Secondary Boycotts: The Ally-Doctrine Revisited

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INTRODUCTION

The so-called “secondary boycott” provisions of the National Labor Relations Act generally prohibit a union from exerting economic pressure on a “person” with the object of forcing that person to “cease doing business” with “any other person.” The question addressed by this article is one which at first blush appears to be relatively easy to resolve: who is entitled to the protection of this provision as an “other person.” As simple as the question may sound, both the National

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2. Section 8(b)(4)(B) of the National Labor Relations Act as amended, 29 U.S.C. Section 158(b)(4)(B), makes it an unfair labor practice for a union “(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .”

3. Section 2(1) of the Act, 29 U.S.C. Section 152(1), provides that when used in the Act, “[t]he term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.”

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Labor Relations Board and the courts have grappled with it, in my opinion, often without success.

There is a crying need for clarity in answering this question. Labor organizations, and to a certain degree, employers, plan their strike tactics and bargaining postures with a view to how far economic pressure may be extended in the event of a breakdown in bargaining negotiations. Moreover, from the point of view of the unions, there is a potential economic liability, as well as the threat of injunction proceedings, if the wrong decision is made.4

It has been recognized, albeit all too infrequently, that there are two essentially different concepts involved in the notion of who is an “other person.” First, by definition, the same person cannot be an “other person” and so, pressure brought upon a single employer to stop dealing in its own products or services is not unlawful under this provision. However, what constitutes a “single employer” is one of the more difficult problems which the NLRB and the courts continue to face. Second, by both evolving case law and common sense, a totally separate individual may became so embroiled in the dispute of the primary employer that he becomes “allied” with the primary, and his dealings with the primary are therefore not entitled to the protection of this section of the Act.5 This is the so-called “ally-doctrine” in its pure sense.

In an earlier article prepared for a symposium conducted by the Georgetown Law Journal,6 the writer reviewed the evolving case law of both of these questions and concluded that the National Labor Relations Board was neither addressing the true issues nor attempting to rationalize clearly its decisions. Unfortunately, a second formal review of these concepts does not provide for a much more charitable evaluation.7

4. Section 303 of the National Labor Relations Act, as amended, 29 U.S.C. Section 187 provides for damage actions in the Federal District Courts against labor organizations which engage in unlawful activity within the meaning of Section 8(b)(4)(B), and Section 10(1) of the National Labor Relations Act as amended, 29 U.S.C. Section 160(1) provides that the General Counsel of the National Labor Relations Board shall seek injunction proceedings where a meritorious charge under Section 8(b)(4)(B) is brought. Furthermore, identical issues arise, although less concretely, under Section 8(e), 29 U.S.C. Sec. 158(e), which prohibits an employer and a union from entering into an agreement for the employer to “cease doing business with any other person.”

5. Senator Taft said, in the debates, “The spirit of the Act is not intended to protect a man who . . . is cooperating with a primary employer and taking his work and doing the work which he is unable to do because of the strike.” 95 Cong. Rec. 8709 (1947).


7. Following the decision by the Court of Appeals for the District of Columbia, Truck Drivers Union Local 413, International Brotherhood of Teamsters v. N.L.R.B., 334 F.2d 539 (1964), cert. denied, 379 U.S. 916 (1964), the NLRB has modified its
A frequent point of confusion is in failing to distinguish between the totally separate concepts of "single employer" and "allied employer." The "single employer" notion has its origin in the permanent relationship between economic entities; it does not arise out of or at the point of a labor dispute. On the other hand, the concept of an "allied employer" presupposes that there is a totally separate and distinct entity or enterprise which, absent its involvement in the particular labor dispute, would be entitled to protection by Section 8(b) (4) (B). Thus, in analyzing these problems, the NLRB and the courts should first address themselves to the question of whether they are dealing with a single entity or two different entities. This distinction is often ignored and too seldom even recognized.

The question of "single employer" is entirely a policy decision as to whether an enterprise is so closely related to the primary or struck employer that pressure upon it may lawfully be applied. Since this is a policy question, the writer must confess his bias in that he represents, as legal counsel, unions which are actual or potential respondents in many of these cases. However, certain normatively neutral statements can be made so that a consistent policy judgment can be brought to bear.

