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Protest Boycotts and Federal Labor Laws: The Russian Trade Boycott

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COMMENT

Protest Boycotts and Federal Labor Laws: The Russian Trade Boycott Litigation*

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INTRODUCTION

A labor dispute between a union and employer ordinarily involves union efforts to achieve recognition or bargaining demands, is traditionally enforced by strikes and boycotts,¹ and inevitably results in economic injury to the struck business.² In contrast to labor activities

¹ The term "boycott" quickly came into common usage after 1880 to describe all forms of nonviolent intimidation. The word originated in Ireland, following a conflict between Captain Charles Cunningham Boycott, an agent for absentee English landowners, and the Irish Land League, a nationalistic organization devoted to securing fixed tenure and fair rent for Irish tenants. After Boycott rejected the League's demands for reduction in rents and summarily evicted the families on his lands, the League induced Boycott's servants, herders and drivers to desert him, and directed all of the townspeople to cease their relations with the Captain. Three days after the ostracism was initiated, local papers referred to the League's activity as a "boycott." The tenant class thereafter adopted the boycott weapon to harass their English landlords. H. LAIDLER, *BOYCOTTS AND THE LABOR STRUGGLE: ECONOMIC AND LEGAL ASPECTS* 23-30 (1968).

In the context of labor-management relations, a boycott may be defined as a union's concerted refusal to deal with an employer. Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1364 n.5 (1962). Boycotts utilized to obtain bargaining goals are generally lawful if directed against and confined to the primary employer, that is, the employer with whom the union has a dispute. The same activities, however, are proscribed if a union attempts to force a secondary, or neutral, employer or person to cease doing business with "any other person . . ." National Labor Relations Act [hereinafter cited as NLRA] § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). See generally R. DERESHINSKY, *THE NLRB AND SECONDARY BOYCOTTS* (1972); Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KANS. L. REV. 651 (1971); Lesnick, *supra*.

² In 1980, 1.4 million workers in the United States were involved in strikes. 106 L.R.R. 113 (1981). Strikes also accounted for more than 31.5 million days lost to affected employers. *Id.* Neutral employers also may incur economic losses as an intended or unintended byproduct of labor boycotts. Moreover, neutral employers may be without a remedy against certain boycotts, for a union is entitled to engage in primary activity no matter how severe the incidental effects on neutral parties. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 627 (1967), *rehearing*

undertaken to secure bargaining concessions from management are boycotts motivated by political considerations that transcend the economic relationship between the union and the employer. The adaptation of the labor boycott as a weapon to further political views has manifested predominantly in union protests directed at foreign governments.³ Protest boycotts⁴ utilize the resulting disruption of business re-

denied, 387 U.S. 926 (1967). Additionally, in some circumstances, unions are allowed to direct boycott and picketing pressures against neutral employers so long as the activity's major impact is on the primary employer. Where a union "follows the struck product" to a neutral distributor, it has the right to picket to persuade customers to boycott that particular product. *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964). *But see NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607 (1980) (consumer picketing directed at primary product was illegal where sales of the struck product comprised over ninety percent of the secondary's gross incomes). Activity is also permitted against the secondary employer when it shares a common situs with the primary employer. *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950). Finally, where a purported neutral employer is sufficiently involved with the business of a primary employer, the union may boycott the "allied" employer. *NLRB v. Business Mchs. and Office Appliance Mechanics Bd. Local 459 (Royal Typewriter)*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

³ See text accompanying notes 24-64 *infra*.

⁴ For the purposes of this Comment, the term "protest boycott" shall be used to refer to labor union activities undertaken to voice opposition to government policies whether the government be domestic or foreign. Historically, strikes motivated by political objectives have been more prevalent in European countries than the United States. *See AARON & WEDDERBURN, INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY* 320-42 (1972). European political strikes often involve general strikes against governments to achieve specific goals. *See CROOK, THE GENERAL STRIKE* 2-9 (1931). For example, general strikes have been undertaken to achieve a definite political concession from the existing government, such as the demand for universal suffrage in the Belgian general strike of 1913, or, more rarely, for the purpose of upholding the existing government against a would-be usurper, as in the German general strike against the *Kapp-Putsch* in 1920. The general strike also has served as the tool of revolutionists attempting to overthrow governments or the industrial system. The Russian Revolution of 1905 is a prime example of a general strike undertaken for the purpose of forcing large measures of self-government and democratic liberty from an autocracy. Perhaps the most famous political strike transpired in England when two million workers struck without success in support of miners whose wages were reduced after government subsidies to coal operators were removed in 1926. *See FARMAN, THE GENERAL STRIKE OF MAY 1926* (1972); Goodhart, *The Legality of the General Strike in England*, 36 *YALE L.J.* 464 (1927). The sole general strike attempted in the United States occurred in 1919, when 60,000 workers in Seattle struck in support of dockworkers demanding higher wages. *FRIEDHEIM, THE SEATTLE GENERAL STRIKE* 124 (1964). Although many reacted to the strike as a harbinger of Bolshevism among American labor groups, available evidence points to the fact that revolution was not actively attempted by the strikers. *Id.* at 177.

Foreign trade unions have also instituted strikes directed against other governments. *E.g.*, *N.Y. Times*, Aug. 10, 1981, at 8, col. 1 (Canadian, Finnish, Italian, and Norwegian air traffic controllers boycott U.S. planes to protest U.S. government's dismissal of striking federal employees of Professional Air Traffic Controllers Organization); *id.*, Sept. 30, 1973, at 61, col. 5 (French dockworkers refuse to load military cargoes bound for Chile to protest the military junta in Chile); *Latin Dockers Join Castro Boycott*, *BUS. WEEK*, May 1, 1963, at 50 (dockworkers in ten South American countries refuse to handle ships of nations trading with Cuba to protest Castro's policies); *N.Y. Times*, July 15, 1959, at 3, col. 4 (Ghanaian Trade Union Congress members refuse to handle shipments from the Union of South Africa to protest its apartheid policies). American

lations between American companies and the foreign nation as a medium for expressing the union's opposition to particular policies of the foreign government. Although business may be a neutral party in the union's dispute with the foreign country, protest boycotts necessarily obstruct American foreign trade, and discourage American companies from participating in international business markets. The recent refusal by the International Longshoremen's Association (ILA) to handle goods bound for or coming from the U.S.S.R.—as a protest against the Soviet invasion of Afghanistan—illustrates this variety of politically-motivated boycott activity.⁵

Remarkably, protest boycotts have induced sparse litigation. This may perhaps be explained by a widespread belief that federal labor laws,⁶ enacted to regulate the relationship between union and employer are not implicated by union activities of a political and international nature.⁷ Accordingly, the response of business to protest boycotts has

labor unions have also organized protest boycotts, albeit on a somewhat more limited scale. These activities have been directed towards the policies of both state and federal governments. *E.g.*, N.Y. Times, July 24, 1975, at 12, col. 4; *id.*, July 25, 1975, at 41, col. 5 (ILA refuses to load any wheat shipments destined for the Soviet Union to protest the sale of grain to the U.S.S.R. by the federal government); *id.*, April 9, 1965, at 65, col. 4 (International Longshoremen and Warehousemen's Union members in West Coast ports refuse to handle products manufactured in Alabama to support the civil rights movement in that state). This Comment, however, will focus upon protest boycotts aimed at foreign governments. This variety of boycott activity is characterized by union refusals to handle goods bound for or coming from a particular country. The union utilizes the resulting cessation of business to direct its protest, if only symbolically or through economic force, toward the foreign government. In contrast to boycotts wherein unions exert pressure against a primary employer to secure bargaining demands, *see* notes 1-2 *supra*, American businesses are neutral bystanders in protest boycotts aimed at foreign governments.

⁵ The ILA instituted its protest boycott aimed at the Soviet Union on January 9, 1980. N.Y. Times, Jan. 10, 1980, at 1, col. 5. For the text of the announcement implementing the Russian trade boycott, *see* note 70 *infra*. For a discussion of the ILA's protest activities, *see* text accompanying notes 65-81 *infra*.

⁶ Throughout this Comment reference will be made to federal legislation governing labor relations. The NLRA (National Labor Relations Act) will refer to the Wagner Act, the original legislation enacted in 1935 which created the National Labor Relations Board and established the right of workers to bargain collectively. NLRA, Pub. L. No. 74-198, §§ 1-16, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-67 (1976)). Congress amended the NLRA with the Taft-Hartley Act of 1947, and added new provisions including a class of union unfair labor practices and various private causes of action to enforce rights created by the legislation. Labor-Management Relations Act [hereinafter cited as LMRA], Pub. L. No. 80-101, §§ 1-503, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-87 (1976)). In 1959, Congress further amended the labor statutes with the Landrum-Griffin Act, which among other changes, strengthened the secondary boycott provisions of the LMRA. Labor Management Reporting and Disclosure Act [hereinafter cited as LMRDA], Pub. L. No. 86-257, §§ 1-531, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531 (1976)). Unless otherwise indicated, "Act" and "NLRA" will refer to the statute that resulted from the combination of the NLRA, LMRA, and LMRDA.

⁷ The chief authority representing the view that the National Labor Relations Board has no jurisdiction over union activities undertaken for political purposes is *NLRB v. Local 1355, Int'l*

been to yield to labor pressure and cease trading with the foreign country under union censure, to endure passively the economic effects of the boycotts, or to turn to the federal government for assistance in countering union activity.⁸ Administrations, when prodded into action by affected private concerns, have limited their support for business to general statements condemning protest boycotts and supporting American participation in foreign trade.⁹ Even when labor union conduct was perceived to interfere with American foreign trade policy and undercut federal control over international relations, administrations have preferred to resolve the problems caused by protest boycotts through negotiation, rather than legal action.¹⁰

The recent Russian trade boycott differs markedly from the typical acquiescence characterizing previous protest activities. Numerous legal challenges to the ILA's protest boycott were asserted by business firms suffering from the effects of the union conduct.¹¹ Yet, while the reluctance to assert legal challenges to protest boycotts has receded, the litigation arising from the Russian trade boycott demonstrates the difficult legal problems brought to fore in examining protest boycotts. Can protest activity be regulated under the National Labor Relations Act (NLRA)? Are legal remedies available to a private party injured by a protest boycott which interrupts his participation in foreign trade? If labor union activity interferes with the foreign policy of the United States, then in what circumstances should federal control be exercised? Underlying these questions exists the inherent tension between labor's use of the protest boycott weapon and the objectives of American foreign trade policy which encourage the formation of business relations by American companies with other nations. The Russian trade boycott of 1980-81 provides an opportunity to study and resolve these conflicting interests.

Part I of the Comment examines the Russian trade boycott, and

Longshoremen's Ass'n (Ocean Shipping), 332 F.2d 992 (4th Cir. 1964). In this case, the Fourth Circuit determined that the Board lacked jurisdiction over a boycott calculated to eliminate trade with Cuba as the union conduct did not involve a "labor dispute" within the meaning of the NLRA. *Id.* at 995. Numerous courts and commentators have also asserted that the NLRB lacks jurisdiction absent the existence of a labor dispute. See *Danielson v. Fur Dressers Local 2F*, 411 F. Supp. 655, 658 (S.D.N.Y. 1975); *Peak v. State Dep't of Indus. Relations*, 304 So.2d 796, 801 (Ala. Civ. App. 1976); *International Longshoremen's Ass'n, Local 1416 v. Eastern S.S. Lines*, 211 So.2d 858, 860 (Fla. Dist. Ct. App. 1968); T. KHEEL, *LABOR LAW* § 8.02[2] (1979); AARON & WEDDERBURN, *supra* note 4, at 322; MORRIS, *THE DEVELOPING LABOR LAW* 761 (1971).

⁸ See text accompanying notes 24-64 *infra*.

⁹ See text accompanying notes 24-41 *infra*.

¹⁰ See text accompanying notes 44-45, 49-56 *infra*.

¹¹ For a discussion of the legal challenges to the Russian trade boycott, see note 92 and text accompanying notes 85-97 *infra*.

compares the boycott to ILA protest activity over the past three decades.¹² The survey of protest boycotts demonstrates the wide range of business interests disrupted by union conduct and the extent to which such activities may undermine American foreign policy. Part II analyzes whether the National Labor Relations Board (NLRB or Board) may assert jurisdiction over protest boycotts.¹³ The jurisdictional reach of the NLRA will be explored with emphasis upon a line of Supreme Court decisions involving foreign-flag vessels. Particular criticism will also focus upon the Fifth Circuit's recent decision concerning the Board's assertion of jurisdiction over the ILA's boycott in *Baldovin v. International Longshoremen's Association*.¹⁴ Part III examines whether a protest boycott constitutes a secondary boycott proscribed by the NLRA.¹⁵ A theory construing section 8(b)(4) of the Act¹⁶ to prohibit protest boycotts will be presented. The theory is then compared to the analyses of the First Circuit in *Allied International, Inc. v. International Longshoremen's Association*,¹⁷ and the NLRB in *International Longshoremen's Association, Local 799 (Allied International, Inc.)*,¹⁸ two cases dealing with the application of section 8(b)(4) to the Russian trade boycott. Finally, Part IV discusses foreign policy considerations implicated by protest boycotts directed at foreign governments.¹⁹ Recognizing the constitutional power of the federal government to restrain

¹² See text accompanying notes 20-97 *infra*.

¹³ See text accompanying notes 98-167 *infra*.

¹⁴ 626 F.2d 445 (5th Cir. 1980).

¹⁵ See text accompanying notes 168-280 *infra*.

¹⁶ NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). The relevant portions of § 8(b)(4) provide that:

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

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a concerted refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees 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

Prior to 1959, what is now the first portion of subparagraph (B) was found in subparagraph (A). Thus, many pre-1959 cases refer to § 8(b)(4)(A), while more recent decisions refer to § 8(b)(4)(B). To ease analysis and avoid confusion, this Comment will refer simply to § 8(b)(4), unless otherwise indicated, in discussing the secondary boycott provisions of that paragraph.

¹⁷ 640 F.2d 1368 (1st Cir. 1981).

¹⁸ 257 N.L.R.B. No. 151, 108 L.R.R.M. 1033 (Aug. 28, 1981).

¹⁹ See text accompanying notes 281-303 *infra*.

protest boycotts, this Comment concludes that federal authority should exist to quell union activities that threaten foreign policy objectives and the conduct of international relations.

I. PROTEST BOYCOTTS AND THE FOREIGN POLICY OF THE ILA

A labor union is an organization of workers that exists to promote the economic interests of its members.²⁰ While concern over international affairs would seem irrelevant to that purpose, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO or Federation) has formulated and presented policy positions on foreign affairs issues on behalf of its membership since its inception in 1955.²¹ Indeed, the efforts of the Federation have gone beyond a mere self-interest in foreign trade and tariff laws, to include advocating the recognition of particular foreign governments and criticizing the conduct of foreign relations by our own government.²² Further, similar to

²⁰ The primary function of a modern union is collective bargaining. It is through collective bargaining that employees obtain a relative equality of bargaining power with their employer, because the collective bargaining process compels the employer to deal with workers not as individuals but as a group. *See generally* BARTOSIC & HARTLEY, *LABOR RELATIONS IN THE PRIVATE SECTOR* 2-3 (1977).

²¹ The foreign policy of the American labor movement is a distinct phenomenon which has been the subject of scholarly writing. *See* C. GERSHAM, *THE FOREIGN POLICY OF AMERICAN LABOR* (1975); R. RADOSH, *AMERICAN LABOR AND UNITED STATES FOREIGN POLICY* (1960); Godson, *The AFL Foreign Policy Making Process From the End of World War II to the Merger*, 16 *LAB. HIST.* 325 (1975). At the first meeting of the AFL-CIO, the Federation adopted a lengthy foreign policy statement which sought to "help our nation evolve and execute an effective democratic foreign policy." *DAILY PROCEEDINGS & EXECUTIVE COUNCIL REPORTS, PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF THE AFL-CIO* 101 (1955) (report of the Resolutions Committee on Foreign Policy). To achieve this objective, the Federation would endeavor to influence government decision-making "through democratic processes." *Id.*

George Meany, the late President of the AFL-CIO, best expressed the philosophy underlying the Federation's concern with international affairs. He asserted that:

[t]here are alot of people who think that we have no business getting involved in foreign policy. They think foreign policy should be left to the politicians or the professors. They seem to think that the workers of America have no interest—or no stake—in what happens in this world. . . . We have as much right as anyone else, and are as determined, to speak out on matters of foreign policy—because we have a real stake in foreign policy. . . . More than that, we have a deep dependency on the survival of freedom in this dangerous world. For, without freedom, . . . unions cannot flourish. And a world without unions becomes a vast sweatshop, . . . and thereby threatens the living standards of all Americans. So if idealism is no longer persuasive in these cynical times, we stake out a bold claim of self-interest.

DAILY PROCEEDINGS & EXECUTIVE COUNCIL REPORTS, PROCEEDINGS OF THE TENTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO 22-23 (1973) (opening address of George Meany).

²² Foreign policy issues are a frequent subject of discussion at most AFL-CIO conventions and executive committee meetings. These debates have sometimes resulted in the censure of particular foreign governments. *DAILY PROCEEDINGS & EXECUTIVE COUNCIL REPORTS, PROCEEDINGS OF THE ELEVENTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO* 223 (1975) (resolution condemning government of Indira Ghandi for repression of freedom in India); *id.* at 450 (resolution expressing disapproval of the British government's administration of Northern Ireland);

other groups exercising the first amendment right to petition the government, the AFL-CIO influences foreign policy decision-making through its lobbying activities designed to persuade legislators, officials and the public to adopt its views.²³

The ILA has distinguished itself among American labor unions for the frequency and intensity of its protests against the policies of foreign governments the union considers inimical to its own interests, and that of the United States. In contrast to the lobbying efforts of the AFL-CIO, longshoremen have sought to influence foreign policy through protest boycotts designed to interfere with business relationships that American firms have established with foreign nations under the union's interdiction.

The ILA's opposition to the policies of foreign governments has manifested in refusals to load or unload goods destined for or coming from particular foreign countries. In view of the essential role maritime unions play in the transportation of goods through international channels,²⁴ an inevitable effect of the ILA's protest boycotts has been

DAILY PROCEEDINGS & EXECUTIVE COUNCIL REPORTS, PROCEEDINGS OF THE TENTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO 78-80 (1973) (resolution approving of economic sanctions instituted against Rhodesia and the Union of South Africa by black African nations); DAILY PROCEEDINGS & EXECUTIVE COUNCIL REPORTS, PROCEEDINGS OF THE SECOND CONSTITUTIONAL CONVENTION OF THE AFL-CIO 420-36 (1957) (resolution condemning the U.S.S.R.'s invasion and occupation of Hungary). The AFL-CIO has also concerned itself with our own government's conduct of international relations. See, e.g., *Detente: Hearings Before the Sen. Comm. on For. Relations*, 93rd Cong., 2d Sess. 371-411 (1977) (statement of George Meany criticizing administration policy fostering detente); DAILY PROCEEDINGS & EXECUTIVE COUNCIL REPORTS, PROCEEDINGS OF THE SEVENTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO 270-83 (1967) (resolution supporting United States involvement in Vietnam War).

²³ Political activism is one of the expressed goals of the AFL-CIO. It devotes a great deal of effort to informing legislators on the objectives of labor and to advising the public about the voting records of various candidates. The Federation also has legislative representatives on Capitol Hill and has a special committee, known as the Committee on Political Education, to campaign for acceptance of favorable legislation. See generally Holloway, *The Political Machine of the AFL-CIO*, 94 Pol. Sci. Q. 117 (1979).

²⁴ To enable vessels to safely transport their cargoes, it is important that the cargo be well stowed, that the vessel keep her trim, and that one portion of cargo may not injure another by contact, leaking, fumes, or heat. The business of stowing ships and of breaking out cargo at the port of delivery is conducted by stevedore companies. These firms employ longshoremen to load and unload cargo. See 1 KNAUTH, BENEDICT ON ADMIRALTY § 235 (7th ed. 1974).

Longshoremen are unionized in every American port. The ILA represents approximately 77,000 maritime workers in 478 locals in ports along the Atlantic and Gulf coasts and in the Great Lakes. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS-1979 33 (1980). Thus, any goods traveling through these ports will be handled by ILA members. As a result, concerted action by ILA locals can have a devastating effect upon foreign commerce. See, e.g., *U.S. v. International Longshoremen's Ass'n*, 147 F. Supp. 425 (S.D.N.Y. 1956) (strike among ILA unions enjoined as national emergency as industry-wide work stoppage threatened health of national economy).

the disruption of American foreign trade. A significant byproduct of these protests is also the interference with American foreign policy posed by the longshoremen's disagreement with these policies or unwillingness to conduct themselves as the policies require.

A brief survey of the ILA's protest boycotts illustrates not only the effectiveness of these campaigns in impairing trade with various foreign countries, but also the failure of our government to eliminate union interference with the conduct of American foreign policy. A focus upon the ILA's activities thereby provides a frame of reference for subsequent analysis and discussion of the availability of legal relief for private concerns injured by protest boycotts, and the propriety of intervention by the federal government to restrain such conduct.

A. The ILA and Foreign Governments

1. *Protest Boycotts Against the Military Aggression of Foreign Governments*

Communist governments have been the principal targets of the ILA's protest activities. In turn, Soviet military interventionism has been the major motivating force for many of the boycotts the union has organized during the past three decades.

The first boycott campaign implemented by the ILA originated in 1950 to protest the involvement of the Soviet Union and the People's Republic of China in the Korean War. ILA locals in the port of New York initiated the protest boycott by announcing their refusal to service Russian ships or handle cargoes bound for the U.S.S.R.²⁵ As sporadic boycott incidents spread to other ports and affected a significant amount of shipping worked by the union,²⁶ President Truman rebuked the ILA and cautioned its locals to refrain from intruding in foreign policy matters.²⁷ Nevertheless, the ILA's executive committee backed the locals, and officially endorsed a boycott of Soviet ships and goods.²⁸ Despite the complaints of affected shipping companies, the union's

²⁵ N.Y. Times, Aug. 24, 1950, at 52, col. 2; *id.*, Sept. 1, 1950, at 41, col. 1. The first ship affected by the boycott was a Czech vessel transporting cargoes to the Soviet Union. *Id.*, Aug. 28, 1950, at 35, col. 2.

²⁶ *Id.*, Sept. 1, 1950, at 41, col. 1. ILA members in the port of Boston concurred in the boycott and also refused to handle cargoes. In addition, Transport Workers Union members in New York City airports joined in the campaign. *Id.*, Sept. 2, 1950, at 31, col. 5.

²⁷ *Id.*, Sept. 1, 1950, at 41, col. 1. The media also criticized the ILA locals in New York and Boston for trying to set foreign policy. *See, e.g.*, COMMONWEAL, Sept. 1, 1950, at 500, col. 1.

²⁸ N.Y. Times, Sept. 7, 1950, at 63, col. 1. After President Truman's warning, the ILA's Atlantic Council backed the boycott activity undertaken by the locals and forbade its members from handling Russian goods "except those vital to defense or the economy" of the United States. *Id.*

leadership later extended the boycott to cover products coming from or destined for the People's Republic of China and Soviet satellite countries in Eastern Europe.²⁹

The ILA thereafter continued its policy of refusing to service Soviet ships and cargoes throughout the Cold War era on an informal basis.³⁰ Locals often ignored the policy as the union's executive committee did not strictly enforce the boycott policy in Atlantic coast ports worked by ILA members.³¹ Protest boycotts were officially reinstated, however, during periods of Soviet military aggression.

In 1956, longshoremen refused to handle goods bound to or coming from Soviet-bloc countries to protest the Russian invasion of Hungary.³² ILA locals in the harbor of New York expanded the scope of the boycott to include diplomatic materials and baggage of Eastern European diplomats arriving at the United Nations.³³ After the State Department expressed fears of retaliation against American embassies, the ILA eased the boycott, and exempted diplomatic consignments to Soviet satellite diplomats and consular personnel.³⁴ Similarly, in 1968, the union implemented a boycott of all goods destined for Russia and its Eastern European allies to protest the occupation of Czechoslovakia by Warsaw Pact troops.³⁵ Exceptions to the boycott were again made

²⁹ *Id.*, Sept. 21, 1950, at 47, col. 2; *id.*, Nov. 8, 1950, at 59, col. 6. In response to protests from stevedore companies, ILA President Ryan declared that "this might teach them not to do business with the Russians and her allies." *Id.*, Sept. 7, 1950, at 63, col. 1. The ILA's Atlantic Council, however, lifted the boycott of Soviet satellite countries under government pressure. *Id.*, Sept. 24, 1950, at 106, col. 8.

³⁰ United States ports were essentially closed to Soviet shipping during the 1950's because of the absence of bilateral shipping agreements between the two nations. See ATLANTIC COUNCIL OF THE UNITED STATES, THE SOVIET MERCHANT MARINE: ECONOMIC AND STRATEGIC CHALLENGE TO THE WEST 26 (1979). Thus, longshoremen registered their opposition with the Russian government by refusing to handle U.S.S.R. cargoes carried on non-Soviet vessels.

³¹ The economic structure of the Atlantic and Gulf coast longshore industry is such that the many ports worked by ILA members are independent product markets. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 91 MONTHLY LAB. REV. 2 (Jan. 1968). Because gains in one port are often made at the expense of another, the loyalty of ILA members lies in local union leaders rather than the union's executive committee. *Id.* Accordingly, ILA locals in South Atlantic ports have often ignored the union's official boycott policy. See N.Y. Times, May, 29, 1967, at 50, col. 5.

³² *Id.*, Oct. 30, 1956, at 10, col. 5. ILA President Bradley asserted that the union would "refuse to load or unload cargoes until the armies of the Soviet oppressors leave the soil of free Hungary." *Id.*

³³ *Id.*, Nov. 10, 1956, at 38, col. 1; *id.*, Nov. 11, 1956, at 37, col. 2; *id.*, Dec. 1, 1956, at 13, col. 2.

