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ENJOINING POLITICAL PROTEST STRIKES

On January 9, 1980, in response to the Soviet Union's invasion of Afghanistan, the International Longshoremen's Association (ILA) instituted a boycott against all Russian imports and exports.[1] ILA members refused to load or unload any ship bound for or arriving from the Soviet Union.[2] In response to the boycott, stevedoring companies and other affected businesses initiated proceedings to compel the union employees to return to work.[3] Efforts to end the ILA action have relied on two approaches. Some complainants have sought to enjoin the ILA boycott under the Labor Management Relations Act,[4] by filing unfair labor practice charges with the National Labor Relations Board (NLRB) or bringing a private suit.[5] Others have attempted to enjoin the boycott pending mandatory arbitration proceedings or to enforce an arbitration award.[6] The First, Fourth, and Fifth Circuits recently addressed the issues raised by the two approaches to ending the boycott.[7] The Fifth Circuit held that the secondary boycott provisions of the Labor Management Relations Act did not prohibit the ILA boycott.[8] In a second case, the same circuit ruled that the boycott, although politically motivated, was entitled to

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[1] Walsh v. International Longshoremen's Ass'n, 630 F.2d 864, 866 (1st Cir. 1980). The ILA leadership ordered rank and file union members to cease immediately the handling of all Russian ships and cargoes. *Id.* at 866 n.1. The order exempted only those ships currently being loaded or unloaded. *Id.* The union cited the present state of United States-Soviet relations and employee sentiments as reasons for taking the union action. *Id.* The boycott was to continue as long as the Russians continued to be "international bully boys." *Id.*

[2] *Id.* at 866.

[3] *See, e.g.*, Allied Int'l, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1981); Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n, 631 F.2d 282 (4th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3496 (U.S. Jan. 13, 1981) (No. 80-1058); Walsh v. International Longshoremen's Ass'n, 630 F.2d 864 (1st Cir. 1980); New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980), *cert. granted sub nom.* Jacksonville Bulk Terminals v. International Longshoremen's Ass'n, 49 U.S.L.W. 3725 (U.S. Mar. 30, 1981) (No. 80-1045); Baldovin v. International Longshoremen's Ass'n, 626 F.2d 445 (5th Cir. 1980).

[4] 29 U.S.C. §§ 141-187 (1976).

[5] 640 F.2d at 1370; 630 F.2d at 866; 626 F.2d at 448. The Labor Management Relations Act prohibits employers and employees from engaging in certain labor-related actions, and empowers the NLRB to seek an injunction against such actions when a complaint is filed. 29 U.S.C. § 158, 160 (1976); *see* note 30 *infra*. The Act also allows a party injured by certain unfair labor practices to bring a private suit. 29 U.S.C. § 187 (1976); *see* text accompanying note 49 *infra*.

[6] 631 F.2d at 283-84; 626 F.2d at 459-61.

[7] *See, e.g.*, Allied Int'l, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1981); Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n, 631 F.2d 282 (4th Cir. 1980); New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980); Baldovin v. International Longshoremen's Ass'n, 626 F.2d 445 (5th Cir. 1980).

[8] 626 F.2d at 454; *see* text accompanying notes 26-31 *infra*.

protection under the Norris-LaGuardia Act's[9] ban on labor injunctions.[10] The Fourth Circuit reached the same conclusion that the Fifth Circuit reached in the latter case, holding that the Norris-LaGuardia Act prohibited an injunction against the ILA boycott.[11] The First Circuit disagreed with the Fifth Circuit's conclusion regarding the former issue, and held that the ILA action violated the Labor Management Relations Act's proscription of secondary boycotts.[12]

In *Baldovin v. International Longshoremen's Association*,[13] the Fifth Circuit refused to enjoin the ILA boycott as a violation of the Labor Management Relations Act on the ground that the boycott did not satisfy the act's jurisdictional requirements.[14] The Labor Management Relations Act applies only to activities "in commerce" or "affecting commerce" as those terms are defined in the Act.[15] The *Baldovin* court relied on a series of Supreme Court decisions in which the Court refused to apply the Labor Management Relations Act to disputes involving foreign ships.[16] The Supreme Court has held repeatedly that such disputes do not affect commerce as the Act requires.[17]

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[9] 29 U.S.C. §§ 101-115 (1976).