The "single employer" issue may arise in several different contexts. Without attempting to enumerate all of the potential economic relationships that may arise between enterprises, the ones treated here are among the more common and are seen in the case literature.

a. Vertical or "straight line" integration of operations. A manufacturer may have associated with it a warehousing or distribution enterprise and various retail enterprises, all of which principally deal in the product of the manufacturer. This form of integration may take place under the rubric of a single corporation with separate divisions, of separate corporations under a single holding com-
pany, or of separate corporations commonly owned and controlled.  

b. **Horizontal integration.** All of the related enterprises are at the same operating level and may involve such "chain" operations as retail stores or newspaper publishers. Again, there may be common ownership and control of each of the chain locations or each of them may be separately owned and operated.  

c. **Conglomerates.** Here there may be product differentiation among different manufacturers or operating companies, but there is common financial control which economically strengthens each of the separate enterprises in the event of a labor dispute.  

d. **The general contractor—subcontractor relationship.** In the typical situation this does not involve common ownership. The control exerted by the general over a subcontractor, limited to a particular job or series of jobs, has usually been protected from involvement in a labor dispute of the other, unless the one entity becomes "allied" as a result of, or in preparation for, a strike.  

e. **Lessor and Lessee.** Relationships of this kind are relatively common in trucking operations where the so-called independent contractor leases a truck and the lessor retains elements of actual or potential control over the operations. The whole enterprise may be carried on in one or several names.  

f. **Loan agreements with rights to control the debtor's operations.** Sometimes the rights are express. Sometimes the extension of credit without security or written document is considered proof that there is less than arms-length dealing between companies.  

g. **Spinoff of previously integrated operations.**  

The enumeration of these relations suggests some basic factors which should be considered in evaluating the "neutrality" of a secondary person. Some of these factors have been found controlling by the Board, but others have been ignored. Too often, the NLRB has concentrated on the issues of common ownership and common day-to-day control which are relevant to the determination of "single employer" status for the purpose of deciding whether the NLRB may assert jurisdiction under its jurisdictional standards, or in deciding bargaining units.  

9. See, e.g., NLRB v. Local 810, International Brotherhood of Teamsters (Sid Harvey, Inc. and Sid Harvey Brooklyn Corp.) 189 NLRB No. 93, enforcement denied, 460 F.2d 1 (2d Cir. 1972).  
10. See, e.g., Miami Newspapers Printing Pressmen Local No. 46 (Knight Newspapers, Inc.) 138 NLRB 1346 (1962), enf'd, 322 F.2d 405 (D.C. Cir. 1963); and Los Angeles Newspaper Guild Local 69 (San Francisco Examiner Division of the Hearst Corporation) 185 NLRB No. 25 (1970), enf'd 443 F.2d 1173 (9th Cir. 1971).  
12. See, e.g., Local 282, International Brotherhood of Teamsters (Acme Concrete), 137 NLRB 1321 (1962), where the factors included shared premises without rent, family control (although not ownership of both), virtually total straight-line segregation and loans without security.  
These considerations are less helpful, and sometimes misleading, in resolving questions of "neutrality."

1. Whether there is operational integration among the various parts of the enterprise has always been considered relevant. The "vertical" enterprise was early recognized as one, and this factor is usually controlling even where ownership is not identical, but related. Where separate businesses are set up merely for the purpose of limiting liability of the stockholders in the event of financial disaster or for tax savings, but all of the arms operate to promote a single product line, unity is found. However, in a recent decision the NLRB ignored the common product, integration of function and common ownership, and focused on the largely irrelevant factor of "day-to-day control," particularly control of labor relations, even looking to so particular a question as the benefits of employees of the various units.

2. Day-to-day control by a common owner or parent company, particularly in the area of labor relations, would clearly nullify the neutrality of the enterprises. However, in making this the sole criterion of parent-subsidiary neutrality, the NLRB has too narrowly limited the proper range of its inquiry. The Board has blinded itself to overall economic control implicit in the dependence of commonly owned entities, or has dismissed these considerations as only indicative of "potential," rather than "actual or active" control.