³⁴ *Id.*, Dec. 13, 1956, at 74, col. 1. At the requests of Under Secretary of State Robert Murphy, the ILA's executive committee also urged locals in Norfolk and Baltimore to ease their boycotts against Soviet-bloc countries. *Id.*

³⁵ *Id.*, Aug. 24, 1968, at 16, col. 2. In justifying the boycott, ILA President Gleason stated that the union's decision was "prompted by the cowardly attack by [the Soviet-bloc countries] along

to ease State Department apprehensions concerning foreign reprisals.³⁶ Neither the ILA's protest boycotts instituted during the Czechoslovakian and Hungarian crises nor during the Korean War were ever challenged in the courts.

2. Protest Boycotts Organized to Object to Particular Policies or Actions of Foreign Governments

The ILA has also engaged in boycotts organized for the purpose of condemning particular policies adopted by foreign countries in governing their own internal affairs. Generally, the union's paramount concern has been human rights. Accordingly, the apartheid policy of the Republic of South Africa and Rhodesia (Zimbabwe) has subjected both countries to protest boycotts initiated by longshoremen.³⁷ The repression of political rights by the Pinochet regime in Chile has likewise precipitated boycotts by the ILA.³⁸ Moreover, in 1979, shortly after the seizure of American diplomatic personnel in Tehran by Iranian militants, the ILA refused to load or unload any cargo destined for or coming from the Islamic Republic of Iran.³⁹ Finally, and most recently, the

with the Soviet Union, on their neighbor, Czechoslovakia, whose new liberal government had extended additional freedoms to its people." *Id.*

³⁶ *Id.*

³⁷ In 1963, the ILA called upon the International Confederation of Free Trade Unions (ICFTU) and the International Transport Workers Federation (ITF) to convene a conference of longshoremen from major ports of the world to explore the possibilities of a world wide industrial boycott against the Republic of South Africa on account of its apartheid policies. The AFL-CIO also supported the ILA's position. DAILY PROCEEDINGS & EXECUTIVE COUNCIL REPORTS, PROCEEDINGS OF THE FIFTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO 265 (1963). In March, 1972, an ILA local, with the backing of the union's executive committee, refused to unload a shipment of Rhodesian chrome in Burnside, Louisiana, on account of the African nation's white supremacist policies. N.Y. Times, Mar. 20, 1972, at 2, col. 6; *id.*, Mar. 22, 1972, at 5, col. 1.

³⁸ *Id.*, April 8, 1979, at 8, col. 1. See also DAILY PROCEEDINGS & EXECUTIVE COUNCIL REPORTS, PROCEEDINGS OF THE THIRTEENTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO 406-07 (1979) (resolution supporting ILA boycott of Chilean goods to protest Chile's banning of trade unions).

³⁹ N.Y. Times, Nov. 9, 1979, at 12, col. 2. The International Longshoremen's and Warehousemen's Union (ILWU), which represents longshoremen on the West Coast, joined in the boycott of Iran. [1979] 284 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-2. Its action immediately affected 100,000 metric tons of paper which were due to be shipped from Portland, Oregon, to Iran aboard the Hoegh Opel. *Id.* The Transport Workers Union of America (TWUA), which loads and unloads air cargo, also joined the ILA's lead, and refused to handle cargoes carried by Air Iran originating from U.S. air terminals. *Id.* at A-1. Additionally, the International Association of Machinists (IAM) stopped servicing Iranian planes in American airports. [1980] 4 DAILY LAB. REP. (BNA) at A-4. Railroads linked to port areas also experienced bottlenecks as the Brotherhood of Airline and Railway Clerks (BRAC) declined to handle rail cars with cargoes destined for Iran. *Id.*

The ILA's boycott in East and Gulf Coast ports stalled shipments of grain, oil drilling equipment, and other machinery. [1979] 284 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-1.

union instituted a twenty-four hour boycott on May 7, 1981, against British-owned ships to protest the death of IRA political prisoner Bobby Sands, and to underscore "its opposition to the actions of the British government in Northern Ireland and . . . its continuing support for fundamental human rights throughout the world."⁴⁰ Of limited duration and economic effect, these boycotts did not produce litigation or arouse State Department objections.⁴¹

The union action affected Iran more severely than the asset freeze and other sanctions implemented by the Carter administration. As Iranian funds to pay for U.S. food exports were exempted from the assets freeze order, Iran successfully contracted to purchase considerable amounts of grain. *Id.* As a result of the ILA's boycott, and that of other unions, however, U.S. exports to Iran were effectively blocked. As a result, the Khomeini government had to seek alternative sources to make up for import losses. The significance to Iran of the protest boycott is suggested by the fact of Iran's dependence upon imports for 35% of its domestic consumption, of which one-quarter came from the United States.

The leadership of the ILA, in conjunction with the ILWU, IAW, BRAC, and their Canadian affiliates, called upon the London-based International Transport Workers Federation (ITF), an international organization of transportation workers, to undertake "world-wide industrial action against Iran in retaliation for that country's holding of American hostages. [1980] 4 DAILY LAB. REP. (BNA) at A-4. The ITF, however, refused to take substantive action, or to issue an official policy statement supporting the steps to stop Iranian shipments. [1980] 11 DAILY LAB. REP. (BNA) at A-1.

In this country, the AFL-CIO officially supported the Iranian boycott. Lane Kirkland, President of the AFL-CIO, asserted that the ILA's action ". . . is a perfectly normal, spontaneous reaction of workers faced with an opportunity to demonstrate how they feel about the conduct of Iran, [and] the seizure of Americans as hostages. . . . I certainly will do nothing to discourage that action. . . ." Remarks of Lane Kirkland, Columbia Broadcasting System interview on "Meet the Press," Washington, D.C. (Nov. 25, 1979), reprinted in [1979] 284 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-2. Kirkland also suggested that he would not discourage a boycott by longshoremen of Soviet grain shipments from the U.S. if the U.S.S.R. were to sell wheat to Iran to counter their loss of American imports. *Id.*

After the United States-Iran Accord ending the hostage crisis was signed on January 19, 1981, Iran resumed its purchase of American grains. [1981] 348 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-1. More than two months later, on March 27, 1981, the ILA announced that it had lifted its boycott of cargoes bound to or coming from Iran. Interview with Mr. Lawrence Malloy, Public Relations Dep't, ILA, New York, N.Y. (Mar. 30, 1981). In terminating the boycott, ILA President Gleason lauded the union's membership for their support "in a united effort to convince terrorists that holding innocent diplomats is a violation of international law and against our human dignity as Americans." [1981] 352 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at C-6.

⁴⁰ [1981] 88 DAILY LAB. REP. (BNA) at A-9, 10. In a resolution adopted by the union's Atlantic Council, the ILA leadership asserted that "as the membership . . . believes that the unification of Ireland is the only way to bring an end to the sufferings and the violations of human rights in Northern Ireland[,] . . . [o]ne of the most visible ways to draw public attention to these wrongs is through peaceful public demonstrations. . . ." *Id.* at A-10. The ILA also boycotted British ships in 1972 following disturbances between the IRA and the English government. N.Y. Times, Feb. 6, 1972, at 12, col. 7.

⁴¹ The ILA has also participated in American maritime union protests against the Arab boycott of Israel. Unlike the protest activities discussed in the text accompanying notes 37-40, this boycott produced substantial foreign dislocations. In 1960, the Seafarers' International Union (SIU) picketed vessels flying the flag of the United Arab Republic to protest Egyptian curbs on the

3. *Protest Boycotts Intended to Further U.S. Foreign Policy Interests*

The ILA has also implemented protest boycotts in situations where the union perceived that American foreign policy measures were inadequate to protect the interests of the United States. Notwithstanding the motivations underlying the ILA's activity, these boycotts have tended to impair the government's conduct of international relations.

The ILA instituted protest boycotts in the late 1960's to assist in the Vietnam war effort. Under the maritime policy formulated by the U.S. government, five foreign ships had been disqualified from carrying government-financed cargoes, but administration policy did not prohibit these ships from entering American ports to pick up private cargoes, nor did the disqualification apply to other ships under the same flag or ownership.⁴² In 1966, the ILA announced that its members would refuse to load vessels of all foreign countries trading with North Vietnam unless the administration took effective steps to stop allied nations from engaging in such trade.⁴³

After the ILA's boycott interfered with the access of several European shipping firms to U.S. ports, the State Department criticized the union, and indicated that the national interest would best be served by continuing to seek a solution on a government-by-government basis.⁴⁴ The Johnson administration, however, succumbed to the wishes of the

freedom of the seas, loss of seamen's jobs due to the Arab boycott, and mistreatment of SIU members on American ships passing through the Suez Canal. N.Y. Times, April 14, 1960, at 62, col. 6; *id.*, April 21, 1960, at 61, col. 5. When ILA locals joined in the picketing of UAR vessels in New York Harbor, the owner of one of these vessels, the *Cleopatra*, unsuccessfully sought to enjoin the picketing in federal court. See *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960) (relief denied as federal courts have no power to grant injunctive relief in admiralty).

The union actions evoked retaliatory picketing of American shipping in the Middle East. N.Y. Times, April 19, 1960, at 74, col. 2; *id.*, May 6, 1960, at 1, col. 3. UAR officials endorsed the boycott of American vessels, and condemned the United States government for its failure to control American maritime unions. *Id.*, April 28, 1960, at 70, col. 8. The Eisenhower administration urgently attempted to negotiate with the unions through AFL-CIO President Meany. *Id.*, May 4, 1960, at 1, col. 3. Under Secretary of State Dillon began extended discussions with AFL-CIO Special Counsel Arthur Goldberg, and reached a settlement on May 6. *Id.*, May 7, 1960 at 1, col. 6. The union agreement to stop picketing was made in return for a detailed statement of government principles on maritime policy issued by the State Department, including a commitment that the government would consult with the AFL-CIO and its maritime unions on future developments affecting American vessels and seamen in the Middle East and would take new steps to halt Arab blacklisting. See 42 STATE DEP'T BULL. 834-35 (1960); N.Y. Times, May 8, 1960, § 4, at 4, col. 1.

⁴² N.Y. Times, Feb. 19, 1966, at 1, col. 4.

⁴³ *Id.*

⁴⁴ *Id.*, Feb. 26, 1966, at 52, col. 2.

ILA by adding more ships to the government blacklist.⁴⁵ Thereafter, the union's executive committee did not compel locals to follow the ILA boycott policy toward North Vietnam.

The ILA did, however, direct boycotts against foreign governments critical of American involvement in Vietnam. In 1968, the union refused to handle Swedish ships and cargoes to protest that government's aid to North Vietnam, and acceptance of American military deserters.⁴⁶ Further entanglement in foreign affairs arose when the ILA refused to handle goods bound for Australia to protest that government's criticism of American participation in Vietnam.⁴⁷ Australian dockworkers had instituted a strike against all U.S. shipping to place economic pressure on the American government to influence its Vietnam policy.⁴⁸ The ILA acted in retaliation, and lifted its boycott only after the Australian government pressured its unions to cease their strike of American shipping.⁴⁹

The protest boycott campaign which posed the most significant interference with federal control over international relations was the ILA's boycott of Cuba from 1960 to 1964. Essentially, the boycott arose on account of the longshoremen's disagreement with the government's measures to control foreign trade with Cuba. While President Kennedy attempted to secure the cooperation of Western European countries in a blockade of the island in 1962, the administration also decided to close American ports to ships that on the same continuous voyage were delivering goods to Cuba.⁵⁰ Believing that the govern-

⁴⁵ *Id.*, Mar. 4, 1966, at 2, col. 4. After the administration added more foreign ships to the blacklist at the behest of the longshoremen, ILA President Gleason declared that the union and the Government were "pretty near agreement" on "what has to be done to stop non-Communist trade with North Vietnam." *Id.*

⁴⁶ In 1968, the ILA boycotted Swedish ships because the Swedish government had welcomed American military deserters from Vietnam. *Id.*, April 22, 1968, at 46, col. 5. The next year, the union picketed Swedish travel liners to protest Sweden's plan to provide \$40 million in aid to North Vietnam. *Id.*, Dec. 9, 1969, at 54, col. 2. One newspaper editorial commented that the ILA was "back at its favorite game of transferring the State Department at Foggy Bottom to the even more foggy waterfront" and that "it is up to the State Department, not the Metternichs of the docks to decide what—if anything—the United States should do about the whole thing." *Id.*

⁴⁷ *Id.*, Jan. 4, 1973, at 3, col. 1; *id.*, Jan. 6, 1973, at 6, col. 4.

⁴⁸ *Id.*, Jan. 5, 1973, at 2, col. 2.

⁴⁹ *Id.*, Jan. 10, 1973, at 2, col. 6.

⁵⁰ ADLER-KARLSSON, WESTERN ECONOMIC WARFARE: 1947-1967 106 (1968). All foreign ships carrying ammunitions to Cuba were barred from American ports. N.Y. Times, Oct. 4, 1962, at 1, col. 6. Additionally, foreign vessels visiting Cuban harbors were not allowed to visit United States ports to pick up commercial cargoes for return trips to Europe. *Id.* As European countries were extensively involved in Cuban trade, the policy pursued by the Kennedy administration bore most heavily on European-flag ships. ADLER-KARLSSON, *supra*, at 106.

ment solutions were "meaningless" and "weak action,"⁵¹ the ILA instituted a total boycott of all ships engaged in Cuban trade.⁵² The union's actions evoked State Department fears that the boycott would complicate relations with European allies,⁵³ and provoked complaints by foreign governments.⁵⁴

The administration gradually toughened its stance against Cuba. In 1963, it established a blacklist to prohibit individual foreign ships trading with Cuba from carrying American-financed cargoes.⁵⁵ Despite this policy, the ILA rejected a State Department request to modify its stance, and indicated that its boycott would continue to apply to all ships trading with Cuba regardless of the vessel's status on the government blacklist.⁵⁶

The administration's increasing inability to eliminate the ILA's interference with foreign commerce led private parties to challenge the protest boycott under federal labor laws. In *Ocean Shipping Service, Ltd. (Local 1355, International Longshoremen's Association)*,⁵⁷ an American stevedore firm asserted that the union's refusal to supply its members for work on a vessel which had engaged in Cuban trade violated section 8(b)(4) of the NLRA. This provision provides in pertinent part that:

It shall be an unfair labor practice for a labor organization or its agents . . . to engage in . . . 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 . . . handle or work on any goods . . . or to perform any services . . . where an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person . . .⁵⁸

⁵¹ N.Y. Times, Oct. 9, 1962, at 1, col. 6.

⁵² *Id.* ILA locals had engaged in selective boycotts against foreign shippers carrying Cuban cargoes since 1960. *Id.*, Jan. 5, 1961, at 6, col. 3. The boycotts spread to numerous Atlantic ports. *Id.*, Jan. 7, 1961, at 8, col. 3; *id.*, Jan. 12, 1961, at 3, col. 8. Moreover, despite the warnings of President Kennedy that such conduct complicated foreign policy, the boycotts continued sporadically. *Id.*, Mar. 10, 1961, at 6, col. 1. Litigation began when the boycott spread to include the Orient-Mid-East-Great Lakes Service, which the ILA alleged was under the same ownership as Orient-Mid-East Lines, whose ships had traded with Cuba. *Id.*, Oct. 26, 1962, at 62, col. 1; *id.*, Oct. 27, 1962, at 50, col. 1. The boycott against the company's vessels ended only after both firms agreed to divert cargoes bound for Cuba, to refuse other Cuban cargoes, and to drop suit against the ILA. *Id.*, Oct. 30, 1962, at 70, col. 1.

⁵³ *Id.*, Oct. 9, 1962, at 1, col. 6.

⁵⁴ *Id.*, Oct. 6, 1962, at 5, col. 7.

⁵⁵ For a discussion of the United States policy toward Cuba during the early 1960's, see *Penello v. Local 1355, Int'l Longshoremen's Ass'n*, 227 F. Supp. 164, 167-68 (D. Md. 1964). See also note 50 *supra*.

⁵⁶ N.Y. Times, Jan. 21, 1964, at 58, col. 5; *id.*, Mar. 29, 1964, at 16, col. 4.

⁵⁷ 146 N.L.R.B. 723 (1964).

⁵⁸ NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

Since the ILA's stated objective was to eliminate trade with Cuba, the stevedore argued that the union's boycott contravened section 8(b)(4) because it forced neutral firms "to cease doing business" with other companies trading with Cuba. In defense, the ILA contended that the Board lacked jurisdiction over the alleged unfair labor practice because the union's refusal to handle Cuban cargoes and ships on political grounds did not constitute a "labor dispute" within the meaning of the NLRA.

The Board rejected the "labor dispute" requirement as a limitation on its jurisdiction, and found that the ILA's politically-inspired conduct violated section 8(b)(4).⁵⁹ On appeal, the Fourth Circuit reversed.⁶⁰ The court interpreted the NLRA as conditioning the Board's jurisdiction on the existence of a labor dispute.⁶¹ As the "union activity . . . pertains to a general political question,"⁶² the court reasoned that the Board lacked jurisdiction over the protest boycott. Yet, despite this determination, the Fourth Circuit went on to review the merits of the Board's decision.⁶³ The *Ocean Shipping* court found that there was no secondary boycott since both elements necessary for a section 8(b)(4) violation—(1) "threats, coercion or restraint," and (2) "an object of forcing or requiring any person . . . to cease doing business with any other person . . ."—were absent. In support of its conclusion, the Fourth Circuit reasoned that the refusal to work one ship did not constitute "threats, coercion or restraint," and maintained that the union's only object was the elimination of trade with Cuba.⁶⁴

The foregoing discussion of the ILA's protest boycott campaigns demonstrates that private parties have been hesitant to challenge union activities in court. Prior to the numerous legal challenges asserted

⁵⁹ 146 N.L.R.B. at 727. After unfair labor practices were filed with the Board, the regional director successfully petitioned for an injunction under § 10(1) to restrain the ILA's boycott pending adjudication of the complaint. *Penello v. Local 1355, Int'l Longshoremen's Ass'n*, 227 F. Supp. 164 (D. Md. 1964). For a discussion of the role of § 10(1) injunctions in restraining alleged unfair labor practices, see notes 83-84 *infra*. The district court also rejected the union's contention that the NLRB lacked jurisdiction absent a labor dispute. 227 F. Supp. at 170.

⁶⁰ *NLRB v. Local 1355, Int'l Longshoremen's Ass'n (Ocean Shipping)*, 146 N.L.R.B. 723, *rev'd*, 332 F.2d 992 (4th Cir. 1964).

⁶¹ *Id.* at 995.

⁶² *Id.* at 996.

⁶³ To justify its departure from the practice of courts to avoid the resolution of issues not in controversy, the court explained that as "we are dealing with a case of first impression and one likely to be offered for review on certiorari, we deem it appropriate to consider further questions that would arise if the Supreme Court should take a different view of the jurisdictional issue." *Id.* Despite the Fourth Circuit's reasoning, the NLRB did not subsequently apply for certiorari. *See Recent Cases*, 78 HARV. L. REV. 463, 465 n.11 (1964).

⁶⁴ 332 F.2d at 998.

against the Russian trade boycott, the *Ocean Shipping* opinion constituted the sole pronouncement regarding the NLRA's application to protest boycotts. Perhaps the reluctance to seek legal remedies against protest boycotts might be attributed, at least in part, to a variety of practical and political considerations. Supplementing these considerations, however, may well have been the impediment to legal relief created by the decision of the *Ocean Shipping* court to clothe protest boycotts with a cloak of immunity from the NLRA.

B. The Russian Trade Boycott of 1980-81

In December of 1979, armed forces of the Soviet Union invaded Afghanistan.⁶⁵ In response, President Carter decided to halt or reduce exports of grain and high technology to the U.S.S.R.⁶⁶ Pursuant to the authority given him by the Export Administration Act of 1979,⁶⁷ the President issued orders implementing an embargo on grain shipments and high technology exports destined for Russia.⁶⁸ Imports were not

⁶⁵ Three Soviet divisions, the vanguard of an eventual occupying force of 85,000 troops, pushed across the Russian-Afghanistan border on December 22, 1979. N.Y. Times, Dec. 22, 1979, at 1, col. 5. Their initial mission purportedly was to save the Russian-installed government of Babruck Karmal from a rebellion by bands of Moslem tribal guerrillas. One year later, the Soviet military had all but abandoned hopes for a quick victory. U.S. NEWS & WORLD REP., Dec. 22, 1980, at 26. See also Rubinstein, *Soviet Imperialism in Afghanistan*, 79 CURRENT HIST. 80 (Oct. 1980).

⁶⁶ For the text of President Carter's statement announcing trade actions against the U.S.S.R., see 16 WEEKLY COMP. OF PRES. DOC. 25 (Jan. 11, 1980). In addition to halting exports, the President took other measures to condemn the Soviet invasion, including recalling the United States ambassador from Moscow to Washington, asking the Senate to defer further consideration of the SALT II Treaty, and delaying construction of any American or Soviet Consular facilities. *Id.* at 26-27.

⁶⁷ Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified at 50 U.S.C. app. §§ 2401-2420 (Supp. III 1979)). Under the 1979 Amendments to the Act, the President has authority to suspend shipments of goods for national security reasons or foreign policy considerations. *Id.* at §§ 2404-2405. For a discussion of the imposition of governmental restrictions on private commercial exports for the purpose of furthering particular goals of United States foreign policy, see Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 MINN. L. REV. 739 (1981).

⁶⁸ On January 7, 1980, Commerce Secretary Klutnick announced that validated export licenses were required to export all U.S. agricultural commodities and products to the Soviet Union. 45 Fed. Reg. 1883 (1980). Prior to this action, agricultural commodities could be exported to the U.S.S.R. through the use of general licenses. See [1980] 290 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-6. Two days later, President Carter directed that all existing licenses for high technology and strategic exports to the Soviet Union be suspended and that all shipments be frozen pending completion of the ongoing review of technology exports to Russia. 45 Fed. Reg. 3027 (1980). The suspension order affected approximately 500 validated export licenses involving high technology goods worth over \$155 million. [1980] 290 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-1. As foreign policy export controls automatically expire one year after imposition unless the President extends them, 50 U.S.C. app. § 2413(b) (Supp. III 1979), President Carter extended the controls on exports bound for Russia on January 7, 1981. 46 Fed.

affected. However, the President chose to exclude from the embargo the outstanding amount of unshipped grain committed under a 1975 agreement between the two nations regulating the purchase and sale of grain for supply to the Soviet Union.⁶⁹

Shortly thereafter, on January 9, Thomas Gleason, the president of the ILA, instructed the union membership to boycott U.S. shipments destined for Russia and to deny services to Soviet-flag ships entering American ports.⁷⁰ Gleason asserted that the directive came "in response to overwhelming demands by rank and file members of the union" reacting to the Soviet threat to world peace.⁷¹ In addition, the executive committee of the ILA adopted a resolution prohibiting locals from handling any cargo bound to or coming from the Soviet Union.⁷²

Reg. 1665 (1981). For a discussion of the changes in export controls instituted during the Russian trade embargo, see Abbott, *supra* note 67, at 874-75 n.803.

⁶⁹ Under the terms of the 1975 grain deal, the United States agreed to allow sales of six million metric tons of wheat and corn to the Soviets. Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Supply of Grain, Oct. 20, 1975, [1975] 26 U.S.T. 2971, T.I.A.S. No. 8206. Although the agreement permitted Russia to increase its purchases by up to two million metric tons above the six million ton sale limit in any twelve month period without consultation, *id.* at 2973, the Soviets had only augmented the agreement's sale limit to 8 million metric tons at the time of President Carter's suspension order on January 7, 1980. See [1980] 289 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-1, 2. The suspension of general export licenses essentially forbid the export of 17 million metric tons of grain ordered by the Soviet Union in excess of 8 million metric tons committed under the earlier agreement. *Id.* at A-2. As of December 1980, approximately 5.6 million metric tons of grain covered by the agreement had been shipped to Soviet destinations. *Id.* at A-3. Although the President decided to honor the commitment levels, the suspension order also required that validated export licenses would be required for the 3.5 million metric tons remaining to be shipped under the agreement. 45 Fed. Reg. 1883 (1980).

⁷⁰ The directive issued by the union hierarchy stated as follows:

In response to overwhelming demands 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. This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. [*sic*] However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

The reason for this action should be apparent in light of international events that have affected relations between the U.S. & Soviet Union.

However, the decision by the Union leadership 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 of 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.

Press Release of Int'l Longshoremen's Ass'n (Jan. 9, 1980), reprinted in Walsh v. International Longshoremen's Ass'n, 480 F. Supp. 524, 526 n.1 (D. Mass. 1980).

⁷¹ N.Y. Times, Jan. 10, 1980, at 1, col. 5.

⁷² Wall St. J., Jan. 10, 1980, at 2, col. 2. In contrast to the boycott of Iranian goods and ships, see note 39 *supra*, the ILA failed to gain support for the Russian trade boycott from its West Coast sister, the 90,000 member International Longshoremen and Warehousemen's Union. *Id.* The

As a consequence, ILA locals in Great Lakes, Atlantic and Gulf Coast ports refused to refer their members through hiring hall arrangements for work involving Russian ships or cargoes.⁷³

In comparison to the export controls implemented by the Carter administration, the ILA directive was considerably broader in scope. The ILA directive prevented not only the loading of grain and other cargo licensed for export and exempted from or not covered by the administration's embargo, but also the unloading of any cargo arriving from Russia.⁷⁴ Gleason proclaimed that the ILA boycott expressed the

ILA reported, however, that a West German longshoremen's union had agreed to follow the Gleason directive and refuse to handle Russian cargo in West German ports. *Id.*, Jan. 11, 1980, at 7, col. 1. Additionally, Canadian dockworkers, all pilots working the Suez and Panama canals, and Australian longshoremen expressed support for the ILA boycott, but nonetheless declined to join in the refusal to handle Soviet cargo. [1980] 290 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-7.

