UNIONS, CONGLOMERATES, AND SECONDARY ACTIVITY UNDER THE NLRA

A union involved in a labor dispute with an employer will often try to pressure the employer into meeting its demands by sponsoring strikes, boycotts,[1] picketing, or other activities designed to improve the union's bargaining position. Such activities are generally lawful if directed against and confined to the primary employer, the employer with whom the union has the dispute. These same activities, however, are generally proscribed by section 8(b)(4) of the National Labor Relations Act (NLRA)[2] if they are directed against a secondary, or neutral, employer, producer, or person.[3] More specifically, it is an unfair labor practice under this section for the union to engage in, induce, or encourage a strike or concerted refusal to handle the goods of or perform services for a neutral employer, or to threaten, coerce or restrain any person engaged in commerce, when the union's objective is to force any person to cease handling the products of "any other producer" or to force "any person" to cease doing business with "any other person."[4] A proviso to section 8(b)(4) exempts nonpicketing pub-

[1] A boycott is a refusal to deal with an employer. A strike is simply one kind of a boycott, in that it is a refusal to deal manifested by a refusal to work for the employer. Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1364 n.5 (1962). Therefore, all analytical references to boycotts in this Comment will be referring to both boycotts and strikes.

[2] National Labor Relations Act [hereinafter cited as NLRA] § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). *See* note 4 *infra*.

[3] "Person" is defined by the NLRA as including "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." NLRA § 2(1), 29 U.S.C. § 152(1) (1976). "Producer" is not defined by the NLRA.

[4] NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976). The section reads:

> It shall be an unfair labor practice for a labor organization or its agents (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 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.

licity.[5] This proviso is limited, however, by the requirement that the publicity be for the purpose of informing the public that "a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." [6]

A key question under the publicity proviso is whether a particular employer is the producer of a product or products distributed by another, ostensibly neutral, employer. A recent National Labor Relations Board (the Board) decision, *United Steelworkers (Pet, Inc.)*,[7] continues the trend of defining broadly the term "producer." [8] It is the first decision to hold that the publicity proviso permits a union representing a struck plant of a conglomerate subsidiary to distribute handbills requesting a consumer boycott of the entire conglomerate. The Board's rationale for this holding is that the struck plant was a "producer" of the products of the entire conglomerate.[9] This decision represents a major expansion of the term "producer." It departs significantly from previous Board and court decisions interpreting the publicity proviso to require some connection along the line of production between the producer of a struck product and the employer at which the nonpicketing publicity is directed.[10]

The *Pet* logic could be extended beyond the publicity proviso to the similar "producer" and "person" language in section

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[5] NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

[6] The full text of the publicity proviso reads:

> Provided . . . nothing contained in such paragraph [8(b)(4)] shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

Id.

[7] 244 N.L.R.B. No. 6 (Aug. 10, 1979), [1979-80] NLRB Dec. ¶ 16,127, at 30, 188, *appeal docketed*, No. 79-1852 (8th Cir. Oct. 10, 1979).

[8] *See* NLRB v. Servette, Inc., 377 U.S. 46 (1964); Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434 (9th Cir. 1966); Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.) 132 N.L.R.B. 901 (1961); Affeldt, *Group Sanctions and Sections 8(b)(7) and 8(b)(4): An Integrated Approach to Labor Law*, 54 GEO. L.J. 55, 104 (1965); Note, *Publicity Proviso of Section 8(b)(4) Given Broad Construction by NLRB*, 62 COLUM. L. REV. 543, 546-48 (1962); Note, *Picketing and Publicity Under Section 8(b)(4) of the LMRA*, 73 YALE L.J. 1265, 1271-73 (1964); 44 OR. L. REV. 301, 312 (1965).

[9] 244 N.L.R.B. No. 6 at 19, [1979-80] NLRB Dec. at 30,193. *See text* accompanying notes 45-65 *infra*.

[10] *See* notes 68-79 *infra* & accompanying text.

8(b)(4)(B).[11] Under the *Pet* rationale, the entire Pet conglomerate could be considered one producer. There would then be no "other" producer or person within the conglomerate's structure for purposes of the section; and the union could picket or shut down any Pet plant without violating the secondary boycott provisions of the NLRA.[12]

This Comment discusses the implications of the Board's expanded definition of "producer," focusing on the scope of permissible union activity directed against conglomerates under the *Pet* publicity proviso holding and under the body of case law interpreting section 8(b)(4)(B), and on the need for a new standard to determine the legality of such activity.[13] Part I reviews the relevant case law prior to *Pet* interpreting the publicity proviso and section 8(b)(4)(B). Part II discusses the *Pet* decision and the problems created by the Board's holding. Part III analyzes the difficulties a union faces when it attempts to use its economic weapons against a subsidiary of a conglomerate, particularly when the weapon sought to be used is a secondary boycott. Finally, Part IV proposes that the Board adopt a present and apparent means-of-control test for cases involving section 8(b)(4)(B), permitting a union to use economic pressure against an entire conglomerate where the union shows complete or close to complete ownership by the parent corporation of a struck subsidiary and the parent fails to demonstrate that it does not have the present and apparent means to control the struck subsidiary.

I. Permissible Activities Under Section 8(b)(4)

A. *The Publicity Proviso*

The publicity proviso permits, by means "other than picketing," appeals to consumers to cease patronizing a company which "distributes" products produced by the struck employer. When a union seeks to justify secondary activity on the basis of the proviso, a determination must therefore be made whether the secondary employer is a distributor of the struck product. If the secondary employer falls within this category, the union will not have vio-

[11] There must be an "other producer" or "other person" against whom union activities are directed for the union to violate this statute. *See* note 4 *supra.*

[12] The Board left this broader, non-proviso issue open. 244 N.L.R.B. No. 6 at 15 n.23, [1979-80] NLRB Dec. at 30,188. *See* text accompanying notes 50 & 51 *infra.*

[13] Potential grounds of decision which were not discussed in *Pet* and which will not be discussed in this Comment include whether the union's activity was coercive under section 8(b)(4)(B), whether its handbilling activity had a lawful objective, and whether or not restraints on handbilling activity violate the first amendment.

lated section 8(b)(4)(ii)(B) by asking consumers to boycott the secondary employer's entire business.

In *Local 537, International Brotherhood of Teamsters (Lohman Sales Co.),*[14] a wholesale distributor of cigarettes and cigars was involved in a primary dispute. The union distributed handbills at retail stores requesting customers not to buy cigarettes from Lohman. The Board held that the handbilling was protected by the publicity proviso even though the primary employer was a distributor rather than a manufacturer. Lohman did not need to manufacture a tangible product in order to be considered a producer within the meaning of the publicity proviso. It was sufficient that Lohman added value to the final product by contributing labor in the form of "capital, enterprise, and service to the product . . . [furnished to] retailers." [15]

The Supreme Court, in *NLRB v. Servette, Inc.,*[16] agreed with the Board's *Lohman* holding and concluded that the publicity proviso encompasses distributors as well as manufacturers. *Servette* involved a strike against a wholesale distributor of food products. The union threatened to, and in some cases did, distribute in front of supermarkets handbills asking the public to refrain from purchasing goods supplied by the distributor. Finding that the publicity proviso to section 8(b)(4) was the "outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded," and that nothing in the legislative history suggested that "the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception," [17] the Court held that the union's activity was protected by the publicity proviso. To justify

[14] 132 N.L.R.B. 901 (1961).

[15] *Id.* 907. *See also* United Plant Guard Workers (Houston Armored Car Co.), 136 N.L.R.B. 110 (1962); International Bhd. of Elec. Workers Local 712 (Golden Dawn Foods), 134 N.L.R.B. 812 (1961); Local 968, Int'l Bhd. of Teamsters (Schepps Grocery Co.), 133 N.L.R.B. 1420 (1961); Plumbers and Pipefitters Local 142 (Piggly Wiggly), 133 N.L.R.B. 307 (1961).

The scope of a secondary boycott permitted by § 8(b)(4)(B) was further expanded by the Board in *Local 662, Radio and Television Engineers (Middle South Broadcasting).* 133 N.L.R.B. 1698 (1961). The union had distributed leaflets asking consumers for a total boycott of merchants advertising on a struck radio station, and the station argued that any secondary boycott must be limited to the products actually advertised on the struck station. The Board held that § 8(b)(4)(B) was not violated because the publicity proviso permits a total consumer boycott of a secondary employer's entire business. The union's publicity therefore could be directed at any product of a secondary employer (an advertising merchant) even if the product was not produced by (advertised on) the struck station. *Id.* 1705. *See also* International Union of Operating Eng'rs Local 139 (Oak Constr., Inc.), 226 N.L.R.B. 759 (1976).

[16] 377 U.S. 46 (1964).

[17] *Id.* 55.

this holding, the Court did not attempt to explain, as was done in *Lohman,* why a distributor of goods should be included as a "producer" within the meaning of the proviso.[18] Instead, the Court reasoned that the term "produced" has always been held to apply to the wholesale distribution of goods." [19]

The definition of producer was expanded further in *Great Western Broadcasting Corp. v. NLRB* [20] to include providers of services who do not handle a tangible good. The union in *Great Western* was involved in a primary dispute with a radio station and sought to use nonpicketing publicity activities to persuade businesses to cease advertising on the struck station. The Board held that the union's activities were protected by the publicity proviso. The radio station added its advertising services to the products advertised on the station and was therefore a producer of the advertised products within the meaning of the publicity proviso.[21] Enforcing the Board's decision, the Ninth Circuit emphasized the broad interpretations previously given the proviso, stating that "whatever difficulties an analytical dissecting of the proviso may reveal, they are not to stand in the way of giving that proviso a scope commensurate with the section to which it is appended." [22]

B. *Determinations of Employer Neutrality Under Section 8(b)(4)*

Section 8(b)(4)(B) distinguishes a union's primary activities, those directed against a primary employer, from its secondary activities, those directed against a neutral employer. Generally, secondary activities not exempted by the publicity proviso are prohibited by the section.[23] However, in some instances, boycotting and picketing are allowed against a secondary employer so long as the activity's major impact is on the primary labor dispute.

[18] *See* text accompanying note 15 *supra.*

[19] *Servette,* 377 U.S. at 56 (footnote omitted).

[20] 356 F.2d 434 (9th Cir. 1966).

