

2009

Secondary Boycotts and Ally Doctrine in the U.S. Law of Strikes

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ITALIAN LEGAL SCHOLARSHIP UNBOUND WORKING PAPER SERIES



SECONDARY BOYCOTTS AND ALLY DOCTRINE IN THE U.S. LAW OF STRIKES

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ABSTRACT

The paper aims to schematically illustrate the legal genesis of the concept of secondary boycott in U.S. statutory law and its application in the relevant case law. For this purpose, a brief overview of the historical origin of the right to strike is provided, along with the analysis of the evolutionary process which led to its inclusion in the Constitutional Charts of many European countries. This introduction is followed by a description of the legislative steps towards the enactment of the Wagner Act (1935), as amended by the Taft-Hartley Act (1947), and of the Landrum-Griffin Act (1959), especially focusing on the different sanctions which may spring from group ostracism against neutral employers. The distinctiveness of the so-called “ally doctrine” as regards the labor unions’ liability for instigating secondary boycotts is further portrayed, as an exception to the guarantee of free speech contained in the First Amendment to the U.S. Constitution.

ILSU WORKING PAPER NO. 2009-01/EN

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I. INTRODUCTION

When employers undergo trade unions' collective actions such as strikes or boycotts, they always strive to reduce, as much as possible, the impact that the work stoppage can provoke on the going concern. In fact, one of the most critical issues arising from a strike lies in the fact that work stoppages may permanently affect the firm's productivity.

Concerned about the risk that such collective actions could affect national security, legislators throughout the ages have been adopting measures aimed at restricting strikes, ranging from civil sanctions to total ban. All the same, the constant tendency for almost all legal systems is by now to grant workers valuable tools in order to counterbalance the inescapable disproportion in bargaining power between the two negotiating parties in employment contracts. This trend has been translated into regulations which have been increasingly more permissive and favorable to workers and to their representatives, namely trade unions, and whose development has been boosted by the drafting of constitutional principles protecting the right to strike (see *infra* II).

Deprived of the workers, the employer will hunt for other sources in order to replace the striking labor force. If these attempts succeed, the effect of the strike is likely to fade away and thus the very significance of the striking workers' grievances – which originally prompted the strike – tends to blur. Meanwhile, on the other side of the river, unions calling a strike strive to make it successful and do their best to prevent employers from getting outside workers. This mostly defensive counter-activity, which targets the secondary means used by the primary employer, is often referred to as a “secondary boycott”. Its essence was defined as “a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A”.¹ Generally speaking, these kinds of activities are deemed to be unlawful under U.S. law, the system which this article is chiefly concerned with. In particular, such practices are normally outlawed to the extent to which they follow the notion of “unfair labor practice” set forth on a statutory basis, although this notion is often construed differently by the courts (see *infra* III). Both aspects of the issue, and the peculiar tenets of the “ally doctrine” (see *infra* IV), will be analyzed in the following paragraphs.

II. AN OVERVIEW OF THE RIGHT TO STRIKE

A. From Crime to Right

The right to strike suffers from being preceded by the social fact of the strike: the law reacts to this phenomenon, the law does not dominate it.² In the industrial relations environment, strikes are coessential with the employment relationship and to some extent they constitute an infringement of the otherwise harmonic performance of workers' contractual obligations. The factors that trigger a strike are diverse and not necessarily interrelated, but as a whole they share the embodiment of demands which employees want to press on the employer. In this sense, strikes are powerful weapons aimed at enforcing a particular policy within the workplace.

Strikes are always collective. This feature has a historical explanation, because as long as employees were supposed to work under conditions unilaterally set by the employer due to the absence of a collective bargaining infrastructure on the labour side, courts used to construe work stoppages literally as a just cause of termination of the employment contract. Later on, workers have realized that the counterpart would have paid attention to their grievances only if they had acted collectively and had ensured the solidarity of other workers. In other words, employees have

¹ FELIX FRANKFURTER & NATHAN GREEN, THE LABOR INJUNCTION 43 (1930), cited in RALPH M. DERESHINSKY, ALAN D. BERKOWITZ & PHILIP A. MISCIMARRA, THE NLRB AND SECONDARY BOYCOTTS 1 (Industrial Research Unit, Wharton School, University of Pennsylvania, rev. ed. 1981) [hereinafter DERESHINSKY ET AL.].

² HÉLÈNE SINAY, TRAITÉ DE DROIT DU TRAVAIL, LA GRÈVE 2 (1966) cited in LAMMY BETTEN, THE RIGHT TO STRIKE IN COMMUNITY LAW 130 (North-Holland 1985).

gradually become aware of the fact that only a high number of strikers would have affected the employer to such an extent that she could not remain insensible to their complaints. In modern labor practice, the collectivity requirement generally necessitates that the strike be announced in advance; otherwise, in the absence of previous proclamation, a sum of individual abstentions would instead arise.

Along with other collective actions, strikes were originally outlawed as criminal offenses – no matter how many participants gathered at the strike. The rationale of such a legislative choice clearly lies in the social alarm arising from strikes, which may result in emulative acts performed by workers belonging to other industrial sectors, potentially able to pose a threat to national security. Not surprisingly, the toughest legislation regarding labor practices was enforced by most of the totalitarian regimes spreading over Europe since the early 1930s.³

Past the phase during which strikes constituted criminal offences, workers' participation to them still constituted a breach of the employment contract: the worker, in fact, stops carrying out what he has promised to do.⁴ However, a particular *fictio juris* aimed at avoiding harmful contractual consequences with respect to striking employees, namely dismissal or more feeble penalties, has been elaborated. According to the so-called “suspension of contract theory,”⁵ the strike merely suspends the effectiveness of the contract but leaves it intact. This technique openly pretends that work stoppages do not infringe labor obligations, “hibernating” them instead, in the hope of recovering fully once the conflict has been resolved.⁶ And it does so by assuming that only the main effects of the contract (i.e. the respective obligations of lending one's services and paying the wage) come to a standstill. On the other hand, several collateral duties remain in force – such as the duty of loyalty and the duty to protect and safeguard the employer's property.