[10] 626 F.2d at 468-69. The Norris-LaGuardia Act deprives the federal courts of jurisdiction to issue injunctions in labor cases. 29 U.S.C. § 104 (1976); *see* note 70 *infra*.

[11] 631 F.2d at 286.

[12] 640 F.2d at 1379.

[13] 626 F.2d 445 (5th Cir. 1980).

[14] *Id.* at 448-54.

[15] 29 U.S.C. §§ 151, 152(6)-(7) (1976); *see* note 17 *infra*.

[16] 626 F.2d at 448-54. The Supreme Court has held federal labor law inapplicable to disputes involving foreign ships. American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 228 (1974); Windward Shipping Ltd. v. American Radio Ass'n, 415 U.S. 104, 113-16 (1974); Incres S.S. Co. v. International Maritime Workers Union, 372 U.S. 24, 27-28 (1963); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 22 (1963); Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 146-47 (1957).

Many merchant shipowners, Americans among them, register their vessels in alien countries. *See generally* Comment, *Foreign Ships in American Ports: The Question of NLRB Jurisdiction*, 9 CORNELL INT'L L.J. 50 (1975). The term "foreign ship" as used in this note refers to a vessel registered in a country other than the United States, regardless of the owner's nationality.

[17] American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 221-25 (1974); Windward Shipping Ltd. v. American Radio Ass'n, 415 U.S. 104, 105-06 (1974); Incres S.S. Co. v. International Maritime Workers Union, 372 U.S. 24, 27 (1963); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 17-22 (1963).

Congress derives the authority to regulate labor-management relations from the commerce clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3. Polish Nat'l Alliance of the United States of N. America v. NLRB, 322 U.S. 643, 649-50 (1944); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 221 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1936). The Court has upheld a statute that regulates the behavior of foreign crews and ships as a legitimate exercise of Congress' power under the commerce clause. *See* Patterson v. Bark Eudora, 190 U.S. 169, 179 (1903) (upholding Seaman's Act of 1898, 30 Stat. 755, 763 (current version at 46 U.S.C. § 599 (1976)). In NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963), the Supreme Court stated that Congress intended the scope of the Labor Management Relations Act to be as broad as the commerce clause would allow.

The Fifth Circuit, in *Baldovin*, focused on the two most recent cases in the foreign ship series, *Windward Shipping, Ltd. v. American Radio Association*[18] and *American Radio Association v. Mobile Steamship Association*.[19] Both cases arose from the picketing of foreign ships by six American maritime unions.[20] The unions' dispute centered on foreign shipping only, and concerned substandard wages paid to foreign crews.[21] In each case, the complaining party had sought a state court injunction against the union picketing.[22] The Supreme Court held in both cases that

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Id. at 226. Nevertheless, in holding that disputes involving foreign ships are not in commerce within the meaning of the Labor Management Relations Act, the Supreme Court has concluded that while Congress could have subjected such disputes to regulations under the Act, Congress did not intend to do so. Windward Shipping Ltd. v. American Radio Ass'n, 415 U.S. 104, 110-11 (1974); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20 (1963); Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 143-44 (1957).

Section 1 of the Labor Management Relations Act, 29 U.S.C. § 151 (1976), expresses Congress' objective to reach labor-management issues in or affecting commerce. The Act defines "commerce" as "[t]rade, traffic, commerce, transportation, or communication among the several States . . . or between any foreign country and any State . . ." 29 U.S.C. § 152(6) (1976). "Affecting commerce" is defined as "[i]n commerce, or burdening or obstructing commerce or the free flow of commerce, . . ." 29 U.S.C. § 152(7) (1976). In this note, the phrases "in commerce" and "affecting commerce" refer to the Labor Management Relations Act definitions.