[21] AFTRA (Great Western Broadcasting Corp.), 150 N.L.R.B. 467, 472 (1964), *enforced,* 356 F.2d 434 (9th Cir. 966), *cert. denied,* 384 U.S. 1002 (1966).

[22] *Great Western,* 356 F.2d at 436-37.

[23] *See* notes 1-3 *supra* & accompanying text. The 1959 Landrum-Griffin amendments to § 8(b)(4) added "express exceptions for the primary strike and primary picketing." United Steelworkers v. NLRB, 376 U.S. 492, 496 (1964).

Another proviso to § 8(b)(4), it should be noted, excepts from unlawfulness the refusal of any person to cross a picket line set up at any lawfully struck employer's premises. While this conduct resembles secondary activity in that a neutral employer whose employees refuse to cross the picket line of a struck employer suffers from a dispute not his own and over which he has no control, it is not the type of organized secondary activity to which this Comment is addressed. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 322-23 (1976).

Thus, where a union "follows the struck product" to a neutral distributor, it has the right to picket to persuade consumers to boycott that particular product.[24] Activity is also permitted against the secondary employer when it shares a common situs with the primary employer.[25] A third doctrine, the "ally doctrine," is of major significance to this Comment because it will often be an issue when a union involved in a dispute with one unit of a conglomerate wishes to further its position by picketing or boycotting the conglomerate itself or another of its subsidiaries. In such a case, the union will argue that under the ally doctrine such picketing or boycotting does not constitute secondary activity because the purported neutral is so "closely related to the primary employer and the dispute with the union [that] he loses his neutrality and may be treated as a primary party to the dispute." [26] The ally doctrine, then, is a tool which the Board [27] and the courts

[24] The leading case on consumer picketing is *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964). The union, in support of its strike against fruit packers and warehousemen, picketed consumer entrances to supermarkets to persuade the public not to purchase Washington State apples because they were packed by nonunion packers. Relying principally upon legislative history, the Supreme Court held that § 8(b)(4)(B) does not prohibit peaceful secondary picketing confined to persuading customers to cease buying the struck product of the primary employer. The Court stated that a total secondary boycott, rather than a boycott limited to the struck product, was the " 'isolated evil' " flowing from picketing at which this legislation was directed. *Id.* 63. *See generally* Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act*, 63 MICH. L. REV. 682 (1965); Comment, *Secondary Consumer Picketing: Some Grafts on Tree Fruits*, 44 TUL. L. REV. 537 (1970).

The Supreme Court recently limited *Tree Fruits* by holding that a situation of consumer picketing directed at the primary product was illegal where sales of the struck product comprised over ninety percent of the secondary employers' gross incomes. NLRB v. Retail Store Employees Local 1001 (Safeco Title Ins. Co.), 48 U.S.L.W. 4796 (1980).

Consumer picketing is also limited by the merged product doctrine. If the primary employer's goods or services are "merged" into the goods or services of the secondary employer, so that appealing for a consumer boycott of the struck product is equivalent to appealing for a total secondary boycott, consumer picketing to induce such a boycott violates § 8(b)(4)(B). American Bread Co. v. NLRB, 411 F.2d 147 (6th Cir. 1969). *See also* K & K Constr. Co. v. NLRB, 592 F.2d 1228, 1234 (3rd Cir. 1979); Honolulu Typographical Union No. 37 v. NLRB (Hawaii Press Newspapers, Inc.), 401 F.2d 952, 955 (D.C. Cir. 1968); Cement Masons Local 337 (Cal. Ass'n of Employers), 190 N.L.R.B. 261, 264-65 (1971); Comment, *Limitation on Product Picketing—Honolulu Typographical Union No. 37*, 9 B.C. INDUS. AND COM. L. REV. 792 (1968); Comment, *Consumer Picketing and the Single-Product Secondary Employer*, 47 U. CHI. L. REV. 112, 133 (1979); Note, *Picketing and Publicity Under Section 8(b)(4) of the Labor Management Relations Act*, 73 YALE L.J. 1265, 1280-82 (1964).

[25] *See* Sailors' Union of the Pac. (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950); Local 662, Radio and Television Eng'rs (Middle South Broadcasting), 133 N.L.R.B. 1698 (1961) (relying on *Moore Dry Dock*).

[26] R. DERESHINSKY, THE NLRB AND SECONDARY BOYCOTTS 50 (1972). *See generally* R. GORMAN, *supra* note 23, at 247.

[27] It should be noted that, although for reasons of convenience this Comment will refer to the ally doctrine as being applied by the Board and the courts, which

have developed to help determine whether a union has been acting lawfully against a nonneutral employer when the union is accused of acting unlawfully against a neutral employer.[28]

The ally doctrine has two branches: it applies when an employer performs struck work for the primary employer,[29] and it may also apply when an employer is related to the primary employer through common ownership.[30] In either case, it provides a rational framework for determining on a case-by-case basis whether an employer is "wholly unconcerned" with the labor dispute [31] or whether it is sufficiently involved in the primary employer's business to lose its neutral status.[32] This analysis is undertaken to further the dual labor policies of preserving a labor organization's right to exert pressure on offending employers, while shielding other employers from disputes not their own.[33]

A party performing struck work is considered firmly allied with the targeted employer and therefore becomes a party to the dispute. Struck work is work "which *but for* the strike would be performed by the employees of the primary employer." [34] The third party thus alleviates the union's pressure on the targeted employer,

review findings of neutrality, any statement made concerning the general application of the doctrine refers also to its application by the Board's General Counsel and by the administrative law judges who hear the unfair labor practice complaints. It is the General Counsel's regional attorneys who must first decide whether a union's conduct is unfair under § 8(b)(4); if they so decide, they must present their complaint to the administrative law judge. In both cases, then, the relevant legal standards are found in the decisions of the Board itself and reviewing courts of appeals, but those standards are first utilized by the regional attorneys and administrative law judges. *See generally* R. GORMAN, *supra* note 23, at 7-9.

[28] Differentiating primary from secondary activity often requires drawing fine distinctions based on careful analysis of the relationship between the primary employer and the purported neutral employer. "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line." Local 761, Int'l Union of Elec. Radio & Mach. Workers v. NLRB, 366 U.S. 667, 673 (1961).

[29] *See* notes 34 & 35 *infra* & accompanying text.

[30] *See* text accompanying notes 39-41 *infra.*

[31] *See, e.g.*, Carpet Layers Local 419 v. NLRB, 467 F.2d 392, 401 (D.C. Cir. 1972); NLRB v. Local 810, Steel, Metals, Alloys & Hardware Fabricators, 460 F.2d 1, 6 (2d Cir.), *cert. denied*, 409 U.S. 1041 (1972); Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446, 451 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).

[32] 93 CONG. REC. 4198 (1947) (remarks of Senator Taft).

[33] 105 CONG. REC. A6653 (1959) (remarks of Mr. Levitan), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1776 (1959) [hereinafter cited as 2 LEG. HIST.]. *See* NLRB v. Local 325, Int'l Union of Operating Engr's, 400 U.S. 297, 302-03 (1971); Local 1976, United Bhd. of Carpenters & Joiners v. NLRB, 357 U.S. 93, 100 (1958); NLRB v. Denver Building and Construction Trades Council, 341 U.S. 675, 692 (1951); *Vulcan Materials Co.*, 430 F.2d at 451; Miami Newspaper Pressmen's Local 46 v. NLRB, 322 F.2d 405, 406 (D.C. Cir. 1963).

[34] R. DERESHINSKY, *supra* note 26, at 59 (emphasis in original).

while deriving an economic benefit from the added business. The direct impact on the labor dispute caused by the "farming out" of struck work presents a situation analogous to the hiring of strikebreakers, justifying the removal of secondary boycott protection from the third party.[35]

The seminal struck-work case is *Douds v. Metropolitan Federation of Architects Local 231*.[36] Upon the advent of a strike, the struck company in that case markedly increased its subcontracts with the purported neutral. The district court refused to issue an injunction against the union's picketing of the subcontractor because it found that the two employers were completely united in interest.[37] It has similarly been held that where an employer being struck directs its service-contract customers to independent companies, and then remunerates those companies directly for its customers' work, the independent employers become allies, susceptible to the whole range of union pressure.[38] In both situations, the third party's business expands with work that would otherwise be handled by the strikers.

Another situation in which two employers will be treated as a single employer occurs when the firms are allied through common ownership and control.[39] To determine whether two companies are allied, the Board and the courts look for, *inter alia*, common ownership, common management, common control of labor relations, integration of business operations, and the degree of dependence of one company on the other.[40] Because potential control is not sufficient, the existence of common ownership alone will not support an alliance finding. A union may not widen the dispute beyond the initially struck employer unless one of the employers exercises actual control over the other.[41]

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[35] Douds v. Metropolitan Fed'n of Architects Local 231, 75 F. Supp. 672, 677 (S.D.N.Y. 1948); R. DERESHINSKY, *supra* note 26, at 58; R. GORMAN, *supra* note 23, at 244.

[36] 75 F. Supp. 672 (S.D.N.Y. 1948).

[37] *Id.* 677.

[38] NLRB v. Business Machs. and Office Appliance Mechanics Bd. Local 459 (Royal Typewriter), 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

[39] *See, e.g.*, Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co., 384 F.2d 101, 105 (5th Cir. 1967). *Miami Newspaper Pressmen's Local 40*, 322 F.2d at 408-09; J. G. Roy & Sons Co. v. NLRB, 251 F.2d 771, 773-74 (1st Cir. 1958).

[40] *Local 810, Steel, Metals, Alloys & Hardware Fabricators*, 460 F.2d at 5; NLRB v. General Teamster Local 126, 435 F.2d 288, 291 (7th Cir. 1970); *Vulcan Materials Co.*, 430 F.2d at 451; *Miami Newspaper Pressmen's Local 46*, 322 F.2d at 408-09; Employing Lithographers v. NLRB, 301 F.2d 20, 29 (5th Cir. 1962).