The latest step of this labeling process is the abolishment of civil sanctions for participation in a strike, and ends up with the recognition of the strike as a right to be exercised by workers under certain conditions.⁷ The fundamental achievement of such an evolution is to make the employment contract much less precarious, preventing it to be terminated because of the possible reprisals by the employer and providing the labor relationship with legal protection also during the time of the work stoppage. Nonetheless, courts often reserve the right to downgrade the strike from a right to a mere liberty whenever it is called for political purposes, which at least in theory should always happen with the general strikes.

1. *The Constitutional Overlay*

In the general theory of law, the holder of a right cannot suffer any loss because of its exercise. This principle is clearly expressed by the Latin brocard *qui iure suo utitur neminem laedit*,⁸ logically intended to elude contradictions inside a legal system, which should never provide different legal responses to the same human act (i.e. prohibiting and in the meanwhile permitting it). The mentioned standard also allows to highlight the difference existing between rights and liberties: only the latter, in fact, may expose those who exercise them to a detriment, although not of criminal kind.

Many of the EEC founder Countries, such as France⁹ and Italy,¹⁰ have developed the general concept of freedom of association typically contained in post-WWII Constitutional Charts (such as

³ A.T.J.M. Jacobs, *The Law of Strikes and Lockouts*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 634 (Roger Blanpain ed., 9th ed. 2008).

⁴ Joaquín García Murcia & Charlotte Villiers, *Strikes and the contract of employment: a comparison of the laws of Spain and England*, 17 *LEG. STUD.* 101, 114-16 (1997).

⁵ The suspension of contract theory has been widely adopted by European courts, in an attempt to overcome the lack of constitutional grounds of the right to strike.

⁶ García Murcia & Villiers, *supra* note 4, at 115.

⁷ BETTEN, *supra* note 2, at 135.

⁸ He who acts in accordance with a right of his does not damage others.

⁹ See 1946 CONST. preamble para.7 (Fr.) (“The right to strike shall be exercised within the framework of the laws governing that right”) (translation provided by the author), which the Preamble to the 1958 Constitution refers to.

the German one),¹¹ turning it into a specific right to strike, albeit to be exercised in compliance with the law. This “southern European” notion of strike, which is also expressly mentioned in the Spanish Constitution,¹² opposes the “northern European” concept of strike¹³, where it appears mostly as a series of statutory immunities from certain torts which workers usually commit¹⁴ while striking.

At the national level, attempts to achieve a statutory regulation failed nearly everywhere, and this also explains the interim role played by courts in elaborating the recognition of the right to strike. At the European level, following a meeting held in 2000 in Nice, the Council adopted the Charter of Fundamental Rights, among whose six big chapters¹⁵ the Solidarity pillar contains a provision (Article 28) expressly dedicated to the right of collective bargaining and action: “Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action”.

This provision marks the conclusion of a long legislative path inaugurated with the European Social Charter¹⁶ of 1961. The latter, in turn, was the forerunner to the 1989 Community Charter of the Fundamental Social Rights of Workers, which until the new millennium has been the main supranational source for the exercise of the right to strike apart from national laws and practice, also thanks to the regulation of all those labor disputes exceeding the Member States’ boundaries. The Nice Charter surpasses the 1989 one, on the one hand, because it guarantees not only social rights but all rights and freedoms of the citizens within the EU and, on the other hand, because it is an official document agreed upon by all Member States whereas the Social Charter was not agreed upon by the United Kingdom.

¹⁰ See COST. art. 40 (Italy) (“The right to industrial action shall be exercised in compliance with the law”) (translation provided by the author).

¹¹ See GG art. 9 (F.R.G.) (“All Germans shall have the right to form corporations and other associations”) (translation provided by the author).

¹² See C.E. art. 28.2 (Spain) (“The right of workers to strike in defence of their interests is recognized. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services”) (translation provided by the author) and C.E. art. 37.2 (“The right of workers and employers to adopt collective labour dispute measures is hereby recognized. The law regulating the exercise of this right shall, without prejudice to the restrictions which it may impose, include the guarantees necessary to ensure the functioning of essential public services”) (translation provided by the author).

¹³ In England, see generally Trade Union and Labour Relations Act, 1974, sect. 18(4), which prevents terms of collective agreements prohibiting or restricting the right of workers to engage in a strike to form part of any employment contract.

¹⁴ The distinction may be further splitted when considering that the “continental Northern European approach” is basically different from the “British Northern European approach”; see BETTEN, *supra* note 2, at 136.

¹⁵ They are: 1) Dignity; 2) Freedom; 3) Equality; 4) Solidarity; 5) Citizenship; 6) Justice. A seventh chapter containing the final provisions follows. However, it should be noted that the Charter is not legally binding *as is*, having only been “solemnly proclaimed” by the European Parliament, the Council and the European Commission. It was however included in the proposed European Constitution, signed in October 2004 but which failed to be ratified after referendum defeats in France and the Netherlands. Nonetheless, the Charter was referred to in the Lisbon Treaty, and will be therefore legally binding within the EU once the ratification process will be completed.