[18] 415 U.S. 104 (1974).

[19] 419 U.S. 215 (1974).

[20] *Id.* at 217; 415 U.S. at 106-07.

[21] 419 U.S. at 217 n.2; 415 U.S. at 106-07. The unions in *Windward* and *Mobile* asserted that the payment of low wages by foreign shipowners resulted in the loss of jobs for American seamen. 419 U.S. at 217 n.2; 415 U.S. at 106-07. The unions picketed to protest this loss of American jobs. 419 U.S. at 217 n.2; 415 U.S. at 106-07. In International Longshoremen's Ass'n Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970), the Supreme Court reasoned that the purpose of union picketing of foreign ships is important in determining whether such picketing affects commerce within the meaning of the Labor Management Relations Act. *Id.* at 199-200. In *Ariadne*, an American union picketed foreign ships that used crewmen and non-union American workers to do longshore work. *Id.* at 196-97. The Supreme Court held that the picketing was "in commerce" because the underlying objective of the picketing was to improve the position of American longshore workers. *Id.* at 199-200.

The *Ariadne* decision appeared to exclude all picketing designed to promote American labor interests from the general rule that labor disputes involving foreign ships are not "in commerce" as defined by the Labor Management Relations Act. *See id.*; note 17 *supra*. The pre-*Ariadne* cases that had held such disputes were not "in commerce" all involved union attempts to influence or interfere with the on-board management and affairs of foreign ships. *See* Incres S.S. Co. v. International Maritime Workers Union, 372 U.S. 24 (1963) (union attempts to organize crew of foreign ship); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (attempt to organize foreign crew); Benz v. Campania Naviera Hidalgo, 353 U.S. 138 (1957) (union sympathy picketing in support of wage and working condition demands of foreign crew). *Windward* and *Mobile* indicate, however, that the *Ariadne* exception may not be quite so broad. *See* note 24 *infra*.

[22] 419 U.S. at 218; 415 U.S. at 105. Sections 7 and 8 of the Labor Management Relations Act, 29 U.S.C. §§ 157, 158 (1976), have preempted state law with respect to labor-management activities that either section governs. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959). Section 7 describes certain protected employee activities,

the union activities did not affect commerce within the meaning of the Labor Management Relations Act.[23] The Court reasoned that the responses by the shipowners which would satisfy the unions did not relate to traditional wage-cost decisions directly benefitting American workers.[24] As a result, the Court found the Labor Management Relations Act inapplicable, and allowed the state courts to assume jurisdiction over the disputes.[25]

In *Baldovin*, the complainants filed unfair labor practice charges with the NLRB, alleging that the ILA had violated the secondary boycott provisions of the Labor Management Relations Act.[26] Section 8(b)(4)(B) of the Act prohibits union activity directed at an employer or

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while section 8 lists a number of prohibited employer and employee practices. 29 U.S.C. §§ 157, 158 (1976). The *Garmon* Court held that when it is reasonable to assume that the activities at issue are protected by § 7 or prohibited by § 8, the states must defer to the jurisdiction of the NLRB. 359 U.S. at 244. If § 7 or § 8 does not cover the activity, the states may regulate the activity. 419 U.S. at 228.

In *Windward*, the unions argued that the state court lacked jurisdiction because the union picketing was a protected activity under § 7 of the Labor Management Relations Act. 415 U.S. at 108-09. In *Mobile*, the unions contended that the Act had preempted state law because the picketing was a prohibited activity under § 8 of the Act. 419 U.S. at 219-20.