[41] *General Teamster Local 126*, 435 F.2d at 291; San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 545 (9th Cir. 1969); *Sheet Metal Workers,*

A conglomerate failing to meet the conditions of the actual control test consists of separate and distinct "persons." [42] Union pressure against the noninvolved units of such a conglomerate is proscribed under section 8(b)(4)(B) as a secondary boycott. For example, in *Los Angles Newspaper Guild Local 69 (Hearst Publications),*[43] the union struck the Los Angles Herald Examiner and picketed the San Francisco Examiner, another Hearst division. The Board held that the San Francisco activity violated the NLRA because "separate corporate subsidiaries are separate persons, each entitled to the protection of section 8(b)(4)(B) from the labor disputes of the other." [44]

II. *Pet:* THE DECISION AND ITS IMPLICATIONS

Pet, Incorporated is a billion-dollar, diversified conglomerate with sales and operations throughout the United States and in several foreign countries.[45] In late 1977, the United Steelworkers union, representing striking employees at one plant of a Pet subsidiary, Hussmann Refrigerator Company, attempted to organize a consumer boycott of all Pet products and retail stores.[46] The boycott did not differentiate between Pet subsidiaries that purchased

384 F.2d at 105; Bachman Machine v. NLRB, 266 F.2d 599, 605 (8th Cir. 1959); *J. G. Roy & Sons Co.*, 251 F.2d at 773; Drivers Local 639 (Poole's Warehousing, Inc.), 158 N.L.R.B. 1281, 1286 (1966); Miami Newspaper Printing Pressmen Local 46 (Knight Newspapers, Inc.), 138 N.L.R.B. 1346 (1962), *enforced sub nom.*, Miami Newspaper Pressmen's Local 46 v. NLRB, 322 F.2d 405 (D.C. Cir. 1963).

[42] Los Angeles Newspaper Guild Local 69 (Hearst Publications), 185 N.L.R.B. 303, 304 (1970), *enforced per curiam*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); *see* R. GORMAN, *supra* note 23, at 250.

[43] 185 N.L.R.B. 303 (1970), *enforced per curiam*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972).

[44] *Id.* 304. *See generally* Siegal, *Conglomerates, Subsidiaries, Divisions, and the Secondary Boycott*, 9 GA. L. REV. 329 (1975). Although some subsequent decisions have impliedly questioned the validity of *Hearst*, the Board's holding has never been overruled, and remains the controlling decision on this issue. *See, e.g.*, Local 391, Int'l Bhd. of Teamsters v. NLRB, 543 F.2d 1373, 1376 (1976).

[45] United Steelworkers (Pet, Inc.), 244 N.L.R.B. No. 6, (Aug. 10, 1979), [1979-80] NLRB Dec. ¶ 16,127, at 30, 188, *appeal docketed*, No. 79-1852 (8th Cir. Oct. 10, 1979). Among Pet's major divisions and subsidiaries are Whitman's Chocolates, Pet Frozen Foods, Stuckey's Inc., 9-0-5 Liquor Stores, and Pet Dairy Products. For a definition of "conglomerate," see note 94 *infra* & accompanying text.

[46] *Pet*, 244 N.L.R.B. No. 6 at 6, 10-11, [1979-80] NLRB Dec. at 30,190. The collective bargaining agreement covering the striking employees expired on May 1, 1977. The employees were on strike when the boycott was announced by the union president at a televised press conference on October 21, 1977. The announcement was followed by newspaper advertisements and handbills explaining that there was a strike against the Hussmann plant, noting that Hussmann was part of Pet, and urging consumers to boycott listed Pet products and stores. The handbilling was orderly, peaceful, unaccompanied by picketing, and took place away from establishments that were owned by Pet or that sold Pet products. The parties stipulated that this conduct did not induce any individual employee to refuse to make deliveries or perform services. *Id.* at 10-12, [1979-80] NLRB Dec. at 30,190-91.

products from Hussmann and those that did not.[47] Pet countered by filing a complaint with the Board, charging the Steelworkers with committing an unfair labor practice under section 8(b)(4)(ii)(B) of the NLRA.[48] Pet argued that the union's publicity activities on behalf of the boycott violated that section because they constituted coercion and/or restraint directed at the parent and specified subsidiaries that were "neutral" persons and therefore should have been exempt from union pressure. The Board General Counsel argued on Pet's behalf that the publicity had an illegal object of causing a cessation of business among Pet divisions and subsidiaries and between Pet and its customers, suppliers and distributors.[49]

The Board specifically declined to decide whether the Steelworker's publicity efforts violated section 8(b)(4)(ii)(B).[50] Instead, it held that the struck subsidiary is a " 'producer' of the products of Pet and its other subsidiaries and divisions as that term is used in the publicity proviso." [51] The proviso was thus held to exempt the union's publicity activities against the entire conglomerate from section 8(b)(4)(ii)(B).

The Board based its holding upon its interpretation of prior cases dealing with the definition of producer[52]—*Lohman*,[53] *Servette*,[54] *Great Western*,[55] and *Middle South Broadcasting*[56]—and its assessment of Hussmann's contribution to the Pet conglomerate. It assessed this contribution by examining Pet's structure and financial policies involving the Hussmann subsidiary. Pet is organized into four groups: Convenience and Specialty Foods, Milk and Dairy Products, Store Environments and Distribution Services, and Specialty Retailing and Consumer Services.[57] These groups are subdivided into twenty-seven separate operating divisions, each engaging in separate and distinct lines of business.[58] Pet appoints and

[47] Solien v. United Steelworkers, 449 F. Supp. 580, 581 (E.D. Mo. 1978), *rev'd*, 593 F.2d 82 (8th Cir.), *cert. denied*, 100 S. Ct. 54 (1979) (appeal of section 10(l) order enjoining the Steelworkers from organizing a secondary boycott of Pet products).

[48] *Pet*, 244 N.L.R.B. No. 6 at 12, [1979-80] NLRB Dec. at 30,191. See note 2 *supra*, for the statutory text.

[49] *Id.* at 12-13, [1979-80] NLRB Dec. at 30,191.

[50] *Id.* at 15 n.23, [1979-80] NLRB Dec. at 30,194 n.23.

[51] *Id.* at 19, [1979-80] NLRB Dec. at 30,193.

[52] *See* notes 14-22 *supra* & accompanying text.

[53] International Bhd. of Teamsters Local 537 (Lohman Sales Co.), 132 N.L.R.B. 901 (1961).

[54] NLRB v. Servette, Inc., 377 U.S. 46 (1964).

[55] Great Western Broadcasting Corp. v. NLRB, 356 F.2d 434 (9th Cir. 1966).

[56] Local 662, Radio and Television Eng'rs (Middle South Broadcasting), 133 N.L.R.B. 1698 (1961).

[57] PET, INC. ANN. REP. 4 (1977).

[58] *Pet*, 244 N.L.R.B. No. 6 at 5, [1979-80] NLRB Dec. at 30,189.

determines compensation of a "Group president" who appoints the presidents for each division in that "Group." Pet determines long-range planning and major capital expenditures, formulates policies in areas such as tax, accounting, employment, quality control, product labeling, and spheres of permissible division business, and maintains national business accounts that enable divisions to obtain products and services at discounted prices. Pet's consolidated financial statements reflect the earnings of its subsidiaries.[59]

Hussmann, the largest business in the Store Environments group, is a separately incorporated and wholly owned subsidiary of Pet.[60] Hussmann manufactures primarily commercial and industrial refrigeration and storage equipment in the United States, Canada, and Mexico, and markets this equipment internationally.[61] It operates as an essentially independent business entity, determining its own policies regarding product line, advertising, pricing, and market strategy. It has a separate financial system and bank account and has complete control over its day-to-day operations, division labor relations, and employment policies.[62] It has received from Pet, however, an interest-free, unsecured loan in excess of fifty million dollars and has utilized Pet legal department counsel.[63]

The Board concluded that prior cases allow a union to "lawfully urge, via handbilling or other nonpicketing publicity, a total consumer boycott of a neutral employer, so long as the primary employer has *at some stage* produced, in the sense of applying capital, enterprise, *or* service, a product of the neutral employer." [64] It then held that Hussmann met this test by contributing diversification, actual or potential profits, and "a measure of goodwill" to the rest of the conglomerate.[65]

The *Pet* opinion is important for at least five reasons. First, prior to this case, the Board and the courts had never decided whether a union may, by publicity alone, request a total consumer boycott of all the products and retail outlets of a parent company and its subsidiaries when only one subsidiary is involved in a labor dispute with the union.[66] In light of the large and growing number

[59] *Id.* at 2-3, [1979-80] NLRB Dec. at 30,189.

[60] *Id.* at 2, [1979-80] NLRB Dec. at 30,189.

[61] PET, INC. ANN. REP. 4 (1977). This equipment is used in operations such as grocery and general merchandise stores.

[62] *Pet*, 244 N.L.R.B. No. 6 at 6-7, [1979-80] NLRB Dec. at 30,189.

[63] *Id.* at 8-9, [1979-80] NLRB Dec. at 30,190.

[64] *Id.* at 18, [1979-80] NLRB Dec. at 30,193 (emphasis added).

[65] *Id.* at 19-20, [1979-80] NLRB Dec. at 30,193.

[66] Petitioner's Brief for Review of an Order of the NLRB at vi, Pet, Inc. v. NLRB, No. 79-1852 (8th Cir. Oct. 10, 1979).

of conglomerates,[67] situations similar to that in *Pet* will no doubt reoccur.

Second, by holding that Hussmann is a "producer of all the products of Pet and its subsidiaries and divisions," [68] and that Pet therefore could be boycotted, the Board apparently discarded the producer-distributor nexus previously held to be required by the publicity proviso.[69] The nexus requirement is inserted in the proviso by the language "produced by . . . [a primary] employer . . . and . . . distributed by another employer." [70] The earlier expansion of the term "producer" to include "all forms of labor or service" [71] adhered to the traditional boycott notion, originally provided for in the Taft-Hartley Act, permitting a union to follow struck products or services to their destination.[72] The issue in *Servette,*[73] *Great Western,*[74] and *Lohman* [75] concerned the extent to which a given primary employer could be considered a producer of the services distributed by the complaining secondary employer. Construing "producer" to include the services of advertisers, distributors, and others in these service-provider cases constituted continued adherence to the line-of-production test.[76] The Board's decision in *Pet,* however, does not utilize this traditional concept of a producer. Hussmann clearly produced tangible commercial and industrial products that the union could have boycotted under established precedents; the legal issue arising in *Pet* was whether Hussmann also "produces" Pet products that it does not manufacture, handle, dis-

[67] *See* note 99 *infra.*

[68] *Pet,* 244 N.L.R.B. No. 6 at 20, [1979-80] NLRB Dec. at 30,193.

