LABOR LAW—WORK STOPPAGES CALLED TO PROTEST ACTIONS OF A FOREIGN STATE ARE LABOR DISPUTES SUBJECT TO THE PROHIBITION AGAINST SECONDARY BOYCOTTS OF SECTION 8(b)(4) OF THE NATIONAL LABOR RELATIONS ACT

In response to the Soviet invasion of Afghanistan, President Carter imposed an embargo upon exports to the U.S.S.R.[1] Subsequently, International Longshoremen's Association (ILA) President Thomas W. Gleason ordered the immediate suspension of handling of Soviet ships and cargoes by ILA workers from Maine to Texas and Puerto Rico.[2] ILA members in various ports complied with that directive.[3] Allied International, a United States importer of Soviet wood products, had contracted with a United States shipper for transport of products from the Soviet Union. The shipper employed a stevedoring company to unload the cargo. Members of ILA Local 799 in Boston, acting on Gleason's orders, refused to unload Allied's cargo.[4]

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[1] The controls were implemented by regulations issued by the Department of Commerce on January 7, 1980. *See* 45 Fed. Reg. 1883 (1980) (to be codified at 15 C.F.R. parts 376, 386 and 399). The controls were issued pursuant to a presidential directive, under authority granted by the Export Administration Act of 1979. 50 U.S.C. app. § 2401 (Supp. IV 1980). For further discussion, *see* Walczak, *Legal Aspects of the U.S.S.R. Grain Embargo*, 10 DEN. J. INT'L L. & POL'Y 279 (1981).

[2] Walsh v. Int'l Longshoremen's Ass'n, 488 F. Supp. 524, 526 n. 1 (D. Mass. 1980). The statement was as follows:

> In response to overwhelming demand by the rank and file members of the union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.
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> This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a water front will be worked until completion.
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> The reason for this action should be apparent in light of international events that have affected relations between the U.S. and the Soviet Union.
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> However, the decision by the union was made necessary by the demands of the workers. It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.
>
> People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the union leadership concurs.

[3] *See, e.g.*, Baldovin v. Int'l Longshoremen's Ass'n, 626 F.2d 445 (5th Cir. 1980); Mack v. Int'l Longshoremen's Ass'n, 626 F.2d 445 (5th Cir. 1980); Walsh v. Int'l Longshoremen's Ass'n, 488 F. Supp. 524 (D. Mass. 1980). When the Court was confronted with the *Allied* appeal, it also considered an action affirming the role of arbitration in such disputes. New Orleans S.S. Ass'n. v. Gen. Longshore Workers, 626 F.2d 455 (5th Cir. 1980), *cert. granted sub nom.*, Jacksonville Bulk Terminals, Inc. v. ILA Local No. 1408, 622 F.2d 455 (5th Cir. 1980), *cert. granted,* 450 U.S. 1029 (1981).

[4] Eventually, the union agreed to unload a shipment, but only in Boston. This forced

Allied responded to the ILA boycott by filing an unfair labor practice charge with the National Labor Relations Board.[5] The Board found that the union activity constituted a secondary boycott, in violation of sections 8(b)(4)(i) and 8(b)(4)(ii)(B) of the National Labor Relations Act (Act).[6] The Board and the Acting Regional Director petitioned the federal district court for a preliminary injunction against the local.[7] The court held that the union action did not constitute a secondary boycott. The petition was denied on the grounds that it was an expression of political protest; thus, in effect, it was construed as a primary boycott against the Soviet Union with incidental effects on the employers.[8] Consequently, Allied sued for damages.[9] The district court granted an ILA motion for summary judgment and dismissed the complaint for failure to state a claim.[10]

On appeal to the First Circuit, the decision was reversed and

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the importer to offload the entire shipment, portions of which were destined for other ports. Allied's shipments were disrupted, which forced the company to renegotiate its contracts.

