DON'T TOUCH THAT GRAPEFRUIT!: PROHIBITING THE ENCOURAGEMENT BY U.S. UNIONS OF SECONDARY BOYCOTTS ABROAD

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On June 6, 1995, the U.S. Court of Appeals for the District of Columbia Circuit overturned a Federal Agency Order that the International Longshoremen’s Association’s (ILA’s) call for solidarity with Japanese unionists was a secondary boycott in violation of the National Labor Relations Act.1 The D.C. Circuit Court held that the ILA’s request of the Japanese union workers to refrain from unloading ships bearing citrus loaded by nonunion labor was not a secondary boycott in violation of the National Labor Relations Act because the act does not extend to the activities of foreign workers, who are not engaged in commerce within the meaning of the National Labor Relations Act.2 In 1992, the U.S. Court of Appeals for the Eleventh Circuit arrived at a very different conclusion in reviewing the same set of facts. In Dowd v. International Longshoremen’s Ass’n, the Eleventh Circuit held that the ILA’s conduct in encouraging Japanese importers to boycott certain American stevedoring3 companies did fall within the jurisdiction of the National Labor Relations Act.4 The question of the extraterritorial jurisdiction of the secondary boycotts provision of the NLRA to matters involving foreign workers in foreign lands begs the larger question of whether the labor and employment laws of the United States are limited in the scope of their power to American workers employed within the territorial boundaries of the United States. Does the NLRA ever warrant extraterritorial jurisdic-

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1 It is important to note that not all secondary boycotts are a violation of the NLRA. In NLRB v. Fruit Packers, the Supreme Court concluded that Congress did not intend to bar “all peaceful consumer picketing at secondary sites.” 377 U.S. 58, 63 (1964).


3 A stevedore is “one who works at or is responsible for loading and unloading ships in port.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1156 (1988).

4 975 F.2d 779 (11th Cir. 1992).
tion in order to effectuate Congressional intent?

As the world economy develops a greater and greater interdependence, and as U.S. industry and commerce become increasingly affected by the activities of individuals and entities not within the territorial limits of the United States, a need for clarity and predictability in the extraterritorial application of U.S. labor law has emerged. Part I of this Note will review the facts of the dispute, the relevant sections of the NLRA and past decisions interpreting the extraterritorial application of U.S. employment law, specifically the NLRA. Part II of this Note will analyze the two recent decisions regarding the secondary boycotts engaged in by Japanese stevedores and encouraged by U.S. unions. Part III of this Note will propose a judicial approach that will be consistent with the past interpretations of the jurisdiction of the NLRA, and in recognition of the growing globalization of U.S. commerce and in keeping with legislative intent of the NLRA, set forth the proposition that secondary boycotts of U.S. products conducted abroad solicited by U.S. unions acting in the United States are a violation of the secondary boycotts provision of the National Labor Relations Act.

I. ANALYZING AND COMPARING THE DECISIONS OF DOWD V. INTERNATIONAL LONGSHOREMEN'S ASS'N AND INTERNATIONAL LONGSHOREMEN'S ASS'N V. NAT'L LABOR RELATIONS BD.

A. Historical Facts of the Dispute

The quarrel in both of these cases arises from a labor dispute in the Florida citrus export industry.6 Japan is a major importer of Florida citrus fruit, and prior to the events at issue in this dispute, Florida exporters shipped fruit to Japan from either Fort Pierce, Florida, or Port Canaveral, Florida.7 This export arrangement was pursuant to agreements between American exporters and Japanese importers. In the handling of the citrus cargo, American stevedores of the Coastal Stevedoring Company ("Coastal") of Fort Pierce and the Port Canaveral Stevedoring Company ("Canaveral") of Port Canaveral loaded the fruit on ships bound for Japan. Upon the

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5 "Extraterritorial jurisdiction" is defined as "[j]uridical power which extends beyond the physical limits of a particular state or country." BLACK'S LAW DICTIONARY 588 (6th ed. 1990).

6 International Longshoremen's, 56 F.3d at 208.

7 Id.
fruit's arrival in Japan, it was unloaded by Japanese stevedores. The International Longshoremen's Association (ILA), an American Union, had been in disputes with the stevedoring companies of these two ports regarding the failure of these companies to hire union-represented employees.

Prior to the 1990-1991 shipping season, ILA representatives traveled to Japan and met with representatives of the National Council of Dockworkers' Unions of Japan, the Japan Labor Union Association, and the Japanese Seamen's Union. The ILA delegates requested the assistance of the Japanese unions in applying whatever pressure they could upon participants in the Japanese citrus trade to deal only with Florida stevedoring companies which used union labor. The Japanese unions then proceeded to pressure Japanese importers, urging the importers to deal only with union stevedoring companies when purchasing citrus fruit in Florida. These communications from the Japanese unions went so far as to warn the Japanese importers that the Japanese stevedoring unions would refuse to unload fruit loaded in American ports by non-union labor.

As a result of the activities of the Japanese unions, at least one ship was diverted from Fort Pierce to Tampa, where union stevedores were employed. After the diversion to Tampa of a citrus-bearing sea vessel, the ILA contacted a National Council of Dockworkers' Union of Japan to express the appreciation of the ILA and to encourage the continued efforts of the Japanese unions. This was the second such written communication to the Japanese unions from the ILA.

As a result of the aforementioned activities of the Japanese unions taken on behalf of the ILA, neither Port Canaveral nor Fort Pierce handled another shipment of citrus bound for Japan for the remainder of the 1990-1991 export season.

