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ACT

The right to strike is firmly ensconced in our nation's labor laws. Section 13 of the National Labor Relations Act [NLRA] provides that "[n]othing . . . except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."1 The Supreme Court also has recognized the right to strike, declaring that the "use of economic pressure by the parties to a labor dispute is not a grudging exception [to the policies of the National Labor Relations Act] . . . it is part and parcel of the process of collective bargaining."2 Nevertheless, not all strikes are lawful. In addition to strikes involving violence,3 strikes in breach of no strike clauses,4 and strikes in violation of specific statutory provisions,5 a common form of unlawful strike is the secondary boycott.

In contrast to a lawful strike, in which a union exerts economic pressure upon an employer with whom it has a direct labor dispute,6 a secondary

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3. Strikes involving violence are condemned by both state and federal law. See UAW v. Russell, 356 U.S. 634 (1958); Elk Lumber Co., 91 N.L.R.B. 333 (1950) (both the ends of a labor dispute as well as the means used to accomplish those ends must be lawful).
4. No strike clauses are regarded as the quid pro quo for an employer's agreement to arbitrate disputes. Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 407 (1976). Strikes in violation of no strike clauses may be grounds for both injunctive relief and damages. Id. at 405. See generally F. Bartosic & R. Hartley, Labor Relations Law in the Private Sector, 202-05 (1977) [hereinafter cited as Bartosic & Hartley].
5. See, e.g., section 8(d)(4) of the NLRA, 29 U.S.C. § 158(d)(4) (1976) (prohibiting strikes within a period of sixty days after one of the parties to a collective bargaining agreement gives notice of the intent to terminate or modify the agreement).
6. A lawful strike is a type of primary activity. Although the distinction between lawful primary and unlawful secondary activity is often a difficult one, § 8(b)(4) has never been read to ban striking or picketing which attempts to prevent primary employees, customers, and suppliers from crossing a picket line at the primary employer's premises. International Rice Milling Co., 341 U.S. 665 (1951). Generally, two principal factors determine the nature of primary and secondary activity: the status of the employer and the object of the union exerting the pressure. See generally Bartosic & Hartley, supra note 4, at 122-26.
boycott attempts to enmesh a neutral employer in a labor dispute over which it has no direct control. A secondary boycott exerts pressure upon the neutral employer in order to induce the primary employer into settling its own dispute. Effective secondary boycotts have predictable economic effects. While they intentionally disrupt the business of an employer directly involved in a labor dispute, they also interfere with a neutral employer's business, thereby preventing the supply of goods and services to its customers.

For these reasons, Congress pronounced secondary boycotts illegal in 1947 by enacting section 8(b)(4) of the NLRA. When interpreting section 8(b)(4), courts have been guided by congressional objectives of preserving the right of labor organizations to pressure offending employers in primary labor disputes while shielding neutral employers from pressures in controversies not their own. To preserve the effectiveness of the strike weapon

7. See H.R. Rep. No. 510, 80th Cong., 1st Sess. 43 (1947), reprinted in [1947] U.S. Code Cong. Service 1135, 1149. Although secondary activity may also be in the form of strikes or picketing, unlike primary activity it attempts to force an employer to boycott someone else. For instance, when one local of a union strikes employer A, it would be an unfair labor practice for a sister union to strike against neutral employer B in order to pressure that employer from doing business with employer A. Similarly, a union cannot lawfully boycott employer B because employer B uses, sells, or handles employer A's goods. In secondary strike and picketing situations, a neutral is being pressured to influence another employer, and the pressured employer does not have any dispute with the picketers or strikers. Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 632 (1967).

8. The current working of § 8(b)(4)(B), formerly § 8(b)(4)(A), is:

   (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, . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

As it was first enacted, § 8(b)(4)(A) was more liberal than its subsequent amendment. Under the original version, workers could lawfully appeal directly to secondary employers and to individual employees of a secondary employer to aid a primary strike. They could not, however, appeal to groups of employees, or a secondary employer, to aid a primary strike. Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 632-33 (1967); Local 761, Int'l Union of Electrical Workers, 366 U.S. 667, 672-73 (1961).

while balancing these conflicting congressional goals, the National Labor Relations Board [NLRB or Board] and the courts have recognized two major exceptions to section 8(b)(4), forming the so-called ally doctrine. The first exception is the struck work doctrine, under which an employer may be the legitimate object of picketing when it performs work for a struck employer which, but for the strike, would have been performed by the struck employer itself. Under the second exception, the single employer doctrine, commonly owned and controlled companies are treated as a single employer, in certain circumstances, so that employees striking one company may legitimately picket the other.

While much has been written about the struck work branch of the ally doctrine, the single employer doctrine has received minimal attention. To fill this gap, this comment analyzes the single employer doctrine as it has been developed by the NLRB and the courts. Additionally, it proposes that the doctrine be more liberally construed to enable courts to focus on the economic realities of labor disputes.

I. ORIGINS OF THE EXEMPTION

In reaction to a growing acceptance of certain kinds of secondary boycotts by the courts, Congress, in 1947, enacted section 8(b)(4) as part of

11. The struck work doctrine was first enunciated in Douds v. Metropolitan Fed’n of Architects, Eng’rs, Chemists & Technicians, Local 231, 75 F. Supp. 672 (S.D.N.Y. 1948). See note 28 infra for an explanation of the court’s reasoning.
Under the struck work doctrine, a secondary employer is an ally when: (1) it does work which would otherwise be done by the striking employees of the primary employer; (2) it does such work knowingly; and (3) the work is done pursuant to an arrangement devised and originated by the primary employer, whether or not the primary employer makes any direct arrangement with the secondary employer. NLRB v. Business Mach. & Office Appliances Conf. Bd., Local 459, 228 F.2d 553, 559 (2d Cir. 1955).
12. The doctrine was first enunciated in Nat’l Union of Marine Cooks & Stewards (Irwin-Lyons Lumber Co.), 87 N.L.R.B. 54 (1949).
14. This article does not discuss the single employer doctrine as it has been applied in determining jurisdictional amounts, e.g., Canton Carp’s Inc., 123 N.R.R.B. 483 (1959), or liability for unfair labor practices other than violations of § 8(b)(4), e.g., Western Union Corp., 224 N.L.R.B. 274 (1976). It also will not explore what are called co-employer cases, in which companies not commonly owned, but nevertheless exercising collective control of common employees, are considered single employers. See Local 24, Int’l Bhd. of Teamsters v. NLRB, 266 F.2d 675 (D.C. Cir. 1959). Co-employer cases do not fall within the single employer doctrine because they do not involve common ownership.
15. In the Senate committee report on the Labor Management Relations Act, the minority noted that courts were beginning to accept certain forms of action directed against
the Taft-Hartley Act. This action grew out of a concern for the sheer dollar amount of commerce lost in secondary strikes and for the sometimes fatal damage incurred by small businesses. The number of workers deprived of work by strikes and the inconvenience and hardship suffered by consumers unable to obtain necessary products also motivated congressional action.

A minority in Congress, believing that certain types of secondary boycotts should be permitted, launched an unsuccessful attempt to distinguish secondary boycotts from primary strike activity on the basis of their objectives. It proposed to distinguish between secondary boycotts aimed at protecting wage rates and working conditions, which the minority would have protected, and those intended to aid jurisdictional strikes or to influence the interpretation of collective bargaining agreements. At least one senator argued that the failure to make this distinction not only denied workers "the right to seek the co-operation of other workers in self-defense but . . . [also the] essential civic rights of addressing themselves to their fellow citizens about anything they want to present to them."

Although minority attempts to legitimize certain secondary boycotts failed, language in the legislative history of the Taft-Hartley amendments nevertheless suggested that the degree of a secondary employer's interest in the outcome of a primary dispute might determine the legitimacy of a sec-

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22. Id. at 481.
ondary boycott. In addition, the literal wording of section 8(b)(4) suggested an exception to the secondary boycott ban, since it premised the illegality of a secondary boycott on the presence of an objective to force any person from doing business with another. Since the disruption of a primary employer’s business is clearly a legitimate goal of any strike, if two employers are considered a single employer, the congressional goal of preventing the spread of labor disputes to neutral employers is technically not threatened, because no employer other than the primary employer will be affected. Thus, a basis for developing a judicial exception to the section’s blanket condemnation of secondary boycotts derives from the face of the statute itself as well as its legislative history.