¹⁶ European Social Charter art. 6.4, Oct. 18, 1961, as revised at Strasbourg on May 26, 1996, Europ. T.S. No. 163, 36 I.L.M. 31 states:

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties . . . recognise: . . . the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

B. Strikes as Conspiracies: the Boycott

When unions call a strike, they are accountable for its effectiveness. Now, a strike's outcomes may never be ascertained *ex ante*; however, for workers to be worth it to undergo a certain degree of hazard in striking, the projected outcomes must at least offset such hazard. But still, although the real effects of a strike are unpredictable, unions will make every effort to make the strike at least look successful in order to persuade striking employees that the struggle is worthwhile. One of the most valuable means to reach such a goal, although in the short term, is intimidation aimed at weakening the employers. *À la guerre comme à la guerre*. This kind of practices occurring during strikes, commonly referred to as boycotts, may consist of violence to persons or properties linked with the employer, or of a complete social or business ostracism, or of both.¹⁷

The origin of the word "boycott" is shrouded in the mists of history. It is commonly attributed to a rent dispute between a group of Irish tenants and a land agent, Captain Charles C. Boycott, during Ireland's Land League rent wars in the 1880's.¹⁸ In the legal field, in spite of more than one century of judicial praxis, the meaning of "boycott" is still controversial and courts continue to argue around its interpretation. One shared aspect is that the word boycott is usually encoded with metaphoric images recalling the idea of a conflicting group refusing to deal.

Black's Law Dictionary defines it as "an action designed to achieve the social or economic isolation of an adversary".¹⁹ This inclination to associate the concept of "boycott" with "insurgency" has strongly influenced the way judges have interpreted its legal meaning, with the consequence that all non-peaceful boycotts have been outlawed in most of the Western countries. Unlike the primary effects of a labor dispute, whose legality is affected by the constitutional overlay covering the exercise of some of the most important collective rights, boycotts have been held as criminal offenses (see *supra* II.A). In other words, they have not been afforded with the same protection granted to other legitimate forms of protest occurring during work stoppages: the legislator's reasoning might be that such an indirect pressure asserted on the employers is of a kind that cannot be simply considered as a breach of contract. Yet, boycotts are the concomitants of nearly every strike of considerable dimensions.²⁰ After all, the employees' boycott against the employers, often consisting of a concerted refusal to work for purposes of advancing a dispute over wages, hours and working conditions,²¹ is the essence of all strikes.

C. Other Collective Forms of Intimidation

1. Picketing

An implicit condition underlying the choice of striking is that the places which the workers have temporarily and voluntarily surrendered must not be filled by others, otherwise the production damage might be neutralized and thus the employers have no incentive to comply with the workers' grievances. According to Black's Law Dictionary, picketing consists in "the demonstration by one or more persons outside a business or organization to protest the entity's activities or policies and to pressure the entity to meet the protesters' demonstration aimed at publicizing a labor dispute and

¹⁷ T.S. COGLEY, *THE LAW OF STRIKES, LOCKOUTS AND LABOR ORGANIZATIONS* 248 (Washington D.C., W.H. Lowdermilk & Co. Press 1894).

¹⁸ GARY MINDA, *BOYCOTT IN AMERICA* 1 (Southern Illinois University Press 1999).

¹⁹ BLACK'S LAW DICTIONARY (8th ed. 2004) (entry "Boycott"). See also BALLANTINE'S LAW DICTIONARY (3rd ed. 1969) (entry "Boycott"):

A species of ostracism, a combination in refusing to have business dealings with another until he removes or ameliorates conditions deemed inimical to the members of the combination, or some of them, or grants concessions which are deemed to make for the removal or amelioration of such conditions.

²⁰ COGLEY, *supra* note 17, at 252.

²¹ MINDA, *supra* note 18, at 102.

influencing the public to withhold business from the employer”.²² Usually picketing is accompanied by patrolling with signs, whose intimidating meaning is addressed not only to the struck employers but also to workers who refuse to join the strike (roughly called “scabs”).

However, picketing targets are not confined within the firm’s boundaries. In particular, it is pretty common that picketers turn to the general public, making them aware of the motivations lying beneath their striking activity. In this sense, although picketing is constitutionally guaranteed as a form of free speech (see *infra* III.B.2) and as the legitimate exercise of the freedom of assembly and association, it can be limited where it constitutes a threat to public order. The general rule applied in some countries is that peaceful picketing is presumed lawful when also the strike is considered lawful.²³

2. *Blacklisting*

Blacklisting is a side practice commonly exercised by unions during labor disputes, which some regard instead as an attempt at revenge undertaken by both conflicting parties.²⁴ It consists of “a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate.”²⁵ It also indicates the act of putting a person on such a list, which employers will do by identifying undesirable employees whereas unions will record workers who refuse to become members or to conform to its rules. Indeed, blacklisting does not necessarily require the physical presence of written documentation, and can instead be pursued informally and by consensus.

The scope of blacklists is clearly discriminatory, as far as they aim at demarcating a certain group of people who share the same objective for mainly retaliatory purposes. Like picketing, blacklisting entails coercive effects irrespective of evident threats of work slowdown through a strike.²⁶ The slippery aspect of blacklists is that, unlike picketing, the anonymity of their drafters limits the other party’s reaction and thus grants an almost full impunity. The more specific blacklists are, the more likely the legislator is to outlaw them. So if this determinativeness characteristic is absent, blacklists should rather be deemed as newspaper advertisements²⁷, and therefore courts are mostly willing not to prosecute their drafters.

III. THE SECONDARY BOYCOTT IN THE AMERICAN LEGISLATIVE HISTORY

A. *The Legislative Path*

The different shapes adopted by the secondary boycott, which will be later analyzed both in its substantial layout and in its effects on labor relations, are the outcome of a suffered legislative path of the U.S. Congress that dates back to 1932. At common law, boycotts were outlawed under a variety of legal theories.²⁸ The courts’ holdings have been multiple and often contrasting, so it is not possible to outline the judicial evolution which has taken place in the absence of a statutory law.