It was at this point that the litigation on the issue began. In November and December of 1990, the two non-union stevedoring companies of Port Canaveral and Fort Pierce, respectively Canaveral and Coastal, and the Canaveral Port Authority, all filed unfair labor practices against the International Longshoremen's Association. Subsequently, the National

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8 Id.
9 Id.
10 Dowd, 975 F.2d at 781.
11 Id. at 781-782.
12 Id. at 782.
13 Id.
14 Id.
15 International Longshoremen's, 56 F.3d at 208.
Labor Relations Board (NLRB) sought an injunction to prohibit the ILA from threatening persons neutral to its labor dispute with Coastal and Canaveral. The NLRB also sought an order requiring the ILA to repudiate its written requests for aid from the Japanese stevedoring unions.\textsuperscript{16} The United States District Court for the Middle District of Florida granted the NLRB's requests\textsuperscript{17} and the Eleventh Circuit affirmed.\textsuperscript{18} With the injunction in place, the parties waived a hearing\textsuperscript{19} and submitted the case before the National Labor Relations Board. On November 24, 1993, the Board held that the ILA violated the NLRA's provision against unlawful secondary boycotts.\textsuperscript{20} The ILA then petitioned the United States Circuit Court for the District of Columbia for review. On June 6, 1995, the Court granted the petition for review, respectfully disagreed with the Eleventh Circuit Court of Appeals, and remanded the case to the National Labor Relations Board for further proceedings consistent with its opinion.\textsuperscript{21}

\textbf{B. The Basis of the Dispute}

The dispute between the International Longshoremen's association and the National Labor Relations Board revolves around whether or not the ILA, by encouraging Japanese unions to refuse to handle citrus loaded in Florida by non-union labor, committed a secondary boycott in violation of the National Labor Relations Act. In order to understand the nature of the conflict, an understanding of what constitutes a secondary boycott is necessary.

A boycott may be defined as a concerted refusal to have dealings with (as in a person, store, or organization) in order to express disapproval or apply economic pressure as a means of achieving a desired end.\textsuperscript{22} In a primary boycott, one party to a dispute, the boycott advocate, exerts economic pressure directly against his opposing party in an effort to compel the latter party to give in to the former's demands. In order to apply further pressure to the 'primary' opponent, the boycott proponent applies economic or social

\textsuperscript{16} Id. at 208-09.
\textsuperscript{17} Dowd v. International Longshoremen's Ass'n, 781 F. Supp. 1565 (M.D. Fla. 1991).
\textsuperscript{18} Dowd, 975 F.2d 779 (11th Cir. 1992).
\textsuperscript{19} In waiving a hearing and submitting the case to the Board based on stipulated facts, the parties waived an administrative law judge's decision.
\textsuperscript{20} International Longshoremen's Ass'n, 313 N.L.R.B. 412 (1993).
\textsuperscript{21} International Longshoremen's, 56 F.3d at 205.
\textsuperscript{22} WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 173 (1988).
pressure against third parties who deal with the 'primary' opponent so that they will join the boycott advocate's cause. The result is a secondary boycott. In the case of a labor dispute, one common means of creating a secondary boycott arises when a labor organization in a dispute with an employer, Company “A,” urges the employees of a neutral secondary party, Company “B,” to engage in a partial work stoppage or a refusal to handle certain goods produced or shipped by Company “A.” The dispute between the ILA and the non-union stevedoring companies involves this particular kind of secondary boycott. The idea behind such pressure exerted against secondary parties is that the secondary parties (Company “B”) who are injured through their own employees' refusal to work will apply pressure to the primary target of the boycott (Company “A”) to accede to the demands of the primary boycott advocate (the labor union).

At common law, the use of such secondary boycotts was treated by the states as strictly illegal since the courts treated the pressure brought to bear on the secondary party as coercive. In 1932, the legal status of secondary boycotts changed with the passage of The Norris-LaGuardia Act, which protected most peaceful labor activity, including secondary boycotts. Strong unions were quick to realize the potency of the secondary boycott weapon and became abusive of this newly found power to exert secondary boycotts. Partly in response to the abusive activity of such unions, Congress passed the Taft-Hartley Act, also known as the Labor Management Relations Act (LMRA), in 1947.

23 These parties in this situation are often termed secondary parties.
24 Justice Learned Hand provided one of the best definitions of secondary boycott in International Bhd. of Elec. Workers Local 501 v. NLRB where electricians' union picketed to encourage employees of carpentry subcontractor to engage in work stoppage, with intent of coercing the subcontractor to pressure general contractor to hire union labor: "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." 181 F.2d 34, 37 (2d Cir. 1950), aff'd, 341 U.S. 694 (1951).
25 See, e.g., International Bhd., 181 F.2d 34.
28 Id. at § 4, 47 Stat. 70 (codified as amended at 29 U.S.C. § 104 (1994)).
The Taft-Hartley Act empowered the National Labor Relations Board to forbid the unfair labor practices of unions as well as employers. This Act amended the NLRA and made it an unfair labor practice for a labor organization or union to engage in, or to encourage the employees of any employer to engage in, a strike or concerted work stoppage where the object of that strike or work stoppage was to force or require any employer to cease doing business with any other person. The legislative history of the Taft-Hartley Act makes clear that this provision was intended to outlaw secondary boycotts aimed at the business of third parties "wholly unconcerned" with the disagreement between the labor organization and the primary employer. In 1959, Congress passed the Landrum-Griffin Act to close gaps and loopholes overlooked in prior secondary boycott legislation. Congress, in drafting the new secondary boycott provision, had two principal goals: to decrease the burdens on neutral employers drawn into labor

31 Id. at § 158(b)(4)(ii)(B).
32 93 CONG. REC. 4198 (statement of Sen. Taft), reprinted in 2 NLRB, Legislative History of the LMRA, 1947, at 1106 (1948). Ironically, it is evident that "secondary" companies that were able to apply pressure to a "primary" employer were anything but "unconcerned" with the labor dispute.
35 "It shall be an unfair labor practice for a labor organization or its agents-... (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is-... (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person ..." National Labor Relations Act, 29 U.S.C. § 158(b) (1994).
36 In 1951, the Supreme Court stated the objectives of the secondary boycotts provision as being the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own." NLRB v.
secondary boycotts abroad disputes and to prevent the widening of industrial strife.\textsuperscript{37}

However, the primary issue in this dispute between the NLRB and the International Longshoremen’s Association is not whether a secondary boycott occurred. Rather, the question is: if a secondary boycott occurred, is this secondary boycott involving Japanese unions and foreign lands within the jurisdiction of the National Labor Relations Act? The Eleventh Circuit Court of Appeals in \textit{Dowd} stated that the actions of the International Longshoremen’s Association do fall within the purview of the NLRB.\textsuperscript{38} The District of Columbia Circuit Court of Appeals came to a different conclusion and "respectfully disagree[d]".\textsuperscript{39} To understand the different conclusions arrived at by the two courts, it becomes necessary to analyze and review the manner in which United States courts have interpreted the will and intent of Congress in approaching the issue of the extraterritorial application of U.S. statutes, and specifically, labor and employment statutes.