The exception also finds support in a statement made by Senator Taft, one of the sponsors of the 1947 amendments. Senator Taft declared that the purpose of the secondary boycott provisions was to outlaw secondary boycotts as a means of injuring the business of a third entity, “wholly unconcerned in the disagreement between an employer and his employees.” Although this statement was followed immediately by another disavowing the distinction between good and bad secondary boycotts, the United States District Court for the Southern District of New York selectively focused on this language as a basis for establishing the struck work branch of the ally doctrine. Further vitality was given to the “wholly uncon-
cerned” language in a 1949 colloquy concerning the sweatshop conditions of the garment industry between Senator Ives and Senator Taft, in which Senator Taft offered a more precise interpretation of the 1947 amendments:

[The secondary boycott ban] is not intended to apply to a case where the third party is, in effect, in cahoots with or acting as a part of the primary employer. . . . I do not believe the law was intended to apply to the case [Senator Ives] cites, where the secondary employer is so closely allied to the primary employer as to amount to an alter ego situation or an employer relationship. . . . The spirit of the Act is not intended to protect a man who 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.29

Although this 1949 statement provides a stronger foundation for the single employer doctrine than does the “wholly unconcerned” criterion espoused in the 1947 remarks, the Board and the courts have relied for the most part on the latter statement as evincing a congressional intent to protect only certain classes of employers from secondary boycotts. The 1947 statement has therefore formed the primary basis for the single employer doctrine.30

29. 95 Cong. Rec. 8709 (1949) (emphasis added). Arguably, the second part of the statement quoted could indicate that Senator Taft was referring exclusively to the struck work doctrine as set forth in Douds v. Metropolitan Fed’n of Architects, 75 F. Supp. 672. See notes 11 & 28 and accompanying text supra for a summary of the doctrine and the reasoning. The comment by Senator Ives to which Taft was responding, however, did not describe a struck work situation. Rather, the discussion concerned the integration of operations between two employers, an element of the single employer doctrine. See text accompanying notes 48-67 infra for a discussion of the Board’s application of the integration of operations test. Thus, Taft’s statement would seem to directly support the single employer doctrine as measured by its functional integration test, in which employers who perform one “straight line operation” are considered as one if they are commonly owned. The statement also argues for an extension of the doctrine based on the actual support one employer may give another during a labor dispute or on integration of operations even in the absence of common control.

30. While lacking in precision, the notion of protecting only “unconcerned” employers makes sense. One rationale for so limiting the protection of § 8(b)(4) is that, by definition, an employer who is “concerned” in a dispute is both likely to be affected by the dispute in any case, and is also probably in a position to influence its outcome. Employing this reasoning, a boycott of such an employer, would not expose that employer to substantial avoidable
Section 8(b)(4) was amended in 1959, primarily to close certain loopholes left open by the 1947 amendments.\textsuperscript{31} In contrast to the 1947 legislative history providing the "any other person" language from which the courts established the single employer exception, the legislative history accompanying the 1959 amendment to section 8(b)(4) provided no further basis for expanding the doctrine. At the same time, Congress considered special exemptions from the secondary boycott ban for the construction and the garment industries.\textsuperscript{32} The exemption for the garment industry, however, was specifically based on the characteristic integration of functions in that industry.\textsuperscript{33} This exemption alone was incorporated into the amendment. Congress could have extended to all industries a general exemption based on mere integration of operations but failed to do so. Such an extension would have expanded the single employer doctrine by eliminating the requirement of common control when integration of operations existed.

Two unsuccessful proposals to liberalize the single employer exemption to section 8(b)(4) were also introduced in 1959. Addressing the single employer doctrine, Senator Morse called attention to what he considered the unfortunate findings by the courts that corporate subsidiaries were separate employers, and that some employers were separate even though substantial common control and integration of operations existed.\textsuperscript{34} He economic harm, but would allow a union to use economic force against an adversary employer who in all probability would oppose union interests. Such union activity is consistent with the dual congressional objectives of protecting neutral employers from the effects of labor disputes not their own and of preserving the effectiveness of the primary strike weapon.


\textsuperscript{33} See note 32 supra.

\textsuperscript{34} Senator Morse stated: Senator Taft said that the secondary boycott section 'is not intended to apply to a case where the third party is, in effect, in cahoots with, or acting as a part of, the primary employer.' The National Labor Relations Board and the courts have failed to keep Senator Taft's concept in mind. The Board has considered subsidiaries to be separate employers. Other enterprises, substantially controlled by the same persons, have been considered separate employers, even though one manufactured a product incorporated into the finished article produced by the other.
introduced a proposal which would have reversed these court decisions and exempted from section 8(b)(4) "businesses doing business with one another when one is owned or controlled or is owned or controlled substantially in common." By permitting businesses controlled "substantially in common" to be treated as single employers in the absence of common ownership, this proposal would have significantly expanded the single employer doctrine.

A similar proposal, introduced several days prior to Senator Morse's, was also rejected. The literal wording of the proposal suggested an exemption for manufacturers involved in an integrated process of production, even without common ownership. According to the accompanying explanation, however, the proposal would have established a per se exemption for employers who were ninety-five percent co-owners. In a sense, this proposal was more restrictive than Senator Morse's because it would have required ninety-five percent common ownership before the exemption operated. Nevertheless, it too would have expanded the single employer doctrine by eliminating the common control requirement.

Two inferences can be drawn from the rejection of these two proposals. First, by refusing to extend existing law, Congress arguably ratified and intentionally froze the state of the law. Had this been the legislative intent, however, it seems likely that Congress would have so stated explicitly, as it did in ratifying the court-made struck work doctrine. Second, and more favorable to unions, Congress may have rejected the proposals because it

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35. 105 Cong. Rec. 16395-96 (1959). The specific wording of the proposal was: Provided further, That for the purposes of section 8(b) of the Act, the phrases 'any person' or 'other Person' will not be deemed to include the relationship between . . . (iii) businesses doing business with one another when one is owned or controlled by the other or is owned or controlled substantially in common. Id. at 16396, 2 Legislative History of the Landrum-Giffin Act, supra note 31, at 1425.

36. S. Res. 181, 105 Cong. Rec. 15906 (1959), reprinted in 2 Legislative History of the Landrum-Giffin Act, supra note 31, at 1383. The specific wording of the proposal was:

Provided, That as used in this section and section 8(b)(4)(B) the terms . . . 'any person' . . . or 'any other person' shall not include persons in the relation of . . . a jobber or manufacturer and subcontractor working on the goods or premises of the jobber of manufacturer or performing parts or an integrated process of production, including jobbers, manufacturers, contractors, and subcontractors in the apparel and clothing industry.


either found the single employer problem too insignificant or failed to grasp its importance. The second inference would seem the more logical. Although Senator Morse demonstrated his awareness of the Board and court decisions formulating the single employer doctrine, the absence of legislative history suggests that Congress as a whole was unaware of the development of the doctrine, or at least unconcerned. Thus, the defeat of the proposals to liberalize this exception to section 8(b)(4) is not conclusive evidence of congressional intent to freeze the development of the single employer doctrine. Instead, it is more likely that Congress simply refused to take a leading role in the liberalization of the doctrine. By developing the single employer doctrine, it may be argued that the Board and courts assumed an extremely innovative role. In recognition of such innovation, congressional silence in 1959 may be interpreted as a license for the Board and courts to maintain their leadership in the development of the doctrine.

