

**“WHOLLY UNCONCERNED”: THE SCOPE AND
MEANING OF THE ALLY DOCTRINE UNDER
SECTION 8(b)(4) OF THE NLRA**

MICHAEL HENRY LEVIN †

In 1947, as part of the Taft-Hartley amendments¹ to the National Labor Relations Act, Congress enacted the secondary boycott section,² thereby opening a can of legal worms which remains unsealed to this day. Because a literal construction would not only prohibit the secondary activities the section's sponsors sought to reach,³ but also forbid an employee to picket his own employer, the National Labor Relations Board (the Board) and the courts quickly retreated to the section's legislative history to distinguish between permissible "primary activity" and illegal "secondary activity"⁴ in its administration. The legislators'

† B.A. 1964, University of Pennsylvania; J.D. 1969, Harvard University; B.Litt. 1970, Oxford University. Member, District of Columbia Bar. Attorney, National Labor Relations Board. The opinions expressed in this Article are those of the author and should not be attributed to either the Board or its General Counsel.

¹ Labor-Management Relations Act of 1947, ch. 120, 61 Stat. 136, *amending* National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935).

² NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1964). The section was originally enacted as § 8(b)(4)(A), but was redesignated § 8(b)(4)(B) and amended in respects not material here by the Labor-Management Reporting & Disclosure Act of 1959, Pub. L. No. 86-257, § 704, 73 Stat. 542. The amended version reads:

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . .

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

. . . .

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

29 U.S.C. § 158(b) (1964). *See also* NLRA § 303, 29 U.S.C. § 187 (1964), providing private remedies for violations of § 8(b)(4)(B).

³ All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

93 CONG. REC. 4198 (1947) (remarks of Senator Taft).

⁴ *E.g.*, NLRB v. Denver Bldg. Trades Council, 341 U.S. 675, 686 (1951); *see* NLRB v. International Rice Milling Co., 341 U.S. 665 (1951). *Rice Milling* held that inducing neutral deliverymen to refuse to cross a picket line at the primary employer's premises did not constitute the type of "concerted activity" banned by the

concept of secondary conduct lacked practical guidelines,⁵ however, and the ensuing morass of litigation over the alleged secondary nature of various union activities is too familiar to all labor lawyers.⁶

Act, but the opinion hints at a broader holding comparable to *Denver Building*. See *id.* at 671-72. For an early discussion of this point, see *Metal Polishers Local 171* (Climax Mach. Co.), 86 N.L.R.B. 1243, 1250-51 (1949). See generally A. Cox, *LAW AND THE NATIONAL LABOR POLICY* 34 (1960).

⁵ Senator Ellender rendered the following definition:

A secondary boycott, as all of us know, is a concerted attempt on the part of a strong union to compel employers to deal with them, even though the employees of that employer desire to be represented by other unions, or not to be represented at all.

93 CONG. REC. 4132 (1947). Senator Murray, however, admitted the existence of a problem:

[T]here are few issues that are more complicated and more illusive than those connected with secondary boycotts. Here we have a term which is almost incapable of any precise definition

Id. 4844. The Supreme Court has recently reaffirmed the existence of a definitional problem:

No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. . . . And the common law of labor relations has created no concept more elusive than that of "secondary" conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities.

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 386-87 (1969).

⁶ The more prominent controversies have included: Whether picketing by primary employees at sites occupied by several employers is "secondary." See *Sailors' Union of the Pacific* (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950). Compare *Oil Workers Local 346* (Pure Oil Co.), 84 N.L.R.B. 315 (1949) and *Electrical Workers Local 813* (Ryan Constr. Corp.), 85 N.L.R.B. 417 (1949), with *Retail Clerks' Local 1017* (Crystal Palace Mkt.), 116 N.L.R.B. 856 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957) and *Seafarers' Int'l Union* (Salt Dome Prod. Co.), 119 N.L.R.B. 1638 (1958), *enforcement denied*, 265 F.2d 585 (D.C. Cir. 1959) and *Chemical Workers Local 36* (Virginia-Carolina Chem. Corp.), 126 N.L.R.B. 905 (1960). Whether the existence of another site at which the union could adequately picket the primary makes picketing a common site secondary. Compare *Brewery Workers Local 67* (Washington Coca Cola Bottling Works, Inc.), 107 N.L.R.B. 299 (1953), *enforced*, 220 F.2d 380 (D.C. Cir. 1955), with *Electrical Workers Local 861* (Plauche Elec., Inc.), 135 N.L.R.B. 250 (1962). Whether pressuring one's employer to remedy conditions over which another employer exercises sole legal control is secondary. Compare *Longshoremen's Local 1066* (Wiggin Terminals, Inc.), 137 N.L.R.B. 45 (1962) and *Journeyman Plumbers Local 5* (Arthur Venneri Co.), 137 N.L.R.B. 828 (1962), *enforced as modified*, 321 F.2d 366 (D.C. Cir. 1963), with *Pipe Fitters Local 539* (American Boiler Mfrs. Ass'n), 154 N.L.R.B. 314 (1965), *remanded*, 366 F.2d 823 (8th Cir. 1966), *on remand*, 167 N.L.R.B. 606 (1967), *enforced*, 404 F.2d 547 (8th Cir. 1968). Whether picketing an employer whose terms of employment are inferior to the primary employer's is secondary. Compare *United Mine Workers* (Arthur J. Galligan), 144 N.L.R.B. 228 (1963) and *Sheet Metal Workers' Local 98* (Cincinnati Sheet Metal & Roofing Co.), 174 N.L.R.B. No. 22, 70 L.R.R.M. 1119 (1969), with *Orange Belt Dist. Council 48 v. NLRB* (Calhoun Dry Wall Co.), 328 F.2d 534 (D.C. Cir. 1964); *cf.* *Meat Drivers Local 710* (Wilson & Co.) v. NLRB, 335 F.2d 709 (D.C. Cir. 1964). Whether primary employees' refusal to handle material produced by another employer in order to preserve work formerly done by them is secondary. Compare *Washington-Oregon Shingle Weavers* (Sound Shingle Co.), 101 N.L.R.B. 1159 (1952), *enforced*, 211 F.2d 149 (9th Cir. 1954), with *Longshoremen's Local 19* (Pacific Maritime Ass'n), 137 N.L.R.B. 119 (1962) and *Metropolitan Dist. Council of Phila.* (National Woodwork Mfrs. Ass'n), 149 N.L.R.B. 646 (1964), *enforcement denied*, 354 F.2d 594 (7th Cir. 1965), *rev'd*, 386 U.S. 612 (1967). And whether the same refusals to acquire work not formerly done by such primary employees are secondary. Compare *Retail Clerks Local 770* (Food Employers Council, Inc.), 127 N.L.R.B. 1522 (1960), *enforced in part*, 296 F.2d 368 (D.C. Cir. 1961) and *Asbestos Workers Local 8* (Preformed Metal Prods. Co.), 173 N.L.R.B. No. 55,

Yet whether or not concerted activity is technically "secondary," if it is directed against an employer who is "firmly allied" in economic interest with the primary employer, it will be treated as primary action not subject to the ban of section 8(b)(4)(B). This concept of alliance has no statutory basis; instead it was implied from the historical treatment of U. P. secondary union activity and the section's legislative history. During congressional debate on the secondary boycott section, Senator Taft explained that "[t]his provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees."⁷ On this slender reed Judge Rifkind decided *Douds v. Metropolitan Federation of Architects (Ebasco)*,⁸ in which the ally doctrine was born.⁹

In *Ebasco* the Board's Regional Director sought a preliminary injunction¹⁰ against striking Ebasco employees who also picketed Project Engineering, causing some of the latter's draftsmen to quit. An independent partnership, Project had done "an appreciable percentage"¹¹ of its business with Ebasco prior to the strike under a cost-plus contract giving Ebasco the power to supervise the work done by Project's employees and set ceilings on their wages. After the strike began, Project performed a significantly greater amount of work for Ebasco, some of which was transferred to Project in the half-finished state in which the strikers left it. Noting that the increased work was precisely that which Ebasco's employees would have done but for the

69 L.R.R.M. 1344 (1968), *with* Retail Clerks Local 876 (Independent Biscuit Co.), 174 N.L.R.B. No. 67, 70 L.R.R.M. 1213 (1969).

Many of these problems have been analyzed in Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962) [hereinafter cited as *Gravamen*]; Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965) [hereinafter cited as *Job Security*]; Note, *Common Situs Rules Fade Away as NLRB and Courts Look to Object of Union's Picketing in Taft-Hartley Section 8(b)(4)(A) Cases*, 45 GEO. L.J. 614 (1957).

⁷ 93 CONG. REC. 4198 (1947) (emphasis added). Senator Taft continued: There is no reason . . . why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike.

Id.

⁸ 75 F. Supp. 672 (S.D.N.Y. 1948).

⁹ The ally doctrine has been usefully examined in Asher, *Secondary Boycotts—Allied, Neutral and Single Employers*, 52 GEO. L.J. 406 (1964); *Gravamen* 1418; Meyer, "Ally" or "Neutral"—*The Secondary Boycott Dilemma*, 34 TUL. L. REV. 343 (1960); Note, *The "Ally" Doctrine Under Section 8(b)(4)(B): A Functional Approach*, 37 N.Y.U.L. REV. 508 (1962); Note, *Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e)*, 38 N.Y.U.L. REV. 97, 121-24 (1963); Note, *Secondary Boycotts and Labor Reform*, 34 N.Y.U.L. REV. 1299, 1306-10 (1959).

¹⁰ Section 10(l) of the NLRA, 29 U.S.C. § 160(l) (1964), grants federal district courts jurisdiction to restrain activity temporarily when the regional attorney "has reasonable cause to believe" that the activity constitutes an unfair labor practice.

¹¹ 75 F. Supp. at 674.

strike, that the effect of Project's activities on the strike was exactly the same as though Ebasco had hired strikebreakers, and that if strikebreakers could be appealed to at Ebasco's premises they could be appealed to elsewhere, Judge Rifkind concluded that section 8(b)(4)(B) did not protect the "business" of indirect strikebreaking. In denying the Director's petition, the court noted that:

To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance. In every meaningful sense [Project] had made itself party to the contest. *Manifestly it was not an innocent bystander, nor a neutral. It was firmly allied to Ebasco and it was its conduct as ally of Ebasco which directly provoked the union's action.*

. . . .

. . . The conduct of the union in inducing Project's employees to strike is not different in kind from its conduct in inducing Ebasco's employees to strike. If the latter is not amenable to judicial restraint, neither is the former. . . .

. . . .

The case at bar is not an instance of a secondary boycott.¹²

By confirming that the section could not be construed literally, the *Ebasco* court generated as many questions as it answered. The court relied on its construction of the section's "doing business" language; an equally sound theory would have been that because Ebasco exercised enough "detailed and pervasive" control over Project's employees to make them its own apart from their performance of "farmed-out struck work," Project was not an "other person" entitled to the protection of the statute.¹³ If Project could be picketed as a primary because its workers by doing struck work became Ebasco's *replacement* employees, it should also be reachable as a primary if its workers were Ebasco's *regular* employees, regardless of struck work. In addition, although

¹² *Id.* at 676-77 (emphasis added). The decision also alluded to §13 of the NLRA preserving the right to strike, *id.* at 675, and suggested that a construction of §8(b)(4)(B) prohibiting the picketing in question might be an unconstitutional restriction on the picketers' first amendment rights under *Thornhill v. Alabama*, 310 U.S. 88 (1940). This raised the question whether the ally doctrine would be narrowed if the courts limited the protection afforded picketing under the first amendment. See *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957). By the time such narrowing took place, however, the ally doctrine was sufficiently established to stand on its own.

¹³ 75 F. Supp. at 676. The opinion expressly noted that in addition to wielding detailed control over Project's employees, Ebasco treated them as its own by failing to segregate them in its invoicing and public advertising. The court also refused to give effect to a contractual provision that Project's employees were to remain Project's on the ground that the provision merely revealed the parties' awareness that their relationship "cast a shadow of doubt upon the identity of the employer." *Id.* at 677; cf. *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983 (7th Cir. 1948), enforcing 73 N.L.R.B. 1463 (1947) (§8(a)(1) action).

the case would probably have come out differently in the absence of struck work,¹⁴ it was unclear whether without these other strands of interrelatedness the outcome would have remained the same. The court seemed to find Project allied with Ebasco on two grounds, neither of which would have been sufficient by itself: Ebasco's control of Project's employees under the contract and Project's performance of struck work. Only when both elements were present could one guarantee that the Board and the courts would not distinguish the decision when future controversies arose.¹⁵

This ambiguity raised difficult questions concerning the extent of union liability for common types of concerted activity—questions whose solutions were crucial to both unions and management. The conclusion that a boycotted secondary employer was “neutral” with respect to the primary dispute would expose the boycotters not only to an eventual injunction under section 8(b)(4)(B), but also to an immediate “temporary” injunction under section 10(l),¹⁶ to potentially crippling damage suits under section 303,¹⁷ and after 1959 to the void-

¹⁴ “[N]or do I indicate any opinion as to the application of the Act if the normal volume of subcontracting work in this case had not been increased . . .” 75 F. Supp. at 677.

¹⁵ Indeed, the case has been distinguished both in the single enterprise area because “[in *Ebasco*] the employees . . . were all working for the same employer and had practically identical interests.” *NLRB v. Wine Workers Local 1 (Schenley Distillers Corp.)*, 178 F.2d 584, 587 (2d Cir. 1949), and in the struck work area because *Ebasco* supposedly involved a parent-subsidiary relationship, *McLeod v. Local 365, UAW (Intertype Co.)*, 200 F. Supp. 778, 781 (E.D.N.Y.), *aff'd*, 299 F.2d 654 (2d Cir. 1962). An early statement of the *Ebasco* rule similarly emphasized both elements:

If, however, the relationship between the two employers is so close that the employees of the second employer work under the direct supervision of the struck employer, and are doing a considerable amount of additional work as the result of the strike, it may be found that the second employer is an “ally” of the struck employer

Annot., 16 A.L.R.2d 769, 779 (1951).

¹⁶ For testimony to the damaging effect of a temporary injunction on a union's attempt to bring sustained economic pressure to bear on an employer, see F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 200-02 (1930). The possibility that the district court will blindly follow what it perceives to be the Board's “rule” presents another danger to the union. *See, e.g., Squillacote v. Teamsters Local 695 (Chase Ready-Mix, Inc.)*, 60 L.R.R.M. 2057, 2060 (W.D. Wis. 1965) (“generally advisable . . . to seek to determine the prevailing view of the Labor Board”). *See also Brown v. Lithographers Local 17*, 180 F. Supp. 294 (N.D. Cal. 1960) (doubts resolved in favor of issuing temporary injunction in light of congressional intent to limit effect of disputes).

¹⁷ Labor-Management Relations Act (LMRA) § 303(b), 29 U.S.C. § 187 (1964). Primary employers injured by secondary action may also bring suits under this section. *E.g., United Brick Workers Union v. Deena Artware, Inc.*, 198 F.2d 637, 643-44 (6th Cir. 1952); *Gibbs v. United Mine Workers*, 220 F. Supp. 871, 878 (E.D. Tenn. 1963), *rev'd on other grounds*, 383 U.S. 715 (1965). For a time courts magnified the risk by allowing punitive damages pursuant to both § 303 suits and state law conspiracy actions entertained under pendent jurisdiction. *Mine Workers District 19 v. Osborne Mining Co.*, 279 F.2d 716 (6th Cir.), *cert. denied*, 364 U.S. 881 (1960); *Gibbs v. United Mine Workers*, 220 F. Supp. 871 (E.D. Tenn. 1963). In 1964 the Supreme Court eliminated this danger by holding that § 303 preempts all state law actions against nonviolent secondary activity and permits only compensatory damages therefor. *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964).

ing of any collective bargaining contract clause permitting such boycotts.¹⁸ A finding that the secondary employer forced to "cease doing business" with the primary employer was "allied" with that primary was a complete defense to these charges.¹⁹

Under steady union pressure to define more precisely the situations in which this immunity for secondary-type activity was available, the Board and the courts eventually split the ally doctrine in thirds. The first third, based on the secondary's performance of struck work, will be designated the "farmed-out struck work" concept; the last two, based on significant breakdowns in the normal barriers between business entities dealing at arm's length, will be labelled the "single enterprise" and the "coemployer" concepts. This Article seeks to raise the questions in response to which each concept developed, to make explicit the principles underlying their development, and to demonstrate how, under the impact of political forces and complex factual variations, the decisional bodies have unreasonably deviated from the controlling considerations which they initially set out.

I. FARMED-OUT STRUCK WORK

Ebasco immediately raised a series of questions concerning farmed-out struck work. May the striking primary employees appeal to the secondary employer's workers if the latter perform struck work without other primary-secondary ties? Next, if simply performing struck work suffices to strip the secondary employer of his neutrality vis-à-vis the primary's labor dispute, the question arises: what is "struck work"? Does a secondary employer who advances a struck primary employer easy credit or initiates poststrike business dealings with him so help the primary as to lose his protection as a neutral, on

¹⁸ NLRA § 8(e), 29 U.S.C. § 158(e) (1964). Under 8(e) any agreement between union and employer to boycott any other employer is void.

The result is that § 8(b) (4) in conjunction with § 8(e) provides three degrees of permissibility respecting picketing in connection with agreements to cease doing business with certain persons: (1) As to the garment industry, picketing to secure and to enforce is permissible; (2) as to the construction industry, picketing to secure is permissible but (under § 8(b) (4) (B)) picketing to enforce is proscribed; (3) as to all other industries, picketing both to secure and to enforce is proscribed.

Construction Laborers Local 383 v. NLRB (Colson & Stevens Constr. Co.), 323 F.2d 422, 425 (9th Cir. 1963).

¹⁹ The ally doctrine is applicable under § 303(b) of the LMRA and § 8(e) of the NLRA since they both incorporate § 8(b) (4) (B)'s standards. *Teamsters Local 20 v. Morton*, 377 U.S. 252, 258 n.13 (1964); *Longshoremen's Local 16 v. Juneau Spruce Corp.*, 342 U.S. 237, 243-44 (1952) (§ 303 violation); *Teamsters Local 413 v. NLRB* (The Patton Warehouse, Inc.), 334 F.2d 539, 546-47 (D.C. Cir.), cert. denied, 379 U.S. 916 (§ 8(e) charge), enforcing in part 140 N.L.R.B. 1474 (1963); *NLRB v. Amalgamated Lithographers Local 17*, 309 F.2d 31 (9th Cir. 1962), cert. denied, 372 U.S. 943 (1963) (§ 8(e) charge); see *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 626-28 (1967) (§ 8(e) charge) (dictum). See also *Job Security* 1013.

the ground that such actions are only made possible by the labor of the secondary's employees, who are therefore strikebreakers once-removed? Is an express agreement to perform the struck work necessary? In the absence of an agreement, the secondary's employees cannot be fairly inferred to be the primary's, and without requiring that the secondary receive some notice that he is accepting struck work, his normal business dealings would be at his peril. If the secondary uses his employees to perform services normally rendered by a shut-down primary and thereby relieves the primary of the pressures the secondary would otherwise apply to encourage him to settle the dispute, can primary employees picket his premises? In addition, *Ebasco* left "farming out" undefined. If a strike-bound primary closes its facilities and later finances a related enterprise through a different corporation, how close must the timing and type of business be before the strikers can successfully argue that but for the strike they would be doing the new corporation's work?

A. Basic Doctrine

The doubt remaining after *Ebasco* over whether doing struck work would per se deprive a secondary employer of the protection afforded neutrals by section 8(b)(4)(B) was dispelled in *NLRB v. Business Machine Mechanics Local 459 (Royal Typewriter Co.)*.²⁰ Struck by its repairmen, Royal instructed customers to whom it owed repair obligations to have their typewriters fixed by any independent repair company, pay for the repairs, and send the receipts to Royal for reimbursement. Most of these customers simply sent Royal their unpaid bills, which Royal paid directly. Apart from this payment procedure, Royal had no contact with the independents.

When the striking Royal repairmen picketed two of the independents, the Trial Examiner found a violation of section 8(b)(4)(B), distinguishing *Ebasco* on the ground that a direct consensual relationship must be established before the primary and secondary employers could be held "allied."²¹ The Board affirmed,²² but the Second Circuit,

²⁰ 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

²¹ *Business Mach. Mech. Local 459 (Royal Typewriter Co.)*, 111 N.L.R.B. 317, 328 (1955). The Trial Examiner found a third independent allied on the basis of a direct oral agreement with Royal and recommended dismissing the charges filed by it. *Id.* at 329. This part of the intermediate proceedings was not appealed.

The striking employees also picketed several of Royal's customers suspected of utilizing the independents for repairs. This activity clearly violated § 8(b)(4)(B) because the union admitted it was attempting to force the customers to cease doing business with Royal. *Id.* at 325-27.

²² The decision contained an unhelpful explanation that, although the Board was not reviewing the Examiner's interpretation of *Ebasco*, the union had failed to sustain its burden of proving an alliance. *Id.* at 318. Member Peterson dissented, arguing that the independents were allies. *Id.* at 321.

noting that the repair work performed by the independents "would inevitably tend to break the strike"²³ and that the independents were enriching themselves and preserving Royal's goodwill at the strikers' expense, denied enforcement. The court concluded that the union's interest in appealing to strikebreakers outweighed the independents' right to be free from secondary pressure when the latter could easily avoid the pressure by refusing the struck work.

[A]n employer is not within the protection of § 8(b)(4)(A) when he knowingly does work which would otherwise be done by the striking employees of the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations. The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing the services.²⁴

The court also found that the secondaries had a duty to make a good faith effort to avoid doing struck work—a duty which in effect demanded actual avoidance.²⁵ Expanding on the majority opinion, Judge Hand explicitly equated paying the secondary for doing struck work with subcontracting, and advocated placing on the secondary the burden of showing that the work would not have been done by the primary absent the strike.²⁶

Royal Typewriter established the core of the struck work doctrine: when a secondary does work which but for the strike would have been done by the strikers, and that work helps the primary to avoid the strike's impact by continuing to provide goods and services to his customers in his name, the primary is using the secondary employees as strikebreakers, and the union may appeal to them as though the primary had imported them onto his premises. Any other holding would enable the primary to evade legitimate economic pressure by restricting his employees' traditional right to appeal not only to their fellows, but also to anyone hired to replace them.