⁷³ Under a hiring hall agreement, an employer promises to hire only those persons referred to it by the union, and the union agrees to refer applicants on a nondiscriminatory basis, i.e., without regard to their membership or non-membership in the union. A labor contract providing for a non-discriminatory hiring hall is legal, absent the actual practice of discrimination under the agreement. *International Brhd. of Teamsters v. NLRB*, 365 U.S. 667, 674 (1961). Thus, hiring halls serve as a means "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." *Mountain Pacific Chapter*, 119 NLRB 883, 896 n.8 (1958), *enforcement denied on other grounds*, 270 F.2d 425 (9th Cir. 1959). The hiring hall arrangement is utilized most frequently in the maritime and construction industries. See MORRIS, *supra* note 7, at 712.

⁷⁴ Some members of Congress also advocated an embargo on Russian trade. On January 22, 1980, Senator Weiher (R.-Conn.) introduced legislation calling for the imposition of a total trade embargo against the Soviet Union pending its withdrawal from Afghanistan. S. 2200, 96th Cong., 2d Sess., 126 CONG. REC. S37 (daily ed. Jan. 22, 1980); S. Con. Res. 64, 96th Cong., 2d Sess., 126 CONG. REC. S38 (daily ed. Jan. 22, 1980). Subsequent measures sought to restrict American-Russian trade in specific commodities. S. Con. Res. 76, 96th Cong., 2d Sess., 126 CONG. REC. S1453 (daily ed. Feb. 18, 1980) (to prohibit export of fertilizers to the Soviet Union); S. RES. 373, 96th Cong., 2d Sess., 126 CONG. REC. S1778 (daily ed. Feb. 26, 1980) (to impose an embargo on export sales to U.S.S.R.); S. Con. Res. 15, 97th Cong., 1st Sess., 127 CONG. REC. S2410 (daily ed. Mar. 19, 1981) (sense of Senate that Soviet grain embargo be expanded to include all other export commodities); H. Res. 563, 96th Cong., 2d Sess., 126 CONG. REC. H606 (daily ed. Feb. 5, 1980) (to prohibit the export of phosphate fertilizer to Russia); H. Con. Res. 262, 96th Cong., 2d Sess., 126 CONG. REC. H295 (daily ed. Jan. 28, 1980) (to block sale and export of fertilizers to Soviet Union); H. Res. 30, 97th Cong., 1st Sess., 127 CONG. REC. H133 (daily ed. Jan. 20, 1981) (urging newly inaugurated Reagan administration to continue grain embargo imposed by President Carter).

Meanwhile, a bill that would deny Soviet vessels access to U.S. ports until the U.S.S.R. withdraws its military forces from Afghanistan was introduced February 5, 1980 by Representative Shumway (R.-Cal.). H.R. 6424, 96th Cong., 2d Sess., 126 CONG. REC. H534 (daily ed. Feb. 5, 1980). In bringing the bill to the House floor, Shumway asserted that "the east and gulf coast longshoremen had the right idea, [for] if we are serious about responding to Soviet actions, we should go farther than just limiting exports." *Id.* Moreover, a House resolution introduced January 30, 1980 by Representative Murphy (D.-N.Y.), Chairman of the House Merchant Marine Committee, and 37 co-sponsors, called for an immediate suspension of U.S. maritime agreements with the Soviet Union after 90 days notice. H.R. Con. Res. 269, 96th Cong., 2d Sess., 126 CONG. REC. H427 (daily ed. Jan. 30, 1980). The Murphy resolution sought to bar Soviet-flag ships from

conscience of union workers against contributing to the economic or military well-being of a nation that they considered a serious threat to the United States.⁷⁵ Further, the ILA leader argued that the longshoremen were not attempting to set foreign policy, as the union activities were in the nature of a political protest.⁷⁶

As a result of the Carter administration's suspension of all grain contracts requested by the Soviet Union that exceeded the 1975 grains agreement limit, the ILA boycott affected only the 3.5 million metric tons that remained to be transported under the terms of the 1975 compact.⁷⁷ In addition, however, the longshoremen's actions affected all other goods which were exempted from the government's export control system. As a result, the boycott succeeded in blocking the shipments of these commodities, for excessive amounts of grain and inadequate storage facilities to handle the backlog of Soviet orders snarled ports worked by ILA locals.⁷⁸

Consequently, Carter administration officials voiced their concern that the union's actions usurped the foreign policy prerogatives of the President.⁷⁹ The administration's response, however, was limited to seeking an end to the ILA's boycott through negotiation with the union's hierarchy. Yet, this strategy failed for despite President Carter's meeting with ILA leaders and his proposal that the union lift its boycott to allow exports to leave American ports, the union's executive committee reaffirmed that the longshoremen would continue their action unless enjoined by the courts.⁸⁰ Defeated in its attempts to per-

calling on 40 U.S. ports open to the U.S.S.R. under a 1976 maritime agreement, and would have a further effect on 30 other U.S. ports that handled Russian cargoes from non-Soviet vessels. [1980] 293 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-12. The Carter Administration, however, vigorously opposed the measure as being inconsistent with the interests of American foreign policy. See [1980] 299 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-19.

⁷⁵ Wall St. J., Jan. 10, 1980, at 2, col. 2. The NLRB and several courts considering legal challenges to the ILA's boycott rejected the assertion that the Gleason directive merely expressed the overwhelming desire of the union's membership. See note 258 *infra*.

⁷⁶ Wall St. J., Jan. 10, 1980, at 2, col. 2.

⁷⁷ *Id.* See note 69 *supra*.

⁷⁸ See [1980] 291 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-2. For example, five grain export terminals in Houston and Galveston, Texas stopped accepting grain shipped by barge and railroad car. The terminals were filled, and operators could not secure buyers for the Soviet-bound grain. *Id.* The ILA boycott affected virtually all of the 3.5 million metric tons excluded from the President's export controls, since only 150,000 metric tons were scheduled to be shipped from West Coast ports. *Id.* at A-4.

⁷⁹ N.Y. Times, Jan. 10, 1980, at 1, col. 5.

⁸⁰ *Id.*, Jan. 18, 1980, at 9, col. 5; *id.*, Jan. 20, 1980, at 37, col. 6. See also [1980] 293 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-14.

In August of 1980, the ILA threatened to open another avenue of protest against the Soviet Union by expanding its boycott to include Poland. Specifically, union president Gleason inti-

suade the ILA to end its boycott, the administration thereupon proposed to assume the outstanding grain contracts frustrated by the union's activity.⁸¹

With the boycott preventing the loading and unloading of cargoes belonging to various parties, several exporters and importers responded by filing unfair labor practice charges with the NLRB against the ILA and the particular locals involved.⁸² The legal theories underlying these suits were similar to the challenge to the Cuban boycott which the Fourth Circuit had rejected sixteen years earlier in the *Ocean Shipping* case. In general, the parties charged that a refusal by the union to handle goods associated with the Soviet Union constituted an illegal secondary boycott as the work stoppage was an attempt to force shippers, carriers, and stevedores to cease doing business with the U.S.S.R. or with each other.

After investigating these charges, the NLRB adopted a similar characterization of the ILA's conduct.⁸³ As a result, while the charges were pending with the Board, three regional directors brought actions in federal district courts seeking preliminary injunctions against the boycott under section 10(1) of the NLRA.⁸⁴ In *Baldovin v. International*

ated that the longshoremen would boycott cargo to and from Poland in support of striking workers should the Polish government fail to grant their demands. [1980] 166 DAILY LAB. REP. (BNA) at A-3. Gleason postponed the planned boycott amid reports that Poland's communist leadership offered concessions that could bring an end to a strike by 20,000 Polish workers. *Id.* The executive committee of the AFL-CIO supported the ILA position and sent letters to the ITWF and ITF urging them to take similar action. *Id.* at A-3, 4. Moreover, the International Association of Machinists disclosed that its members would refuse to handle air cargo going to and from Poland should the Polish government refuse to grant the workers' demands. *Id.* at A-3. After concessions were granted by the Polish government, however, the ILA canceled its threatened boycott.

⁸¹ See [1980] 294 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-5. Legislation was also introduced to authorize the repurchase of embargoed grain, and alleviate the effect of lost sales upon farmers. See S.2258, 96th Cong., 2d Sess., 126 CONG. REC. S981 (daily ed. Feb. 5, 1980); H.R. 6238, 96th Cong., 2d Sess., 126 CONG. REC. H116 (daily ed. Jan. 22, 1980).

⁸² See [1980] 293 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-14, O-1. Three unfair labor practice charges were filed with the regional offices of the NLRB in Massachusetts, Georgia, and Texas. *Id.* at A-14.

⁸³ Section 8(b) of the NLRA creates six unfair labor practices. NLRA § 8(a)-(e), 29 U.S.C. § 158(a)-(e) (1976). The Board may not act until an unfair labor practice charge is filed with a regional office of the NLRB alleging a violation of the Act on the part of an employer, a labor organization, or their agents. NLRB Rules and Regulations, 29 C.F.R. § 102.9 (1981). Thereafter, the charge is investigated by a Board agent from a regional office, and upon completion of the investigation, the NLRB's regional director determines whether a formal complaint is warranted. *Id.* § 102.15.

⁸⁴ Section 10(1) provides in pertinent part that:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(B) . . . of section 8(b), . . . and the . . . regional attorney . . . has reasonable cause to believe such charge is true and that a complaint should issue, . . . [he]

Longshoremen's Association,⁸⁵ Judge Black of the Southern District of Texas denied the regional director's petition on the ground that the boycott was not "in commerce," and therefore, the NLRB lacked jurisdiction over the dispute. In the second of the section 10(l) proceedings, *Mack v. International Longshoremen's Association*,⁸⁶ Judge Edenfield of the Southern District of Georgia rejected the union's assertion of res judicata on the basis of the Texas decision, found jurisdiction in the Board, and issued the requested injunction as probable cause existed to believe that the Act had been violated. That order enjoined ILA locals from refusing to perform work in the ports of Savannah and Brunswick, Georgia on account of any grievance concerning shipments of cargo to or from the Soviet Union.⁸⁷ Finally, in *Walsh v. International Longshoremen's Association*,⁸⁸ Judge Skinner of the District of Massachusetts also rejected the claim of res judicata, and found jurisdiction over the boycott under the NLRA. However, the court denied the petition on the ground that the boycott was protected by the First Amendment.⁸⁹ The rulings of both the Texas and Georgia district courts were appealed to the Fifth Circuit.⁹⁰ That court, in *Baldovin v. International Longshoremen's Association*,⁹¹ affirmed the decision of Judge Black in finding that the NLRB lacked jurisdiction over protest boycotts, and reversed the issuance of an injunction by Judge Edenfield.

shall, on behalf of the Board, petition . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to the alleged secondary boycott.

NLRA § 10(l), 29 U.S.C. § 150(l) (1976). Mandatory injunction proceedings under § 10(l) are available only in certain situations where union actions have the potential for subjecting employers to substantial damage over short periods of time. Specifically, § 10(l) provides that charges filed under § 8(b)(4)(A),(B), or (C), 8(b)(7) or 8(e) (secondary boycott, hot cargo agreement, recognition picketing, etc., charges) give jurisdiction to district courts to grant injunctive relief. *Id.*

⁸⁵ No. H-80-259 (S.D. Tex. Feb. 15, 1980). In *Baldovin*, the Kansas, Texas and American Farm Bureaus filed complaints after ILA locals in the port of Houston refused to supply longshoremen so that a Belgian ship could load grain being purchased by the U.S.S.R. from an American grain dealer. *Id.* slip op. at 2.

⁸⁶ 104 L.R.R.M. 2892 (S.D. Ga. Mar. 4, 1980). *Mack* involved refusals by an ILA local in Savannah to unload Russian ammonia imported by Occidental Chemical Company, and a similar incident in Brunswick, Georgia, where ILA members declined to service a ship transporting imports of Soviet potash for Occidental. *Id.* at 2893.

⁸⁷ *Id.* at 2893-95.

⁸⁸ 488 F. Supp. 524 (D. Mass. 1980). In *Walsh*, an ILA local in Boston refused to unload shipments of wood imported from Russia on American ships. *Id.* at 526.

⁸⁹ *Id.* at 529.

⁹⁰ In addition, the *Walsh* decision was appealed to the First Circuit. See *Walsh v. International Longshoremen's Ass'n*, 630 F.2d 864 (1st Cir. 1980). However, the court of appeals did not reach the merits, but instead remanded with instructions to dismiss on the ground of res judicata. In the court's view, the denial of an injunction by the district court in *Baldovin* precluded additional § 10(l) petitions. *Id.* at 876.

⁹¹ 626 F.2d 445 (5th Cir. 1980).

In addition, one importer brought an action in federal court in Boston seeking damages caused by the Russian trade boycott under section 303 of the Labor-Management Relations Act (LMRA).⁹² This cause of action provides that a suit may be maintained in federal dis-

⁹² See note 94 *infra*. The importer, Allied International, also challenged the ILA's protest boycott on the grounds that the union's activities constituted (1) a violation of § 1 of the Sherman Act, and (2) a maritime tort. Both of these arguments were rejected by the district court and later on appeal by the First Circuit. See *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 492 F. Supp. 332 (D. Mass. 1980), *aff'd*, 640 F.2d 1368 (1st Cir. 1981). Allied International subsequently filed a writ of certiorari, currently pending before the Supreme Court, to vacate the judgment of the First Circuit with regard to its antitrust and maritime tort claims. See *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir.), *cert. pending*, 49 U.S.L.W. 3883 (filed May 5, 1981) (No. 80-1906).

Other employers adversely affected by the Russian trade boycott sought to enjoin the ILA's activities under § 301 of the Act. LMRA § 301, 29 U.S.C. § 185 (1976). This provision provides that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." *Id.* § 185(a). In these cases, members of multi-employer bargaining groups who were parties to labor contracts with ILA locals brought injunction actions alleging that the boycott violated their collective bargaining agreements. As the contracts contained detailed grievance provisions, mandatory arbitration procedures, and no-strike clauses, the employers argued that they were entitled to preliminary injunctive relief pending arbitration of any grievance the ILA had over the companies' shipments of cargo to or from the Soviet Union.

Employers met with varying success at the district court level. Several courts enjoined the boycott pending arbitration as the work stoppage breached broad no-strike obligations. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, Local 1408, No. 80-81-Civ-J-B (M.D. Fla. Feb. 1, 1980); *Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n*, Locals 1248 & 1963, Civ. No. 80-186-N (E.D. Va. Feb. 22, 1980); *Carolina Shipping Co. v. International Longshoremen's Ass'n*, Local 1422, C.A. No. 80-0873-1 (D.S.C. May 7, 1980). In contrast, one court refused to issue an injunction pending arbitration since the collective bargaining agreement at issue lacked a specific no-strike obligation. *John W. McGrath Corp. v. International Longshoremen's Ass'n*, Local 1294, No. 80-CV-150 (N.D.N.Y. Mar. 6, 1980). Finally, one court enforced three arbitrators' decisions wherein ILA locals had been adjudged to have violated contractual no-strike obligations. *New Orleans Steamship Ass'n v. General Longshore Workers, ILA Local Union No. 1418*, 486 F. Supp. 409 (E.D. La. 1980).

The decisions in *Jacksonville Bulk Terminals*, *New Orleans Shipping Association*, and *Hampton Roads Shipping Association* were appealed to the Fifth and Fourth Circuits. These courts dissolved each injunction issued in the lower courts, for in their view, the Supreme Court's decision in *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976), precluded injunctive relief pending arbitration of a grievance which an employer had no power to eliminate. *Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n*, Locals 1248 & 1963, 631 F.2d 282 (4th Cir. 1980); *New Orleans Steamship Ass'n v. General Longshore Workers, ILA Local Union No. 1418*, 626 F.2d 455 (5th Cir. 1980) (consolidated cases). The Supreme Court has accepted certiorari in the *Jacksonville Bulk Terminals* case. *New Orleans Steamship Ass'n v. General Longshore Workers, ILA Local Union No. 1418*, 626 F.2d 455 (5th Cir. 1980), *cert. granted sub nom.*, *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, Local 1408, 49 U.S.L.W. 3722 (Mar. 31, 1981) (No. 80-1045). A petition for certiorari is still pending in *Hampton Roads Shipping Ass'n*. *Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n*, Locals 1248 & 1963, 631 F.2d 282 (4th Cir.), *cert. pending*, 49 U.S.L.W. 3496 (filed Dec. 17, 1980) (No. 80-1058).

strict court for damages resulting from "any activity or conduct defined as an unfair labor practice under section 8(b)(4) of the [NLRA]." ⁹³ In *Allied International, Inc. v. International Longshoremen's Association*, ⁹⁴ the district court dismissed the suit relying on its earlier decision in *Walsh* that the union's activities did not constitute an illegal secondary boycott. On appeal, however, the First Circuit reversed this determination, concluding that Allied had stated a valid cause of action under section 303. ⁹⁵ Though the decision in *Allied International* was confined to a consideration of whether the challenge to the Russian trade boycott stated a cause of action under section 303 of the LMRA, the First Circuit's conclusion is in effect a repudiation of the Fifth Circuit's holding in *Baldovin*.

Finally, after the three separate cases concerning the section 10(1) injunctions and the section 303 damage suit had been adjudicated by the First and Fifth Circuits, the Board reached a decision on the merits in the unfair labor practice charges which had been pending against the ILA for nearly nineteen months. ⁹⁶ In *International Longshoremen's Association, Local 799 (Allied International, Inc.)*, ⁹⁷ the NLRB determined that it possessed jurisdiction over the Russian trade boycott, and concluded that the ILA's activities violated section 8(b)(4) of the Act. Yet, while the Board's decision, like the First Circuit's opinion in *Allied International*, rejected the reasoning of the Fifth Circuit in *Baldovin*, the NLRB's analysis of the ILA's boycott differed in significant respects from that of the First Circuit.

The inconsistency of results involving virtually identical sets of circumstances, and the conflicting and disparate analyses employed by the Board and the numerous courts confronting the ILA's boycott, is illustrative of the novel legal questions posed by protest boycotts. To determine whether protest boycotts are subject to regulation under the NLRA (and assuming that the Board possesses such jurisdiction, the

⁹³ LMRA § 303, 29 U.S.C. § 187 (1976).

⁹⁴ 492 F. Supp. 332 (D. Mass. 1980).

⁹⁵ *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981). As the First Circuit determined that a protest boycott violates § 8(b)(4), the court reversed and remanded for further consideration of Allied International's claim for damages under § 303 of the LMRA. *Id.* at 1379. The Supreme Court has subsequently granted the ILA's petition for certiorari to review the First Circuit's conclusion regarding the union's liability under § 303. *See Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir.), *cert. granted*, 50 U.S.L.W. 3245 (Oct. 6, 1981) (No. 80-1663).

⁹⁶ The first of three unfair labor practice charges was filed on January 23, 1980, approximately two weeks after the ILA instituted its boycott. *See* [1980] 40 DAILY LAB. REP. (BNA) at A-4.

⁹⁷ 257 N.L.R.B. No. 151, 108 L.R.R.M. 1033 (Aug. 28, 1981).

extent of that regulation), these analyses must be examined and reconciled.

II. THE JURISDICTIONAL REACH OF THE NLRA AND PROTEST BOYCOTTS

In *Baldovin v. International Longshoremen's Association*, the Fifth Circuit determined that the secondary boycott provisions of the NLRA did not extend to the ILA's activities. According to the court, a union's political protest of a foreign government's invasion of another nation does not satisfy the "in commerce" jurisdictional minimum of the NLRA.⁹⁸ In reaching this result, the *Baldovin* court concentrated its analysis upon a line of Supreme Court cases delineating the meaning of the "in commerce" requirement in the context of NLRA regulation of foreign flag-of-convenience vessels.⁹⁹ Since the Fifth Circuit indicated that the Supreme Court precedent compelled its decision in *Baldovin*,¹⁰⁰ a review of the development of the "in commerce" prerequisite to NLRB jurisdiction is warranted.

A. The "In Commerce" Requirement

The secondary boycott provisions regulate particular union activities directed at individuals employed by a "person engaged in commerce or in an industry affecting commerce. . . ."¹⁰¹ These provisions buttress the Act's general limitations to activities "affecting commerce."¹⁰² Moreover, the NLRB's jurisdiction over unfair labor practices is also confined to conduct "affecting commerce."¹⁰³

While the scope of the terms "in commerce" and "affecting commerce" is not self-evident, section 2(6) of the Act¹⁰⁴ defines "commerce" to include traffic "between any foreign country and any State, Territory, or the District of Columbia"¹⁰⁵ The legislative history of the definition likewise evinces a congressional intent to invest the

⁹⁸ 626 F.2d at 454.

⁹⁹ A "flag-of-convenience" vessel has been defined as a ship of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever reasons, are opportune for the persons who are registering the ships. *BOCZEK, FLAGS OF CONVENIENCE* 2 (1962). In the first five decades of the twentieth century, the practice of registering national ships under foreign flags had grown to the point where it threatened the survival of the United States merchant marine. *Id.* at 26-63.

¹⁰⁰ 626 F.2d at 454.

¹⁰¹ NLRA § 8(b), 29 U.S.C. § 158(b) (1976) (emphasis added).

¹⁰² *Id.* §§ 153-56, 160 (1976).

¹⁰³ *Id.* § 160(a) (1976).

¹⁰⁴ NLRA § 2(6), 29 U.S.C. § 152(6) (1976).

¹⁰⁵ *Id.*

Board with all the power constitutionally delegable under the commerce clause.¹⁰⁶

In light of the literal language of section 2(6), it has never been doubted that the NLRA applies to the American shipping industry. Accordingly, as early as 1936 the Board asserted its jurisdiction to order bargaining unit elections among crews on vessels traveling between the United States and foreign ports in *Panama Railroad Co.*¹⁰⁷ In 1940, the NLRB further extended its jurisdiction over foreign commerce in *American West African Lines, Inc.*,¹⁰⁸ to include an unfair labor practice proceeding involving an employer engaged in international freight shipping. Moreover, the Supreme Court has consistently upheld such rulings without question.¹⁰⁹

Since shipping is an obvious component of the American economy, strikes and boycotts disrupting shipping traffic would appear to affect commerce pursuant to the analysis of the Board's early case law. However, when the Supreme Court ultimately ruled on the subject in 1957, its decision reversed the Board's expanding jurisdictional concepts.

B. The Supreme Court and the Flag-of-Convenience Vessel Cases

The first case decided by the Supreme Court on the issue of NLRB jurisdiction over ships in foreign commerce was *Benz v. Compania Naviera Hidalgo*.¹¹⁰ It involved a flag-of-convenience ship, owned by a Panamanian corporation, flying a Liberian flag, and sailing under British articles of agreement. American maritime unions had picketed the vessel while it was temporarily berthed in the harbor of Portland, Ore-

¹⁰⁶ On its face, the NLRA has a rather broad international scope of subject matter jurisdiction. Legislative history indicates that NLRB jurisdiction is "based squarely on the power of Congress to regulate commerce among the several States and with foreign nations . . ." H.R. REP. NO. 969, 74th Cong., 1st Sess. 8-9 (1935), *reprinted in* II NLRB LEGISLATIVE HISTORY OF THE NLRA, at 2918 (1935) (statement of Rep. Connery) [hereinafter cited as LEG. HIST. NLRA]. *See also* H.R. REP. NO. 972, 74th Cong., 1st Sess. 8-9 (1935), *reprinted in* II LEG. HIST. NLRA, at 1964 (statement of Rep. Connery); H.R. REP. NO. 1147, 74th Cong., 1st Sess. 10 (1935), *reprinted in* II LEG. HIST. NLRA, at 3057 (statement of Rep. Connery).

¹⁰⁷ 2 N.L.R.B. 290 (1936). The NLRB's analysis mirrored the plain language of § 2(6), for the company, it reasoned, was "directly engaged in commerce between the United States and foreign countries" and the seamen in question were "directly engaged in such traffic and commerce." *Id.* at 292.

¹⁰⁸ 21 N.L.R.B. 691 (1940).

¹⁰⁹ The Act has always been held applicable to American-flag ships, notwithstanding the fact that such vessels operate outside the territorial limits of the United States. *See* NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 (1949); Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942); NLRB v. Waterman S.S. Co., 309 U.S. 206 (1940).

¹¹⁰ 353 U.S. 138 (1957).

gon, in support of foreign crew members striking to protest the standard wages being paid by the owner of the ship. At issue was whether the NLRA preempted¹¹¹ the application of Oregon law in a diversity action granting damages caused by the union's picketing. The Supreme Court concluded, after a review of the legislative history of the Act, that Congress did not intend the Act to regulate labor disputes between nationals of other countries operating ships under foreign laws. In determining that federal labor laws were inapplicable, the Court stated:

The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act . . . [for the NLRA was meant only as] a bill of rights . . . for *American* workingmen and their employers For us to run interference in such a delicate field of international relations, there must be present the affirmative intention of Congress clearly expressed.¹¹²

Thus, the dual considerations of lack of affirmative congressional intent and the reluctance to intrude upon foreign affairs matters were sufficient grounds to place the picketing outside the Act. In the absence of Board jurisdiction, damages from picketing could be granted under state law.

The Court reaffirmed the *Benz* reasoning and afforded jurisdictional content to the "affecting commerce" terminology of the Act some six years later in the companion cases of *McCulloch v. Sociedad de Marineros de Honduras*¹¹³ and *Ingres Steamship Co., Ltd. v. International Maritime Workers Union*.¹¹⁴ *McCulloch* involved a challenge to jurisdiction asserted by the Board over Honduran vessels when the NLRB attempted to conduct a representation election for alien crews pursuant to a petition filed by the National Maritime Union, an Ameri-

¹¹¹ The doctrine of federal preemption derives from the supremacy clause of the Constitution. In the context of federal labor law, the Board has exclusive jurisdiction over activities that are potentially subject to regulation under the NLRA. A corollary to this concept provides that state courts may decide labor law disputes in cases where the NLRB does not have jurisdiction. The current state of the labor law doctrine of federal preemption is best articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In *Garmon*, the Court asserted:

If the Board decides . . . that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. . . . In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.

