you add something to the value of the product, tangible
4 or intangibly, in the form of labor, and that labor can
5 take capital, it can take enterprise, it can take
6 service. If you enhance the value of the product in any
7 way then you are on the chain of production and you are
8 part of the unity of interest and you fall within the
9 producer/distributor, and the union could handbill here.

10 QUESTION: Well, the argument of the Board is
11 that every major tenant in the mall adds value in effect
12 to every other tenant because you're bringing more
13 people into the mall.

14 MR. COHEN: That's where the Board is wrong.
15 And that's where we disagree with the board.

16 QUESTION: Why?

17 MR. COHEN: Because tenants of a shopping
18 center are not engaged in a joint venture. They're
19 competitors at many times. They're all competing for
20 the same business. One tenant --

21 QUESTION: But they all want people to come to
22 the mall.

23 MR. COHEN: But those people may be shopping
24 at my store rather than your store. And those people
25 may come and take away business from me. The only

1 relationship we have is we're neighbors who share common
2 costs. Everybody in an office building are neighbors
3 who share common costs. Everyone who is in an
4 industrial park are neighbors who share common cost.

5 The value is being enhanced not only of the
6 tenants in the store -- if you look at the diagram of
7 the shopping center that's in the Joint Appendix, you'll
8 see there's a circle of restaurants, Burger King's and
9 Sambo's and others around the Wilson store. Obviously
10 they're all going to be better off if there's a
11 functioning Wilson's just like all the tenants are.
12 They are going to have gotten more customers, too. But
13 no one's ever claimed that they are part of some joint
14 merchandising venture which is what the Board says the
15 shopping center is.

16 One tenant has no control and no relationship
17 with another tenant other than the fact that they're
18 located on the same premises and they share certain
19 common costs. Well, that's true of many, many other
20 types of relationships. And if all of those people are
21 going to be embroiled in the labor disputes of the High
22 and the bank that contributes to the existing store or
23 anybody who's contributing to creating the existing
24 store, then we really have read the producer/distributor
25 language out of the act altogether.

1 QUESTION: What do you say the handbilling was
2 aimed at?

3 MR. COHEN: The handbilling was aimed here to
4 try to cause the tenant stores to lose customers in the
5 hope that somehow that would put pressure on High who
6 was the primary. And by putting pressure on High, and
7 what the union believed to be, that High's unfair
8 practice is in not paying union standard wages and
9 benefits.

10 When we look at the -- at what the
11 producer/distributor language is to mean, it -- we have
12 referred in our brief at various points to the words,
13 what those words mean in other labor laws, to what they
14 mean elsewhere in the act, to what they were referred to
15 by members of Congress, and, finally, to what the Board
16 itself said was the unity of interest standard.

17 And in Servette that was the exact test that
18 it proposed to this Court. It said that while a union
19 should be able to follow the product, they should not be
20 able to spread a labor dispute more widely through the
21 community by putting pressure upon any firm that had any
22 form of business relations with the firm engaged in the
23 labor dispute.

24 Now that's what it did here. It allowed
25 pressure on a firm just because they had business

1 relationships. DeBartolo -- I mean, the tenants having
2 a relationship with DeBartolo who in turn had a
3 relationship with Wilson's who in turn had a
4 relationship with High. That's not the way the Board
5 has ever defined the unity, producer/distributor and
6 that's not the way that the Congress intended that it be
7 defined.

8 Let me address briefly the Board's First
9 Amendment concerns because they are --

10 QUESTION: How did they get in this case, Mr.
11 Cohen? I read the Fifth Circuit's, or rather the Fourth
12 Circuit's opinion to say that the Board hadn't
13 considered any First Amendment argument in this case and
14 the Fifth Circuit will refuse to consider it.