The case's subsidiary holdings demonstrate the paramount importance of the primary employees' right to pressure their employer.

²³ 228 F.2d at 558.

²⁴ *Id.* at 559.

²⁵ A case may arise where the ally employer is unable to determine that the work he is doing is "farmed out." . . . [But] [w]herever they worked on new Royal machines [the independents] were probably aware that such machines were covered by a Royal warranty. . . . [and] in any event, before working on a Royal machine they could have inquired of the customer whether it was covered by a Royal contract and refused to work on it if it was.

Id.

²⁶ *Id.* at 562 (concurring opinion).

Although the opinion specifically noted that in both *Ebasco* and *Royal Typewriter* the union notified the secondaries that they were doing struck work before picketing them, the court reduced its "knowingly" requirement to a fiction by remarking that picketing itself gave the secondaries adequate notice of the nature of the work.²⁷ Similarly, the court treated the requirement that the secondary "inject itself into the dispute" as largely metaphorical, reasoning that whether the impetus for the arrangement came from the secondary employer or from the primary the adverse effect on the strike would be the same.²⁸ Finally, for the same reason that the court did not require an express arrangement to establish the ally relationship, it found that the lack of direct payments to the secondaries did not affect the outcome: secondary employees used as strikebreakers remained strikebreakers, whether or not they were specifically designated or paid by the primary.

For ten years after *Ebasco*, the Board, while acknowledging the existence of the court-created struck work rule, found no case requiring its affirmative application.²⁹ But the first quartet of cases in which the Board held the doctrine to be a complete defense to secondary boycott charges firmly supports the interpretation of *Royal Typewriter* outlined above.

In *Shopmen's Local 501 (Oliver Whyte Co.)*,³⁰ the secondary processed wire for the struck primary employer from which all insignia had been removed so that the secondary employees could not identify the farmed-out pieces.³¹ When the primary employees picketed the

²⁷ *Id.* at 559; see General Drivers Local 563 (Fox Valley Material Suppliers Ass'n), 176 N.L.R.B. No. 51, 71 L.R.R.M. 1231, 1234-35 (1969) (*unknowing* performance of struck work no defense).

²⁸ If the impetus came solely from the primary's customers, however, no issue of farmed-out work would arise. See text accompanying notes 80-89 *infra*.

²⁹ See, e.g., Chauffeurs Local 135 (Marsh Foodliners, Inc.), 114 N.L.R.B. 639 (1955); Business Mach. Mech. Local 459 (Royal Typewriter Co.), 111 N.L.R.B. 317 (1955); Metal Polishers Local 171 (Climax Mach. Co.), 86 N.L.R.B. 1243 (1949). In the most pregnant early example, Oil Workers Local 346 (Pure Oil Co.), 84 N.L.R.B. 315 (1949), Pure Oil enjoyed loading privileges on a cost-sharing basis at a Standard Oil dock manned by Standard Oil employees. During the 60-day notice period prior to the strike, Pure Oil made an agreement with Standard Oil that in the event of a labor dispute with Standard, Pure Oil would be permitted to operate the dock to load its ships. When Standard's employees struck and picketed the dock, Pure Oil's workmen refused to cross the picket line. Citing *Ebasco*, the Trial Examiner found that Pure Oil's attempt to provide services normally provided by the striking Standard employees created an alliance between the two companies. *Id.* at 330. The case raised prophetic questions regarding the validity of predispute arrangements, the nature of the benefit the secondary's activities must yield the primary, and whether by sharing the costs (including labor expenses) of maintaining the dock, the two companies became coemployers of the dock workers. The Board, however, held the picketing to be legitimate on the basis of the now-discredited title-to-situs doctrine and never reached these issues. *Id.* at 319. For critiques of the title-to-situs doctrine, see Steelworkers Local 5895 v. NLRB (Carrier Corp.), 376 U.S. 492, 497-99 (1964); Retail Clerks' Local 1017 (Crystal Palace Mkt.), 116 N.L.R.B. 856, 858-59 (1956), *enforced*, 249 F.2d 591 (9th Cir. 1957).

³⁰ 120 N.L.R.B. 856 (1958).

³¹ *Id.* at 859.

secondary and induced a complete work stoppage, the secondary argued that the picketing was an unfair labor practice because it halted not only struck work but also work for his other customers. The Trial Examiner noted that a partial work stoppage involving only the struck work might be an unfair labor practice by the secondary workers or a valid ground for discharging them,³² and then explained that a secondary employer doing struck work was equivalent to a primary who could be picketed with regard to *all* his work.

[O]nce an employer "allies" himself with the primary employer whose employees are on strike, he stands *in the shoes* of the primary employer so that the union may lawfully exert the same type of pressures against the former employer as it may against the latter.³³

The Board reasoned that to limit the primary employees to inducing only a partial work stoppage would overly restrict their traditional right to appeal to all primary employees, even those doing work unrelated to the strikers' task.³⁴

The potential argument that *Oliver Whyte's* "in the shoes" ruling was only required by the inability of the secondary employees to identify struck work was quashed by the Board three weeks later. In *International Die Sinkers Lodge 410 (General Metals Corp.)*,³⁵ the primary employees, members of the machinists union, picketed General Metals, the secondary employer. Representing the relevant General Metals employees, the die sinkers local instructed its members to refuse to perform the primary's easily identified work. When General Metals fired the workers refusing to work, the die sinkers walked out, joining the primary employees' picket line. The Board held that because the secondary's premises were "the situs of farmed-out or struck work which [General Metals] was knowingly performing for another," the machinists union could legally picket there,³⁶ and went on to find that the die sinkers did not participate in prohibited secondary activity by inducing the secondary employees to refuse to perform struck work. Regardless of the scope of the struck goods clause in their contract with General Metals, the die sinkers local had a legitimate primary interest in stop-

³² *Id.* at 860. This possibility would be eliminated if the contract contained a valid clause permitting refusals to handle struck work. *But cf.* *International Die Sinkers Lodge 410 (General Metals Corp.)*, 120 N.L.R.B. 1227 (1958).

³³ 120 N.L.R.B. at 862 (emphasis added).

³⁴ See *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664, 668 (1967); *NLRB v. General Drivers Local 968 (Otis Massey Co.)*, 225 F.2d 205 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955); *Administrative Ruling of the General Counsel*, Case No. SR-99, 44 L.R.R.M. 1516 (1959).

³⁵ 120 N.L.R.B. 1227 (1958).

³⁶ *Id.* at 1228.

ping the secondary from making its members strikebreakers in another dispute.³⁷ Given the strength of the secondary employees' interest in preventing strikebreaking, that of the primary employees could only be stronger; the legality of the latter group's general picketing was treated as settled.

Within three months after deciding *General Metals*, the Board approved a primary union's inducement of a slowdown against a secondary employer who had agreed before the strike to perform deliveries normally made by the strikers, reasoning that—like the primary—the secondary could be subjected to a slowdown in his whole business.³⁸ Three months later the Board carried the “in the shoes” concept even further. In *Teamsters Local 324 (Truck Operators League of Oregon)*,³⁹ when struck beer distributors hired ICC common carriers to accept and deliver beer consigned to them, their striking employees also picketed the carriers' trucks when they made deliveries for the primaries. Because the carriers argued that their common law and Interstate Commerce Act duties to perform any requested service prevented them from choosing whether to enter the dispute and that to subject them to economic pressure would therefore be inequitable, the case offered a seemingly strong factual basis for limiting the “in the shoes” doctrine. Nevertheless, the Board rejected the carriers' argument with the remark that secondary employers doing struck work were primary and that if the union could strike a primary employer who was a common carrier, it could picket an ally who was.⁴⁰

These cases correctly reveal the basic standard to be whether the primary employer's use of the secondary employees is sufficiently similar in impact on the effectiveness of the strike to equate appeals to the secondary employees with appeals to strikebreakers entering the primary's premises. If the secondary employees' labor directly decreases the economic impact of the strike *on the primary*,⁴¹ the secondary employees can be generally reached. Whether the primary employer's arrangement with the secondary is created after the strike begins or in anticipation of the strike is irrelevant because the effect upon the strike

³⁷ But compare *Local 232, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 255-56 (1949), with *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 492-96 (1960), on the validity of *General Metals*' initial discharge of the refusing employees. See also *NLRB v. Alamo Express, Inc.*, 74 L.R.R.M. 2742 (5th Cir. 1970); *Teamsters Local 657 v. NLRB*, 429 F.2d 204 (D.C. Cir. 1970).

³⁸ *Brewery Workers Local 366 (Adolph Coors Co.)*, 121 N.L.R.B. 271, 275-76 (1958), *enforcement denied on other grounds*, 272 F.2d 817 (10th Cir. 1959).

³⁹ 122 N.L.R.B. 25 (1958).

⁴⁰ *Id.* at 27 & n.8.

⁴¹ The test may be alternatively phrased in terms of the benefit to the primary of the secondaries' labor or the harmful effect of their labor on the strike against the primary. See text accompanying notes 80-89 *infra*.

will be the same.⁴² On the other hand, alliance is not proven if the primary simply receives financial aid from the secondary. Although this aid does help the primary resist the strike, the secondary employees cannot be equated with strikebreakers since they are not performing the strikers' work.

Two major attacks have been launched against this basic doctrine. The first argues that no secondary should be exposed to pressure from striking employees because the psychological threat that the secondary will retain the transferred customers after the strike will suffice to coerce the primary into a rapid settlement.⁴³ The second, while acknowledging the primary employees' right to reach the secondaries, argues that "in the case of farmed-out struck work the appeal to the pickets should be limited to [halting] the farmed-out work of the primary employer."⁴⁴ But the first of these arguments misconceives the doctrine's rationale, while the second must fail for a series of policy reasons.

With respect to the first argument, the primary employer farms out struck work to continue his business, not to lose it; the very act of farming out the work implies a decision that his business is less likely to be diminished by transferring work to a secondary than by importing strikebreakers or ceasing to operate the plant. For the primary, the psychological impact of continuing business through a secondary would thus be in most instances a positive force tending to prolong the strike. But even if the effect were negative, the struck work doctrine protects the strikers' right to bring *economic* as well as psychological pressure to bear on the primary employer, even when the economic pressure is *de minimus*.⁴⁵ A rule allowing the primary employer to choose his strikebreakers with impunity would seriously curtail this right.

With respect to the second argument, nothing intrinsic to the doctrine requires that the secondary's whole business stand "in the shoes" of the primary when only part of it is performing struck work. Yet insofar as partial refusals to work are unfair labor practices or grounds for discharge under state or federal law, the primary employees' only alternatives are to induce all or none of the secondary's workers to

⁴² See Teamsters Local 901 (Editorial "El Imparcial," Inc.), 134 N.L.R.B. 895, 906-08 (1961); Teamsters Local 560 (Pennsylvania R.R.), 127 N.L.R.B. 1327 (1960).

⁴³ See 7 SYRACUSE L. REV. 321, 322 (1956).

⁴⁴ Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 VA. L. REV. 189, 209 n.74 (1966). See also Warehouse Union Local 6 (Hershey Chocolate Corp.), 153 N.L.R.B. 1051, 1061 (1965).

⁴⁵ See Masters, Mates & Pilots Local 28 (Ingram Barge Co.), 136 N.L.R.B. 1175, 1187 (1962), *enforced*, 321 F.2d 376 (D.C. Cir. 1963) ("I am not aware that in the formulation and acceptance of the 'ally' concept . . . the importance of the struck work is weighed . . ."). As Judge Rifkind noted in the *Ebasco* case, "[t]he effect of a strike would be vastly attenuated if its appeals were limited to the employer's conscience." 75 F. Supp. at 675.

stop working completely, and the latter choice empties the right to strike of all significance. Thus, a rule limiting unions to inducing refusals to do struck work would eliminate the one viable alternative they presently possess. Moreover, the suggested limitation would facilitate a primary employer's efforts to evade the effect of a strike. Evasion could then be accomplished either by farming out struck work piecemeal so that strikers cannot tell which of many possible secondaries is performing it, or by creating a runaway shop situation in which the first secondary when picketed immediately reconsigns his struck work to the next. In either case the primary employees would be forced to investigate or picket all potential secondaries, resulting in an immense drain on their finances and morale. The "in the shoes" doctrine provides a powerful deterrent to this kind of subterfuge,⁴⁶ without imposing an inordinate burden on the secondary, who can always escape the pressure by simply refusing all struck work. Thus, the balancing test underlying all 8(b)(4)(B) cases—the primary employees' right to exert economic pressure on their employer versus the secondary's right to be free from pressure emanating from a dispute "not his own"⁴⁷—clearly favors the unions in this situation.

B. What Is Struck Work?: "Work which but for"

Given the antistrikebreaking rationale of the struck work doctrine, the crucial question is often whether the work performed by the secondary is "work which but for the strike would have been performed by the primary's employees." Difficulties in applying this formula to effectuate the doctrine's rationale have led to several divergences from the basic equation, which will be clarified by eliminating the easier cases.

The formula itself indicates that when a secondary employer performs a subcontract concluded with the primary without reference to evading a strike, he does not become the primary's ally because the contracted work would be done by the secondary employees regardless of the strike.⁴⁸ Even when the secondary's product if sold to the primary directly contributes to his efforts to resist the strike, the sec-

⁴⁶ The rule that picketing a secondary reasonably believed to be doing struck work remains primary activity until the secondary affirmatively notifies the pickets that it has permanently ceased performing struck work also serves to deter a primary's efforts to avoid a strike's impact. See *Laundry Workers Local 259 (California Laundry & Linen Supply)*, 164 N.L.R.B. 426 (1967).

⁴⁷ See *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 692 (1951).

⁴⁸ *Cuneo v. Teamsters Local 575 (Dierickx Vending Co.)*, 210 F. Supp. 450, 453-54 (D.N.J. 1962); *Teamsters Local 728 (Brown Transport Corp.)*, 140 N.L.R.B. 1436 (1963); *Mailers' Union No. 6 (Publishers Ass'n)*, 136 N.L.R.B. 196 (1962), *enforced*, 316 F.2d 371 (D.C. Cir. 1963) (only refusals to handle *farmed-out* struck work sanctioned); *Business Mach. Mech. Local 459 (Friden, Inc.)*, 134 N.L.R.B. 598, 607-08 (1961); *Metal Polishers Local 171 (Climax Mach. Co.)*, 86 N.L.R.B. 1243, 1253 (1949); *cf. Wine Workers Local 1 (Schenley Distillers Corp.)*, 78 N.L.R.B. 504, 507 (1948), *enforced*, 178 F.2d 584 (2d Cir. 1949) (independent sales outlet not an ally).

ondary's production cannot be equated with strikebreaking. Any other holding would isolate the primary from all suppliers and clog commerce by forcing the secondary to investigate the primary's labor status as a condition precedent to every sale.⁴⁹ Similarly, a secondary does not become an ally merely because the primary employer continues to do business with him using supervisors and nonstriking employees.⁵⁰ The supervisors, not the secondary, perform the struck work, and the primary employees have an adequate chance to appeal to them at the primary's premises. In addition, subcontracting work formerly done by a bargaining unit of primary employees does not create an alliance, even when this action will foreseeably cause the primary employees to strike,⁵¹ for the subcontracting is neither a result of nor an attempt to evade a strike; the primary employees cannot show that but for their strike, they would be performing the work.

In other situations, however, the emphasis shifts from the identity of the workers who would normally perform the transferred work to the primary employer's ability to escape legitimate pressure by farming out the work. For instance, when an outside union seeking recognition from a primary employer pickets both the secondary and the primary,⁵²

⁴⁹ See *Steel Fabricators Local 810 (Fein Can Corp.)*, 131 N.L.R.B. 59, 71 (1961), *enforced*, 299 F.2d 636 (2d Cir. 1962) (secondary continued to provide essential shipping service). Even when the sales are made on a nonregular basis after the strike begins and the product is one whose use for strikebreaking is reasonably foreseeable, the struck work doctrine should not apply because the primary employees have an adequate opportunity to stop deliveries of the product at the primary's premises.

⁵⁰ See *Chauffeurs Local 135 (Marsh Foodliners, Inc.)*, 114 N.L.R.B. 639, 642 (1955) (when carriers transfer goods to primary's nonstriking trucks in secondary's parking lot to avoid pickets, the secondary is not an ally). See also *Warehouse Workers Local 688 (Acme Paper Co.)*, 121 N.L.R.B. 702 (1958) (ally defense not raised).

⁵¹ *Warehouse Union Local 6 (Hershey Chocolate Corp.)*, 153 N.L.R.B. 1051, 1064 (1965); *Teamsters Local 25 (J. C. Driscoll Transp., Inc.)*, 148 N.L.R.B. 845 (1964); *Highway Truckdrivers Local 107 (Riss & Co.)*, 130 N.L.R.B. 943, 950 n.15 (1961), *enforced*, 300 F.2d 317 (3d Cir. 1962); *Longshoremen's Local 13 (Catalina Island Sightseeing Lines)*, 124 N.L.R.B. 813, 830 (1959). By subcontracting, however, the employer may be engaging in an unfair labor practice in violation of § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1964). See *Fibre-board Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-15 (1964) (duty to bargain encompasses subcontracting of work previously performed by union members).

The result may also differ when the primary employees have a contractual right to the contracted-out work and the subcontracting arrangement is made in anticipation of an unrelated strike. See *Steelworkers Local 4203 (TCI)*, 127 N.L.R.B. 823, 826, *enforced as modified*, 294 F.2d 256 (D.C. Cir. 1961); cf. *McLeod v. Electrotypers' Local 100 (Rapid Electrotpe Co.)*, 49 L.R.R.M. 2945 (S.D.N.Y. 1962) (§ 10(1) injunction), in which the primary decided to use plates made by the secondary and consequently discharged 42 of his employees. The primary's employees struck and induced a sister union at the secondary's plant to refuse to handle plates bound for the primary. The court held the sympathy strike unlawful on the ground that the secondary did not become an ally simply by agreeing to sell a new product to the primary. *But see* text accompanying notes 69-74 *infra*.

⁵² This statement assumes that the primary employees do not respect the picket line. Picketing by a union not representing the employees is legal for 30 days under 29 U.S.C. § 158(b)(7)(C) (1964), and for a longer period if a representation petition under § 9(c) of the NLRA, 29 U.S.C. § 159(c) (1964), is filed.

an alliance may be found although the work farmed out by the primary to avoid the picketing is not ordinarily performed by the pickets.

In *Madden v. Steel Fabricators Local 810 (Ideal Roller Co.)*,⁵³ the court clearly recognized that the pickets need not be persons ordinarily performing the farmed-out struck work. The Ideal Roller employees striking the primary employer's Long Island plant also picketed the company's Chicago plant and prevented the nonstriking Chicago employees from working by turning away all truck deliveries. The primary arranged for a Chicago warehouse company to accumulate the truck shipments and then forward them to the Chicago plant in railroad cars. When their picketing failed to prevent the railroad cars from reaching the plant, the Long Island workers picketed the warehouse company. The court held that even if none of the work done at the warehouse would otherwise have been done by these pickets, the warehouse was doing the primary's struck work and had made itself an ally:

If Ideal's Chicago dock employees were on strike and [the warehouse] was hired to do their work, it would be an ally. It is equally so where, as here, some of the customary activities of the dock employees are transferred to [the warehouse] to avoid the impact of [the primary employees'] picketing.⁵⁴

The case stands for the propositions that a strike at the facility involved is not a prerequisite to finding struck work, and that struck work is not limited to work which the strikers themselves would perform but for the strike: the doctrine encompasses the primary employer's use of secondary employees to diminish the economic impact of any concerted activity on his business. As the *Ideal Roller* court concluded:

The "ally doctrine" exception to the prohibition of secondary boycotts is not limited to situations where the primary employer is struck and employees of a secondary employer engage in the work previously performed by the strikers. A secondary employer is an "ally" and is engaged in "struck work" when it performs services or work previously performed by employees of a lawfully picketed plant even though such employees are not on strike but are prevented from performing such services or work by such lawful picketing.⁵⁵

⁵³ 222 F. Supp. 635 (N.D. Ill. 1963).

⁵⁴ *Id.* at 638; *accord*, *Teamsters Local 560 (Pennsylvania R.R.)*, 127 N.L.R.B. 1327, 1340, 1344-45 (1960); *see* *Brown v. Amalgamated Lithographers Local 17*, 180 F. Supp. 294 (N.D. Cal. 1960) (strike or "other difficulty" sufficient).

⁵⁵ 222 F. Supp. at 637. The Ninth Circuit's failure to articulate these principles has caused confusion over its decision in *NLRB v. Amalgamated Lithographers Local*

The consequences of failing to consider this range of interests protected by the struck work doctrine are illustrated by several storage cases decided during the past decade. In *McLeod v. Local 365, UAW (Intertype Co.)*,⁵⁶ the primary immediately prior to the strike stored nine completed linotype machines with the secondary for eventual shipment to customers. The secondary had handled occasional transshipments for the primary but never so substantial a storage operation. The primary employees induced the secondary's employees to refuse to handle the crated machines, arguing that the machines were stored in anticipation of the strike and that shipments made by the secondary involved operations normally performed by the strikers. Confusing cause and effect, the court stated that whether the storage occurred in anticipation of the strike was relevant only if the secondary were the primary's ally, disregarded Intertype's own storage operation by holding that the secondary performed no services normally performed by Intertype, and granted an injunction on the ground that because the primary employees had loaded the machines before the strike, when the

17, 309 F.2d 31 (9th Cir. 1962), cert. denied, 372 U.S. 943 (1963). The union attempted to obtain a struck work clause providing that:

The Employers agree that they will not render assistance to any lithographic employer any of whose plants is struck [by the union] . . . and accordingly agree that in implementation of this purpose the employees covered by this contract shall not be requested to handle any lithographic work . . . customarily produced by such employer.