[23] 419 U.S. at 224; 415 U.S. at 106. In *Windward*, the foreign owner of one of the picketed ships had sought an injunction, while in *Mobile* the plaintiffs were American stevedoring companies. 419 U.S. at 219; 415 U.S. at 105-06. The difference in the identity of the complaining parties in the two cases was sufficient to cause a Justice in the *Windward* majority to dissent in *Mobile*. 419 U.S. at 236-44 (Stewart, J., dissenting). The *Mobile* dissent argued that a dispute between American unions and American businesses was "in commerce" even if the unions' dispute with the foreign shipowners in *Windward* was not. *Id.*; *see* note 17 *supra* & note 40 *infra*.

[24] 419 U.S. at 222-25; 415 U.S. at 115. Although the unions' objective in *Mobile* and *Windward* was to influence domestic labor affairs by persuading people to patronize American manned vessels, 419 U.S. at 217 n.2; 415 U.S. at 106-07, the Supreme Court did not find International Longshoremen's Ass'n Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970), to be controlling. 419 U.S. at 223 n.9; 415 U.S. at 115. *Ariadne* had held that union action with the underlying purpose of influencing domestic labor affairs, even though involving a foreign ship, was "in commerce" for Labor Management Relations Act jurisdictional purposes. 397 U.S. at 199-200; *see* note 21 *supra*. In *Mobile*, the Court distinguished *Ariadne* by noting that American workers were among those receiving the substandard wages in *Ariadne*. 419 U.S. at 223 n.9. The *Windward* Court characterized the dispute in *Ariadne* as one which could have been resolved by increasing the wages paid to American workers. 415 U.S. at 114. Thus, the Court reasoned that the union in *Ariadne* merely was seeking traditional labor concessions for American employees, while in *Windward* and *Mobile* the unions sought to influence the wages paid to foreign employees. 419 U.S. at 223 n.9; 415 U.S. at 112-15. The *Mobile* Court recognized that the unions' interest in foreign labor relations was caused by union concern over the adverse effect of substandard foreign wages on the American job market. *See* 419 U.S. at 218 n.2. Yet the Court did not find the domestic purpose exception of *Ariadne* applicable. *Id.* at 223 n.9. Thus, *Windward* and *Mobile* shift the focus from the underlying purpose behind the union action to the immediate response the union hopes to elicit. *See* 419 U.S. at 22-24; 415 U.S. at 114-15; note 21 *supra*.

[25] 419 U.S. at 232; 415 U.S. at 115-16; *see* note 22 *supra*.

[26] 626 F.2d at 448.

any other person with whom the union has no dispute and which seeks to force that employer or person to cease doing business with the actual target of the union's action.[27] The complaining parties in *Baldovin* claimed that they were the targets of a secondary boycott on the ground that they had no dispute with the ILA, and because the boycott was designed to force them to stop dealing with the Soviets.[28] Pursuant to section 10(l) of the Labor Management Relations Act[29] the NLRB filed suit in federal district court to enjoin the union boycott pending final disposition of the charges.[30] On appeal, the Fifth Circuit found *Windward* and *Mobile* controlling and held that the NLRB did not have jurisdiction to petition the district court for an injunction because the ILA boycott did not affect commerce.[31]

Although the ILA dispute did not involve typical labor-management issues such as wages and working conditions, the *Baldovin* court concluded that the *Windward/Mobile* standards for determining NLRB jurisdictions aplied to the case.[32] The court reasoned that the rationale of *Wind-*

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[27] 29 U.S.C. § 158(b)(4)(B) (1976); NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 687 (1951). The focus of § 8(b)(4)(B) is on secondary union activity, rather than on legitimate primary activity directed at an employer. Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667, 672-73 (1961); *see* note 38 *infra*.

[28] 626 F.2d at 452. The Fifth Circuit agreed with the complainants in *Baldovin* that the ILA action was secondary activity within the meaning of § 8(b)(4)(B) of the Labor Management Relations Act. *Id.* at 449. Since the union's dispute was with the Soviet Union, the action against the shipping and stevedoring companies was secondary. *Id.*

[29] 29 U.S.C. § 160(l) (1976).