Id. at 245-46.

¹¹² *Id.* at 142, 144, 147 (emphasis in original).

¹¹³ 372 U.S. 10 (1963).

¹¹⁴ *Id.* at 24.

can labor organization. The vessels were owned by a foreign subsidiary of an American corporation, but their labor relations were governed by the Honduran labor code.¹¹⁵ In holding that the Board lacked jurisdiction to conduct a representation election, the Court reasoned that it could find nothing in the language or the legislative history of the NLRA which provided a basis for a construction of the Act which would allow jurisdiction over the internal management and affairs of a foreign-flag ship.¹¹⁶ The Court also focused on the need to avoid "embarrassment in foreign affairs [since] . . . the possibility of international discord cannot . . . be gainsaid. . . . on account of the concurrent application of the Act and the Honduran Labor Code that would result with our approval of jurisdiction."¹¹⁷ *McCulloch* thus reasserted the *Benz* rationale that the Act could not be construed to reach "the internal management and affairs" of foreign-flag ships.¹¹⁸

Ingres was a case brought in New York state court. Liberian flag carriers sought an injunction against the picketing of their vessels by the International Maritime Workers Union, an American union formed for the purpose of organizing foreign seamen on foreign-flag ships.¹¹⁹ The Court concluded that the picketing was not "in commerce," since the assertion of jurisdiction over the union's activities would involve the Board in a determination of foreign employer-employee relationships. Essentially, *Ingres* carried the ouster of NLRB jurisdiction one step further than *McCulloch*, establishing that since the NLRA was without effect, state courts could have jurisdiction over the dispute.¹²⁰

¹¹⁵ *Id.* at 14.

¹¹⁶ *Id.* at 21.

¹¹⁷ *Id.* at 19.

¹¹⁸ *Id.* at 21.

¹¹⁹ *Id.* at 25-26.

¹²⁰ *Id.* at 21. For a discussion of the preemption doctrine, see note 111 *supra*. When the Fourth Circuit examined the challenge to the Cuban protest boycott in *NLRB v. Local 1355, Int'l Longshoremen's Ass'n (Ocean Shipping)*, 332 F.2d 992 (4th Cir. 1964), the Supreme Court's pronouncements in *McCulloch* and *Ingres* represented the state of the law regarding Board jurisdiction over foreign-flag ships. Although ultimately denying NLRB jurisdiction on the grounds that the Act did not apply absent a "labor dispute," *id.* at 995, the *Ocean Shipping* court decided the foreign-flag jurisdictional issue in accordance with the *Benz-McCulloch-Ingres* rationale. The Fourth Circuit reasoned:

[i]t is said that because the [ship at issue] is a foreign-flag vessel manned by an alien crew and because her owner, Ocean, seeks to invoke the Board's aid, this controversy is not one "affecting commerce" within the meaning of the Act. In *McCulloch* . . . *Ingres* . . . and *Benz* . . . , the cases relied upon for this purpose by the ILA, the Supreme Court declared the Board without jurisdiction over labor relations between owners of foreign-flag vessels and their crews. *These cases all relate to shipboard labor relations, something very different from the present case.*

Id. (emphasis added) (citations omitted). The Board and the district court issuing a § 10(l) injunc-

The *Benz-McCulloch-Incres* trilogy involved attempts by American unions to represent alien crew members aboard foreign vessels. Sometime later, however, American unions picketed foreign flag-of-convenience ships to call attention to the competitive advantage enjoyed by those vessels due to wage differences between foreign and domestic maritime workers.¹²¹ In *International Longshoremen's Association Local 1316 v. Ariadne Shipping Co.*,¹²² the Supreme Court considered whether the NLRB had jurisdiction over picketing of foreign ships in Florida ports to protest "substandard wages paid by foreign-flag vessels to American longshoremen working in American ports."¹²³ The dispute involved a ship of Liberian registry, owned by a Liberian corporation, which had employed American longshoremen, as well as part of its foreign crew, to perform longshore operations. Although the foreign shipowners successfully enjoined the picketing in state courts, the Court determined that the Board possessed jurisdiction, and thus preempted application of state law.

In reaching its conclusion, the *Ariadne* Court distinguished the *Benz-McCulloch-Incres* rationale. While *Benz* and *McCulloch* involved situations where NLRB jurisdiction "would necessitate inquiry into the 'internal discipline and order' of a foreign vessel,"¹²⁴ the Court observed no need to bar the Board from jurisdiction in the present controversy:

The participation of some crew members in the longshore work does not obscure the fact that this dispute centered on wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work. There is no evi-

tion against the boycott also found jurisdiction and distinguished *Benz*, *McCulloch*, and *Incres*. Ocean Shipping Service, Ltd. (Local 1355, Int'l Longshoremen's Ass'n), 146 N.L.R.B. 723, 727 (1964); *Penello v. Local 1355, Int'l Longshoremen's Ass'n*, 227 F. Supp. 161, 169 (D. Md. 1964). As the Board reasoned, "[since] the instant proceeding involves no issue bearing upon labor relations aboard the *Tulse Hill*, its registry and the composition of the vessel's crew are immaterial in determining the Board's power to entertain Ocean's unfair labor practice charges . . ." 146 N.L.R.B. at 727 n.3.

¹²¹ For a description of the history of labor union opposition to flag-of-convenience vessels on account of their adverse effect on maritime employment opportunities, see BOCZEK, *supra* note 99, at 64-90. Labor opposition culminated in a 1971 strike against all flag-of-convenience ships by the ILA and ILWU which closed virtually all American ports to such vessels. See Comment, *Foreign Ships in American Ports: The Question of NLRB Jurisdiction*, 9 CORNELL INT'L L.J. 50, 53-54 (1975) [hereinafter cited as *Foreign Ships*].

¹²² 397 U.S. 195 (1970).

¹²³ *Id.* at 196.

¹²⁴ *Id.* at 198. It was this intervention which would be likely to "raise considerable disturbance, not only in the field of maritime law, but in our international relations as well." *Id.*, quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963).

dence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law.¹²⁵

Thus, foreign flag vessels could be picketed where the possibility of conflict with foreign law was absent.¹²⁶

The line of Supreme Court decisions beginning with *Benz* and culminating in *Ariadne* recognized that federal labor law would be applied to foreign-flag vessels where the underlying dispute centered on long-shore operations involving American maritime workers, and not the controversies of foreign shipowners and their foreign workingmen. However, in 1974, two major Supreme Court decisions dramatically changed the scheme of labor law jurisdiction over foreign ships. *Windward Shipping (London) Ltd. v. American Radio Association*¹²⁷ and *American Radio Association v. Mobile Steamship Association*¹²⁸ arose out of multi-union picketing in protest of the competition for work opportunities presented by flag-of-convenience vessels.¹²⁹ *Windward Shipping* resulted from an injunction entered by a Texas state court on behalf of a foreign shipowner restraining the ILA from picketing foreign vessels. In *Mobile Steamship*, American stevedoring companies sought injunctions from an Alabama state court to enjoin the same conduct. The Supreme Court held in both cases that the picketing was not "in commerce" within the meaning of the Act, and therefore not preempted by federal labor law.

The Court in *Windward Shipping* observed that the picketing did not "involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Inces*."¹³⁰ Nevertheless, the Court declined to recognize NLRB jurisdiction despite the fact that no possible conflict existed with respect to the internal affairs of the foreign vessels.

In articulating a new jurisdictional test, the Court determined that the purpose of the picketing was to "exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers."¹³¹ As a consequence, commerce essential to the United States might be interrupted if foreign shipowners choose to boycott American ports to avoid the difficulties

¹²⁵ 397 U.S. at 199.

¹²⁶ Compare *International Longshoremen's Ass'n Local 1316 v. Ariadne Shipping Co.*, 397 U.S. 195, 200 (1970) (NLRB has jurisdiction since its assertion would not be "likely to lead to conflict with foreign or international law") with *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 142 (1957) (the Board lacks jurisdiction over "a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation").

¹²⁷ 415 U.S. 104 (1974).

¹²⁸ 419 U.S. 215 (1974).

¹²⁹ See note 121 *supra*.

¹³⁰ 415 U.S. at 114.

¹³¹ *Id.*

caused by the picketing. Further, retaliatory action against American vessels in foreign ports might result if the NLRA were applied to foreign vessels. Thus, the accomplishment of the union's picketing would result in "more than a negligible impact" on the overall costs of the foreign ships' operations.¹³² For this reason:

[u]nlike *Ariadne*, the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefitting American workmen which the Act was designed to regulate. This case, therefore, falls under *Benz* rather than *Ariadne*.¹³³

Under this rationale, the Board lacked jurisdiction over picketing which could affect the economic interests of foreign ships.

The *Mobile Steamship* plaintiffs sought to enjoin the same picketing involved in *Windward Shipping*. However, the state court plaintiffs were not the foreign shipowners of the picketed ships, as in *Windward Shipping*, but were instead the stevedoring companies which serviced the vessels and shippers who wished to have their crops loaded for carriage. The change in disputants did not alter the Court's analysis. The Court held that, where the primary dispute between the union and the foreign shipowners is beyond the Board's statutory authority, the effect of the picketing of the foreign vessels on the businesses of domestic stevedoring companies provides no foundation for coverage under the NLRA.¹³⁴ A bifurcated view of the term "commerce" to extend its reach to American businesses affected by the primary dispute would not be sanctioned; the Board's jurisdiction as to the incidental effects on American stevedoring companies would depend upon whether the Act extended to the primary dispute.¹³⁵

The *Windward Shipping-Mobile Steamship* jurisdictional test,

¹³² *Id.*

¹³³ *Id.* at 114-15. The dissent of Justice Brennan, joined by Justices Douglas and Marshall, took strong exception to the majority's analysis. *Id.* at 116-24. Justice Brennan criticized the Court for its failure to adequately rationalize and distinguish the *Benz-Ariadne* line of cases. *Id.* at 116-17. These cases had held that Congress did not intend to grant the NLRB jurisdiction if, but only if, it would involve Board inquiry into the labor relations between foreign crews and foreign owners. *Id.* at 119-22. Moreover, the dissent could find no support for the rationale focusing upon the economic effects of the union's picketing. *Id.* at 118. NLRB cognizance of the union activity in *Windward* would not, claimed Justice Brennan, result in Board inquiry into the internal affairs of foreign vessels. *Id.* at 122.

¹³⁴ 419 U.S. at 219.

¹³⁵ Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, dissented for the reason that the case should be within the jurisdiction of the NLRB in view of *Ariadne*. *Id.* at 234. According to the dissent's reasoning, the picketing constituted a secondary dispute between the union and a domestic stevedoring company. *Id.* at 237.

which focuses upon the possible economic ramifications of union picketing, would have been irrelevant under the analysis of the *Benz-McCulloch-Ingres* trilogy. The result, a dramatic departure from the former rationale, posits a sweeping test which places any union conduct affecting the economic interests of foreign-flag ships beyond the jurisdiction of the Board. More importantly, the *Mobile Steamship* holding removes NLRA protection for neutral, domestic employers suffering from the adverse effects of the union activity.

C. *Baldovin*: The Russian Trade Boycott in the Fifth Circuit

The *Baldovin* court analyzed whether the ILA's protest boycott met the "affecting commerce" jurisdictional minimum with reference to the Supreme Court's flag-of-convenience vessel cases. The Fifth Circuit asserted that these cases demonstrate that the Supreme Court has interpreted the commerce requirement of the secondary boycott provisions to advance two separate purposes:

[First,] they set forth the basis for congressional action and the limitation on that action in accordance with congressional concepts traditionally incorporated by those terms, [and second,] they limit the statutory scope of the secondary boycott provisions to those boycotts that could be remedied by domestic action.¹³⁶

In light of these dual purposes, the *Baldovin* court examined the reach of the NLRA under the *Windward Shipping* "economic effects" test.

In writing for the panel, Judge Rubin reasoned that "the object of a dispute determines whether or not it is 'in commerce.'" ¹³⁷ In the instant case, the ILA's objective "is to voice a political protest against the U.S.S.R. by refusing to handle cargo bound for that country."¹³⁸ For this reason, the union's activities were even further removed from the type of conduct to which the NLRA had already been held not to apply in *Windward Shipping*:

When the dispute is over the hiring of American labor in United States ports, it is "in commerce." [*Ariadne*.] When the dispute is over the foreign vessels' relations with its foreign employees, it is not "in commerce." [*Windward Shipping*.] When the dispute is over a foreign government's

¹³⁶ 626 F.2d at 450.

¹³⁷ *Id.* at 453.

¹³⁸ *Id.* at 452. In so characterizing the object of the union's picketing, the court rejected the Board's contention that "whatever the ultimate object of the ILA's boycott may be, 'an object' of the boycott is to force or require the stevedores to cease doing business" with the U.S.S.R. in violation of §8(b)(4). *Id.* This would seem to imply that if the ILA had a dispute with neutral domestic companies doing business with the Soviet Union, an object of the boycott would be "in commerce" within the meaning of *Windward Shipping*. See text accompanying notes 130-33 *supra*.

invasion of a remote nation, it is emphatically not "in commerce."¹³⁹

The Fifth Circuit's focus upon the union's object diverted the court's consideration from the factual premise upon which the Supreme Court based its interpretation of the NLRA in *Benz*, *McCulloch*, *Incres*, *Ariadne*, and *Windward Shipping*. With the exception of *McCulloch* (which involved the Board's attempt to conduct a representation election for the crew of a foreign-flag vessel), each of these cases involved union picketing of foreign-flag vessels. Accordingly, the question presented to the Supreme Court was whether the Act affirmatively protected or prohibited union activity directed at working conditions aboard foreign-flag ships. Had the ILA's Russian trade boycott affected the servicing of an American ship, however, the concerns which prompted the restriction of NLRB jurisdiction of foreign-flag vessels in the *Benz-Windward Shipping* cases would not be implicated.¹⁴⁰ Yet in *Baldovin*, Judge Rubin neither identified the registry of the vessels boycotted in the Texas and Georgia ports nor implied that the issue even figured in his analysis.¹⁴¹ The extension of the *Windward Shipping* analysis by the Fifth Circuit without such discussion is unwarranted.¹⁴²

¹³⁹ *Id.* at 453 (citations added).

¹⁴⁰ See, e.g., *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1371 (1st Cir. 1981); *Walsh v. International Longshoremen's Ass'n*, 488 F. Supp. 524, 529 (D. Mass. 1980); *International Longshoremen's Ass'n, Local 799 (Allied Int'l, Inc.)*, 257 N.L.R.B. No. 151, 108 L.R.R.M. 1033, 1035 (Aug. 28, 1981). For a discussion of the rationale of the First Circuit and the Board regarding jurisdiction over the ILA's protest boycott, see notes 236-39 *infra*. Moreover, where American ships are involved, the NLRB has always asserted jurisdiction. See cases cited in notes 107-08 *supra*. Likewise, long standing Supreme Court precedent supports such an interpretation of the Act. See note 109 *supra*. The Board reaffirmed this rationale most recently in *Alcoa Marine Corp. (Int'l Org. of Masters, Mates, & Pilots)*, 240 N.L.R.B. 1265 (1979). In this case, the Board exercised jurisdiction over a United States flag ship performing offshore drilling under contract to the Brazilian government. Jurisdiction was found despite the vessel's "permanent stay outside United States territorial waters." *Id.*

¹⁴¹ In the case on appeal from the Southern District of Texas, the ILA refused to load grain bound for Russia aboard the *Belgium*, a bulk carrier of Belgian registry. [1980] 24 DAILY LAB. REP. (BNA) at A-11. In *Mack*, an appeal from the Southern District of Georgia, the opinion does not discuss the registries of the boycotted vessels. However, in the consolidated unfair labor practice proceeding, the opinion of the administrative law judge indicated that the ships boycotted in the ports of Savannah and Brunswick were of foreign registry. See *International Longshoremen's Ass'n, Local 799, (Allied Int'l, Inc.)*, Case No. 1-CC-1753, slip op. at 3 n.9 (Mar. 16, 1981). In any event, the lower courts and the Fifth Circuit neither identified the vessels and their respective registries, nor factored such a consideration into their analyses.

¹⁴² The Fifth Circuit affirmed Judge Black's denial of an injunction in the § 10(l) proceeding filed in the Southern District of Texas. 626 F.2d at 454. In this particular proceeding, the NLRB's regional director sought a nation-wide injunction of the Russian trade boycott. [1980] 22 DAILY LAB. REP. (BNA) at A-12. In affirming the denial of the injunction on solely jurisdictional grounds, the Fifth Circuit presumably intended its jurisdictional decision to apply to all ILA activities, not just those specific instances of union conduct directed at foreign ships. Otherwise, the *Baldovin* court would have issued an injunction exempting ILA action concerning United States

The *Baldovin* court declared that the Russian trade boycott did not come within the coverage of the Act for the additional reason that "only a political decision on the part of a foreign government can satisfy the ILA's grievance."¹⁴³ This analysis mirrors the inquiry undertaken by the Supreme Court in *Windward Shipping* in determining whether the predictable responses of a foreign shipowner to picketing "would be limited to the sort of wage-cost decision benefitting American workingmen which the Act was designed to regulate."¹⁴⁴ There, the Supreme Court determined that because the accomplishment of the union's aim would impact upon the foreign shipowner's operations beyond United States borders, the Board did not have jurisdiction over the picketing. Hence, the *Baldovin* court reasoned that because the "Soviet government . . . is the only authority capable of responding to the ILA protest," a hypothetical response by that government would constitute an intolerable intrusion into the affairs of a foreign sovereign.¹⁴⁵ Since a Soviet reaction to eliminate the cause of the boycott would necessarily affect its own internal interests, the economic effects test of *Windward Shipping* therefore "compels a finding that the ILA activities do not come within the coverage of the Act."¹⁴⁶

To support his broad reading of the economic effects test, Judge Rubin cited an earlier decision of the Board in *National Maritime Union (Shipper's Stevedoring Co.)*.¹⁴⁷ In this case, the Board upheld the decision of an administrative law judge (ALJ) that picketing by an American union of a Soviet vessel to protest the ship's carrying of cargo financed by United States government contracts was not an unfair labor practice.¹⁴⁸ Although the question was not decided, the ALJ's decision implied that jurisdiction did not exist on account of "the degree of intrusion into the affairs of the foreign entity which will be brought about by that entities [sic] response to the union's activities."¹⁴⁹ Thus, according to the Fifth Circuit, *Windward Shipping*, coupled with *Ship-*

ships. The Fifth Circuit's decision therefore eliminates Board jurisdiction over the ILA's boycott with regard to Russian cargoes, including cargoes carried on American ships. It would appear that the extension of the *Windward Shipping* analysis to situations wherein American vessels are involved is contrary to prior Supreme Court decisions. See notes 107-09, 140 *supra*. Such a result warrants a rationale for distinguishing between American and foreign vessels. The *Baldovin* court provided none.

¹⁴³ 626 F.2d at 453-54.

¹⁴⁴ *Id.* at 451, quoting *Windward Shipping (London) Ltd. v. American Radio Ass'n*, 415 U.S. 104, 115 (1974).

¹⁴⁵ *Id.* at 454.

¹⁴⁶ *Id.*

¹⁴⁷ 245 N.L.R.B. 149 (1979).

¹⁴⁸ *Id.* at 150, 161.

¹⁴⁹ *Id.* at 162.

per's Stevedoring, foreclosed NLRB jurisdiction over the Russian trade boycott.

A scrutiny of the ALJ's opinion, however, reveals that the Fifth Circuit placed undue reliance upon the construction of the *Windward Shipping* test advanced in *Shipper's Stevedoring*. First, the order issued by the ALJ, and approved by the Board, was based upon a finding that no violation of the Act had occurred.¹⁵⁰ The focus upon the degree of intrusion into the affairs of a foreign country as a guide for determining NLRB jurisdiction is therefore dicta. Second, the extension of the *Windward Shipping* rationale to the factual situation in *Shipper's Stevedoring* appears questionable. The objectives of the picketing in *Windward Shipping* were to pressure the foreign shipowners to raise their operating costs to levels comparable to American shippers. In short, the picketing constituted an attempt to interfere with the internal affairs of a foreign vessel. Yet, in *Shipper's Stevedoring*, the union sought enforcement of American cargo preference laws by the United States government.¹⁵¹ The accomplishment of the union's objective did not require action by a foreign government. The ALJ's focus upon the in-

¹⁵⁰ *Id.* at 161. Courts have also viewed the order in *Shipper's Stevedoring* to be based on a finding that no violation of the Act had occurred. *Walsh v. International Longshoremen's Ass'n*, 630 F.2d 864 n.12 (1st Cir. 1980).

¹⁵¹ The cargo preference laws require that 50% of all government financed cargoes be carried on American vessels. Act of Aug. 26, 1954, ch. 936, 68 Stat. 832 (1954) (codified at 46 U.S.C. § 1241 (1976)). When shipments to the Soviet Union have been involved, enforcement of these laws has been a constant source of conflict between the ILA and the government over the past two decades. Longshoremen opposed President Kennedy's sale of wheat to the Soviet Union in 1963, but agreed to lift their subsequent boycott of Russian ships in return for the administration's pledge that 50% of the grain would be carried in American bottoms. See Bilder, *East-West Trade Boycotts: A Study in Private, Labor Union, State, and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841, 873-78 (1970). Waivers of the 50% requirement precipitated additional boycotts of grain shipments destined for the U.S.S.R. during the Johnson administration. ALDER-KARLSSON, *supra* note 50, at 107; N.Y. Times, Feb. 16, 1964, at 1, col. 5. Maritime unions also opposed further grain sales to Soviet-bloc countries. See *Shipping Restrictions on Grain Sales to Eastern Europe: Hearings Before the Sen. Comm. on For. Relations*, 89th Cong., 1st Sess. 115-79 (1965) (statement of John Condon, ILA spokesman). Although the government explored the possibility of bringing secondary boycott charges against the ILA, complaints were not filed after lawyers advising the Johnson administration concluded that the protest boycott did not contravene § 8(b)(4). See BUS. WEEK, Feb. 29, 1964, at 24.

Boycotts were reinstituted during the administration of President Ford to protest renewed grain sales to Russia. Wall St. J., Aug. 7, 1975, at 20, col. 2; *id.*, Aug. 11, 1975, at 2, col. 2. One court enjoined the boycott in Texas ports on account of an ILA local's breach of a collective bargaining agreement. *West Gulf Maritime Ass'n v. International Longshoremen's Ass'n*, 413 F. Supp. 372 (S.D. Tex. 1975), *aff'd*, 531 F.2d 574 (5th Cir. 1976). Secondary boycott charges were also filed against other locals by neutral parties unable to ship wheat harvests to the Soviet Union. [1975] 183 DAILY LAB. REP. (BNA) at A-17. However, the parties settled their dispute before the case reached the Board. See *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445, 448 n.2 (5th Cir. 1980).

trusion into the affairs of a foreign country brought about by that sovereign's response to the union's activities is thus misplaced in light of the factual situation in *Shipper's Stevedoring*. Finally, for the same reason, the Fifth Circuit's analogy of the Russian trade boycott to the situation in *Shipper's Stevedoring* is incorrect. *Shipper's Stevedoring* involved a protest boycott directed against the American government, whereas *Baldovin* concerned union activity focusing upon a foreign government.

The final prong of analysis followed by the *Baldovin* court in reaching its conclusion rested upon the reasoning of the Supreme Court's decision in *Mobile Steamship*. Judge Rubin recognized that the ILA's boycott had an incidental effect on American farmers who produce grain, transportation companies which move the products to port, and American stevedore firms which load it aboard vessels.¹⁵² In the court's view, however, the economic repercussions caused by the boycott were an incidental effect of the union's activity and not its objective. Invoking the rationale of *Mobile Steamship*, the Fifth Circuit held that a bifurcated view of the "affecting commerce" requirement is not permitted in order to protect the domestic businesses adversely affected by the ILA's politically-inspired work stoppage. Therefore, the effect of the union's conduct on the businesses of American entities provides no "basis for Board jurisdiction where the primary dispute is beyond its statutory authority."¹⁵³

The Fifth Circuit's utilization of the *Mobile Steamship* rationale demonstrates the dangerous extreme to which the Supreme Court's *Windward Shipping-Mobile Steamship* rationale can logically be carried. Essentially, on account of the potential foreign effects of union conduct, the result in *Baldovin* vests the regulation of protest boycotts in the states rather than the NLRB.¹⁵⁴ This result unduly restricts NLRB jurisdiction over labor union conduct affecting the foreign com-

¹⁵² 626 F.2d at 453. Specifically, members of the American Farm Bureau Federation and the Texas and Kansas State Farm Bureaus alleged that the protest boycott prevented the loading of their members' grain shipments under terms of a five year trade agreement between the U.S. and the Soviet Union. [1980] 17 DAILY LAB. REP. (BNA) at A-3.

¹⁵³ 626 F.2d at 452-53, quoting *American Radio Ass'n v. Mobile Steamship Ass'n*, 419 U.S. 215, 226 (1974) (emphasis in original).

¹⁵⁴ Upon the determination that a protest boycott is directed at foreign entities, the *Baldovin* rationale automatically removes the federal preemption bar. See note 111 *supra*. At the trial hearing stage, this same reasoning led to the dismissal of unfair labor practice charges resulting from the Russian trade boycott. In *International Longshoremen's Ass'n, Local 799, (Allied Int'l, Inc.)*, Case No. 1-CC-1753 (Mar. 16, 1981), an administrative law judge dismissed three complaints filed against the union on the ground that the ILA's work stoppage was beyond the Board's jurisdiction. According to the ALJ, "[u]nion conduct which is intended to disrupt foreign commerce and its instrumentalities, and which has the real capability of disrupting such commerce

merce of the United States, and represents an unwarranted departure from the goals of federal labor legislation and the evils those laws sought to redress.