Id. at 36 n.6. The Board equated the second "employer" with "Employers" and outlawed the clause as permitting employees of the signatory employers to refuse work usually done for the struck primary by the signatory. *Amalgamated Lithographers Local 17, 130 N.L.R.B. 985, 989 (1961), aff'd in part, 309 F.2d 31 (9th Cir. 1962)*. Attempting to implement the clause's clear intent, the Ninth Circuit concluded that "such employer" must refer to the struck employer rather than to the signatories and that:

As so read, the clause embodies only the ally doctrine. Employers are to refrain from handling lithographic work "customarily produced by such [struck] employer." This is the work which would be farmed out. They are left free to perform work which the contracting employer normally does for the struck employer.

309 F.2d at 38. The court set aside the Board's order insofar as it applied to this clause.

Because the clause permitted not only refusals to perform the primary's struck work but also refusals to handle goods the primary produced with strikebreakers or delivered from inventory accumulated before the strike, this decision has been criticized for overextending the ally doctrine. Note, *Hot Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e)*, 38 N.Y.U.L. Rev. 97, 122-23 (1963). With respect to goods produced by strikebreakers, the criticism is valid, for the primary employees would have an adequate opportunity to appeal to the strikebreakers at the primary's premises without interfering with the secondary's business. With respect to goods produced before the strike and stored on the primary's premises, it seems equally apt. The strikers can still reach both the nonstriking employees performing the strikers' loading tasks and the delivermen picking up the inventory—traditional targets of primary strikes, e.g., *United Steelworkers Union v. NLRB (Carrier Corp.)*, 376 U.S. 492, 499 (1964)—without picketing the secondary. But when goods produced by the striking employees before the strike are stored on the secondary's premises, the loading activities of the secondary employees diminish the strike's economic impact on the primary by enabling him to continue normal delivery operations, and deprive the strikers of the opportunity to stop all deliveries. Therefore the secondary should be reachable as an ally.

⁵⁶ 200 F. Supp. 778 (E.D.N.Y. 1962) (§ 10(l) injunction).

secondary duplicated this work by reloading them, it did not perform struck work.⁵⁷ The reloading operation was not the work the strikers would have performed but for the strike.

The Board's decision in *Woodworkers Local 3-101 (Priest Logging, Inc.)*⁵⁸ eliminated the possibility that *Intertype* merely exemplified a district court's reluctance to deny a section 10(l) injunction when the ally defense raised by the union broke new ground.⁵⁹ In *Priest Logging*, the primary sawmill, closed by the strike, hired a commercial storage dump upriver to receive logs normally delivered directly to the primary by Priest Logging. Priest could not be paid unless the primary accepted its logs upon delivery somewhere. The mill's employees picketed the storage dump, claiming that the dump's unloaders were doing work the strikers would have done had the logs come directly to the mill and had there been no strike. The Trial Examiner agreed.⁶⁰ The Board, however, overruled him on the ground that because the unloading would be repeated when the stored logs arrived at the mill for processing after the strike, the secondary employees merely duplicated the primary employees' labor. Thus the storage operation neither deprived the primaries of any work nor furthered the business interests of the primary.⁶¹ The Ninth Circuit expanded the Board's holding by stating that because the primary employer's (substantial) storage operations were not sufficiently "essential" to its milling activities, the secondary storage did not provide the kind of counterstrike benefit which would make the secondary an ally. The court indicated that it would reach the same result even if the secondary rafted the logs to the primary after the strike instead of trucking them, although rafting would clearly supplant rather than duplicate the strikers' normal work.⁶²

⁵⁷ *Id.* at 781. The argument that there was no showing that but for the strike the machines would have been stored at *Intertype* was apparently not directly raised. Eight days later the Second Circuit granted a rubberstamp enforcement order. *McLeod v. Local 365, UAW*, 299 F.2d 654 (2d Cir. 1962) (per curiam).

⁵⁸ 137 N.L.R.B. 352 (1962).

⁵⁹ See *Gravamen*, *supra* note 6, at 1410 & n.227.

⁶⁰ 137 N.L.R.B. at 360.

⁶¹ *Id.* at 354.

⁶² *NLRB v. Woodworkers Local 3-101 (Priest Logging, Inc.)*, 319 F.2d 655, 657-58 (9th Cir. 1963). The court stated that secondary services diminishing the impact of the strike on the primary were reachable only if they supplanted the strikers' work "with the purpose and effect of enabling the primary employer to carry on its usual operations during and not withstanding the strike." *Id.* at 657. The court gave reasons neither for its determination that the primary's storage activities were not "normal operations" nor for its requirement that the storage operation transferred to the secondary substantially further the primary's basic production function. For a reasoned rejection of this requirement, see *Masters, Mates & Pilots Local 28 (Ingram Barge Co.)*, 136 N.L.R.B. 1175 (1962), discussed at text, accompanying notes 85-86 *infra*.

Finally, in *Teamsters Local 868 (Mercer Storage Co.)*,⁶³ the primary employer, an automobile dealer picketed by its salesmen, had all cars consigned to it delivered to the secondary's warehouse to avoid the pickets. By threatening to picket the warehouse, the striking salesmen induced the secondary to refuse the cars. The Trial Examiner reluctantly held that because handling the delivered cars—the work performed by the secondary—was not work ordinarily done by the salesmen, the inducement violated section 8(b)(4)(B) even though the primary had farmed out its whole storage operation:

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 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.⁶⁴

The Board adopted the Trial Examiner's conclusions without comment.

Intertype dealt with storage with a secondary of goods produced by the primary employer while *Priest Logging* and *Mercer Storage* involved storage with secondaries of goods bound for primaries, but both approaches appear erroneous in contradicting the interpretation of the struck work doctrine articulated in *Ideal Roller*. Passing over the question of supplanted primary work raised in *Priest Logging*—doing struck work even by that court's standards—if the criterion for alliance is whether the secondary employees' labor is intended to reduce the strike's impact on the primary's business, it is irrelevant that the work performed by the secondary will be repeated by the primary's employees after the strike, if during the strike it enables the primary to continue any aspect of his business unscathed. Particularly when the work done by the secondary is essential to continuing the primary's business—for instance, the deliveries in *Priest Logging* enabling the logging contractor to be paid and continue operations during the strike—the work should be labelled struck work and the ally defense allowed. The secondary also “inevitably tend[s] to break the strike”⁶⁵ when, as in *Intertype*, it duplicates work ordinarily done by the primary employees after rather than before their performance, because in either case the transfer of the delivery function deprives the striking primary employees of a fair chance to picket those doing their work. In addi-

⁶³ 156 N.L.R.B. 67 (1965).

⁶⁴ *Id.* at 70 (citing NLRB v. Woodworkers Local 3-101 (*Priest Logging, Inc.*), 319 F.2d 655 (9th Cir. 1963)); accord, *Vincent v. Chemical Workers Local 61 (Sterling Drug Co.)*, 75 L.R.R.M. 2496 (W.D.N.Y. 1970) (§ 10(*I*) injunction).

⁶⁵ NLRB v. Business Mach. Mech. Local 459 (*Royal Typewriter Co.*), 228 F.2d 553, 558 (2d Cir. 1955).

tion, a holding such as *Intertype's* undercuts industrial peace because the primary employees' knowledge that excess production might be used against them in a strike could easily result in a permanent slow-down designed to prevent inventory from accumulating. Such slow-downs will seldom occur if the primaries know that, in the event of a strike, they may picket as a primary any secondary providing storage which helps the primary employer to avoid the strike's effect.

The anomalous results produced by such narrow reliance on exact duplication by the secondary of the primary employees' work are amply illustrated by the *Mercer Storage* case. The Trial Examiner in that case would have accepted the ally defense if a sympathy walkout by the primary employees actually handling the car deliveries had fortuitously occurred. Yet the relevant question is not whether the secondary employees do the work of striking or nonstriking primary workers, but whether diverting work to the secondary helps the primary employer to evade any economic pressure exerted by the strike.

These cases seem to embody an unarticulated feeling that injecting the struck work doctrine into secondary storage situations creates special problems. In *Priest Logging*, for instance, the court offered no justification for its conclusion that storage was not part of the primary sawmill's normal business. The line between "primary" sawmilling and "incidental" storage was apparently drawn for fear that treating the storer as an ally would endanger the secondary's right to continue his ordinary business relations with the struck primary. Such fears seem unwarranted, for a rule that secondaries will be treated as allies only when the storage activity significantly increases because of the strike, involves work normally performed by primary employees, and purposefully enables the primary to carry on a segment of his business would adequately protect the contending interests. If it is felt that application of the ally doctrine in this area would unduly restrict the primary's normal business opportunities by confronting the potential secondary with the threat of a full strike whenever the primary workers think he is doing struck work, the doctrine might be narrowed in secondary storage cases by eliminating its "in the shoes" aspect and permitting only picketing limited to inducing secondary employees to refuse to handle the goods specifically involved in the strike—precisely the situation in *Intertype* and *Mercer Storage*.⁶⁶

The justification for this possible distinction between ordinary farming out and secondary storage turns on the degree to which the

⁶⁶ Because of the possible difficulties attending partial work stoppages, text accompanying notes 45-46 *supra*, this modification might have to be implemented legislatively rather than through the judicial or administrative process. If the primary's main business were storage, this protective distinction would, of course, not apply.

primary employer's action in contracting with a secondary resembles strikebreaking. The primary employer's action in *Priest Logging*, for instance, is significantly less like strikebreaking than hiring another sawmill to cut and sell its lumber. Correspondingly, to the extent that the secondary is not helping the primary break the strike, his claim to immunity from picketing has more merit. In this balancing sense, the *Priest Logging* court's distinction between farming out primary production and farming out activities incidental thereto does have relevance, but this test should not be used to deny primary workers all chance of reaching those displacing them. A limited rule, incorporating safeguards permitting the "in the shoes" doctrine to reapply if the secondary shows bad faith, would leave the primary and secondary free to conclude whatever non-struck-work business arrangements they desire, subject only to the liability deliberate farming out must entail.

Indeed, the Board's General Counsel appears to have begun the line of storage cases by endorsing this view. In a 1960 administrative ruling,⁶⁷ he refused to issue a complaint when the primary employer arranged for a secondary to receive goods carried by a deliveryman turned away by pickets from the primary's gate, and the pickets followed the deliveryman to the secondary's premises to prevent him from unloading there. The summary of the ruling explained that the picketing was permissible because the primary "sought to make [the secondary] its ally in [the] primary dispute by arranging for [the secondary] to serve as temporary receiving depot for merchandise which, except for [the] dispute, would have been delivered directly to [the primary]"⁶⁸—a situation identical to *Priest Logging* and *Mercer Storage*. But those decisions intervened, and a similar instance has not since been reported.

C. *What Is Struck Work?: Motive and Intent*

Different questions of a more evidentiary nature arise when the problem is not whether the secondary employees are performing the strikers' work, but whether that work was intentionally transferred to avoid the impact of the primary dispute. In *Brewery Workers Local 8 (Bert P. Williams, Inc.)*,⁶⁹ a case encapsulating the issues involved in this problem, the primary employer, O'Brien, operated an exclusive franchise obligating it to solicit, sell, and deliver beer. Although O'Brien had once subcontracted the franchise's delivery responsibility, for the past twenty years all deliveries had been made by primary em-

⁶⁷ Administrative Ruling of the General Counsel, Case No. SR-717, 46 L.R.R.M. 1492 (1960).

⁶⁸ *Id.*

⁶⁹ 148 N.L.R.B. 728 (1964).

ployees represented by the union. Because the delivery service was losing money, O'Brien considered resuming the subcontracting procedure, and notified the union in late December that he would allow their current contract to expire on March 1. Simultaneously, O'Brien commenced negotiations with Williams, an independent deliveryman. In January he began parallel contract negotiations with the union, but withdrew from the latter negotiations when Williams submitted a favorable written proposal on February 15. Williams and O'Brien reached an unofficial agreement in late February and on March 7 signed a binding contract, six days after the primary employees voted to strike. Once the new delivery arrangement became public, the strikers picketed Williams' trucks as well as O'Brien's premises.

O'Brien argued that Williams would have received the contract for economic reasons regardless of the strike. Emphasizing that O'Brien held lengthy prestrike negotiations with Williams and that Williams' contract ran for two years rather than for the strike's duration, the Trial Examiner agreed that even though the strike preceded the execution of the contract, it did not motivate O'Brien to subcontract the delivery operation.⁷⁰ The Board recited a plethora of facts characteristic of situations in which it had found no alliance⁷¹ and reversed, holding that the contract's duration could not be used to determine motive because such a test would facilitate employers' attempts to evade the struck work rule.

It may be, of course, that sometime in the future O'Brien might have contracted out its delivery work, but the decision to contract out coincidentally with the strike was, we hold, caused by the failure or imminent failure of collective-bargaining negotiations with Respondent and represented an attempt by O'Brien to insure continuance of beer deliveries notwithstanding the strike by its own employees.⁷²

Member Leedom dissented because he believed that an equally valid inference was that the subcontracting, which was justified by the economic data, caused the strike rather than vice versa, and that the contract was made "close in time" to the strike because O'Brien could

⁷⁰ *Id.* at 742-43.

⁷¹ These included: taking over the same function performed by the striking unit; hiring the drivers who had performed that function for the primary; the secondary's lack of significant capital investment; the temporary leasing of the trucks previously used by the primary; and the primary's exercise of supervision over the subcontracted operation. *Id.* at 730-31; see Teamsters Local 25 (J. C. Driscoll Transp., Inc.), 148 N.L.R.B. 845 (1964); Teamsters Local 107 (Riss & Co.), 130 N.L.R.B. 943 (1961), enforced, 300 F.2d 317 (3d Cir. 1962).

⁷² 148 N.L.R.B. at 733 (alternate holding). The court also found the picketing to be legitimate activity because the delivery trucks, now leased by Williams, remained the situs of the dispute. *Id.* at 734; see Sailors' Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547, 549 (1950).

not conclude it until he knew the union would not meet his terms.⁷³ To make the juxtaposition of strike and subcontract a presumption of alliance would force primary employers desiring to subcontract for legitimate business reasons to do so before the end of the collective bargaining term, thus limiting the union's opportunity to persuade the employer that it could meet his demands.⁷⁴

Insofar as *Williams* merely erects a rebuttable presumption of alliance, its holding is justified by the need to protect the right to strike from employer evasions camouflaged beneath multiple goals. Moreover, although all subcontracting which might diminish the impact of a future strike cannot be held to make the secondary an ally without eliminating independent subcontractors, and although subcontracting specifically to avoid a legitimate strike cannot be protected, a broad spectrum exists between these two extremes. If only because the primary has better access to evidence of his intent, the burden of proving that the subcontract would have been made regardless of the strike threat should probably shift to him when a strike is imminent or reasonably foreseeable, since at these points suspicion falls most heavily on the primary anyway.

But insofar as *Williams* generates a rigid rule⁷⁵ that making subcontracts after a strike becomes reasonably foreseeable proves an intent to evade a strike, it contradicts the Board's earlier flexibility in this area.⁷⁶ Subcontracts may be made even after the strike begins without intending to evade it, and to deny employers the chance to show that the contract would have been made in any case may cripple an employer's ability to conduct a viable business. Furthermore, the corollary of the *Williams* rule is plainly false: subcontracts made long before or after the primary dispute begins may still be designed to evade its impact, and to hold them protected by an acceptable intent inferred from the date of their making would create an exception capable of swallowing the struck work rule.

The dangers of relying on a per se rule linked to the time of contracting, especially in precipitous temporary injunction proceedings, are demonstrated by *Cuneo v. Newspaper Deliverers of New York*.⁷⁷ The unionized employees of the *Morning Call's* distributor were en-

⁷³ 148 N.L.R.B. at 735-36.

⁷⁴ *Id.* at 738 n.15.

⁷⁵ For a mechanical application of this timing principle prior to its recognition in *Williams*, see Administrative Ruling of the General Counsel, Case No. SR-2053, 50 L.R.R.M. 1489 (1962).

⁷⁶ For an example of the Board's earlier flexibility, see *Plumbers & Pipe Fitters Local 35* (Richard E. Buettner), 126 N.L.R.B. 708 (1960) (inference of intent to evade dispute rebutted by showing that primary never performed the work it subcontracted and had been advised not to undertake it).

⁷⁷ 69 L.R.R.M. 2880 (D.N.J. 1968) (§ 10(l) injunction).

gaged in a lawful dispute with the Morning Call, a daily newspaper which they had distributed. A year after the strike's inception, Bergen, which shared common officers, directors, stockholders, and facilities with the Morning Call, began publishing the Sunday Record Call in addition to its evening newspaper. Arguing that the Morning Call would have published and distributed the new paper but for the strike, the primary employees induced Bergen's independent distributors to refuse to handle the Sunday Record Call. The district court granted an injunction halting the union's activity after simply concluding that no struck work was involved because the striking employees failed to show that but for the strike the Morning Call would have published and distributed the new paper, without considering whether the burden of proof on this issue might have shifted to the publisher even on the sparse facts given in its opinion.⁷⁸

Cuneo appears to rest on the starting date for the new paper, one year after the strike began. But the time at which the work shifted cannot be conclusive, because it may simply have marked the point at which the primary strike began to hurt the Morning Call. Furthermore, the case's implicit conclusion that the Call would have transferred the disputed work anyway represents an ultimate factual inference which must be grounded on stated intermediate inferences if it is not to be totally subjective. The court, however, never investigated whether sound economic reasons justified the transfer, whether plans for the transfer predated the time at which the strike became foreseeable, and whether the Call was equipped to publish a similar paper or had previously done so. It thereby made timing conclusive proof of the primary's intent rather than treating it as relevant evidence of intent,⁷⁹ though the publication and distribution by Bergen plainly diminished the strike's effect on the primary.

D. Secondary Self-Help: The Necessity of an Arrangement

Another early caveat to the formula that a secondary's performance of strikers' work creates an alliance developed in cases of secondary self-help. As the Trial Examiner noted in the leading case in this area, *Longshoremen's Local 333 (New York Shipping Association)*,⁸⁰

⁷⁸ In his concurring opinion in *Royal Typewriter*, Judge Hand noted that: When, however, a secondary employer accepts business for which the primary employer pays him, although it is not an inevitable inference that, but for the strike, the primary employer would have done the business himself, I see no reason why he should not be compelled to prove that the primary employer would not have done it, if he could have.

228 F.2d at 562.

⁷⁹ The Board later reached the same result on fuller facts without specifically mentioning the timing of the transfer. *Newspaper Deliverers of New York (Bergen Evening Record Corp.)*, 175 N.L.R.B. No. 62, 70 L.R.R.M. 1590 (1969).

⁸⁰ 107 N.L.R.B. 686 (1954).

[secondary] employers by seeking to accommodate their operations to the strike situation [do not necessarily make] themselves allies in interest with struck employers A secondary employer faced with a strike against his supplier of services is not obliged to sit idly by lest he forfeit his status as a neutral; he may, without risking the protection Section 8(b)(4) [(B)] accords him . . . , seek other suppliers, devise other methods, and employ other means to enable him to continue his business on as nearly normal a level as possible.⁸¹

In *New York Shipping*, employees of harbor tugboat operators struck, forcing the tugs to suspend operations. The pier operators, who normally relied on the tugs to dock arriving ships, used their own employees to pull the ships in with cables, hand over hand. When the tugboat employees picketed the pier operators for performing tasks the struck tugs would do but for the strike, the Trial Examiner found that the work done by the secondary's employees, although technically struck work, was not done for the primaries and did not "enure to their benefit,"⁸² and refused to hold the pier operators and primary employers allied.

Precise definition of "benefit to the primary" plays a crucial role in distinguishing *New York Shipping* from ordinary struck work cases, for the pier operators' improvisation did benefit the primary employers to the extent that the secondary operators were no longer deprived of necessary services and consequently would not pressure the primary to settle too quickly. Yet the right to subject secondary employers to direct pressure to force a primary settlement is precisely the right denied strikers by section 8(b)(4)(B). Insofar as the secondary employees' performance reduced the impact of the strike only on the secondary employers, the primary employers did not benefit. If anything, that performance was detrimental to the primary employers because the secondaries might have decided to continue using their experimental method after the strike.⁸³

The holding in *New York Shipping* stands for two related propositions: (1) Secondary employers may use any means to reduce the impact of the strike on *their* businesses as long as they do not directly

⁸¹ *Id.* at 708. The case involved substitute services performed by the primary's customers, but the customers might also have contracted with other secondaries for the services. The following discussion concentrates on the latter but assumes both possibilities.

⁸² *Id.* at 708.

⁸³ The pier operators were unlikely to continue to dock and move ships by hand after the strike, but they had also hired truckers to transfer freight between piers—a task formerly performed by the struck harbor craft—creating a more significant risk of a permanent transfer. *See id.* at 699.

reduce the impact of the strike on the primary employer by enabling him to continue *his* business. (2) No alliance exists between the struck primary and the substitute servicer when the impetus for the arrangement by which the substitute services are provided to the primary's customers comes solely from those customers, and the services are not undertaken for the primary's account or in his name. There must be an *arrangement* between the primary and the substitute servicer, as well as primary-type services furnished to the primary's market, before the substitute servicer can be reached by the striking primary employees.

On the other hand, the secondary customer's need for primary-type services to continue his business will not necessarily exempt him from union pressure if in quest of self-help he incidentally creates an arrangement.⁸⁴ In *Masters, Mates & Pilots Local 28 (Ingram Barge Co.)*,⁸⁵ striking employees of the primary barge company were replaced by scabs who performed the strikers' loading operations at Texaco's dock. The strikers picketed the Texaco dock while the scab-manned barges were loading there, and the barge company withdrew the scab crew, leaving the barges to be loaded by Texaco employees. When the picketing continued, the General Counsel sought to halt it by expanding the argument used in *New York Shipping*: Texaco's loading of Ingram's barges was merely the exercise of secondary self-help to continue its own business. Furthermore, because the striking barge workers' loading responsibilities were incidental to their central transportation function, any struck work was de minimus and should not outweigh the secondary's right to insulate itself from the effects of the primary dispute. The Board, however, flatly stated that if the transferred work benefited the primary, its incidental nature was irrelevant, and held that when the work transferred was essential to the primary's operations and secondary employees performed it under the secondary employer's direction, an arrangement with the secondary would be presumed to exist if he did not normally direct the operations. Because the loading was necessary to the continuation of the primary's operations as well as the secondary's, permitting the secondary to perform the loading would deprive the strikers of one of their few significant opportunities to reach those doing their work. As the Board explained:

The significant fact is that the loading operations in this case could not have proceeded without performance of the duties

⁸⁴ See, e.g., *Teamsters Local 901 (Editorial "El Imparcial," Inc.)*, 134 N.L.R.B. 895, 907 (1961).