15 MR. COHEN: The First Amendment argument was
16 not considered because of the interpretation of the
17 proviso being that this fell within the proviso,
18 therefore there was no prohibited conduct. And since
19 there was no prohibited conduct we don't have to address
20 the First Amendment. In the Pet case, the other case,
21 the First Amendment issue was remanded to the Board.
22 The Board has never addressed the First Amendment as
23 such. It has presumed, however, in the Delta Airlines
24 case that we cite in our brief that the -- adds the
25 Constitution --

1 QUESTION: I'm still not satisfied as to why
2 the First Amendment issue is in this case. I mean,
3 we're not reviewing the Pet case here, are we?

4 MR. COHEN: That's correct. It's here only if
5 -- by reason of the argument -- that if you accept what
6 we are arguing, then the Board says that you will have a
7 potential First Amendment violation.

8 QUESTION: But the Board didn't in this case,
9 as I understand it, address any First Amendment.

10 MR. COHEN: That's correct.

11 QUESTION: So why -- I don't see how the First
12 Amendment is in the case.

13 QUESTION: The First Amendment is not in the
14 case, obviously, unless the Court feels there is a need
15 to address that issue as one of the arguments the Board
16 has raised on why the interpretation we have given is an
17 impermissible interpretation.

18 QUESTION: Perhaps I should ask my questions
19 to Board Counsel.

20 MR. COHEN: Perhaps, then, maybe I should
21 reserve my time to hear what the Board has to say on the
22 issue and address that, unless the Court has any
23 questions.

24 QUESTION: Well, for you to prevail, you have
25 to get over the First Amendment issue.

1 MR. COHEN: Yes, we do, if that's before the
2 Court.

3 QUESTION: Now, it may be resolved on a remand
4 if you were to prevail up here, or something like that.

5 MR. COHEN: We think there's no First
6 Amendment concern. I can summarize briefly the
7 reasons. They're two-fold.

8 First let me reiterate that the union here had
9 many ways to communicate its message, that what we have
10 here is not a restriction on all forms of
11 communication. We have a restriction on one limited
12 form of communication which is secondary coercive
13 handbilling that falls outside the proviso.

14 QUESTION: May I ask in that connection if
15 they had right outside the entrance to the mall a
16 soundtruck that recited the exact language of the
17 handbill, would that be objectionable?

18 MR. COHEN: Yes, because it's publicity other
19 than picketing that doesn't fall within the
20 producer/distributor relationship.

21 QUESTION: Well then what other means of
22 communication do they have to convey this particular
23 message?

24 MR. COHEN: It could -- it could picket, as we
25 say, the primary. It could --

1 QUESTION: No, but how could they convey this
2 message to the audience they want to reach --

3 MR. COHEN: They could convey -- all --

4 QUESTION: -- namely people who would like to
5 shop at the mall?

6 MR. COHEN: They could convey -- the only
7 thing they couldn't convey was, do not patronize an
8 unrelated secondary employer.

9 QUESTION: Well, you're really not suggesting
10 that there's an alternative means of communication.
11 You're saying the content of this communication is
12 something that's unprotected by --

13 MR. COHEN: We're saying the pressure that
14 they put on the secondary is what is --

15 QUESTION: But the pressure is entirely in the
16 message. You don't do anything else --

17 MR. COHEN: Just like picketing, it's entirely.

18 QUESTION: Well there's some dispute about
19 that.

20 MR. COHEN: But the --

21 QUESTION: You even suggest that there's some
22 dispute about that.

23 MR. COHEN: That's right. The evil the
24 Congress addressed here was coercion on a secondary
25 employer, whether by picketing or otherwise.

1 MR. COHEN: But the entire source of the
2 coercion is communication. And the entire basis for
3 saying it's not protected is that its content is
4 unprotected?

5 MR. COHEN: That's correct. And I think
6 there's a substantial government interest in regulating
7 that content because it's part of the delicate balance
8 that Congress drew between allowing a union to
9 disseminate information and prohibit getting secondaries
10 embroiled in the labor conflicts of others.

