SECONDARY BOYCOTTS AND THE ALLY DOCTRINE

The Taft-Hartley Act provides in section 8(b)(4)(A) that secondary boycotts constitute an unfair labor practice.\(^1\) The Act does not specifically refer to secondary boycotts by name, but the courts in interpreting this section have by reference to the legislative history\(^2\) and other factors almost unanimously agreed that the intent of Congress was to outlaw acts which constituted a secondary boycott at common law.\(^3\) Acts which constituted primary activity are not covered by the Act. As a result, the courts are faced with the double problem of finding a secondary boycott and finding a violation of the exact wording of the statute. Frequently the two become interwoven. It is in one of these interwoven areas that the ally doctrine becomes an issue.

The courts have had frequent occasion to define a secondary boycott.\(^4\) One of the District Courts illustrated the situation as one in which a labor organization having a dispute with employer A induces the employees of employer B to engage in concerted activity to cause B to cease dealing with A.\(^5\) This is a very clear, although somewhat oversimplified, definition of the nature of the secondary boycott. It is interesting to note, however, that this court reached the conclusion that a union which struck its own employer to prevent his using non-union goods was not committing a violation of section 8(b)(4)(A), on the grounds that the union was acting against the employer with whom it had the labor dispute. This would seem to be at extreme variance with the plain wording of the statute, and definitely contrary to the results reached by other courts in “hot goods” cases.\(^6\)

However, certain problems more complex have arisen in applying this section; the ally doctrine represents one of these problems. To state the principle concisely, it sometimes happens that an employer so enmeshes himself in a labor

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1. 61 Stat. 141 (1947), 29 U.S.C. §158 (b) (4) (A) (1952) provides as follows: “8(b). It shall be an unfair labor practice for a labor organization... (4), to engage in... a strike or a concerted refusal in the course of their employment to... handle or work on any goods... or to perform any services, where an object thereof is: (A). forcing or requiring any employer or... other person to cease... dealing in the products of any other... manufacturer, or to cease doing business with any other person.”
2. E.g., 93 Cong. Rec. 3950, 4323 (1947) (Senator Taft).
4. The Supreme Court gave the classic definition in Duplex Printing Press Co. v. Deering, describing a secondary boycott as... a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain, but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.” 254 U. S. 443, 446 (1921).
dispute between a union and another employer that he loses his status as a protected person under section 8(b) (4)(A). Senator Taft, one of the original sponsors of this section, specifically stated that the Act is not intended to protect employers who co-operate with a struck employer so closely as to become the equivalent of a party to his dispute.7

The first case to apply the ally doctrine was the Ebasco case,8 decided by Judge Rifkind in a District Court in 1948. Ebasco was a corporation furnishing engineering services to its customers. It had been customary for Ebasco to subcontract some of its work to Project, a partnership owned by the same principals and engaged in the same field. When Ebasco underwent a strike by its employees, it increased greatly the amount of work subcontracted to Project. Furthermore, Ebasco's own foremen supervised the work at Project. In this situation, Judge Rifkind decided that the union had a legitimate right to picket Project, saying:

"The evidence is abundant that Project's employees did work which, but for the strike of Ebasco's employees, would have been done by Ebasco. The economic effect upon Ebasco's employees was precisely that which would flow from Ebasco's hiring strikebreakers to work on its own premises. 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. In encouraging a strike at Project, the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it."9

The Ebasco decision has been one of the most widely cited cases involving section 8(b) (4)(A), though it has been more often distinguished than followed. Although there has been no decision which in any way casts doubt on the validity of the general principles of the Ebasco case, subsequent cases engendered considerable doubt as to the scope of the rule. For the purpose of understanding the exact development of the ally doctrine, it will be beneficial to examine a case-by-case history of the theory