⁸⁵ 136 N.L.R.B. 1175 (1962), *enforced*, 321 F.2d 376 (D.C. Cir. 1963). The *Ingram Barge* problems were implicit in *NLRB v. Operating Engineers Local 571 (Layne-Western Drilling Co.)*, 317 F.2d 638 (8th Cir. 1963), but the *Layne-Western* court ignored these issues in deciding its case on more superficial grounds. Compare *id.* at 643, with, e.g., *Teamsters Local 901 (Editorial "El Imparcial," Inc.)*, 134 N.L.R.B. 895, 907 (1961).

regularly carried out by Ingram's employees and that Texas employees were directed to take them over pursuant to an understanding between their employer and Ingram.

. . . Th[e] privilege of self-help . . . is not an unqualified authorization to a secondary employer to perform with its employees the struck work of its supplier of services, on the struck employer's equipment, and by arrangement with that employer.⁸⁶

Texaco could have hired other barges or shifted to tank trucks, but staffing Ingram's barges with Texaco employees to perform a function vital to Ingram's business as well as Texaco's enabled Ingram to evade the effects of the primary strike.

Standing at the intersection of the right to self-help and the right to strike is *Local 333, NMU (D.M. Picton)*.⁸⁷ Picton and Sabine were the only commercial towing companies in the relevant geographic market, and local secondary employers customarily rotated their business between the two. When Sabine's employees struck, Sabine shut down and sent an open letter to its customers advising that Picton would be available during the strike. Picton declared that it would not handle any of Sabine's work pending settlement of the strike and refused to tow any vessel owned by or under contract with Sabine. Nevertheless, its business increased dramatically as the market it shared with Sabine became a temporary monopoly. The primary employees picketed every second boat towed by Picton on the theory that half of the tows would have been Sabine's under the rotation system but for the strike.

Because Sabine and its customers knew that, given the market structure, Picton had to do Sabine's normal work and that Sabine would return the favor if Picton were struck, any shutdown by Sabine automatically created "an arrangement." In this sense Sabine's letter and Picton's disclaimer were irrelevant because the transfer would have occurred even in their absence.⁸⁸ On the other hand, unlike the situation in *Ingram Barge*, the secondaries dependent on Sabine for towing had no alternative but to switch to Picton, and to hold that Picton was the primary's ally by the de facto arrangement resulting from this fortuitous market structure would deprive the customers of their only significant opportunity for self-help. Moreover, in one sense

⁸⁶ 136 N.L.R.B. at 1187-88.

⁸⁷ 131 N.L.R.B. 693 (1961).

⁸⁸ That Sabine was Picton's direct competitor was similarly irrelevant because they were also oligopolists and Sabine was certain to regain its share of the business after the strike. The independents performing repair services in *Royal Typewriter* were Royal's competitors, yet they were held to be allies as well. See text accompanying notes 20-28 *supra*.

at least, no arrangement existed: Picton worked not for Sabine but for Sabine's customers. The services were rendered in Picton's name, not Sabine's, and even if Picton's towing reduced the economic impact of the strike on the customers, Sabine did not benefit in any economic sense as long as it remained closed.

Although the last arguments may also be advanced in defense of "back-scratching" arrangements by which parties agree to take up the slack caused by a strike against either, it is at this point of deadlock between the right to strike and the right to secondary self-help—and only at this point—that good faith enters the picture. By refusing to handle all the work Sabine was contractually obligated to perform, Picton did all that could reasonably be asked of a secondary desiring to remain neutral consonant with the right of Sabine's customers not to have to shut down all operations dependent on towing. The primary employees' right to exert full economic pressure on their employer is largely preserved when the challenged secondary's actions exhibit a bona fide intent not to interfere in the dispute, and that right should give way at its edges when the failure to do so will cause avoidable and disproportionate harm to secondary customers not directly involved. The Board in effect so held in *Picton*.⁸⁹

E. Secondary Self-Help: Conduit Farming Out

The clash between secondary self-help and the right to strike evidenced in *Picton* may be carried a step farther. In *Pipefitters Local 638 (Consolidated Edison Co.)*,⁹⁰ the primary employer, Courter, received a general contract for the fabrication and installation of piping in Consolidated Edison's new power plant. The contract contained a clause authorizing the owner to withdraw from the contract, and to reassign, piping not installed according to schedule. Courter's contract with the Pipefitters required that all pipe fabrication preceding installation be performed by Courter employees either at the jobsite or in Courter's shops. When Courter subcontracted the fabrication of

⁸⁹ Although it would seem clear that Picton and the customers were not wholly innocent in the matter in that they clearly knew that Picton was performing some work at least that Sabine would have performed . . . a customer arranging for substitute services during a strike does not make himself or the substitute an "ally" merely because he knowingly arranges for services and the substitute knowingly performs them. In the absence of a direct or indirect arrangement by the struck employer with the customer or secondary employer (Picton) to have the work performed for its account, the secondary employers do not lose the protection afforded a "neutral" under the Act. This may appear, from an economic point of view, an illogical and, indeed, arbitrary drawing of a line, but the line has to be drawn somewhere

¹³¹ N.L.R.B. at 699; *accord*, Teamsters Local 806 (Ada Transit Mix), 130 N.L.R.B. 788 (1961).

⁹⁰ 124 N.L.R.B. 521 (1959).

some of the piping, its employees refused to install this piping, causing Courter to fall behind schedule. Consolidated Edison then asked Courter to designate the piping furthest behind schedule and transferred that fabrication to a second subcontractor, Midwest, without consulting Courter on its choice. Courter's workmen again refused to install the pipe, arguing that it was not fabricated according to the terms of the union's contract. The Board held that the second refusal violated section 8(b)(4)(B), adopting the Trial Examiner's finding that because the owner was solely concerned with the construction delays caused by the first refusal and suffered a 12,000 dollar loss from the transfer, that transfer was not made "in Courter's behalf,"⁹¹ and the union had failed to prove a Courter-Midwest alliance.⁹²

The Second Circuit enforced with the somewhat unsatisfactory explanation that because Courter had had no direct business dealings with Midwest and no longer controlled the fabrication work, it could not have farmed out that work.

True, [Courter] informed Edison that it could not perform on schedule, thus paving the way for Edison to exercise its contractual privilege of withdrawing work from Courter. But the evidence stands uncontroverted that Edison gave the work to Midwest without the advice or knowledge of Courter. To bring these facts within the Ebasco-Royal doctrine would require a holding that Edison was somehow Courter's agent, a holding that would fly in the face of reality.⁹³

But the question *Consolidated Edison* raises is precisely whether the owner should be treated as the general contractor's agent in such situations—whether the owner is merely a conduit through which the primary employer accomplishes by contract the farming out it could not arrange openly, and whether this result should not be prevented by a prophylactic rule permitting the strikers to picket secondaries knowingly engaged by conduit employers to perform farmed-out work.

Arguments attacking three of the premises of the *Consolidated Edison* holding militate for a prophylactic rule of this nature. The *Consolidated Edison* court appeared to assume that applying economic pressure against a primary employer lacking legal power to reassign the disputed work was per se unlawful. In this respect the decision

⁹¹ *Id.* at 526.

⁹² *Id.* at 527.

⁹³ *NLRB v. Pipefitters Local 638*, 285 F.2d 642, 645 (2d Cir. 1960); *cf.* *Springfield Bldg. Trades Council (Spear Constr. Co.)*, 120 N.L.R.B. 600, *enforced*, 262 F.2d 494 (1st Cir. 1958); *Seafarers Int'l Union (Gulf & Caribbean Towing Co.)*, 125 N.L.R.B. 1023, 1032-34 (1959), in which the struck primary chartered a tug to *B* to haul for *C*, and the strikers unsuccessfully argued that *C* controlled *B* and used *B* to disguise hauling which would otherwise have been done by the primary.

seems open to question because the "right to control" concept has been discredited for permitting primary employers to negate their workers' right to strike simply by ceding control to another employer⁹⁴—arguably the situation in *Consolidated Edison*. To the extent the opinion assumed that the owner's engagement of Midwest was not Courter's, it seems similarly questionable.⁹⁵ Because the piping most likely to fall behind schedule would plainly be that delayed by a Courter labor dispute, the contract pursuant to which the transfer was accomplished can be read as requiring Courter to let Consolidated Edison farm out its struck work—palpable evidence of the two parties' strikebreaking intent.⁹⁶ The primary's nonparticipation in the selection process is irrelevant, since the only purpose in allowing withdrawal under the general contract was to permit transfer to some secondary, and an undesignated secondary can provide a strikebreaking force as effectively as one chosen by the primary. And the owner's understandable desire to avoid delays is equally irrelevant when the means used to maintain his schedule enable the primary to continue furnishing the very services which are the subject of dispute.

The *Consolidated Edison* court further assumed that the owner could seek self-help in this manner without jeopardizing his neutrality, although his right to self-help differs from that of Picton's customers in at least two ways. Not only did the owner fail to make any good faith effort to avoid infringing upon the primary workers' right to strike,⁹⁷ but the lack of other "nonarrangement" sources of primary-type services resulted from his own actions rather than impersonal market conditions. By hiring the general contractor, the owner saddled himself with the effects of the general's labor disputes, insofar as the only way to avoid those effects also helped the general to avoid them. If the general were a monopoly shut down by the primary strike, the owner would have to absorb the losses caused by the unavailability of the primary's services and could legally be bankrupted by the losses.⁹⁸

⁹⁴ See, e.g., *Plumbers Local 636 v. NLRB*, 430 F.2d 906, 910 (D.C. Cir. 1970), and cases cited therein; *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 556 (8th Cir. 1968); *NLRB v. Electrical Workers Local 164*, 388 F.2d 105 (3d Cir. 1968).

⁹⁵ The argument that the primary employer should have the burden of proving nonalliance if work is transferred when a strike is reasonably foreseeable, see text accompanying notes 74-78 *supra*, is even more compelling when, as here, the strikers have a contractual right to the work and the strike is the direct result of the transfer.

⁹⁶ This reading is particularly persuasive in light of the union's additional argument that Courter's original contract price to Consolidated Edison was so low that it necessarily contemplated breaking the union contract. 285 F.2d at 645.

⁹⁷ Appropriate efforts might have included asking Courter to continue only those installations not requiring the disputed pipe, or reassigning the disputed fabrication work to Courter's own employees under the contract.

⁹⁸ As one commentator has noted:

Almost every strike causes economic loss to one or more employers who are unconcerned with the labor dispute. A coal distributor may go bankrupt because of a coal strike. A small steel fabricator may be forced to close

By contracting all its piping to the general contractor, the owner made the general a monopoly for this construction project, and the same result should obtain.

These arguments suggest that whenever employers in Consolidated Edison's position, aware of the primary employer's labor dispute, engage secondary employers to do work which would otherwise be done by the strikers, they are acting as conduits by which the primary employer farms out his struck work, and secondaries so engaged may be reached as the primary's allies. The opposite holding would undermine the struck work doctrine for the same reasons discrediting the right to control rule, and produce results as anomalous as that in the instant case in which primary employees were denied the right to pressure an employer who had blatantly breached his contract with them.

All such arguments for a prophylactic rule founder, however, on the basics of the struck work doctrine—the nature of the “benefit to the primary” required, the need for an arrangement, and the necessity of preserving self-help opportunities for affected secondaries. Thus, the primary “benefited” when Consolidated Edison transferred the disputed fabrication only because the Board found that its employees' partial work stoppage was an unfair labor practice; if the Board had not intervened, the transfer would not have helped Courter weather its strike at all because—unlike the situation in *Ingram Barge*—the Courter employees could have continued to refuse to install the piping fabricated by Midwest. Even apart from the Board's intervention, the transfer did not aid Courter because he lost his profit on the fabrication.⁹⁹ Finally, to hold, as the prophylactic argument urges, that Midwest and Consolidated Edison were Courter's allies because of the withdrawal clause is to hold not merely that the primary employees could refuse to handle piping fabricated by Midwest, but that they could picket Midwest and Consolidated Edison as well—a holding that would effectively eliminate the owner's chances for self-help. The inconsistency of this position is revealed by a variation on the facts in *Consolidated Edison*. If the owner engages two general contractors and reassigns one's work to the other when the first falls victim to a dispute—a situation indistinguishable from *Picton*—the prophylactic rule would permit the primary employees to picket the second con-

his doors because of a major steel strike. Such economic losses as these far outweigh the losses caused by secondary boycotts. Yet Congress has not sought to aid these neutrals. . . . [W]hile harm to a neutral is an essential ingredient of a secondary boycott, such injury is not *by itself* objectionable in the eyes of the legislature.

Tower, *A Perspective on Secondary Boycotts*, 2 LAB. L.J. 727, 732 (1951) (emphasis added). See also *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 627 (1967) (dictum).

⁹⁹ 124 N.L.R.B. at 525.

tractor, erasing *Picton's* beneficially balanced result. Without some direct proof of an arrangement between the *general contractor* and Midwest, the blanket application of a prophylactic rule exposing the owner and Midwest to picketing would deny incidental secondaries the opportunity to avoid the full impact of the primary dispute, and promote the economic dislocation Congress intended section 8(b)(4)(B) to prevent.

The central problem in *Consolidated Edison* is therefore not the primary employees' inability to pressure the owner or Midwest, but that they were prevented from pressuring the employer who had breached his contract with them. Their complaint clearly involves the preservation of work guaranteed them under the existing contract—a claim better handled by allowing them to refuse to install the products of work farmed out in violation of that contract while preserving self-help for those incidentally affected by such refusals.¹⁰⁰ Unnecessary and drastic revisions of the rights balanced by the secondary boycott section under which their original protest was halted would thereby be avoided.

F. *Conclusions: Farmed-Out Struck Work*

The classic formulation of the struck work doctrine—that a secondary employer's performance of work which the primary employees would do but for their strike permits those employees to picket his establishment despite the statutory prohibition against secondary boycotts—inadequately explains many of the cases decided under this rubric. The doctrine evolved to prevent employers from evading strikes by continuing to do business through others. Throughout its development, protection of employees' traditional right to exert a full complement of economic pressure against their employer to improve their working conditions has remained paramount, and this rationale often outruns the classic formula. Thus a strike at the facility farming out work is not a prerequisite to finding the secondary accepting it to be allied on struck work grounds. When an outside union seeking recognition pickets the original facility, for instance, the transfer of work to another location reduces the picketers' traditional opportunity to appeal to those entering the premises of the employer with whom they have a dispute. Nor need struck work be the precise tasks done by the strikers because even when the work transferred is usually done by nonstrikers, removing it to another location reduces the strikers' chance to exert economic pressure below that which would be present were the work performed at the primary site.

¹⁰⁰ *E.g.*, *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 642-46 (1967) (on-site refusal to handle prefabricated material displacing refusers' normal work is lawful primary activity).

For the doctrine to apply, there need be only a direct or indirect arrangement between the secondary and the primary, a "benefit" to the primary diminishing the impact of lawful pressure on some aspect of his business, and a finding that the work performed by the secondary employees cannot be picketed at the primary premises to the extent it could be if it were all done there. If the primary workers can adequately appeal to the secondary employees at the primary premises in the course of activities comparable to strikebreaking, the doctrine should not be invoked because the right it protects is not undermined, even when those to whom the pickets appeal refuse to listen. The right to strike does not incorporate a right to a *successful* strike: a primary employer threatened by a work stoppage or a secondary confronted by his supplier's strike are not obliged to cease production. They may use any means to carry on their businesses and to prevent the spread of the dispute's dislocating effects. The struck work doctrine does not gain-say this; it merely permits the union to appeal to secondary employees used to replace striking primaries, if the union cannot adequately picket their strikebreaking activities at the primary site.

II. SINGLE ENTERPRISES

After *Ebasco*, other problems arose if the decision's second ground—the interrelatedness deriving from the participation of Project employees in Ebasco's "unified and integrated production effort"¹⁰¹—sufficed to make the secondary "concerned" in the primary's labor dispute. What evidence justifies the conclusion that secondary employees are "acting as a part of"¹⁰² the primary employer's enterprise? If the primary purchases an essential component of his only product exclusively from the secondary under a long-term requirements contract, are the secondary's employees part of a single enterprise with the primary because they effectively work for him? Ebasco exercised continuous supervision over the Project employees doing its work. Had it retained this supervisory power without exercising it, would the result have been different? Although merely retaining the power makes the primary the secondary workers' employer in a representation proceeding,¹⁰³ perhaps actual control should be required before subjecting the secondary to picketing when no representation issue has been raised.

¹⁰¹ 95 CONG. REC. 8709 (1949) (remarks of Senator Ives).

¹⁰² *Id.* (remarks of Senator Taft).

¹⁰³ See NLRA §§ 8(a) (5), 9(c), 29 U.S.C. §§ 158(a) (5), 159(c) (1964); cf. Insurance Agents' Int'l Union (Provident Life & Accident Ins. Co.), 118 N.L.R.B. 412, 414-15 (1957) (§ 9(c) petition); Teamsters Local 389 (National Van Lines), 117 N.L.R.B. 1213, 1219-20 (1957) (§ 9(c) petition).

Ebasco's struck work aspect depended upon a clearly definable act by which the secondary involved himself in the dispute. But the single enterprise concept allowed the same question of the permissibility of picketing to turn on an ambiguous status rather than an act, and threatened to force secondaries to limit their business dealings radically to avoid being held part of some struck customer's enterprise. Moreover, the clear implication of holding that secondary workers controlled by a primary employer are picketable is that his control of the secondary employer will also make them picketable, because in both situations the primary determines the employment conditions of the secondary workers as well as his own. Here the problems resulting from the single enterprise concept became nightmares. Judge Learned Hand early held that, in the absence of struck work, the "business" protected by section 8(b) (4)(B) included any business the secondary employer could freely discontinue, even if the price were a suit for breach of contract.¹⁰⁴ Did this mean that the secondary is "part of the primary" only when the primary so controls the secondary's business decisions that the secondary cannot withdraw without the primary's consent? If the primary is a monopsonist able to dictate the terms on which he purchases from his secondary supplier, would the secondary then be "concerned"?¹⁰⁵ Is common ownership providing potential control of the secondary equivalent to actual control? The general yardstick for determining whether primary and secondary employers were part of a single enterprise was plainly whether protecting the secondary would unduly limit the right of the primary employees to strike their employer. But this test could not be used to decide concrete cases without introducing an arbitrary element of personal preference. The need for objective standards was acute.

A. Basic Doctrine

Although the Board waited ten years before applying the struck work doctrine stemming from the *Ebasco* case, it exhibited no such

¹⁰⁴ *Electrical Workers Local 501 v. NLRB* (Langer), 181 F.2d 34, 37 (2d Cir. 1950), enforcing 82 N.L.R.B. 1028 (1949), *aff'd*, 341 U.S. 694 (1951).

¹⁰⁵ For an interesting variation on this argument suggesting that if the primary is a monopolist-oligopolist or is engaged in a horizontally organized industry in which a union success against one employer will inevitably be followed by similar demands on others, the primary's customers will not be "wholly unconcerned" because the increased labor costs will be passed on to them, and the horizontal competitors will not be "wholly unconcerned" because the surrender of one means the defeat of all, see Borus & Warshal, *Neutrality and Secondary Boycotts: An Economic Evaluation of a Legal Question*, 17 LAB. L.J. 310 (1966). The argument could logically be extended to apply to vertically organized industries and to industries characterized by a "leapfrog" pattern of bargaining. The courts, of course, have not accepted this argument, *see, e.g.,* *Carpenters Dist. Council (Wadsworth Bldg. Co.)*, 81 N.L.R.B. 802, 805-07 (1949), *enforced*, 184 F.2d 60 (10th Cir. 1950), *cert. denied*, 341 U.S. 947 (1951), and probably should not as long as rules more attuned to the specific interests the Act protects can be developed. The argument illustrates, however, the sometimes desperate quest for standards in this field.

hesitancy about the single enterprise concept. In *Marine Cooks and Stewards Union (Irwin-Lyons Lumber Co.)*,¹⁰⁶ decided barely a year after *Ebasco*, the Board held almost without discussion that when two separate but commonly owned and controlled corporations engaged in a "straight line operation," the second corporation was not "wholly unconcerned" in the first's labor disputes and could lawfully be picketed although neither common supervision nor a transfer of struck work occurred. The Boom Company, the sole licensed common carrier on the Coos River, shared common stockholders and principal officers with the Lumber Company. When the primary workers struck the Lumber Company, they also picketed the Boom Company's separate premises, inducing the latter's employees to stop work. Finding no violation of the secondary boycott provision, the Trial Examiner noted that because lumber production could only take place if the Boom Company transported logs from the Lumber Company's timberland to its mill, the Boom Company functioned as "a necessary adjunct" of the primary's business and "constituted but a phase" of a single economic enterprise producing finished planks.¹⁰⁷ The Board affirmed, accepting the determination that the companies were "engaged in 'one straight line operation'."¹⁰⁸

Insofar as the "straight line" test rested on Senator Taft's explanation of the secondary boycott provision¹⁰⁹ that employers standing in a jobber-contractor relationship in which the latter acted as the former's production arm were not protected from each other's labor disputes, the test seemed crucial to the finding that the strikers' picketing of the Boom Company was lawful. Yet the precise interests protected by that test remained unclear. It plainly did not protect integrated secondary employers by limiting the effect upon them to that which would be caused by a strike shutting down the primary.¹¹⁰ Although the Lumber Company depended upon the Boom Company to transport its logs, the Boom Company—the only licensed carrier for the whole river—could have continued other aspects of its business if the primary were shut down.¹¹¹ But the Board allowed picketing which closed down all the secondary's activities. Nor did the "straight line" test appear aimed at classic

¹⁰⁶ 87 N.L.R.B. 54 (1949).

¹⁰⁷ *Id.* at 83.