3. The major factor which the Board seems to ignore is the financial integration between enterprises, particularly that found in a conglomerate organization. The willingness and ability of an employer to resist bargaining demands by a union to a very large extent depends upon the financial resources available to it, the extent to which it may be sub-

15. See, e.g., Local 282, International Brotherhood of Teamsters (Acme Concrete) 137 NLRB 1321 (1962), where the stone and gravel business was set up on the same premises principally to supply the ready-mix concrete company with materials. Three brothers operated both businesses, which were found not "neutral," even though the ready-mix company was separately owned.
16. Steel Fabricators Local 810 (Sid Harvey, Inc.) 189 NLRB No. 93 (1971), enforcement denied, 460 F.2d 1 (2d Cir. 1972); see also, Kaynard v. Local 810 (Sid Harvey, Inc.) 74 LRRM 2789 (1970).
17. Miami Newspapers Printing Pressmen Local No. 46 (Knight Newspapers, Inc.) 138 NLRB 1346 (1962) enf’d, 322 F.2d 405 (D.C. Cir. 1963); Miami Newspapers Printing Pressmen Local No. 46 (Knight Newspapers, Inc.) 138 NLRB 1346, 1347-51 (1962), enf’d, 322 F.2d 405 (D.C. Cir. 1963); Drivers, Chauffeurs & Helpers Local 639 (Poole’s Warehousing) 158 NLRB 1281, 1286 (1966); International Brotherhood of Teamsters and Local 179 (Alexander Warehouse) 128 NLRB 916, 919 (1960).
sized by other related organizations, and the potential for diversion of its operations to other enterprises.\(^9\) In a conglomerate organization, management asserts its strength from its potential to subsidize. To wait until one portion of the conglomerate octopus has come to the aid and assistance of another (that is, "ally" itself) focuses on a point in time which is too late. The superior bargaining strength of the employer may have already been brought to bear to force capitulation by the union. The recognition of this reality would permit the union to exert its strength against the full economic resources arrayed against it without waiting for their commitment to the combat.

4. Where the enterprise or enterprises, even if separately owned, hold themselves out to the public as a single enterprise, it is not unfair to treat them as such in the event of a labor dispute. The union acts at its peril in extending a picket line, and may be assessed damages for making the wrong determination.\(^2\) Where the enterprise has turned a common face to the general public, the union should not be required to examine corporate books, other records and documents to determine if it is dealing with separately owned or controlled employers. The employers in this situation have for various reasons chosen to be treated as one, and it is not unfair in this context to do so.

19. The conglomerate merger movement has shifted tactical collective bargaining power in favor of the management. In dealing with the many national unions it typically faces, management can cross-subsidize between industries and plants and whipsaw different unions at its varied facilities—supported by substantially enhanced financial staying power. 'Deep pocket' staying power applies to labor markets as well as product markets. In contrast to its behavior in product markets, management can exercise its wider range of options in dealing with unions free from any restraint which may emanate from fear of anti-trust prosecution. Alexander, Conglomerate Mergers and Collective Bargaining, 24 IND. AND LAB. REL. REV. 354, 362 (1971).

Compare the following from the Decision of Trial Examiner Marx in the San Francisco Examiner case:

The 'operating profits' made by the Hearst divisions are fuel for the total corporate body and, together with other economic resources of the Corporation, are available at its will to sustain any division in a contest of legitimate economic pressures involved in a labor dispute between a union and the management of the division or, in other words, with Hearst. The right and power of the Corporation to muster its economic resources to such an end, irrespective of their divisional source, underscores the need for recognition of a correlative right in the union to engage in 'otherwise' lawful picketing of premises of the Corporation other than the dispute situs. Such recognition gives balancing effect to the 'dual congressional objectives,' reflected in the harnessing of the proviso of Section 8(b)(4)(B) to the prohibitions of the section, of preserving the right of employees to bring economic pressure to bear upon their employer in a dispute they have with him, while shielding other employers 'wholly unconcerned' in the dispute from such a tactic." 185 NLRB No. 25 (1970), TXD Slip op. at 24.

In Madden v. Local 743, Teamsters (Aetna Plywood), 43 LRRM 2472 (E.D. Wisc. 1959), the court's opinion appears to have adopted this analysis. However, this was prior to the Board's Hearst decisions, infra note 21.