7. "The spirit of the Act is not intended to protect a man who in the last case I mentioned is co-operating with a primary employer and taking his work and doing the work which he is unable to do because of the strike." 95 Cong. 8709 (1949). President Eisenhower, in his January 1954 recommendations to Congress for revision of the Taft-Hartley Act, included a suggestion which would make a specific provision of the Act.
9. Id. at 677, 21 L.R.R.M. at 2260.
Immediately after the *Ebasco* decision, another District Court, in the *Mills* case, held that the subcontracting relationship found in the construction industry furnishes an equal degree of alliance, resulting in non-application of the Act. However, at the same time, the National Labor Relations Board in the *Schenley* case decided that the relationship between the manufacturer of liquor and his distributors was not close enough to result in non-neutrality on the part of the distributors. The Board distinguished the *Ebasco* case by saying that the essence of that case was the financial relationship between Ebasco and Project, a fact which was not present in the *Schenley* case. The Board implied by this case that it would look only for economic alliance in terms of common financial backing, rather than in a contractual relationship. In affirming the order of the Board, the Second Circuit indicated that it accepted this particular test, saying:

"There (*Ebasco*) was a case where a parent and a subsidiary partnership were conducting enterprises alternately as business exigencies demanded. It was held that a strike which originated in the parent company might be extended to the subsidiary partnership without violation of section 8(b)(4)(A). There the employees of the corporation and the partnership were all working for the same employer and had practically identical interests. Here the corporations were completely separate in ownership and management."

The Board, when facing the issue of subcontracting in the construction industry, in effect repudiated the *Mills* case by finding that this relationship did not prevent application of the Act. The *Climax* case not only held that subcontracting did not bypass the Act, but distinguished the *Ebasco* case on two distinct grounds. First, the Board pointed out that the common ownership factor was entirely lacking in the *Climax* situation. It went further to stress that the subcontracting of Climax Co. was a fact which had been present for some time before the strike, and which had not increased to any appreciable extent after the strike.

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12. "The *Metropolitan Architects* case is not applicable to the facts of the instant case. Here the record establishes that there is no financial or other connection, other than that of seller and buyer, between Schenley and the wholesale distributors involved. We hold that the language of the Act does not vest the Board with discretion to allow a union to engage in secondary activity otherwise unlawful, because of an essential alliance which rests solely on the fact that the so-called ally is an independent sales outlet for the products of the primary employer." *Id.* at 507, 22 L.R.R.M. at 1224.
began.\textsuperscript{15} In making the latter point, however, the Board went on to say that it might have decided differently if there had been an increase in the subcontracting. It indicated that under such circumstances the economic effect of which Judge Rifkind had spoken might logically convert the activity from secondary to primary.\textsuperscript{16} This dictum was the first indication by the Board of how it would apply the ally doctrine by using any test other than common ownership.

Immediately following the Climax case, the Board indicated that its policy would be to examine the facts of each case separately, rather than to establish set rules as to the degree of alliance for any industry or any relationship. In the Pettus-Bannister case,\textsuperscript{17} the Board re-opened the hearing for the sole purpose of receiving evidence of the question of alliance in a case of subcontracting in the construction industry. Although no alliance was found, the case is indicative of the Board’s approach to this problem.

The courts, on the other hand, have almost universally held that the subcontracting relationship common to the construction industry does not in itself show an alliance within the meaning of the Ebasco rule. The Supreme Court, in a group of cases decided simultaneously,\textsuperscript{18} took a stand firmly in favor of protecting the employers in this situation. The Second Circuit, in expounding the same principle, expressed the following:

“In short, is a secondary boycott limited to pressure upon third parties who are not engaged in the same venture with the unyielding employer? We can see no basis for such a distinction. The gravamen of a secondary boycott is that its sanctions bear not upon the employer who alone is a party to the dispute but upon some third party who has no concern in it... We cannot see why it should make any difference that

\textsuperscript{15}”Unlike the primary contractor in the Ebasco case, Adams did not exercise employer attributes of management and control over the employees of Climax, the sub-contractor. And unlike that case, the record here does not show that Climax forfeited its neutrality and allied itself with Adams in the latter’s labor dispute, by accepting work which but for the strike Adams’ employees would have performed. All the record in the case does show is that Climax was attempting to continue its normal business dealings with Adams, in the same manner and to the same extent as it had before the strike.” \textit{Id.} at 1253, 25 L.R.R.M. 1053-4.