¹⁰⁸ *Id.* at 56.

¹⁰⁹ 95 CONG. REC. 8709 (1949).

¹¹⁰ *Cf. Gravamen, supra* note 6, at 1411-15.

¹¹¹ Although the Trial Examiner noted that all the logs stopped by the picketing of the Boom Company were destined for the Lumber Company, and although the three loggers Boom served did most of their business with the Lumber Company, they did not do all of their business with the Lumber Company, and the findings are silent with respect to other customers Boom may also have served. The Board did not specifically adopt either alternative.

strikebreaking situations. If the Boom Company's workers performed unloading operations at the mill usually done by the strikers, the strikers would have had an adequate chance to picket them at the primary's premises. But neither the Trial Examiner nor the Board mentioned these facts. Nor could the new test be directed at strikebreaking in the storage sense, for concluding that Boom's uninterrupted operations enabled the primary to continue its business assumed Boom to be part of the primary and was therefore circular. Moreover, if the essential requirement for finding a single enterprise was that two companies together produced a single end product, the test seemed arbitrary: two companies could produce different products or provide different services, yet still be so interrelated that the interests of their employees were identical.

The Board eventually responded to these considerations by eliminating the straight line prerequisite. In *Brotherhood of Carpenters (J.G. Roy & Sons Co.)*,¹¹² five brothers owned equal shares of a lumber and a construction company and divided the joint income equally. All five brothers were directors of the construction company, and four were directors of the lumber company. The construction company bought all its millwork requirements from the lumber company, but these purchases were at competitive prices and constituted only five percent of the lumber company's sales, six percent of the construction company's total purchases, and twenty-five percent of its lumber purchases.¹¹³ When the union called the construction company's employees off the jobsite in an attempt to organize the lumber company's employees, the district court noted that the two companies were actually controlled by different brothers and held that the relatedness required by the single enterprise doctrine was one of business activities rather than ownership or management,¹¹⁴ distinguished *Irwin-Lyons* on the ground that these firms were "regularly engaged in entirely separate enterprises,"¹¹⁵ and granted an injunction. Approaching the case with a broader philosophy, the Trial Examiner found the apparently autonomous companies to be merely different phases of a family joint venture in the building industry and held that the construction company could be picketed because its officers had the power, as members of the lumber company's board of directors, to resolve the primary's labor disputes.¹¹⁶

Because this holding overextended the single enterprise doctrine by permitting primary employees to picket any business controlled by

¹¹² 118 N.L.R.B. 286 (1957), *rev'd and remanded*, 251 F.2d 771 (1st Cir. 1958).

¹¹³ *Id.* at 290.

¹¹⁴ *Alpert v. Brotherhood of Carpenters*, 143 F. Supp. 371, 375 (D. Mass. 1956).

¹¹⁵ *Id.* at 376.

¹¹⁶ 118 N.L.R.B. at 299.

persons sitting on the primary's board of directors, the Board found different reasons for sustaining the result. Ignoring the finding that different persons effectively controlled the two corporations and that the secondary bought its millwork from the primary because the primary was the only local source, the Board held, over Member Rodgers' dissent,¹¹⁷ that the secondary's purchases from the primary constituted a straight line relationship under *Irwin-Lyons*. The opinion continued, however, explaining that:

[T]he Board did not decide in *Irwin-Lyons* that the absence of a "single line operation" precludes a finding of an ally relationship. [Such a] determination . . . must be based on all the circumstances presented. Even if there were no "single line operation" here, we conclude that the element is not a prerequisite to the establishment of an ally relationship and that such a relationship is established . . . where the businesses of the primary and the secondary employers are commonly owned and controlled¹¹⁸

The First Circuit reversed on the ground that two employers did not become allies merely by conducting sales transactions with one another. And whether or not a straight line operation was needed to find an employer nonneutral, the Board in this case could not even establish the degree of common control found in *Irwin-Lyons*. "[A]ctual common control *over labor policies* or any other phase of the operations," not just the potential control implicit in common ownership, was required before two employers could be found to be a single enterprise.¹¹⁹

Even when common ownership and actual control were indisputably present, the straight line concept caused difficulties. In *Warehouse Workers Local 688 (Bachman Machine Co.)*,¹²⁰ the same individual was president and majority stockholder of the primary and secondary employers, owned the separate buildings in which the primary and secondary operated, and exercised active control over both companies' collective bargaining, although he ran only the secondary's day-to-day

¹¹⁷ *Id.* at 288. Member Rodgers argued that: "There is neither common management, nor common operation, nor common control over labor relations, nor unified production effort. The only elements of integration . . . are common ownership, interlocking directorates, and ordinary buying and selling." *Id.* at 290.

¹¹⁸ *Id.* at 287-88.

¹¹⁹ *J. G. Roy & Sons Co. v. NLRB*, 251 F.2d 771, 773 (1st Cir. 1958) (emphasis added); *accord*, *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 N.L.R.B. No. 25, 75 L.R.R.M. 1014 (1970); *American Fed'n of Television and Radio Artists (Hearst Corp.)*, 185 N.L.R.B. No. 26, 75 L.R.R.M. 1018 (1970); *Teamsters Local 639 (Poole's Warehousing, Inc.)*, 158 N.L.R.B. 1281 (1966); *Newspaper Pressmen Local 46 (Knight Newspapers, Inc.)*, 138 N.L.R.B. 1346 (1962), *enforced*, 322 F.2d 405 (D.C. Cir. 1963). On remand the Board accepted the First Circuit's *Roy* decision as the law for that case only, refusing to disclaim its earlier view. 120 N.L.R.B. 1016 & n.3 (1958).

¹²⁰ 121 N.L.R.B. 1229 (1958).

operations. The primary, Plastics Molding Co., bought eighty percent of its molds from the secondary, Bachman Machine Co., which purchased "most" of the plastic parts required for the machines it made from Plastics. When Plastics' employees struck for a new contract, they also picketed the secondary's premises a block away, alleging an alliance. The Board reaffirmed its departure from the straight line test, but found the common control exercised in conjunction with the common ownership sufficient to deny Bachman the immunity of a neutral.¹²¹ The Eighth Circuit reversed,¹²² pointing out that the primary and secondary employees were represented by different unions, that their interests were completely separate because the two businesses were "unrelated," and the president's common ownership and control over both companies' labor policies was therefore irrelevant:

Bachman's participation, as President of Plastics, in the bargaining sessions with the Union, which represented only the employees of Plastics and had nothing to do with the employees of Bachman, [is] insufficient to justify the conclusion of the Board that Plastics and Bachman were so intimately and inextricably united as to constitute them one employer
¹²³

Judge Woodrough entered a perceptive dissent in which he argued that the president's concern with maintaining the high wages of the secondary's (skilled) workmen would directly influence his reaction to the (unskilled) strikers' demands. He suggested that when the same person owned both corporations and controlled their labor relations, the boundary between them was sufficiently indistinct to prevent legal form from controlling the result.¹²⁴

If the dominant impression left by this string of cases is one of confusion, that impression is justified. It is apparent that the single enterprise doctrine developed not so much from a need to prevent actual strikebreaking as from the related public policy of preserving the traditional scope of the primary employees' right to strike their employer.¹²⁵ For example, when two centrally controlled companies are

¹²¹ *Id.* at 1229 n.1. Member Rodgers repeated his dissent in *Roy*, arguing that common ownership and control, even if actual, were not enough to validate the secondary boycott when the 2 employers were separate, nonintegrated enterprises. *Id.* at 1229-30.

¹²² *Bachman Mach. Co. v. NLRB*, 266 F.2d 599 (8th Cir. 1959).

¹²³ *Id.* at 605.

¹²⁴ *Id.* at 605-07. The Board on remand again accepted the reversal as the law for that case alone. 124 N.L.R.B. 743, 744 (1959).

¹²⁵ The importance of the right to strike is conceded: "Collective bargaining can hardly exist without preserving the right to strike [because] one cannot negotiate without the ability to reject the proffered terms." A. COX, *LAW AND THE NATIONAL LABOR POLICY* 48 (1960).

engaged in the same line of business, the second will almost certainly take up the slack caused by a strike against the first. Therefore, in such cases, a union may picket the second company without showing that any struck work has been transferred.¹²⁶ But the same result should also obtain when the two are commonly controlled but engaged in completely different businesses so that strikebreaking is impossible. If strikers can appeal to fellow employees in unrelated bargaining units of the same employer in the name of "mutual aid or protection,"¹²⁷ they should be allowed to do so when those unrelated bargaining units are different companies within the same employer's enterprise: in either case the right to strike includes the right to a meaningful if not to a successful strike, and the persuasive power of many strikes upon the employer would be greatly reduced if they were limited to the bargaining unit immediately concerned. When two entities form a single enterprise, concerted activity by the employees of the first against the second is no more unlawful than activity aimed at other employees of the first: the primary employer is not prevented from doing business with an "other person," but only with himself.¹²⁸ Any other rule would permit the employer to divide and conquer by doing business through several corporations, each comprising one bargaining unit.

But a strong public policy militates against the unnecessary proliferation of labor disputes,¹²⁹ and the standards for measuring when sufficient "relatedness" exists to justify holding two entities to be one are tenuous in the absence of a definite action such as farming out work. In addition to common ownership, common control, and integration of operations, the Board and the courts have looked to whether the two companies do substantial business with each other, occupy the same premises, share or exchange employees or interchange functions, advance each other credit or do business on less than competitive terms, or maintain separate records, payrolls, tax returns, and public images.¹³⁰

¹²⁶ See, e.g., *Milwaukee Plywood Co. v. NLRB*, 285 F.2d 325 (7th Cir.), *aff'd* 126 N.L.R.B. 650 (1960); *Teamsters Local 179 (Alexander Warehouse & Sales Co.)*, 128 N.L.R.B. 916 (1960).

¹²⁷ 29 U.S.C. § 157 (1964); see, e.g., *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664, 668 (1967). The Supreme Court noted that: "A boycott cannot become secondary because engaged in by primary employees not directly affected by the dispute" *Id.* at 669.

¹²⁸ "To give such broad scope to the term [other person] would, for instance, reach out to and include the business relation between an employee of the primary employer (Ebasco, in this case) and the primary employer . . ." *Douds v. Metropolitan Fed'n of Architects*, 75 F. Supp. 672, 675 (S.D.N.Y. 1948).

¹²⁹ LMRA § 1(b), 29 U.S.C. § 141(b) (1964). "There must be . . . an actual, as distinct from merely a potential, integration of operations and management policies" for two commonly owned business enterprises to be treated as one, because "it [is] not in the public interest for one business enterprise to be halted because of the unrelated problems of another." *Newspaper Pressmen's Local 46 v. NLRB*, 322 F.2d 405, 409 (D.C. Cir. 1963).

¹³⁰ E.g., *Teamsters Local 639 (Poole's Warehousing, Inc.)*, 158 N.L.R.B. 1281, 1286-87 (1966); *Newspaper Pressmen Local 46 (Knight Newspapers, Inc.)*, 138

The result is a naked exercise of judicial discretion—an unspoken balancing of the right to strike against the strike's projected social advisability. The test for singleness requires a sufficient accumulation of the considerations enumerated above.¹³¹ Because any number of these considerations may arise in a particular case with each consideration given a different weight, the constraining pressure of *stare decisis* to articulate a decision's rationale in accord with precedent is largely absent. The decisionmaker's personal concept of what is best for society often determines which sum of the relationships is sufficient to justify holding two companies one, under cover of a general rule.

This concern with the societal effect of findings of singleness underlies the rule that sales transactions between two entities do not make them one,¹³² even when the secondary is the primary's exclusive distributor and thus has a substantial interest in the outcome of the latter's labor disputes.¹³³ Exclusive or substantial dealing, even when combined with common ownership, is too common to permit the geometrical increase in the effect of strikes that holding the dealers to be a single enterprise would entail. This concern also explains why the "potential control inherent in common ownership" is insufficient to warrant application of the doctrine.¹³⁴ Although primary employers owned by secondaries are likely to follow the latter's desires even absent active control, common ownership is too prevalent to allow all mergers and acquisitions to result in "single enterprises" in which all parts will be vulnerable to a component's labor dispute. Above all, this concern offers the principal, and perhaps the only, rationale for the straight

N.L.R.B. 1346 (1962), *enforced*, 322 F.2d 405 (D.C. Cir. 1963); Teamsters Local 282 (Acme Concrete & Supply Corp.), 137 N.L.R.B. 1321 (1962); General Drivers Local 806 (Ada Transit Mix), 130 N.L.R.B. 788, 799 (1961).

¹³¹ See L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 370-82 (2d ed. 1961).

¹³² See, e.g., *Schauffler v. Retail Store Union* Dist. 65, 41 L.R.R.M. 2404 (E.D. Pa. 1957); General Drivers Local 745 (Associated Wholesale Grocery), 118 N.L.R.B. 1251, 1255 (1957), *enforced in part*, 264 F.2d 642 (5th Cir.), *cert. denied*, 361 U.S. 814 (1959); Carpenters Dist. Council (Wadsworth Bldg. Co.), 81 N.L.R.B. 802, 806 (1949).

¹³³ E.g., *NLRB v. Wine Workers Local 1* (Schenley Distillers Co.), 178 F.2d 584 (2d Cir. 1949); Grain Elevator Workers Local 418 (Continental Grain Co.), 155 N.L.R.B. 402 (1965) (exclusive handling of 2.8 million bushels of primary's grain insufficient); Milk Drivers Local 584 (Old Dutch Farms, Inc.), 146 N.L.R.B. 509, 516 (1964), *enforced*, 341 F.2d 29 (2d Cir. 1965) (processing primary's product insufficient without exercising control); Teamsters Local 996 (Waiialua Dairy), 111 N.L.R.B. 1220 (1955) (exclusive production for secondary under long-term contract insufficient). *But cf.* *McLeod v. Milk Drivers Local 584*, 54 L.R.R.M. 2287 (E.D. N.Y. 1963) (processor performs integral function in primary's business).

¹³⁴ See *J. G. Roy & Sons Co. v. NLRB*, 251 F.2d 771, 773 (1st Cir. 1958); cases cited note 119 *supra*. See also *Retail Clerks Local 1017 v. NLRB*, 249 F.2d 591 (9th Cir. 1957) (lessor-lessee relationship plus common site insufficient); General Drivers Local 806 (Ada Transit Mix), 130 N.L.R.B. 788 (1961) (father-son relationship between owners of primary and owners of secondary plus guarantee of bank loans to secondary insufficient); General Drivers Local 745 (Associated Wholesale Grocery), 118 N.L.R.B. 1251 (1957) (purchase of 30% of requirements from primary plus power to help elect primary's directors insufficient without active control).

line requirement. Even within the scope of the cases discussed above, the straight line idea has undergone a noteworthy metamorphosis. The Trial Examiner in *Irwin-Lyons* thought the primary need only be dependent upon the secondary for some aspect of its production function for the two to constitute a "single integrated operation."¹³⁵ The *Roy* court seems to have believed that if the primary furnished most of a product necessary to the secondary's operation, then they were a single enterprise if commonly controlled.¹³⁶ Under this standard the relationship in *Bachman Machine* would certainly be straight line, but the *Bachman* court evidently disagreed.¹³⁷ These apparent inconsistencies disappear when the straight line concept is recognized as merely another aspect of the quest for a viable limiting principle underlying the single enterprise concept; it represents a judgment that common ownership and control are too prevalent to permit the economic dislocation which making them the exclusive test for singleness would entail.¹³⁸

Although a societal need to limit the single enterprise doctrine is doubtless present, limiting it by the straight line concept undermines the very right to strike the doctrine supposedly protects. If the general test for the doctrine's application is to be how many breakdowns in the normal distance between two employers dealing at arm's length must occur, the one element which seems both necessary and sufficient for holding two firms to be one is active common control over labor relations.¹³⁹ Such control will seldom be exercised without common

¹³⁵ 89 N.L.R.B. at 83.

¹³⁶ "In contrast to [*Irwin-Lyons*], *Roy Construction's* purchases of millwork from *Roy Lumber* constitute a very small part of the total sales and purchases of both companies and were [therefore] not part of a 'unified production effort.'" *J. G. Roy & Sons Co. v. NLRB*, 251 F.2d 771, 773 (1st Cir. 1958).

¹³⁷ The *Bachman* court apparently emphasized its finding that the companies were "engaged in a different, separate and nonintegrated business" and downgraded its finding that "each is a substantial customer of the other" in refusing to hold *Irwin-Lyons* applicable. *Bachman Mach. Co. v. NLRB*, 266 F.2d 599, 602, 605 (8th Cir. 1959).

¹³⁸ See, e.g., *Employing Lithographers v. NLRB* (Lithographers Local 78), 301 F.2d 20, 29 (5th Cir. 1962), *modifying and enforcing* 130 N.L.R.B. 968 (1961) (common ownership and control do not conclusively establish a "single enterprise").

¹³⁹ Certainly [the secondary] was the agent of [the primary] for some purposes. It was [the primary's] agent for receiving freight consigned to [the primary], for soliciting freight for [the primary], for receiving telephone calls for [the primary]. *The pertinent question here is whether [the secondary] was [the primary's] agent with regard to [the primary's] labor relations with the [disputing employees].*

Truck Drivers Local 728 v. Empire State Express, Inc., 293 F.2d 414, 420 (5th Cir.), *cert. denied*, 368 U.S. 931 (1961) (emphasis added); see *Building Service Employees Local 32-J v. NLRB*, 313 F.2d 880, 883 (D.C. Cir. 1963), *denying enforcement* to 135 N.L.R.B. 909 (1962); *J.G. Roy & Sons Co. v. NLRB*, 251 F.2d 771, 773-74 (1st Cir. 1958) (dictum) (common ownership plus actual control qualifies as a "single enterprise"); *Squillacote v. Teamsters Local 695* (Chase, Inc.), 60 L.R.R.M. 2057, 2059 (W.D. Wis. 1965); Administrative Ruling of the General Counsel, Case No. SR-1948, 50 L.R.R.M. 1102 (1962) (common ownership plus overall supervision of three separate plants' labor regulations sufficient).

ownership.¹⁴⁰ But even absent common ownership, to deny primary employees the right to bring pressure against a secondary determining the employment conditions against which they are protesting unreasonably curtails their right to strike and tends to undermine industrial peace. Regardless of the extent to which the two companies' businesses are "unrelated" or their employees represented by different unions, for all practical purposes the secondary is the primary workers' employer. The situation is indistinguishable from that of separate bargaining units within the same company but on different premises, in which case picketing of the "secondary" is plainly permissible.¹⁴¹ Even if he merely negotiates contracts without supervising day-to-day grievances, the manager exercising common control effectively hires, fires, and disciplines the primary workers by contracting for the grievance procedures, and his decisions with respect to each set of employees will inevitably take into account their possible effect on the other sets and on the whole single enterprise.

Moreover, by not limiting primary pressure, Congress has declared that however dislocating the impact of a strike by workers against their own employer, the social interest in allowing the strike to go forward outweighs the interest in avoiding the possible harm. Given this congressional policy, it seems unreasonable, having found the active control of labor relations that normally makes the secondary the primary workers' de facto employer, to require a closer relationship on unstated social interest grounds unsupported by the congressional mandate. In this light the *Bachman* decision seems to overreach the single enterprise analysis. Although the satisfaction of *Bachman's* straight line standard does indicate an additional degree of "concern" on the part of the secondary in the outcome of the primary's dispute,¹⁴² requiring this extra relatedness is unnecessary either to limit the single enterprise doctrine or to protect the underlying right to strike. As a limiting principle, "integration of operations" reveals no more secondary power over the primary employees' working conditions than active common control itself, and the test protects values Congress intentionally left unguarded.

Although the straight line concept has little significance in limiting the single enterprise doctrine, it may have a substantial impact on that

¹⁴⁰ Indeed, the general managerial control of daily operations often mentioned is frequently read as a synonym for control of labor relations. Compare, e.g., *Teamsters Local 179 (Alexander Warehouse & Sales Co.)*, 128 N.L.R.B. 916, 919 (1960), with *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 N.L.R.B. No. 25, 75 L.R.R.M. 1014, 1016 (1970) (control of labor relations flows from general managerial control).

¹⁴¹ E.g., *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664 (1967); *NLRB v. General Drivers Local 968 (Otis Massey Co.)*, 225 F.2d 205 (5th Cir.), cert. denied, 350 U.S. 914 (1955).

¹⁴² See *Borus & Warshal*, *supra* note 105.

doctrine's expansion. When two companies are not commonly owned and controlled, they may nonetheless be sufficiently related to justify extending the dispute. If their integration is substantial, the labor decisions of each will be largely calculated in light of their effect upon the other, and the interests of both sets of employees in the conditions under which each works will be correspondingly increased.

The paradigm case is *Teamsters Local 282 (Acme Concrete & Supply Corp.)*,¹⁴³ in which the primary, Twin County, distributed concrete manufactured from raw materials provided by the secondary, Acme Concrete. The two firms occupied the same premises, and Twin County bought almost all its raw materials, constituting eighty-five percent of Acme's sales, from Acme Concrete. An outsider owned Twin County, but Acme was owned by Twin County's manager's wife and operated by the manager's two brothers. Acme Concrete owned the joint premises and made unsecured loans to Twin County, while Twin County paid no rent, housed its manager immediately above Acme's office, and "conspicuously displayed" its name on Acme's building. When Twin County's employees picketed the gate reserved for Acme's employees as well as the general entrance, the Trial Examiner concluded that the evidence did not support a single enterprise finding.¹⁴⁴ The Board, however, announced that:

We need not here determine whether the relationship between Acme and Twin County is one of "single employer" or "ally." It is sufficient that Acme and Twin County have such identity and community of interests as negative the claim that Acme is a neutral employer.¹⁴⁵

The crucial circumstances are, of course, the integration of the companies' operations and the close proximity of the working conditions of the two companies' employees, because these circumstances directly determine the terms of the workers' employment. The other considerations suggested by the Board ease the decisionmaker's conscience by

¹⁴³ 137 N.L.R.B. 1321 (1962).

¹⁴⁴ *Id.* at 1329.

