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Labor Law - NLRA - "Ally" Doctrine

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LABOR LAW—NLRA—"ALLY" DOCTRINE—With the purpose of compelling Roy Construction Co. to stop buying supplies from Roy Lumber Co., a non-union supplier which the union had been unsuccessfully trying to organize, the union called a strike of the employees of Roy Construction. While the two employers were distinct corporate entities, all of the stock in both was owned by the five Roy brothers, and the two boards of directors were largely identical. The two businesses were parts of a family partnership venture and were engaged in related businesses with Roy Lumber supplying Roy Construction's millwork.¹ The NLRB issued a complaint against the striking union for engaging in an unfair labor practice in violation of section 8 (b) (4) (A) of the National Labor Relations Act.² On hearing by the NLRB, *held*, complaint dismissed. The union's effort to induce Roy Construction to cease doing business with Roy Lumber was not an illegal secondary boycott because the common ownership and control and the interrelation of the two businesses make the two employers "allies." *Carpenters Union (J.G. Roy & Sons Co.)*, 118 N.L.R.B. No. 24, 40 L.R.R.M. 1171 (1957).

Section 8 (b) (4) (A) of the NLRA makes it an unfair labor practice for a union to engage in a strike for the purpose of forcing an employer "to cease doing business with any other person."³ Although by its plain meaning this prohibition would appear to extend to all secondary boycotts induced by strikes,⁴ the provision has not been so

¹ A discussion of whether these factual conclusions, reached by a majority of the board, are supported by the facts of the case appears *infra*.

² 61 Stat. 141 (1947), 29 U.S.C. (1952) §158 (b) (4) (A).

³ Note 2 *supra*.

⁴ See 50 MICH. L. REV. 315 at 319 (1951). See also *Curto v. International Longshoremen's & W. Union*, (D.C. Ore. 1952) 107 F. Supp. 805 at 815, n. 15.

construed.⁵ Instead, the "ally" doctrine has been invoked to limit the scope of this section to those cases in which its purpose of protecting innocent third persons will be effectuated.⁶ Thus, when the secondary employer is sufficiently related to the primary employer, the "ally" doctrine prevents the finding of a violation of section 8(b) (4) (A), the theory being that the two employers are in effect but one employer or that they are so closely related that they are not "doing business" *inter se*.⁷ The doctrine springs from a statement by Senator Taft, made during the Senate's pre-enactment discussion of this provision, that this section would prohibit secondary boycotts only against employers which were "wholly unconcerned" with the primary dispute.⁸ Relying on the Senator's remark, Judge Rifkind gave the first judicial expression to the rule in *Douds v. Metropolitan Federation of Architects, etc.*,⁹ commonly called the *Ebasco* case. There the court found that no unfair labor practice resulted from picketing a secondary employer to whom struck work was being transferred by the primary employer. The application of the "ally" doctrine in this type of case is based on sound policy, for, as Judge Rifkind notes, if the primary employer could freely transfer struck work, the strike against the primary employer would be rendered as ineffectual as if the use of strike breakers was permitted.¹⁰ The "ally" doctrine was first applied by the Board in *National Union of Marine Cooks and Stewards (Irwin-Lyons)* to a situation where the two employers were commonly owned and managed and were engaged in "one straight line operation."¹¹ The majority in the principal case purport to bring the present case within the rationale of the *Irwin-Lyons*

⁵ Cases on this topic are collected in 16 A.L.R. (2d) 769 at 778 to 781 (1951).

⁶ See 64 HARV. L. REV. 781 at 802 (1951).

⁷ Principal case; *Douds v. Metropolitan Federation of Architects, etc.*, (S.D. N.Y. 1948) 75 F. Supp. 672. See also *NLRB v. Wine, Liquor & Dist. Workers Union*, (2d Cir. 1949) 178 F. (2d) 584 at 587. The Supreme Court has yet to pass affirmatively on the scope of the doctrine. But see note 11 *infra*.

⁸ "This 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." 93 CONG. REC. 4198 (1947). By "wholly unconcerned" Senator Taft probably meant more precisely, as he stated in a later debate, that the third person must not be in "cahoots with or acting as a part of the primary employer." 95 CONG. REC. 8709 (1949).