II. THE CASE LAW: A STUDY IN JURISPRUDENTIAL CONFUSION

Although the 1947 and the 1959 legislative histories provide some basis for the single employer doctrine and its expansion, neither suggested guidelines for its application. Because the Congress was silent as to which employers to protect from secondary boycotts, the Board and the courts have tended to err on the side of protecting employers who arguably qualify as primary employers under the single employer doctrine by finding those employers to be secondaries. The congressional purpose of protecting as far as practicable the effectiveness of the primary strike weapon has been virtually ignored.39 Tests developed by the Board and courts to determine single employer status, although reasonable when viewed in the abstract, have been applied restrictively without any articulated rationale, thereby limiting what arguably might be primary activity.

The need for meaningful guidelines underlying the tests for determining single employer status becomes clear when one considers the two most important criteria applied: common ownership and actual common control.40 The breadth of the "wholly unconcerned" justification renders the requirement of common ownership superfluous, since companies which are not commonly owned but have a high degree of interdependence are also likely to be affected by each other's labor disputes and are likely to

39. See text accompanying note 9 supra for a statement of the congressional purpose, and text accompanying notes 136-40 infra for arguments supporting the application of this purpose to the single employer doctrine.
render mutual aid during such disputes. Moreover, the technicality of the “any other person” justification contradicts the rationale behind the common control requirement enforced in cases dealing with corporate subdivisions that literally constitute one legal entity with the corporate parent.41

The need for a consistent rationale becomes even more apparent after analyzing the other tests used to determine single employer status: the amount of business done between the employers,42 the functional integration of the employers’ operations,43 the existence of common labor relations policies,44 and the presence of an arm’s length relationship between the employers.45 When these tests are applied, the Board and courts tend to lump together and confuse the factors of integration of operations and common control.46 This confusion, combined with the low incidence of integrated businesses, has narrowed the single employer exception. Furthermore, common control over daily labor relations matters such as hirings and firings, which can easily be manipulated by an employer to its advantage, has been emphasized at the expense of factors such as joint participation in labor negotiations.47 Moreover, the appearance of an arm’s length relationship, also easily manipulated by employers, is yet another factor bearing no discernible relation to the structure of a labor dispute. The resulting contradictions and restrictions have produced a doctrine ill-suited to the determination of the parameters of a primary labor dispute.

A. Integration of Operations

The first case to apply the single employer doctrine to an alleged violation of section 8(b)(4) was National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.).48 Irwin-Lyons established the integration of business operations as a test for determining single employer status. In

41. See text accompanying note 25, supra. For a discussion of the application of the single employer doctrine to corporate subsidiaries, see text accompanying notes 109-49 infra.  
42. See Retail Store Employees, Local 1001 (Safeco Title Ins. Co.), 226 N.L.R.B. 754, 756 (1976).  
45. See Joint Council of Teamsters No. 42 (Inland Concrete Enterprises, Inc.), 225 N.L.R.B. 209, 213 (1976). In evaluating whether an arm's length relationship exists, such factors as the location of the businesses, the utilization of common facilities such as telephones, and the employment of common services such as bookkeeping are considered. Id. at 211.  
46. See note 92 infra for a discussion of cases exhibiting this confusion.  
47. See text accompanying notes 95-108 infra for a discussion of the Board's treatment of common labor relations policies.  
48. 87 N.L.R.B. 54 (1949).
pursuance of a labor dispute, Irwin-Lyons employees had picketed not only their own company, but also the Boom Company which transported timber logged by Irwin-Lyons to the Irwin-Lyons mill.\textsuperscript{49} The owners of the Boom Company owned seventy-five percent of Irwin-Lyons' stock, the president and secretary-treasurer of each company were the same, and the Boom Company transported all of Irwin-Lyons' logs to milling.\textsuperscript{50} On these facts, the trial examiner found that the companies were commonly owned and controlled, that the operations of the Boom Company constituted only a phase of Irwin-Lyons' business of producing lumber, and that the two organizations were "one economic enterprise."\textsuperscript{51} Quoting Senator Taft's "wholly unconcerned" statement,\textsuperscript{52} the examiner held that the Boom Company was not an unconcerned employer in the dispute with Irwin-Lyons and that, due to the integration of its operations with Irwin-Lyons, Boom was not "another employer" within the meaning of section 8(b)(4).\textsuperscript{53} Although the common ownership of the companies was essential to the trial examiner's determination, the trial examiner emphasized that the case would have been entirely different had "mere pecuniary interest alone" been the sole connection between the two enterprises.\textsuperscript{54} On review, the Board characterized the relationship between the two companies as "one straight line operation" and adopted the trial examiner's findings and conclusions.\textsuperscript{55} The Board thus embraced the dual integration of operations and common ownership tests as determinative of single employer status.\textsuperscript{56}

\textit{Irwin-Lyons} thus established that common ownership alone furnished insufficient grounds for invoking the single employer doctrine. It also expanded the area of legitimate strike activity allowed under section 8(b)(4) with minimal statutory and legislative support. Thus, in one sense, the decision was pro-labor. The rationale underlying the dual integration of operations and common ownership tests, however, indicates that the Board intended the single employer doctrine to be a narrowly applied exception to section 8(b)(4). The common ownership test represents a policy determination that mere business dealings with a struck employer should not be

\textsuperscript{49} Id. at 81, 83.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} See text accompanying note 26 \textit{supra}.
\textsuperscript{53} 87 N.L.R.B. at 84. See also text accompanying note 25 \textit{supra}.
\textsuperscript{54} Id. at 83.
\textsuperscript{55} Id. at 56.
\textsuperscript{56} The Board and courts have continued to stress the insufficiency of common ownership. See note 81 \textit{infra} for cases rejecting the importance of attributes of common ownership.
sufficient to subject another employer to a dispute not its own. While *Irwin-Lyons* itself provided no rationale for adding the integration of operations test to the test of common ownership, later cases make clear that common ownership alone is insufficient for determining single employer status because it is so widespread. Moreover, in the view of the Board and the courts, the congressional purpose of limiting the area of labor disputes would be defeated by such a standard.

The integration of operations standard established by *Irwin-Lyons* also demonstrates the narrowness of the single employer doctrine. In contrast to common ownership, the existence of two or more companies which form "one economic enterprise" is rare. In the recent case of *Retail Store Employees, Local 1001 (Safeco Title Insurance Co.),* for example, the Board failed to find an integrated operation between a title insurance underwriter and five title insurance companies, even though over ninety percent of the income of the five was derived from polices underwritten by the underwriter whose written consent was required for commitments of insurance coverage over a limit set for each company. Similarly, in *Dairy Employees, Local 754 (Glenora Farms Dairy),* the Board failed to find that a distributor of milk and its recently purchased processor constituted an integrated operation, even though the distributor purchased ninety-five percent of its processed milk from the processor.

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57. United Bhd. of Carpenters & Joiners (J.G. Roy & Sons Co.), 118 N.L.R.B. 286, 293 (1957)(Rogers, Member, dissenting), enforcement denied, 251 F.2d 771 (1st Cir. 1958).


60. *Id.* at 755-56. Although on the facts stated it seems clear that the operations of the title insurance company in *Safeco* were indispensable to the five insurance companies, the Board merely commented that "the type and degree of collaboration between [the companies] . . . is not such as to warrant a finding that [they] are engaged in an integrated business operation," and that economic interdependency alone is not a sufficient basis on which to predicate single employer status. *Id.* at 756.

A finding of integration of operations, however, would not necessarily have been decisive in this case. While language in one case indicates that a finding of an integrated operation may form the sole basis for single employer status, see Lithographers & Photoengravers, Local 235 (Henry Wurst Inc.), 187 N.L.R.B. 490, 491 (1970), *Safeco* represents the general view that "the degree of common ownership; the common control of day-to-day operations, including labor relations; the extent of integration of business operations; and the dependence of one employer on the other for a substantial portion of its business" are all factors to be weighed and that none alone is sufficient. 226 N.L.R.B. at 756.