¹⁴⁵ *Id.* at 1324 (citations omitted). The court had earlier denied a § 10(1) petition for an injunction in this case:

While those facts . . . do not establish *common ownership or control* of Acme and Twin County. . . there was ample evidence of such *identity and community of interests* as would negative the claim that Acme is a neutral employer.

Kaynard v. Teamsters Local 282, 200 F. Supp. 505, 507 (E.D.N.Y. 1962); *accord*, Administrative Ruling of the General Counsel, Case No. SR-1164, 47 L.R.R.M. 1578 (1961); *see* *Carpet Layers Local 419 v. NLRB (Sears, Roebuck & Co.)*, 429 F.2d 747 (D.C. Cir. 1970) (primary's status as an independent contractor plus absence of direct secondary control of primary employees' working conditions irrelevant if sufficient economic interest and dependence are present).

assuring him that as long as they must be present, other decisionmakers will be restrained from overextending his decision.

B. *Extensions: Actual Common Control*

Because the purpose of the single enterprise doctrine is to permit the disputing employees to reach those who—like the primary employer—determine their working conditions, when one company actually controls the other's labor relations, the two should clearly be held to be a single enterprise. Lacking actual common control, a finding of singleness may still be possible, although an enormous increase in the other interrelationships between the two companies seems necessary to generate the primary-type community of interests between the two sets of employees. This nearly conclusive importance of actual common control is illustrated by the "two hats" cases in which work connected with the secondary employer's operations is performed by an independent contractor, the primary, who is also the secondary's employee. The contractor's dual roles provide a strong inference that the secondary actually controls his operations as an independent contractor.

In *Teamsters Local 20 (National Cement Products Co.)*,¹⁴⁶ one Edwards took over the independent trucking business which transported some of the secondary's products. Edwards was either the son- or brother-in-law of four of the secondary's five partners and was also the secondary's salaried salesman-buyer. He maintained separate social security and workmen's compensation records for his trucking employees and set their wages, hours, and terms of employment, but his sales office at the secondary's plant also served as his trucking firm's office. In addition, the trucks were garaged on the secondary's premises and were used to haul only for the secondary according to its needs. When the union induced the secondary's employees to refuse to load Edwards' trucks, the Trial Examiner found no violation on the grounds that the secondary's ties to Edwards gave it the power to resolve the dispute, and that the inference of actual control arising from those ties was too strong to be rebutted.¹⁴⁷ The Board, however, held that despite the two firm's physical and economic integration, neither the employment nor the family relationship nor a combination of them sufficed, absent a showing of actual common control, to make Edwards in his independent trucker capacity part of the secondary's enterprise.¹⁴⁸

¹⁴⁶ 115 N.L.R.B. 1290 (1956).

¹⁴⁷ *Id.* at 1299-1300 (second ground by implication).

¹⁴⁸ *Id.* at 1292-93. Member Murdock's dissent prophetically noted that:

[I]n the 1 Board and 1 court case in which it has thus far been found that a secondary employer was unneutral or an ally of the primary employer [*Irwin-Lyons* and *Ebasco*], there was either evidence of common ownership and managerial control, or transfer of struck work, neither of which are [*sic*]

In *Building Services Employees Local 32-J (Terminal Barber Shops)*,¹⁴⁹ the secondary employer, Terminal, fired its independent unionized cleaner. After personally negotiating unsatisfactory contracts with two other cleaners, the supervisor of one of Terminal's shops obtained the cleaning contract. The supervisor provided cleaning services only for Terminal, operated his cleaning business out of the shop he supervised, reported to himself in his supervisory capacity with respect to cleaning his own shop, and decided not to sign a union contract after consulting Terminal. When the union picketed Terminal's shops in an attempt to force it to stop doing business with the supervisor-cleaner, the Board adopted the Trial Examiner's conclusion. Because the supervisor maintained separate records and insurance for his cleaning employees, and had already lost his cleaning contract at two shops for failure to provide satisfactory services,¹⁵⁰ he dealt at arm's length with the secondary and was not part of the latter's enterprise.

But the considerations on which the Trial Examiner relied made a finding of singleness dependent on easily manipulated conduct. On appeal the court noted the supervisor's overlapping management functions, the lack of an independent labor policy, and the danger that such arrangements could easily be used by employers "as a device to achieve insulation from union activity," and denied enforcement.

The inquiry in the present case was limited to whether [the supervisor] was an "independent contractor." We think it clear, however, that [his] relationship to Terminal was in the "zone of dispute in which such formulae are useless" and . . . required consideration of such facts as, for example, the history of [his] relationship to Terminal; the conduct of his cleaning business and its relation to Terminal's business; *and Terminal's influence on, if not control over, [his] labor policy.* In our view, these facts make inescapable the conclusion that Terminal was not a neutral within the meaning of the statute.¹⁵¹

Relying on a similar analysis, however, another court found—without looking at any other facts—that when an employee had an established independent business and maintained that business after acquiring a

present here. There is nothing in those cases, however, which even suggests that in no other situation can a finding be made that the secondary employer is not a neutral or "wholly unconcerned" employer.

Id. at 1295.

¹⁴⁹ 135 N.L.R.B. 909 (1962).

¹⁵⁰ *Id.* at 915-17.

¹⁵¹ *Building Service Employees Local 32-J v. NLRB*, 313 F.2d 880, 883 (D.C. Cir. 1963) (emphasis added).

contract from his employer, sufficient common control could not exist despite the straight line nature of the contracted work.¹⁵²

The *Terminal* court found mere influence on labor relations significant, even in the absence of common ownership. A similar progression toward recognizing the unique importance of actual common control appears when common ownership is present. In *Newspaper Pressmen Local 46 (Knight Newspapers, Inc.)*,¹⁵³ for instance, the secondary Detroit corporation owned all the stock in its Miami subsidiary and the same individuals were president and vice-president of both. Despite the identity of owners and officers, the Board found that different persons controlled the general operations and labor policies of the two companies, and held that the Miami employees could not lawfully picket the parent corporation in Detroit. In a more extreme example, *Teamsters Local 639 (Poole's Warehousing, Inc.)*,¹⁵⁴ the two commonly owned and officered entities were located in the same city and did significant business with each other in addition to sharing a bookkeeper, cars, an office, and a telephone. Nevertheless, the Board held that separate managers making independent labor decisions kept the two distinct. Finally, in twin cases decided the same day,¹⁵⁵ the Board held that subsidiary divisions of the same corporation were not parts of a single enterprise absent active control by the parent over the daily labor decisions of each division—a result previously reached by the courts granting 10(l) injunctions in these cases.¹⁵⁶

¹⁵² *Gibbs v. United Mine Workers*, 220 F. Supp. 871, 878 (E.D. Tenn. 1963), *aff'd on other grounds*, 343 F.2d 609 (6th Cir. 1965), *rev'd*, 383 U.S. 715 (1966). The decision's rationale was apparently that since the "employee" was not dependent upon his employer for all his business as an independent contractor, the inference of independence was sufficiently powerful not to be rebutted by anything in the case.

¹⁵³ 138 N.L.R.B. 1346 (1962), *enforced*, 322 F.2d 405 (D.C. Cir. 1963). The Trial Examiner explained that:

The Board . . . will not consider two corporate entities as one, unless . . . the operations of the two companies have been conducted in such a manner [*sic*] as to indicate that to an appreciable degree the separateness of the two entities has not been maintained. Thus, even though two corporations may have substantially identical officers and directors and one may be wholly owned by the other, if there is no showing that there was an appreciable amount of common *active* control, I assume the Board would not consider the two as a single employer.

Id. at 1353 (emphasis in original).

¹⁵⁴ 158 N.L.R.B. 1281 (1966).

¹⁵⁵ *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 N.L.R.B. No. 25, 75 L.R.R.M. 1014 (1970) (divisions engaged in the same type of work); *American Fed'n of Television and Radio Artists (Hearst Corp.)*, 185 N.L.R.B. No. 26, 75 L.R.R.M. 1018 (1970) (divisions engaged in different work).

¹⁵⁶ *See Kennedy v. San Francisco-Oakland Newspaper Guild*, 69 L.R.R.M. 2301 (N.D. Cal. 1963), *aff'd*, 412 F.2d 541 (9th Cir. 1969); *Penello v. American Fed'n of Television and Radio Artists*, 291 F. Supp. 409 (D. Md. 1968); *cf. NLRB v. Amalgamated Lithographers Local 17*, 309 F.2d 31, 38-41 (9th Cir. 1962) (chain shop clause extended only to actively controlled subsidiaries and therefore did not encompass "other persons" within the meaning of § 8(e)).

C. Coemployers

Even when a secondary employer has no close relations with a primary employer, he may still be "concerned" in the latter's dispute if he possesses enough control over the manner in which the primary employees perform their tasks to be termed their "coemployer." The distinction between this concept and the single enterprise doctrine is philosophically insignificant, for both rest on the need to preserve the primary workers' right to strike those determining their working conditions. The distinction is, however, tactically crucial, because circumstances suggesting coemployer status are even more prevalent than those required for singleness. If it is easier for a union to argue that the secondary it has picketed is part of the primary's single enterprise than that the secondary is performing the primary's struck work, it is even easier for the picketers to argue that the secondary employer, because he supervises their activities, should be treated as their own.

This implication of *Ebasco's* second ground was first made explicit in *Truck Drivers Local 728 (Empire State Express, Inc.)*.¹⁵⁷ Empire State, a company with headquarters in Columbus, Georgia, purchased ACA's local and long-distance Atlanta trucking franchise, hired ACA's long-distance drivers, and decided to subcontract the local cartage to Service, which immediately hired ACA's local cartage employees. While waiting for the Atlanta long-distance drivers to move to Columbus, Empire "temporarily" authorized Service to dispatch and pay them and handle their grievances. The Atlanta drivers regarded Service as their actual employer, and under the contract Service solicited and handled all of Empire's Atlanta freight and represented itself to be part of Empire's service network.¹⁵⁸ When the Atlanta drivers walked out over an unrelated dispute, Empire took up the slack by dispatching all its Atlanta trucks from Columbus. Three weeks later, when Service was no longer dispatching or handling the grievances of any Empire drivers, the union picketed its terminal in an attempt to organize Empire, inducing a general strike.

The Trial Examiner found that Service was Empire's "alter ego" by virtue of its power over the Empire drivers and recommended dismissing the complaint.¹⁵⁹ The Board bypassed this coemployer analysis and found a violation on the ground that the relevant time for determining the legality of the picketing was that of the organizational drive, not the walkout. Because Empire had never had control over

¹⁵⁷ 116 N.L.R.B. 615 (1956).

¹⁵⁸ *Id.* at 617. The arrangement was probably more than temporary, for Empire was negotiating, through Service, a plan to let the drivers remain in Atlanta permanently. *Id.* at 631.

¹⁵⁹ *Id.* at 632-34.

Service and Service controlled no Empire drivers when the picketing began, no argument that the picketing was lawful could be sustained.¹⁶⁰ Yet on the same facts the Fifth Circuit, noting that if ACA had continued in business the union could certainly have picketed its local-cartage unit, dismissed Empire's action for damages under section 303. The court explained that Service ceased to exercise general supervision over Empire's long-distance drivers

only when there were no longer any drivers to supervise [O]nce the strike began . . . the employer could not make a change in form which would deprive the strikers of the right to call on their fellow drivers to support their action.

The immediately preceding economic history of the two companies, plus the fact that nearly all of Service's business was with Empire, plus the fact that the over-the-road drivers were generally supervised and dispatched by [Service] . . . convinces us that Service was not the unconcerned, neutral employer whom Sections 8(b)(4) and 303 . . . were designed to protect¹⁶¹

The coemployer analysis suggested in *Empire State* was further clarified by the several opinions in *Teamsters Local 24 (A.C.E. Transportation Co.)*.¹⁶² ACE partly operated its own long-haul trucking but also leased tractors with drivers from independents. The independent lessors repaired and insured their own tractors, set their drivers' wages, paid them, and maintained workmen's compensation, tax returns, and social security records for them. The leases provided, however, that only drivers meeting ACE's employment standards could be hired by the lessors to drive the leased vehicles. In addition, ACE exercised detailed supervisory control over the drivers' operations through a strictly enforced training manual and the power to cancel leases if the lessors did not follow its instructions on discharging and disciplining drivers.

When the union picketed ACE in a drive to organize the lessors' drivers, the Trial Examiner found no violation of the secondary boycott section. Because ACE possessed sufficient control over the drivers to be held their employer for the purposes of sections 8(a)(3) and 9(c), and could be required under the statute to bargain collectively with them, it could not be "unconcerned":

¹⁶⁰ *Id.* at 622. Member Murdock dissented, arguing that despite its independent contractor status, Service was Empire's agent for handling labor problems with the truck drivers within the meaning of § 2(2) of the NLRA, 29 U.S.C. § 152(2) (1964), and there was no showing that this authority had been revoked. 116 N.L.R.B. at 625-26.

¹⁶¹ *Truck Drivers Local 728 v. Empire State Express, Inc.*, 293 F.2d 414, 423 (5th Cir.), *cert. denied*, 368 U.S. 931 (1961).

¹⁶² 120 N.L.R.B. 1103 (1958), *enforcement denied*, 266 F.2d 675 (D.C. Cir. 1959).

[A]n employer-employee relationship . . . exist[s] where the party for whom the services in question are performed reserves the right . . . to determine not merely the result [for which the ostensibly independent contractor was hired] but the methods and means by which such result is to be accomplished. . . . [S]uch veto power by a contractor over the hire and discharge of employees by its subcontractor [is] of itself sufficient to constitute the contractor and [*sic*] employer jointly with the subcontractor over these employees¹⁶³

The Trial Examiner recognized that neither common ownership nor control were in evidence and held that a common law right of control by the secondary over the primary's employees sufficed to make the two "coemployers."¹⁶⁴

In its haste to overturn this result, the Eisenhower Board invoked every available questionable principle. First, it suggested that the only relevant control for all purposes was the secondary employer's control over the primary *employer*, while here the primary was an independent contractor. The section 8(a) cases cited by the Trial Examiner were therefore distinguishable because they involved control over *employees* rather than single enterprise situations. The Examiner's section 9(c) case was similarly distinguishable, since it concerned a self-employed one-man independent contractor who was not part of another bargaining unit whereas the lessors' drivers were not self-employed.¹⁶⁵ Moreover, said the Board's majority, ACE's mere control over the manner in which the drivers operated could not make it an ally because such control over the independent contractors' employees is always necessary to insure proper accomplishment of the purpose for which the subcontract was made. In addition, ACE's lack of legal power to grant the pickets' organizational demand made their action illegal per se. Finally, the majority concluded with the question-begging statement that a "concerned" employer for 8(b)(4) purposes was solely one involved in a dispute with his own employees.¹⁶⁶

Member Fanning concurred on the ground that if in "certain circumstances" a secondary could be the coemployer of an independent contractor's workers, this case did not contain those circumstances¹⁶⁷—a result ignoring the fact that if the pervasive control exercised by ACE did not suffice, none would. Member Bean adopted the Trial Examiner's coemployer analysis in his dissent, adding that because ACE

¹⁶³ *Id.* at 1129.

¹⁶⁴ *Id.* at 1131.

¹⁶⁵ *Id.* at 1105. The Trial Examiner cited *National Van Lines (Teamsters Local 389)*, 117 N.L.R.B. 1213 (1957).

¹⁶⁶ 120 N.L.R.B. at 1108-09.

¹⁶⁷ *Id.* at 1112.

exercised sufficient control over the lessors' drivers to be their employer under the common law representation test, the drivers were part of its bargaining unit, and that it did possess power to grant the union's demand.¹⁶⁸ The Court of Appeals for the District of Columbia rejected the Board's narrow reasoning and adopted the dissent:

The answer to the problem before us cannot be reached by the use of any legalistic word or phrase, such as "co-employer", or "independent contractor", or even "ally"

. . . [T]he relationships of ACE, these drivers, and the lessor-owners are so intertwined with respect to employment that ACE was not protected by the statute against the impact of a strike The many tiny strands of ACE control over these drivers cannot be extricated from the total fabric of mutual obligation. Those strands are clearly part of the patterns of the employer-employee relationship.¹⁶⁹

Thus, the Board, although apparently accepting the coemployer concept in an early case,¹⁷⁰ and freely finding one-man independent contractors coemployed for section 8(b)(4)(B) purposes—and even applying a more liberal standard of control to them¹⁷¹—firmly resisted extending the concept to independent contractors' employees, and for fourteen years after *Ebasco* let no attempted extension stand.¹⁷² The Board's reasons for this resistance were twofold: a conscientious desire to confine strikes within their narrowest possible bounds, and the Supreme Court's ruling in *NLRB v. Denver Building Trades Council*,¹⁷³ in which the Court had held that the supervision exercised by a

¹⁶⁸ *Id.* at 1113-17. He averred that "a coemployer relationship may be found to exist between parties who are otherwise bound to each other by no closer ties than merely their contractual commitments." *Id.* at 1115.

¹⁶⁹ *Teamsters Local 24 v. NLRB*, 266 F.2d 675, 680 (D.C. Cir. 1959); *see Drivers Local 816 v. NLRB* (Montgomery Ward & Co.), 292 F.2d 329, 331 (2d Cir. 1961) (dictum), *cert. denied*, 368 U.S. 953 (1962), *enforcing* 127 N.L.R.B. 1059 (1961); *Longshoremens' Local 1291* (National Sugar Refining Co.), 142 N.L.R.B. 257 (1963), *enforced*, 332 F.2d 559 (3d Cir. 1964).

¹⁷⁰ *See Teamsters Local 294* (Conway's Express Co.), 87 N.L.R.B. 972 (1949) (by implication), *aff'd on other grounds*, 195 F.2d 906 (2d Cir. 1952).

¹⁷¹ In these cases, doing work similar to employees' work and being treated as employees has been held sufficient, although the primary exercised no detailed control over the manner of performance, but only over the result. *E.g.*, *Milk Drivers Local 546* (Minnesota Milk Co.), 133 N.L.R.B. 1314, 1316 (1961), *enforced*, 314 F.2d 761 (8th Cir. 1963); *Construction Drivers Local 83* (Marshall & Haas), 133 N.L.R.B. 1144, 1145 (1961); *Teamsters Local 249* (Polar Water Co.), 120 N.L.R.B. 155, 162 (1958).

¹⁷² *E.g.*, *Chauffeurs Local 135* (Hoosier Petroleum Co.), 106 N.L.R.B. 629 (1953), *enforced*, 212 F.2d 216 (7th Cir. 1954), in which the Trial Examiner found extensive control exercised by the secondary over the primary's drivers, including disciplinary power. *Id.* at 640. Nevertheless, the Board held that such power was merely necessary to ensure the result desired by the secondary and did "not reflect such a right of control . . . over the manner or means of [the primary's] performance of his contract as is required by the applicable common law right-of-control test. . . ." *Id.* at 631.

¹⁷³ 341 U.S. 675 (1951); *see* text accompanying notes 194-210 *infra*.

general construction contractor over the employees of his independent subcontractors was insufficient to make him the subcontractors' ally in a dispute. But the one-man independent contractor rule, the core of the Board's approach, was logically untenable since it was absurd to hold that an individual operating as a subcontractor was coemployed by the primary employer, but became independent if he hired a helper, when the primary's control over his working conditions remained the same.¹⁷⁴

The first breach in the Board's resistance came in *Truck Drivers Local 107 (Sterling Wire Products Co.)*,¹⁷⁵ in which a bare majority relied upon unique history and the secondary's control over the seniority and normal duties of the independent's employees in holding that the secondary operated as a coemployer. But the Board apparently delivered the *coup de grâce* to the one-man rule in *Teamsters Local 559 (Atlantic Pipe Corp.)*.¹⁷⁶ In *Atlantic Pipe*, the primary employer hauled exclusively for the secondary as its contract carrier. Although commonly owned and officered, the two firms operated from separate premises. The Trial Examiner held that the two firms' alternating supervision of the hourly activities of the primary drivers made the secondary their coemployer. Although the opinion purported to rest on the two firms' integrated operations as well as the coemployer theory, the only precedent cited for the result was a section 8(a)(5) case in which evidence of integration did not significantly figure.¹⁷⁷ The Board adopted the decision without comment.

The remaining major question is whether the control needed to make the secondary a coemployer must be actively exercised or merely retained. The frequently stated rule¹⁷⁸ that retention suffices finds little support among the cases. In *Empire State*, the secondary stopped exercising active control over the primary drivers' daily operations only because the drivers were no longer working. In *ACE Transportation*, ACE enforced the provisions of its training manual by following the lessors' drivers with patrol cars.¹⁷⁹ The secondary employers in *Ster-*

¹⁷⁴ See *Electrical Workers Local 501 v. NLRB (Langer)*, 181 F.2d 34, 41 (2d Cir. 1950) (Clark, J., dissenting), *aff'd*, 341 U.S. 694 (1951).

¹⁷⁵ 137 N.L.R.B. 1330 (1962).

¹⁷⁶ 172 N.L.R.B. No. 35, 1 CCH 1968 NLRB DEC. ¶ 22,633.

¹⁷⁷ *Greyhound Corp. (Transit Union)*, 153 N.L.R.B. 1488 (1965), *enforced*, 368 F.2d 778 (5th Cir. 1966). The Trial Examiner in *Atlantic Pipe* noted with regard to the coemployer concept that "[a]lthough research has revealed no case in which this concept has been applied to a secondary boycott situation, [he could not] find any precedent holding that the concept would not be so applicable." 172 N.L.R.B. No. 35, 1 CCH 1968 NLRB DEC. ¶ 22,633.

¹⁷⁸ See, e.g., *Teamsters Local 249 (Polar Water Co.)*, 120 N.L.R.B. 155, 162 (1958).

¹⁷⁹ 120 N.L.R.B. at 1129.

ling Wire and Atlantic Pipe also exercised active control over the working conditions of the striking employees. Even the one-man independent contractor cases, in which the "mere retention" rule seems most cited, exhibit actual control.