\textbf{C. Judicial History of the Larger Dispute—the Extraterritorial Application of (1) U.S. Law and of (2) The National Labor Relations Act}

\textit{1. U.S. Law}

The history of the extraterritorial application of U.S employment laws begins with an analysis of the various presumptions involved in the extraterritorial application of U.S. laws. In \textit{American Banana Co. v. United Fruit,}\textsuperscript{40} the United States Supreme Court first considered the extraterritorial application of a federal statute. The Court in \textit{American Banana} was asked to decide whether or not to apply the Sherman Anti-Trust Act to a dispute revolving around the activities of two United States corporations in the Costa Rican banana market.\textsuperscript{41} Writing for the Court, Justice Oliver Wendell Holmes deferred to international law and custom and declined to accept jurisdiction and apply the Sherman Act to a monopoly existing in Costa Rica: “[T]he general and almost universal rule is that the character of an act

\textsuperscript{37} In 1982, the U.S. Supreme Court listed these two purposes as the two goals behind the secondary boycotts provision of the NLRA. \textit{International Longshoremen’s Ass’n v. Allied Int’l}, 456 U.S. 212, 223 (1982).

\textsuperscript{38} 975 F.2d at 789.\textsuperscript{39} \textit{International Longshoremen’s}, 56 F.3d at 215.\textsuperscript{40} 213 U.S. 347 (1909).\textsuperscript{41} \textit{Id.} at 354-355.
as lawful or unlawful must be determined wholly by the law of the country where the act is done." In focusing upon the issue of whether Congress had the authority to regulate any activities occurring abroad, Holmes proposed that in the absence of a clear mandate from Congress, a court must limit the operation of its laws to the "territorial limits over which the lawmaker has general and legitimate power." This sweeping presumption against the extraterritorial application of federal law was a direct application of the turn-of-the-century prevailing view that jurisdiction and hence the ability of courts to act was limited by the geographic boundaries of territoriality. If territoriality is the primary basis of jurisdiction, a court is less likely to regulate conduct outside its borders and run the risk of encroaching on the sovereignty of fellow nations.

In American Banana, Justice Holmes articulated a view of extraterritoriality that would remain the prevailing judicial view of the extraterritorial application of federal statutes until the 1930s. By the early 1930s, courts began to modify this strict geographically-dependent territorial approach. Nations, including the United States, began to realize that it was to their advantage to be able to wield some degree of control over the activities of their citizens while they were overseas, and it was to their disadvantage if they could not. What was a strict rule against the extraterritorial application of U.S. law beyond U.S. borders slowly evolved, shaped by the political realities of a world shrinking in size due to technological advances in communications and travel.

42 Id. at 356.
44 213 U.S. at 357.
46 213 U.S. at 356.
47 Turley, supra note 45, at 604.
48 Id.
49 In this Note, the terms "overseas" and "abroad" are not to be strictly interpreted but are used merely to identify places outside the borders of the United States, including Canada and Mexico.
50 Barella, supra note 43, at 892.
51 Turley attributes the evolution to the two alternative bases for territorial jurisdiction, objective territoriality and subjective territoriality. Under objective territoriality, a state could "legitimately extend jurisdiction extraterritorially where the conduct in question occurred within the state . . . Under a subjective theory, a state has jurisdiction whenever certain conduct has territorial effects . . ." Turley, supra note 45, at 604-05.
In *Blackmer v. United States*, the Supreme Court stopped short of overruling the presumption against extraterritoriality as set forth in *American Banana*. In considering the transnational application of the Walsh Act, and its express Congressional mandate for extraterritorial jurisdiction, the *Blackmer* court veered from the strict territorialist approach of *American Banana* and held that the act applied transnationally and that such transnational application was legitimate under international law. With *Blackmer*, the presumption involved in the extraterritorial application of U.S. law had changed from the virtual irrebuttable presumption against such application, as espoused in *American Banana*, to a presumption which allowed for the extraterritorial application of U.S. law only when Congress expressed the intent of transnational application.

At that time in U.S. legal history, there were two primary rationales for the presumption against the extraterritorial application of U.S. law. The first rationale was that Congress "does not idly, or silently, enter into conflicts with foreign sovereigns or international principles." What was crucial in *Blackmer* was that the Court was presented with an issue of extraterritorial application of a U.S. law that would not significantly intrude on the sovereignty of other nations. This made extending the application of this U.S. law judicially palatable. The second rationale behind the presumption against the extraterritorial application of U.S. law was expressed in *Foley Bros. v. Filardo*, where the Supreme Court faced the issue of the extraterritorial application of a Federal employment statute, the Eight Hour Law.

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54 "The law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy". *Blackmer*, 284 U.S. at 437 n.2 (1932).
55 And a presumption which questioned the very authority of Congress to mandate transnational application of U.S. law.
56 Turley, *supra* note 45, at 606.
57 *See Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). "[A]n act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."
59 The Eight Hour Law established that no employee "shall be required or permitted to work more than eight hours in any one calendar day upon such work" except for paid work "in excess of eight hours per day at not less than one and one-half times the basic rate of pay." 40 U.S.C. § 324-325 (1940).
In *Foley Bros. v. Filardo*, an American cook sued for the overtime due to him for his service on construction projects in Iraq and Iran. Based on the presumption against extraterritorial application of U.S. law, the Supreme Court reversed a New York Court of Appeals decision allowing the cook a recovery for uncompensated overtime. The Court reaffirmed the *Blackmer* rationale that legislation, absent express Congressional authorization, is limited by the territorial boundaries of the United States. More importantly, the *Foley Bros.* Court formally stated the second rationale behind the presumption against the transnational application of U.S. laws. The Court reasoned that Congress is "primarily concerned with domestic conditions" when it enacts legislation. This rationale has been a strong guiding impetus for courts who have considered the transnational application of U.S. employment laws.