[30] 626 F.2d at 448. When an employer files unfair labor practices charges under § 8(b)(4)(B) of the Labor Management Relations Act, 29 U.S.C. § 158(b)(4)(B) (1976), the NLRB must make an immediate investigation of the charges. 29 U.S.C. § 160(l) (1976). If that investigation provides the Board with reasonable cause to believe that the charges are true, the Board must send an officer to federal district court to seek a temporary injunction pending final NLRB disposition of the matter. *Id.*

In *Baldovin*, the Fifth Circuit consolidated appeals from two district court decisions, Baldovin v. International Longshoremen's Ass'n, No. 80-259 (S.D. Tex. Feb. 15, 1980), and Mack v. International Longshoremen's Ass'n, 104 L.R.R.M. 2892 (S.D. Ga. 1980). 626 F.2d at 448. The district court in *Baldovin* had denied the § 160(l) temporary injunction, while the district court in *Mack* had issued an injunction. *Id.*

[31] 626 F.2d at 452-54. In addition to the Labor Management Relations Act's general language limiting the Act's coverage to matters in or affecting commerce, *see* note 17 *supra*, the secondary boycott provisions are limited specifically to disputes in or affecting commerce. 29 U.S.C. § 158(b)(4)(B) (1976); *see* 626 F.2d at 449.

[32] *Id.* at 452. The *Baldovin* court cited a recent NLRB decision for the proposition that the *Windward/Mobile* test for determining NLRB jurisdiction, which looks to the management reponses to union action, *see* text accompanying notes 24 & 25 *supra*, is not limited to disputes involving traditional labor-management issues. 626 F.2d at 452. In National Maritime Union of America (Shippers Stevedoring), 245 NLRB No. 29, 102 L.R.R.M. 1487 (1979), an American union had picketed a Russian ship, protesting the transporting of American cargo by Russian ships. 102 L.R.R.M. at 1487. The NLRB applied the *Windward/Mobile* response test and held that the union pickets were not "in commerce" because the predictable response of the shipowner would not relate to traditional American labor-management issues. *Id.* at 1488; *see* text accompanying notes 24 & 25 *supra*. Notwithstand-

ward and *Mobile* is at least as appropriate to a strike protesting a foreign nation's policies as it is to a strike involving foreign labor relations.[33] Since the ILA's actions in *Baldovin* were even less related to traditional American labor concerns than was the picketing in *Windward* and *Mobile*, the Fifth Circuit found the *Windward/Mobile* reasoning compelling.[34] Thus, in accordance with *Windward* and *Mobile*, the court focused on the ILA's objective and the responses that would satisfy the union.[35] The court found that the ILA's goal was to force a change in Soviet policy in another part of the world, and that only a political response by the Soviet government would satisfy the union.[36] The Fifth Circuit concluded that since *Windward* and *Mobile* held that union activity designed to influence a foreign employer's relation with its employees does not affect commerce, union actions designed to influence a foreign nation's relations with another country a fortiori do not affect commerce.[37]

The *Baldovin* court based its decision that the ILA boycott did not affect commerce on the finding that the union's primary dispute was with the Soviet Union.[38] The court did, however, discuss two cases which

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ing the fact that the union actions were not directed at labor-management relations on board the foreign ship, the Board found *Windward* and *Mobile* controlling. 102 L.R.R.M. at 1488. The NLRB thus did not read *Windward* and *Mobile* as limited to cases involving shipboard labor relations. *Id.*; *see* note 24 *supra.*

[33] 626 F.2d at 453.

[34] *Id.*; *see* text accompanying notes 24 & 25 *supra.*

[35] 626 F.2d at 453-54.

[36] *Id.* at 454. The NLRB argued in *Baldovin* that "an object" of the ILA boycott was to force the American stevedoring companies to stop doing business with the Russian ships. *Id.* at 452; *see* text accompanying note 43 *infra.* The Fifth Circuit rejected this argument, holding that the union's sole objective was to voice a political protest, and that the only response satisfactory to the union would be a Soviet withdrawal from Afghanistan. 626 F.2d at 452-54.