[69] The decision is unclear on this question. It does not explicitly state whether the Board found any producer-distributor nexus between Hussmann and Pet. The Board's Brief to the Eighth Circuit, however, by arguing that the type of business relationship between two parties should not determine the union's right to appeal to the public so long as the boycott attempts to result in a rejection of the primary's contribution to those products, suggests that the nexus requirement has been abandoned. NLRB's Brief for Review of an Order of the NLRB at 24-25, Pet, Inc. v. NLRB, No. 79-1852 (8th Cir. Oct. 10, 1979).

[70] 29 U.S.C. § 158(b)(4). *See* note 6 *supra.*

[71] McLeod v. Business Mach. & Office Appliance Mechanics Conf. Bd., 300 F.2d 237, 241 (2d Cir. 1962).

[72] International Union of Operating Eng'rs Local 139 (Oak Const. Inc.), 226 N.L.R.B. 759, 759 (1976) (distinguishing between struck and nonstruck products); 2 LEG. HIST., *supra* note 33, at 1389 (remarks of Senator Kennedy) (noting that the right to follow struck work was provided under Taft-Hartley Act).

[73] NLRB v. Servette, Inc., 377 U.S. 46 (1946). *See* text accompanying notes 16-19 *supra.*

[74] Great Western Broadcasting Co. v. NLRB, 356 F.2d 434 (9th Cir. 1966). *See* text accompanying notes 20-22 *supra.*

[75] International Bhd. of Teamsters Local 537 (Lohman Sales Co.), 132 N.L.R.B. 901 (1961). *See* text accompanying notes 14-15 *supra.*

[76] *See* note 78 *infra* & accompanying text.

tribute, or otherwise contribute to *along the line of production.* The Board decided that Hussmann produces anything to which it "at some stage"—not necessarily along the line of production—applies "capital, enterprise or service." [77] This new test, requiring only economic enhancement rather than a producer-distributor nexus, represents a major shift from *Lohman,* which required that the *labor* of the primary employer, in the form of capital, enterprise, and service, be applied to a boycotted product in the initial or intermediate stages of product marketing.[78] The significance of this extension is that it broadens the scope of permissible union activity to cover a much earlier stage in the production process. Under the Board's new test, Hussmann need only contribute profit or potential profit [79] to Pet's current or future products to be considered a producer of these products. In effect, the line-of-production test—and with it the literal language of the statute—have been abandoned.

A third significant aspect of the *Pet* test is that it abandons a previous requirement that a "producer" actually contribute service to the products it produces. Although the Board found in this case that Hussmann contributed "capital, enterprise, *and* service to Pet and its other subsidiaries and divisions," [80] it required only a showing that Hussmann had contributed "capital, enterprise, *or* service" to Pet.[81] This change in wording from past decisions was not inadvertent.[82] It expands the targets of permissible union ac-

[77] 244 NLRB No. 6 at 18, [1979-80] NLRB Dec. at 30,193. Note that if the labor dispute had been with the parent corporation, the same test would have resulted in a finding that the parent corporation, because of the loans it made and the services it provided to its subsidiaries, is a producer of its subsidiaries' products. This result follows because the economic enhancement test bears no relation to the marketing of a product along the line of production.

[78] International Bhd. of Teamsters Local 537 (Lohman Sales Co.), 132 N.L.R.B. 901, 907 (1961).

Although a few decisions contain broader language than *Lohman,* they relied on or voiced agreement with *Lohman* and had fact patterns amenable to a *Lohman* test. *See, e.g., Servette,* 377 U.S. at 55 (1964) (services of wholesale distributor of food products were distributed by supermarkets); *Great Western,* 356 F.2d at 436-37 (9th Cir. 1966) (advertising considered to be a product distributed by neutral advertisers). *See* text accompanying notes 16-22 *supra.* There is no indication from these opinions that the courts contemplated extending the publicity proviso to situations where the primary and secondary employer have no line-of-production relationship in which the primary's labor is applied to the product distributed by the secondary employer.

[79] *Pet,* 244 N.L.R.B. No. 6 at 19, [1979-80] NLRB Dec. at 30,193.

[80] *Id.* at 19, [1979-80] NLRB Dec. at 30,193 (emphasis added).

[81] *Id.* at 18, [1979-80] NLRB Dec. at 30,193 (emphasis added).

[82] *See* NLRB's Brief for Review of an Order of the NLRB at 22, 23 n.8, Pet, Inc. v. NLRB, No. 79-1852 (8th Cir. Oct. 10, 1979). The Board uses the "or"

tivity further than that permitted in *Lohman,* in which the Board stated that "labor is the primary requisite of one who produces," [83] and further than other precedents allowing handbilling of employers providing actual services, such as advertising or handling, which aid in the distribution of a struck product.

Fourth, *Pet* significantly widens the potential range of targets of permissible union activity by not placing any clear limitation on who can be held a producer within the meaning of the publicity proviso.[84] Although future cases may limit the effect of the holding to conglomerates,[85] the broad test enunciated in *Pet* does not contain

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language and speaks in terms of all Pet subsidiaries contributing capital and enterprise, *not* service, to each other. This represents a retreat from the actual *Pet* decision in which the Board held that the subsidiaries contributed capital, enterprise, *and* service to the parent corporation and thus to each other. Although not clear, it appears that the Board feels that a distinct service requirement is unnecessary because the contribution of capital and enterprise is also a contribution of service. *Id.* 22. *See also* Brief for Amicus Curiae in Support of Petitioner at 14, Pet, Inc. v. NLRB, No. 79-1852 (8th Cir. Oct. 10, 1979). Subsequent to the *Pet* decision, the Board has affirmed its new test in Florida Gulf Coast Bldg. Trades Council (The Edward J. De Bartolo Corp.), 252 NLRB No. 9, at 10-12 (Sept. 30, 1980).

[83] 132 N.L.R.B. at 907. *See* text accompanying notes 14-15 *supra.*

[84] The steelworkers were permitted to urge a consumer boycott of products of Pet subsidiaries that had not used any Hussmann services nor had purchased any Hussmann products. Solien v. United Steelworkers, 449 F. Supp. at 582-83.

[85] There is language in the Board's appellate brief to the Eighth Circuit that suggests that the Board may later try to limit the potential impact of its decision. The Board states that its

> conclusion that Hussman [sic] contributed to Pet's products was based, not only on Hussmann's potential capital contributions, but also on Hussmann's status as an industry leader with ever-increasing sales and earnings, a status which enhances both the reputation of Pet and its subsidiaries and the value of Pet's stock; on Hussmann's participation in Pet's national accounts, which enables all subsidiaries to buy at lower prices; and, most important, on Hussmann's major role in the diversification . . . which is central to Pet's strategy . . . .

NLRB's Brief for Review of an Order of the NLRB at 23 n.8, Pet, Inc. v. NLRB, No. 79-1852 (8th Cir. Oct. 10, 1979). It might be implied from this language that the Board will require a high degree of economic enhancement of the secondary employer's products before it will find the *Pet* test satisfied. This, however, does not appear to be the case. In *Pet* Hussmann was operating with a negative cash flow in relation to its parent, which detracts somewhat from the degree it is economically enhancing the rest of the conglomerate. 244 N.L.R.B. at 6-7, [1979-80] NLRB Dec. at 30,189. In Florida Gulf Coast Bldg. Trades Council (The Edward J. De Bartolo Corp.), 252 NLRB No. 9 (Sept. 30, 1980), the Board applied the *Pet* test to hold that when a union involved in a labor dispute with a contractor working for one tenant in a shopping mall distributes handbills requesting that consumers boycott all the stores in the mall, the union's conduct is protected by the publicity proviso. In this fact situation, the degree of economic enhancement that the contractor contributes to the shopping mall does not appear to be very great.

any such limitation. The Board's analysis, extended to its extreme logical limits, could lead to the result that a stockholder, regardless of the substantiality of his holdings or his ability to control a corporation, could be held to be a producer of the corporation's products because of his capital contribution. The corporation could also be held to be a producer of any product that its stockholders produce because of its contribution of a portion of its profits to such stockholders. Moreover, this analysis could be extended to any business transaction so long as one of the two parties involved contributes "capital, enterprise or service" to the other party.

Finally, a fifth significant result of the *Pet* decision is that its economic enhancement test could conceivably be extended beyond the publicity proviso to the similar language of section 8(b)(4)(B). That proviso is the exception to the general statutory command that unions may not pressure "any other producer" [86] than the one with which the union has its dispute. It allows the union to advise consumers—without picketing—"that a product or products [distributed by the secondary employer] are produced by an employer with whom the labor organization has a primary dispute." [87] By stating that the central issue in *Pet,* a publicity proviso decision, was whether Hussmann is a producer of Pet products,[88] and by formulating such a broad test to resolve that question, *Pet* could have a significant impact on the definition of "producer" in section 8(b)(4)(B). If, as the Board held, the economic enhancement test demonstrates that Hussmann is a producer of the products of Pet and its subsidiaries, thereby making those businesses subject to union publicity activities,[89] that test would also seem to demonstrate that Pet and the subsidiaries are producers of Hussmann products. Therefore, if the union is boycotting Hussmann, it could also boycott Pet's other units because they are all producers of the struck products and do not fall within the prohibition against striking "any other producer." In short, there would be no "other" producers within the Pet structure because each unit is a producer of the primary employer's products.

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[86] NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976). *See* note 4 *supra.*

[87] *Id. See* note 6 *supra.*

[88] "The central question for resolution, therefore, is . . . more specifically, whether Hussmann constitutes a 'producer' within the meaning of the proviso *vis-à-vis* the products of Pet . . . . 244 N.L.R.B. No. 6 at 16, [1979-80] NLRB Dec. at 30,192.

[89] *Id.* at 20, [1979-80] NLRB Dec. at 30,193. *See* notes 64 & 65 *supra* & accompanying text. The actual holding in *Pet,* it should be emphasized, was based solely on the producer language of the publicity proviso. *Id.* at 16, 20 & n.33, [1979-80] NLRB Dec. at 30,192-93, 30,195 n.33.

Under this interpretation, a union in a dispute with one Pet subsidiary may boycott any Pet plant without violating the secondary boycott provisions of the NLRA.