D. The Validity of the *Windward Shipping-Mobile Steamship* Test as Applied to Protest Boycotts

Contrary to the fears expressed in *Windward Shipping* and *Mobile Steamship*, and echoed in *Baldovin*, NLRB jurisdiction over protest boycotts would not constitute an intolerable intrusion into the affairs of a foreign nation. While the ILA's work stoppage was motivated by the dispute between the union and the U.S.S.R. over the latter's military policy, the application of section 8(b)(4) to the union's activities would not imply jurisdiction over Soviet military policy. Rather, jurisdiction over the Russian trade boycott would advance the policies underlying federal labor legislation while nonetheless maintaining due regard for foreign interests.

In allowing neutral, domestic businesses to invoke the Act to counter protest boycotts, NLRB jurisdiction over the secondary aspects of union conduct would not result in the extraterritorial extension of United States labor laws.¹⁵⁵ The application of the NLRA to the situation in *Baldovin* would portend no interference in the management or affairs of foreign governments, companies or workers. Instead, the Act would regulate the union's power to exert economic pressure upon American firms doing business with foreign countries.¹⁵⁶ Finally, a successful injunction against the protest boycott would prevent "an embarrassment in foreign affairs," an objective which the Supreme Court

. . . is not within the reach of the Board's jurisdiction, but rather is exclusively subject to state laws." *Id.* slip op. at 5.

¹⁵⁵ In comparison to a union's attempt to organize the alien crew of a foreign vessel, application of the NLRA to protest boycotts would not represent an intrusion into the affairs of a foreign sovereign. See *Foreign Ships*, *supra* note 121, at 69-70.

Curiously, while the Fifth Circuit would restrict Board jurisdiction in *Baldovin* on account of the potential for international discord, the very same panel of circuit judges enforced injunctions issued by arbitrators who had adjudicated ILA actions as violations of no-strike obligations in collective bargaining agreements. See *New Orleans Steamship Ass'n v. General Longshore Workers ILA Local Union No. 1418*, 486 F. Supp. 409 (E.D. La.), *aff'd in part*, 626 F.2d 455 (5th Cir. 1980). How injunctions enforcing arbitration decisions are any less intrusive of foreign interests than the requested § 10(l) injunctions denied in *Baldovin* escapes reasoned analysis.

¹⁵⁶ What is at stake is whether an American firm is entitled to be shielded by § 8(b)(4) from union conduct occurring in this country, and directly affecting its domestic business. One commentator has suggested that where jurisdiction hinges upon a balance between international comity and the legitimate interests of domestic entities, the policy of respect for foreign governments should not take precedence over a domestic interest. See *Foreign Ships*, *supra* note 121, at 73 & 73 n.114.

has deemed important in construing the reach of the Act when foreign interests are implicated.¹⁵⁷

The pillar upon which the Supreme Court supported its interpretation of the NLRA in the flag-of-convenience vessel cases was the absence of a congressional intent to apply the Act to foreign ships. Understandably, the *Baldwin* court likewise declined to analyze the jurisdictional question with reference to the policies of the NLRA. Yet, an attempt to effectuate the purposes of the Act should not be abandoned because the legislative history reveals no evidence of attention to the specific problem of foreign-flag ships or protest boycotts.¹⁵⁸

An examination of the purposes of federal labor legislation yields the conclusion that NLRB jurisdiction over protest boycotts would further the underlying policies of the NLRA. The goals of the Act are generally recognized as the amelioration of the situation of workmen, the avoidance of disorder and injury caused by strikes and the improvement of the economic health of the nation.¹⁵⁹ In restricting Board jurisdiction over protest boycotts, the absence of federal regulation leads to a disruptive effect on American industrial peace and the national economy. Since American longshoremen are an obvious part of our domestic economy and labor force, and boycotts in United States ports quite plainly obstruct the free flow of commerce, the long-

¹⁵⁷ See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963).

¹⁵⁸ Although there is some evidence suggesting that in 1939 the ILA refused to load shipments of scrap iron bound for Japan on account of the impending conflict between the American and Japanese governments, see *Shipping Restrictions on Grain Sales to Eastern Europe: Hearings Before the Sen. Comm. on For. Relations*, 89th Cong., 1st Sess. 174 (1965), it would appear that Congress never considered the issue of jurisdiction over protest boycotts in passing the LMRA and the LMRDA. Inasmuch as Congress never envisioned a situation involving a union's tactical use of a boycott against a foreign government, the issue concerning the application of the Act should turn on whether congressional intent may be inferred. Commentators have argued that a proper jurisdictional test should therefore focus on whether the interests which the NLRA seeks to promote would be furthered by applying the Act to union activities which impact upon foreign interests. See Nothstein and Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 CORNELL INT'L L.J. 1, 40 (1976).

¹⁵⁹ As provided by the introductory section of the Taft-Hartley Act:

Industrial strife which interferes with the normal flow of commerce . . . jeopardize[s] the public health, safety, [and] interest. It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

LMRA § 1, 29 U.S.C. § 141 (1976). For a more detailed analysis of the factors which led to the passage of the NLRA, LMRA, and LMRDA, see KORETZ, STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATIONS 259-348, 548-672, 682-784 (1970).

shore industry is clearly within the purpose and scope of the NLRA. Moreover, maritime workers engaged in loading operations in American ports are a legitimate object of congressional concern in view of their role in transporting cargoes in the foreign commerce of the United States. Finally, the specific purpose of the secondary boycott provisions, namely, to protect neutral businesses from disputes to which they are not a party, is effectuated by application of section 8(b)(4) to protest boycotts.

Another consideration in evaluating any limitation upon Board jurisdiction is the interest in labor law uniformity. It is undisputed that in the interests of equality of treatment and predictability, labor law questions should be treated by means of a uniform national system of law.¹⁶⁰ Taken together, the decisions in *Baldovin*, *Windward Shipping*, and *Mobile Steamship* direct American business entities to the state courts to seek remedies against protest boycotts. Implicit in *Windward Shipping* and *Mobile Steamship* is the judgement that labor law uniformity is promoted by state court resolution of these matters, since they are more likely than the NLRB to enjoin picketing of foreign vessels by American maritime unions.¹⁶¹ However, in the context of protest boycotts, the validity of this judgment remains open to question.

It is settled that peaceful picketing, without more, is lawful and cannot be enjoined.¹⁶² The collateral consequences of such activity, however, may be regulated, and in doing so, a state may constitutionally enjoin picketing to effectuate some public policy.¹⁶³ Foreign shipowners therefore have been successful in obtaining state court injunctions against maritime union picketing on the grounds that the picketing interfered with the business affairs of the vessel and disturbed existing contractual relationships.¹⁶⁴ Because a refusal to handle spe-

¹⁶⁰ The desire for national labor law uniformity was one of the major factors prompting the creation of the NLRB. See MORRIS, *supra* note 7, at 27. The preemption doctrine, discussed at note 111, is a prominent illustration of the uniformity principle in operation.

¹⁶¹ Foreign shipowners generally have been successful in obtaining injunctions in state courts against union picketing. See, e.g., *Fruit Dispatch Co. v. National Maritime Union of America*, 138 So.2d 853 (La. Ct. App. 1962); *Ryan v. Hirsch*, 174 Ohio St. 461, 190 N.E.2d 262 (1963); *State ex rel. Seafarer's Int'l Union of North America v. Common Pleas Court of Lucas County*, 174 Ohio St. 466, 190 N.E.2d 263 (1963); *Upper Lakes Shipping, Ltd. v. Seafarer's Int'l Union of Canada*, 18 Wis.2d 646, 119 N.W.2d 426 (1963); *International Longshoremen's Ass'n, Local 1416, AFL-CIO v. Eastern S.S. Lines, Inc.*, 211 So.2d 858 (Fla. 1968); *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n*, 291 Ala. 201, 279 So.2d 467 (1973), *aff'd*, 419 U.S. 215 (1974).

¹⁶² *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹⁶³ *Hughes v. Superior Court of California*, 339 U.S. 460 (1950); *International Bhd. of Teamsters v. Hanke*, 339 U.S. 470 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

¹⁶⁴ See note 161 *supra*. But see *Marlindo Campana Naviera S/A v. Seafarer's Int'l Union of North America*, 47 Lab. Cas. (CCH) ¶ 18,252 (W.D. Wash. 1963).

cific goods does not involve the coercive aspects of a picket line, protest boycotts present different legal issues from those found in the analysis of picketing. Accordingly, the extent to which peaceful boycott activity may be enjoined will be resolved in light of the varying substantive and procedural laws of the fifty states. Furthermore, a majority of states bar the issuance of state court injunctions in labor disputes through anti-injunction statutes.¹⁶⁵ Thus, to place within a framework of state labor law regulation the determination of the legality of protest boycotts, typically conducted by local unions on a multi-state basis, is to create the inevitability of a confused pattern of conflicting decisions.

The *Baldovin* approach therefore increases the possibility of international discord by giving state courts unequivocal jurisdiction over protest boycotts. This result presents the anomaly that state courts may plunge into the field of international relations, while the NLRB, because it is international relations, is precluded from acting. Moreover, regulation of an activity of national concern is subject to disparate state laws reflecting parochial interests. The risk of state court adjudication fracturing foreign relations is thereby augmented. In this situation, the need for a uniform national policy is unusually compelling. The Board is the uniquely suited to this task as the administrative body empowered to enforce the federal policies embodied in the NLRA. Thus, NLRB jurisdiction over protest boycotts would eliminate the potential for conflicting state court decisions while providing a uniform rule of national scope applicable to multi-state protest boycotts.

In a time when many national economies are international in impact, and when the labor relations of a domestic enterprise may have a substantial bearing upon the conduct of foreign trade, the *Windward Shipping-Mobile Steamship* jurisdictional concept is shortsighted. Accordingly, this Comment will now undertake an examination of the jurisdictional reach of the NLRA over protest boycotts in light of the underlying policies of federal labor legislation. In the following discussion, a theory positing that the Act's secondary boycott provisions encompass and forbid all protest boycotts will be presented. The theory will also be compared to the analyses of the First Circuit in *Allied International, Inc. v. International Longshoremen's Association*,¹⁶⁶ and the Board in *International Longshoremen's Association, Local 799 (Allied*

¹⁶⁵ Thirty-four states have enacted "baby Norris-LaGuardia Acts" which bar state court injunctions in labor disputes. See 1 CCH LAB. L. REP., STATE LAWS ¶ 40,356 (1976). In such jurisdictions, labor activity outside the jurisdiction of the NLRA is not enjoined under state tort law. Regardless of whether state courts decide that their anti-injunction statutes cover protest boycotts, the interpretation of state law will be made with no possibility of federal review.

¹⁶⁶ 640 F.2d 1368 (1st Cir. 1981).

International, Inc.),¹⁶⁷ two cases holding that section 8(b)(4) was applicable to the ILA's boycott of American vessels carrying Russian cargoes.

III. THE APPLICATION OF SECTION 8(B)(4) TO PROTEST BOYCOTTS

In the Russian trade boycott cases, several parties advanced a theory which reasoned that the ILA violated section 8(b)(4) through its application of coercive pressure upon stevedoring companies with an object of inducing them to cease doing business with firms trading with the Soviet Union.¹⁶⁸ Sixteen years earlier, a similar theory convinced the Board in *Ocean Shipping Service, Ltd. (Local 1355, International Longshoremen's Association)* that the ILA's boycott of vessels engaged in Cuban trade violated the NLRA.¹⁶⁹ However, this theory appears to be unfaithful to the reality of circumstances of the Russian trade boycott.

The ILA's policy of refusing to work ships which had engaged in trade with Cuba stemmed from a "clearly defined policy to eliminate trade with Cuba."¹⁷⁰ Pursuant to this policy, the union sought to punish shipowners who had engaged in trade with Cuba by forcing neutral companies to cease rendering services to them. Yet, in the Russian trade boycott, the ILA framed its dispute as exclusively with the U.S.S.R., and not with firms doing business with the Russians. Thus, any theory upon which a violation of the secondary boycott provisions is premised must consider the political nature of protest boycotts.

A theory which more clearly takes account of the facts underlying the Russian trade boycott, and protest boycotts in general, recognizes that the primary disputants are the union and the foreign government under union censure. American entities maintaining business relationships with the foreign countries are neutrals, for the union does not seek to affect the labor relations of domestic employers. In implementing its boycott, the union endeavors to utilize the resulting disruption of business relations between American firms and the foreign country as a medium for expressing the union's disapproval of the foreign government. Moreover, the cessation of business becomes a sword by which the union inflicts economic carnage upon the foreign government to

¹⁶⁷ 257 N.L.R.B. No. 151, 108 L.R.R.M. 1033 (Aug. 28, 1981).

¹⁶⁸ See, e.g., Brief of Occidental Chemical Company at 5, *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980).

¹⁶⁹ See 146 N.L.R.B. 723 (1964).

¹⁷⁰ *Id.* at 726. For a discussion of the motives underlying the Cuban trade boycott, see notes 50-63 *supra*.

force a change or reassessment of its objectionable policies. Thus, as the union has forced neutral employers to cease doing business with the primary target of the union's protest, the protest boycott violates section 8(b)(4).

The protest boycott theory must confront several jurisdictional thresholds before section 8(b)(4) can be measured against union conduct. First, whether the secondary boycott provisions apply absent the existence of a "labor dispute;" second, whether a foreign government qualifies as a "person" under section 8(b)(4) so as to make the Act's prohibitions applicable to a protest boycott; and third, whether the primary dispute between the union and foreign government must be "in commerce" for the Board to assert jurisdiction over the secondary aspects of the union's conduct. Following an analysis of these jurisdictional hurdles, examination will focus on whether a protest boycott constitutes an unfair labor practice. Although the theory discussed below will be applied to the Russian trade boycott, it is assumed that the theory is equally applicable to all protest boycotts.

A. The Requirement of a "Labor Dispute"

A characteristic of any protest boycott is that the primary dispute between the union and foreign government is not a traditional labor dispute.¹⁷¹ Accordingly, the protest boycott theory must confront the argument that the statutory ban on secondary boycotts does not apply absent a primary labor dispute to which the challenged union conduct can be secondary.

The ILA asserted this contention in section 10(l) proceedings in the form of a jurisdictional argument that the Board has no authority to resolve controversies that do not involve a "labor dispute" as defined in section 2(9) of the Act.¹⁷² The primary authority representing the view that section 2(9) creates a jurisdictional barrier is *NLRB v. Local 1355, International Longshoremen's Association (Ocean Shipping)*.¹⁷³ In this case, the Fourth Circuit construed the NLRA to require the existence

¹⁷¹ See note 4 *supra*. As the First Circuit observed of the Russian trade boycott, "[t]here is no dispute between the ILA and Russia over matters traditionally thought to be the subject of union concern." *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1372 n.3 (1st Cir. 1981). Likewise, the Board asserted that "this case presents a dispute between the ILA and the USSR . . . [for the union] concede[s] . . . a primary objective to pressure the Soviet government to halt its aggression against Afghanistan." *International Longshoremen's Ass'n, Local 799 (Allied Int'l, Inc.)*, 257 N.L.R.B. No. 151, 108 L.R.R.M. 1033, 1035 (Aug. 28, 1981).

¹⁷² See, e.g., Brief of ILA at 14-26, *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980).

¹⁷³ 332 F.2d 992 (4th Cir. 1964).

of a labor dispute as a condition of the Board's jurisdiction.¹⁷⁴ The *Ocean Shipping* court garnered support for its position on two grounds: (1) that the term "labor dispute" as defined in section 2(9) is found throughout the Act,¹⁷⁵ and (2) that the Supreme Court has stated that the NLRA was "designed to regulate the conduct of people engaged in labor disputes."¹⁷⁶

The jurisdictional argument accepted in *Ocean Shipping* has been soundly rejected by the Board,¹⁷⁷ courts,¹⁷⁸ and commentators.¹⁷⁹ Likewise, both the *Mack* and *Allied International* decisions, and the opinion of the Board in *International Longshoremen's Association, Local 799*, repudiated the Fourth Circuit's reasoning in the context of the Russian trade boycott.¹⁸⁰ Section 2(9) is more properly viewed as a definitional provision utilized to ensure uniform meaning to the phrase "labor dispute" as it appears in different contexts throughout the statute.¹⁸¹ Certainly the frequency of the use of the phrase "labor dispute"

¹⁷⁴ *Id.* at 995-96.

¹⁷⁵ *Id.* at 995, citing 29 U.S.C. § 152(9).

¹⁷⁶ *Id.*, citing *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 372 (1960).

¹⁷⁷ In considering *Ocean Shipping's* labor dispute requirement, the Board stated that "until such time as the issue is finally resolved by the Supreme Court, [it would adhere] to the view that its power to prevent unfair labor practices is not so qualified." National Maritime Union (Weyerhaeuser Lines), 147 N.L.R.B. 1317, 1317 n.3 (1964). The Board has continually reaffirmed this position. Local 16, Int'l Longshoremen & Warehousemen's Union (City of Juneau), 176 N.L.R.B. 889, 893 (1969); Twin City Carpenters Dist. Council (Red Wing Wood Products, Inc.), 167 N.L.R.B. 1017, 1023 (1967); National Maritime Union (Delta Steamship Lines), 147 N.L.R.B. 1328, 1331 (1964); National Maritime Union (Houston Maritime Ass'n), 147 N.L.R.B. 1243, 1246-47 (1964).

¹⁷⁸ The Courts of Appeals for the District of Columbia Circuit, the Second Circuit, and the Eighth Circuit have rejected the proposition that the definition of a labor dispute in § 2(9) was intended by Congress to limit the Board's jurisdiction. *Teamsters, Local 812 v. NLRB*, 105 L.R.R.M. 2659, 2662 (D.C. Cir. 1980); *NLRB v. Twin City Carpenters Dist. Council*, 422 F.2d 309, 312-13 (8th Cir. 1970); *National Maritime Union of America v. NLRB* (Delta Steamship Lines), 346 F.2d 411, 415 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965); *National Maritime Union of America v. NLRB* (Weyerhaeuser Lines), 342 F.2d 538, 542-43 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965). *Accord* *Mountain Navigation Co., Inc. v. Seafarers' Int'l Union of North America*, 348 F. Supp. 1298, 1303 (W.D. Wis. 1971). *But see* cases cited at note 7 *supra*.

¹⁷⁹ *Case Note*, 7 B.C. IND. & COMM. L. REV. 752, 754-55 (1966); *Comments on Recent Cases*, 50 IOWA L. REV. 946, 952 (1965); *Comments*, 113 U. PA. L. REV. 1317, 1318 (1965); *Recent Decisions*, 51 VA. L. REV. 157, 161 (1965); *Notes*, 11 WAYNE L. REV. 580, 581-85 (1965); *Recent Cases*, 78 HARV. L. REV. 463, 464-65 (1964). *But see* authorities cited in note 7 *supra*.

¹⁸⁰ *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1378-79 (1st Cir. 1981); *Mack v. International Longshoremen's Ass'n*, 104 L.R.R.M. 2892, 2894 (S.D. Ga. 1980); *International Longshoremen's Ass'n, Local 799 (Allied Int'l, Inc.)*, 257 N.L.R.B. No. 151, 108 L.R.R.M. 1033, 1036 & 1036 n.15, 1039-40 (Aug. 28, 1981).

¹⁸¹ The term is used three times in the definitional section. *See* NLRA § 2(3), (5), (7), 29 U.S.C. § 152(3), (5), (7) (1976). It should also be noted that "labor dispute" is linked with jurisdiction in two other sections of the Act. In both sections, however, the term is employed in a negative jurisdictional manner which does not limit the Board's jurisdiction. *See* NLRA § 10(a), 29 U.S.C.

in the NLRA is not determinative of jurisdiction, for no explicit stricture in the Act limits the jurisdictional arm of the Board to cases which arise out of "labor disputes."¹⁸² Moreover, the Board has jurisdiction under section 10(a) "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."¹⁸³ For the purposes of the Act, the term "affecting commerce" is defined in section 2(7) as follows: "[t]he term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."¹⁸⁴ In view of section 2(7)'s utilization of "labor dispute" in the alternative, it is too restrictive an interpretation of section 10(a) to limit NLRB jurisdiction over unfair labor practices to union activities arising in the context of a labor dispute.

The *Ocean Shipping* court also cited the Supreme Court's decision in *Marine Cooks & Stewards v. Panama Steamship Co.*¹⁸⁵ to bolster its conclusion that section 2(9) creates a jurisdictional requirement. A close reading of the Supreme Court's opinion reveals, however, that the Fourth Circuit supported its construction of the Act in *Ocean Shipping* with a statement made in a wholly different context.

In *Marine Cooks*, the Supreme Court interpreted section 1 of the Norris-LaGuardia Act to determine whether it barred a district court from issuing an injunction against union picketing of a foreign-flag vessel. In construing the term "labor dispute," the Court declared that "Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of the courts, not, as it passed the Taft-Hartley Act, to regulate the conduct of people engaged in labor disputes."¹⁸⁶ This dicta, made in the context of a Norris-LaGuardia Act case, is not a pronouncement on the Board's power to hear unfair labor practice charges under the NLRA. Furthermore, while it may be true that the main function of the NLRA is to regulate parties to labor disputes, it need not follow that the Act has no other purpose. Mere dictum, in the absence of corroborative analysis, cannot be deemed dispositive of the

§ 160(a) (1976) (Board may cede jurisdiction to a state agency even though a labor dispute affecting commerce is involved); NLRA § 14(c), 29 U.S.C. § 164(c) (1976) (Board may decline jurisdiction over labor disputes having an insubstantial effect on commerce).

¹⁸² Whereas the NLRA primarily employs the term "labor dispute" in its definitional sections, see note 181 *supra*, the Norris-LaGuardia Act limits the jurisdiction of federal courts to issue injunctions in labor disputes. Act of Mar. 23, 1932, ch.90, § 1, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 (1976)).

¹⁸³ NLRA § 10(a), 29 U.S.C. § 160(a) (1976).

¹⁸⁴ NLRA § 2(7), 29 U.S.C. § 152(7) (1976).

¹⁸⁵ 362 U.S. 365 (1960).

¹⁸⁶ *Id.* at 372.

issue.¹⁸⁷

A closely related argument which the ILA presented to the First Circuit in *Allied International* posited that section 8(b)(4) cannot apply to protest boycotts since there is no primary labor dispute to which the union conduct could be secondary.¹⁸⁸ Although it admitted that the ILA had no conventional labor dispute with the Soviet Union,¹⁸⁹ the *Allied International* court rejected the union's argument in light of the congressional policies embodied in the secondary boycott provisions.

The legislative history of section 8(b)(4) demonstrates that the core concept behind the statutory proscription of secondary boycott activity is to shield "unoffending employers and others from pressures in controversies not [of] their own."¹⁹⁰ Perhaps the best explanation of the intent behind section 8(b)(4) comes from the bill's sponsor, Senator Taft, who said:

This provision [section 8(b)(4)] makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. . . . It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.¹⁹¹

Furthermore, in the 1959 amendments to section 8(b)(4), Congress reiterated its concern with the prevention of the "suffering and hardship [imposed by secondary boycotts] on innocent parties who are helpless to protect themselves."¹⁹² Therefore, the ILA's argument is inconsistent with the underlying policies of the Act. The harm to neutrals do-

¹⁸⁷ The assertion by the Supreme Court in *Marine Cooks* is also overly broad. Under § 8(a) and (b) of the NLRA, unfair labor practices can be committed only by employers and unions, or their respective representatives. "Person," according to the definition in § 2(1), is not limited to this group. See 29 U.S.C. § 152(1) (1976).

¹⁸⁸ See 640 F.2d 1368, 1377-78.

¹⁸⁹ See note 171 *supra*.

¹⁹⁰ *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 627 (1967), *rehearing denied*, 387 U.S. 926 (1967).

¹⁹¹ 93 CONG. REC. 4323 (1947), *reprinted in* II NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 1106 (1948) [hereinafter cited as LEG. HIST. LMRRA].

¹⁹² 105 CONG. REC. 3524 (1959), *reprinted in* II NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1007 (1959) (statement of Sen. McClellan) [hereinafter cited as LEG. HIST. LMRDA]. Similarly, Congressman Griffin, one of the bill's sponsors, condemned the secondary boycott for this very same reason:

The secondary boycott is an un-American device whereby one attacks an enemy by coercing or inflicting injury upon the friends of those who do business with the enemy. It is based upon the concept of 'guilt by association.' It is a method used by dictators to handle nonconformists by coercing their families and friends.

105 CONG. REC. 14,195 (1959), *reprinted in* II LEG. HIST. LMRDA, at 1568.

ing business with the Soviet Union from the effects of the Russian trade boycott is no less serious because the controversy does not involve a labor dispute.

Secondly, the contention that the Act is inapplicable to protest boycotts ignores the express language of the statute.¹⁹³ The prohibited object of a boycott is stated by section 8(b)(4) to be "forcing . . . any person to cease . . . handling . . . the products of any other producer . . . or to cease doing business with any other person."¹⁹⁴ That is the prohibited object whether or not the union has a labor dispute with the target of its boycott.¹⁹⁵ Accordingly, both the Board¹⁹⁶ and the courts¹⁹⁷ have rejected the proposition that the existence of a primary

¹⁹³ Section 8(b)(4) prohibits a union to strike or to induce a strike, or otherwise to coerce or restrain an employer, when its object is "forcing or requiring any person to cease doing business with any other person." The statute does not refer to a labor dispute with the primary target of the secondary pressure. Likewise, to a neutral party, the immediate recipient of the union's pressure, the ultimate object of the union's boycott is immaterial. The effect upon the neutral is the same regardless of the source or nature of the dispute. Sound policy considerations therefore support the contention that Congress' omission of a labor dispute requirement in § 8(b)(4) was not inadvertent.