62. *Id.* at 487, 490 (1974). The trial examiner emphasized that the companies were
In practice, the courts have found an integration of operations only when the facts in each instance virtually dictated such a conclusion. In *Lithographers and Photoengravers, Local 235 (Henry Wurst)*,\(^6\) for example, a printer, a book binder, and a mailing service qualified as an integrated operation. All three were located in the same building, seventy-five percent of the printer’s bindery and mailing work was done by the mailing house, and all three met once a week to coordinate operations.\(^64\) Similarly, in *Graphic Arts International, Local 262 (London Press)*,\(^65\) a printer, publisher, and distributor were found to be involved in an integrated operation when both the printer and the distributor exclusively handled the publisher’s materials.\(^66\) Both cases presented unusual situations which rarely can be matched.

By focusing so narrowly on the business relationships, these cases fail to recognize the decisive role which can be played by common ownership in a labor dispute and its legitimacy as a basis for strike and picketing activity.\(^67\) A labor union seeking to sustain a strike will understandably reevaluate its prospects for success once it becomes aware that the struck company, supported economically by a sister company, is in a strong position to withstand a strike. Failure to expose the sister company providing such assistance to union picketing allows the struck company the advantage of the other’s economic arsenal and protects the second company from the very warfare in which it willingly participates. In view of these realities, the emphasis by the Board and the courts on integration of opera-

\(^{64}\) Id.
\(^{65}\) 208 N.L.R.B. 37 (1973).
\(^{66}\) Id. at 38. See also Building Serv. Employees, Local 32-J (Terminal Barber Shops), 135 N.L.R.B. 909 (1962), *enforcement denied*, 313 F.2d 880 (D.C. Cir. 1963)(barber shop chain and wholly owned purchaser and distributor of supplies held single employer); Teamsters Local 249 (Polar Water Co.), 120 N.L.R.B. 155, 157-58 (1958) (bottlers and distributors of water and root beer which occupied same plant and whose employees performed the same functions for both held single employer).

\(^{67}\) A critic of the single employer doctrine has stated:

The decisive consideration for the purpose of section 8(b)(4)(B) is whether the economic pressure exerted strikes the same purse, and curtailment of income hits the same people, regardless of which of their legal entities holds the purse strings. Such pressure is designed to turn inchoate control into active control, thus providing the very criteria for lack of which the Board is given to invoking 8(b)(4)(B).

Asher, *supra* note 10, at 418.
tions at the expense of common ownership is a fundamental flaw in the single employer doctrine.

B. Actual Common Control

In two early decisions, the Board abandoned the integration of operations and common ownership test as the sole basis for single employer status and began to utilize a test of common control. In each application, the Board liberalized the single employer doctrine, resulting in a finding of single employer status. Ultimately, however, each Board determination was reversed by the courts, thereby narrowing the common control test in favor of employers.

In United Brotherhood of Carpenters and Joiners (J.G. Roy & Sons Co.), the Roy brothers owned lumber and construction companies and served as each company's board of directors. The trial examiner, in a careful analysis of the facts, noted that although the powers of management were vested in the board of directors by the by-laws, actual management of the companies was carried on by corporate officers unrelated to the Roys. He concluded, however, that regardless of whether there was in fact interference with management functions, the brothers had the power to make managerial decisions and to direct the labor relations of both entities; therefore, they were in a position to resolve the dispute. The Board found that the commonly owned construction and lumber companies constituted a straight line operation because the lumber company supplied all of the construction company's millwork requirements. Integration of operations, however, was explicitly rejected as a prerequisite for the finding of single employer status; common ownership and control were held to be sufficient in themselves. Dissenting Board member Rogers, however, found that the failure of the companies' boards of directors to

68. Neither case would have sustained a finding of single employer status based on integration of operations. See text accompanying notes 73, 77 & 84 infra.
69. 118 N.L.R.B. 286 (1957), enforcement denied, 251 F.2d 771 (1st Cir. 1958).
70. 118 N.L.R.B. at 196-97. All five brothers constituted the membership of the board of directors of Roy Construction, and four of the brothers constituted the membership of the board of directors of Roy Lumber. Id. at 297.
71. Id.
72. Id. at 299. The trial examiner also noted that the five brothers shared equally in the profits and losses of the companies, regardless of which company each controlled. Id. at 299. Thus, each brother, regardless of his formal role in company affairs, presumably would have been concerned with the running of each company and would have had a motive for interference if the company fared badly.
73. Id. at 287.
74. Id. at 287-88. The Board did not discuss the trial examiner's reasoning concerning his finding of common control.
exercise their legal powers of control indicated a de facto lack of common control. He also disagreed that common ownership and control were sufficient to establish single employer status.

On petition to review the Board's order, the First Circuit denied enforcement, characterizing the Board's finding of integration of operations as strained. Comparing the case with Irwin-Lyons, the court read Irwin-Lyons to warrant a finding of integrated operations only when the secondary employer's operations were an absolutely essential and integral part of the primary employer's enterprise. In the case at issue, however, the court emphasized the conflicting viewpoints of the Board majority and dissent and reasoned that no actual common control was present between the Roy companies. Consequently, it held that the potential to exercise common control was an insufficient basis for finding a single employer relationship because potential common control is always possible where there is common ownership.

In comparing potential control situations with situations involving struck work, the court sanctioned secondary activity only in the latter case, since the employees of a primary would be considerably disadvantaged in their dispute unless they could pressure the employees of a secondary employer to cease performing the farmed out struck work. The court thus implied that employees are not disadvantaged by

75. *Id.* at 289, 292 (Rogers, Member, dissenting).
76. *Id.* at 293. The primary basis for Rogers' disagreement with the majority was his belief that the exceptions to § 8(b)(4) should be limited to cases in which struck work is being performed or in which there is an integration of operations. *Id.* His basis for such a limitation, oddly, was the 1959 statement of Senator Taft, quoted in the text accompanying note 29 *supra*, which, on its face, appears to be support for the single employer doctrine. See discussion in note 29 *supra*. Rogers specifically found that the companies were wholly independent of each other except for occasional buying and selling. *Id.* at 289. Especially critical of the majority's treatment of the lumber company's provision of millwork to the construction company, he stated that under the Board's decision, "the public policy of the Act can be defeated by the mere coincidence of common ownership and ordinary buying and selling." *Id.* at 293. Rogers also protested that in the present case, the employees of the construction company, induced by their union to strike in order to force the construction company to pressure the lumber company into recognizing the union, were in reality trapped in a dispute which did not concern them. *Id.*
78. *Id.* at 773.
79. *Id.* This holding was consistent with the view, already implicitly accepted by the Board, that common ownership is insufficient simply because it is so widespread. See notes 57 & 58 and accompanying text *supra*. See also note 81 *infra* for cases rejecting the significance of attributes of common ownership.
80. *Id.* at 775. The court also agreed with member Rogers' dissent in finding that the employees of the construction company were essentially trapped in a dispute which did not concern them. See note 76 *supra*.
The inability to combat a secondary employer's potential intervention in their dispute.

The court's rejection of potential control as a single employer test is ironic. Its reasoning, that potential common control is always possible where there is common ownership, is precisely the reason that common ownership should be sufficient. As the trial examiner had stated, possession of potential common control means being in a position to resolve a dispute. But if potential common control can be used to resolve a dispute, it also can be employed to prolong one. The court's reasoning apparently reflected a concern that the single employer exception would become too broad when measured against the policy of preventing the spread of labor disputes. Its failure to consider seriously that potential control subsumes the power to resolve a dispute also indicates a failure to consider the competing policy of preserving the effectiveness of the primary strike weapon. The peremptory conclusion that potential common control is less threatening to a strike than the performance of struck work underscores this failure.

On remand, the Board accepted the First Circuit's interpretation but adhered to the views expressed in its original determination. In the next single employer case to come before it, however, the Board bowed to the...
First Circuit's actual control test. *Warehouse and Distribution Workers, Local 688 (Bachman Machine Co.)* involved manufacturers of plastic custom parts and tools. The same individual was president of both companies and also owned approximately seventy percent of the stock of each. Adopting the trial examiner's findings that the president admittedly controlled the tool manufacturer's labor relations and also actively represented the plastics company in the negotiations concerning the strike in question, the Board found actual common control.