A common element in the collective bargaining agreements in *Allied* and the aforementioned cases are "no-strike" and "arbitration" clauses such as the following:

1. In pertinent part, the language is as follows:
   "(a) *No Strikes—No Lockouts*
   There shall be no strikes, work stoppages, nor shall there be any lockouts.
   (b) *Disputes Procedure and Arbitration*
   The parties accept the principle that any dispute involving the interpretation or application of the terms of this agreement shall be resolved in an orderly and expeditious manner. They commit themselves to the procedure outlined below . . . and failure to deal with disputes under the disputes procedure shall constitute a violation of this agreement.
   (c) These steps shall be followed to insure prompt resolution of disputes. The arbitrator's authority shall be limited to interpretation and application of the terms of this agreement . . . . The arbitrator shall have no authority to render decisions which have the effect of adding to, subtracting from, or otherwise modifying the terms of this Agreement."

New Orleans S.S. Ass'n v. Gen. Longshore Workers 626 F.2d 455, 459 n. 1 (5th Cir. 1980).

[5] Int'l Longshoremen's Ass'n., 257 N.L.R.B. 151 (1981).

[6] *Id.*; 29 U.S.C. §§ 158 (b)(4)(i), (b)(4)(ii)(B) (1976).

[7] Walsh v. Int'l Longshoremen's Ass'n, 488 F. Supp. 524 (D. Mass. 1980). The injunction was sought pursuant to § 10(i) of the Act.

[8] Walsh v. Int'l Longshoremen's Ass'n, 488 F. Supp. 524, 531. The Acting Regional Director appealed. *See* Walsh v. Int'l Longshoremen's Ass'n, 630 F.2d 864 (1st Cir. 1980) (vacated and remanded).

[9] Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 492 F. Supp. 334 (D. Mass. 1980). The complaint paralleled the N.L.R.B. charge of violation of sections 8(b)(4)(i), 8(b)(4)(ii)(B), for which Allied had a private right of action under § 303 of the Labor-Management Relations Act. 29 U.S.C. § 187 (1976). Additionally, Allied alleged that the boycott violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (as amended, 1975), and subjected the union to maritime tort liability. A divided court of appeals rejected the antitrust and tort claims. Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1980) (Aldrich, J., concurring and dissenting.)

[10] In so doing, the court relied on its holding in Walsh v. Int'l Longshoremen's Ass'n, 488 F. Supp. 524, *supra* note 7.

remanded.[11] The court held that elements of a violation of section 8(b)(4)(ii)(B) were established, and that the ILA actions were "in commerce" within the meaning of the Act, even though inspired by the military actions of a foreign power.[12]

Certiorari was granted by the United States Supreme Court:[13] *held*, affirmed. "Political" secondary boycotts are not excluded from the scope of section 8(b)(4)(B) where the effects reasonably can be expected to threaten neutral parties with ruin or substantial loss. *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*, 102 S. Ct. 1656, ____ U.S. ____ (1982).

The issuance of restraining orders or injunctions "in any case involving or growing out of any *labor dispute*" is restricted.[14] Title 29, United States Code section 113(c) defines *labor dispute* in the following manner:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.[15]

Attempts to invoke federal jurisdiction typically are predicated upon section 301(a) of the Labor-Management Relations Act.[16]

The nature of the underlying dispute becomes significant when attempts are made to characterize it as a "labor dispute." Thus, the inquiry shifts to a determination of the parties involved. The ILA actions against the Soviet Union were not unprecedented. During the Cuban missile crisis, the ILA boycotted all ships involved in trade with Cuba.[17] Similarly, the union previously had refused

[11] Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1980).

[12] *Id.*

[13] Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 640 F.2d 1368 (1st Cir. 1980), *cert. granted*, 102 S. Ct. 90 (Oct. 5, 1981) (No. 80-1663).

[14] 29 U.S.C. §§ 104-115. (emphasis added).

[15] Section 13(c) of the Act, 29 U.S.C. § 113(c) (1932). In situations where the nature of the dispute does not lend itself to an immediate characterization as a "labor dispute," litigation results, particularly when there is an underlying element of political expression involved.