¹⁹⁴ NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

¹⁹⁵ The typical secondary boycott involves a dispute between a union and a primary employer followed by secondary activity against another employer who has business dealings with the primary employer. However, the fact that the prototype secondary boycott is more usual or frequent in occurrence does not demonstrate that it is the only type Congress intended to reach. The legislative history of the LMRA indicates that a violation of § 8(b)(4) is possible without the existence of an active dispute, over specific demands, between a union and the primary disputant. Senator Taft had spoken of a product boycott in which a neutral employer "happens to be doing business with someone the union does not like or with whom it is having trouble. . . ." 93 CONG. REC. 4198 (1947), *reprinted in* II LEG. HIST. LMRA, at 1107-08. Additionally, a Senate Report indicated that a secondary boycott unlawful under the Act included that where a union makes no specific demands upon a target of the secondary pressure:

This [section] also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3. . . . [Allen Bradley v. Local Union 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1941)].

S. REP. NO. 105, 80th Cong., 1st Sess. 22 (1947), *reprinted in* I LEG. HIST. LMRA, at 428. An examination of the *Allen-Bradley* case shows that the union made no express or implied demands on the manufacturers whose products it refused to install. *Roane-Anderson Co. (Local 760, Int'l Bhd. of Elec. Workers, A.F.L.)*, 82 N.L.R.B. 696, 711 (1940).

¹⁹⁶ *International Longshoremen's Ass'n, Local 799 (Allied Int'l, Inc.)*, 257 N.L.R.B. No. 151, 108 L.R.R.M. 1033, 1036 (Aug. 28, 1981); *Monarch Long Beach Corp. (Soft Drink Workers Union Local 812)*, 243-N.L.R.B. 801, 806 (1979); *National Maritime Union (Delta Steamship Lines)*, 147 N.L.R.B. 1328, 1331 (1964); *National Maritime Union (Weyerhaeuser Lines)*, 147 N.L.R.B. 1317, 1318 (1964); *National Maritime Union (Houston Maritime Ass'n)*, 147 N.L.R.B. 1243, 1246-47 (1964); *Local 11, United Bhd. of Carpenters & Joiners (General Millwork Corp.)*, 113 N.L.R.B. 1084, 1086 (1966); *Washington-Oregon Shingle Weavers' Dist. Council (Sound Shingle Co.)*, 101 N.L.R.B. 1159, 1161-62 (1953).

¹⁹⁷ *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1378 (1st Cir. 1981); *Teamsters, Local 812 v. NLRB*, 105 L.R.R.M. 2658, 2663 (D.C. Cir. 1980); *National Maritime*

labor dispute is a prerequisite for the application of the secondary boycott provisions. As the *Allied International* court reasoned:

We think it . . . [is] . . . objectionable that a national union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity. . . . The language of section 8(b)(4) and the congressional objectives that prompted its enactment point to no reason why that section should not prohibit such secondary pressure, for whatever reasons motivated.¹⁹⁸

The requirement of a labor dispute as a condition of NLRB jurisdiction thus constitutes an unsupportable departure from the explicit language and congressional intent of section 8(b)(4). Accordingly, protest boycotts are precisely the type of conduct which Congress intended to regulate with the NLRA.

B. The Requirement that a Foreign Government by "Any Other Person" Within the Meaning of Section 8(b)(4)

The secondary boycott provisions proscribe certain union activities where an object thereof is to require a neutral party "to cease doing business with any other person" ¹⁹⁹ The protest boycott theory posits that section 8(b)(4) is violated when a union's conduct forces American companies to cease trading with the foreign government under union censure. Yet, one court has rejected this theory on the ground that the statute does not encompass boycotts directed against foreign governments. In *Walsh v. International Longshoremen's Association*,²⁰⁰ the court held that the "contention that a secondary boycott exists through the inducement of [the importer] and [the shipper] to 'cease doing business' with the U.S.S.R. must fail, as the U.S.S.R. can-

Union v. NLRB (Delta Steamship Lines), 346 F.2d 411, 417 (D.C. Cir.), cert. denied, 382 U.S. 840 (1965); National Maritime Union v. NLRB (Weyerhaeuser Lines), 342 F.2d 538, 542 (2d Cir.), cert. denied, 382 U.S. 835 (1965); NLRB v. Local 751, United Bhd. of Carpenters, 285 F.2d 633, 639 (9th Cir. 1960); NLRB v. Local 11, United Bhd. of Carpenters, 242 F.2d 932, 935 (6th Cir. 1957); NLRB v. Washington-Oregon Shingle Weavers' Dist. Council, 211 F.2d 149, 152 (9th Cir. 1954). As the District of Columbia Circuit Court of Appeals has most recently asserted:

The Board and courts do not approach a Section 8(b)(4)(ii)(B) case by attempting to fit the challenged union activity into a categorical box labeled "secondary boycott;" rather, they read the exact language of the section to see if it forbids what the union has done. Certain acts, when done for a specified object are proscribed. The mere fact that the language of this Section comprehends the familiar patterns of a secondary boycott in the customary sense does not inexorably dictate the conclusion that it excludes all variations from those patterns.

Teamsters, Local 812 v. NLRB, *supra*, at 2663.

¹⁹⁸ 640 F.2d at 1378 (citations omitted).

¹⁹⁹ NLRB § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

²⁰⁰ 488 F. Supp. 526 (D. Mass. 1980).

not be characterized as 'any other person' under the statute."²⁰¹ The court, however, failed to support its conclusion with an analysis of the issue of whether a foreign government constitutes "any other person" under section 8(b)(4).

The NLRA employs the term "persons" as a generic term for individuals and groups who are generally subject to the Act. According to section 2(1), "persons" include "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."²⁰² However, it would appear that the definition of "employer" in section 2(2) is more helpful in determining whether a foreign government constitutes a "person" under the Act. This provision defines an employer with reference to certain types of persons in section 2(1): an "employer" includes "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation . . . or any State or political subdivision thereof. . . ."²⁰³

Despite the absence of any clear legislative history on the subject,²⁰⁴ and a permissible interpretation to the contrary based upon the wording of the Act,²⁰⁵ the Board has consistently held that foreign gov-

²⁰¹ *Id.* at 531 n.5.

²⁰² NLRA § 2(1), 29 U.S.C. § 152(1) (1976).

²⁰³ NLRA § 2(2), 29 U.S.C. § 152(2) (1976).

²⁰⁴ The dearth of legislative history on the subject may be due to the fact that Congress never realized that foreign government corporations might one day operate in the United States, and thereby be made subject to the NLRA. The few available remarks on the question of whether Congress in fact exercised its constitutional power to apply the Act to employers with substantial foreign contacts indicate that only American workmen were the concern of Congress. *See* H.R. REP. NO. 245, 80th Cong., 1st Sess. 4 (1947), *reprinted in* 1 LEG. HIST. LMRA, at 295 (remarks of Rep. Hartley).

²⁰⁵ It might be argued that a foreign government should be excluded from the definition of "employer" as the plain language of the Act exempts the United States government or "*any wholly owned Government corporation. . . .*" 29 U.S.C. § 152(2) (1976) (emphasis added). According to this construction of the statute, if Congress had meant to limit the government corporation exception to instrumentalities of the United States government, it could have done so explicitly.

It should be noted that a state can be "any other person" for purposes of § 8(b)(4). *Local 399, Int'l Bhd. of Elec. Workers (Illinois Bell Telephone Co.)*, 235 N.L.R.B. 555, 560 (1978); *Local 3, Int'l Bhd. of Elec. Workers (Mansfield Contracting Corp.)*, 205 N.L.R.B. 559, 562 (1973). Thus, if a union directs its protest boycott against a state, *see note 4 supra*, the union activities are cognizable under the secondary boycott provisions. While the federal government is expressly excluded from the definition of "employer" under the Act, *see* 29 U.S.C. § 152(2) (1976), it would appear that it would qualify as "any other person" within the meaning of § 8(b)(4). *See Douds v. Seafarers' Int'l Union of North America*, 148 F. Supp. 953, 957 (E.D.N.Y. 1957) (Maritime Administration, although an agency of the U.S. government, is "any other person" for purposes of the secondary boycott provisions); *International Longshoremen's Ass'n, Locals 1248 & 1458 (U.S. Naval Supply Center)*, 195 N.L.R.B. 273, 274 (1972) (Navy is "any other person" under § 8(b)(4)). Thus, protest boycotts aimed at the United States government, *see note 4 supra*, would also be subject to the prohibitions of § 8(b)(4). *Cf. Pfizer v. Government of India*, 434 U.S. 308, 318

ernments qualify as employers under section 2(2) of the Act.²⁰⁶ If an entity qualifies as an "employer" for the purposes of the Act, it would be inconsistent to deny that same entity the status of a "person" under section 2(1). Thus, as the Russian government operates vessels in American ports, and transacts business with American exporters and importers, "any other person" should be interpreted to include a foreign government for the purposes of the secondary boycott provisions. The rationale of the *Walsh* court is therefore incorrect.

In *Allied International*, the First Circuit held that the ILA violated section 8(b)(4) without discussing whether the Soviet Union constituted "any other person" under the statute. The court also avoided a consideration of the reasoning of the *Walsh* decision. Instead, the *Allied International* court implied that the requirements of the secondary boycott provisions were satisfied on account of a cessation of business relations between neutral parties.²⁰⁷

The Board's opinion in *International Longshoremen's Association, Local 799* also avoided the issue of whether a foreign government is a "person" as defined by section 2(1) of the Act. Instead, the NLRB asserted that section 8(b)(4) had been violated on account of the termination of business relationships between neutral stevedoring and shipping companies. Its discussion of the question, however, was relegated to a footnote.²⁰⁸

While the analyses of both the First Circuit and the Board fail to undertake a thorough consideration of the issue, case law supports the proposition that the cessation of business between two neutral employers satisfies section 8(b)(4).²⁰⁹ In the context of the Russian trade boy-

(1978) (a foreign nation is a "person" within the meaning of § 4 of the Clayton Act which authorizes "any person" injured by antitrust violations to sue for treble damages in federal court).

²⁰⁶ S.K. Products Corp. (Warehouse, Mail Order, Office, Technical, & Prof. Emp. Union, Local No. 743), 230 N.L.R.B. 1211 (1977); State Bank of India (Chicago Joint Bd., Amalgamated Clothing & Textile Workers Union), 229 N.L.R.B. 838 (1977). In *State Bank of India*, the Board specifically rejected the bank's argument, that as an instrumentality of a foreign government, it did not come within the definition of "employer" under § 2(2). *Id.* at 840. See note 205 *supra*.

²⁰⁷ 640 F.2d at 1375.

²⁰⁸ 257 N.L.R.B. No. 151, 108 L.R.R.M. at 1042 n.43.

²⁰⁹ See *National Maritime Union v. NLRB (Delta Steamship Lines)*, 346 F.2d 411, 418-19 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965); *National Maritime Union v. NLRB (Weyerhaeuser Lines)*, 342 F.2d 538, 545-46 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965); *Miami Newspaper Pressmen's Local 46 v. NLRB*, 322 F.2d 405, 410 (D.C. Cir. 1963); *McLeod v. United Auto Workers, Local 365*, 200 F. Supp. 778, 781-82 (E.D.N.Y. 1962); *Lykes Bros. Steamship Co. (Int'l Org. of Masters, Mates & Pilots, AFL-CIO)*, 197 N.L.R.B. 363, 365 (1972); *Miller & Solomon Const. Corp. (Local 272, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers)*, 195 N.L.R.B. 1063, 1063 n.5 (1972); *Monroe Building Const. Trades Council (Jack W. Royce)*, 189 N.L.R.B. 295, 299 (1971); *National Maritime Union (Delta Steamship Lines)*, 147 N.L.R.B. 1328, 1331-32 (1964); *National Maritime Union (Weyerhaeuser Lines)*, 147 N.L.R.B. 1317, 1326 (1964); *Miami*

cott, "any other person" could thus be a firm engaged in foreign trade with the U.S.S.R., or a shipowner transporting cargoes to or from the Soviet Union. Under this formulation, the ILA's pressure forced neutral stevedore firms to "cease doing business with any other person," i.e., neutrals transporting or trading products with Russia.

Union conduct similar to the ILA's boycott will always precipitate cessation between neutrals, since the transportation of goods between American companies and foreign countries necessarily involves various carriers which importers and exporters hire to move products through international markets.²¹⁰ A protest boycott affecting imports and exports will therefore terminate business dealings between shipping, rail, and trucking firms. Thus, the failure of a foreign government to attain the status of "any other person" under section 8(b)(4) is not fatal to the protest boycott theory.

C. The Requirement That the Primary Dispute be "In Commerce"

The ILA argued successfully in *Baldovin* that since its primary dispute with the Soviet Union was not "in commerce," it would be inconsistent to confer Board jurisdiction over the secondary effects of the boycott on neutral, domestic employers.²¹¹ However, the contrary view, that a union's pressure upon domestic firms is subject to the secondary boycott provisions despite a lack of jurisdiction over the primary dispute, finds solid support in the language of section 8(b)(4). The provision expressly requires that the neutral, secondary employer be "engaged in commerce or in an industry affecting commerce."²¹² Yet, it requires only that the primary object of the secondary pressure be "any other person." According to section 2(1) of the Act, a "person" is not required either to be "engaged in commerce or in an industry affecting commerce," or otherwise be within the jurisdiction of the NLRA.²¹³

Despite the literal language of section 8(b)(4), the protest boycott theory must confront the Supreme Court's decision in *American Radio*

Newspaper Printing Pressmen Local 46 (Knight Newspapers, Inc.), 138 N.L.R.B. 1346, 1352 (1962); United Marine Div., Local 333 (Int'l Longshoremen's Ass'n), 107 N.L.R.B. 686, 711 (1954).

²¹⁰ For example, in the context of the ILA boycott of Iranian cargoes, see note 39 *supra*, neutral parties included ocean shipping firms, railroads, and trucking companies. Since a protest boycott instituted by the ILA on the waterfront (or for that matter, any other union in the transportation process) would necessarily stop the transportation of imports and exports, the termination of business between carriers will always satisfy the cease doing business requirement of § 8(b)(4).

²¹¹ See note 153 *supra*.

²¹² NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

²¹³ NLRA § 2(1), 29 U.S.C. § 152(1) (1976).

Association v. Mobile Steamship Association.²¹⁴ In *Mobile Steamship*, the Court determined that the NLRA did not preempt state court jurisdiction where a domestic stevedoring company, employing longshoremen who honored the picketing of foreign flagships, sought a state court injunction against the secondary aspects of the primary picketing.²¹⁵ In short, *Mobile Steamship* stands for the proposition that the effect of the union's picketing of the foreign flag vessels (an activity not "in commerce" under *Windward Shipping*) on the businesses of the domestic stevedoring companies provides no basis for prohibition under the secondary boycott provisions. Finally, and most importantly, a bifurcated view of "commerce" is not permitted, for the effect of the union's activities on American entities provides no "basis for Board jurisdiction where the primary dispute is beyond its statutory authority. . . ." ²¹⁶

The Supreme Court's decision also made clear that its holding "[c]l[as]t no doubt on [the *Grain Elevator Workers* decisions] which hold that the Board has jurisdiction under [8(b)(4)] of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States."²¹⁷ Moreover, the Court acknowledged the vitality of several cases providing that the Board may exercise jurisdiction over the secondary aspects of primary disputes which, for various reasons, the NLRB lacked jurisdiction.²¹⁸ Though some of these cases are distinguishable from *Mobile Steamship*, the decisions arguably support the theory that the preemption doctrine should apply to secondary boycotts even where the primary dispute is beyond the reach of the Board's jurisdiction. Furthermore, the majority in *Mobile Steamship* neither provided a rationale for reconciling these cases with its decision nor overruled them outright.²¹⁹ The protest boycott theory

²¹⁴ 419 U.S. 215 (1974).

²¹⁵ *Id.* at 220.

²¹⁶ *Id.* (emphasis in original).

²¹⁷ *Id.* at 225 n.10 (citations omitted). The cases referred to are *Grain Elevator, Flour and Feed Mill Workers, Local 418 v. NLRB*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967), and *Madden v. Grain Elevator, Flour and Feed Mill Workers, Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965). For a discussion of the *Grain Elevator Workers* cases, see text accompanying notes 230-33 *infra*.

²¹⁸ *Id.* at 228, *citing* *Plumbers Local 298 v. County of Door*, 359 U.S. 354 (1959) and *Local 25, Int'l Bhd. of Teamsters v. New York, N.H. & H.R.R.*, 350 U.S. 155 (1956).

²¹⁹ Numerous commentators have criticized the reasoning of *Mobile Steamship* on this ground. See Bartosic, *The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy*, 62 VA. L. REV. 533, 568-69 (1976); Ross, *American Legal Restrictions on the Use of Union Economic Weapons Against Multinational Employers*, 10 CORNELL INT'L L.J. 59, 67, 80 (1976); Comment, *Labor Law—National Labor Relations Act—State Court Jurisdiction to Enjoin Picketing of a Foreign Flag Vessel by American Unions is not Preempted by the National Labor Relations Act*

must therefore be reconciled with and distinguished from the results reached in *Mobile Steamship* and the *Grain Elevator Workers* cases.

The genesis for the case law providing that the NLRA allows the exercise of jurisdiction over the secondary aspects of a primary dispute over which the NLRB has no jurisdiction is the Board's decision in *Sailor's Union of the Pacific (Moore Dry Dock)*.²²⁰ In this case, a Panamanian ship berthed in the petitioner's dry dock for repairs was picketed by American maritime unions protesting the loss of domestic jobs to foreign seamen and seeking recognition as the bargaining agent of the ship's employees. The NLRB dismissed the union's petition to be certified as the bargaining representative of the employees for lack of jurisdiction, "inasmuch as the internal economy of a vessel of foreign registry and ownership [was] involved."²²¹

Simultaneous with the dismissal of the union's petition for representation, the Board took cognizance of the dry dock company's complaint seeking to enjoin the picketing of the ship on the grounds that it constituted an illegal secondary boycott.²²² In analyzing the section 8(b)(4) issue, the NLRB observed that the problem "is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved."²²³ In holding that the picketing constituted primary activity and not an illegal secondary boycott, the Board set out four conditions to be satisfied before picketing on the premises of secondary employer can be considered primary and therefore deserving of protection under the NLRA.²²⁴ Thus, the plain implication of *Moore Dry Dock* is that section 8(b)(4) applies to the secondary aspects of picketing, notwithstanding the Board's lack of jurisdiction over the primary dispute.²²⁵

Justice Stewart in his dissent in *Mobile Steamship* relied upon this reading of *Moore Dry Dock* as precedent for granting the NLRB jurisdiction over the secondary aspects of a primary dispute outside the cov-

Even Though the Injunctive Relief Was Sought by an American Employer Whose Employees Honored the Picket Lines, 27 ALA. L. REV. 649, 664 (1975); *Foreign Ships*, *supra* note 121, at 62-63.

²²⁰ 92 N.L.R.B. 547 (1950).

²²¹ *Id.* at 560. For similar reasons, the Supreme Court declared in *McCulloch* that the NLRA should not be construed to allow the Board to conduct a representation election for alien crews aboard a foreign ship pursuant to a petition filed by an American union. *See* text accompanying notes 113-18 *supra*.

²²² 92 N.L.R.B. at 549.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Justice Douglas advanced this view in his dissent in *Benz*. *See Benz v. Campana Naviera Hidalgo*, 353 U.S. 138, 148 (Douglas, J., dissenting).

erage of the Act.²²⁶ The majority disagreed with this reading of *Moore Dry Dock*. Justice Rhenquist asserted that a "1950 Board precedent such as [*Moore Dry Dock*] can scarcely be regarded as controlling when it is clearly contrary to the thrust of this Court's *Benz-Windward Shipping* line of cases."²²⁷ A careful reading of these decisions, however, belies the assertion that *Moore Dry Dock* is antithetical to the rationale of the *Benz-Windward Shipping* decisions.

The *Benz* Court, in examining a *primary* dispute between a *foreign* shipowner and an American union, found the rationale of *Moore Dry Dock* inapposite since the Board's decision involved a *secondary* dispute between a *domestic* shipowner and union. Thus, the *Benz* Court distinguished *Moore Dry Dock* for the very reason that the *Windward Shipping* dissenters criticized Justice Rhenquist's reading of the Board's decision.²²⁸ Moreover, the policy concerns of the *Benz-Windward Shipping* family of cases are not contradicted by allowing an exercise of jurisdiction over a secondary dispute as postulated by the *Moore Dry Dock* rationale. The cases preceding *Mobile Steamship* that deal with suits by foreign shipowners against American unions stand for the proposition that the internal operations of foreign flag vessels are not "in commerce," and thus are not subject to federal labor laws. As the Court in *Windward Shipping* reasoned, jurisdiction over the primary dispute would necessarily impact either the internal management and affairs of the carrier, or endanger "long-standing principles of comity and accommodation in international maritime trade."²²⁹ Yet, these concerns are not implicated by halting an illegal secondary boycott directed against United States companies. For one, no attempt is made to regulate or apply the Act to the internal affairs of any foreign ships or companies. Further, no conflict between foreign and American laws can result from enjoining a secondary boycott in this country. Therefore, the *Mobile Steamship* opinion fails to provide a cogent rationale for its departure from the logic of the theory enunciated in the *Moore Dry Dock* case.

In *Mobile Steamship*, the Court expressed approval of the *Grain Elevator Workers* decisions, two cases which sustained the NLRB's jurisdiction over secondary disputes involving American employers and unions despite the fact that the accompanying primary dispute was not "in commerce." In *Madden v. Grain Elevator, Flour and Feed Mill*

²²⁶ 419 U.S. at 234 (Stewart, J., dissenting).

²²⁷ *Id.* at 227.

²²⁸ See 353 U.S. at 143 n.5.

²²⁹ 415 U.S. at 113-14.

*Workers, Local 418*²³⁰ and *Grain Elevator, Flour and Feed Mill Workers, Local 418 v. NLRB*,²³¹ the Seventh and District of Columbia Circuits examined an identical secondary boycott by a union in the United States in support of a Canadian union engaged in a labor dispute with a Canadian shipper. The employees of Continental Grain Company, an American corporation, who were members of an American union, refused to load the Canadian shipper's vessels in order to support the picketing of the shipper by the Canadian union.²³² The Board successfully petitioned both courts for an injunction against Local 418 based on section 8(b)(4). In rejecting the contention that the NLRB lacked jurisdiction because the subject matter of the dispute involved the internal affairs of Canadian parties, the District of Columbia Circuit reasoned "that the Board is not . . . exercising jurisdiction over the Canadian primary dispute, but over the secondary activity in this country, 'directed against an American labor organization and involving employees working in a domestic plant of the American employer.'"²³³

The protest boycott theory is also reconcilable with the rationale of the *Grain Elevator Workers* cases and *Mobile Steamship*. The complaints in *Windward Shipping*, as in both *Grain Elevator Workers* cases, concerned domestic secondary boycotts resulting from primary disputes which were not "in commerce." In *Mobile Steamship*, the finding that the secondary picketing was not within the jurisdiction of the NLRB rested on the nature of the primary dispute giving rise to the secondary activity. As the Supreme Court noted, "the affect of the picketing on the operations of the stevedores and shippers . . . is precisely the same whether it be complained of by the foreign-ship owners or by the [domestic employers] seeking to service and deal with the ships."²³⁴ Thus, in *Mobile Steamship*, the Court stressed the inextricable intertwining of the primary and secondary effects of the same conduct. However, in the *Grain Elevator Workers* cases, the only union activity involved secondary picketing undertaken against a domestic employer. Moreover, as the union conduct was purely secondary, there was no risk that assertion of Board jurisdiction would intrude upon foreign interests. Whereas *Mobile Steamship* precluded jurisdiction over primary conduct interfering with foreign maritime relations and inextricably involving secondary employers, jurisdiction was proper in

²³⁰ 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965).

²³¹ 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967).

²³² *Id.* at 775.

²³³ *Id.* at 778, *quoting* *Madden v. Grain Elevator, Flour and Feed Mill Workers, Local 418*, 334 F.2d 1014, 1019 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965).

²³⁴ 419 U.S. at 224-25.

the *Grain Elevator Workers* cases as the union's secondary picketing focused exclusively on domestic employers. This distinction provides an explanation for the Court's assertion that the holding in *Mobile Steamship* "cast[s] no doubt on" the *Grain Elevator Workers* cases.²³⁵

In the protest boycott situation, the application of section 8(b)(4) to a union's secondary pressure against domestic businesses is directly analogous to the reasoning of the *Grain Elevator Workers* cases. First, international comity concerns are not implicated, for NLRB jurisdiction would portend no interference in the management or affairs of any foreign country. Moreover, no conflict between the policies of the United States and a foreign government can result from halting a secondary boycott, directed against American employers and involving employees working in domestic industries. In short, the effect of Board cognizance over protest boycotts would not produce the sort of international reverberations which would warrant a limitation upon the jurisdictional reach of the NLRA.

Likewise, the logic of the *Mobile Steamship* decision does not contradict the protest boycott theory. In *Mobile Steamship*, the Court rejected a bifurcated view of union activity for jurisdictional purposes: "[s]ince *Windward Shipping* held that . . . the picketing [of foreign shipowners] was not in or affecting commerce, it would be inconsistent to now hold, insofar as concerns Board jurisdiction over a complaint by [domestic employers,] that the employer of the longshoremen . . . was in or affecting commerce."²³⁶ The rejection of a bifurcated view of the union's actions resulted from the fact that both the primary and the secondary effects of the same picketing interfered with foreign maritime operations. For this reason, both the First Circuit in *Allied International* and the Board in *International Longshoremen's Association, Local 799* reasoned that the Supreme Court's decision in *Mobile Steamship* did not foreclose NLRB jurisdiction over the Russian trade boycott.

In *Allied International*, the First Circuit read *Mobile Steamship* as establishing that in a case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried on at a single site, "a primary dispute cannot be extricated from a secondary dispute for purposes of contrary jurisdictional findings."²³⁷ As jurisdiction over the ILA's secondary pressure of domestic employers did not involve separation of the primary and secondary effects of single union action, the

²³⁵ *Id.* at 215 n.10.

²³⁶ *Id.* at 214.

²³⁷ 640 F.2d at 1374.