During the Hoover Administration (1929-33) the legislator enacted the Anti-Injunction Bill (also known as Norris-LaGuardia Act),²⁹ under which “yellow-dog” contracts³⁰ had been outlawed. It can

²² BLACK’S LAW DICTIONARY, *supra* note 19 (entry “Picketing”). See also BALLANTINE’S LAW DICTIONARY, *supra* note 19 (entry “Picketing”): “The establishment and maintenance of an organized espionage upon the works of an employer and upon persons going to and from them.”

²³ Jacobs, *supra* note 3, at 657.

²⁴ COGLEY, *supra* note 17, at 293.

²⁵ BALLANTINE’S LAW DICTIONARY, *supra* note 19 (entry “Blacklist”).

²⁶ Recent Case, 74 HARV. L. REV. 1665, 1667 (1961).

²⁷ *Id.*

²⁸ DERESHINSKY ET AL., *supra* note 1, at 1.

²⁹ The name of the Act derives from its sponsors: NE Senator George Norris (R) and NY Representative Fiorello H. La Guardia (R).

be seen as an expression of liberal policy, upon appraisal of the attribution to U.S. employees of the freedom to form unions without employer interferences. For our purposes, it is also notable that the Act deprived the courts of the injunction tool, on which they commonly relied as a means to stop secondary union activity.

Three years later, with the National Labor Relations Act (NLRA, also known as Wagner Act),³¹ collective bargaining became the accepted national labor policy, mainly thanks to a steadily higher support of union growth by the Federal Government. Despite the NLRA enactment, the Norris-LaGuardia Act was not abolished, so that conflicts emerged between their respective provisions. In particular, the NLRA's scope was limited to workers in the private sector and did not cover agriculture and domestic employees, supervisors, independent contractors and all those employees whose employers were subject to the Railway Labor Act.³² The major legacy of the Wagner Act is however the establishment of the National Labor Relations Board (NLRB),³³ a federal agency in charge of investigating and ruling about unfair labor practices as well as conducting elections among workers, a channel through which they could express their will to be represented by unions in the workplace.

After the NLRA passed, the co-existence of two Acts treating secondary boycotts in a different manner had the effect of making them a powerful weapon³⁴ available to unions. This critical situation urged the Congress to react, and in 1947 the NLRA was amended by the Labor Management Relations Act (LMRA, also known as Taft-Hartley Act).³⁵ During the parliamentary debate on the secondary boycott section, co-sponsor Senator Haft explained that “[t]his provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees”.³⁶ Unfair union labor practices were reformulated in more precise terms, and secondary boycotts were eventually banned. Furthermore, many union privileges granted in the Wagner Act were abolished. Even though workers were still secured the right of organizing and bargaining collectively, the Taft-Hartley Act also recognized the possibility not to join any union and finally outlawed all those enterprises, known as “closed-shop”³⁷ which hired only unionized workers.

B. Framing the Secondary Boycott Under the Statutory Law

As briefly stated above (see supra I), secondary boycotts occur when the aggrieved party attempts either to boycott a third party or to coerce it into joining an ongoing boycott. Thus, workers instituting a boycott may refuse to patronize firms that continue to deal with the initially boycotted party.³⁸

³⁰ The expression “yellow dog” refers to those clauses contained in employment contracts which state the employee’s consent not to join a labor union as a condition of employment. The formula indicates the metaphoric transformation of all workers waiving their rights in yellow dogs, a symbol of slavery and submission to the owner.

³¹ The name of the Act derives from NY Senator Robert F. Wagner (D), who had already promoted the Social Security Act and is considered one of the architects of the modern social state. The NLRA was one of the most significant legislative initiatives of Franklin D. Roosevelt’s New Deal, and resulted in a deep change of the U.S. labor law. Although toughly hindered by the employers, the NLRA was active only from 1938 on, after several head-on collisions between the two parties such as the almost two-month long occupation of General Motors.

³² The Railway Labor Act (RLA) is the first federal law governing labor relations in the transportation industries. Passed in 1926, the Act was amended in 1936 to cover the emerging airline industry.

³³ The NLRB substituted a much weaker organization established under the National Industrial Recovery Act. It is formed equally by both workers’ and employers’ representatives for a total number of six.

³⁴ DERESHINSKY ET AL., *supra* note 1, at 3.

³⁵ The name of the Act derives from its sponsors: OH Senator Robert A. Taft (R) and NJ Representative Fred A. Hartley (R). Still effective, the Act was legislated overriding President Harry S. Truman’s veto.

³⁶ 93 Cong. Rec. 4198 (1947).

³⁷ Except in those states that have enacted “right-to-work” laws, the Taft-Hartley permitted the “union-shop” clause, which although not requiring the union membership as a precondition for the employment still forced the employed worker to join the union within a period of time following its hiring.

³⁸ THE COLUMBIA ENCYCLOPEDIA (6th ed. 2008) (entry “Boycott”).

Assuming that the (primary) employer cannot afford to comply with the requests which have triggered the strike, he can still seek help from another (secondary) employer in order to be supplied with the workers he needs for a temporary period of time. Consequently, unions may react by damaging this secondary employer in order to stop her from making business with the struck employer through secondary boycotts. In other words, they always arise out of a primary dispute between a labor union and a primary employer and involve a neutral third party. These innocent employers are also referred to as “noncombatants”, i.e. people drawn into a dispute not of their own making.