[37] *Id.* at 453-54.

[38] *Id.* at 452-54. Primary union activity is that activity directed at the party with whom the union has a dispute. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 623 (1967). Unlike the union's dispute in *Baldovin*, a union's primary dispute generally is with an employer. Allied Int'l, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368, 1377-78 (1st Cir. 1981).

By relying on *Windward* and *Mobile*, the *Baldovin* court indicated that the political nature of the ILA boycott did not mandate a finding that the boycott did not come within the coverage of the Labor Management Relations Act. *See* 626 F.2d at 453 (noting that boycott's political aspects merely reinforced conclusion drawn from *Windward* and *Mobile*). Contrary to *Baldovin*, in NLRB v. International Longshoremen's Ass'n, 332 F.2d 992 (4th Cir. 1964), the Fourth Circuit held that a longshoremen's boycott markedly similar to the ILA's boycott of Russian cargoes was outside the coverage of the Act solely because the action was politically motivated. *Id.* at 996. In *International*, the ILA had boycotted all ships that recently had done business with Cuba. *Id.* at 993-94. As in *Baldovin*, a stevedoring company had filed unfair labor practice charges against an ILA local. *Id.* at 994. The NLRB had sought federal court enforcement of a cease and desist order that the Board had issued to the union. *Id.* at 995. The Fourth Circuit refused to enforce the NLRB order, holding that the Board was without jurisdiction because the case did not involve a labor dispute as defined

had held that the NLRB had jurisdiction over secondary activity affecting commerce even though the primary dispute did not affect commerce.[39] The Fifth Circuit distinguished those cases as involving union attempts to influence relations between American employers and employees, while the ILA sought only to influence activity abroad.[40] The court ad-

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in § 2(9) of the Labor Management Relations Act, 29 U.S.C. § 152(9). *Id.* at 995-96. The *International* court stated that Congress intended the Labor Management Relations Act to serve as a mechanism for regulating labor disputes. *Id.* at 995; *see* Marine Cooks & Stewarts v. Panama S.S. Co., 362 U.S. 365, 372 (1960) (noting in dictum that Act designed to regulate labor disputes). The Fourth Circuit thus reasoned that political protest strikes do not come within the coverage of the Act. 332 F.2d at 995-96. At least one circuit has criticized the Fourth Circuit's holding in *International*. *See* National Maritime Union of America v. NLRB, 346 F.2d 411, 415 (D.C. Cir.) (questioning Fourth Circuit rule that presence of labor dispute is jurisdictional prerequisite to application of Labor Management Relations Act), *cert. denied*, 382 U.S. 840 (1965).

[39] *See* 626 F.2d at 453 n.5 (discussing Grain Elevator, Flour and Feed Mill Workers Local 418 v. NLRB, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 898 (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)).

[40] *Id.* In the *Grain Elevator* cases, note 39 *supra*, a Canadian union had a dispute with a Canadian shipping company. 376 F.2d at 775; 334 F.2d at 1016. In support of the Canadian union, an American union local refused to handle goods shipped by the Canadian firm. 376 F.2d at 775; 334 F.2d at 1016. An American company that employed members of the American union filed unfair labor practice charges against the union based on the secondary boycott provisions of the Labor Management Relations Act, and the NLRB sought a temporary injunction. 376 F.2d at 775; 334 F.2d at 1016; *see* note 30 *supra*. In each case the circuit court issued the injunction, holding that even though the primary disputes involved a foreign concern, the secondary dispute between the American union and employer put the union activity within the scope of the Labor Management Relations Act. 376 F.2d at 780; 334 F.2d at 1019.