First Circuit viewed the Russian trade boycott as analogous to the picketing in the *Grain Elevator Workers* cases. Similarly, the Board concluded in *International Longshoremen's Association, Local 799* that the union's conduct was purely secondary and domestic, and thus distinguishable from *Mobile Steamship*. Thus, the NLRB limited *Mobile Steamship* to the proposition that "where primary activity interferes with foreign maritime relations and inextricably involves the secondary employers, the Board is prohibited from asserting jurisdiction over the primary conduct or its secondary effects. . . . [; for this reason,] there is . . . no bar to our assertion of jurisdiction [over the Russian trade boycott]." ²³⁸

The reading given *Mobile Steamship* by both the First Circuit and the Board is in harmony with the underlying purposes of the Act. ²³⁹ Jurisdiction over protest boycotts would not entail bifurcation of the effects of single union action which the Supreme Court disapproved in *Mobile Steamship*. The only labor dispute extant is a secondary boycott involving the ILA and American employers. Moreover, the fact that the boycott was inspired by military events in a foreign country does not counsel against the application of section 8(b)(4) to a domestic labor dispute. In short, none of the considerations that prompted a limit upon the NLRB's jurisdiction in *Windward Shipping, Incres* and *Benz* are present in the context of a protest boycott. Thus, the assertion of jurisdiction over protest boycotts is consistent with the *Grain Elevator Workers* cases, and reconcilable with the result reached in *Mobile Steamship*.

²³⁸ 257 N.L.R.B. No. 151, 108 L.R.R.M. at 1039.

²³⁹ In contrast to the reasoning of the First Circuit and the NLRB, the Fifth Circuit's decision in *Baldovin* construed the *Windward Shipping-Mobile Steamship* test in very broad terms. See text accompanying notes 143-52 *supra*. A comparison of the analyses of *Baldovin* and the *Allied International* decisions in the context of non-maritime protest boycotts, however, yields the conclusion that the reasoning of the First Circuit and the Board is consonant with the underlying purposes of § 8(b)(4). For example, mine workers strike against an American steel company (which imports South African steel) located in Alabama for the purpose of protesting the apartheid policy of the Republic of South Africa. The First Circuit and the Board would allow NLRB jurisdiction over the secondary aspects of the strike against the American firm, as the concerns of *Windward Shipping* and *Mobile Steamship* are not implicated by enjoining a domestic strike. Although the Fifth Circuit had earlier intimated that an employer suffering from a similar protest boycott could obtain a remedy through § 8(b)(4), *United States Steel Corp. v. United Mine Workers*, 519 F.2d 1236, 1247 n.23 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976), the *Baldovin* court asserted that the NLRB would not possess jurisdiction over such a strike. See *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445, 454 n.6 (5th Cir. 1980). In light of the Fifth Circuit's assertion that "the object of a dispute determines whether or not it is 'in commerce,'" *id.* at 453, it is difficult to conceive of any protest boycott (maritime or non-maritime) to which the NLRA would apply under the *Baldovin* rationale.

D. Elements Required to Prove a Section 8(b)(4) Violation

Section 8(b)(4) has been called one of the most labyrinthine provisions ever included in a federal statute,²⁴⁰ for a literal reading of the section does not provide ready answers to the many problems of interpretation that have arisen in examining secondary boycotts. The meaning of the statutory language is neither obvious nor intuitive. Indeed, the Supreme Court has acknowledged that a literal construction of the provision would ban most strikes historically considered to be lawful primary activity.²⁴¹ Furthermore, though section 8(b)(4) does not explicitly mention "primary" or "secondary" boycotts, strikes or disputes, the legislative history of the Act refers to the section as the "secondary boycott" provision.²⁴² Congress directed the impact of the section toward "what is known as the secondary boycott whose 'sanction[s] bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.'"²⁴³

Though the distinction between legitimate "primary activity" and banned "secondary activity" is crucial, section 8(b)(4) fails to present a bright line marking out a frontier between the two concepts. Thus, in an effort to yield an integrated set of standards by which union activities may be measured against the statute, the Board and the courts have utilized a means-object test to determine the legality of union conduct. Both an illegal means—threatening, coercing or restraining the secondary employer—and an illegal object—forcing the secondary employer to cease doing business with the primary employer—must be established to prove a violation.²⁴⁴ It is against this general test that protest boycotts must be measured.

1. *Threatening, Coercing or Restraining the Secondary Employer*

Subsection (ii) of section 8(b)(4) makes it unlawful for a union "to

²⁴⁰ Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1113 (1960). The Supreme Court has observed that "[n]o cosmic principles announce the existence of secondary conduct, condemn it as an evil or delimit its boundaries." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386 (1969). This difficulty is further compounded by language wanting in clarity and a confusing legislative history, both of which are the "product of compromise of the closely divided Congress that enacted the words into law." BARTOSIC & HARTLEY, *supra* note 20, at 124.

²⁴¹ See *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 98 (1956).

²⁴² See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 681 (1951).

²⁴³ *Local 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 672 (1961), quoting *International Bhd. of Elec. Workers v. NLRB*, 181 F.2d 34, 37 (1955) (Hand, L., J.).

²⁴⁴ See *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 98 (1956); *Teamsters, Local 812 v. NLRB*, 105 L.R.R.M. 2664, 2668 (D.C. Cir. 1980).

threaten, coerce or restrain any person" for proscribed objects.²⁴⁵ Whether a union pursues its object by threatening, coercing or restraining a neutral business goes not to the motive underlying the boycott, but to the natural and foreseeable consequences of the pressure which the union has brought to bear upon the neutral. In the protest boycott situation, this conduct takes the form of union pressure designed to impede the operation of domestic businesses.

In the context of the Russian trade boycott, one can argue that the ILA's manipulative use of its hiring hall arrangement with stevedoring companies is a form of coercion undertaken against neutral parties for the purpose of forcing them to cease doing business with the Soviet Union. Since the ILA has no dispute with stevedoring firms, the action of the union in refusing to refer longshoremen to these neutral parties involves them in a dispute not of their own. The union's action in furtherance of its disagreement with Soviet foreign policy is therefore precisely the type of direct economic pressure upon neutral persons which the Congress intended to prohibit with the secondary boycott provisions.

A union's manipulative abuse of its hiring hall arrangement with a neutral employer was clearly contemplated by Congress in the 1959 Amendments to section 8(b)(4) to be a form of coercion. As Congressman Rhodes declared, refusal to refer was one of the loopholes in the secondary boycott provisions which the 1959 Amendments were intended to remedy:

. . . a union with a hiring hall system . . . may also coerce a secondary employer into ceasing to use products of some other company by denying him access to the craftsmen on the hiring hall list. This [Amendment] makes such direct coercion of an employer unlawful by insertion of clause 4(ii) forbidding threats or coercion of 'any person engaged in commerce or an industry affecting commerce.'²⁴⁶

The argument that the ILA's refusal to refer its members to load or unload Russian cargoes pursuant to hiring hall arrangements with stevedoring companies satisfies the "threaten, coerce and restrain" requirement is therefore consistent with the Landrum-Griffin Amendments to section 8(b)(4). In *International Longshoremen's Association, Local 799*, the Board accepted such a position, and held that the union had violated subsection (ii) of section 8(b)(4) since it had "threatened, coerced, and restrained [domestic employers] with a refusal to refer

²⁴⁵ NLRA § 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii) (1976).

²⁴⁶ 105 CONG. REC. 14,208 (1959), reprinted in II LEG. HIST. LMRDA, at 1581. See also 105 CONG. REC. 5971 (1959), reprinted in II LEG. HIST. LMRDA, at 1194 (remarks of Sen. McClellan).

[ILA] members for unloading cargo emanating from the USSR.”²⁴⁷

The district court in *Walsh*, however, rejected the argument that an ILA local’s refusal to refer longshoremen to stevedoring companies constituted threats, coercion or restraint. According to Judge Skinner, a bare refusal to refer does not contravene section 8(b)(4), for “union members have simply declined to accept employment on certain ships, as a form of political protest.”²⁴⁸ For support, the court referred to the reasoning of the *Ocean Shipping* decision. In this case, the Fourth Circuit held that should a mere refusal to refer, unaccompanied by any other acts, be deemed illegal, “the union would be deprived of its rights of expression and . . . section 8(b)(4)(B) would be emptied of meaning.”²⁴⁹

The *Ocean Shipping* court believed that the refusal to refer longshoremen to work one ship which had engaged in Cuban trade “is not itself coercive.”²⁵⁰ The opinion intimated that a refusal to refer would not amount to coercion until the union instituted a general work stoppage against the neutral.²⁵¹ However, this reasoning conflicts with other circuits which have adopted the approach that a refusal to refer which substantially hinders the neutral’s business with the primary constitutes “restraint or coercion.”²⁵²

A union restrains the neutral employer whenever the deliberate actions of the former hinder the latter in doing business with the primary employer. In *Walsh*, the ILA’s refusal to refer its members to a stevedoring company to unload Russian cargoes caused substantial dislocation of business between it and Allied, the importer of the Soviet goods. Since eighty-five percent of Allied’s imports originated in the U.S.S.R., and accounted for \$25 million in annual revenues, the ILA’s

²⁴⁷ 257 N.L.R.B. No. 151, 108 L.R.R.M. at 1042. A violation of the secondary boycott provisions may also be premised upon subsection (i) of § 8(b)(4). Under this provision, a union engages in illegal action when it “induce[s] or encourage[s] any individual employed by any person” to strike, boycott, or refuse to handle any goods for proscribed objects. In the context of the Russian trade boycott, the Board determined that the ILA had “induced and encouraged their members to engage in refusals in the course of the employment by [the stevedore firm] to process or otherwise handle Soviet cargoes owned by [the importer]” *Id.*

²⁴⁸ 488 F. Supp. at 531.

²⁴⁹ *NLRB v. Local 1355, Int’l Longshoremen’s Ass’n (Ocean Shipping)*, 332 F.2d 992, 997 (4th Cir. 1964).

²⁵⁰ *Id.* at 998.

²⁵¹ *Id.* at 997.

²⁵² *NLRB v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 477 F.2d 260, 266 (2d Cir. 1973); *Local No. 5, United Ass’n of Journeymen Plumbers v. NLRB*, 321 F.2d 366, 368 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963); *NLRB v. Local 825, Int’l Union of Operating Engineers*, 315 F.2d 695, 697-98 (3d Cir. 1963); *NLRB v. Highway Truckdrivers & Helpers, Local No. 107*, 300 F.2d 317, 320-21 (3d Cir. 1962).

boycott restrained and coerced Allied although the union's activity stopped short of a general work stoppage.²⁵³ For this reason, the Fourth Circuit's view of what constitutes threats, coercion or restraint is excessively narrow. In light of the purpose of the 1959 Amendment's inclusion of clause (ii) into section 8(b)(4), any refusal to refer which tends to exert pressure on the neutral should be considered sufficient to constitute restraint or coercion.²⁵⁴

Perhaps one explanation of the *Ocean Shipping* court's (and subsequently the *Walsh* court's) disinclination to characterize the ILA's refusal to refer as coercive results from the Fourth Circuit's reliance on the Supreme Court's decision in *NLRB v. Fruit & Vegetable Packers (Tree Fruits)*.²⁵⁵ The Fourth Circuit analogized the refusal to refer for work upon one vessel to the narrow consumer appeal being made in *Tree Fruits* which the Supreme Court has concluded to be legal under section 8(b)(4). The *Tree Fruits* Court held that a union could picket the retail outlet of a struck product if it confined its appeal to urging customers not to purchase the product.²⁵⁶ The Court interpreted the section to allow the union activity in the absence of a contrary congressional intent, so as to avoid first amendment questions inherent in the prohibition of union picketing.²⁵⁷ Yet, in *Ocean Shipping*, as in the context of the Russian trade boycott, this problem is absent, for the ILA made no appeal to the public concerning the Soviet Union. For this reason, section 8(b)(4) would not be emptied of meaning by enjoining a protest boycott. First, the proviso to the secondary boycott provisions protects legitimate primary activities, something which is very different from union conduct undertaken against neutral parties. Second, a prohibition against the union's work stoppage would not deprive the ILA or its members of their right of expression. Alternative forms of expression exist, including the right to assemble or leaflet in protest of Soviet aggression, the opportunity to picket the Russian em-

²⁵³ 257 N.L.R.B. No. 151, 108 L.R.R.M. at 1041. The union's conduct also caused substantial dislocation of business relationships between the shipper and the stevedore. Upon learning of the ILA boycott, the shipper, Waterman Steamship Lines, repudiated its future agreement to carry wood products from Leningrad to Boston aboard the vessel Jefferson for the importer Allied. 488 F.Supp. at 526. Additionally, Waterman restricted the cargo being loaded on the ship Middleton in Leningrad to one-third its scheduled size, cancelled its scheduled delivery to several U.S. ports, and unloaded the wood products in Montreal. *Id.* Thus, as stevedores could not be obtained through any other sources, the refusal to refer ILA members exerted pressure on Waterman to refrain from servicing Allied.

²⁵⁴ See note 246 *supra*. See also II LEG. HIST. LMRA, at 989, 1079, 1523, 1568, and 1581.

²⁵⁵ 332 F.2d at 994, citing 377 U.S. 58 (1964).

²⁵⁶ 377 U.S. at 63.

²⁵⁷ *Id.*

bassy and consular offices, and the right to petition and lobby elected officials to effectuate a reassessment of United States foreign policy regarding American-Russian trade.²⁵⁸

The *Allied International* court rejected the view that protest boycotts are exempted from section 8(b)(4) as a form of political expression.²⁵⁹ As the First Circuit reasoned, "prohibiting the [union's boycott] . . . would [not] rob either the ILA or its members of their 'right of expression' . . . [since its] resort to coercive tactics . . . exceed[s] the bounds of 'political expression' in its pure form."²⁶⁰ The NLRB dismissed the union's first amendment arguments in shorter form, holding that the application of "section 8(b)(4) to such conduct imposes no impermissible restrictions on constitutionally protected speech."²⁶¹

Despite the political nature of protest boycotts, a fact which lead the *Ocean Shipping* and *Walsh* courts to afford such conduct first amendment protection, section 8(b)(4)'s regulation of a partial refusal to refer should not be subjected to a narrow reading under the rationale of *Tree Fruits*. Rather, a partial refusal to refer union workers should

²⁵⁸ For a discussion of the American labor movement's endeavors to influence United States foreign policy "through democratic processes," see notes 21-24 and accompanying text *supra*. Interestingly, the administrative law judge conducting factual findings in the consolidated unfair labor practice proceedings against the ILA found that "[t]here is little support . . . for the claim that [union president] Gleason's directive merely expressed the overwhelming desire of the membership . . . [, for there is no] testimony about a flood of sentiment pouring in on him from ILA members throughout the nation" International Longshoremen's Ass'n, Local 799 (*Allied Int'l, Inc.*), Case No. 1-CC-1753, slip op. at 3 (Mar. 16, 1981). In addition, one court noted that the ILA directive implementing the Russian trade boycott may have forced union members to express themselves contrary to the views of some:

[T]he Union's position that its action constitute [sic] only the joint expression of its members' opinion . . . is neither factually nor legally supportable. No evidence of a mandate from the Union's membership has been presented, nor did the Union make any effort to notify its members of employees that Union members who wished to work or who did not support this action could ignore the Union's order without fear of retaliation.

Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n, Locals 1248 & 1963, Civ. No. 80-186-N, slip op. at 10 (E.D. Va. Feb. 22, 1980), *rev'd on other grounds*, 631 F.2d 282 (4th Cir. 1980).

²⁵⁹ 640 F.2d at 1378-79. The conclusion of the First Circuit accords with well established case law. There is no reason § 8(b)(4)(B) should be deemed inapplicable because the ILA's activities are politically motivated. As early as 1949 the Supreme Court rejected the argument that regulation of picketing and other concerted activity violated either the first or the thirteenth amendments. *United Autoworkers*, Local 232 v. *Wisconsin Employee Relations Bd.* (Briggs & Stratton), 336 U.S. 245, 251 (1949). Two years later the Court upheld the constitutionality of the secondary boycott provisions, *International Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 705 (1951), and determined that § 8(b)(4)'s regulation of union activity is not violative of the first amendment. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689 (1951).

²⁶⁰ 640 F.2d at 1378-79.

²⁶¹ 251 N.L.R.B. No. 151, 108 L.R.R.M. at 1041 n.38.

be deemed sufficient to maintain an action under the statute if the union has an object of forcing a neutral to cease doing business with persons trading with the target of the union's action, the U.S.S.R.

2. *The Forbidden Object—To Force the Cessation of Business*

The second element of a violation of section 8(b)(4) necessitates a finding that the challenged union conduct have as a goal the forcing or requiring of a neutral employer to cease doing business with another person. Absent an impermissible object, the union's conduct is protected primary activity.

The ILA's posture throughout the Russian trade boycott was to characterize its activity as a passive, political protest against the militaristic designs of the Soviet government.²⁶² For this reason, the union maintained that any cessation in business dealings between the U.S.S.R. and American companies was not an object of its work stoppage, but rather, the unintended effects attendant their protest against Soviet military policy. As the union contended in argument before the Fifth Circuit in *Baldovin*:

Longshoremen have elected to bear the economic consequences in the form of lost wages rather than participate in an abhorrent venture. This is the express and demonstrable object of the ILA's action. . . . Their quarrel is solely with the Soviets over that nation's political policy, and their response is conscientious, personal abstention.²⁶³

Thus, while the ILA's conduct obviously had affected the business of neutral employers, the union contended its boycott was lawful absent a proscribed object.

The protest boycott theory, however, would posit that the foreseeable and inevitable consequence of the union's conduct is the cessation of business between American companies and the foreign government under the union's interdiction. Hence, whatever the ILA's ultimate object, at least one goal of the union's conduct was to force domestic companies to cease doing business with the Soviet Union. Even accepting the ILA's characterization of its boycott, the union's goal was furthered by causing stevedores and shippers to cease handling Russian goods. The resulting cutback in trade with the U.S.S.R. served to direct its protest, if only symbolically or through economic force, to the Soviet government.

Despite the fact that a protest boycott may have several motives,

²⁶² Brief of ILA at 14, 16, 26, 28, 31-32, 34, 39, *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980). See also Reply Brief of ILA at 10, 15, 16, *id.*

²⁶³ Brief of ILA at 15, *id.*

the secondary boycott provisions do not require that the sole object of the activity be one prescribed by the statute. Such an interpretation of secondary boycott provisions finds solid support in the legislative history of the Act.²⁶⁴ As the Supreme Court has repeatedly observed, section 8(b)(4) dictates only that "an object" of the boycott be one which contravenes the statute, and conduct that has such an intermediate object, if prohibited, is not protected merely because the ultimate object is beyond the proscription of the Act.²⁶⁵

In cases involving mixed motives, the Board and the courts look to the totality of the union's conduct in determining whether the motive claimed by the Union is pretextual, and whether an object of the conduct complained of is proscribed by section 8(b)(4).²⁶⁶ As the Supreme Court asserted in *NLRB v. Pipefitting Local No. 638*, "this issue turns on whether the boycott was addressed to the labor relations of the contracting employer vis-a-vis his own employees, and is therefore primary conduct, or whether the boycott was tactically calculated to satisfy union objectives elsewhere," in which event the boycott would be prohibited secondary activity.²⁶⁷ In *Allied International*, the First Circuit followed this test and determined that the Russian trade boycott was "calculated to satisfy union objectives elsewhere."²⁶⁸

Since the ILA had no dispute with neutral employers, the targets of the boycott, the conclusion of the First Circuit is correct. As the court reasoned, "[w]hen a union orders all employees of a neutral employer to cease handling goods originating from a particular source, it is *a fortiori* forcing that employer to 'cease doing business' with that source."²⁶⁹ For this reason, the court observed that the object of a protest boycott "can be inferred from the inevitable results generated by it."²⁷⁰ Since it is logical to conclude that the ILA intended the foreseeable consequences of its refusal to handle Russian cargoes, the union, in coercing neutrals to cease doing business with the U.S.S.R., utilized

²⁶⁴ The sponsor of the statute, Senator Taft, stated in his supplementary analysis of the secondary boycott provision: "[s]ection 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.'" 93 CONG. REC. 6662 (1947), reprinted in II LEG. HIST. LMRA, at 1579.

²⁶⁵ *NLRB v. Local 825, Operating Engineers (Burns & Roe)*, 400 U.S. 297, 302-03 (1971); *Carpenters Local 74 v. NLRB*, 341 U.S. 707, 713 (1951); *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689 (1951).

²⁶⁶ See *NLRB v. Pipefitting Local No. 638*, 429 U.S. 507, 511 (1976); *NLRB v. Plumbers Local 307*, 469 F.2d 403, 408 (7th Cir. 1972); *IBEW Local 480 v. NLRB*, 413 F.2d 1085, 1091 (D.C. Cir. 1969); *Teamsters, Local 812 (Monarch Long Beach Corp.)*, 243 N.L.R.B. 801, 804-06 (1979).

²⁶⁷ 429 U.S. at 511.

²⁶⁸ 640 F.2d at 1377.

²⁶⁹ *Id.* at 1375 (emphasis in original).

²⁷⁰ *Id.*

the resulting cessation of business as a means of expressing its disapproval over the Afghanistan invasion. In essence, the union's intent is evidenced by the very nature of its conduct. Thus, since the cessation of business is tactically used for its effect upon the Soviet Union, an impermissible object necessary to prove a violation of section 8(b)(4) is present.²⁷¹

Although the Board agreed that the ILA's boycott of Russian cargoes stemmed from an unlawful object, the NLRB reached this conclusion with a different analysis. The Board assessed the object of the Russian trade boycott with reference to the Supreme Court's decision in *NLRB v. Retail Store Employees Union, Local 101 (Safeco)*.²⁷² In *Retail Store Employees*, the Court examined a section 8(b)(4) challenge to union picketing undertaken against neutral title insurance companies who derived over ninety percent of their incomes from their business with Safeco, the primary employer of the union's membership. In determining whether the union's object was one proscribed by Section 8(b)(4), the Court focused exclusively on the nature of the foreseeable injury to the neutral parties. Accordingly, the Court determined that picketing that "reasonably can be expected to threaten neutral parties with ruin or substantial loss" violates section 8(b)(4) as its purpose is to force the neutral employers to cease doing business with the primary employer.²⁷³

In the context of the Russian trade boycott, the NLRB was of the opinion that the object of the ILA's conduct could likewise be gleaned through the test promulgated in *Retail Store Employees*. First, the Board determined that the boycott of Russian cargoes could be ex-

²⁷¹ The union conduct condemned by the Eightieth Congress was characterized as "a strike against employer A for the purpose of forcing that employer to cease doing business with employer B [the employer with whom the union has a dispute] . . ." S. REP. NO. 105, 80th Cong., 1st Sess. 22 (1947), reprinted in 1 LEG. HIST. LMRA, at 428. Yet, when the union engages in a protest boycott, the calculus of secondary pressure is reformulated: the union pressures neutral companies trading with the U.S.S.R. for the purpose of forcing Russia to alter its conduct (i.e., to withdraw from Afghanistan) by causing it to lose the business of American companies. The pressure against neutral stevedoring firms is secondary because the resulting cessation of business between the entities trading with Soviets (the neutral shipping and import/export companies) and the U.S.S.R. is utilized as a weapon against the foreign government. Furthermore, even if the union's activities only achieve a partial cessation in business relations between American companies and a foreign government, the cease doing business object is nonetheless satisfied. See *NLRB v. Local 825, Int'l Union Operating Engineers*, 400 U.S. 297, 304-05 (1971) (secondary boycott provision is read too narrowly if complete termination of business relationship between neutral and primary is required); *NLRB v. Local 830, Int'l Bhd. of Teamsters*, 281 F.2d 319, 321 (3d Cir. 1960) (eight instances of refusals to handle goods out of thousands is sufficient).

²⁷² 447 U.S. 607 (1980).

²⁷³ *Id.* at 614-15.

pected to inevitably threaten neutral employers with substantial economic loss. Such a conclusion was evidenced by the fact that approximately eighty-five percent of Allied's products were imported from the U.S.S.R.²⁷⁴ Second, regardless of whether the ILA intentionally calculated to cause a total cessation in the flow of goods between the U.S. and the Soviet Union, the union was responsible for the foreseeable consequences of its conduct. To support this finding, the Board reasoned that:

[The ILA] had every reason to foresee with absolute clarity . . . that Russian goods would not be moved by any employees in any of the ports encompassed by the boycott . . . and that Allied would be forced to cease purchasing Russian wood for delivery to ports affected by the boycott [Thus,] under the rationale of *Safeco*, [the union] must be held accountable for the foreseeable consequences of [its] conduct . . . and . . . must be held to have induced the boycott with an object of forcing the business entities involved to cease business operations among themselves and to cease handling goods of the U.S.S.R.²⁷⁵

Since the boycott presented neutral employers such as Allied with the choice between economic survival and the severance of their business relationships with the Soviet Union, the ILA's conduct contravened section 8(b)(4)(ii).

A comparison of the analyses utilized by the First Circuit and the NLRB reveals that the former accords with the premise of the protest boycott theory. The pressure directed against neutral companies trading with the Soviet Union is unlawful, as the purpose of the boycott is to force American employers to cease doing business with the Soviet Union. In the words of the First Circuit, "when a union orders all employees of a neutral employer to cease handling goods originating from a particular source, it is *a fortiori* forcing the employer to cease doing business with that source."²⁷⁶ In contrast, the reasoning of the Board implies that a protest boycott stems from an unlawful object only in situations where the foreseeable consequences of the union's pressure "inevitably . . . threatens [a neutral employer] with substantial economic loss."²⁷⁷ Whereas the protest boycott theory and the rationale of the First Circuit would deem the object of the ILA's boycott against neutral employers dealing with the Soviet Union to be illegal, the approach of the Board is narrower as it envisions that the object of

²⁷⁴ 257 N.L.R.B. No. 151, 108 L.R.R.M. at 1041. These imports amounted to approximately \$25 million annually. *Id.*

²⁷⁵ *Id.* at 1042.