11 And as part of that delicate balance that
12 Justice Blackmun referred to in Safco. I understand
13 your concerns because you expressed them in Safco, too,
14 of course. But that picketing was -- while picketing
15 can be more coercive, what Congress addressed was the
16 evil of secondary -- coercion of a secondary employer.
17 And why -- not degrees of coercion -- and as long as it
18 fell within what Congress -- whether it was misleading;
19 whether it was causing a secondary work stoppage or was
20 outside the producer/distributor relationship. Those
21 are the three conditions. And if you didn't fall within
22 those three conditions you weren't saved by the
23 proviso. That was the balance that Congress drew and we
24 think it out to be respected.

25 QUESTION: Well suppose the union mailed the

1 leaflets. That wouldn't violate the rule?

2 MR. COHEN: The evil here is that pressure not
3 to patronize a secondary employer.

4 QUESTION: I said, mail the exact same leaflet
5 to the customers of that store. That would violate --
6 that would be prohibited.

7 MR. COHEN: In our opinion, yes, because it
8 doesn't meet the producer/distributor test. It has to
9 meet three tests. It didn't meet that test. And no
10 matter what form of publicity it took it would be
11 similarly condemned.

12 I'd like to say that --

13 QUESTION: And under your theory even an ad in
14 the newspaper would be invalid?

15 MR. COHEN: The -- Congress drew a line
16 between two types of activity, picketing which only can
17 take place at a primary site, publicity other than
18 picketing which can take place at any place and any form
19 if three tests are met. And if it was untruthful,
20 whether it was a newspaper ad or a letter, it would be
21 condemned. If it caused a secondary work stoppage,
22 whether it was a newspaper ad or a letter, it would be
23 condemned, and if there's no producer/distributor
24 relationship and it's coercive, then it's condemned no
25 matter what form it takes. That's the line that

1 Congress drew and that's the balance that it struck and
2 that's the balance we think is constitutional.

3 CHIEF JUSTICE BURGER: Mr. Come.

4 ORAL ARGUMENT OF NORTON J. COME, ESQ.,

5 ON BEHALF OF THE RESPONDENTS

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

8 The union here had a primary dispute with High
9 Construction Company over the payment of allegedly
10 substandard wages and fringe benefits to construction
11 employees.

12 When Wilson's contracted with High to build
13 its store at the East Lake Mall in Tampa owned by
14 petitioner DeBartolo, the union passed out handbills at
15 the mall appealing to the public not to shop at the
16 Mall. The handbills are set out at page 84-A of the
17 Joint Appendix. I won't read it all, but, in essence,
18 what the handbills pointed out was that the Wilson's
19 department store was under construction on these
20 premises and was being built by contractors who had paid
21 substandard wages and fringe benefits.

22 It explained that in the past, the mall's
23 owner, DeBartolo, had insured that the mall and its
24 stores were built by contractors who did pay fair wages
25 and fringe benefits, and that the mall owner had

1 departed from that requirement in the lease that it gave
2 to Wilson's.

3 And the handbill ended up by asking the public
4 in view of the fact that Wilson's was being built with
5 allegedly unfair work standards, not to patronize the
6 stores in the mall until the mall's owner publicly
7 promises that all construction at the mall will be done
8 using contractors who pay their employees fair wages and
9 fringe benefits. And added that, however, if you must
10 enter the mall to do business, please express to the
11 store managers your concern over substandard wages and
12 your support of our efforts.

13 Now the Board did not decide whether this
14 handbilling constituted restraint and coercion within
15 the meaning of the operative part of 8(b)(4)ii(b)
16 because it found that it was protected by the publicity
17 proviso to the section which excludes publicity other
18 than picketing for the purpose of fruitfully advising
19 the public that a product or products are produced by an
20 employer with whom a labor organization has a primary
21 dispute and are distributed by another employer as long
22 as such publicity does not have an effect of stopping
23 deliveries, and there were no such work stoppages here.

24 Now in *Servette*, decided 19 years ago, this
25 Court, noting that the publicity proviso was the

1 outgrowth of a profound Senate concern that the union's
2 freedom to appeal to the public for support be
3 adequately safeguarded, rejected a narrow reading of the
4 producer/distributor language and sustained the Board's
5 holding in Lohman that the terms as used in the proviso
6 cannot be applied in a narrow literal manner but must be
7 applied in a manner so as to effectuate Congress's
8 concern in putting in the proviso which was, as I will
9 outline in a moment, a concern that a ban on such
10 publicity would present a First Amendment problem as
11 Congress understood the cases under the First Amendment
12 and the labor area in 1959.