Moreover, if the rule were that the secondary becomes a co-employer merely by retaining control over the manner in which the primary's employees accomplish their tasks, it would be demonstrably incorrect. The retention principle is borrowed directly from section 8(a) and 9(c) cases.¹⁸⁰ Aside from the historical accident that Congress enacted the statutory sections prohibiting employer unfair labor practices before those banning unfair labor practices by unions so that the term "employer" was judicially defined under the former, no substantial reason exists for requiring different control for the coemployer test than for the single enterprise doctrine. The two situations are equally prevalent and present equal potential for disrupting the economy, and in both cases only active control by the secondary directly determines the working conditions of the common employees. The section 9(c) argument—that the disputed workers would be part of the second employer's bargaining unit for the purposes of representation proceedings before the Board—is merely a useful analogy for preserving the workers' right to reach those determining their working conditions. The language of the section 9(c) cases should not be determinative when a more appropriate balancing test can be applied.¹⁸¹

The other half of that balancing test must, of course, be the secondary's right to be free from unnecessary pressure. The cases discussed above indicate that the limitation protecting that right is the requirement that the coemployer's control over the primary employees' work be greater than that normally exercised by a secondary over an independent contractor's employees. Minimizing the force of this limitation may produce such tangled aberrations as the recent decision in *Carpet Layers Local 419 v. NLRB (Sears, Roebuck & Co.)*,¹⁸² in

¹⁸⁰ *E.g.*, *NLRB v. Phoenix Mutual Life Ins. Co.*, 167 F.2d 983 (7th Cir. 1948) (§ 8(a)), enforcing 73 N.L.R.B. 1463 (1947); *Provident Life & Accident Ins. Co. (Insurance Agents' Union)*, 118 N.L.R.B. 412 (1957) (§ 9(c)).

¹⁸¹ There is comparatively little risk of serious economic dislocation in holding an employer jointly bound to rectify another's intimidation of his employees, or to recognize a union for bargaining purposes which may never result in a collective bargaining contract. See 29 U.S.C. §§ 158(a)(5), (d) (1964). The risk of dislocation from holding that employer open to picketing by another's nominal workers is considerably greater, however, and justifies a narrower construction of § 158(2) in 8(b) situations.

¹⁸² 429 F.2d 747 (D.C. Cir. 1970), enforcing as modified 176 N.L.R.B. No. 120, 71 L.R.R.M. 1372 (1969). For another such aberration, see *Steelworkers Local 6991 (Auburndale Freezer Corp.)*, 177 N.L.R.B. No. 108, 71 L.R.R.M. 1503 (1969), *rev'd and remanded*, 75 L.R.R.M. 2753 (5th Cir. 1970), in which a majority of the full Board also minimized the independent secondary's right to be free from undeserved union pressure.

which the Circuit Court for the District of Columbia seized upon its *ACE Transportation* language¹⁸³ to carry the coemployer and single enterprise concepts to unacceptable lengths.

Sears sold carpeting at a retail price including installation, and had arrangements with small businessmen to install the carpet at Sears' expense. Sears prepared cost estimates and installation plans when the carpeting was purchased, and placed these in the chosen installer's pigeonhole on Sears' premises to be picked up with the uncut carpeting for installation in the buyer's home. The installers, however, operated out of individual locations under their own names, were wholly responsible to the customers for defective work, and had complete power to disregard the plans, increase the estimates to reflect the work's difficulty, or reject any assignment they thought could not be satisfactorily performed. In addition, the installers set their own employees' wage rates and work schedules, genuinely negotiated their installation prices with Sears, subcontracted some Sears work despite their contracts' terms, and worked for customers other than Sears. Neither they nor their workers were subject to Sears' work priorities, personnel regulations, or benefit programs.¹⁸⁴

When the union attempted to organize one of the installers by picketing Sears, the Trial Examiner found the picketing secondary on the dual grounds that since Sears controlled only the result of the installer's work and not the manner of performance or labor decisions, it was neither the installer's employer nor part of a single enterprise including the installer.¹⁸⁵ The Board sustained the result, agreeing that the installers were independent contractors and that Sears was not "sufficiently related to [them] to destroy its neutrality."¹⁸⁶ The court first noted that Sears' lack of legal power to resolve the dispute by recognizing the union was not conclusive,¹⁸⁷ then remarked that Sears had a direct economic interest in the installers' unionization because it profited from the installations as well as its carpet sales,¹⁸⁸ and held that the installers' status as independent contractors was not conclusive either, if they could be *analogized* to Sears employees.

[T]he Board appears to have found the "ally" cases inapplicable because Sears was not legally capable of resolving the dispute. To rephrase the Board's position as we understand

¹⁸³ Text accompanying note 169 *supra*.

¹⁸⁴ 71 L.R.R.M. at 1374.

¹⁸⁵ Carpet Layers Local 419, No. 27-CC-278 (N.L.R.B., Feb. 2, 1969) (Trial Examiner) (by implication).

¹⁸⁶ 71 L.R.R.M. at 1374-75.

¹⁸⁷ 429 F.2d at 750.

¹⁸⁸ *Id.* at 751.

it, the Board would interpret the phrase "control over labor policies," one of the criteria of a "single employer," to mean control over whether a union is to be recognized, or direct employer control over such fundamental employment factors as wages and working conditions. To accept this view would be to render the finding that the installers here were independent contractors dispositive, a result this court heretofore has not attributed to an independent contractor status.¹⁸⁹

The court then quoted from its opinion in *ACE Transportation*—in which the picketed secondary in fact controlled the independent contractors' working conditions—and remanded the case for further consideration of whether

as in [*ACE*], the relationship between Sears and the installers might so resemble that of employer and employee that a labor dispute with the installers could justifiably include Sears

. . . While we support the findings of the Board that the installers are not employees of Sears, they stand in such a business relationship with Sears as to require further consideration and explication by the Board of whether the Union's effort to unionize the installers grows out of the same kind of a relationship as would justify a union in picketing to obtain unionization of employees of a primary employer. If this is the case, Sears cannot be protected as a neutral.¹⁹⁰

The court's opinion seems to rest on two considerations: Sears' economic interest in maintaining its competitive position in the carpeting market by keeping the installers' costs low,¹⁹¹ and its alleged "influence over the relationship" with the installers through their functional integration deriving from their contracts.¹⁹² But these considerations are present whenever an independent contractor regularly works on some aspect of a retailer's finished product, and to hold them determinative of the retailer's neutrality would irrationally multiply the effect of strikes.¹⁹³ Without direct control by the secondary over the contractor's labor policies or the details of its employees' performance, the contractor's workers can claim a right to appeal to neither their fellow employees nor those determining their working conditions

¹⁸⁹ *Id.* at 752.

¹⁹⁰ *Id.* at 754. The court's cryptic interpretation of *Ebasco*—"that an employer may not be insulated from union activities designed to affect a business relationship which itself forms part of the dispute," *id.*, seems greatly overstated. See text accompanying notes 8-19 *supra*.

¹⁹¹ 429 F.2d at 751.

¹⁹² *Id.* at 752.

¹⁹³ In addition to subjecting these prevalent subcontracting relationships to blanket economic pressure, to hold that the outside union could picket Sears necessarily implies that striking installers' employees could also do so.

as justification for picketing the secondary. In this sense the Board's finding that the installers were independent of Sears is dispositive—a conclusion the court seems to have admitted by taking the extraordinary step of enforcing the Board's order pending reconsideration by the Board.

D. *Conclusions: Single Enterprises*

Absent his performance of struck work, a secondary employer may be held picketable by another employer's employees or by an outside union seeking to organize them in two major situations: when he actively controls the primary employer's managerial and labor decisions, or when he exercises supervisory power over the daily activities of the primary employer's workers extending beyond control of the result to control of the ways in which they perform their tasks. If neither type of control is present, the secondary employer may still be found to be "concerned" if his operations are sufficiently integrated both physically and economically with those of the primary employer to create a community of interests between the two sets of workers analogous to that between separate bargaining units working for the same employer. But this third situation rarely occurs because, as *Acme Concrete* demonstrates, the two employers' interrelationships in the absence of common control or extensive supervision must be so great that when the secondary changes his employees' working conditions, a de facto change in the working conditions of the primary employees results as well. Thus, the presence of active common control or extensive supervision is conclusive in determining alliance in the absence of struck work; and although the absence of these indices is not necessarily conclusive, it should nearly always be decisive in fact.

Both the single enterprise and the coemployer concepts rest on the need to preserve the disputing employees' right to appeal to all their fellow workers to exert the primary strike's traditional complement of economic pressure on those determining their working conditions: if the secondary employer is the disputing employees' coemployer or part of a single enterprise including their own "employer," the secondary workers are their fellows and may justifiably be reached. Lacking clear intermediate tests for the two concepts' applicability, such as the struck-work doctrine's progressive determinations of what the primary employees' work is, whether it has been transferred, and whether it has been transferred with the requisite motive, the Board and the courts have introduced limitations such as the "straight line" requirement into the administration of the two concepts to prevent their immunization of ostensibly "secondary" picketing from being too broadly applied. But the two concepts contain their own limitation: when the secondary

employer does not control the details of the primary workers' performance and neither controls nor is controlled by the primary employer's labor decisions, then picketing their immediate employer provides the primary employees with all the opportunity for applying economic pressure that a primary strike traditionally yields, and extending the dispute is no longer necessary to protect that right. Whether the requisite control is present in a given case is a question of fact for the Board, a question which should be no more troublesome than the countless similar decisions concerning motive and status made daily by the Board.

III. THE IMPACT OF *General Electric*

A. *The Path of Precedent*

After *Ebasco* and *Irwin-Lyons*, much early speculation centered on whether a general contractor and subcontractors working for him on the same construction project were a single enterprise or co-employers.¹⁹⁴ Several circumstances favored such a holding: (1) the employees of the general contractor and his subcontractors worked in close physical proximity; (2) the secondary employees performed functions essential to the fulfillment of the general contractor's obligations under his contract; (3) general contractors customarily exercised extensive supervisory and financial control over any subcontractor they engaged; and (4) the general contractor had the power to engage subcontractors whose lower union contracts, or lack of union contracts, he preferred.

The Supreme Court appeared to resolve this controversy in 1951 with its decision in *NLRB v. Denver Building Trades Council*.¹⁹⁵ In *Denver*, the general contractor let the electrical work on its building project to a nonunion subcontractor. The Building Trades Council represented the employees of the general contractor and the other on-site subcontractors. When the general contractor refused to terminate the nonunion subcontractor's contract, the Council induced a general walk-out. Rejecting without comment the argument successfully advanced before the Court of Appeals for the District of Columbia Circuit that finding an 8(b)(4)(B) violation would establish a precedent permitting general contractors to evade legitimate union pressure by subcontracting essential functions,¹⁹⁶ the Supreme Court held that an object of

¹⁹⁴ Compare *Denver Bldg. Trades Council v. NLRB*, 186 F.2d 326, 336-37 (D.C. Cir. 1950), *rev'd*, 341 U.S. 675 (1951) and *Mills v. Plumbers Local 178*, 83 F. Supp. 240 (W.D. Mo. 1949) (principal-subcontractor relationship creates an alliance), *with* *Electrical Workers Local 501 v. NLRB (Lanzer)*, 181 F.2d 34, 37 (2d Cir. 1950) (principal-subcontractors in common venture not allied).

¹⁹⁵ 341 U.S. 675 (1951), *rev'g* 186 F.2d 326 (D.C. Cir. 1950).

¹⁹⁶ 186 F.2d at 337.

the walkout was to force the general contractor to "cease doing business" with the nonunion subcontractor, and that the principal-subcontractor relationship did not legitimize that intent.

[T]hat the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.¹⁹⁷

Thus was established—despite protestations that the decision discriminated against workers in the construction industry in which enterprises were historically created by subcontracting rather than through unitary plants¹⁹⁸—the rule that functional integration of principals and subcontractors was insufficient to involve either in the other's labor disputes. In the years following this decision, the rule was extended to encompass other industries,¹⁹⁹ to subcontractors occupying separate premises,²⁰⁰ and to situations in which the degree of supervision or

¹⁹⁷ 341 U.S. at 689-90.

¹⁹⁸ Justices Douglas and Reed dissented in *Denver* on the grounds that the situation's supervision and integration aspects were analogous to *Ebasco* and that basing neutrality on whether the general contractor performed the contested work himself or through subcontractors made the right to strike "dependent on fortuitous business arrangements that have no significance so far as the evils of the secondary boycott are concerned." *Id.* at 693; *accord*, Baltimore Bldg. Trades Council (John A. Piezonki), 108 N.L.R.B. 1575 (1954), *rev'd*, 219 F.2d 879 (4th Cir. 1955). Former Secretary of Labor Willard Wirtz commented along these lines that:

[T]hese "fortuitous" arrangements are no accident. Many considerations govern the choice of a subcontractor before bids are submitted on a construction job, as well as afterward. One prime consideration is the nature and source of the contractor's labor supply. . . .

No one can be taken by surprise in these situations. No one can claim damage without advance warning. No one is an innocent bystander. Everyone is well aware of the probable consequences of his own course of action.

Hearings on H.R. 6411 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 5 (1965).

¹⁹⁹ *See, e.g.*, *Haughton v. Woodworkers Local 5-40*, 294 F.2d 766, 767 (9th Cir. 1961), *aff'g* 168 F. Supp. 273 (D. Ore. 1958) (subcontracting equally customary in logging industry); *Milk Drivers Local 584 (Old Dutch Farms, Inc.)*, 146 N.L.R.B. 509 (1964), *enforced*, 341 F.2d 29 (2d Cir. 1965) (subcontracting of functions in local dairy industry analogous to subcontracting in construction industry). One court recently noted that:

[T]here is logic to the building trades argument that, at least as to a general contractor who had contracted to perform a total building job, no subcontractor working on that job . . . should be regarded as entirely independent or "neutral" in a lawful labor dispute with the general contractor. However, whatever logic there may be to this argument has thus far been rejected by the United States Supreme Court.

NLRB v. Nashville Bldg. Trades Council (Markwell & Hartz), 383 F.2d 562, 565 (6th Cir.), *enforcing* 164 N.L.R.B. 280 (1967) (citing *Denver*).

²⁰⁰ *See, e.g.*, *Longshoremen's Local 418 (Continental Grain Co.)*, 155 N.L.R.B. 402 (1965); *Longshoremen's Local 13 (Catalina Island Sightseeing Lines)*, 124 N.L.R.B. 813, 831 (1959); *Teamsters Local 996 (Waiialua Dairy)*, 111 N.L.R.B. 1220, 1234 (1955).

other interrelatedness far exceeded that in *Denver*.²⁰¹ The *Denver* rule, emphasizing the "independence" of independent contractors, became the basis for the storage decisions²⁰² (although in those cases the subcontractors directly diminished the effect of the primary strike); the main argument behind the Board's decisions barring the ally defense in the "two hats" cases;²⁰³ and the Board's rationale for refusing to extend the coemployer concept beyond its "one-man" independent contractor rule.²⁰⁴

Then the Supreme Court decided *Electrical Workers Local 761 v. NLRB (General Electric Corp.)*,²⁰⁵ the only other major case in which it has directly treated the ally doctrine.²⁰⁶ *General Electric* involved successful picketing by the aggrieved primary employees at a gate reserved exclusively for employees of independent contractors working on the primary employer's premises. In its opinion, the Court embarked on a lengthy attempt to rationalize the Board's primary and common situs decisions in terms of a proper definition of "primary activity," concluded that "[t]he key to the problem is found in the type of work that is being performed"²⁰⁷ by the independent contractors' employees, and held that it would allow the Board to apply its *Moore Dry Dock*²⁰⁸ rules for limiting common situs picketing only in the following circumstances, since only then were the independents truly secondary and a common site present:

"[1] There must be a separate gate marked and set apart from other gates; [2] the work done by the men who use the gate must be unrelated to the normal operations of the [primary] employer and [3] the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations."²⁰⁹

²⁰¹ *E.g.*, *Chauffeurs Local 135 (Hoosier Petroleum Co.)*, 106 N.L.R.B. 629 (1953), *enforced*, 212 F.2d 216 (7th Cir. 1954).

²⁰² See text accompanying notes 56-68 *supra*.

²⁰³ See text accompanying notes 146-52 *supra*.

²⁰⁴ See text accompanying notes 162-74 *supra*.

²⁰⁵ 366 U.S. 667 (1961), *rev'g* 278 F.2d 282 (D.C. Cir. 1960), *enforcing* 123 N.L.R.B. 1547 (1959).

²⁰⁶ *But see* *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

²⁰⁷ 366 U.S. at 680.

²⁰⁸ *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950). In *Moore Dry Dock*, the Board

set out four standards for picketing in [common situs] situations which would be presumptive of valid primary activity: (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer.

366 U.S. at 677.

²⁰⁹ *Id.* at 681-82 (quoting *United Steelworkers v. NLRB*, 289 F.2d 591, 595 (2d Cir. 1961)). The Board found on remand that the picketing was lawful.

In all other situations employees of independent contractors performing work for the primary on his premises became primary employees because they were doing primary work: appeals to them constituted the "traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations."²¹⁰ The following text is concerned with the impact on the ally doctrine of the Court's second and third primary-status criteria.

B. On Farmed-Out Struck Work

It has been argued above²¹¹ that because the harm attacked by the struck work doctrine is not secondary employees' performance of strikers' work but the counterstrike benefit their performance affords the primary employer, their performance of any work diminishing the impact of the primary strike should be deemed to be the performance of "struck work," making the secondary employer the primary's ally. An examination of the reasons for the Supreme Court's third criterion for primary status shows that in *General Electric* it implicitly approved and extended this argument.

The Court adopted its *General Electric* criteria verbatim from the decision in *United Steelworkers Union v. NLRB (Phelps Dodge Refining Corp.)*,²¹² in which the Second Circuit explained that

the contractors in this case were truly neutral and were not the alter ego of the employer, taking over its ordinary business and benefiting from the strike. . . . Nor was the work they were engaged in of a kind that would have necessitated closing down or curtailing the activity at the plant so that by hiring them after the strike began or in anticipation of it, the employer was escaping from or mitigating the economic effect of the strike.²¹³

Because *General Electric* employees had formerly performed some of the work now done by the independent contractors' employees, that work was "related to" *General Electric's* normal operations, and the gate was therefore "mingled." 138 N.L.R.B. 342, 346 (1962).

²¹⁰ 366 U.S. at 681. In *United Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 492 (1964), the Court, extending *General Electric* to secondaries aiding the primary's normal operations by making deliveries through a reserved gate adjacent to the primary's premises but not owned by it, reaffirmed its right to strike rationale by stating that the primary employee could lawfully reach these secondaries directly, not just incidentally to their appeals to primary employees. If all picketing at the employer's premises was not necessarily primary, all appeals to secondary workers were not necessarily secondary. For a fuller analysis of *General Electric* and its progeny, see *Gravamen*, *supra* note 6, at 1385-91, 1417-20.

²¹¹ Text accompanying notes 41-42, 80-89 *supra*.

²¹² 289 F.2d 591 (2d Cir. 1961).

²¹³ *Id.* at 595. The court based its decision on a finding that the separate gate constructed for the independent contractors' employees engaged in building a capital improvement was so isolated from the main gate that an intent violative of the Act could be inferred.

Though independent contractors doing work which would require the primary employer to halt production if there were no strike are not doing the strikers' work,²¹⁴ and though they do not thereby carry on any aspect of the primary's normal business,²¹⁵ they are performing work for which the primary would not have made arrangements without the strike. By allowing the primary to capitalize on the normally unprofitable hiatus created by the strike, these independent contractors help the primary to diminish the strike's impact. Consequently, their employees are reachable as "strikebreakers" even if a separate gate is established.²¹⁶

C. On the Single Enterprise and Coemployer Concepts

The question raised by *General Electric's* second criterion for primary status is more momentous: does the requirement that the work performed by the secondary be related to the primary's "normal operations" apply to common situs cases as well as to cases such as *General Electric* in which the dispute occurs at the primary's premises? In other words, does *General Electric* overrule *Denver* sub silentio by treating independent contractors performing functions essential to the general contractor's operations as part of the latter's enterprise? The Board first faced this issue in *Building Trades Council of New Orleans (Markwell and Hartz, Inc.)*,²¹⁷ and the thicket of opinions produced by that case provides a fruitful basis for further discussion.

Markwell, a general contractor, subcontracted twenty percent of the work required under its contract to electrical and piledriving subcontractors and performed the remainder with its own employees. On October 17 the union striking Markwell picketed all four gates at the

²¹⁴ Heavy maintenance workers whose duties usually require that production halt would be an exception, but the primary would be unlikely to keep such workers on the regular payroll instead of contracting for them as the need arose. If he did choose to contract with them, they would be amenable to picketing as secondaries performing the primary's "related work." See text accompanying notes 217-54 *infra*.

²¹⁵ *But cf.* *Seafarers Int'l Union v. NLRB (Salt Dome Production Co.)*, 265 F.2d 585 (D.C. Cir. 1959), denying enforcement to 119 N.L.R.B. 1638 (1958) (repairs are normal business under the second *Moore Dry Dock* rule), criticized in *Gravamen*, *supra* note 6, at 1423-25.

²¹⁶ See *Automotive Employees Local 618 v. NLRB (Incorporated Oil Co.)*, 249 F.2d 332 (8th Cir. 1957), denying enforcement to 116 N.L.R.B. 1844 (1956); *Gravamen*, *supra* note 6, at 1418-19. The *General Electric* Court's test makes the performance of such work an apparently irrebuttable presumption of the primary's intent to evade the strike, thus demonstrating the strong policy behind, and the deterrent aspects of, the struck work doctrine. In the "normal" strikebreaking situation, the primary would have an opportunity to rebut the inference arising from such subcontracting by showing that he would have transferred the challenged work regardless of the strike. See text accompanying notes 69-79 *supra*. But when the work transferred is not work which would normally be performed by the strikers, the employer cannot possibly justify the transfer on economic grounds because the sole effect of the savings accomplished is to diminish the effect of the primary strike.

²¹⁷ 155 N.L.R.B. 319 (1965).

construction site, inducing the subcontractors' workmen to refuse to cross the picket line. On October 23 Markwell reserved three of the gates for the exclusive use of the subcontractors and deliverymen, including those making deliveries to Markwell. The union continued to picket the reserved gates, the subcontractors' workmen remained outside, and Markwell finished the piledriving with its own employees.²¹⁸ On November 14, Markwell reserved two gates for its own employees and suppliers and two exclusively for the subcontractors and their suppliers; and on November 16 a third gate was reserved for the subcontractors, leaving only one for Markwell's employees. The picketing continued as before. Except that the primary employer was operating on another's premises, the relevant aspects of the final situation²¹⁹ were thus identical to the facts in *General Electric*.