[16] 29 U.S.C. § 185(a) (1947). Section 101 of the Act, 29 U.S.C. § 151 (1947), encourages the disposition of labor-management disputes through arbitration. Hence, the characterization of a "dispute" is frequently tied to its arbitrability. *See, e.g.*, Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) (where the issue involved is the meaning of a no-strike clause, which itself is subject to arbitration, it is improper for courts to rule prior to arbitrator's decision); Boys Mkts, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) (a strike is enjoinable if the grievance in question is subject to arbitration).

[17] *See*, Penello v. Int'l Longshoremen's Ass'n, 227 F. Supp. 164 (D. Md. 1964) (a politically motivated action is a "labor dispute" subject to N.L.R.B. jurisdiction).

to load grain bound for the Soviet Union until the president of the ILA was satisfied that the interests of the United States public were safeguarded.[18] However, in that instance the Fifth Circuit held that such a "political dispute" was not a "labor dispute."[19] At about the same time, ironically, a separate panel of the Fifth Circuit found that a strike protesting the importation of South African coal was a "labor dispute" within the meaning of the Act.[20]

Section 8(b)(4) of the National Labor Relations Act prohibits union actions such as strikes, refusals to handle materials, or threats or coercion, with the object of forcing one party to cease or restraining one party from conducting business with any other party.[21] The Supreme Court developed a two-tier test to identify violations of section 8(b)(4) in *Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*[22] "Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with another person."[23] The purpose of section 8(b)(4) is to "shield . . . unoffending employers and others from controversies not their own" while at the same time protecting the right of labor organizations to bring pressure on offending employers in primary disputes.[24] Section 8(b)(4)(i) confines the prohibition against second-

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[18] W. Gulf Maritime Ass'n v. Int'l Longshoremen's Ass'n, 413 F. Supp. 372, 376 (S.D. Tex. 1975), *aff'd summarily*, 531 F.2d 574 (5th Cir. 1976).

[19] *Id.*

[20] United States Steel Corp. v. United Mine Workers, 519 F.2d 1236 (5th Cir. 1975), *reh'g denied*, 526 F.2d 377 (1976), *cert. denied*, 428 U.S. 910 (1978). *See also* Khedivial Line, SAE v. Seafarer's Int'l Union, 278 F.2d 49 (2d Cir. 1960); *But cf.*, N.L.R.B. v. Int'l Longshoremen's Ass'n (Ocean Shipping), 332 F.2d 992 (4th Cir. 1964) (politically motivated boycott is not a "labor dispute" within the meaning of the Act).

[21] 29 U.S.C. § 158(b)(4) reads as follows:

> (b) Unfair labor practices by labor organization
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> It shall be an unfair labor practice for a labor organization or its agents—
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> . . .
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . .
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

Id.

[22] Local 1796, United Bhd. of Carpenters v. N.L.R.B., 357 U.S. 93 (1958).

[23] *Id.* at 98.

[24] Nat'l Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612 (1966). Section 8(b)(4)(ii)(B) of

ary boycotts to situations involving employers or industries "engaged in commerce."[25] This jurisdictional threshold becomes relevant in a labor activity involving some form of foreign rather than domestic action.

In *Benz v. Compania Naviera Hidalgo*, the Court held that the protections of the Act did not extend to picketing by United States unions in support of a strike by foreign seamen against their foreign employers.[26] Such activity has been found to be "not in commerce" within the meaning of the Act.[27] The essence of the *Benz* holding and subsequent cases on point is that United States labor laws are not intended "to resolve labor disputes between nationals of other countries operating ships under foreign laws."[28] Accordingly, the Court has held that picketing of foreign ships to protest wages paid to non-union United States workers falls within the meaning of "in commerce" as defined by section 2(6) of the Act.[29]