On petition to review the Board's order, the Eighth Circuit denied enforcement. The court emphatically disagreed with the Board's application of the actual common control standard, stating that the two companies did not qualify as a single employer merely because the president controlled the labor relations of both companies. It emphasized, however, that its holding was a narrow one, going no further than to reject the sufficiency of the president's participation in labor negotiations for a finding of single employer status. Reasoning that the Board's conclusion was inconsistent with the congressional purpose of shielding unoffending employers from controversies not their own, the court suggested that a different problem would have been presented had the president actually joined with the plastics company in resisting the strikers' demands. The Eighth Circuit thus impliedly rejected the basis for the actual common control standard established by the First Circuit in *J.G. Roy*. The dissent disagreed with the majority's characterization of the tool manufacturer as an unoffending employer, reasoning that the president of the company

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84. 121 N.L.R.B. 1229, 1232 (1958), enforcement denied, 266 F.2d 599 (8th Cir. 1959). The plastics company used molds manufactured by the tool manufacturer in the process of molding approximately half of its custom parts. Similarly, the majority of the plastics parts used by the tool manufacturer were supplied by the plastics company. The companies' sales to each other, however, constituted only one-fifth of their gross sales. 121 N.L.R.B. at 1232.

85. *Id.* Other members of the president's family also owned stock in both companies and served as officers. Both boards of directors were comprised of the officers of each company. *Id.*

86. *Id.* at 1233. The president had dominated all of the negotiating sessions that were held concerning the strike. All sessions were held on the plastics company's premises. *Id.*

Member Rogers again dissented on the ground that mere common ownership and control should be insufficient for finding single employer status. *Id.* at 1230 (Rogers, Member, dissenting). Rogers also thought that the facts of *Bachman* were not sufficiently different from those of *J.G. Roy* to warrant finding a single employer. *Id.*

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

88. *Id.* at 605. The court quoted in full Rogers' dissent in *Bachman* and also restated a substantial portion of his dissent in *J.G. Roy*. *Id.* at 603-04.

89. *Id.* at 605.

90. *Id.* The court also stated that integration of operations or the performance of struck work would have justified an exemption from § 8(b)(4).
could not be considered wholly disinterested in a labor dispute in which he had actively bargained with the plastics company's employees and "rendered a decision against them with such finality that they went on strike to coerce him."\footnote{Id. at 606 (Woodrough, C.J., dissenting).}

In spite of the Eighth Circuit's near outright rejection of the test, actual common control has remained a primary test for finding single employer status, both for the Board and a majority of the courts.\footnote{See, e.g., NLRB v. Dallas Gen. Drivers, Local 745, 264 F.2d 642 (5th Cir.) cert. denied, 361 U.S. 814 (1959); Local 810, Steel, Metals, Alloys, Hardware Fabricators & Warehousemen, Int'l Bhd. of Teamsters (Sid Harvey, Inc.), 189 N.L.R.B., 612 (1971), enforcement denied, 460 F.2d 1 (2d Cir.), cert. denied, 409 U.S. 1041 (1972).}

J.G. Roy's rejection of the role of potential common control in the resolution of labor disputes has been mirrored in virtually all subsequent case law.\footnote{Id. at 606 (Woodrough, C.J., dissenting).} Bachman Machine Co., for its part, has foreshadowed a line of cases which reject the significance of such factors as an officer's participation in collective bargaining in favor of greater emphasis on control of day-to-day operations in determining actual common control.\footnote{See, e.g., NLRB v. Dallas Gen. Drivers, Local 745, 264 F.2d 642 (5th Cir.) cert. denied, 361 U.S. 814 (1959); Local 810, Steel, Metals, Alloys, Hardware Fabricators & Warehousemen, Int'l Bhd. of Teamsters (Sid Harvey, Inc.), 189 N.L.R.B., 612 (1971), enforcement denied, 460 F.2d 1 (2d Cir.), cert. denied, 409 U.S. 1041 (1972).}

Together, these cases, more than...
any others, have determined the narrowness of the single employer exception to section 8(b)(4).

C. Common Labor Relations Policies

In addition to considering the integration of operations and common control in determining single employer status, the Board and the courts also consider other criteria, including the extent of business relations between employers, the presence or absence of an arms-length relationship, and, most significantly, the existence of a common labor relations policy.95

Consideration of a common labor relations policy in determining single employer status appeals to a sense of justice: workers ought to be able to strike and put economic pressure on the party responsible for resisting their demands96 or for controlling their terms and conditions of employment.97 Accordingly, it would make sense to consider not only an employer's control over the terms, conditions, and fact of employment—what are termed day-to-day labor relations—but also the employer’s power both to intervene in labor relations in times of crisis such as strikes or contract disputes, as well as to exercise this power.

In *Royal Typewriter v. NLRB*,98 an unincorporated division of a corporate subsidiary controlled its own day-to-day labor relations. The parent operations. Instead, the court indicated in its “common cause” dicta, see text accompanying note 90 *supra*, that it would have required some sort of extraordinary interference by one company in the other's labor relations. Only one case has predicated single employer status on such action. See *Royal Typewriter Co.*, 209 N.L.R.B. 1006 (1974), enforced, 533 F.2d 1030 (8th Cir. 1976) (decision to shut down plant's operations).


retained sufficient control, however, so that during a strike it was able to shut down the division's operations, thereby determining the course of the contract negotiations. In finding that the parent and the subdivision constituted a single employer, the Eighth Circuit reasoned:

In assessing the appropriateness of single employer treatment, the fact that day-to-day labor matters are handled at the local level is not controlling. . . . A more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries and whether its course of conduct encouraged or permitted the local negotiators to so represent the situation to union negotiators for the purpose of achieving a tactical or strategic objective.99

This statement was quoted in full by Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit in Local 391, International Brotherhood of Teamsters v. NLRB.100 In that case, the District of Columbia Circuit, ignoring the reasoning of the Eighth Circuit in Royal Typewriter, held that because of the lack of common control over day-to-day labor relations, two corporate subdivisions were separate employers, in spite of the participation by the parent corporation's industrial relations officers in the subdivisions' strike negotiations.101 In its per curiam decision, the court emphasized that the president of each subdivision had the authority to formulate individual labor relations policies as well as to negotiate and execute collective bargaining agreements, and that the parent's industrial relations officers participating in the strike negotiations did so at the invitation and under the authority of the subdivisions' presidents.102 Judge Bazelon characterized as "deceptively simple" the Eighth Circuit rule classifying separate corporate divisions as separate persons under section 8(b)(4) when neither the division nor the parent exercised actual control over the daily labor relations of the other. In a parent-subsidiary situation, he reasoned, an evaluation of neutrality must consider the extent to which a corporation is supporting, or appears willing to support, its divisions in their labor disputes.103 Whether such support is financial or stems from the participation by the parent's officials in the negotiations of the

99. 533 F.2d at 1043 (citations omitted).
100. 543 F.2d 1373, 1379, n.3 (D.C. Cir. 1976) cert. denied, 430 U.S. 967 (1977), enforcing 208 N.L.R.B. 540 (1974). Although Judge Bazelon joined in the per curiam opinion he wrote a separate statement explaining his reason for joining the court's decision to deny the union's petition for rehearing en banc. 543 F.2d at 1373.
101. 543 F.2d at 1374-76.
102. Id.
103. Id.
divisions, Judge Bazelon considered the crucial question to be whether the parent thereby gains a tactical advantage over the union by causing it to conclude that it faces the full economic might of the corporation.  