20. See, e.g., Sheet Metal Workers Local 273 v. Atlas Sheet Metal Co. of Jacksonville, 384 F.2d 101 (5th Cir. 1967) confirming a jury award of more than $2,600.
The narrowness of the Labor Board's point of view and its devotion to poorly-reasoned precedent came to fruition in the *Hearst* cases, decided in 1970. In these cases, the Board was called upon to decide for the first time whether separate divisions of a single corporation could be neutral "persons" within the meaning of Section 8(b)(4)(B). Only the Board's mania for limiting the situs of primary picketing can explain the outcome of these cases.

In the *San Francisco Examiner* case, some eight unions on strike against the *Los Angeles Herald-Examiner* division of the Hearst Corporation extended their picket line to San Francisco, there picketing the offices of the *San Francisco Examiner*. They also picketed the *San Francisco Chronicle*, a separate employer which was engaged in a joint printing company enterprise with *San Francisco Examiner*, and they picketed the premises of the jointly-run printing company. In the *Baltimore News* case, the Television and Radio Artists Union extended its picket line in Baltimore, Maryland, from Radio Station WBAL, a division of the Hearst Corporation, with which it had a dispute, to the premises of the *Baltimore News American*, another division of the Hearst Corporation within the same city. In both cases, the Regional Directors for the respective regions sought and obtained preliminary injunctions under the provisions of Section 10(1) of the National Labor Relations Act.

The corporate relationship between the Hearst Corporation and its newspaper and other divisions was elaborated in the respective trial examiners' decisions. These decisions reveal enormous economic control by the Hearst offices in New York. The president and Board of Directors of Hearst Corporation appointed the operating heads of each of the divisions, required regular reports of the financial status of each division, demanded that all profits in excess of ordinary operating expenses and a certain reserve for emergencies be remitted to the parent, and made and passed upon all capital expenditures in excess of $10,000. Moreover, the Hearst Corporation made interest-free loans, termed "down-stream advances" to those divisions with temporary operating

22. Kennedy v. San Francisco-Oakland Newspaper Guild, 69 LRRM (N.D. Calif. 1968) *aff'd* 412 F.2d 541 (9th Cir. 1969), and Penello v. American Federation of Television and Radio Artists, 291 F. Supp. 409 (D. Md. 1968). It may be of more than passing interest that both of these Regional Directors have now been elevated to membership on the NLRB.
losses. No cash was ever remitted on transactions between operating divisions of the Hearst Corporation; these transactions were handled as paper entries only.

With respect to the newspaper operations, final authority over such items as editorial endorsements for the President of the United States were lodged in the president of the Corporation, who, for these purposes, was called the “Editor in Chief,” and whose column was run on a syndicated basis by the newspaper divisions. Further, the New York office had made the decision for the San Francisco Examiner to enter into the joint enterprise with the Chronicle to set up and operate the printing company, as it made all decisions on major capital expenditures.

The operations of the newspaper divisions evidenced also a large degree of vertical or “straight-line” integration. Thus, other divisions of the Hearst Corporation, such as the King Features Syndicate, the Hearst Enterprises, the Hearst Headline Service, the Hearst Wire Service, the Hearst Washington Bureau and the Hearst Advertising Service provided essential parts of the product that was sold at corner newsstands. The Hearst Enterprises provided all of the newsprint for the Los Angeles Herald Examiner and other newspaper operations which, unlike the San Francisco Examiner, did not have separate access to relatively inexpensive sources of newsprint. The King Features Syndicate and the other services of the Hearst Corporation provided features, advertising services, etc., for both the Los Angeles and San Francisco newspapers, as well as other newspapers in the Hearst chain.

There were even to a certain extent some aspects of the public use of the common name. Thus, although not mentioned in either trial examiner’s decision, presumably the name of the common “Editor in Chief” and Publisher would be found on the masthead of each of the newspapers. In the Baltimore News case, moreover, the radio station identified itself on the air as “the News American station” and “affiliated with the News American” with direct lines to “the News American and NBC.” Writers and columnists of the News American were used as commentators and panel guests on the radio station under arrangements found to be those of “independent contractors.”