This trend was reaffirmed by the Court in *Windward Shipping (London) Ltd. v. American Radio Association.*[30] In *Windward Shipping*, the Court again held that picketing of foreign ships to protest wages paid to foreign crews was not activity "affecting commerce" within the meaning of the Act.[31] The Court reached the same conclusion in *American Radio Association v. Mobile Steamship Association.*[32] Although *Mobile Steamship* arose from the same incident as *Windward*, it can be distinguished by the fact that a United States company sought the injunction. The Court refused to bifurcate its analysis simply because the same activity generated both foreign and domestic repercussions. Thus, the Court recog-

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the Act protects unions when engaged in primary activity regardless of the impact upon neutral employers. The distinction between "secondary boycotts" and the protected "primary boycotts" has been the subject of considerable litigation, with conflicting results. *See generally* Electro-Coal Transfer Corp. v. Gen. Longshore Workers, 591 F.2d 284, 290 (5th Cir. 1979). (A "primary" boycott exists where the activities are addressed to the labor relations of the contracting employer. A "secondary" boycott is calculated to satisfy union objectives elsewhere.) *See also* Hoffman & Sons, Inc. v. Int'l Bhd. of Teamsters, 617 F.2d 1234 (7th Cir. 1980). *Cf.* Local 1976 United Bhd. of Carpenters v. N.L.R.B., 357 U.S. 93, 98 (1958) (section 8(b)(4) is not a sweeping prohibition).

[25] 29 U.S.C. § 158(b)(4), *supra* note 21. "Commerce" is defined in 29 U.S.C. § 152(6) (1976). "Affecting Commerce" is defined in 29 U.S.C. § 152(7) (1976).

[26] Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957).

[27] Incres S.S. Co. v. Int'l Maritime Workers Union, 372 U.S. 24 (1963); McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963).

[28] Benz v. Compania Naviera Hidalgo, 353 U.S. at 143.

[29] Int'l Longshoremen's Ass'n, Local 1416 v. Ariande Shipping Co., 397 U.S. 195, 200 (1970). *See supra* note 25.

[30] Windward Shipping (London) Ltd. v. Am. Radio Ass'n, 415 U.S. 104 (1974).

[31] *Id.* The Court reached this conclusion despite the fact that the avowed purpose of the activity was to publicize the competitive advantage enjoyed by the foreign shippers as a result of their wage scales.

[32] Am. Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215 (1974).

nized that the response of the United States employers was a "crucial part of the mechanism" by which the union's foreign objective was to be satisfied.[33]

The foregoing reveals the two-step analysis developed in approaching 8(b)(4) situations. The first step characterizes the underlying dispute to determine if it is "in commerce," by examining both the object of the union activity and the response of the foreign entity. The second step examines whether the domestic effects of the activity can be severed to identify an independent domestic dispute that is subject to regulation under the Act.[34]

Justice Powell, writing for a unanimous Court, asserted that section 8(b)(4) is "aimed precisely at the sort of activity alleged in this case."[35] The opinion began the "in commerce" phase of the two-step analysis by addressing the ILA contentions that the activity was not in commerce and, alternatively, that it was not the sort of secondary boycott Congress intended to proscribe.[36]

Justice Powell reviewed the *Benz-Windward-Mobile* line of cases to identify the jurisdictional limits of United States labor law. He reaffirmed that this line of cases does not permit a bifurcated view of the effects of the union activity.[37] Powell recognized that *Allied* was distinguishable from the *Benz* line of cases in that "[t]his drama was 'played out by an all-American cast.'" The Court held that

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[33] *Id.* at 220-24. Curiously, it was the union that was arguing in favor of a finding that a secondary boycott existed. In so doing, it desired the removal of the case from the jurisdiction of the state courts to the presumably more sympathetic jurisdiction of the N.L.R.B. Note the strong dissents by Justice Stewart, Douglas, Brennan and Marshall. *Id.* at 234-44.