The modern analysis of the transnational application of U.S. statutes incorporates an expanded view of the territorial principle, operating under the titles of the "effects doctrine" or "objective territoriality." This expanded view recognizes the authority of the Federal courts or Congress to regulate actions outside of its geographic boundaries if such actions have or are intended to have substantial territorial effects.

While this new modern analysis has expanded the jurisdiction of certain statutes, the history of the judicial application of U.S. employment laws and the NLRA has generally followed a very traditional, territorial approach. In 1991, the Supreme Court revived and reaffirmed this traditional approach.

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61 *Id.* at 290-91.
62 *Id.* at 285.
63 *Id.*
65 *Barella*, supra note 43, at 894. Turley and Barella differ as to whether to call the effects doctrine subjective (Turley) or objective (Barella). *See also* Turley, supra note 45, at 605.
67 Such statutes include antitrust and securities laws. Turley classifies the type of statute as either "market" statutes or "nonmarket" statutes. Turley points out that securities and antitrust laws, "market" laws primarily intended to protect market interests, are consistently granted extraterritorial application, even though Congress has been silent on whether such extraterritorial application was intended. "Nonmarket" statutes such as employment or environmental laws, "are consistently denied extraterritorial application." Turley, *supra* note 45, at 601.
regarding the extraterritoriality of U.S employment laws with its analysis in *Boureslan v. Aramco.* In *Aramco,* the court made clear that the protection afforded employees under the umbrella of Title VII of the Civil Rights Act of 1964\(^6\) did not extend beyond the geographic borders of the United States.

In *Aramco,* the petitioner, Ali Boureslan, a naturalized citizen of the United States, sued under Title VII alleging he was fired and harassed on account of his race while working in Saudi Arabia.\(^7\) The Supreme Court relied heavily on the 1949 decision of *Foley Bros.\(^7\) and held that absent a clear statement\(^7\) by Congress, Title VII did not apply\(^7\) extraterritorially to regulate the employment practices of United States firms that employ American citizens abroad.\(^7\) As *Aramco* indicates, the focus of the courts on the extraterritorial application of employment laws has been, and remains, on whether Congress, with regard to a particular employment statute, has evidenced the necessary affirmative intent to warrant the extraterritorial application of the employment statute in question.\(^7\)

2. The National Labor Relations Act

The extraterritorial application of the NLRA has been considered by the National Labor Relations Board (NLRB) and by the Federal courts under a variety of factual settings. The language of the Act itself would appear to

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\(^7\) Title VII prohibits various discriminatory employment practices by employers (employing 15 or more employees for a specified period and engaged in an industry affecting commerce) based on an individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2, 2000e-3, 2000e(h) (1994).

\(^7\) 499 U.S. 244, 246 (1991).

\(^7\) 336 U.S. 281.

\(^7\) In his dissent in *Aramco,* Justice Marshall argued that the *Foley Bros.* presumption against extraterritoriality does not require a clear statement, but instead suggests that *Foley Bros.* indicates that "a court is not free to invoke the presumption against extraterritoriality until it has exhausted all available indicia of Congress' intent on this subject." 499 U.S. at 265 (1991).

\(^7\) In the wake of *Aramco,* Congress amended Title VII so that U.S. companies operating abroad are now within the jurisdiction of Title VII's protection.

grant wide jurisdictional authority to the NLRB. Despite the broad language of the NLRA, courts have generally denied NLRA jurisdiction in NLRA cases involving significant foreign elements or actors.

The difficulty in ascertaining the precedential value of past cases interpreting the extraterritorial application of the NLRA lies in the fact that many of the cases involve unique or very specific fact patterns and often the language of the holdings of such cases is tailored to the specific facts of the particular case. Interpreting such precedent is further complicated by the different decision-makers involved in interpreting the reach of the NLRA—namely the NLRB, the lower Federal Courts, and the Supreme Court. Several commentators and a few courts have questioned whether the true issue of the extraterritoriality of the NLRA has yet to be determined.

The leading cases which have consulted the legislative history of the NLRA to determine whether or not Congress intended the Act to have transnational jurisdiction have been maritime suits. A series of Supreme Court decisions have created or have been recognized as creating the parameters of the jurisdiction of the NLRB when the dispute involves American Unions and foreign-flag ships. Benz v. Compania Naviera Hidalgo is the seminal case in this area, and one on which other decisions on extraterritoriality have relied. In Benz, the Supreme Court held that the

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76 Section 10(a) of the Act empowers the Board to “prevent any person from engaging in any unfair labor practice . . . affecting commerce.” 29 U.S.C. 160(a) (1994). The Act defines commerce broadly as “trade, traffic, commerce, transportation, or communication . . . between any foreign country and any state . . .” (29 U.S.C. 152(6)) and defines “affecting commerce” as “in commerce, or burdening or obstructing commerce” (29 U.S.C. 152(7) (1994)).

77 Note also the necessary Congressional intent that could be inferred from the plain meaning of the words of such legislation.

78 The courts, however, have not been consistent.


80 Nothstein and Ayres, supra note 79, at 24; Dowd, 975 F.2d 779, 787 (1992).

81 The cases with the greatest precedential impact.

82 The fact that the leading cases are maritime suits has complicated the question to be resolved because maritime suits bring in issues of the law of the sea and issues of international custom afforded to vessels of other nations.