Without going into these details of operating and financial control and integration, the Board proclaimed the rule that “separate corporate subsidiaries are separate persons, each entitled to the protection of Section 8 (b) (4) (B) from the labor disputes of the other, if neither the subsidiaries nor the parent exercises actual or active, as opposed to merely potential, control over the day-to-day operations or labor relations of
The Board then spent the rest of the decision justifying the same rule for corporate divisions as it had just proclaimed for corporate subsidiaries. However, there was precious little support for the subsidiary rule proclaimed by the Board and a weak case for the assertion that the same corporate person could be split up into a multitude of "persons" cloaked with neutrality in the labor disputes of the others. In support of its assertion of the rule for subsidiaries, the Board cited its own decision in *Knight Newspapers*, the trial examiner's decision in *Poole's Warehousing* (a sparse factual record, not even involving subsidiaries, in which the Board adopted a rather routine decision of the trial examiner) the Court of Appeals' reversals of the *Roy and Sons* and *Bachman* cases, and the Board's own decision in *Alexander Warehouse*, in which no neutrality had been found. It is significant that while the distinction between "actual or active" as opposed to merely "potential" control was enunciated in some of these cases, the Board's emphasis upon day-to-day control and particularly upon control of day-to-day labor relations policy was an entirely new element in the *Hearst* test, not found in the previous cases.

The reliance upon its own decision in *Alexander Warehouse*, while misplaced, unfortunately evidences the prescience of the writer in criticizing that decision in the writer's earlier article. In *Alexander Warehouse*, the unions had a dispute with the company in Joliet, Illinois, and proceeded to picket other warehouses of the same employer located in Urbana and Peoria, Illinois, two other downstate Illinois communities. While the Board found that the Peoria and Urbana warehouses were not cloaked with neutrality, the particular significance for this case is that the Board emphasized the elements of common supervision and control, rather than the fact that all three warehouses were owned by one and the same employer. Thus, the pregnant negative produced a deformed offspring in the *Hearst* case, where *Alexander Warehouse* is cited for the proposition that separate locations of the same employer must be treated as neutrals if there is no common supervision, and that common ownership is not significant.

The *Hearst* decisions were promulgated notwithstanding the strenuous dissent of member Brown and the eloquent decision of Trial Examiner

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23. 185 NLRB No. 25, Slip op. at 4.
24. See supra n.17.
25. See supra n.18.
26. J. G. Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958), reversing 118 NLRB 286 (1957); Bachman Machine Co. v. NLRB; 266 F.2d 599 (8th Cir. 1959), reversing 121 NLRB 1229 (1958).
27. See supra n.18.
Herman Marx in the *San Francisco Examiner* case. These opinions persuasively argued that where all of the corporate profits are centrally funneled off, and particularly where the central entity has the power to subsidize a struck employer for the duration of a strike in order to obtain concessions from a union, which will then inure to the benefit of the corporate enterprise, these divisions should not be treated as "wholly unconcerned in the dispute" or "neutral." However, the Board passed off these considerations and appears to have adopted the reasoning of Trial Examiner Samuel M. Singer in the *Baltimore News American* case that the true test of neutrality is that a "primary" employer is one who is in a position to grant the union's demands and to resolve the underlying dispute, and that since bargaining was carried on with one division only, that division was the only primary. However, this argument proves too much; it undercuts the ground upon which stand the "straight-line" or "integrated operation" line of cases in which the Board has always recognized that the close, intimate and substantial relationship between ostensibly separate employers removes their claim to neutrality, even though the union is bargaining with only one of them at a time.

While the writer submits that the *Knight Newspapers* case was wrongly decided in that it wholly ignored the financial relationship of the newspapers in the Knight chain, that case, even if correctly decided, provides scant support for the Board's decision in *Hearst*. Whereas in *Knight Newspapers* there was very little dealing between the various newspapers and evidence of only about 2% of purchases centrally, the Hearst organization was obviously developed with the object of realizing purchasing economies for the various local newspapers through Hearst enterprises, improving the product and differentiating it from others through the services of the Washington Bureau, the Features Syndicate and the News Service, and, in turn, enhancing the position of those

28. A further consideration not expressed in either Member Brown's dissent or Trial Examiner Marx's decision is that the central enterprise can, by resisting a strike at one division, obtain concessions from the unions which will be applied at other divisions. While all employers which are in competition have an interest in the outcome of the negotiations, and could not be held involved for this reason alone, the immediacy of the "tandem" relationship within related enterprises is significant. Thus, the relevant factor is not active control over day-to-day labor relations policies, but the ability (potential) to affect collective bargaining postures.