Judge Bazelon's reasoning should be applicable to any common ownership situation in which one company dominates, or has the power to dominate, another. His consideration of the tactical advantages flowing from the relationship between two companies is, however, unique. While a few cases give weight to factors such as the actual intervention in labor disputes or the use of common tactics to combat strikes, most give controlling weight to such factors as separate control over hiring and firing and lack of interchange of personnel. Such factors as use of parent or related company's advisors during negotiations are discounted, unless the advisors have proven ultimate authority. Thus, the Board and the courts have ignored not only the significant tactical advantages that may flow to companies from an apparently united front, but also the potential for actual intervention by one in the event of a crisis. In view of such omissions, the consideration of common labor relations policies is obscure,

104. Id. at 1377-78.

105. See NLRB v. General Teamster, Warehouse & Dairy Employees, Local 126, 435 F.2d 288 (7th Cir. 1970) (companies belonged to separate employer associations and had employed different tactics in a recent strike); Squillacote v. International Bhd. of Teamsters, Local 695, 355 F. Supp. 793 (W.D. Wis. 1965) (president actively controlling labor relations of one company actively intervened in the other's labor dispute); Madden v. Int'l Bhd. of Teamsters, Local 743, 262 F.2d 812 (E.D. Wis. 1959) (manager of company took no action against picketing until after consultation with parent corporation).


108. While it would seem that analysis of the potential for active intervention is highly relevant to the task of designating legitimate opponents, such analysis probably would be held to be irrelevant by the Board and courts because it is an indication of "potential" rather
unless as with the functional integration test, it functions merely to limit the application of the single employer doctrine.

D. Wholly Owned Corporate Subsidiaries and Divisions

In spite of the early attempts to liberalize the single employer doctrine in *J.G. Roy* and *Bachman Machine*, the Board has proven to be as stringent as the courts in its later applications. A prime example is the Board’s treatment of wholly owned corporate subsidiaries and divisions.

The argument has been made that secondary activity should be allowed in any case of common ownership because the profits of one entity are likely to be used to support another in times of economic pressure. This argument is especially strong in the case of corporate subsidiaries and divisions, often formally connected through financial reporting systems and profit passover arrangements. The argument nevertheless has been rejected both in the case of companies commonly owned by individuals and in the case of common corporate ownership. The Board presently applies the same single employer tests to both.

Two early Board cases indicated that corporate subsidiaries and divisions would be treated as single employers without meeting the requirement of actual common control. In *International Brotherhood of Teamsters Local 200 (Milwaukee Plywood Co.)*, the Board held that because the Milwaukee Plywood Company was a wholly owned subsidiary of Aetna Plywood and Veneer Company, Milwaukee was engaged in a labor dispute with the union representing the parent company’s employees. In *International Brotherhood of Teamster, Local 179 (Alexander Warehouse and Sales Co.)*, the Board likewise permitted a union engaged in a dispute with a warehouse company to picket all three of the company’s warehouse locations. Furthermore, language in the latter decision indicated that picketing each branch of an employer’s enterprise was per se lawful pri-

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110. Asher, supra note 10, at 418.

111. See Packinghouse Employees, Local 616 (Southwest Forest Indus., Inc.), 203 N.L.R.B. 645, 646 (1973); Los Angeles Newspaper Guild, Local 69 (San Francisco Examiner, Div. of The Hearst Corp.), 185 N.L.R.B. 303, 320 (1970), enforced, 443 F.2d 1173 (9th Cir. 1971).


113. None of the parties in *Milwaukee Plywood* argued that the companies were not allies. *Id.* at 654.

mary activity. Other language, however, emphasized that the branches of the company in question were engaged in an integrated operation, and that picketing would be allowed because, under the circumstances, the continued operation of all branches could have been decisive in determining the outcome of the dispute.

Because neither Alexander Warehouse nor Milwaukee Plywood actually discussed the single employer doctrine, neither provided compelling precedent when the Board first considered the doctrine's applicability to corporate subsidiaries in the context of section 8(b)(4). Two other early cases, however, did discuss the single employer doctrine and indicated that the requirement of actual common control would be applied to corporate subsidiaries and divisions. These cases involved chainshop clauses, which provided that the companies would not request their employees to handle any work of another plant either wholly owned and controlled by the companies or commonly owned and controlled if that company were on strike or locked out. In Amalgamated Lithographers of America, Local 78 (Miami Post Co.) the Board upheld the clause, interpreting it to sanction sympathy strikes only as long as the companies involved were commonly owned and controlled, thus constituting a single employer within the meaning of the Act. The clause was held to be unlawful in Amalgamated Lithographers (Miami Post Co.), 130 N.L.R.B. 968 (1961), enforcement denied, 301 F.2d 20 (5th Cir. 1962); Amalgamated Lithographers (The Employing Lithographers), 130 N.L.R.B. 985 (1961), modified, 309 F.2d 31 (9th Cir. 1962).

Id. at 919.

115. The Board stated:
Though the economic dispute with Alexander directly involved only Alexander's Joliet employees, Respondents had the right to bring pressure upon Alexander at each and every one of its warehouses. The Peoria and Urbana warehouses are no more to be considered neutral premises for the purpose of applying Section 8(b)(4)(A) [now Section 8(b)(4)(B)] than are the premises of an employer who 'allys' himself with a primary employer. . . . A fortiori if an 'ally' is not sufficiently neutral to permit a distinction to be drawn between it and the primary employer for purposes of applying the secondary boycott provisions of the Act, Alexander's Peoria and Urbana warehouses cannot be regarded as premises of a neutral employer here.
128 N.L.R.B. at 918-19.

116. The Board continued:
Thus, the continued operation of the Peoria and Urbana warehouses during Respondents' strike at the Joliet warehouse, constituted, because of their proximity to, and integration with, the Joliet warehouse, a factor which conceivably could have been decisive in determining the outcome of the dispute, and Respondent could legitimately extend their picketing to those premises.
Id. at 919.

117. Amalgamated Lithographers (Miami Post Co.), 130 N.L.R.B. 968 (1961), enforcement denied, 301 F.2d 20 (5th Cir. 1962); Amalgamated Lithographers (The Employing Lithographers), 130 N.L.R.B. 985 (1961), modified, 309 F.2d 31 (9th Cir. 1962).

118. 130 N.L.R.B. 968, 971 (1961), enforcement denied, 301 F.2d 20 (5th Cir. 1961); 130 N.L.R.B. 985, 986-87 (1961), modified, 309 F.2d 31 (9th Cir. 1962).

119. 130 N.L.R.B. at 975.
mated Lithographers of America, Local 17 (The Employing Lithographers), however, on the ground that it permitted sympathy strikes in the plant of a principal company when a subsidiary was on strike, even though the principal and subsidiary did not constitute a single employer within the meaning of the Act.\textsuperscript{120}

The Board was directly confronted with the argument that a corporation should not be considered neutral in the labor disputes of its subsidiaries in Miami Newspaper Printing Local 46 (Knight Newspapers, Inc.).\textsuperscript{121} The union argued that since the corporation stood to profit directly from the subsidiaries' operations, neutrality could be based only on the fiction of corporate entity.\textsuperscript{122} The trial examiner was unpersuaded, declaring that the Board would not "pierce the corporate veil" unless there was evidence of active common control.\textsuperscript{123} Distinguishing Milwaukee Plywood's factual involvement with companies possessing integrated operations, the Board instead relied on The Employing Lithographers applying the common ownership and control test to corporate subsidiaries.\textsuperscript{124}