84 See, e.g., American Radio Ass’n v. Mobile Steamship Ass’n, 419 U.S. 215 (1974); Dowd, 975 F.2d 799 (11th Cir. 1992).
Labor Management Relations Act\textsuperscript{85} does not apply in cases where the damages result from the picketing of a foreign ship sailing under foreign articles, operated entirely by foreign seamen, when the vessel was temporarily in an American port.\textsuperscript{86} The Court, in depriving the National Relations Board of jurisdiction in the dispute, pointed out that Congress "could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters."\textsuperscript{87} However, the Court reasoned that given the Act's overall emphasis and focus on matters of industrial strife between American employers and American employees, the NLRA was not enacted by Congress in order to resolve disputes arising under the laws of foreign nations, between foreign crews, and foreign employers.\textsuperscript{88} A primary concern of the Benz court was that if the Board were to have jurisdiction in such a case, it would be interfering in a particularly delicate field of international relations and international custom.\textsuperscript{89} The Court used a "not in commerce" rationale as a device for depriving the NLRB of jurisdiction, despite the broad scope given to "commerce" as evidenced by the Act's plain language.\textsuperscript{90} Benz is significant in that it was first in the line of Supreme Court decisions that held the NLRB may lack jurisdiction over labor disputes involving significant foreign elements.\textsuperscript{91}

\textit{McCulloch v. Sociedad Nacional de Marineros de Honduras}\textsuperscript{92} was the next Supreme Court decision placing another brick in the wall of the presumption against extraterritoriality of the NLRA. In \textit{McCulloch}, the National Maritime Union of America sought to become the collective bargaining representative for the Honduran Crew of a Honduran ship. The

\textsuperscript{85} The LMRA includes the NLRA, and future cases denying extraterritorial application of the NLRA have cited \textit{Benz} as directly controlling authority.
\textsuperscript{86} 353 U.S. at 139.
\textsuperscript{87} Id. at 142.
\textsuperscript{88} Id. at 143.
\textsuperscript{89} "For us to run interference in such a delicate field of international relations, there must be present the affirmative intent of Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." Id. at 147.
\textsuperscript{92} 372 U.S. 10 (1963).
Court found the NLRB was without jurisdiction to order representation elections on vessels which employed Honduran crews under Honduran articles and who had regular contact with a Honduran Union on registered vessels of a Honduran corporation,\textsuperscript{93} operating under the employment laws of Honduras.\textsuperscript{94} The Court ruled that despite the frequent contact the vessel had with American waters,\textsuperscript{95} the jurisdiction of the NLRA would have an immediate effect on the internal operations of a foreign vessel.\textsuperscript{96} Again, the Court used the "not in commerce" rationale set forth in \textit{Benz}.\textsuperscript{97}

Similarly,\textsuperscript{98} in \textit{Incres Steamship Co. v. International Maritime Workers Union},\textsuperscript{99} an American union sought to organize the foreign crew of a foreign vessel, and proceeded to picket to accomplish these ends.\textsuperscript{100} Consistent with \textit{Benz} and \textit{McCulloch}, the Court denied the jurisdiction of the NLRB to order a representation election, stating "[T]he Board's jurisdiction to prevent unfair labor practices, like its jurisdiction to direct elections, is based upon circumstances 'affecting commerce', and we have concluded that the maritime operations of foreign-flag ships employing alien seamen are not 'in commerce'. . . ."\textsuperscript{101}

The next important judicial development came in \textit{ILA Local 1415 v. Ariadne Shipping Co.}.\textsuperscript{102} In \textit{Ariadne}, an American union, the ILA, was picketing foreign-flag ships to protest the substandard wages paid to the non-union American stevedores who unloaded these ships. The vessel owners sought injunctive relief under Florida state law, and the union contended state law was preempted by the NLRA, which they maintained had jurisdiction over the labor dispute.\textsuperscript{103} The Supreme Court found that the

\begin{itemize}
\item \textsuperscript{93} The Court arrived at this conclusion despite the fact the Honduran Corporation was a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. \textit{Id.} at 13.
\item \textsuperscript{94} \textit{Id.} at 14.
\item \textsuperscript{95} In \textit{Benz}, the vessel had limited contact with American waters.
\item \textsuperscript{96} 372 U.S. at 20.
\item \textsuperscript{97} The Supreme Court expressed a judicial desire to prohibit the intrusion of the NLRB into the internal affairs of a ship sailing under a foreign flag. For the purposes of maritime law, a ship is considered to be part of the territory of nation whose flag she flies. See Comment, \textit{Foreign Ships in American Ports: The Question of NLRB Jurisdiction}, 9 CORNELL INT'L L.J. 50, 62 (1976).
\item \textsuperscript{98} And on the same day as \textit{McCulloch}.
\item \textsuperscript{99} \textit{Incres Steamship}, 372 U.S. 24 (1963).
\item \textsuperscript{100} \textit{Id.} at 25-26.
\item \textsuperscript{101} \textit{Id.} at 27.
\item \textsuperscript{102} 397 U.S. 195 (1970).
\item \textsuperscript{103} \textit{Id.} at 196-97.
\end{itemize}
activities by the union taken on behalf of American stevedores were not within the maritime operations of foreign-flag ships, and as such, any ruling would not conflict with international law. Furthermore, the initial dispute, the paying of wages to American longshoremen, was "in commerce" within the meaning of the NLRA. The Court thus found NLRA jurisdiction applicable.

The Ariadne holding is especially significant because it recognizes that some labor disputes which involve foreign elements may nevertheless fall within the jurisdiction of the NLRA. The Ariadne Court conducted a balancing test of the degree to which the dispute affects American workers, the American economy, or NLRA policy versus the interference in the maritime operations of foreign ships.