Unlike primary boycotts, the legislator has a relevant interest in restricting pressures exerted against third parties in controversies for which they are not liable, and that they neither have the power nor the authority to solve. This rationale justifies rules that would be impermissible if imposed on primary boycotts.³⁹ The pertinent provision is Sec. 8(b)(4)(A) of the NLRA as amended by the Taft-Hartley Act, titled “Unfair Labor Practices by Labor Organization”:⁴⁰ assuming that the secondary employer remains neutral irrespective of the dispute’s outcome, entangling attempts made by unions are to be held unlawful⁴¹ and shall be prosecuted in the forms prescribed, which often involve the NLRB.

Courts realized very soon that the strict application of this provision led to great uncertainties. In fact, the language of the law bared several ambiguities: the definition of “employee” could not be analogically extended to those categories of workers excluded in the NLRA (see *supra* III.A), and the same happened with the correspondent definition of “employer”. Furthermore, since Sec. 8(b)(4)(A) prohibited only inducements to employees, the courts had come to the paradox that inducements and threats made directly to secondary employers did not violate the secondary boycott statute.⁴²

In 1959 the Congress enacted the Labor-Management Reporting and Disclosure Act (LMRDA, also known as the Landrum-Griffin Act).⁴³ For our purposes, the law incorporates the secondary boycott provision in the new Sec. 8(b)(4)(B) of the amended Wagner Act, still titled “Unfair Labor Practices by Labor Organization”.⁴⁴ This insertion succeeded in closing the aforementioned

³⁹ Barbara J. Anderson, Comment, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811, 833 (1984).

⁴⁰ The provision reads as follows:

8(b) It shall be an unfair labor practice for a labor organization or its agents . . . 4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other 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.

⁴¹ DERESHINSKY ET AL., *supra* note 1, at 121.

⁴² *Id.*, at 5.

⁴³ The name of the Act derives from its sponsors: GA Senator Phil Landrum (D) and MI Representative Robert P. Griffin (R).

⁴⁴ The provision reads as follows:

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

loopholes, and as a result two goals were accomplished: the range of employers covered by the act was broadly extended, and the new language of the rule prevented its misapplication by the courts.

Despite these two relevant achievements, the doctrine of secondary boycotts must still face borderline situations, where the law is in fact developed on a case-by-case basis. Both the common-situs picketing (see *infra* III.B.1) and the ally doctrine (see *infra* IV) pose several questions about the effectiveness of the NLRA provisions, which still lack ultimate answers and which should be viewed in a perspective *de jure condendo*.

3. “Common-Situs” Picketing in a Nutshell

The basic principles for common-situs cases were established by the U.S. Supreme Court in the *General Electric* case.⁴⁵ Since the mid 1950s, General Electric (hereinafter “GE”) had followed a policy of reserving a gate exclusively for independent contractors’ employees working on its premises, who performed a wide variety of tasks at its manufacturing facility. In July 1958, following a strike called by the union which resulted in picketing of the entire plant, the separate gate was also picketed and most of the independent contractors’ employees were forced to stay out of the factory.

Ruling on the case, the NLRB applied a literal approach to the statute and held that the union’s conduct constituted an unfair labor practice in violation of Sec. 8(b)(4)(B) of the NLRA as amended by the Taft-Hartley Act. On the other hand the Supreme Court, in reviewing the Board’s decision, concluded that “[t]he key to the problem is found in the type of work that is being performed by those who use the separate gate”.⁴⁶ The evidence arising from the case was that the independent contractors’ employees had done work which was very similar to the tasks normally performed by the striking employees. Because of the integration of the independent contractors’ employees into the production process of GE, it was possible to infer that the two groups of workers were, by and large, almost replaceable and furthermore that they were an essential element in the non-paralleled competition that GE and the independent contractors had created.⁴⁷

Beside the criterion of the type of work performed by the neutral employees, the Supreme Court also held that an unfair labor practice by the unions may come to light only if the independent contractors’ work is “of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations”.⁴⁸ In other words, similarly to the exception under the “ally doctrine” regarding employers performing struck work (see *infra* IV.A), the Court introduced a “related work” test for determining the lawfulness of picketing that occurs at a primary site.⁴⁹ Nevertheless the judicially provided threshold was very vague, as it restricted the relevant work to that “connected to the normal operations”⁵⁰ of the primary employer.

4. Other Peaceful Secondary Activities

With regard to all possible forms of secondary boycotts, which overall consist of techniques intended to exert pressure on unrelated businesses,⁵¹ employees’ secondary actions are only one side of the coin. Typically labor unions arrange secondary boycotts different from those involving employees vis-à-vis ineffective alternative measures. Among them, consumer boycotts comprise practices of disseminating information aimed at eliminating consumer demand for products supplied by the target employer.⁵²

⁴⁵ Local 761, *International Union of Electrical Workers v. NLRB (General Electric)*, 366 U.S. 667, 674 (1961).

⁴⁶ *Id.*

⁴⁷ D.J. Chepaitis, *The National Labor Relations Act, Non-Paralleled Competition, and Market Power*, 85 CAL. L. REV. 769, 811 (1997).

⁴⁸ *General Electric*, *supra* note 45.

⁴⁹ DERESHINSKY ET AL., *supra* note 1, at 25.

⁵⁰ *General Electric*, *supra* note 45.

⁵¹ WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2008) (entry “Secondary Boycott”).

⁵² DERESHINSKY ET AL., *supra* note 1, at 192.