13 Now we submit that the Board's interpretation
14 of the proviso in this case is faithful to the
15 principles of Servette and to the legislative intent.

16 Now let me just briefly outline what was
17 before Congress in 1959. As the Court may recall, the
18 Landrum-Griffin bill passed by the House which embodied
19 the Eisenhower Administration's proposals as to
20 secondary boycotts was chiefly concerned with closing
21 three loopholes that were perceived in 8(b)(4) as it
22 then existed. Direct inducement of a supervisor or
23 secondary employer by a threat of labor trouble was not
24 covered. Appeals to individual employees were not
25 covered. Nor was inducement of employees of

1 non-statutory employers.

2 There was no one in the Congress that thought
3 that the amendments that were proposed would cover
4 consumer boycotts until late in the debates on the
5 bill. In August of '59, President Eisenhower delivered
6 a radio address in which he pointed out that any new
7 reform legislation should include a provision that
8 banned consumer picketing by a union at a retail
9 establishment.

10 On August 20, following the appointment of the
11 House and the Senate conferees to work out a compromise
12 on two versions of the proposed legislation, Senator
13 Kennedy, who was to preside at the conference and
14 Representative Thompson, who was one of the conferees,
15 issued an analysis of the Landrum-Griffin bill which had
16 by then passed the House, and criticized it in two
17 respects that are relevant to this case.

18 The first was that the House bill would
19 prevent the union that had a dispute with an employer
20 such as Coors Beer from picketing a restaurant with
21 signs asking the public not to buy the product. And the
22 second concern was that the prohibition of the House
23 bill reach not only picketing, but leaflets, radio
24 broadcasts, and newspaper advertisements, thereby
25 interfering with freedom of speech.

1 Now, as this Court held in Tree Fruits, the
2 first concern that picketing that just followed the
3 struck product would be prohibited by the
4 Landrum-Griffin bill was taken care of when they, the
5 conferees, agreed that that would not come even within
6 the restraint and coerce language in 8(b)(4)ii at all.
7 That the only picketing that would be covered would be
8 picketing that cut off the neutrals' total business.

9 And as this Court later held in Safco, in some
10 circumstances where his business was only one product
11 even following that product by picketing would be --

12 QUESTION: What do you say is the product
13 here, now, Mr. Come.

14 MR. COME: Well the product is the Wilson's
15 store. Even the petitioner concedes that. It is not a
16 physical product in the normal sense, but on the other
17 hand as the Court pointed out in Servette there was no
18 intention that Congress intended the proviso to be any
19 narrower than the prohibition to which it was attached.
20 And unless you interpret product so that it can include
21 things other than physical products, whole industries
22 would be not included within the scope of the proviso.

23 QUESTION: So the store is the product
24 produced by the construction company?

25 MR. COME: That is correct. And the Board

1 found, and we submit reasonably so on this record, that
2 in view of the interrelationships between the tenants at
3 the mall and Wilson's that were created by the lease
4 arrangements that the DeBartolo set up here, that in an
5 economic sense all of the tenants -- were, together with
6 Wilson's, distributing the fruits of Highs' labor in the
7 Wilson's store.

8 QUESTION: Does that strike you as a very
9 faithful application of the language of the proviso?

10 MR. COME: It does, Your Honor, when it is
11 recognized that what Congress was seeking to accomplish
12 by the proviso. And anything that --

13 QUESTION: I would think we would know what
14 Congress was seeking to accomplish by the proviso by the
15 language it chose in enacting a proviso.