The next ship in the fleet of the Supreme Court maritime cases is Windward Shipping (London) Ltd v. American Radio Ass'n. In this case, American unions picketed foreign-owned vessels in protest of the substandard wages paid to the foreign crewmen who manned these vessels. The Court in Windward displayed an important understanding of the extraterritoriality issue by pointing out that the activities in Benz and McCulloch were no less "in commerce" than were those in Ariadne; rather jurisdiction had been denied in those cases because it had never been the intent of Congress in drafting the National Labor Relations Act to "erase longstanding principles of comity and accommodation in international maritime trade." While noting that the picketing activities in Windward did not involve the same intrusion into the affairs of foreign ships present in Benz and McCulloch, the picketing did possess numerous foreign elements. The picketing was intended to protest "wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States." Due to the fact that the picketing would force the foreign vessel owners to

104 And as such not subject to Benz precedent which would hold any interference in foreign-flag maritime activities beyond the scope of the Act.
106 397 U.S. at 200.
108 It is important to note that the interest displayed by the Union was not out of altruism but rather out of a desire to eliminate the low wages which could undercut their own ability to obtain employment at a higher wage. Id. at 112-13.
109 Id. at 111-13.
110 Id. at 114.
raise the wages they paid their own maritime employees, a large scale increase in maritime operating costs would naturally result. Such an increase would have "more than a negligible impact on the maritime operations of foreign ships." Thus in *Windward*, the primary issue of whether the dispute was "in commerce" turned on the critical inquiry established in *Benz*: whether NLRB jurisdiction would cause an impermissible intrusion into the hallowed international ground of the maritime affairs of foreign ships.

The Supreme Court faced a case with essentially the same facts as *Windward* in *American Radio Ass'n v. Mobile Steamship Ass'n.* In *Mobile*, United States stevedoring companies brought suit against American unions who were picketing to protest the substandard wages paid by foreign shipowners to foreign seamen. Following its lead in the connected case of *Windward*, the Court found that since the primary dispute was found to be beyond the jurisdiction of the NLRA, the secondary dispute arising from the same set of facts could not be considered to be within the Act either. The Court came to this conclusion despite the fact that the parties in dispute were American employees and American employers. In their determination of whether the dispute was within "commerce," the *Mobile* Court found it important that the dispute was directed toward the "substandard wages being paid to the crews of foreign-flag vessels throughout those vessels' worldwide maritime operations." The union activity was not "affecting commerce" because of its possible foreign effects.

In 1982, the provision of the NLRA prohibiting secondary boycotts gave rise to another dispute regarding the extraterritoriality of U.S. labor law in *International Longshoremen's Association v. Allied International.*

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111 *Id.*
112 *Id.* at 113-14.
114 The companies brought suit because their own employees were refusing to cross the picket lines of the Unions to unload the foreign vessels and their businesses were negatively impacted. 419 U.S. 215, 236.
115 The six American unions who were the petitioners in *Mobile* were the respondents in *Windward.* 419 U.S. at 217.
116 Over the vigorous dissents of Justice Douglas and Justice Stewart.
118 419 U.S. at 224.
119 *Id.* at 223 n.9.
120 Ross, *supra* note 105, at 67.
121 § 8(b)(4)(b) of the National Labor Relations Act.
The dispute arose out of the Russian invasion of Afghanistan. In protest of this act of aggression, the International Longshoremen's Association (ILA) refused to load or unload cargoes shipped to or from the Soviet Union. An American importer of Russian wood products, Allied International, Inc., sought to bring this boycott to a halt, since its wood shipments had been disrupted by the activities of the ILA. Allied filed suit alleging the boycott violated the provision against secondary boycotts of the NLRA. Despite the fact that the primary dispute was with a foreign entity, the Supreme Court held that ILA's activity was "in commerce" and within the jurisdiction of the NLRA. In approving the jurisdiction of the NLRA in the dispute, the Court focused on the impact NLRB jurisdiction would have on American employers and American workers, and how minimal the impact on foreign entities would be.

What is to be drawn from this maritime litany of Supreme Court cases that deal with the application of the NLRA to foreign ships and foreign seamen? Are we to presume that the NLRA never applies to activities occurring abroad? Does the presumption against extraterritoriality of U.S laws end when actions and events occurring outside the boundaries of

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123 Id. at 214.
124 Id.
125 Id. at 215.
126 The Soviet Union.
127 "... [T]he ILA's refusal to unload Allied's shipments in no way affected the maritime operations of foreign ships. The boycott did not aim at altering the terms of employment of foreign crews on foreign-flag vessels. It did not seek to extend the bill of rights developed for American workers and American employers to foreign seamen and foreign shipowners."

456 U.S. at 221.

128 This is not to say that these Supreme Court cases are the only cases that have dealt with the application of the NLRA in cases with significant foreign elements. Other cases of some import that have dealt with this issue: GTE Automatic Elec., Inc., 226 NLRB 1222 (1976) (no jurisdiction over American employer of American employees where employer was doing business in Iran); RCA OMS, Inc., 202 N.L.R.B. 228 (1973) (no jurisdiction over Danish employer doing business in Greenland where employees, although hired in United States, worked exclusively in Greenland where controversy arose); Labor Union of Pico Korea Ltd. v. Pico Prods., Inc., 968 F.2d 191 (2d Cir. 1992), cert. denied, 113 S. Ct. 493 (1992).

the United States are felt within its borders? Is the fundamental question whether or not such extraterritorial application would best serve the interests of the state? Judging from the dispute between Circuits regarding the range and scope of U.S law in enjoining the ILA from encouraging Japanese stevedoring unions to refuse to handle Florida citrus loaded by non-union labor, the question may still be open. Or is it?

II. THE DECISIONS IN DOWD AND INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (ILA): CONTRASTING POSITIONS

The decision by the Eleventh Circuit Court of Appeals in Dowd granting the NLRB jurisdiction over the ILA was in keeping with the intent of the secondary boycott provision of the National Labor Relations Act. In Dowd, the Court considered whether it was appropriate for the NLRA to govern the solicitation by the ILA of Japanese unions to coerce Japanese importers to boycott certain American stevedoring companies. In rejecting the ILA’s claim that the NLRB lacked jurisdiction, the Court held that the NLRA governed the dispute. What the Court found instrumental in determining that the NLRA applied was that the jurisdiction of the NLRA would not have impacted the internal operations of foreign vessels. It was the impact on foreign vessels and this intrusion on “longstanding principles of comity and accommodation in international maritime trade” that the Benz

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130 In the frequently quoted opinion of Judge Wilkey:
“Certainly the doctrine of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries, which easily pierce its “sovereign” walls, while its own regulatory efforts are reflected back in its face.”