As a way of advertising and promoting the dispute, unions' activities directed to consumers should never be restricted according to the First Amendment to the U.S. Constitution,⁵³ which *inter alia* expressly prohibits the legislator to enact laws infringing the freedom of speech. In spite of its constitutional overlay, such a freedom had to be balanced with the neutral employers' right not to be harmed because of non-related labor disputes. An ad hoc solution was apparently found through the "publicity exception" contained in Sec. 8(b)(4)(ii)(B)⁵⁴ of the NLRA as amended by the Taft-Hartley Act, which subordinates the legality of consumer secondary boycotts induced by labor unions to a number of conditions.

Another remarkable secondary boycott practice is the so-called "hot cargo clause",⁵⁵ a contractual provision contained in union contracts obliging the employer (or allowing employees) to refrain from handling or working on goods stemming from a struck plant, or from dealing with employers listed on a union "unfair list." Cargo clauses were outlawed by the Taft-Hartley Act on the basis that, through a pressure on the struck employers, they tended to settle strikes on terms favorable to workers. The function of these clauses is to secure permission from an employer to exert secondary pressure upon any person doing business with the employer who has a dispute with the labor organization.⁵⁶

The pertinent rule is Sec. 8(e)⁵⁷ of the NLRA as amended by the Landrum-Griffin Act, titled "Enforceability of Contract or Agreement to Boycott any other Employer", which provides some exceptions. According to the legislative history of Sec. 8(e), there should be no doubt that the legislator's intent was to grant the employer a freedom to choose whom to deal with. This freedom was intended to be as broad as possible. By referring the proscription to "express or implied" agreements, the legislator aims to extend the prohibition to all those clauses that might reasonably be intended by the contracting parties as a veiled agreement not to handle or to work on goods stemming from a struck plant, or to deal with employers listed on a union "unfair list".⁵⁸

IV. GENESIS OF THE ALLY DOCTRINE IN ACTS AND CASE LAW

A. *The Very Beginning: the Ebasco Case*

It should now be clear that the secondary boycott statute protects only disinterested parties, in other words third parties whose intervention in the controversy has no valuable effect. However, if

⁵³ The provision reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

⁵⁴ The provision reads as follows:

8(b) It shall be an unfair labor practice for a labor organization or its agents . . . (4)(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.

⁵⁵ Comment, *Hot Cargo Clauses*, 25 U. CHI. L. REV. 182, 182-87 (1957).

⁵⁶ Jack G. Armstrong, Comment, *LMRA: 'Hot Cargo' Clause as a Defense to Secondary Boycott*, 54 MICH. L. REV. 253, 255 (1955).

⁵⁷ The provision reads as follows:

8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

⁵⁸ Comment, *Hot Cargo Clauses: The Scope of Section 8(e)*, 71 YALE L. J. 158, 165 (1961).

the secondary target has previously accepted farmed-out struck work or is somehow related to the primary employer, then it is not deemed to be neutral to the latter's labor dispute, but is instead considered an ally of the primary employer.⁵⁹

This concept of alliance has no statutory basis. Relying on Senator Taft's remark expressed during the Senate's pre-enactment of Sec. 8(b)(4)(A),⁶⁰ Judge Rifkin ruled on the *Ebasco* case⁶¹ finding that "no unfair labor practice resulted from picketing a secondary employer to whom struck work was being transferred by the primary employer".⁶² According to Sec. 10(1), the federal district courts have jurisdiction to restrain activity temporarily when the regional attorney has "reasonable cause to believe" that the activity constitutes an unfair labor practice. Using this rule, a regional director of the NLRB sought a preliminary injunction against some *Ebasco* striking employees. In fact, they were alleged to have also picketed an independent partnership, called Project Engineering, forcing some of its draftsmen to quit. However, on the basis of a previous contract, *Ebasco* was entitled to supervise the work done by Project's employees and even to set their wages.⁶³ This led the court to say that Project actually ran a business "identical to *Ebasco*'s".⁶⁴ Judge Rifkin highlighted a noteworthy detail about this case, namely that the effect of the strike had been fully balanced by Project's activity, as if *Ebasco* had hired strikebreakers. As a result, the picketing clearly did not have as its object "requiring ... any ... person ... to cease doing business with any other person". Finally, the court held that the provision of the NLRA prohibiting secondary activity applied only where it could truly be said that the other person had no interest in the dispute⁶⁵, which takes us back to what was underlined in the beginning of the paragraph, i.e. that the secondary boycott statute does not apply here since Project by no means can be considered a disinterested party.

B. Conditions Under Which Alliances Arise

1. Integration of Business and Operation: the Struck Work

As in the *Ebasco* case, two independent employers may become allies when B's business expands with work that would otherwise be handled by A's striking workers.⁶⁶ This was particularly evident in the aforementioned seminal struck-work case, because already before the strike *Ebasco* had subcontracted workers to Project, and had furnished supervisors entitled to exercise a pervasive control over Project's employees. However, after the *Ebasco* ruling courts have not implied that secondary employers are to be deprived of the protection afforded to neutral ones by Sec. 8(b)(4)(B) solely because they make use of externalised struck work. In the case *Royal Typewriter Co.*⁶⁷ a company struck by its repairmen instructed customers to let their typewriters be fixed by any independent repairman of their choice, and promised them to pay the receipts. Since there was no integration between the two businesses, the court held that the picketing towards the independents constituted a violation of the NLRA because *Royal* and the secondary employers could not be deemed to be allies.

What is struck work? The significance of this question is self-evident, because on its boundaries rests the rationale of the NLRA provision. It is widely agreed that struck work is work which – *but*

⁵⁹ Anderson, *supra* note 39, at 834.

⁶⁰ See *supra* note 36.

⁶¹ Douds v. Metropolitan Federation of Architects (*Ebasco*), 75 F. Supp. 672 (S.D.N.Y. 1948).