16 MR. COME: The language is certainly the
17 starting point, however, but this Court has recognized,
18 and most particularly, in *Servette*, that --

19 QUESTION: Well that was a
20 wholesaler/retailer. That was nothing like this case.

21 MR. COME: But nonetheless the argument was
22 that producer meant only the manufacturer, and the
23 principle that sustained a broader interpretation, that
24 is, the Board's *Lohman* decision which was being reviewed
25 in *Servette* in which the Board first enunciated the

1 principle here, that a producer is, in order to
2 effectuate the purpose of the proviso, is anyone who
3 adds value to a product in an economic sense.

4 Now in -- as I say, even petitioner here
5 concedes, or acknowledges, that the Wilson's store here
6 is a product that was created by High's and is being
7 distributed by Wilson's.

8 QUESTION: I didn't know he -- he concedes
9 this being distributed by Wilson's? He doesn't concede
10 this as being distributed by the other retailers in the
11 --

12 MR. COME: He does not concede it's what -- by
13 the other retailers, but --

14 QUESTION: You have to -- you have to get over
15 that hurdle, don't you? And the Board certainly did.
16 They thought it was being distributed by all the
17 retailers.

18 MR. COME: That is correct. And I've
19 attempted to explain why the Board did so in this case
20 in order to give effect to the Congressional intention
21 in adopting the proviso.

22 The reason that the proviso was put in there,
23 again returning to Senator Kennedy, was as he explained,
24 "we were not able to persuade the House conferees to
25 permit picketing in front of that secondary shop but we

1 were able to persuade them to agree that the union shall
2 be free to conduct informational activity short of
3 picketing". In other words, the union can hand out
4 handbills at the shop and place advertisements in
5 newspapers and make announcements over the radio and can
6 carry on all publicity short of having ambulatory
7 picketing in front of a secondary site.

8 Now as I indicated, shortly after the '59
9 amendments were enacted, and for more than two decades
10 since, the Board has applied the proviso in the light
11 cast by this legislative history and its basic purpose.

12 QUESTION: Mr. Come, in your view, what is
13 important in interpreting the language of in some manner
14 distributed. Is it the ability of the secondary
15 employer to bring economic leverage to bear on the labor
16 dispute or what? What's the key? Where would you draw
17 the line?

18 MR. COME: Well I think the -- I think the key
19 is whether you have a person that is contributing
20 something of value to a product which in turn is
21 distributed in an economic sense by the persons who are
22 being handbilled.

23 Now on the facts of this case, the Board found
24 such a relationship in the fact that the petitioner,
25 DeBartolo, here is the owner of the land on which High,

1 the primary employer, was constructing this store, using
2 labor the union contended did not measure up to area
3 standards.

4 QUESTION: Mr. Come, the proviso is sort of
5 downstream proviso, isn't it? It's to people who are
6 distributing a product. You couldn't go around -- you
7 couldn't under this proviso picket the people who supply
8 -- who supply the elements to build a building. You
9 couldn't go upstream under this proviso, could you? And
10 why do you think DeBartolo or any of the other tenants
11 are downstream?

12 MR. COME: Well it is a big stream in order to
13 --

14 QUESTION: It only runs one way, though.

15 MR. COME: Well --

16 QUESTION: Could they handbill the suppliers
17 to the mall stores?

18 MR. COME: I think we'd have to --

19 QUESTION: Have to have a new proviso,
20 wouldn't you?

21 MR. COME: Well, let me put it this way, if it
22 were found that the proviso would not protect that then
23 I think that the Court would have to face a very
24 substantial constitutional question that the --

25 QUESTION: All right. You concede, though,

1 don't you, that the proviso wouldn't cover picketing
2 suppliers.