132 The Eleventh Circuit and the District of Columbia Circuit.

133 See supra section entitled “Historical Facts of Dispute”.

134 Dowd, 975 F.2d 779.

135 International Longshoremen's, 56 F.3d 205.

136 975 F.2d 779, 781-83.

137 Id. at 788.

138 Other than the fact that a secondary boycott apparently had occurred.

139 975 F.2d at 788.
presumption sought to protect; the oft-cited Benz did not provide a general rule regarding extraterritoriality. The Court reasoned the Benz line of cases "do not represent generally applicable boundaries of commerce," rather the Benz cases merely clarify the intent of Congress that the words "in commerce" are not meant to clash with principles of international law. This conclusion drawn by the Eleventh Circuit court is the heart of its reasoning that the NLRA should apply to this dispute.

The court in Dowd does not seek to refute the individual conclusions drawn in the cases cited by the ILA as establishing the presumption against extraterritoriality. Rather the court treats the holdings in the cases of Benz, McCulloch, and Aramco as binding to those fact patterns only, and since different facts are involved in this scenario, the court is able to distinguish those cases from the facts of this dispute. In this manner the court rebuts the general presumption against extraterritoriality by explaining that these cases do not stand for such an "unsophisticated" presumption. The court is, however, quick to draw parallels between the facts of this dispute and cases involving foreign elements where the NLRA was held to apply, like Ariadne and Allied. The court cites Allied and Ariadne to indicate areas where the Supreme Court saw fit to apply the NLRA because of the lack of conflict with international principles.

The Dowd court departs from labor precedent in its analysis in one significant respect. The Court justified jurisdiction in the matter by using an

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140 Id.
141 Which have been interpreted to limit the application of the NLRA to the boundaries of the United States.
142 975 F.2d 779, 788. The United States Court of Appeals for the Fifth Circuit agreed with this conclusion in NLRB v. Dredge Operators, Inc., 19 F.3d 206, 211 (1994).
143 See supra notes 83-90 and accompanying text.
144 See supra notes 91-94 and accompanying text.
145 See supra notes 68-74 and accompanying text.
147 See supra notes 99-103.
149 975 F.2d 779, 788.
"effects" analysis. Such an effects analysis had been limited to the extraterritorial application of antitrust and securities statutes, and the Dowd Court analogizes this dispute to cases governed by the Sherman Antitrust Act, and the Securities and Exchange Act.

After explaining how it could grant the NLRA jurisdiction in this matter, the court went on to explain why the NLRA should be applied to this dispute. The court justified granting jurisdiction by asserting that several factors combined to favor applying the NLRA to this dispute. Applying the NLRA to this dispute would best serve the purpose of the secondary boycott provision, shielding neutral employers from pressure in labor disputes to which they are not parties and limiting the spread of industrial labor strife. The court also noted that favoring the application of the NLRA was that the ILA took steps in furtherance of the boycott while in the United States and that the intended target, the "primary opponents," were American companies. Further, the court noted that any action taken would be against a domestic labor organization in a dispute with U.S. employer.

In sum, the Dowd court weighed the costs of applying the NLRA to the dispute versus the benefits to be attained from such application. The court, in ascertaining the costs, noted that there would be no potential for conflict with foreign laws or foreign workers, and that there would be no international outcry resulting from any U.S. action taken against the ILA, an American labor organization. Further, the court was careful to tailor its holding to the facts of the case, so that there would be no potential undue expansion of

150 "Since the object and the effect of the conduct in question was to implement a secondary boycott within the United States, we do not believe the location of that conduct is determinative." 975 F.2d at 790. This is similar to the effects doctrine espoused by Judge Learned Hand in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
151 Barella, supra 43, at 894.
152 In drawing such analogies, the court reveals the lack of support it has in the labor arena. 975 F.2d 779, 790.
153 Id. at 790-91.
154 Id. at 789. The court was concerned with the impact the Japanese boycott was having on the neutral entities of the Canaveral Port Authority, which received a tariff on vessels loaded by Canaveral (a non-Union stevedoring Company with which the ILA had the dispute), as well as the exporters with whom Coastal and Canaveral conducted business.
155 See supra note 12.
156 See supra note 23.
157 975 F.2d at 790-91.
158 Id. at 790-91.
labor jurisdiction in further cases using this case as a guide. The benefit to
be gained by applying the NLRA to this dispute would be the furthering of
the intent of the drafters of the secondary boycott provision of the NLRA.
The statutory "black hole" created by a lack of NLRA jurisdiction would
enable American unions to create labor havoc abroad. "In an increasingly
global economy, the opportunities abound for U.S unions to initiate harmful
secondary activities by unions representing employees of the foreign trade
partner. Permitting U.S unions to escape responsibility purely on geographic
grounds for the economic harm they unleash subverts the purpose of the
Act." In the court's eye, the balancing test of costs versus benefits
resulted in the application of the NLRA.

How is it that the Circuit Court for the District of Columbia, in Interna-
tional Longshoremen's Association (ILA), came to such a different
conclusion in June of 1995? The answer lies in the manner in which the
court viewed the Supreme Court cases dealing with the application of the
NLRA on foreign vessels—its view of precedent: "... [T]he Supreme Court
in a long line of cases has held that Congress never intended the Act to
apply to labor disputes involving foreign workers operating under foreign
laws on foreign flag ships, ... and we certainly can conceive of no basis for
a different result where the relevant dispute occurs on foreign soil,
..." The court then cites the string of maritime cases discussed earlier
in this Note. The Dowd Court, it would then seem, gave too little weight to
the principles guiding such Supreme Court decisions. But in justifying
its conclusion, the D.C. Circuit, in ILA, glossed over the amount of
American involvement in the dispute and the lack of remedy that would
be left to the affected neutral American parties. The ILA court also
failed to address the broad statutory language of the Act and the broad

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159 Longshoremen's Association Tells NLRB That U.S. Labor Laws Do Not Reach Japan,
160 International Longshoremen's Ass'n, 313 N.L.R.B. at 415.
161 56 F.3d at 211.
162 Citing Benz, the D.C. Circuit noted the NLRA focus on "the American workingman"
and describing the "boundaries of the Act as including only the workingmen of our own
163 The union was a domestic one, the primary opponents of the unions were domestic,
and some of the affected neutral parties were domestic.
164 The Canaveral Port Authority and the affected exporters doing business with Coastal
and Canaveral.
165 See supra note 35.
reading the Supreme Court had given the statute quite recently in Allied, a case involving significant foreign elements.\textsuperscript{166} The ILA court did not address the issue that NLRA jurisdiction in this dispute would require nothing of a foreign party; it would not interfere with the employment conditions of foreign workers, and it would not interfere with the laws of Japan.\textsuperscript{167} The law on the extraterritoriality of the NLRA, if ILA is to be the standard, leaves much to be desired and much to be explained.