\textsuperscript{16}“In these circumstances, it cannot be fairly said that Climax’s continued dealings with Adams had an economic effect upon Adams’ striking employees and their union similar to that which would flow from Adams’ hiring strikebreakers to do his work. Had it appeared otherwise, the Respondents’ argument, that the boycott action at Climax represented primary action against Adams, might have had validity but that is an issue not now before the Board, and one that need not now be decided.” \textit{Id.} at 1253, 25 L.R.R.M. 1054.

\textsuperscript{17}Journeymen Plumbers Union (Pettus-Bannister Co.), Case No. 10-CC-16, Dec. 2, 1949 (unreported).

the third person is engaged in a common venture with the employer, or whether he is dealing with him independently. The phrase 'doing business' would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do . . . [T]he phrase 'cease doing business' is general, and admits of no such evasion."19

These words would on their face seem to indicate that the Second Circuit had little respect for the entire ally doctrine, and at least one court drew that conclusion.20 However, it must be borne in mind that the construction industry cases have been concerned primarily with the "situs" doctrine,21 and the issue of alliance has been secondary in almost every case. Indeed, it sometimes appears as though alliance has been rejected in these cases only to avoid any evasion by the union of the adverse ruling of the court on the situs doctrine. Moreover, the decisions of the Supreme Court has been subjected to some criticism,22 and the President's recommendations to Congress in 1954 for revision of the Taft-Hartley Act23 included a proposed change overruling these decisions. In addition, the fact situations in these cases usually represent the converse of the Ebasco case; almost invariably it is the non-union subcontractor with whom the union has its dispute and the principal contractor who is the "secondary" employer in the boycott aspect. Thus the economic effects on the employees relied on in the Ebasco case and alluded to by the Board in the Climax case are not present in these situations.

The Board has established the rule that the union has the burden of proof as to alliance, once a prima facie case has been made out for violation of the Act.24 Thus in effect alliance is an affirmative defense, rather than non-alliance being an element of the violation. It is doubtful that this rule of proof has had any serious effect, but it may be indicative of the distrustful attitude of the Board toward this doctrine.

Only one important case before the Board has permitted avoidance of the

21. The situs doctrine represents a separate problem in the application of Section 8(b) (4) (A), which will not be analyzed in this paper. Briefly, it may be said that courts are split on the right of the union to picket the situs of its dispute with the primary employer when the picketing has inevitable secondary effects; See e.g., notes 5, 10, 19, 20 supra.
23. See note 7, supra.
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Act by a finding of non-neutrality. The *Irwin-Lyons* case, in reaching this result, based its conclusion entirely on the fact of common ownership rather than on an economic effects test. The Board referred to the *Ebasco* decision, but used it only to point to the common ownership present (although not emphasized) in that case.

The Circuit Courts have used varying tests to determine whether a status on non-neutrality exists. At least two cases have approached the problem by analysing the relationship between the employers in much the same way as the common law courts compared an employee and an independent contractor.

Although there is little doubt that a person who meets the definition of employee within this test would be allied, it seems certain that the converse would not be equally accurate. Barring the fact of common ownership in the *Ebasco* case, there is no doubt that the relationship between *Ebasco* and Project would have been comparable to the independent contractor relationship. Furthermore, even if *Ebasco*’s foremen had not supervised the work at Project, eliminating any possible fact of employee relationship, the decision of Judge Rifkind would in all likelihood have been the same.