3 MR. COME: Well I --

4 QUESTION: I mean, maybe the First Amendment
5 might protect it, but certainly the proviso wouldn't.

6 MR. COME: Well, I certainly know of no such
7 case that the Board has had. But let me talk about the
8 First Amendment, not because it is in this case, but
9 because the Board, over the twenty years that the
10 proviso has been in the act, has been conscious of the
11 same thing that Congress was concerned of when it put
12 the proviso in, namely --

13 QUESTION: May I interrupt before you get into
14 your First Amendment argument?

15 MR. COME: Yes.

16 QUESTION: Is it not true that, assume we
17 disagreed with you on the proviso, you said they have
18 not yet decided whether it's restraint, coercion and so
19 forth. And I guess it's not only that it has got to be
20 restraint and coercion, but it's also within the meaning
21 of be -- forcing or requiring somebody to cease doing
22 business. And would it not be correct that we would
23 first have to send it back to the Board to decide
24 whether those elements of a violation were present
25 before we have to worry about any constitutional

1 question? I know the Court hasn't decided it, but how
2 do we get to the Constitution before we know whether
3 there's a statutory violation?

4 MR. COME: Well, I think that technically that
5 is correct. However, I should point out that in some of
6 the earlier cases the Board has assumed that it would be
7 restraint and coercion unless it were saved by the
8 proviso. But in this case the Board did not decide that
9 issue because it followed the position that it has
10 consistently taken, that even if it were, it's taken out
11 by the proviso.

12 Now the First Amendment issue is a very
13 substantial one. Even petitioner concedes that the
14 First Amendment would give the union a right to hand out
15 these handbills that merely describe the nature of the
16 dispute. And the thing that in their view --

17 QUESTION: Mr. Come, let me interrupt you
18 again. You're assuming that giving out the handbills --
19 that that's all they did, but if they actually coerced
20 somebody and threatened them, and perhaps implicitly
21 were suggesting violence if they do some purchasing it's
22 an entirely different issue.

23 MR. COME: Well -- but on this record there is
24 no suggestion of that. The only coercion is in the
25 handing out of the handbills. But --

1 QUESTION: Well then, maybe there's no
2 coercion. That's not --

3 MR. COME: But -- Well, that may be.

4 QUESTION: But the Board didn't make any
5 finding of fact on the issue of coercion, did it?

6 QUESTION: I mean, how do we know there's
7 none? You say they didn't address this --

8 MR. COME: Well, this was a stipulated record,
9 Your Honor. There are no facts other than the
10 stipulation. The stipulation shows that nothing went on
11 here but the handing out of these handbills which
12 described the facts of the labor dispute and added,
13 don't patronize the mall stores if you agree with the
14 case that we're setting forth here.

15 Now it is well established in the decisions of
16 this Court, and indeed the Court emphasized that, in
17 Claiborne Hardware only last term, in quoting from an
18 opinion by Justice Rutledge in Thomas against Collins
19 that the protection afforded by the First Amendment
20 extends to more than abstract discussion unrelated to
21 action. Free trade and ideas means free trade and the
22 opportunity to persuade the action, not merely to
23 describe facts.

24 And so therefore, the mere fact that the union
25 added to its message a request that the consumers not

1 patronize the mall, does not make the speech or the
2 message coercive so as to the private of its First
3 Amendment protection, so that if the Board's
4 construction of the proviso in this case --

5 QUESTION: Wouldn't it violate the statute
6 then, either?

7 QUESTION: It wouldn't violate the statute.

8 MR. COME: Well, that may well be. It may be
9 that the Board has made its work difficult for itself by
10 not saying that this is not restraint and coercion to
11 begin with. It's not in the statute and as with product
12 picketing in Tree Fruits --

13 QUESTION: I know, but if -- I take it you --
14 there wouldn't be any violation of 8(b) if the --

15 MR. COME: If it were not restraint and
16 coercion. The Board --

17 QUESTION: Exactly. And if that's a good
18 statutory answer, I don't know why we have to deal with
19 the Constitution.

20 MR. COME: Well, the other way of avoiding the
21 Constitution is to interpret -- is to sustain the
22 Board's interpretation of the proviso as taking this
23 kind -- as saving this sort of activity from the ban of
24 8(b)(4)(b). This is the way the loop that the Board has
25 followed --

1 QUESTION: But it strikes me, Mr. Come, that
2 your First Amendment argument that you made a moment ago
3 was framed in terms of the difference between coercion
4 and non-coercion which really goes to the coercive
5 section of the proviso and not to the producer section.