III. A PROPOSITION

This Note will propose a judicial approach that will be consistent with the past interpretations of the jurisdiction of the NLRA, and in recognition of the growing globalization of U.S. commerce and in keeping with legislative intent of the act, set forth the following proposition: Secondary boycotts of U.S. products conducted abroad which are solicited by U.S. unions acting in the United States are a violation of the secondary boycotts provision of the National Labor Relations Act.\textsuperscript{168}

Section 8(B)(4)(i) of the Labor Management Relations Act\textsuperscript{169} specifically targets union actions to engage in, or induce or encourage others employed in commerce to engage in, a strike or a refusal to work on goods.\textsuperscript{170} The issue in this dispute is whether or not the foreign labor unions are “in commerce” within the meaning of the Act. The Act defines “commerce” broadly as “trade, traffic, commerce, transportation, or communication... between any foreign country and any State...”\textsuperscript{171} and the Act defines “affecting commerce” as “in commerce, or burdening or obstructing commerce...”\textsuperscript{172} Is there any doubt that the Florida-Japan citrus trade

\textsuperscript{166} In Allied, supra notes 119-124, the primary opponent was Russia, and the Court granted NLRB jurisdiction, stating § 8(b)(4) of the NLRA “was drafted broadly to protect neutral parties”; Congress “intended its prohibition to reach broadly”; it is a “statutory provision purposefully drafted in broadest terms.”

\textsuperscript{167} This is not to say that the Dowd decision has been universally supported. “[T]he Eleventh Circuit made the wrong decision in Dowd.” Balzano, supra note 129, at 591.

\textsuperscript{168} For a different approach to the extraterritorial application of the NLRA, see Bradford T. Hammock, The Extraterritorial Application of the National Labor Relations Act: A Union Perspective, 22 SYRACUSE J. INT’T L. & COM. 127 (1996).

\textsuperscript{169} See supra note 29.

\textsuperscript{170} 56 F.3d 205.


\textsuperscript{172} 29 U.S.C. 152(7) (1994).
qualifies as "commerce" within the meaning of the Act? Is there any doubt that the activities of the ILA, in soliciting the boycott of Japanese union stevedores, "affected commerce?" Based on the threatened boycott, neutral entities ceased doing business with Coastal and Canaveral; shippers and importers changed the loading ports to Tampa from Ft. Pierce and Port Canaveral and exporters hauled their produce to Tampa instead of the closer ports of Port Canaveral and Fort Pierce. Clearly the neutral parties affected by the boycott here fall within the class the Act intended to protect.

The solution to the controversy lies in avoiding the presumption against extraterritorial application of the NLRA by applying the provisions of the NLRA only against violating parties who are within U.S. borders and where there are strong domestic ties to the labor dispute. In a case like this where certain actions took place within the borders of the United States, and the parties to the suit are domestic entities, it would seem natural that jurisdiction would not be exercised extraterritorially. By approaching the matter in this way, by only controlling the activities of U.S. citizens and entities, the intent of the NLRA can be preserved without intruding on the laws of other nations or their sovereignty.

Even if such an application might be termed by some to be extraterritorial, and would undoubtedly have effects beyond the borders of the United States, the larger question must be whether applying the Act in this manner, so that the bargaining relationship between employers and employees is not unfairly tilted to the employees' advantage, acts to the general benefit of the United States. And if it does, should this "extraterritorial" reach, in the absence of Congressional action, be judicially accomplished?

In a situation such as the one previously described, it is clearly within the discretion of the Federal Courts to take action against the defendant union in the matter. The gains to be made by exercising jurisdiction over the parties in this dispute are clear, and the risks articulated in cases establishing the presumption against the extraterritorial application of labor law, given these facts, are minimal.

173 The answer is a resounding "No."
174 See supra note 159.
175 The Eleventh Circuit broaches this subject: "Further, the conduct charged in the Board's petition is not wholly extraterritorial." Dowd, 975 F.2d 779, 791.
176 With the growing dependence of U.S. companies on overseas markets, labor would be granted a weighty bargaining tool if employees (collectively) were able to hinder or even halt access to foreign markets through secondary boycotts abroad.
177 Aramco, supra note 68; Benz, supra note 83.
The benefits to be attained from NLRA application within this context are many. If the parties to the dispute are determined not to be "in commerce," the NLRA is not to apply. If the NLRA is not to apply, there is no federal preemption of state law. Without a federal preemption of state law in such labor disputes, the potential for conflict exists between the laws of states and the NLRA stemming from the dual regulation of labor relations. One of the primary concerns provoking the drafting of the NLRA was the necessity for only one set of uniform governmental labor policies. Jurisdiction in this matter serves these ends, as well as the ends sought in drafting the secondary boycott provision.

Allowing the application of the NLRA in this dispute involving these parties will not violate the principles of accommodation and comity that the Supreme Court sought to preserve in articulating its presumption against extraterritoriality. Here, where the jurisdiction would only negatively impact U.S. parties, there is no reasonable fear of reprisal from abroad or conflict of laws with other nations. Balancing the benefits to be achieved with the potential costs to be incurred, NLRA jurisdiction was appropriate under these circumstances.

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179 See supra notes 36-37.
180 International comity consists of that body of rules which states observe towards one another from courtesy or mutual convenience, although they do not form part of international law. See Hilton v. Guyot, 159 U.S. 113 (1895).
181 The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Aramco, 499 U.S. at 248.