Section 8(b)(4)(B) also uses the term "other person." [90] The language used by the Board in *Pet* suggests that the Board's interpretation of "producer" could logically be extended to "person." [91] When the Board held that a struck subsidiary "produces" the products of an entire conglomerate, it implicitly refused to accept the rationale of *Los Angeles Newspaper Guild Local 69 (Hearst Publications),*[92] which had established clear lines separating corporate subsidiaries from the labor disputes of other subsidiaries within the same corporation.[93] It would now be logically inconsistent for the Board to hold that a struck subsidiary "producing" all the products of a conglomerate—and consequently making valuable contributions of labor, capital, or enterprise to the conglomerate—is separate from the other, heretofore neutral, subsidiaries.

III. A Union's Special Problems with Conglomerates

Before assessing the special problems a union faces when attempting to bargain with one subsidiary or division of a conglomerate, it is first necessary to determine when an employer is part of a conglomerate. One commentator has defined a conglomerate as "a firm that does business in three or more unrelated product groups . . . and in which no single group accounts for more than two-thirds of its total sales and earnings." [94] Pet, being composed of four product groups, twenty-seven divisions, and businesses which cover "virtually every facet of the food system," [95] falls within this definition.[96]

Since the passage of the Landrum-Griffin Act,[97] adding the current section 8(b)(4)(B) to the NLRA, there has been a sharp

[90] *See* note 4 *supra.*

[91] *See* note 3 *supra.*

[92] 185 N.L.R.B. 303 (1970), *enforced per curiam,* 443 F.2d 1173 (9th Cir. 1971), *cert. denied,* 404 U.S. 1018 (1972). *See* notes 42-44 *supra* & accompanying text.

[93] 185 N.L.R.B. at 304. Some judges and commentators have since questioned the wisdom of the *Hearst* rationale. *See* notes 118-21 *infra* & accompanying text.

[94] Craypo, *Collective Bargaining in the Conglomerate, Multinational Firm: Litton's Shutdown of Royal Typewriter,* 29 Indus. & Lab. Rel. Rev. 3, 5 (1975).

[95] Pet, Inc. Ann. Rep. inside back cover (1977).

[96] The Board specifically referred to Pet as a conglomerate. United Steelworkers (Pet, Inc.), 244 N.L.R.B. No. 6 (Aug. 10, 1979), [1979-80] NLRB Dec. ¶ 16,127, at 30,188, 30,189, *appeal docketed,* No. 79-1852 (8th Cir. Oct. 10, 1979).

[97] Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 § 704(a) Pub. L. No. 86-257, 73 Stat. 542 (codified at 29 U.S.C. § 158(b)(4) (1976).

increase in the number and size of conglomerates.[98] At the same time, union membership as a percentage of the labor force has

[98] It was not until the late 1960's that the shift away from horizontal and vertical corporate mergers toward conglomerate mergers became significant. L. SULLIVAN, ANTITRUST 653 (1977). *See* FORTUNE MAGAZINE EDITORS, THE CONGLOMERATE COMMOTION 8 (1970); Alexander, *Conglomerate Mergers and Collective Bargaining*, 24 INDUS. & LAB. REL. REV. 354, 355 (1971).

The following data illustrate this trend:

U.S. MERGERS AND ACQUISITIONS

($10 MILLION & OVER)

ASSETS ACQUIRED BY YEAR, 1950-1976

	Acquisitions	
	Total	*Conglomerate*
Year	(million dollars)	
1950	186	20
1951	202	112
1952	385	231
1953	795	323
1954	1,479	819
1955	2,227	1,080
1956	2,111	840
1957	1,428	904
1958	1,173	609
1959	1,712	1,257
1960	1,734	1,172
1961	2,234	1,472
1962	2,661	1,519
1963	3,187	1,822
1964	2,577	1,651
1965	3,704	3,004
1966	4,380	3,218
1967	8,956	7,302
1968	13,759	12,244
1969	12,219	9,002
1970	6,601	5,319
1971	3,141	2,253
1972	2,671	1,476
1973	3,559	2,294
1974	5,119	3,248
1975	5,528	4,791
1976	6,590	5,578

Mergers and Industrial Concentration: Hearings on Acquisitions and Mergers by Conglomerates of Unrelated Businesses before the Subcom. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 77 (1978) (data supplied by Federal Trade Commission, Bureau of Economics) [hereinafter cited as *Conglomerate Hearings*].

slowly, but almost steadily, declined.[99] These trends, combined with the unique structural characteristics of conglomerates have resulted in a weakening of the "traditional balance-of-power premise . . . [that has] institutionalized collective bargaining." [100] The

[99] The decline in union membership as a proportion of the labor force is demonstrated by the following table:

National union membership as a proportion of labor force and nonagricultural employment

[Numbers in thousands]

Year	Membership excluding Canada	Total labor force		Employees in nonagricultural establishments	
		Number	Percent members	Number	Percent members
1958	17,029	70,275	24.2	51,363	33.2
1959	17,117	70,921	24.1	53,313	32.1
1960	17,049	72,142	23.6	54,234	31.4
1961	16,303	73,031	22.3	54,042	30.2
1962	16,586	73,442	22.6	55,596	29.8
1963	16,524	74,571	22.2	56,702	29.1
1964	16,841	75,830	22.2	58,331	28.9
1965	17,299	77,178	22.4	60,815	28.4
1966	17,940	78,893	22.7	63,955	28.1
1967	18,367	80,793	22.7	65,857	27.9
1968	18,916	82,272	23.0	67,951	27.8
1969	19,036	84,240	22.6	70,442	27.0
1970	19,381	85,903	22.6	70,920	27.3
1971	19,211	86,929	22.1	71,222	27.0
1972	19,435	88,991	21.8	73,714	26.4
1973	19,851	91,040	21.8	76,896	25.8
1974	20,199	93,240	21.7	78,413	25.8
1975	19,553	94,793	20.6	77,364	25.3
1976	19,634	96,917	20.3	80,048	24.5
1977	19,902	99,534	20.0	82,423	24.1
1978	20,246	102,534	19.7	84,446	24.0

Totals include reported membership and directly affiliated local union members. Total reported Canadian membership and members of single-firm unions are excluded.

U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1937, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS, 1975 (1977); Telephone conversation with Eugene Becker, Bureau of Labor Statistics (Sept. 4, 1980) (citing statistics from DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS, 1979). Membership totals of single-firm unions are excluded.

[100] Craypo, *supra* note 94, at 21. *See* Los Angeles Newspaper Guild Local 69 (Hearst Publications), 185 N.L.R.B. 303, 307 (1970), *enforced*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972) (Board Member Brown dissenting on ground that the decision distorted the balance of power by shielding an employer from his own dispute); Mueller, *Conglomerates: A "Nonindustry,"* in THE STRUCTURE OF AMERICAN INDUSTRY 442, 450 (W. Adams ed., 5th ed. 1977);

many unions involved with a single conglomerate may frequently constitute a "diverse set of weak opponents" [101] when arrayed against management.[102] These imbalances, and the Board's unique analysis of the conglomerate structure involved in *Pet*,[103] suggest that the labor policies governing union activity against conglomerates should be reexamined, and the ally doctrine revised.

A conglomerate's power in labor negotiations stems from its size and diversification, which give it the ability to "cross-subsidize between industries and plants and whipsaw different unions at . . . various facilities—supported by substantially enhanced financial staying power." [104] A multiplant firm, with each plant accounting for only a portion of the firm's total business, is obviously better able to withstand economic pressure from a union if this pressure is limited to one or a few of its plants: [105] it can weather an "economic assault on any one of its operations" [106] while concentrating on long-run concerns.[107]

Conglomerate Hearings, supra note 98, at 146 (statement of M. Pertschuk, FTC Chairman). *Cf.* Local 391, Int'l Bhd. of Teamsters v. NLRB, 543 F.2d 1373, 1378 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 967 (1977) (per curiam) (statement of Bazelon, J.) (noting that a division that can count on corporation support during a labor dispute "will obviously have greater bargaining strength than a division which truly stands alone"); Asher, *Secondary Boycotts—Allied, Neutral and Single Employers*, 52 GEO. L.J. 406, 417 (1964) (a union unable to apply pressure directly to the whole of an enterprise is deprived of an economic weapon); Kujawa, *U.S. Labor, Multinational Enterprise, and the National Interest: A Proposal for Labor Law Reform*, 10 L. & POL'Y INT'L BUS. 941, 942 (1978) (the power balance has tipped in favor of business).

[101] Hildebrand, *Coordinated Bargaining: An Economist's Point of View*, in [1968] PROCEEDINGS OF THE ANNUAL SPRING MEETING OF THE INDUS. REL. RESEARCH ASS'N, 524, 526.

[102] The union is at an additional disadvantage if the corporation, in addition to being a conglomerate, is also multinational. A multinational corporation has been defined as "any corporation in which ownership, management, production, and sales activity extend over more than one jurisdiction." GILPIN, SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, THE MULTINATIONAL CORPORATION AND THE NATIONAL INTEREST, 93d Cong., 1st Sess. 14 (1973). Such a corporation presented with a labor dispute can subsidize American subsidiaries with foreign profits or can even decide to move its operations completely outside of the country. *See* Craypo, *supra* note 94, at 19. *See generally* Ross, *American Legal Restrictions on the Use of Union Economic Weapons Against Multinational Employers*, 10 CORNELL INT'L L.J. 59 (1976); Gunter, *Erosion of Trade Union Power Through Multinational Enterprises?*, 9 VAND. J. TRANSNAT'L L. 771, 772 (1976); Comment, *National Labor Unions v. Multinational Companies: The Dilemma of Unequal Bargaining Power*, 11 COLUM. J. TRANSNAT'L L. 124 (1972).

[103] *Pet*, 244 N.L.R.B. No. 6 at 18, [1979-80] NLRB Dec. at 30,193. *See* text accompanying note 77 *supra*.

[104] Alexander, *supra* note 98, at 362. *See* Mueller, *supra* note 100, at 450-51. *Cf. Hearst Publications*, 185 N.L.R.B. at 320 (decision of the trial examiner) (subsidiary or division profits are "fuel for the total corporate body . . . available at its will to sustain any division in a . . . labor dispute").

[105] Brinker, *The Ally Doctrine*, 23 LAB. L.J. 543, 558-59 (1972).

[106] *Pet*, 244 N.L.R.B. No. 6 at 19, [1979-80] NLRB Dec. at 30,193.