6 MR. COME: That may be, if legislation were
7 drafted in an ideal sort of way, as Your Honor I'm sure
8 is aware is not the case.

9 The fact of the matter is that when it became
10 apparent that picketing, at least certain forms of
11 consumer picketing, were covered by the restraint and
12 coercion part of 8(b)(4)(b), the Senate conferees
13 thought that out of an abundance of caution it was
14 necessary to add the proviso to make doubly sure that
15 this sort of publicity short of picketing would not be a
16 violation of 8(b)(4)(b). And that is the way the Board
17 has read the legislative history and has thus
18 interpreted the proviso.

19 So the point that I want to get at is, and I'm
20 not suggesting that the Court reject the Board's
21 interpretation of the statute, all I'm suggesting is
22 that unless there's a clear indication that Congress
23 intended to cover this type of publicity, and we submit
24 that, if anything, there's a clear indication that it
25 did not. Prudential considerations that this Court has

1 long followed would dictate that it should avoid the --
2 the difficult constitutional problem that would be
3 presented by sustaining the Board's interpretation of
4 the statute.

5 QUESTION: Well, we still have to find -- we
6 still have to agree that there's some -- some merit at
7 least in the holding that DeBartolo and all the other
8 stores were distributing a product of an employer with
9 whom the union had a dispute. And you do it on the
10 basis that -- the theory that a rising tide raises all
11 the boats I guess, the -- everybody helps everybody else
12 in this store -- in this shopping center.

13 MR. COME: At least in the particular type of
14 relationship that you had at this mall, that this is
15 different from the stores on a block that the petitioner
16 is positing. You do not have the kind of interlocking
17 leasing arrangements and a joining together for mutual
18 benefit that you have here where the --

19 QUESTION: So even if -- even if there are
20 three competing department stores, all nosed in nose to
21 nose competition, in this shopping center, the union can
22 picket the mall on the grounds that they're all feeding
23 off of one another.

24 QUESTION: Add three -- for the three
25 supermarkets, grocery supermarkets and a few other

1 multiples.

2 MR. COME: If you had the same sort of leasing
3 arrangements that you had here where the rent that the
4 tenants paid to DeBartolo went up depending upon the
5 sales, and that recognition of the fact that bringing in
6 a store of Wilson's was a particular magnet because that
7 factor increased the rents of all of the tenants by ten
8 percent. And where there is a --

9 QUESTION: And thereby subjected them to
10 picketing.

11 MR. COME: Not for picketing, not for
12 picketing, Your Honor.

13 QUESTION: Thereby subjected them to
14 handbilling.

15 MR. COME: That is correct. Which, if it were
16 prohibited, I submit, would present a substantial
17 constitutional question because what the Court would
18 have to decide is whether the First Amendment permits a
19 constitutional prohibition directed solely to a message
20 that is communicated to members of the public that
21 elicits no unlawful response on their part because
22 there's nothing unlawful about asking consumers to
23 withhold patronage. And it effects a secondary employer
24 only if members of the public who are not subject to any
25 union discipline or control are persuaded of the merits

1 of the union's case.

2 I submit that the prudential considerations
3 the I alluded to should prompt the Court to avoid this
4 question and sustain the Board's interpretation of the
5 statute in this case.

6 CHIEF JUSTICE BURGER: Mr. Cohen?

7 ORAL ARGUMENT OF LAWRENCE M. COHEN, ESQ.,

8 ON BEHALF OF THE PETITIONER -- REBUTTAL

9 MR. COHEN: There are three points I'd like to
10 make.

11 First, analytically you never get to the
12 question of the proviso unless there is coercion. We
13 don't have coercion. We don't have an 8(b)(4)
14 violation. If we don't have an 8(b)(4) violation then
15 we aren't -- we would not be here today.

16 Every Board case -- and they're cited at page
17 9, footnote 8, of our brief and page 13, note 14, of our
18 reply brief -- every Board case from the enactment of
19 the proviso, from Lohman on, has said that conduct of
20 the type that's engaged in here was coercive. The Board
21 said so in its brief in Servette. There's been no
22 argument by anybody at any point that the conduct here
23 was not coercive. It must be coercive.