Neither the Board nor the trial examiner, however, squarely addressed the union's argument in Knight Newspapers. The applicability of the single employer doctrine to corporations and their subsidiaries received fuller treatment in Los Angeles Newspaper Guild, Local 69 (San Francisco Examiner, Division of The Hearst Corp.),\textsuperscript{125} a case involving two unincorporated divisions of The Hearst Corporation. The manager of each had responsibility for day-to-day operations, as well as for labor, news, and production policies. Each had its own financial system.\textsuperscript{126} Nonetheless, each division was subject to financial reporting requirements, each needed Hearst's approval for expenditures over $10,000, and each was expected to remit excess profits to Hearst.\textsuperscript{127} Viewing Hearst's exercise of authority over financial matters as indicative of common ownership, the Board stated that such authority constituted mere potential control.\textsuperscript{128} Under these circumstances, the Board reasoned that the divisions would not have been considered a single employer had they been subsidiaries, and to deprive them of statutory protection on the "technical ground" that they were merely divi-

\begin{thebibliography}{9}
\bibitem{120} 130 N.L.R.B. at 989.
\bibitem{121} 138 N.L.R.B. at 1346 (1962).
\bibitem{122} \textit{Id.} at 1352.
\bibitem{123} \textit{Id.}
\bibitem{124} \textit{Id.} at 1352-53.
\bibitem{125} 185 N.L.R.B. 303 (1970), enforced, 443 F.2d 1173 (9th Cir. 1971).
\bibitem{126} \textit{Id.} at 304.
\bibitem{127} \textit{Id.}
\bibitem{128} \textit{Id.} at 304. See note 81 \textit{supra}.
\end{thebibliography}
sions of the corporation would thus exalt form over substance. The Board accordingly held that the divisions were separate persons. Recognizing that section 2(l) of the Act does not specifically include corporate subdivisions as “persons” for purposes of section 8(b)(4), the Board also held that the definition of persons in section 2(l) was not exclusive and that the term “person” therefore included corporate subdivisions. Because section 8(b)(4) had been amended in 1959 to substitute the broad term “person” for “employer,” the Board justified its holding as consonant with the congressional intent to reduce the impact of labor disputes by expanding the protection afforded by the section. The Board thus adhered to the test of actual control over day-to-day operations and labor relations. Dissenting Member Brown, however, argued that to restrict the union’s activity in this case would not prevent the spread of labor disputes; instead, he saw the restriction as ultimately insulating the offending employer from what was essentially its own dispute. Emphasizing that a corporate subdivision is not literally within the definition of person set forth in section 2(l) and relying on a line of precedent which cautioned against interpreting section 8(b)(4) to restrict primary activity, he charged that the Board’s decision extended section 8(b)(4)’s protection to an employer who had been made “fair game” by the Act.

The trial examiner also argued forcefully in favor of the conclusion that the divisions constituted a single employer. In contrast to the Board,

129. Id.
130. Id.
132. 185 N.L.R.B. at 304-05.
134. 185 N.L.R.B. at 305.
135. Id. at 305.
136. Id. at 307 (Brown, Member, dissenting and concurring).
137. Id. Member Brown also placed reliance on section 13 of the NLRA, 29 U.S.C. § 163 (1976), amended in 1947 when the Act’s secondary boycott provision was enacted and which states that “[n]othing in this... [Act], except specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”
138. 185 N.L.R.B. at 305. The trial examiner held that subdivisions were “persons” within the meaning of section 8(b)(4)(B). Id. at 321. The trial examiner distinguished Knight Newspapers on the grounds that it involved two corporate “persons” within the meaning of section 8(b)(4)(i) & (ii) as contrasted with two parts of a single person in San Francisco Examiner. Id. at 321. See note 131 supra. Both sides had contended that Alexander Warehouse & Sales Co., 128 N.L.R.B. 916 (1960), controlled. The General Counsel and the charging parties argued that but for the finding of integration, the picketing at issue would have been secondary. Id. at 319. See note 116 and accompanying text, supra. The
which focused only on the congressional intent to expand the protections of section 8(b)(4), he pointed to the judicial recognition of the dual congressional objectives of preserving the effectiveness of primary activity and of protecting neutral employers from the pressures of controversies which they did not create. Emphasizing that the use of economic pressure is essential to the collective bargaining process, he reasoned that Hearst's right to use the operating profits of its divisions as "fuel for the total corporate body" and to support its divisions during labor disputes gave rise to a correlative right in the union to picket the various divisions.

In *American Federation of Television and Radio Artists (Baltimore News American, Division of The Hearst Corp.)*, the Board adopted the decision of the trial examiner and again found two divisions of the Hearst Corporation to be separate employers. Using *in terrorem* reasoning, the trial examiner concluded that the union's position would sanction extension of the labor dispute to "everyone of Hearst's numerous divisions... in every part of the country." Defining the primary employer as the entity in a position to resolve a dispute, the trial examiner refused to permit an expansion of the labor conflict to entities which did not have the power to resolve the dispute. Finally, he rejected *Alexander Warehouse* as controlling precedent because it was decided on the basis of integration of operations, rather than on single employer grounds. The Board's order, based on these findings, was subsequently enforced by the District of Co-

unions argued that the language concerning integration of operations was dicta and that the Board's statement concerning the ally doctrine, see note 115 supra, indicated its intention to hold that a single corporation should, as a matter of law, be subject to picketing wherever it does business, 185 N.L.R.B. at 319. However, the trial examiner found the case inapposite because it did not involve construction of the term person. *Id.* at 320. Similarly, he distinguished *Knight Newspapers* on the ground that corporate subsidiaries are persons within the meaning of sections 2(1) and 8(b)(4).

140. *Id.* at 320.
142. *Id.* at 594. Member Brown once again dissented, quoting the trial examiner's opinion in *San Francisco Examiner* at length, and arguing that to construe section 2(1) to include corporate divisions jeopardized the balance to be maintained in light of the "dual congressional objectives" referred to by the trial examiner in that decision. Further, he once again relied upon section 13 of the Act and pointed to precedent cautioning against interpreting section 8(b)(4) to restrict direct economic pressures in primary labor disputes. *Id.* (Brown, Member, dissenting). See note 137 and accompanying text supra.
143. *Id.* at 600. He declared that the union's argument looked not to the substance of the corporation but to its form. *Id.*
144. *Id.* at 598, 600.
145. *Id.* at 600-01. See notes 115-16 and accompanying text supra.
lumbia Circuit. Rather than adopting the dual objectives referred to by the trial examiner in *San Francisco Examiner*, the court viewed the single purpose of confining "labor conflicts to the employer in whose labor relations the conflict has arisen" as the relevant policy consideration.

In contrast to the reasoning adopted by the Board and the courts, the unions' position in *San Francisco Examiner* and *Baltimore News American* directly clashed with precedent establishing common ownership as an insufficient ground for single employer status. The unions' arguments were apparently based on a technical interpretation of section 2(1). Their real basis, however, could only have been the radical assertion that operating divisions of a corporation should be linked with the parent as a single employer. This argument postulates that financial control is the most significant criterion for single employer status and that a high degree of financial control is almost always present over operating divisions. Nonetheless, the Board and the courts have rejected this reasoning in cases of common stock ownership by individuals, in which it is perhaps equally applicable. In presenting their case, the unions were forced to accept this precedent and thus to argue the inconsistent position that financial control would be insufficient to indicate unity in some cases, yet sufficient in others. Nonetheless, because the ultimate ability to employ financial control over corporate subdivisions portends the concomitant ability to subsidize those subdivisions experiencing economic pressure, the union position has merit despite its inconsistency.

### E. The Subterfuge Doctrine

The development of subterfuge doctrines has played a significant role in labor law, allowing the Board to see through an employer's attempts to camouflage its unfair labor practices. The essence of a subterfuge is the use of a right or privilege by a party to obscure an underlying liability or

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148. See note 56 and accompanying text supra.
vulnerability to legal action. By using the subterfuge doctrine, the Board or a court may ignore an asserted right or privilege and expose its claimant to legal or economic sanctions. In the case of the single employer doctrine, a subterfuge can exist if a company in fact operates commonly owned businesses as one economic enterprise but arranges the day-to-day operations of the businesses to give the appearance of independence. Notwithstanding the subterfuge doctrine, such an arrangement would permit the company to limit the economic sanctions arising in a labor dispute afflicting one of its divisions. The application of the subterfuge doctrine, however, would permit the Board or a court to expose all businesses of the employer to strike or picketing activity.