29. Trial Examiner Singer's decision contains the even more astounding proposition that the News American and WBAL were "competitors" for advertising revenue, etc. See also the Court of Appeals decision, 462 F.2d at 891. This assertion is a distortion of the term "competition" as it is commonly used, and totally ignores the movement for concentration of news media, particularly by newspaper enterprises, in all major news markets. The News American and WBAL received advertising revenue not from "competition" but from the advertisers' desires to reach both markets, newspaper and AM radio.
providers of services in their dealings with non-Hearst enterprises. That the Board could have cited the absence of these factors in the *Knight* case in support of its decision and yet totally ignored them in the *Hearst* case indicated the deep-seated desire of the Board to isolate the situs of the dispute, regardless of economic realities. This desire totally ignores the equally persuasive factor of allowing the union to exert as much influence as there is interest in the dispute.

The simplistic approach to dealing with the intricacies of modern corporate and financial interdependence was carried further in the *Sid Harvey* case. Although the Court of Appeals for the Second Circuit reversed the Board's pro forma adoption of the trial examiner's statement that "the precise (and only) question is whether the corporations are under the actual control of Stephen Harvey, as distinguished from his potential control," it is not safe to assume that the Board has been deterred from the misapplication of illogical slogans in order to isolate the locus of labor disputes.

### The Ally-Doctrine

By the time we reach the question of whether one employer is "allied" with another, we have presumably already determined that he is separate and distinct from the struck employer. We are here dealing with an employer who has done or wants to "do business" with a struck or primary employer, but the union seeks to interfere with this relationship and requests that he terminate or fail to commence that relationship. Generally speaking, such an employer is protected by Section 8(b)(4)(B). However, if by his undertaking to perform

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31. *Id.* The Court of Appeals decision by Judge Hays said:

> Neutrality, for purposes of the Act, is not a technical concept. To determine whether an employer is neutral involves a common sense evaluation of the relationship between the two employers who are being picketed. In mechanically applying a 'day-to-day' test in this case, the Board engaged in a technical exercise in the intricacies of corporate structure rather than a realistic, common sense evaluation of neutrality.

> The Sid Harvey organization is essentially an integrated complex which manufactures, distributes, and sells a limited number of products. Ownership and control of the five corporations is centralized or overlapping. The daily contact among the corporations is extensive, and the operation and success of each is interrelated with and heavily dependent upon the other members of the group performing their assigned tasks. Only in the most strained and technical sense could the picketed employers be characterized as neutral. 460 F.2d at 6.

32. In one of the latest cases decided at the time of this writing, the Board sought and was granted temporary injunctive relief, relying on the *Hearst* cases, where labor relations experts of one corporate division were used by another. Phillips v. Local 391, Teamsters. 70 CCH Labor Cases ¶ 13,371 (E.D. Tenn. 1972).
struck work or otherwise, he lends assistance to the struck employer to see the struck employer through the strike, pressure may, in some cases, lawfully be brought to bear upon him.\textsuperscript{33}

The mere performance of struck work by the secondary employer is not, and should not be, enough to make him an ally. This conclusion is dictated by the economic fact that one who seeks to divert business away from the struck business on a permanent basis is a competitor, not an ally. Competitors are for these purposes "neutral." Moreover, a union would ordinarily want to see pressure brought to bear upon the primary by the diversion of his work to one of his competitors.

Since the mere performance of struck work by another enterprise is not sufficient to ally him with the primary, then it is necessary for the struck employer to benefit in some way from the performance of the struck work by the secondary. But the Board and Courts have proceeded from this logical premise to engraft additional conditions on the ally-doctrine. For example, in the NLRB formulation there must be an "arrangement" for the performance of the struck work,\textsuperscript{34} initiated by the struck employer,\textsuperscript{35} and some cases further require that the ally must "supplant" the work of the striking employees,\textsuperscript{36} and that the primary must pay for the performance of the work.\textsuperscript{37}

The engrafting of additional conditions seems to follow partly from a need in the first place to articulate a specific "test" to rationalize the

\textsuperscript{33} See United Steelworkers of America (Tennessee Coal & Iron) 127 NLRB 823, 824-25 (1960), enf'd as modified, 294 F.2d 256 (D.C. Cir. 1961).