24 QUESTION: Well good. Mr. Cohen, the Board,
25 as I read the opinion, didn't make a finding, did it?

1 MR. COHEN: The Board did not make a finding,
2 but on all -- they said in all previous cases after
3 remands back and other statements, in Lohman and Great
4 Western -- in all the cases we cite in our brief they
5 found that do no patronize activity is coercive. So
6 there's no purpose --

7 QUESTION: Let me ask you, which is the
8 strongest case among those -- closest case among those
9 you've sited to this one on the proposition, just
10 coercion?

11 MR. COHEN: I would pick Lohman.

12 QUESTION: Lohman, I just --

13 MR. COHEN: Lohman and -- they're all sited at
14 page 9, note A.

15 QUESTION: I understand there are a lot of
16 them. I was just wonder which one is --

17 MR. COHEN: Board's brief in Servette -- any
18 of those. They're all equal, because they're all the
19 same type of activity.

20 QUESTION: Just the handbilling, though, all
21 of them.

22 MR. COHEN: All handbilling -- all do not
23 patronize handbilling.

24 The second point to make is, if incoercive,
25 then we get to the proviso in the producer/distributor

1 test. Now the Board admits in its briefs -- it says
2 very clearly -- the Board has not read Servette to
3 permit disregarding the producer/distributor language
4 altogether. Producer/distributor has got to mean
5 something. Does it cover the type of attenuated
6 relationship we have here?

7 Well, let's take the example that the boycott
8 the union sought here was totally one hundred percent
9 effective. Nobody came in to shop at the shopping
10 center. Would that have any effect whatsoever on High?
11 The answer is no.

12 Now if that's what Congress intended by
13 producer/distributor, that's not the way the act has
14 been interpreted. And in any other law it's not the way
15 that any member of Congress said it, not what Senator
16 Kennedy was referring to. It's the exact opposite of
17 any normal meaning of those words.

18 There's no way that the tenants here have any
19 leverage over any of the -- over Wilson's -- or over
20 High, excuse me -- there's no way the tenants can
21 effectuate his labor policies. There's no way that they
22 add in any way to anything that High does. And the
23 pressure's being put on the tenants. So how are they
24 part of the distribution/producer scheme?

25 Finally, First Amendment argument. Claiborne

1 is the case that Mr. Come cites. In Claiborne, this
2 Court said secondary boycotts and picketing by labor
3 unions may be prohibited constitutionally as part of
4 Congress striking the balance, delicate balance between
5 union freedom of expression and the ability of neutral
6 employers and employees and consumers to remain free
7 from coerced participation in an industrial strike.

8 That's the delicate balance. That balance
9 gives unions certain rights of expression. Handbilling,
10 as long as there's a producer/distributor relationship.
11 Handbilling, as long as it's not misleading.
12 Handbilling, as long as it doesn't cause a secondary --
13 handbilling or any form of publicity as long as it
14 doesn't cause a secondary work stoppage. If those are
15 met the union's got full freedom of expression. The
16 union's always got freedom of expression as long as it
17 doesn't get engaged in coercion and restraint within the
18 meaning of the act.

19 Here, it engaged in coercion within the
20 meaning of the act and it did not meet the terms of the
21 proviso. Therefore there's a limited, narrow evil that
22 Congress addressed, which is applicable here and this
23 Court has held that just as in the case of secondary
24 picketing it meets the narrow evil, any form of coercion
25 as long as it's not too broad, and this is not too

1 broad, may be regulated within the constitutional powers
2 of the Congress.

3 Thank you.

4 CHIEF JUSTICE BURGER: Thank you, gentlemen.

5 The case is submitted.

6 [Whereupon, at 2:58 p.m., the case in the
7 above-entitled matter was submitted.]

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: Edward J. DeBartolo Corp., Petitioner v. National Labor Relations Board, et al., No. 81-1985

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