⁹ *Douds v. Metropolitan Federation of Architects, etc.*, note 7 *supra*.

¹⁰ The rationale of the *Ebasco* case was applied in *NLRB v. Intl. Union of Electrical, Radio & Machine Workers, Local 459*, (2d Cir. 1955) 228 F. (2d) 553, in allowing the union to picket an employer which was accepting struck work from the primary employer.

¹¹ 87 N.L.R.B. 54 (1949). The board's concept of "one straight line operation" was based on these facts: *A* cut logs; *B* transported the logs to *A*'s mill, where *A* sawed the logs. The "ally" doctrine was refused application in the following cases: *Labor Board v. Denver Bldg. Council*, 341 U.S. 675 (1951) (general contractor and subcontractor); *NLRB v. Wine, Liquor & Dist. Workers Union*, note 7 *supra* (manufacturer and distributor); *International Brotherhood of Teamsters, etc. (National Cement)*, 115 N.L.R.B. 1290 (1956) (*A* was a relative of the partners of *B* and an employee of *B*); *Electrical Workers v. Labor Board*, 341 U.S. 694 (1951); *Carpenters Union v. Labor Board*, 341 U.S. 707 (1951); *Metal Polishers, Buffers, Platers & Helpers (Climax Machinery)*, 86 N.L.R.B. 1243 (1949).

case, by finding both common ownership and control and a "straight line operation." Of these factual conclusions, only the finding of common ownership is supportable by the facts. The control of the two businesses was vested in separate sets of brothers; they possessed complete authority to run their respective businesses, which were operated as entirely separate enterprises and managed wholly independently from each other.¹² The two businesses were not parts of a "straight line operation." They engaged merely in ordinary buying and selling, as their own best interests dictated, and such buying and selling constituted but a small portion of their business operations.¹³ Consequently, the Board's decision can be said to rest solely on common ownership, interlocking directorates and ordinary buying and selling.¹⁴ On such a basis, the principal case represents a considerable extension of the "ally" doctrine.¹⁵ Continued application of the principal case would sanction a wide area of secondary activity because of the frequency with which two businesses are related by the elements forming the basis for the invocation of the "ally" doctrine in the principal case. The sound policy of the *Ebasco* case can have no application in this type of case, since common ownership and interlocking directorates, unlike the transfer of struck work, cannot diminish the vitality of the union's strike against the primary employer. Section 8(b) (4) (A) seeks to promote two policies: prevention of injury to persons not associated with a labor dispute, and preservation of the union's right to present its claims to the employer effectively.¹⁶ The principal case sacrifices the first of these policies in a case where the second policy was not being undercut. These two policies would be served best by limiting the "ally" doctrine to cases where the association between the primary and secondary employer results in a significant impairment of the effectiveness of the union's primary strike.¹⁷

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¹² Dissent in the principal case by Member Rodgers, 40 L.R.R.M. 1171 at 1173 (1957). In *Alpert v. United Brotherhood of Carpenters, etc.*, (D.C. Mass. 1956) 143 F. Supp. 371, a temporary injunction was granted against the union's activities which were those out of which the principal case also grew. The court found the two businesses were managed and controlled "without interference, assistance or control" from the other business.

¹³ Dissent by Member Rodgers, note 12 *supra*. In *Alpert v. United Brotherhood of Carpenters, etc.*, note 12 *supra*, the court found that Roy Construction bought millwork from Roy Lumber, "but when it could purchase more advantageously elsewhere, it did so."

¹⁴ The board stated that it would have reached the same result in the principal case, even without a finding that there was a "straight line operation."

¹⁵ Previously there had been dicta in accord with such a holding. See, e.g., *International Brotherhood of Teamsters, etc. (National Cement)*, note 11 *supra*.

¹⁶ See 40 MINN. L. REV. 872 at 876 (1956); Tower, "A Perspective on Secondary Boycotts," 2 LAB. L. J. 727 at 737-739 (1951).

¹⁷ In *Alpert v. United Brotherhood of Carpenters, etc.*, note 12 *supra*, the court rejected common ownership and control as a basis for this doctrine and stated that the doctrine is limited to cases of transfer of struck work. The case ascribes this meaning to "wholly unconcerned": "'Concerned' means related or connected through activities, not through the incident of ownership, or management." *Curto v. International Long-*