\textsuperscript{34} Truck Drivers Local 413 (Patton Warehouse), 140 NLRB 1474, 1483 (1963), enf'd in this aspect, 334 F.2d 559, 547 (D.C. Cir. 1964) cert. denied 379 U.S. 916 (1964).

\textsuperscript{35} See Laborers Local 171 (Climax Machinery) 86 NLRB 1243 (1949).

\textsuperscript{36} See NLRB v. Western States Council, Woodworkers, 319 F.2d 655, 657-58 (9th Cir. 1963), enforcing 137 NLRB 352 (1962).

\textsuperscript{37} See Warehouse Union Local 6, ILWU (Hershey Chocolate), 153 NLRB 1051, 1062 (1965) enf'd 378 F.2d 1 (9th Cir. 1967). See also NLRB v. Business Machine Local 459, (Royal Typewriter) 228 F.2d 555, 562 (2d Cir. 1955, concurring opinion of Judge Hand).
decision, and secondly, from approaching such a "test" in subsequent cases as divinely inspired. For example, in the *Royal Typewriter* case, Royal had service contracts with its customers to repair Royal typewriters. When the union struck and prevented Royal employees from performing repair work, service contract customers were told by Royal to have the work done elsewhere and to send the bills to Royal for payment. The Board's order against the union's picketing the independent repair companies was denied enforcement by a three-judge panel of the Second Circuit Court of Appeals. Judge Lumbard, with whom Judge Medina apparently agreed, emphasized the interest of the union in preventing Royal's work from knowingly being done by the independents who could easily extricate themselves from the dispute by refusing to accommodate Royal. There appears to have been little competition between Royal and the independents for this work, since the customers were on service contracts to Royal, and the business would ultimately return to Royal. Judge Lumbard found the lack of a direct arrangement between Royal and the independents not controlling. However, this seems not to have satisfied Judge Hand, who insisted that the critical factor was Royal's payment to the picketed independents. As the writer has earlier noted, there would have been no economic difference had the customers paid for the repairs and service and merely deducted those amounts from their contract payments to Royal. But in order to obtain Judge Hand's concurrence, the "holding" of Judge Lumbard, unsupported by anything else either he or Judge Medina wrote, incorporates the element of payment by the struck employer. The element of payment by the primary employer is thereafter slavishly recited as part of the "ally test."

Again, the "arrangement" test, as the writer has previously noted, is artificial because it fails to consider the possibility that the "secondary" employer will purposefully assist the struck employer without being asked and without expecting permanent retention of the new business. This possibility inheres in an oligopolistic market, where none of the "competitors" wishes to increase his ultimate market share for reasons of friendship, antitrust liability and other considerations. Certainly, it makes no sense to require, as the Board seems to, that the

38. Accord, Laborers Local 859 v. NLRB (Thomas S. Byrne, Inc.) 446 F.2d 1319 (D.C. Cir. 1971).
39. 52 GEORGETOWN L.J. at 409.
40. Accord, Laborers Local 859 v. NLRB, supra n.38.
41. 288 F.2d at 559.
42. See Hershey Chocolate, supra n.37.
43. 52 GEORGETOWN L.J. at 409.
performance of the struck work must be at the request of the struck employer, as opposed to the customers. \textsuperscript{44}

The NLRB's growing ritualism and dependence upon formal expressions of "doctrine" is further exemplified by the \textit{Hershey Chocolate} case.\textsuperscript{45} Although the traditional formulation of the ally-doctrine is that the performance of struck work is one of the ways in which an employer may ally itself with the primary disputant,\textsuperscript{46} cases like \textit{Hershey Chocolate} indicate that no other like situations will be considered. In \textit{Hershey Chocolate}, the employer had maintained warehouse space at San Francisco for its products. The warehouse employees were represented by the Union. The employer decided to begin construction of a new manufacturing and warehousing facility in Oakdale, 100 miles away. In the meantime, the employer decided to terminate its own warehousing operation, lay off its employees, and have the warehousing operation performed by employees of Encinal Warehouse at the latter's facility in San Leandro. The Union requested preferential hiring of its members at the new Oakdale facility and also claimed bargaining rights for all warehouse employees at the new Oakdale facility. Receiving no favorable reply, it informed Encinal of the dispute and commenced picketing Encinal, all of the goods having previously been removed from the former warehouse to Encinal. The Union also induced the Encinal employees to stop working on Hershey goods.