[107] Edwards, *The Large Conglomerate Firm: A Critical Appraisal*, in MONOPOLY POWER AND ECONOMIC PERFORMANCE 117-18 (E. Mansfield ed. 1968). *See gen-*

A major goal of labor relations policy is to strike an appropriate power balance, normally as close to equality as possible, between management and labor. This is desirable because the collective bargaining process is jeopardized if either party possesses excessive bargaining power.[108] For the purposes of this Comment, the effect that the recent proliferation of conglomerates has had upon the power balance between management and labor may be assessed by examining the practical constraints placed upon the economic weapons available to a union involved in a labor dispute with a subsidiary or a division of a conglomerate.

A union involved in a labor dispute with a subsidiary, because of section 8(b)(4), will not be able to bring to bear any of its more traditional weapons—boycotts, picketing, or handbilling—on a parent corporation or its noninvolved subsidiaries, unless the handbilling falls within the proviso or unless the nonpublicity activities in a given case are considered to be outside the scope of the section. Thus, unless a union can legitimize its purportedly secondary activity against the parent or other subsidiaries, it will not be able to place pressure on those very units that may be subsidizing the employer with whom the union has its dispute. Such activities will be permitted only under three doctrines. A union may "follow the struck product" [109] or picket a common situs,[110] but these exclusions will not be discussed here because when they apply to a given conglomerate situation it is for reasons basically unrelated to the corporate structure involved. The ally doctrine,[111] however, is directed toward those situations where employers combine their economic forces against a union, and such a combination is more likely to be reasonably alleged by a union when the two employers are related by common ownership. In such a case, the incentive to become allied is greater because of the potential benefit to the long-run profitability of the entire conglomerate in more effectively resisting a union's demands, and the potential for effective aid to the struck

erally Dougherty, *The Case Against Bigness: Politics, Power and Technological Inertia*, 11 ANTITRUST L. & ECON. REV., Issue No. 2 at 41 (1979).

[108] *See* Lodge 76, Int'l Assn. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 146, 146 n.7 (1976); Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 392 (1968); Nat'l Woodwork Mfrs. v. NLRB, 386 U.S. 612, 619 (1967); Local 20, Int'l Bhd. of Teamsters v. Morton, 377 U.S. 252, 259 (1964); NLRB v. Local 639, Int'l Bhd. of Teamsters, 362 U.S. 274, 289 (1960); Local 1976, United Bhd. of Carpenters and Joiners v. NLRB, 357 U.S. 93, 99-100 (1958); G. FARMER, COLLECTIVE BARGAINING IN TRANSITION 56 (1967); St. Antione, *Secondary Boycotts and Hot Cargo: A Study in Balance of Power*, 40 U. DET. L.J. 189, 190 (1962).

[109] *See* note 24 *supra* & accompanying text.

[110] *See* note 25 *supra* & accompanying text.

[111] *See* text accompanying notes 26-32 *supra*.

employer is greater because of the possibility for cross-subsidization.[112] But the doctrine rarely will aid a union bargaining with only one unit of a conglomerate because neither branch of the doctrine generally will facilitate a union's efforts to boycott the other units. The struck-work branch deals exclusively with an outside firm performing the work of a struck firm. It does not cover the other services and financial support that a parent corporation may be supplying to a struck subsidiary.[113] Because a conglomerate has many product lines, only a small portion of the conglomerate is likely to be capable of performing struck work. A parent corporation's aid to its subsidiaries, therefore, is not likely to be in the form of struck work and the union is not likely to reach a substantial portion of a conglomerate under the struck-work branch of the ally doctrine.

It is also difficult for a union to boycott a conglomerate under the single-employer branch of the ally doctrine because, under that branch, the union must prove actual control of the subsidiary by the parent before the Board and the courts will—for the purpose of the NLRA—pierce the corporate veil and treat two commonly owned corporations as one.[114] It is more difficult for a union to establish that a primary and secondary employer are really a single employer than to demonstate that a secondary employer is not neutral because it performs the work of a struck employer.[115] The law requires "more than the existence of 100 per cent common stock control and even more than outright ownership by the same legal entity before two physically separated facilities will be considered a single employer." [116] This requirement has been upheld even when a parent and its subsidiaries have an "inescapable community of interest" [117] in each other's labor policies.

The inflexible application of the actual control test to determine when one part of a conglomerate is allied with another can lead to inequitable results because it may exclude consideration of factors that distort the balance of bargaining power between union and management. Judge Bazelon, filing a separate opinion in

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[112] *See* text accompanying notes 104-107 *supra.*

[113] Brinker, *supra* note 105, at 558-59.

[114] Miami Newspaper Pressmen's Local No. 46 v. NLRB, 322 F.2d 405, 408-09 (D.C. Cir. 1963); J. G. Roy & Sons v. NLRB, 251 F.2d 771, 773-74 (1st Cir. 1958); Shore v. United Bhd. of Carpenters and Joiners, 316 F. Supp. 426, 430 (W.D. Pa. 1970). *See* text accompanying notes 39-44 *supra.*

[115] Engel, *Secondary Consumer Picketing—Following the Struck Product,* 52 VA. L. REV. 189, 205-06 n.63 (1966).

[116] Asher, *supra* note 100, at 417.

[117] Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp,* 19 U. KAN. L. REV. 651, 667 (1971).

Local 391, International Brotherhood of Teamsters v. NLRB,[118] argued that the test is not a "common sense" evaluation of neutrality.[119] A better test would include an assessment of the tactical bargaining advantage an employer gains from a corporate relationship, and "some consideration of the extent to which the corporation is—or appears to be—able and willing to support its divisions (financially and otherwise), if they should become involved in protracted labor disputes." [120] Judge Bazelon thus favors a "wide-ranging, flexible inquiry" by the Board or a court deciding whether two business entities should be treated as a single employer for purposes of distinguishing protected primary from unlawful secondary activity.[121]

The actual control test also suffers from problems of proof. For example, the employer possesses the critical information that the union may need to prove actual control. Although this information can be elicited through the federal discovery process when the General Counsel of the Board initiates an injunction proceeding in district court under section 10(l) of the NLRA,[122] the time pressures inherent in such a proceeding may preclude the fully effective use of discovery procedures.[123] Apart from such discovery, the union can obtain information by cross-examining company officials in the injunction and unfair labor practice proceedings,[124] but

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[118] 543 F.2d 1373, 1378 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 967 (1977) (separate opinion of Bazelon, J.). The *Local 391* decision is a per curiam opinion in which the D.C. Circuit denied a rehearing on a Board decision directing the union to cease and desist from a secondary boycott. Judge Bazelon addressed the ally doctrine issue in a separate opinion filed to explain why he voted to deny rehearing en banc.

[119] *Id.*

[120] *Id.* 1378. A subsidiary or division that can count on the corporate parent's support will "obviously have greater bargaining strength than a division which truly stands alone." *Id.*

[121] *Id.* 1377. Although Judge Bazelon did not specifically endorse a particular approach, he did quote, for purposes of comparison with the actual control test, the test used by the Eighth Circuit in *Royal Typewriter*. *Id.* 1379 n.3. *See* text accompanying note 138 *infra*.

[122] 29 U.S.C. § 160(l) (1976).

[123] The section stresses the importance of quick action in these cases: "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 8(b), . . . the preliminary investigation of such charge shall be made forthwith and given priority over all other cases. . . ." *Id.* Section 10(i) states that "[p]etitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed." 29 U.S.C. § 160(i) (1976). Although a union may indeed be able to gather useful information even with the pressure to move expeditiously with the injunction proceeding—the union in *Pet* was successful in doing so—it is at the least important to note the possibility of the problem arising in any given actual control doctrine case.

[124] Unfair labor practice proceedings are conducted, "so far as practicable," in accordance with the Federal Rules of Evidence. NLRA § 10(b), 29 U.S.C. § 160(b) (1976).

this is an unsure method of obtaining the complicated financial and operating information needed to prove actual control. The union would be wise not to rely on the Regional Director's investigation—in *Pet,* it consisted of two affidavits and a telephone call [125]—because it is initially undertaken under pressured time circumstances, and once a decision is made to file a complaint, the Regional Director has little incentive to pursue evidence establishing the other employer's control of the primary employer.[126]

Another deficiency of the test is that it invites circumvention through cosmetic changes in management procedures and operations. In *Western Union Corp. (United Telegraph Workers),*[127] a section 8(a)(5) case that hinged on whether the parent should have bargained not only for itself but also for some of its subsidiaries, the majority of the Board rejected the union's actual control argument,[128] relying on the fact that the parent's and subsidiary's officers, especially their directors of labor relations, were not the same persons. Member Fanning, however, maintained that the officers might nevertheless be acting under the control of the parent.[129] An implication of this decision is that if a conglomerate with control over its subsidiaries arranges its operations so as to give the appearance of independence by minimizing the most visible signs of control, the Board deciding the case may not undertake an inquiry suf-

[125] Brief for Respondent Before the NLRB at 7 n.4, *Pet.*

[126] *See* note 123 *supra.*

The NLRA does not contain any other provisions which would help a union obtain the information needed to prove actual control. The § 7(d), 29 U.S.C. § 157(d) (1976), obligation of an employer to bargain in good faith requires an employer to furnish the union which represents its employees with certain information needed by the bargaining representatives of the union for the proper performance of their duties. NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967) (citing NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956)). The information an employer is required to furnish, however, is not the data a union needs to prove that a parent actually controls a subsidiary. For example, the employer must furnish wage and other data which aids the union in performing its bargaining obligation, but the employer is not required under section 7(d) to furnish the union with documents concerning the financing and management of subsidiaries. Only this type of financial and management data could establish actual control. *See generally,* B. GOTTLIEB AND C. WERNER, STATUTORY OBLIGATION OF AN EMPLOYER TO FURNISH INFORMATION TO A UNION (1971).

[127] 224 N.L.R.B. 274 (1976).

[128] *Id.* 275, 279. *Cf. Hearst Publications,* 185 N.L.R.B. at 304, 320 (concluding that there was no actual control despite the trial examiner's finding that local management was the instrument of the parent corporation). *But see* Local 391, Int'l Bhd. of Teamsters v. NLRB, 543 F.2d 1373, 1376 (D.C. Cir. 1976), *cert. denied,* 430 U.S. 967 (1977) (stating in dictum that a "specious intra-corporate arrangement, contrived to take advantage of the protection of the secondary boycott provisions of the Act, obviously would stand on a different footing").