In *United Mine Workers of America (Lone Star Steel Co.*), the Board held that an independent contractor hired to operate a mine owned by the Lone Star Steel Company was an ally of that company and could be picketed by the company's employees. The trial examiner based his holding not only on the fact that Lone Star owned the coal and both used and supervised the coal's excavation, but also on the fact that Lone Star had previously mined the coal itself and apparently hired an independent contractor in contemplation of an expected strike by its employees. Endorsing the trial examiner's reasoning, the Board recognized the possibility that an employer may intentionally change its operational structure in order to foil employee attempts to exert economic pressure on it during a dispute. Nonetheless, *Lone Star Steel* is not technically a single employer case, however, but a co-employer case. To date, the Board has failed to promulgate a doctrine in single employer cases to deal with employer subterfuge aimed at limiting the exercise of employee rights to exert primary economic pressure. Nevertheless, two courts of appeals have laid a foundation for a single employer subterfuge doctrine. In *NLRB v. Local 810, International Brotherhood of Teamsters*, the Second Circuit reversed an order in which the Board had declined to find that several commonly owned companies were engaged in integrated operations, even though one company served as the source of supply for several others acting as retail-

153. Slip op. at 12.
154. Id. at 8.
155. See note 14 supra for an explanation of co-employer cases.
The basis for the Board’s decision was the absence of common control over day-to-day operations. ReJECTING this conclusory approach, the court declared that the issue of neutrality must be resolved through an ad hoc examination of the factual relationship between the primary and the alleged secondary employer. In a concurring opinion, Circuit Judge Mansfield further noted that the degree of domination and control of the companies by the president and majority stockholder, “though only potential, was overwhelming,” and that “each company was fundamentally dependent on the others for its economic well-being.” Criticizing the Board for a mechanical application of the day-to-day control test, he argued that other factors may be more important and that a high degree of common ownership and economic interdependence between two or more companies should be sufficient for a finding of single employer status. “Any other rule,” he stated, “would permit the employer to divide and conquer by doing business through several corporations, each comprising one bargaining unit.”

In Local 391, International Brotherhood of Teamsters v. NLRB, the District of Columbia Circuit granted enforcement of a Board order denying single employer status to several operating divisions of a single corporation. Stating that the independence of the operating divisions was genuine and not an artifice devised for tactical or strategic purposes, the court emphasized that an arrangement of intra-corporate functions specifically contrived to take advantage of the contours of the single employer doctrine would not be honored.

Together, Local 810 and Local 391 form the basis for a workable subterfuge doctrine. Certainly an employer should not be permitted to split up the operations of one company or to form several companies to function as one in order to avoid the economic consequences of its own labor disputes. However, merely looking for the separate and actual exercise of day-to-day control is insufficient. It is possible for a parent corporation to

158. Id. at 616.
159. 460 F.2d at 6.
160. Id. at 7.
161. Id. The judge did not attempt to describe what other circumstances should be considered.
164. 543 F.2d at 1376.
165. Id. at 1376.
set up subsidiaries or divisions in such a way that day-to-day operations are managed locally, while ultimate control over fundamental decisions and labor disputes is retained. Inquiry into day-to-day control is useful, but the more fundamental question is whether the corporations or divisions at issue are obtaining the economic benefits that would accrue from operation as a single enterprise and, at the same time, avoiding the consequences of major labor disputes which could affect the entire enterprise. For such a purpose, the integration or the interdependence of financial affairs is the most appropriate and fundamental test.

III. THE NEED FOR REVISION

In its current state, the single employer doctrine goes beyond protecting "wholly unconcerned" employers from labor disputes not their own. Instead of balancing the dual congressional objectives of preserving the primary strike weapon and narrowing the area of labor disputes, the Board and courts have given overriding deference to the latter at the expense of the former. The Board's treatment of corporate giants, as exemplified in the Hearst cases, illustrates this imbalance.

Labor disputes with corporate giants are, of all such disputes, most likely to expand and have wide ranging economic consequences. The Board's concern with the repercussions of such disputes is clear. At the same time, however, it is precisely in cases involving corporate conglomerates that unions are most disadvantaged economically, given the corporation's ability to transfer funds to divisions embroiled in labor dispute from areas unaffected by strikes. In these cases, it would also seem that the "divide and conquer" strategy is most likely to be effective because separate incorporation is likely to be most efficient for massive operations. And, while limiting the spread of labor disputes is a legitimate objective, it is not the sole objective to be considered. The right to strike can be meaningful only if there is a possibility that the strike weapon will be effective. Consequently, the Board and courts should safeguard the effectiveness of strikes by permitting their use whenever the economic realities of a situation indicate that a union's real adversary is not merely the immediate employer, but a commonly owned company.

The single greatest threat to the strike weapon is common financial control, a factor specifically rejected by the Board and courts as determinative of single employer status. Common financial control has two consequences, however, which should make its consideration paramount. First, it insures that the struck employer is interested in a dispute beyond mere

166. See text accompanying notes 125-47 supra.
buying and selling, and it therefore becomes a limitation on the expansion of disputes. In contrast to an exception based on mere buying and selling which would legitimate virtually all secondary boycotts, one based on common financial control would occur less frequently. Second, common financial control substantially limits the effectiveness of a strike by allowing the struck employer to draw on a greater pool of financial resources. Furthermore, interference with the effectiveness of a strike has been a primary rationale behind the struck work doctrine; arguably, it also should form part of the rationale for the single employer doctrine.

To say that common financial control should be the most relevant factor is not to say that the tests currently applied are unimportant. Integration of operations, although inappropriately used by the Board and courts to narrow the single employer exception, is a practical means of determining the natural boundaries of dispute. Two functionally integrated employers are likely to be seriously affected by each other’s labor disputes, and the more exclusively one business deals with another, the less likely other businesses will be affected by a dispute. Additionally, common labor relations policies, although also misused to narrow the exception, are likewise relevant. By any standard, it would be harsh to deny a labor union the ability to use the economic strike weapon against the party actually determining the terms and conditions of employment of its members. Common control over day-to-day operations, however, would seem to be significant only as an indicator either of common financial control or of integration of operations. Finally, the existence of an arms-length relationship between two businesses seems the most inappropriate of the tests applied when the appearance of an arms-length relationship can easily disguise the actual and substantial control over related businesses.

It is not a contradiction of the single employer doctrine that factors other than financial control, such as the integration of operations or common labor relations policies, may make one employer a concerned party to another’s labor disputes even in the absence of common ownership. Nothing in the legislative history of section 8(b)(4) precludes either the application of a financial control test or the elimination of the common ownership requirement in appropriate cases. Nevertheless, for an expansion of the single employer doctrine to occur, the Board and courts must begin to ar-

167. The Board has begun such an expansion of the single employer doctrine in its co-employer cases, see note 14 supra. The Fifth Circuit has also initiated an expansion of the doctrine based on integration of operations in the absence of common ownership. See Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971); Truckdrivers Local 728 v. Empire State Express, 293 F.2d 414 (5th Cir. 1961), cert. denied, 368 U.S. 931 (1961).
articulate the reasons behind particular tests which have been invoked for close to thirty years.

IV. Conclusion

The single employer doctrine is a judicial and Board made exception to the National Labor Relations Act's prohibition on secondary boycotts. Under this doctrine, companies which are commonly owned may be treated as a single employer if their operations are functionally integrated, if there is a substantial degree of common control over day-to-day operations, or if there is a common labor relations policy over daily affairs. All three factors are considered in determining single employer status. The primary consequence of such a determination is that a union striking one employer will be able to strike or picket the second employer.

In their application of the doctrine, the Board and courts have been insensitive to the potential impact on labor disputes by the common financial control of two or more companies. Since common financial control allows one company to aid another in its labor disputes, it thus may be a determinative factor in such disputes. A union therefore should be allowed to extend its strike or picketing activity to such companies in appropriate circumstances. The tests applied by the Board and courts in determining single employer status are unduly restrictive, however, and emphasize the absence of common control over day-to-day operations at the expense of potential tactical advantages enjoyed by the companies in question. In its present state, the single employer doctrine is a basically pro-union doctrine which has been applied to favor employers and is deserving of revision by the Board and courts.

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