The district court granted a temporary injunction, reasoning that because Markwell did not usually perform electrical work or piledriving, these tasks were "unrelated" to its normal operations, and the subcontractors doing them could not be reached.²²⁰ A bare majority of the Board found unlawful only that picketing occurring after November 16,²²¹ enunciating several reasons for this outcome. First, *General Electric* and *United Steelworkers Union v. NLRB (Carrier Corp.)*²²² were "inapposite" because they dealt with picketing at the primary employer's premises and merely represented the "policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer."²²³ Second, the *Moore Dry Dock* rules gained "express approval" in *General Electric*, and the Board should continue its tradition of applying them to common situs situations. Launching into this analysis, the Board explained that:

Applying the *Moore Dry Dock* standards to the instant case requires the timing and location of the picketing . . . to be tailored to reach the employees of the primary employer, rather than those of the neutral employer, and deviations from these requirements establish the secondary object of the picketing and render it unlawful.²²⁴

²¹⁸ *Id.* at 322.

²¹⁹ That the primary designated the reserved gate after the dispute began was plainly irrelevant. The case from which the *General Electric* criteria were taken involved a gate reserved in anticipation of a strike, *United Steelworkers Union (Phelps Dodge Refining Corp.)*, 126 N.L.R.B. 1367, 1371 (1960), *enforced*, 289 F.2d 591 (2d Cir. 1961), and *General Electric* itself hinged primary status on whether a gate was reserved, not when.

²²⁰ *Paschal v. Building Trades Council*, 225 F. Supp. 845, 847 (E.D. La. 1964).

²²¹ 155 N.L.R.B. at 326 & n.22.

²²² 376 U.S. 492 (1964).

²²³ 155 N.L.R.B. at 326.

²²⁴ *Id.*

By continuing to picket at the neutral gates after the change effected on November 16, the union "failed to comply."²²⁵ Finally, a contrary finding would overrule *Denver* doubly because it would make the primary and secondary employers "concerned" or "primary" "not only where the overarching general contractor on the building site is the primary employer, but also, where the intertwined work of a construction subcontractor is the primary target."²²⁶

Two members entered a lengthy dissent emphasizing that *General Electric* prescribed a general test for the status of all picketing; that the whole thrust of *Carrier* and *General Electric* was that appeals to secondary employees whose work furthered primaries' operations were primary activity; and that the Board could not then rely solely on the picketing's location to determine its legality without looking at the type of work done by those to whom the appeal was made:

The crucial consideration regarding [*General Electric*] is not, as the majority apparently views it, that it was made with respect to conduct occurring in connection with a strike at an industrial plant, but that it held that appeals to respect a picket line made to employees of secondary employers whose operations do not meet the [*General Electric*] tests . . . constitute legitimate primary activity²²⁷

Moreover, the dissenters noted, if *General Electric* were inapplicable, the Board could not justify outlawing the picketing after November 16 without outlawing the picketing after October 23,²²⁸ because the only possible grounds for this distinction were that the separate gate protected the secondary employees per se or that appeals to secondary employees were unlawful if not incidental to appeals to primary employees. Neither of these grounds supported the distinction, however, since the first was a *General Electric* requirement, while the Court expressly repudiated the other in *Carrier*.²²⁹

Noting that "[t]he majority advances no reason why an employer in the construction industry should be permitted to designate or limit the places of primary activity against him, while those in other industries may not do so,"²³⁰ the dissenters argued that holding *General Electric* applicable to common situs cases would not be equivalent to treating the general contractor and his subcontractors as a single enterprise or as coemployers. Applying *General Electric*'s criteria would

²²⁵ *Id.* at 326-27.

²²⁶ *Id.* at 328.

²²⁷ *Id.* at 332 (emphasis added).

²²⁸ *Id.* at 333.

²²⁹ 376 U.S. at 498.

²³⁰ 155 N.L.R.B. at 334 n.32.

only permit appeals to secondary employees to respect a picket line, not picketing designed to induce concerted activity by the secondary employees against their own employer away from that line. The *Moore Dry Dock* rules could still be applied to outlaw the latter. Whenever the work performed by the secondary employees was "unrelated" to the primary's normal operations or was strikebreaking under the third *General Electric* criterion, those rules would apply in full. Finally, the dissenters suggested *Markwell* was distinguishable from *Denver* because in *Denver* other indicia of unlawful intent existed: the picketing was not limited to invoking respect for the picket line, and the initial dispute was with a subcontractor rather than the general contractor.²³¹

On petition for enforcement, the *Markwell* case split the Fifth Circuit's panel into thirds.²³² Judge Connally's majority opinion noted that *General Electric* cited *Denver* with apparent approval, rejected the dissent's suggested distinctions between the two cases, and held that the "relatedness" of the subcontractors' work to *Markwell*'s normal activities was irrelevant because *Denver* controlled. Because the subcontractors were neutrals under *Denver*, picketing them was not activity reasonably directed towards the primary dispute, and the union had no cognizable defense to the charge that it had acted with a secondary object.²³³ Judge Rives, concurring specially, found the subcontractors' tasks "related" because *Markwell* was obligated to accomplish both the piledriving and the electrical work, and could have done so with its own employees; but he concluded that the *Moore Dry Dock* rules made the picketing illegal without explaining why he was discussing "related work" when that doctrine's only purpose was to protect certain picketing independently of *Moore Dry Dock*.²³⁴ Judge Wisdom's dissent seemed to go farther than even the dissenting Board members. Arguing that the *General Electric* Court used the term "common situs" to mean any

²³¹ *Id.* at 335 & n.35; see *McLeod v. Milk Drivers Local 584 (Old Dutch Farms, Inc.)*, 54 L.R.R.M. 2287 (E.D.N.Y. 1963) (§ 10(l) proceeding), in which the court held that an independent contractor processing the primary's milk on shared premises owned by the contractor was allied with the primary because the processing aided the primary, but added in dicta that:

The uncertain inference from the last part of the *General Electric* case might similarly dissolve the element of secondary boycott if that language is taken to mean that subcontracting an integral part of an essentially unitary business function precludes treating the subcontractor as a neutral employer. . . . [The processor] is little more than the incorporated performer of a function integral to the business of [the primary], notwithstanding the legal clarity of the independent contractor relationship.

Id. at 2289. In the subsequent proceeding the Board never mentioned this issue. *Milk Drivers Local 584 (Old Dutch Farms, Inc.)*, 146 N.L.R.B. 509 (1964).

²³² *Markwell & Hartz, Inc. v. NLRB*, 387 F.2d 79 (5th Cir. 1967).

²³³ *Id.* at 83.

²³⁴ *Id.* at 84. The dissenters below found the subcontractors' work "related" for similar reasons, 155 N.L.R.B. at 335 n.35, adding that "we reject the General Counsel's view that the 'unrelated work' condition is met unless the work is 'identical or substantially similar' to that of the primary employer." *Id.* at 336 n.39.

situation in which primary and secondary employers were present, and that the majority opinion by permitting general contractors to "frustrate the purposes of [primary] picketing by opening gates reserved for [their] subcontractors" was applying more restrictive standards to the construction industry than any other, he pointed out that *Denver* merely held that "contractors and subcontractors . . . are not necessarily so interconnected that they should all be regarded as one entity,"²³⁵ and suggested that holding "related work" subcontractors nonneutral would not overrule the earlier case. "Under *General Electric*, not all independent contractors are neutrals: They lose their neutral status when their work is related ('necessary') to the normal or day-to-day operations of the primary employer."²³⁶ The obvious implication of this analysis is that whether the dispute is with the general contractor or a subcontractor, if one's work is related to the other's operations the whole site could be picketed.

Regardless of their differences all three judges treated *Markwell* as having profound potential impact on the single enterprise and coemployer concepts, as well they might. Despite the dissenting Board members' claim that they were merely protecting the primary picket line, making *General Electric* applicable to common sites would have precisely the same effect, at least when the dispute is with the general contractor, as holding the employers present there to be a single enterprise, and would have made Justice Douglas' *Denver* dissent the law.

The argument that *General Electric* overruled *Denver* sub silentio is not without substance. Although the Supreme Court cited *Denver* in its *General Electric* opinion, it did so not for that case's holding or specific reasoning but for general language with which no one would quarrel.²³⁷ The same ambiguity attends the Court's citation of *Moore Dry Dock*, for while the *Dry Dock* rules were also "approved" in the *General Electric* opinion, the precise meaning for which they were cited is unclear, and the unexplained citation provides no guarantee that the Court also intended to adopt the Board's "traditional mode" of applying them. The *Moore Dry Dock* rules have been given two widely divergent meanings, although their verbal form has remained unchanged.²³⁸ First, they have been treated as tests for when a union may picket a secondary site in appealing to *primary* employees. Under this interpretation, failure to comply is merely evidence of an unlawful object, so

²³⁵ 387 F.2d at 89.

²³⁶ *Id.*

²³⁷ The Court used language from its *Denver* decision to support the propositions that § 8(b)(4)(B) could not be literally construed, 366 U.S. at 672, and that the section's purpose was to balance the competing rights of strikers and secondaries. *Id.* at 679.

²³⁸ See *Gravamen*, *supra* note 6, at 1421.

that compliance with them will not save picketing which is found to have appealed in fact to secondary employees. Secondly, they have also been treated as tests for when the union may lawfully appeal to *secondary* employees at a secondary site. Under this interpretation, compliance with the rules protects picketing even if it appeals to secondary employees. The first interpretation is unfavorable to the union because it implies that appeals to secondary employees at secondary sites are never lawful; the second is more favorable because it permits such appeals if the requirements of *Moore Dry Dock* are literally obeyed. By exclusively relying on the union's conduct as a test for the object of the picketing, the *Markwell* majorities implicitly adopted the first interpretation as the Board's "traditional approach." But the *General Electric* Court seemed to lean toward the second interpretation in endorsing the nature of the secondary employees' work as the conclusive test of the primary employees' object. Likewise, the Board's *Markwell* dissenters, arguing that related work determines intent and that mechanical compliance with *Moore Dry Dock* precludes any inference of unlawful object, apparently adopted this second interpretation as well.²³⁹ *Denver's* blanket holding that employees of independent subcontractors, as neutrals, may not be appealed to on the jobsite is thus "sicklied o'er with the pale cast" of later thought.²⁴⁰

Moreover, it is difficult to square the Court's generally stated criteria—which were delivered at the end of a sweeping assessment of the entire secondary-pressure area—with a narrow restriction of those criteria to the primary site facts on which *General Electric* arose. The *General Electric* Court had before it the painfully cautious limitations of the *Rice Milling* case,²⁴¹ and could easily have adopted similar restrictions had it desired such a result. Furthermore, the distinction between primary and common site cases relied upon by the *Markwell* majorities seems irrelevant to the Court's broad desire to preserve the "traditional primary activity of appealing to neutral employees whose tasks aid the

²³⁹ See also *Steelworkers Local 6991 (Auburndale Freezer Corp.)*, 177 N.L.R.B. No. 108, 71 L.R.R.M. 1503 (1969) *rev'd and remanded*, 75 L.R.R.M. 2753 (5th Cir. 1970) (properly limited picketing of independent secondary warehouse held lawful because work related to primary's operations was performed there, making it a common site though no primary employees were present). *But cf.* *Electrical Workers Local 480 v. NLRB (Gulf Coast Bldg. & Supply Co.)*, 413 F.2d 1085, 1089-90 (D.C. Cir. 1969); *NLRB (Sunset Int'l Petro. Corp.) v. Northern Calif. Dist. Council of Hod Carriers*, 389 F.2d 721, 725 (9th Cir. 1968) (courts accepting Board's more recent espousal of original and more restrictive *Moore Dry Dock* interpretation).

²⁴⁰ The Court's famous observation that the *Moore Dry Dock* standards have been "mechanically applied," 366 U.S. at 677, does not provide a persuasive counter-argument. The "mechanism" to which the Court disparagingly referred was used to restrict the bounds of legitimate activity, but the Court in *General Electric* was expanding those bounds in the same way that a "mechanically applied" rule that complying with *Moore Dry Dock* protects secondary activity does.

²⁴¹ *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 668, 672, 674 (1951), cited in *Electrical Workers Local 761 v. NLRB (General Electric Corp.)*, 366 U.S. 667, 672 (1961).

employer's everyday operations,"²⁴² when work performed by a secondary's employees aids a general contractor's operations in precisely the same way that it would a manufacturer's operations. Finally, the argument that by overruling *Denver* the Court would have been legislating, because Congress had previously refused to change the rule, is likewise unpersuasive. Although several attempts to overrule *Denver* legislatively have failed,²⁴³ their failure is less indicative of congressional approval of the *Denver* rule than of "the practical impossibility, in the labor area, of enacting an isolated measure at all controversial."²⁴⁴ That some congressmen have been motivated to propose altering the rule suggests instead a general feeling that *Denver* is less than the proper law of the land.²⁴⁵ The Supreme Court has "legislated" in other sensitive areas when it became impatient with legislative process; such action should not shock us here.

The acid test for whether *General Electric* overruled *Denver*, however, is whether application of the *General Electric* criteria to common situs cases can be meaningfully limited to anything less than a complete overruling. The apparently better founded argument—and the one which would surely be the union's fall-back position were *Markwell* before the Court—is that *General Electric* modified rather than overruled *Denver*, preserving the possibility of independent contractors' neutrality by providing a more realistic test than "an object" of the picketers' conduct for balancing the rights with which *Denver* was properly concerned. *General Electric* "corrected" *Denver* with respect to what constitutes "an object,"²⁴⁶ and may have refined *Denver*'s

²⁴² 366 U.S. at 681.

²⁴³ See Carroll, *Common Situs Picketing: A Pending Amendment to Section 8(b)(4)*, 43 U. DER. L.J. 731 (1966); Cushman, *Secondary Boycotts and the Taft-Hartley Law*, 6 SYRACUSE L. REV. 109, 120-23 (1954). See also H.R. Rep. No. 1041, 89th Cong., 1st Sess. 2-4 (1965).

²⁴⁴ *Gravamen*, *supra* note 6, at 1425 n.291.

²⁴⁵ Dissatisfaction with the *Denver* rule is also suggested by the Board's willingness to accept union attempts to evade the rule by "building a record" of greater control by the general contractor over the subcontractor than was present on the facts stated in the *Denver* opinion, despite the almost certain presence of such control in the *Denver* situation itself. See, e.g., *Teamsters Local 982 (J. H. Barker Trucking Co.)*, 181 N.L.R.B. No. 67, — L.R.R.M. — (1970), and cases cited therein.

²⁴⁶ See Comment, *Secondary Boycotts and Work Preservation*, 77 YALE L.J. 1401, 1404-05 (1968) (arguing that *General Electric* overruled *Denver*). In *Denver* the Court spoke strictly of the object of the picketing. 341 U.S. at 688-89. In *General Electric*, however, the Court elaborated:

"Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success." But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer.

366 U.S. at 673-74 (citations omitted) (quoting *NLRB v. Teamsters Local 294*, 284 F.2d 887, 890 (2d Cir. 1960)).

conception of the determinants for whether activity is primary.²⁴⁷

The problem created by this "modification" argument, as by the outright overruling argument, lies in distinguishing disputes with on-site subcontractors performing integrated operations from disputes with the general contractor. Permitting the general contractor's workmen to appeal to employees of the various subcontractors presents little difficulty because the general contractor, by exercising its power to engage only those subcontractors with whose labor policies it agrees, effectively determines their employees' working conditions—a situation wholly analogous to *General Electric*. But the subcontractors have no such power over the general contractor's employees, and the general contractor's operations do not aid theirs in the same sense. Furthermore, permitting the employees of the subcontractors to reach the general contractor is the exact converse of *General Electric*—a case in which the Court would not have allowed subcontractors' striking workers to appeal to General Electric's employees.²⁴⁸ Yet if *General Electric's* purpose was to preserve the full scope of the primary employees' right to strike those determining their working conditions, the general contractor should equally be an ally when the primary dispute is with the subcontractor, for he equally controls the disputing employees' working conditions, and his employees and the subcontractor's workers are equally "fellows."

As the *Markwell* dissenters realized, this problem will be resolved, if at all, by a definition of "related work" which reconciles the strikers' rights with the independent contractors' claim to invulnerability.²⁴⁹ But it is when the problem is considered in "related work" terms that its dimensions are fully revealed. On the one hand, all subcontracting aiding the primary's normal operations cannot be held "related" to those operations, for all subcontracting does so directly or indirectly, or the primary would not have contracted for it. Such a result, universally applied, would erase section 2(3)'s²⁵⁰ protection of independent

²⁴⁷ As Judge Wisdom noted in his *Markwell* dissent, *Denver* looked only to the object of the picketers as inferred from their conduct to determine their activity's legality, but *General Electric* established an additional factor which is also intended to preserve the traditional right to strike. 387 F.2d at 84.

²⁴⁸ 366 U.S. at 668.

²⁴⁹ See 155 N.L.R.B. at 335 n.35. The meaning of the phrase "related work" remains open, for while the Court in *General Electric* held "conventional maintenance work necessary to the normal operations," 366 U.S. at 682 (emphasis added), of the primary and deliveries to the primary to be "related," it did not define the italicized phrase, and deliveries are not at issue here. Compare National Maritime Union (Farmers Union Grain Terminal), 152 N.L.R.B. 1447, 1460 (1965) (away from the primary's premises "related work" is that normally performed by the primary), with Oil Workers Local 4-23 (Firestone Synthetic Rubber & Latex Co.), 173 N.L.R.B. No. 195, 69 L.R.R.M. 1569, 1570 (1968) (test for relatedness is whether primary employer's workers always perform the work or whether maintaining the primary's normal operations requires it).

²⁵⁰ NLRA § 2(3), 29 U.S.C. § 152(3) (1964).

contractors from the Act. On the other hand, a definition of "related work" focusing on the degree to which the subcontracted work is necessary to the primary employer's operations would be overly vague and therefore dependent upon the decisionmaker's subjective standards.²⁵¹ Even if the definition were somehow standardized, it would give employees of construction subcontractors a more free-wheeling right to strike than employees in other industries, simply because the on-site operations of any construction contractor are too dependent on those of all the others to be separated from them on "necessity" grounds.²⁵²

Professor Lesnick has suggested a "related work" test based on whether the effect on the secondary employers is greater than that which would be caused by the total absence of the primary's employees,²⁵³ but this test seems open to the same objection in situations such as *Markwell*. Because the operations of all employers on a construction site are generally so intertwined that the stoppage of one's operation at some point will require all the others to cease working, such a definition would also permit subcontractors' workers to picket the general contractor pursuant to a dispute with their immediate employer. Other definitions couched in terms such as "that work normally done by the primary" or "that work whose assignment the primary controls" are similarly unsatisfactory—the first because its result is identical to *Denver*, the second because a right of control test is too easily manipulated by collusive employers.

The conclusion seems inescapable that when *General Electric* is applied to common site situations, it cannot be workably limited to disputes with the general contractor. Thus, if the *Denver* and *Markwell* results are unsatisfactory, the alternatives are equally unpalatable. Either *Denver* is overruled absolutely, a result that would empty section 2(3) of its meaning for the construction industry and increase the dislocating effect of strikes; or *Denver* stands, unduly restricting the primary employees' right to picket the entire site when it is in fact a single enterprise. When the alternatives are equally intractable and the social policy beneath a law requires its expansion, but a viable

²⁵¹ The problems with such a test are explored in the discussion of *Priest Logging*, text accompanying notes 58-68 *supra*.

²⁵² This may reflect recognition that a construction site is in fact a single enterprise and that the construction workers' right to strike should generally be wider than that of other workers. But such a result would eliminate the "unconcerned" independent from the construction industry, and would defeat the argument's premise by overruling *Denver* instead of modifying it.

²⁵³ The crucial question . . . is: does the picketing union intend to subject the secondary employer to a loss of the services of his employees broader in impact than would be directly caused by the unavailability, as a result of the complete success of the strike, of the services of the primary employees? If so, the picketing is secondary; otherwise, it is primary.

Gravamen, *supra* note 6, at 1414.

limit cannot logically be justified, only the legislature can demarcate an acceptable middle ground.²⁵⁴ The future of the ally doctrine with respect to common site activities when struck work is not present rests in Congress' halting hands.

IV. CONCLUSION

All three aspects of the ally doctrine grow from the same base—the need to preserve, in the interest of industrial peace, the full scope of primary employees' right to strike their employers for better wages and working conditions. The rationale may also be phrased as the need to prevent the primary employer from evading the impact of the primary strike on his business. However the doctrine is stated, neither the Board nor the courts have rationally applied it, though the situation is improving. In the struck work area, the standards and operative facts are relatively clear, yet the Board and the courts have been over-cautious in extending the *Royal Typewriter* rule to instances logically covered by its reasoning. In the single enterprise area, the standards and operative facts are more tenuous, and they have first pounced, then retreated from the implications of their decisions. In the coemployer area, the Board has simply been recalcitrant, while the courts have exhibited a tendency to become obtuse. Such inconsistency makes reasoned prediction of the rules which should determine conduct unduly difficult and breeds superfluous litigation and industrial strife.

Substantial reasons exist for the reluctance of these decisionmaking bodies to extend the ally doctrine to all situations to which its rationale would seem to carry; but if the right to strike can be fully protected by viable rules which do not trench upon secondary employers' claims to be free from disputes which are genuinely "not their own," then the decisionmakers should so protect it. If the statute does not allow the Board and the courts to create judicial rules which will adequately protect this right, then Congress should act to provide a remedy.

²⁵⁴ Although courts rightly feel constrained by §2(3) of the NLRA, Congress could modify its language to eliminate the protection of "independent contractors" in on-site construction situations. Congress could also find as a matter of policy that treating construction sites as single enterprises, either for all disputes or for those with the general contractor, does not produce the type of proliferating economic dislocation with which the Act is concerned.