[129] 224 N.L.R.B. at 277-79 (member Fanning dissenting).

ficient to uncover the corporate reality, and consequently may treat the parent and its various subsidiaries as separate employers.[130]

IV. Restoring a Balance Between Unions and Conglomerates

A. *The "Present and Apparent Means" Test*

If, as this Comment has argued, unions are often at an unfair disadvantage when bargaining with units of conglomerates [131] and the Board's test for a producer enunciated in *Pet* could be extended to result in too much union activity directed against commonly-owned employers; [132] a new test encompassing both of these concerns is needed to determine the neutrality of secondary employers. The problem of excess conglomerate bargaining power is a general one that should be dealt with in the section 8(b)(4) context of the ally doctrine; the publicity proviso should be used to resolve those problems when there really is a producer-distributor nexus apart from the intracorporate financial structure.[133]

One commentator has suggested that the neutrality of commonly owned corporations be evaluated by determining whether the union activity at issue strikes the same "economic purse" at the primary and "secondary" sites.[134] If so, the secondary employer would not be considered neutral. Common ownership alone, under this test, would be a sufficient basis for treating two corporations as a single employer. This test is too broad, however. It sets up a per se rule that, when applied to commonly owned corporations that should be considered separate employers, would defeat the congressional intent to limit the expansion of labor disputes.[135] It thus suffers from the same defect as the *Pet* test.[136]

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[130] This problem of potential subterfuge is explored in Comment, *The Single Employer Doctrine as Applied to Section 8(b)(4) of the National Labor Relations Act*, 28 Cath. U. L. Rev. 555, 581-83 (1979).

[131] *See* text accompanying notes 108-29 *supra*.

[132] *See* text accompanying notes 84-93 *supra*.

[133] *See* notes 68-79 *supra* & accompanying text.

[134] Asher, *supra* note 100, at 418. The economic purse test illustrates that a parent and a subsidiary are not "neutral" in the sense that the outcome of a labor dispute affects the profitability of both. *See also* Brinker, *supra* note 100, at 558 (suggesting that commonly owned firms operating independently should be considered allies rather than neutrals); Comment, *supra* note 130, at 584-85 (suggesting a common financial control test); Comment, *Consumer Picketing of Economically Interdependent Parties:* Retail Store Employees Local 1001 v. NLRB (Safeco Title Insurance Co.), 32 Stan. L. Rev. 631, 642-45 (1980) (suggesting that economically interdependent parties should be considered allies).

[135] *See* note 33 *supra* & accompanying text. *Cf.* Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1415 (1962) (the legislative desire to discourage the "metastasis of labor disputes" was a major basis for restricting secondary activity).

[136] *See* notes 68-89 *supra* & accompanying text.

The type of flexible inquiry that is needed to accommodate both sides' legitimate interests was employed in the context of sections 8(a)(1) & (5) in *Royal Typewriter Co. v. NLRB*.[137] There, the Eighth Circuit held that Litton Industries, the parent, and Royal, its subsidiary, were allied under the single employer theory, even though Litton did not participate in Royal's day-to-day labor relations. The court stated that the proper test is whether the parent corporation has

> 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.[138]

It is submitted that the best standard for determining whether the various units of a conglomerate should be treated as a single employer for the purposes of section 8(b)(4)(B) is a variation of *Royal Typewriter's* "present and apparent means" test. The *Royal* test has not yet been applied to a section 8(b)(4)(B) situation.[139] If it were applied in this context, however, it would begin to redress the present imbalance of economic power favoring conglomerates.[140] It would more fairly determine when an unfair labor practice has been committed against a neutral employer because it recognizes that a parent corporation may achieve a bargaining advantage by having the present and apparent means to accomplish its objectives without needing to exercise actual control. It would not go far enough, however, because it requires *both* a tactical advantage and the present and apparent means of control, and therefore is subject to the problem of subterfuge.[141] Under the *Royal* test, a conglomerate could avoid a single-employer determination so long as the parent company did not permit "the

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[137] 533 F.2d 1030 (8th Cir. 1976). Judge Bazelon called for a similar inquiry in Local 391, International Brotherhood of Teamsters v. NLRB, 543 F.2d 1373, 1377-79 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 967 (1977). *See* notes 118-21 *supra* & accompanying text.

[138] *Id.* 1043. Litton met this test because it "reserved to itself a role in major expenditures, budget control, acquisitions and plans, including any decision to close a plant"; provided labor relations advice to subsidiaries; and sent its director of labor relations to sit in on negotiations with the union. *Id.* 1041-42.

[139] Royal was charged with violating §§ 8(a)(1) & (5) of the NLRA, pertaining to unlawful restraint of union activities and failure to bargain in good faith. *Id.* 1034.

[140] *See* notes 97-107 *supra* & accompanying text.

[141] *See* notes 127-29 *supra* & accompanying text.

local negotiators to so represent the situation [of parent company control] to union negotiators for the purpose of achieving a tactical or strategic objective." [142] Absent such representations, the union negotiators might still be aware of and affected by the imbalanced bargaining situation, yet the Board or a court applying the test could not make a single-employer finding.

This Comment proposes that the *Royal Typewriter* "present and apparent means" test be modified for use by the Board and courts in the section 8(b)(4) context by eliminating the test's tactical or strategic advantage requirement.[143] A procedure should be adopted that, first, requires a preliminary showing from the union that the parent corporation has complete, or close to complete, ownership of the primary employer.[144] Once such ownership is demonstrated, it would be presumed that the parent corporation possesses the present and apparent means to materially influence the outcome of a labor dispute.[145] The burden having

[142] *Royal Typewriter*, 533 F.2d at 1043.

[143] For convenience, this Comment refers to the application of the proposed test as by the Board and the Courts, but, as noted above, before a case ever reaches the Board it is heard by a NLRB regional attorney and an administrative law judge. *See* note 27 *supra*. In any given case, the proposed procedure would be utilized first by the regional attorney who must decide whether to file an unfair labor practice complaint against the union. If a complaint is issued, an administrative law judge would then be required to use the proposed standard to make a judgment whether the complaining employer is in fact neutral, *see* note 27 *supra;* if no complaint is issued by the regional attorney (or by the General Counsel, his superior, on appeal), the decision is nonreviewable (by the administrative law judge) and the matter ends there. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

A hearing before an administrative law judge is similar to a normal hearing in federal district court. Although the NLRB is technically the complainant, the employer claiming neutrality also has the opportunity to present evidence substantiating its claim. R. GORMAN, *supra* note 23, at 8. To the extent practicable, the hearing operates under the Federal Rules of Evidence. NLRA § 10(b), 29 U.S.C. § 160(b) (1976).

[144] Complete or close to complete ownership should mean, at the least, more than fifty-percent ownership. The exact figure chosen will necessarily be somewhat arbitrary, but this should not preclude making such a finding. Determinations of this nature frequently are made in other contexts. *See, e.g.*, I.R.C. §§ 1501-1504, 1563(a)(1) (80% stock ownership or voting power required for affiliated group of corporations to file consolidated tax returns or receive a single surtax exemption); ALI-ABA MODEL BUS. CORP. ACT § 75 (1979 (90% ownership of shares of each class of another corporation needed for a "short merger"); DEL. CODE ANN. tit. 8, § 253 (1975) (90% ownership of shares needed for "short merger").

[145] To execute the proposal's shifting of the burden of proof of neutrality upon a finding of common ownership, various procedures could be used. For example, the burden could shift when the union avers common ownership in its answer to the complaint, if its averment were accompanied by some manner of documentary proof. Cases that are appealed from the administrative law judge to the Board itself are usually disposed of on the basis of written briefs and records; few restrictions exist on the Board's scope of decision. *See generally* R. GORMAN, *supra* note 23, at 7-9. Under the proposed standard, it would be incumbent upon the commonly-owned employer to argue from the record established below that it does

shifted to the parent corporation, it would use the information it possesses relevant to the single employer determination to try to rebut the presumption that it has the present and apparent means to materially influence the outcome of a labor dispute. If the parent cannot rebut the presumption, all of the units of the conglomerate should constitute the primary employer and union activity should be permitted against all of its operations.[146]

The indicators currently used by the Board to determine whether actual control exists—interrelation of operations, common management, and centralized control of labor relations—should be relevant to the rebuttal. These should be defined broadly and used to assess the parent's present and apparent means of control, rather than to demonstrate the presence or absence of actual control. Moreover, to prevent the test from becoming too rigid, the Board and the courts should not hesitate to consider additional factors when warranted.[147] It should remain an "all the circumstances" test, with no one rebuttal factor controlling.

The proposed test retains the positive features of current law. It is not meant to apply to non-conglomerates, and therefore would not preclude a union from demonstrating under the traditional ally doctrine that two corporations that do not have a high degree of common ownership are nonetheless allies. It also would allow the employer to rebut the presumption of common control even when two unincorporated divisions—rather than separately incorporated divisions—of a single corporation are involved, al-

not have the present and apparent means to influence the outcome of the labor dispute.

There is no reason why a corporation, considered a separate entity for corporate law purposes, must also be considered a separate entity for secondary boycott purposes. Policy considerations in these two areas are very different. The labor law policies of protecting neutral employers from disputes not their own while protecting the union's right to exert legitimate economic pressure can be fostered by changing the ally doctrine without infringing upon the corporate law policies of limiting liability and fostering capital formation. *See generally* R. HAMILTON, CORPORATIONS 8 (1976).

146 This test presumes that at a minimum the parent corporation possesses potential control which can be readily converted into active control. The extension of the primary dispute to all of the subsidiaries and divisions of a conglomerate, rather than just the parent, is necessary because, if the parent functions only as a holding company, a standard enabling the union to extend the dispute only to the parent and not to the other units would not provide the union with any additional economic leverage. Moreover, even if the parent itself conducts business operations, it derives additional strength, which could be used during a labor dispute, from its other subsidiaries.

147 For example, whether a struck subsidiary has been operating at a loss or was recently acquired by the parent corporation may be relevant to a neutrality determination. The Board may be able to infer from these factors that a parent corporation would be likely to retain the present and apparent means to interfere in the labor relations of an unprofitable or recently acquired company.

though the employer might have a very difficult case in such situations, because unincorporated divisions of a corporation "may be created or abolished [by the parent corporation] without even the stroke of a pen." [148]

The proposed test has several advantages over the actual control test. First, it is specifically designed to resolve the problem of imbalanced bargaining power.[149] By allowing unions to place pressure on all those employers that have the capability and are likely to indirectly interfere in negotiations with primary employers, it is hoped that the balance would move toward the equilibrium envisioned by Congress in passing the National Labor Relations Act.[150]

Second, the proposed test would reduce the likelihood of subterfuge.[151] It is of course unlikely that this problem can be completely eliminated, but the present and apparent means test is advantageous in that it does not give undue weight to factors that are particularly vulnerable to the problem. For example, the test does not require the overt participation of the parent corporation in the subsidiary's labor negotiations. Instead, it recognizes that involvement of this nature may be present but not detectable by outsiders. Shifting the burden of proof from the union to management properly places it upon the party with the best access to relevant information, which would make it more difficult for management to cover up evidence that is probative of the type of relationship between the parent and subsidiary.