[34] *See, e.g.*, Baldwin v. Int'l Longshoremen's Ass'n, 626 F.2d 445 (5th Cir. 1980). *Baldwin* arose from the same boycott as in *Allied*. Although the court determined that there was a "secondary boycott" within the accepted sense of the term, the court found that the fact that the boycott was directed against the Soviet Union removed it from the constraints of the Act, despite an incidental effect upon United States commerce. Thus, the court applied *Windward* and *Mobile* to deny the injunction. *Cf.* Walsh v. Int'l Longshoremen's Ass'n, 488 F. Supp. 524, 528 (D. Mass. 1980), *vacated and remanded* (on different grounds), 630 F.2d 864 (1st Cir. 1980) (dismissal on grounds of res judicata). The *Walsh* court held that the same activity clearly affected commerce due to the effect it has on the consignee (Allied).

This dichotomy belies the fact that the Supreme Court has noted that directing a boycott toward a foreign entity need not automatically preclude N.L.R.B. jurisdiction. Am. Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 225 n. 10 (1974). However, the *Mobile* rejection of a bifurcated approach was substantiated by the First Circuit in *Allied*. *See also* Grain Elevator Workers v. N.L.R.B., 376 F.2d 774 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 932 (1967); Madden v. Grain Elevator Workers, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965).

[35] Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., No. 80-1663, 102 S. Ct. 1656, ___ U.S. ___ (1982).

[36] *Id.*

[37] *Id.* *See supra* note 34.

the *Benz* principles were applicable and conclusive of a finding that the language of the Act and its elements were satisfied.[38]

In applying the second step of the analytical framework, Powell reasserted that the prohibition against secondary boycotts in section 8(b)(4)(ii)(B) was clearly applicable in this case.[39] Although the objectives of the boycott were characterized as "understandable and even commendable," the fact that the "certain effect of its action is to impose a heavy burden on neutral employers" was dispositive in construing the secondary boycott provisions.[40] Thus, the Court applied the *Carpenters v. N.L.R.B.* test.[41] The Court maintained that the congressional objectives in enacting the secondary boycott provisions included protection of employers from disputes that are not their own.[42] The disruption of Allied's business was a reasonably foreseeable consequence of the boycott. This foreseeability overcame the ILA defense that the object of the boycott was to free ILA members from handling objectionable goods.[43] Similarly, the opinion rejects the contention that "political boycotts" are exempt from the section 8(b)(4) prohibitions.[44]

Finally, Justice Powell noted entrenched precedent to reject the ILA contention that application of section 8(b)(4) infringes upon their first amendment rights.[45] The characterization of this conduct as coercive and not communicative is consistent with traditional first amendment analysis.

Allied International reaffirms that section 8(b)(4) was intended to protect neutral employers from the repercussions of a labor dispute directed at a primary employer target. Furthermore, the rejection of a bifurcated treatment of the domestic, as distinct from the foreign, effects of labor actions does more than merely reaffirm the *Benz-Windward-Mobile* line of cases. Indeed, it appears to add a third step to the section 8(b)(4) analysis: the degree of intru-

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[38] 102 S. Ct. at 1662, ___ U.S. ___ (1982).

[39] *Id.*

[40] *Id.* at 1663.

[41] *See supra* notes 22-23 and accompanying text.

[42] *See supra* note 24.

[43] 102 S. Ct. at 1663, ___ U.S. ___ (1982).

[44] *Id.* at 1664. The Court expressed concern that such an exception not only would be counter to congressional intent, but would open avenues to circumvent § 8(b)(4) under the guise of political expression.

[45] *Id. See* N.L.R.B. v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980). It is well established that the first amendment extends to union activities. However, such activities are subject to regulation or restraint. Thomas v. Collins, 323 U.S. 516 (1945); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957).

sion into matters of foreign policy. Although distinguishable from its predecessors in that *Allied* did not involve an attempt by the ILA to extend its influence over workers employed by foreign entities, the signal to foreign trading partners is clear. Despite political differences United States labor may have with foreign traders, any labor action taken without the support of the executive branch effectively may be precluded.

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