⁶² William P. Wooden, Comment, *NLRA: "Ally" Doctrine*, 56 MICH. L. REV. 462, 463 (1958).

⁶³ During the strike, Project also performed work for *Ebasco* and some of it was even transferred to Project in the half-finished state in which the strikers left it.

⁶⁴ See note 61.

⁶⁵ Chepaitis, *supra* note 47, at 812.

⁶⁶ Comment, *Union, Conglomerates, and Secondary Activity under the NLRA*, 129 U. PA. L. REV. 221, 228 (1980), p. 228.

⁶⁷ NLRB v. Business Machine Mechanics Local 459 (*Royal Typewriter Co.*), 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

for the strike – would be performed by the employees of the primary employer. The formula should be read as following: the performing of subcontractual obligations by a secondary employer on the primary's behalf is not alone sufficient to make them allies, when the contracted work would be done regardless of the strike.⁶⁸ In both the *Ebasco* and the *Royal Typewriter* decisions, the secondary employers clearly performed work that, but for the strike, would have been performed by the (striking) primary employees.⁶⁹

Furthermore, some courts have added the malice factor in order to restrict the sphere of application of struck work. In other words, there should also be evidence that the work was intentionally transferred to the secondary employer in order to avoid the impact of the primary dispute. The rebuttable consequence of such a test is the assumption that entering into subcontracts after a strike has been called is a reasonable proof of the intent to evade it. Insofar as this practice imposes a reverse burden of proof, it improperly contradicts the flexibility which should be typical of contractual negotiations, and therefore should be rejected.

2. *Common Ownership and Control*

The first application of the ally doctrine occurred barely one year after the ruling about *Ebasco*. In the case *Irwin-Lyons*⁷⁰ both the primary and the secondary employers were owned and managed by the same corporation: here the court held that a common ownership affects the business activities to such an extent that the second corporation will never be “wholly unconcerned” in the first's labor disputes. The rationale of this ruling lies in a judicial presumption applied by the court, i.e. that commonly owned and managed employers engage in “one straight line operation”.⁷¹

This test assumes that enterprise A is enterprise B's production arm, but if plainly applied may lead to deadlocks. In fact, it fails to give a logic explanation to those cases where, although the goods produced or the services provided are different (thereby forbidding the inference that it is a common production that turns the two firms into “allies”), two enterprises still share the same substantial expectations by creating a community of interests. Perfectly aware of the inaccuracy underlying the straight line prerequisite, the NLRB eventually discarded it as a valuable means to disclose alliances between employers and, therefore, to make the secondary boycott provision inapplicable.

The “one straight line operation” concept has never been properly defined in case law, and, as a result, it is still used with different meanings and for different purposes. In particular, where the “straight line” element is too mild to encompass relevant cases of common ownership and control, the “actual common control” standard comes up. Briefly, this standard consists of a number of tests taken by courts which consider several corporate factors⁷² such as whether the companies exchange employees, advance each other credit, make sales to each others, etc. Ça va sans dire that the efficiency of such a method cannot be generalized, since the tests are conducted on a case-by-case basis. However, it is essential for the control exercised on the two entities to be actual, since potential influence is too common to warrant application of the doctrine.⁷³

3. *Co-employers*

As underlined above, a close relationship between employers is not a necessary condition to consider them allies. It is worth recalling Senator Taft's statement about the “unconcern” element as a requisite for the application of Sec. 8(b)(4)(B): according to it, a secondary employer may still be concerned in the primary's dispute as far as he supervises, on the latter's behalf, employees

⁶⁸ Michael Henry Levin, “*Wholly Unconcerned*”: *The Scope and Meaning of the Ally Doctrine under Section 8(b)(4) of the NLRA*, 119 U. PA. L. REV. 283, 295 (1970).

⁶⁹ DERESHINSKY ET AL., *supra* note 1, at 129.

⁷⁰ *Marine Cooks and Stewards Union (Irwin-Lyons Lumber Co.)*, 87 N.L.R.B. 54 (1949).

⁷¹ *Id.* Here the NLRB held that, because the two commonly owned companies were engaged in “one straight line operation”, neither could claim neutrality from the other's labor disputes.

⁷² DERESHINSKY ET AL., *supra* note 1, at 171.

⁷³ Levin, *supra* note 68, at 321.

accomplishing their tasks. It is important to emphasize the fact that the extension of such a supervision goes far beyond a mere control of the final result, whereas it entails that secondary employers are in charge of overseeing the labor process *in itinere*. What triggers the existence of a co-employers relationship is different than under the single entity doctrine: in fact, the attention is here focused on the degree of control that one employer exercises over another employer's employees. Not surprisingly, co-employer cases mainly occur when A's work is subcontracted to B but A still retains some control over the labor relation policies of B. The language used by scholars in shaping the co-employers doctrine tends to associate it with the single entity doctrine (see *infra* IV.B.4). Although the distinction between the two concepts is philosophically insignificant, it is however tactically crucial because circumstances suggesting coemployer status are even more prevalent than those required for singleness.⁷⁴

The rate of control exercised by the secondary employer which allows him to be viewed as a co-employer is fairly disputed. Courts have consistently contended that, unlike the influence stemming from the holding entity (see *supra* IV.B.2), it is sufficient for this kind of control to be merely retained, meaning that – while in the former case the holding entity is in a position to exert an all-encompassing influence on the way in which the controlled firm operates – in the latter situation, instead, the co-employer must merely be in the position to affect specific aspects of the other employer's labor relations: it merely retains control in some areas, while leaving the rest to the other employer's discretion. Finally, secondary employers shall be free from unnecessary pressure exercised by the primary ones,⁷⁵ otherwise the integration between the two enterprises would end up being too close and they should be considered as a single entity.