It is interesting to note that the ally doctrine was used on one occasion to support a finding of a violation of section 8(b)(4)(A). The *National Trucking* case represents a somewhat unusual fact situation in this respect. National was engaged in the business of transporting automobiles; it picked up cars from the Ford Motor Company and took them from there to its warehouse for reshipment to various points. The union struck National, and utilizing the "moveable situs" doctrine placed pickets at Ford Motor Company. However, these pickets stayed at the Ford plant too long to come within this rule, and the picketing would have constituted a secondary boycott. Shorty thereafter National ceased its pickups

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25. *National Union of Marine Cooks (Irwin-Lyons Lumber Co.),* 87 N.L.R.B. 54, 25 L.R.R.M. 1092 (1949). The rationale of the Board was stated in these words: "The Trial Examiner found that Coos River Boom Co. . . . is engaged . . . in the transportation of logs; that Irwin-Lyons Lumber Co. is a separate corporate unity engaged in logging and sawmill operations; that the stock ownership and managerial control in the Coos River Boom Co. and in Irwin-Lyons Lumber Co. are vested, substantially, in the same individuals; and that both companies are in effect engaged in one straight line operation, i.e., the Lumber Company cuts the logs, the Boom Company transports the logs down the river, and the Lumber Company saws the logs into lumber at the mill. On the basis of these facts, we agree with the Trial Examiner that the Boom Company is not a neutral or wholly unconcerned employer within the meaning of Section 8(b)(4)(A) of the Act. We therefore conclude, as did the Trial Examiner, that the respondent unions have not violated Section 8(b)(4)(A)." Id. at 56, 25 L.R.R.M. at 1094.


27. *N.L.R.B. v. Truck Drivers & Helpers,* 228 F. 2d 791, 37 L.R.R.M. 2351 (5th Cir. 1956)
at Ford, and contracted with Air Travelers to pick up the cars at Ford for National. The Union then changed its signs at Ford to constitute organizational picketing of Air Travelers. When the action was brought alleging a secondary boycott, the union advanced the defense that no dispute existed between it and Air Travelers. The Circuit Court, however, ruled that Air Travelers was allied with National, and action against the former would be treated exactly the same as action against the latter. With this rationale, the Court was able to find a secondary boycott.

At this point, it would be well to analyze the rules of law which these cases establish. The *Ebasco* case had laid down a universally accepted principle that allied employers should not receive the protection of the Act. Indeed, at least one case which arose long before the Act espoused the same rule in similar circumstances. Moreover, the rule is far narrower than the "unity of interest" test which the New York courts had applied to secondary boycotts at common law.

However, in determining exactly what constitutes an allied employer, both the courts and the Board seem to have had considerable difficulty in deciding upon efficient criteria. Three separate tests have developed out of the *Ebasco* decision, to meet with varying reactions by the courts.

The first of these tests might be called the contract relation test. This was the basis of the *Mills* case, to the effect that the existence of a contract for work between the primary and secondary employer was sufficient evidence of the alliance. As has been mentioned before, this met with short-lived success, and almost before it was recognized as a test both the Circuit Courts and the Supreme Court completely rejected it. Even the textwriters and others who advocated rejection of the Supreme Court rulings never contended that this test should be established; the dissatisfaction with the Supreme Court's rulings rested on issues other than the ally doctrine.

The second test is the joint ownership principle, the basis for the *Irwin-Lyons* decision by the Board. Certainly it does not seem at all unfair to refuse to permit an employer to split his union problems by organizing two companies doing work in the same industry. Of course, the rule should be and has been restricted to companies within the same industry, and somewhat related in each or most of the projects which constitute their work. However, the rule, although proper, seems too narrow to cover the intent of Senator Taft and the other proponents of the ally doctrine.

31. See note 7, *supra*.
The third and by far the most important test arising from the *Ebasco* case might be termed the economic effects rule. This is the rule which Judge Rifkind stressed in his decision, saying that where the work of the third person was equivalent to the hiring of strike-breakers, the union would be free to picket. Until very recently, this rule had never been recognized other than by the reference to it in the dictum of the *Climax* case. In December, 1955, the Second Circuit picked it up and expanded it broadly, in a decision which may herald a drastic revision in the ally doctrine. The *Royal Typewriter* case is deserving of thorough study. When service workers of Royal went on strike, Royal was left with a large number of service contracts to fulfill, without any service employees to do the work. As a result, Royal adopted the policy of advising each of its customers, when service was requested, to contact an independent typewriter company and send the invoice to Royal. This was done, and in most cases the customers sent Royal the original invoices which were paid by Royal directly to the independent repair companies. The Board had held that there was no alliance, since Royal did not itself select the repair companies. The Second Circuit unanimously reversed, in an opinion which compared this situation directly with the *Ebasco* case, saying that the relationship between Royal and the independent repair companies was, if not actually a subcontract, so closely analogous to it as to result in the application of the same rules of law. In addition to approving the *Ebasco* decision generally, the Court specifically applied the economic effects rule, saying in part:

"Where an employer is attempting to avoid the economic impact of a strike by securing the services of others to do his work, the striking union obviously has a great interest, and we think a proper interest, in preventing those services from being rendered. This interest is more fundamental than the interest in bringing pressure on customers of the primary employer. Nor are those who render such services completely uninvolved in the primary strike. By doing the work of the primary employer they secure benefits themselves at the same time that they aid the primary employer."

This decision seems to leave no doubt that the dormant economic effects test has once again come to life, in a way which considerably exceeds the scope given it in its parent case.

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32. *N.L.R.B. v. Business Machine Mechanics*, 228 F. 2d 553, 37 L.R.R.M. 2219 (2d Cir. 1955). The *Royal Typewriter* case actually decided two questions: the right of a union to picket allies of a struck employer, and the right to picket customers of the struck employer. Although the decision represents a landmark in both aspects, only the former is discussed in this article.


34 The opinion of the court was written by Judge Lumbard; Judges Hand and Medina each concurred in separate opinions.

35. 228 F. 2d 558-9, 37 L.R.R.M. 2222.
The case leaves, however, many very important questions unanswered. Two primary problems present themselves. The first, and the most easily answered, is the question as to what a person obtaining services from a firm can do when the firm is struck. The decisions of both the *Ebasco* and the *Royal Typewriter* cases refer to the economic effects on the employees of the struck employers from his contracting for the replacement services. There seems no reason to assume that the person receiving the services would not be able to secure by himself, without going to the struck employer, another source for these services, presumably with immunity for both himself and his replacement source. In fact, the Board, faced with this exact problem in one case, reached this conclusion:

"A secondary employer faced with a strike against his supplier of services is not obligated to sit idly by, lest he forfeit his status as a neutral; he may, without risking the protection which section 8(b) (4)(A) accords him against the extension to his business of economic conflicts in which he is not involved, 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."  

Equally important, however, and not as nearly settled, is the question of what work another employer can safely assume without undergoing the risk of being picketed himself. Regarding this the Second Circuit spoke in these terms:

"The ally employer may easily extricate himself from the dispute and insulate himself from picketing by refusing to do that work. A case may arise where the ally employer is unable to determine that the work he is doing is 'farmed out.' We need not decide whether the picketing of such an employer would be lawful, for that is not the situation here."  

This, of course, hardly constitutes an answer to what may well be the most serious question posed by this decision. An employer may be well advised to avoid work where there is any reason to anticipate that it might be the result of a strike. Even if it may be assumed, by virtue of the fact that the Court mentioned the distinction without deciding its effect, that there is a difference in status between an informed and an uninformed ally, this would not completely solve the problem. It may easily happen that an employer will take a job without any reason to believe that it is struck work, and will learn, partway through a long project, that it is struck work. Should he then be subjected to picketing, if he refuses to discontinue? Who will reimburse him for the losses which he suffers by beginning and not completing the job? Is this a breach of the contract which he innocently

37. 228 F. 2d 559, 37 L.R.R.M. 2222-3.
made with the struck employer? For an employer, there must be a considerably more litigation before he can be sure of his position.

For the union, on the other hand, this leaves no doubt as to its effect. The union can, with very little effort, insure its position by immediately advising all persons likely to receive the "farmed-out" work of the existence of the strike. In this way, it is at the very least safe in picketing work received thereafter. Without doubt, the union is placed in a far stronger position to put pressure on an employer against whom it strikes than it was before the Royal decision.

Exactly what the full effect of this decision will be is impossible to predict. Future cases will have to settle the several questions which have been raised. Of one fact there can be no doubt: the ally doctrine, after seven years of famine, is due for its years of feast.

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