²⁷⁶ 640 F.2d at 1375 (emphasis in original).

²⁷⁷ See text accompanying notes 272-75 *supra*.

union activity is unlawful only if neutral employers are faced with the near total collapse of their business.

The nature of protest boycotts belies the validity of the Board's determination that the object of such union activity is unlawful only in situations directly analogous to *Retail Store Employees*. Since protest boycotts are confined to secondary employers and calculated to satisfy union objectives unrelated to labor-management relations, the union's object is illegal. This view accords with the factual circumstances underlying the Russian trade boycott. First, courts examining the circumstances under which the ILA instituted the Russian trade boycott concluded that the boycott campaign was implemented by the union's hierarchy, rather than, as ILA President Gleason represented it to be, a grass-roots movement amongst the union's rank and file.²⁷⁸ Such evidence suggests that the union's leadership sought to inflict economic harm upon the U.S.S.R. in retaliation for its military adventurism. Moreover, these findings counsel against acceptance of the ILA's claim that the boycott constituted a primary protest since the sole object was to vindicate the consciences of the union's membership by refusing to load Russian cargoes. Secondly, in argument before the *Baldovin* court, ILA lawyers admitted that the infliction of economic harm upon the Soviet Union was one goal of the protest boycott:

[L]ongshoremen will not supply their labor to contribute, directly or indirectly to the aggressor's cause . . . [as] *an incidental purpose is to bring pressure to bear on the Soviets to induce their withdrawal from the invaded territory and their cessation of military designs* The present controversy involves a passive form of protest by ILA members against aiding or abetting Soviet aggression²⁷⁹

²⁷⁸ See note 258 *supra*. In addition, Gleason asserted that the boycott will cost the Soviet Union "millions of dollars" and will involve "millions of tons of cargo." Statement of Thomas Gleason (Jan. 16, 1980), *reprinted in* [1980] 13 DAILY LAB. REP. (BNA) at A-7. Another economic weapon launched against the Soviet Union by the boycott was aimed at eliminating the carriage of goods from the United States to European ports by Russian vessels. In this regard, Gleason stated that U.S. shipping companies would prosper under the boycott because traders using Soviet-flag ships for the shipments were only "looking for the cheapest way to Hamburg, West Germany." Statement of Thomas Gleason (Feb. 7, 1980), *reprinted in* [1980] 294 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-5.

²⁷⁹ Brief of ILA at 16-17, 26 (emphasis added), *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980). See also Brief of ILA at 14 ("the ILA's refusal to work is . . . primary, with no object but to affect the conduct of the longshoremen . . . and, perhaps, the foreign policy of the Soviet Union"), 16 ("the overriding object remains the vindication of longshoremen's [sic] own convictions. . . as [r]ealistically, the ILA does not expect its refusal to exert significant influence on the Politbureau"), 20 ("the sole object of the activity is the conduct of the employees themselves—or at most to affect the military policy of a foreign country . . ."), *id.*; Reply Brief of ILA at 16 ("the ILA's action is nothing more than to satisfy its' members con-

The fact that the potential for inducing the U.S.S.R. to withdraw its forces from Afghanistan may be remote does not detract from the theory that an objective of the boycott was to pressure the Soviet Union by stifling its foreign trade with the United States. Thus, in examining the position of a neutral employer in the context of the Russian trade boycott, and asking whether a cessation of his business is being employed by the ILA for its effect elsewhere—in order to give expression, symbolically or in reprisal, of its disapproval of the U.S.S.R.—one can see that a neutral party is entitled to protection from protest boycotts under section 8(b)(4).²⁸⁰

IV. FEDERAL CONTROL OVER PROTEST BOYCOTTS

On April 24, 1981, President Reagan officially removed trade controls on exports of agricultural commodities and phosphates which were imposed against the Soviet Union fifteen months earlier following its invasion of Afghanistan.²⁸¹ Immediately thereafter, the ILA announced its support for the President's action and terminated its boycott of Russian cargoes and ships.²⁸² While some data suggests that government export controls were largely responsible for the decline in American-Soviet trade during 1980,²⁸³ the longshoremen's protest boy-

sciences by not contributing their own services to the Soviet Union with, perhaps, an added hope of influencing the Soviets to behave"), *id.* These statements, and others made by ILA President Gleason, *see note 278 supra*, indicate that at least one object of the boycott was to utilize the resulting cessation of business for its effect upon the U.S.S.R. Conduct with such an intermediate object, if proscribed, is not protected merely because the "ultimate" object is beyond the proscription of the Act. *See notes 264-66 supra.*

²⁸⁰ Private parties therefore have several remedies to counter protest boycotts. First, unfair labor practices can be filed with the NLRB alleging a violation of § 8(b)(4). Under § 10(l), the Board will then seek injunctive relief from a federal district court pending adjudication of the alleged unfair labor practice. *See, e.g., Mack v. International Longshoremen's Ass'n*, 104 L.R.R.M. 2892 (S.D. Ga. 1980). Thereafter, cease and desist orders will be issued by the Board upon a finding that the union conduct violates the Act. *International Longshoremen's Ass'n, Local 799 (Allied Int'l, Inc.)*, 257 N.L.R.B. No. 151, 108 L.R.R.M. 1033 (Aug. 28, 1981). Enforcement may be secured by an order from an appropriate United States court of appeals. NLRA § 10(c), 29 U.S.C. § 160(c) (1976). Violation of such an order is also punishable by an action for contempt. *Id.* Finally, § 303 allows a suit for damages caused by violations of § 8(b)(4). LMRA § 303, 29 U.S.C. § 187 (1976); *see, e.g., Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981).

²⁸¹ *See* 17 WEEKLY COMP. OF PRES. DOC. 465 (April 24, 1981). *See also* N.Y. Times, April 25, at 1, col. 5; *id.*, April 26, at 1, col. 6. Several Congressmen, however, have introduced a resolution urging the administration to reimpose an embargo against the U.S.S.R. *See* H. Con. Res. 141, 97th Cong., 1st Sess., 127 CONG. REC. H 2614 (daily ed. June 3, 1981).

²⁸² [1981] 355 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-2.

²⁸³ In its 25th quarterly report on trade with non-market economies, the International Trade Commission (ITC) attributed the "relatively unimpressive" trade level between the United States and the communist world in 1980 as "primarily the result of the imposition of trade sanctions" on

cott undoubtedly impacted upon Russian trade. First, the protest boycott prevented Soviet imports from entering ILA-controlled ports in the Great Lakes and along the Atlantic and Gulf coasts. Since neither the Carter nor Reagan administrations restricted imports from the U.S.S.R., the longshoremen's action significantly contributed to the overall decline in import trade levels between the two countries.²⁸⁴ Secondly, the ILA effectively blocked the export of 3.5 million metric tons of agricultural commodities which President Carter exempted from export controls.²⁸⁵ As a result, the government assumed contracts for the agricultural commodities stranded in U.S. ports at considerable cost to the American taxpayer.²⁸⁶ Finally, the extent to which the ILA's action may have discouraged potential trade cannot be measured. Many businessmen who might have otherwise engaged in trade with the U.S.S.R. may have been deterred by the Russian trade boycott. Likewise, due to the inability of the executive branch to negotiate an end to the ILA's boycott campaign and the disinclination of federal courts to enjoin the longshoremen's action, the spectre of protest boycotts may well inhibit the formation of future Soviet trade relationship by American companies.

The significance of the Russian trade boycott, however, transcends the monetary losses experienced by American exporters and importers. Rather, the protest boycott of the ILA represented a direct challenge to the executive branch's management of foreign policy decision-making

the Soviet Union. See INTERNATIONAL TRADE COMMISSION, TWENTY-FIFTH QUARTERLY REPORT ON TRADE WITH NON-MARKET ECONOMIES (ITC Pub. No. 1136) (Mar. 1981), *reprinted in* [1981] 74 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-13. According to the ITC, the level of trade between the United States and communist countries rose 3% during 1980, compared to trade increases of 53% in 1979 and 52% in 1978. *Id.* In addition, while the Soviet Union had been the United States' leading communist trade partner, accounting for more than 40% of U.S. exports (with 70% of that in agricultural products) and 30% of U.S. imports, trade between the two countries declined by more than 50% in 1980. *Id.*

²⁸⁴ Explicit data regarding the effect of the ILA's boycott on imports is difficult to obtain. Soviet imports gained entrance to Pacific ports throughout the period of the ILA boycott, as West Coast longshoremen refused to join in the Russian trade boycott. See note 72 *supra*. In addition, the ILA's policy throughout its boycott campaign was to obey court injunctions of their strike against Soviet cargoes and ships. See text accompanying notes 79-80 *supra*. Thus, in ports where courts enjoined ILA locals, Soviet imports gained admittance to the United States. See notes 86-87 and 92 *supra*. Therefore, the ILA was unsuccessful in achieving a total exclusion of U.S.S.R. imports from American ports.

²⁸⁵ See text accompanying notes 76-78 *supra*.

²⁸⁶ On February 1, 1980, the government reached final agreement with 13 grain exporting companies for the assumption of suspended Soviet contracts of approximately 16 million metric tons of wheat and corn. [1980] 293 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) at A-14. Officials from the Department of Agriculture estimated that the contract buy-up program would cost the government \$2.5 billion. *Id.*

and the frustration of congressional policies fostering American participation in foreign trade. Accordingly, this potential for impairment of presidential and congressional foreign policies raises the question of the means of controlling protest boycotts. Effective authority over foreign affairs and enforcement of international trade programs may require legislation prohibiting labor union interference with foreign commerce. Yet, even if the federal government can constitutionally restrain protest boycotts, one must also ask if the full exercise of such a power is in the national interest. While the former issue is one of constitutional law, the latter focuses upon policy considerations.

A. The Scope of Federal Power

The Export Administration Act of 1979 (EAA)²⁸⁷ manifests a congressional intent "to encourage trade with all countries with which the United States has diplomatic or trading relations"²⁸⁸ This foreign trade policy is implemented through a system of licenses and export controls, and is based upon the power of Congress "to regulate commerce with foreign nations, and among the several States."²⁸⁹ The statute also grants power to the President to prohibit or curtail the exportation of goods and technology "to the extent necessary to further . . . the foreign policy of the United States or to fulfill its declared international obligations."²⁹⁰ Protest boycotts, however, discourage American exporting and importing businesses acting in accord with stated government policy. In addition, insofar as labor union protest activities may block exports from leaving American ports, the President's control of exports for foreign policy purposes under the EAA may be subjected to unwarranted private pressure. Likewise, protest boycotts are antithetical to the concept of Congress' absolute power over foreign commerce.

Legislative regulation of protest boycott activity might therefore be premised upon the commerce clause. The purpose of such legislation would be to prevent labor interference with goods moving through foreign commerce. As one scholar has noted:

Under the [foreign commerce clause], Congress has no less authority over foreign commerce than it has over interstate commerce. And since the

²⁸⁷ Pub. L. No. 96-72, §§ 1-21, 93 Stat. 503 (1979) (codified at 50 U.S.C. app. §§ 2401-2420 (Supp. III 1979)) [hereinafter cited as EAA].

²⁸⁸ EAA § 3, 50 U.S.C. app. § 2402(1) (Supp. III 1979).

²⁸⁹ U.S. Const. art. 1, § 8, cl. 3. It is well established that congressional power over foreign commerce is absolute. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824).

²⁹⁰ EAA § 6, 50 U.S.C. app. § 2405(1) (Supp. III 1979). For a discussion of the EAA's approach to foreign policy controls, see Abbott, *supra* note 67, at 858-73.

revolution initiated by [*NLRB v. Jones & Laughlin [Steel Corp.]*] it no longer needs citation of authority or argument that under the commerce power Congress . . . can reach matters precedent to or subsequent to interstate or foreign commerce . . . [In addition,] it can reach strictly local commerce and activities when necessary to make effective a regulation of interstate or foreign commerce.²⁹¹

Therefore, Congress has a broad mandate to regulate interferences with its control over the foreign commerce of the United States.²⁹²

The federal government could be empowered to restrain protest boycotts through various legislative measures. First, Congress might provide a mechanism to prevent protest boycotts by amending the national emergency provisions of the NLRA.²⁹³ These provisions authorize the President to seek injunctive relief against threatened or actual strikes, which "if permitted to occur or to continue, will imperil the national health or safety . . ."²⁹⁴ Labor union interference with for-

²⁹¹ Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 914-15 (1959) (citations omitted) [hereinafter cited as Henkin]. As the Supreme Court has most recently noted:

Foreign commerce is preeminently a matter of national concern Although the Constitution, Art. I, § 8, cl. 3, grants congress power to regulate commerce "with foreign nations" and "among the several states" in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction.

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) (citations omitted).

²⁹² Another basis for congressional regulation may stem from the "foreign relations" power. Although the Constitution does not explicitly mention such a power, numerous decisions have referred to the federal government's inherent power in the field of foreign affairs. See *Perez v. Brownell*, 356 U.S. 44, 57 (1958); *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 318 (1936). In one instance, a court has determined that the "federal government's power over foreign affairs" includes the authority "to prohibit any disturbance or interference with" the administration of American foreign policy. *United States v. Elliott*, 266 F. Supp. 318, 323 (S.D.N.Y. 1967). *Elliott* involved an indictment under the Logan Act for conspiring in the United States to destroy a bridge in Zambia for the purpose of profiting from an ensuing mineral shortage. In denying the defendant's motion to dismiss the indictment, the court asserted:

The federal government's power over foreign affairs comprises not only authority to regulate relations with foreign countries but also to prohibit any disturbance or interference with external affairs. The offense charged . . . would have disrupted the economy of a nation . . . [and] would have seriously affected American relations with Zambia. The prevention of the deed and the prosecution of the culprits . . . makes such proceedings imperative and is well within the legitimate interest of the United States Government.

Id. at 323 (citations omitted). Commentators have also suggested that the foreign affairs power of Congress authorizes "legislation on any subject which deals with, or relates to, or affects the relations of the United States with other nations." Henkin, *supra* note 291, at 922-24.

²⁹³ NLRA §§ 206-210, 29 U.S.C. §§ 176-180 (1976).

²⁹⁴ NLRA § 208(a), 29 U.S.C. § 178(a) (1976). Strikes undertaken by the ILA account for nearly 30% of the occasions in which Presidents have invoked the emergency dispute provisions. Curtin, *Transportation Strikes and the Public Interest*, 58 GEO. L.J. 243, 246-47 (1969).

One might argue that not all protest boycotts are of sufficient duration or economic effect to imperil the "national health or safety." Cf. *United States v. International Longshoremen's Ass'n*, Local 418, 335 F. Supp. 501 (N.D. Ill. 1971) (strike by dockworkers imperiling national market for

eign trade could be eliminated by granting the President the power to restrain conduct which threatens federal control over foreign commerce. Alternatively, Congress could formulate legislation allowing the federal government to seek injunctions similar to the section 10(1) remedies provided for in the NLRA.²⁹⁵ This section allows the NLRB to seek injunctive relief of certain unfair labor practices on behalf of private party complainants pending Board adjudication of the alleged charge. Accordingly, legislation could authorize the federal government to petition for an injunction as a guardian of the public interest whenever protest boycotts cause disruption in the conduct of foreign affairs. Finally, the reach of the Norris-LaGuardia Act,²⁹⁶ which withdraws the jurisdiction of federal courts to issue injunctions of "labor disputes,"²⁹⁷ could be clarified with appropriate legislation to allow injunctions against protest boycotts. The federal government could then be afforded the power to enjoin such boycotts in circumstances where labor unions inhibit the transportation of goods in foreign commerce.

B. Is Federal Control Warranted?

The issue of the propriety of federal control of labor activities directed against foreign governments involves a consideration of whether the exercise of such power is consistent with national interests. In turn, the resolution of this issue rests upon identifying what, if any, restraints upon labor union behavior are justified to ensure a successful control of

grain is insufficient to warrant application of national emergency provisions). However, even the institution of a protest boycott by a local union in a single port may touch off an international incident and cause severe dislocations for American foreign commerce. *See* note 41 *supra*. Thus, the amendment of the national emergency provisions may be a viable means of preventing protest boycotts.

²⁹⁵ *See* note 84 *supra*.

²⁹⁶ Act of Mar. 23, 1932, ch. 90, §§ 1-15, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-15 (1976)) [hereinafter cited as NLA].

²⁹⁷ The Act provides that "[n]o court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute . . ." NLA § 1, 29 U.S.C. § 101 (1976). A "labor dispute" is defined as including "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." *Id.* § 13(c), 29 U.S.C. § 113(c) (1976). Since protest boycotts are undertaken to express political, as opposed to economic views, one may argue that the NLA is inapplicable to activities such as the Russian trade boycott. Several lower courts have accepted this suggestion. *See* *Khedivial Line, S.A.E. v. Seafarer's Int'l Union*, 278 F.2d 49 (2d Cir. 1960); *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, Local 1408*, No. 80-81-Civ.-J-B (M.D. Fla. Feb. 1, 1980); *West Gulf Maritime Ass'n v. International Longshoremen's Ass'n*, 413 F. Supp. 372 (S.D. Tex. 1975), *aff'd*, 531 F.2d 574 (5th Cir. 1976). *But see* *New Orleans Steamship Ass'n v. General Longshore Workers, ILA Local No. 1418*, 626 F.2d 455 (5th Cir. 1980), *cert. granted sub nom.*, *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, Local 1408*, 49 U.S.L.W. 3722 (Mar. 31 1981) (No. 80-1045).

foreign policy. Unions engaged in activities similar to the Russian trade boycott may argue that their conduct constitutes political action entitled to first amendment protection. In contrast, those responsible for foreign policy decisions may condemn labor union interferences as detrimental to federal management of international affairs and foreign commerce. Likewise, American firms participating in international business markets pursuant to foreign trade policies may support control of protest boycotts on the grounds that such conduct is beyond the enclaves of the first amendment.

Federal regulation of protest boycotts is desirable from the standpoint of maintaining national control over the administration of international relations. Labor union activities arising from an unwillingness to abide by foreign policy decisions interfere with the exercise of government authority over foreign affairs. Indeed, ILA boycotts instituted to eliminate trade with Cuba and North Vietnam illustrate the extent to which labor unions may undermine government policies.²⁹⁸ Second, protest boycotts may harm relations with American allies when labor unions endeavor to take foreign policy into their own hands. For example, ILA boycotts undertaken in the early 1960's against European shipping lines trading with Cuba strained American and European cooperative efforts to deal with Castro's Cuba.²⁹⁹ Likewise, protest boycotts add to the complex and difficult task of implementing American foreign policy. Unfriendly or less informed governments may fail to distinguish between official administration policies and labor union conduct, and may interpret unrestrained protest boycott activities to belie the government's declared policy or indicate official weakness and indecision. The continuance of the ILA's boycott of exports bound for Iran after the conclusion of the recent hostage crisis may, for example, have increased the difficulties attendant to the restoration of normal relations.³⁰⁰ Accordingly, federal regulation of protest boycotts would reverse the erosion of government control over foreign affairs permitted by successive administrations over the past three decades.

Federal regulation of protest boycotts is also desirable in order to facilitate the implementation of American foreign trade policies. Protest boycotts interfere with the international business transactions of American companies participating in foreign trade pursuant to government policies encouraging exports and imports. The liberalization in

²⁹⁸ See notes 42-49 and accompanying text *supra*.

²⁹⁹ See notes 52-56 *supra*.

³⁰⁰ The ILA continued its boycott of cargoes bound for Iran for more than 2 months after the conclusion of the hostage crisis. See note 39 *supra*.

post-World War II trade with communist countries which can be attributed to presidential and congressional initiatives in foreign trade policy³⁰¹ is wholly inconsistent with inaction by the federal government in the face of protest boycotts. This inconsistency betrays and injures those citizens who have relied upon express trade policies. Moreover, any disruption of international trade by private parties should be checked in order to maintain national control over foreign commerce. The climate in which foreign relations are conducted is both too heated and delicate to allow a multiplicity of uncoordinated voices to participate. Finally, when labor unions deliberately interfere with foreign trade policies, their actions are inimical to the democratic system of government since even dissenting citizens must respect and conduct themselves in accord with policies formulated through the legislative process by their representatives.

Forceful counterarguments, however, counsel that federal control may be unwarranted, if not improper. The aspects of political expression advanced through protest boycott activities, either directed at other governments or voiced in dissent to American foreign policy, would appear to come within the ambit of first amendment protection. These fundamental values should not be subordinated to an exaggerated deference to foreign policy considerations. Clearly, the Constitution should not be implicitly repealed merely to ease the job of American diplomats.

On the other hand, protest boycotts constitute more than mere expression. Labor union activity directed toward foreign governments is objectionable for the very reason that it involves collateral consequences beyond speech. Nevertheless, even conduct lacking constitutional protection may have redeeming value despite its variance from government foreign policy. Experience likewise demonstrates that speech alone may not be a sufficient catalyst to promote socially useful changes. The civil rights movement of the 1960's and protests directed against United States military involvement in Southeast Asia bear out this observation. Thus, the adverse effect of protest boycott activity upon the administration of American foreign policy may be outweighed by the utility such conduct contributes toward the critical examination of government decision-making on the part of the citizenry.

Yet, one might contend that the critical function of dissent in a democratic society may adequately, and more fully be served by expression properly within the protections of the first amendment. A nec-

³⁰¹ See ADLER-KARLSSON, *supra* note 50, at 100-06; Bilder, *supra* note 151, at 843-62.

essary corollary of this concept brings dissent that exceeds the bounds of constitutional freedoms within the scope of government regulation. Accordingly, labor unions may dissent from the foreign policy decisions of government officials through democratic channels.³⁰² Protest boycotts are improper for the reason that labor unions are not entitled to make decisions normally made by government officials. Therefore, as legitimate avenues of union dissent may be pursued without the harm typified by the Russian trade boycott, federal control over protest boycotts is warranted.

Finally, whether the protest boycott theory enunciated in the foregoing section is accepted, or regulation proceeds at the local level under the rationale of the *Baldovin* decision, federal control is preferable to reliance upon private parties to control or enjoin protest boycotts. Private parties may be unwilling to bear the expense of suits to challenge protest boycotts, especially in situations where the firm's participation in foreign trade is a minor component of their business. Thus, to the extent protest activities go unchallenged in various localities, the appearance of national unity in the international arena is unattainable. Moreover, even if each local union's participation in a protest boycott is challenged in applicable state forums, the potential for conflicting decisions despite identical factual patterns might contribute to an em-

³⁰² As Senator Fulbright, former chairman of the Senate Foreign Relations Committee, expressed in his opposition to the ILA's protest boycott against Egyptian ships in 1960:

There are constitutional channels through which citizens can bring about changes in the conduct of foreign policy. Actions on the part of the individuals or organizations which interfere directly or indirectly with the constitutional exercise of government authority or activity in the conduct of foreign policy, however, . . . [is] inimical to the total national interest.

111 CONG. REC. 18, 232 (1965) (remarks of Sen. Fulbright); see also 106 CONG. REC. 8625-26 (1965) (remarks of Sen. Fulbright). In light of the political strength of organized labor, see notes 20-23 and accompanying text *supra*, unions, through their sheer numbers, may exert considerable influence over the formation of American foreign policy.

Unions may also employ alternative means otherwise unavailable to the citizenry to express their disapproval of American foreign policy or the conduct of foreign governments. These measures may include instituting legal proceedings against foreign governments, see [1980] 52 INT'L TRADE REP. U.S. IMPORT WEEKLY (BNA) at A-15, 17 (United Auto Workers Union petition for import relief under § 201(a)(1) of the Trade Act of 1974, on account of the influx of Japanese automobiles into the U.S. market, denied by the Int'l Trade Comm.); *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981) (suit by union alleging that the price-setting activities of OPEC violated § 1 of the Sherman Act dismissed as union members were indirect purchasers from the defendants and thus precluded from seeking damages and injunctive relief), and withholding investments of pension fund assets in companies refusing to condemn the social policies of particular foreign governments. See [1979] 263 PEN. REP. (BNA) at A-28, 29; *Detroit Free Press*, June 23, 1980, at 3, col. 3 (UAW-Chrysler agreement to cease investment of pension funds in companies named by the union as operating in South Africa without supporting the elimination of apartheid).

barrassment in foreign affairs.³⁰³ Therefore, authority to control protest boycotts should be afforded the federal government in light of the important national interests such control would facilitate.

CONCLUSION

The Russian trade boycott of 1980-81 is the most recent protest boycott in a long history of labor union interferences with foreign trade policy and the government's conduct of international relations. This Comment contends that federal labor laws should be deemed applicable to protest boycotts. First, the assertion of jurisdiction over protest boycotts is consistent with the underlying policies of the NLRA. The rationale of the Supreme Court's flag-of-convenience vessel cases is therefore distinguishable in the context of protest boycotts. Second, a proper construction of the secondary boycott provisions of the NLRA proscribes labor union pressures directed against domestic companies engaged in foreign trade. Failure to accord the protection of section 8(b)(4) to neutral companies from politically-inspired protest activities would render the prohibition devoid of function. Third, federal control of protest boycotts would appear to be desirable to prevent foreign affairs problems. Remedial legislation authorizing the government to enjoin protest boycotts is suggested. Moreover, in light of the increasing penetration of foreign markets by American companies, the resolution of the coverage of protest boycotts under federal labor laws is crucial to the continuing viability of United State foreign trade policies. Thus, the need is manifest for a clear rule or statute capably addressed to these labor union activities which impact dramatically upon an area of national concern.

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³⁰³ Protest boycotts are likely to receive disparate treatment under state laws. See text accompanying notes 160-66 *supra*. The potential for conflicting decisions, however, is not limited to state courts. Compare *Baldovin v. International Longshoremen's Ass'n*, 626 F.2d 445 (5th Cir. 1980) and *NLRB v. Local 1355, Int'l Longshoremen's Ass'n (Ocean Shipping)*, 332 F.2d 992 (4th Cir. 1964), with *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981).

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