4. *Common Control over Labor Relations*

The cut-off of such an interrelatedness between two (formally) separate business entities may be found in those situations where the employment conditions for both the enterprises are set by only one employer. In this case scholars tend to recognize the two entities as a single enterprise. Here the application of Sec. 8(b)(4)(B) should be granted only to those businesses which the secondary employer could freely discontinue, even running the risk to be sued by the primary employer for breach of contract.⁷⁶

Usually this common control over negotiations in the labor market is strictly linked with common ownership, which makes companies horizontally integrated. However this element is not necessary: it may also happen that unrelated enterprises' workers, even represented by different unions, go on strike against one employer in order to prevent the latter to fix work conditions for the workforce as a whole. A crucial consequence stemming from the horizontal integration between two companies is that when employees of one do not engage in concerted bargaining activity, they compete with employees of the other company⁷⁷. Briefly, assuming that two enterprises (A and B) actually form one integrated and multi-shaped enterprise, a picketing activity of A's striking workers damages B no more unlawfully than it would damage A. This conclusion is made possible by courts through a much broader construction of the term "other person" contained in NLRA.⁷⁸ It goes without saying that this results in an extension of its sphere of application.

C. *From Alliance to Neutrality: the Way Back*

Once a neutral employer becomes an ally, under which conditions can he restore his neutral status? The issue has a huge relevance for the secondary employers, to whom the NLRA affords the

⁷⁴ *Id.*, at 328.

⁷⁵ *Id.*, at 333.

⁷⁶ *Id.*, at 315.

⁷⁷ Chepaitis, *supra* note 47, at 813.

⁷⁸ Judge Rifkin affirmed: "To give such broad scope to the term would, for instance, reach out to and include the business relation between an employee of the primary employer and the primary employer". (Ebasco, *supra* note 61).

right to be preserved from boycotts only if they have no (actual) tight relations with the primary employer.

The case law that has evolved under the ally doctrine identifies factors that may be used to appraise the secondary employer's neutrality.⁷⁹ As stated above (see *supra* IV.B), the lawfulness of secondary activities should be determined by assessing whether its economic impact is disproportionate to the secondary's involvement with the primary employer. In the Morrison's case,⁸⁰ some laundry workers went on strike with the purpose of renegotiating the collective agreement. When the union found out that the enterprise relied on a secondary employer whose employees performed struck work on Morrison's behalf, it requested that the secondary employer either affirm or deny that it was performing such work.⁸¹ Having received no response, the union picketed the secondary employer; but the Trial Examiner found in such a behavior a violation of Sec. 8(b)(4), since at the time the union commenced picketing at the secondary employer's premises, it had ceased performing struck work and hence it should not be held an ally anymore.

Contra, the NLRB reversed this decision holding that "the ally, in order to expunge its identity with the primary dispute, is under an affirmative duty to notify the picketing union that struck work shall no longer be performed".⁸² This obligation however is neutralized when unions know or should have known, through the exercise of ordinary care, that during the time of picketing the secondary employer does not perform struck work. The Morrison's case does not jeopardize the protection granted to former allies, who can still enjoy the application of the NLRA provisions simply breaking their link with the primary employers. However, it still entails that upon termination of the ally status an affirmative duty of notification arises every time unions are not able to discover the relinquishment of struck work on their own.

V. CONCLUDING REMARKS

Secondary boycott provisions, along with exceptions to the general rules such as the ally doctrine, reflect an underlying policy of balancing the rights of unions to pursue their economic interests with the protection afforded to nonaligned parties. The single enterprise and the coemployers doctrines rest on the need to overcome the employers' neutrality, every time that their businesses are identifiable with those of the primary employer's ones to such an extent that, the secondary workers being the primary's fellows, they may justifiably be reached. Nonetheless, this sort of immunity granted to labor activities has been judicially created on a case-by-case basis, hence heavily relying on each factual background. Ever since, moreover, reversals of policy and disagreements have been so frequent that foreseeing a certain judicial outcome relative to secondary boycotts is nearly impossible.

The US statutory law has long provided sections outlawing secondary activities performed during strikes, even though the term "secondary boycott" is never used by the legislator. Other legal systems, such as the vast majority of European countries, consider secondary activities rather as collateral behaviors typically related to work stoppages, in other words as devices aimed at ensuring the effectiveness of strikes. As a result, courts within the EU are quite reticent to shield unoffending employers from pressures in controversies that are not their own. This approach is indeed endorsed by a stronger unionization, which tremendously affects labor relations and the policy making in the labor law field.

All this assumed, would an exclusive regulation on secondary boycotts make any sense? Considering that specific by-laws would involve extremely different prohibited activities, ranging from picketing at the neutral employer's premises to engaging in actions harmful to the latter's

⁷⁹ Lawrence N. Minch, *Consumer Picketing: Reassessing the Concept of Employer Neutrality*, 65 CAL. L. REV. 172, 174 (1977).

⁸⁰ Laundry Workers Local 259 (Morrison's of San Diego), 164 N.L.R.B. 426 (1967).

⁸¹ DERESHINSKY ET AL., *supra* note 1, at 155.

⁸² Morrison's of San Diego, *supra* note 80.

productivity, the judicial struggle for unambiguity would be harsh. The answer is therefore negative. Narrowing the issue, legislators should instead develop general guidelines aimed at preventing litigation among parties and at the same time at encouraging courts to adopt permanent determinations. For this purpose, a crucial substitutive role shall be played by administrative bodies or by international organizations such as the International Labor Organization (ILO), a specialized agency operating under the UN aegis, whose near-worldwide scope could even result in a harmonization of the different national legal frameworks related to the strike phenomenon.