In response to the secondary boycott charge against it, the Union claimed that Encinal was an "ally" of Hershey, the "struck" employer. The trial examiner, in a decision approved pro forma by the NLRB, held that Hershey was not "struck" since it had no employees any longer, and that Encinal was not performing "struck work" because at the time of consummating the lease, there was no strike.\textsuperscript{47}

This formalistic approach assumes that only by carefully adhering to each condition of the traditional Board formulation of the ally-doctrine can one employer ally itself with the primary disputant. However, this ignores the fact that the Union had represented a unit of employees and was seeking to preserve its bargaining rights, in the face of the employer's refusal to continue dealings. As the Union's signs said

\textsuperscript{44} Laborers Local 859 v. NLRB, 446 F.2d 1319 (D.C. Cir. 1971) reversing in this respect 180 NLRB 502 (1969).

\textsuperscript{45} Warehouse Union Local 6, ILWU (Hershey Chocolate), 153 NLRB 1051 (1965), enf'd. 378 F.2d 1 (9th Cir. 1967).

\textsuperscript{46} An otherwise neutral employer becomes an ally when he "engages in conduct which is inconsistent with his professed neutrality in the dispute such as performing the farmed out struck work . . . ." Tennessee Coal & Iron, supra n.33 at 825 (emphasis added.)

\textsuperscript{47} 153 NLRB at 1063-64.
“Hershey Chocolate’s running away from San Francisco to Oakdale with this temporary stopover in San Leandro.” The Board’s approach also ignores the fact that, although the primary employer had terminated its employees, there was a real dispute between it and the Union. There was no remaining location at which the Union could publicize its dispute except the Encinal warehouse. Encinal was on notice that the Union had a dispute with Hershey over the warehouse work, and Encinal knew that the work would not permanently be assigned to it because of the construction of the new Hershey warehouse facility. Encinal was acting as a mere accommodation for Hershey in its apparent effort to rid itself of the Union. There seems to be no other reason for the termination of the San Francisco warehousing operation prior to the construction of the new manufacturing and warehouse facility in Oakdale. When Encinal put itself in this relationship with Hershey and the Union, and when it provided the only Northern California location of Hershey goods, it had scant claim to protection from the Union’s pressure. However, the Board’s formal application of its limited “struck work” doctrine afforded this protection.48

The Hershey Chocolate result is astonishing when compared with the Board’s determination in Auburndale Freezer49 that in substantially similar circumstances the warehouse became a “common situs” at which the Union could lawfully picket with similar signs, identifying the owner of the warehouse goods as the primary disputant. The Board dismissed the trial examiner’s reliance on Hershey Chocolate and other “ally” cases, saying only that the “common situs” issue was not raised in Hershey. Notably, the Board did not say that Hershey had been wrongly decided, thus exalting linguistic form over substance. One would have thought that the Auburndale warehouse, at which there was no increase of business during the strike and due to the strike, would have been entitled to more protection than Encinal, which was engaged in the performance of the disputed work of the primary, knowing the assignment to be a temporary accommodation for Hershey. But the

48. Sometimes, the blindness to the rationale of the ally-doctrine is explicit. See e.g., Local 868, Teamsters (Mercer Storage Co.), 156 NLRB 67, at 70 (1965): “To be sure, the purpose and effect of storing Mid-County’s cars at Mercer was to avoid the impact of the lawful picketing at Mid-County and assist the latter in combating the strike. But under the present statute, as authoritatively construed, these considerations do not amount to legal justification for involving the neutral employer in a labor controversy to which he is otherwise a stranger.” (Emphasis added.) If the purpose of the accommodation is to assist in combating the strike, then what justification, legal or otherwise, is there for isolating the secondary from the effects of the dispute?

Board, without attempting to reconcile the cases, merely said in Auburn-dale that what you call it makes all the difference. The Steelworkers in the Auburndale case picked the correct label; the Longshoremen and Warehousemen’s Union in the Hershey case picked the wrong one.

CONCLUSION

The NLRB has failed to mend its ways, and it persists in confusing allied and single employer situations. In addition, the Board keeps stretching the facts for the purpose of finding that a subsidiary or division of the same corporation is another person. The result in short is that labor unions are being deprived of their statutory right to apply economic pressure at the whole of an employer’s enterprise.