Third, adoption of the proposed test would help to remedy the unions' bargaining problems with conglomerates while remaining consistent with the legislative intent behind section 8(b)(4)(B) of the NLRA.[152] Congress wished to protect neutrals from the labor

[148] British Indus. Co. (Local 475, Int'l Union of Elec., Radio & Mach. Workers), 218 N.L.R.B. 1127, 1134 (1975). Protection from union economic weapons should not depend on "the fortuitous structuring of a business organization." Goetz, *supra* note 117, at 667.

[149] *See* notes 97-107 *supra* & accompanying text.

[150] *See* note 108 *supra* & accompanying text.

[151] *See* notes 127-30 *supra* & accompanying text.

[152] In enacting the Landrum-Griffin Act, Congress rejected a proposal that would have excluded from the definition of the 8(b)(4) terms "person" and "other person," "businesses doing business with one another when one is owned or controlled by the other or is owned or controlled substantially in common." 105 CONG. REC. 17,881 (1959), *reprinted in* 2 LEG. HIST., *supra* note 33, at 1425. The legislative history does not explain why this amendment was rejected. Although an argument could be made that Congress demonstrated its approval of the then-existing state of the law by rejecting the amendment, this argument would not seem to apply to the conglomerate question. At the time of passage, Congress may have failed to perceive the importance of deciding when subsidiaries should be treated as separate employers for secondary boycott purposes, or may have thought

disputes of other employers, and the test would work toward that end by keeping a given dispute within the clearly defined limits of the conglomerate, and by allowing the complaining employer to show that it or its parent does not have the means to control the primary employer's labor relations.

Finally, the proposed test would resolve the problem of publicity proviso interpretation that arose in *Pet*. If all of the units of a conglomerate are considered to constitute a single "person," union handbilling activities directed against all of them are legal. The Board, in order to establish the legitimacy of such activity, would not need to resort to a strained interpretation of the proviso that places no effective limitation on the definition of "producer." [153]

B. *Applying the Proposed Test*

The following situations illustrate how the present and apparent means test, if adopted, would operate differently than the actual control test. If the union in *Pet* had struck, rather than handbilled, various units of the entire conglomerate, an examination of the actual control branch of the ally doctrine would have been necessary. Under the actual control test, the Board would have found common ownership, but in all probability no parent corporation control over Hussmann's daily operations or labor relations.[154] Pet

it better to leave this issue to future resolution by the Board and the courts. Comment, *supra* note 130, at 562-63. Moreover, even if Congress had intended to resolve the single employer issue for large corporations in general, it might have decided the issue differently had it specifically considered the conglomerate problem. The trend toward conglomerate expansion was only beginning at the time the 1959 amendments were debated, so Congress probably would not have foreseen that the distinctions between the structure of conglomerates and other large corporations had ramifications in the labor area—the most important being that a union's use of its traditional economic weapons is more likely to be lawful under the NLRA when it is dealing with a vertically or horizontally integrated corporation than when it is dealing with a diversified conglomerate. *See* text accompanying notes 111-17.

[153] *See* notes 84 & 85 *supra* & accompanying text.

Another way that the *Pet* Board could have avoided using such an overly broad test while permitting the union to publicize its position would have been for it to base its decision on the freedom of speech issue raised by the union. *See* Brief for Respondent at 58-66, United Steelworkers (Pet, Inc.), 244 N.L.R.B. No. 6 (Aug. 10, 1979), [1979-80] NLRB Dec. ¶ 16,127, at 30,188, *appeal docketed*, No. 79-1852 (8th Cir. Oct. 10, 1979). The Board, however, found it unnecessary to address the issue because it decided the case in the union's favor based on its interpretation of the proviso. Although reasonable conflicting statutory interpretations should be resolved in favor of the one that does not require a constitutional adjudication, United States v. CIO, 335 U.S. 106, 121 (1948), unreasonable statutory interpretations should not be relied upon to avoid these questions. The Board should either adopt a test that is based upon a more reasonable interpretation of the NLRA than is its *Pet* test, *see* notes 68-77 *supra* & accompanying text, or it should confront the constitutional issue raised by the union.

[154] *See Pet*, 244 N.L.R.B. No. 6 at 6-7, [1979-80] NLRB Dec. at 30,189.

thus would not have been considered allied with Hussmann. In contrast, under the present and apparent means test, the Board would first raise a presumption of control by the parent corporation because Hussmann is a wholly-owned subsidiary of Pet. Pet would then try to rebut this presumption by demonstrating that the means of control do not exist. It would present evidence showing, for example, that each of its divisions has a separate financial system and operates "essentially" as an independent business entity, and that division presidents have complete control over day-to-day operations and labor relations in their divisions.[155]

The union would in turn seek to demonstrate that Pet did have the means to materially influence the outcome of the labor dispute. It could show that Pet had in the past made an unsecured, interest-free loan to Hussmann with no stated repayment schedule and had provided Hussmann with legal services, including representation in labor arbitrations; further, the union could point out that Pet currently maintains national purchasing accounts, centrally administers a division executive and salaried employee benefit program, sets division policies on matters ranging from taxes and accounting to employment practices, and is responsible for long-range planning, major capital expenditures, and other management functions. Finally, the union could point to Hussmann's negative cash flow position with its parent since the end of fiscal year 1973.[156]

Although the Pet situation presents a close case, the application of the proposed test should lead to the finding that Pet has the present and apparent means to control Hussmann, so that the Pet conglomerate should be treated as a single employer. Pet's ability to control is indicated, first, by the policies Pet established for Hussmann. But more importantly, control is indicated by the amount of indebtedness—formal and otherwise—Hussmann has incurred in relation to Pet. Assuming Pet acts rationally in the economic sense, it is difficult to believe that it has not replaced its lack of traditional business controls over its borrower with more subtle controls, ready to become more overt if Hussmann's financial situation one day calls for such action.

Applying the proposed test to the *Hearst Publications* fact pattern,[157] all of the units of the Hearst corporation would probably be

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[155] *Id.*

[156] *Id.* at 7-10, [1979-80] NLRB Dec. at 30,189-90.

[157] Los Angeles Newspaper Guild Local 69 (Hearst Publications), 185 N.L.R.B. 303, *enforced per curiam*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972). *See* text accompanying note 44 *supra* for description of fact pattern and holding.

considered a single employer. The division heads were delegated responsibility for the day-to-day operation of its divisions, but the parent retained a ten thousand dollar limit on division spending absent parent approval, provided a centralized pension and insurance program, and did not separately incorporate the divisions.[158] The ten thousand dollar limitation alone clearly suggests that Hearst retained the means to control its divisions. Consequently, the Hearst corporation, absent a very convincing countervailing consideration, would not be able to rebut the presumption that its divisions should be treated as parts of a single employer. If that is indeed the case, the use of the present and apparent means test here would result in a different outcome than that actually arrived at by the Board using the actual control test.[159]

Royal Typewriter presents an easier case than either *Pet* or *Hearst*.[160] Although not involved in Royal's labor relations on a day-today basis, the parent was heavily involved in the formation of significant policies of concern to the union; moreover, this involvement was apparent to the union. Thus, just as the Board and appellate court found for the union in the employer unfair labor practice context, the Board would find for the union in the secondary boycott context if it uses the proposed test; under the actual control test, the union would probably not be able to carry its burden.

The proposed test would operate more broadly than the overly narrow actual control test, and more narrowly than the overly broad economic enhancement test. For example, if a corporate lender has advanced funds to another corporation involved in a labor dispute, the contribution of capital and the expectation of profit might be sufficient under the economic enhancement test to allow a union to boycott the lending corporation. If the Board applies the present and apparent means test, however, no presumption of control would be raised because there is little or no common ownership. The two corporations would therefore be treated as separate employers under the traditional ally doctrine. Likewise, when each of two commonly-owned businesses contributes profits to the owner, but each is truly independent from the other, use of the economic enhancement test might favor the union because of the expected profits to the common

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[158] *Hearst Publications*, 185 N.L.R.B. at 304.

[159] *Id.; see text* accompanying note 44 *supra.*

[160] Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976); *see* text accompanying note 138 *supra.*

owner. If these two businesses are clearly operated independently of each other, however, under the present and apparent means test they would not be considered a single employer because the presumption of control arising from common ownership could be rebutted. The proposed test thus would prevent the spread of industrial disputes to situations in which the corporate structure does not result in a bargaining power imbalance.

V. Conclusion

The Board in *Pet* extended the definition of "producer" for purposes of the section 8(b)(4) publicity proviso by changing from a line-of-production test to an economic enhancement test. Although the Board was legitimately desirous of protecting the steelworkers' right to urge a consumer boycott of a parent corporation having the ability to control its subsidiary, the reasoning it used to protect the union's right may in the future be extended unjustifiably far in organized labor's favor. A union may be allowed to use publicity to harm an employer who is really neutral with respect to the primary labor dispute. Further, if the *Pet* test is extended beyond the publicity proviso context—as it might well be if its reasoning is in the future applied without arbitrary limits—neutral employers would be put at an even greater disadvantage. This Comment has argued that the solution is not to continue to use the economic enhancement standard for proviso cases while maintaining the rigid actual control test for all other section 8(b)(4)(B) cases involving conglomerates. Rather, the Board should seek to accommodate employers' and unions' interests by using a "present and apparent means of control" test to make an initial finding whether the union is engaging in any secondary activity. A presumption of control would be raised by a showing of common ownership, and if the parent cannot rebut this presumption, the Board would make a single-employer finding. This standard is directed more toward the strategic and tactical realities of union-employer bargaining than are the current approaches to section 8(b)(4)(B) and its publicity proviso, and it is hoped that, if adopted, it would not only help to further Congress' goal of relatively balanced bargaining power, but would also help the Board avoid advancing such strained analyses in this important area of labor law.