In distinguishing the *Grain Elevator* cases, the *Baldovin* court characterized the *Grain Elevator* union's objective as an effort to force the American company to cease doing business with the foreign shipper. 626 F.2d at 453 n.5. This objective was the same objective that the court refused to ascribe to the ILA boycott in *Baldovin*. *Id.* at 452; *see* note 36 *supra*. Yet, in the *Grain Elevator* cases, as in *Baldovin*, the American employer was a neutral party in the union's dispute with the foreign entity. 376 F.2d at 780-81. The *Baldovin* court recognized the difficulties with its distinction of the *Grain Elevator* cases, calling the difference between the cases "solely one of degree." 626 F.2d at 453 n.5.

In Hattiesburg Bldg. & Trade Council v. Broome, 377 U.S. 126 (1964), the Supreme Court seemed to adopt the holding of the *Grain Elevator* cases that secondary disputes "in commerce" satisfied Labor Management Relations Act jurisdictional requirements even when the primary dispute was outside of commerce. *See id.* at 126. In a *per curiam* opinion, the *Broome* Court reversed a state court's exercise of jurisdiction over a labor dispute. *Id.* at 127. The Court ruled that the NLRB had exclusive jurisdiction under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), *see* note 22 *supra*, even though the primary target of the union's activities was not "in commerce." 377 U.S. at 126-27. The Court held that the NLRB's jurisdictional standards may be satisfied by reference to either the primary or secondary employer. *Id.* at 126. Since the secondary employer was "in commerce," the *Broome* Court held that the NLRB had jurisdiction over the dispute. *Id.* at 126-27.

Four justices of the Supreme Court thought that *Broome* should control in *Mobile*, finding the two cases indistinguishable. *See* 419 U.S. at 238 (Stewart, J., dissenting); note 23

mitted that the ILA boycott was secondary activity within the meaning of the Act and had harmed American interests,[41] but held that any such harm was an incidental effect of the boycott.[42] The court did not view the resulting effect on American concerns as an "object" of the boycott, thereby failing to find a necessary element of a section 8(b)(4)(B) violation.[43] The court thus held that the secondary effect of the ILA boycott upon the complaining parties was insufficient to bring the boycott within the jurisdictional boundaries of the Labor Management Relations Act.[44]

In *Allied International, Inc. v. International Longshoremen's Association*,[45] the First Circuit disagreed with the Fifth Circuit's holding in *Baldovin* that the Labor Management Relations Act did not apply to the ILA boycott.[46] *Allied* involved a private suit against the ILA by an American importer.[47] The plaintiff, Allied, Inc., alleged that the ILA action was a secondary boycott in violation of section 8(b)(4)(B) of the Act.[48] Allied sued for injunctive relief and damages under section 303 of the Act, which provides a private right of action for any party injured by a secondary boycott.[49] The First Circuit reversed the district court's dismissal of Allied's suit, holding that because the ILA boycott had affected commerce the boycott was subject to the proscription of secon-

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supra. The majority in *Mobile* distinguished *Broome* by stating that *Broome* merely involved internal NLRB jurisdictional standards established pursuant to 29 U.S.C. § 164(c), rather than the statutory jurisdictional requirements of the Labor Management Relations Act. 419 U.S. at 225-26. The Fifth Circuit's failure to mention *Broome* in *Baldovin* is understandable in light of the *Mobile* treatment of *Broome*.

[41] 626 F.2d at 449, 452; *see* note 28 *supra*.

[42] 626 F.2d at 452.

[43] *Id.*; 29 U.S.C. § 158(b)(4)(B) (1976); *see* note 36 *supra*.

[44] 626 F.2d at 453-54.

[45] 640 F.2d 1368 (1st Cir. 1981).

[46] *Id.* at 1374.

[47] *Id.* at 1369-70.

[48] *Id.* at 1370; *see* text accompanying notes 27 & 28 *supra*. In addition to claiming that the ILA had violated the Labor Management Relations Act, the plaintiff in *Allied* alleged that the union had violated the Sherman Act, 15 U.S.C. § 1 (1976), and had committed a tort against Allied under admiralty law. 640 F.2d at 1370. Discussion of the latter two theories, which are beyond the scope of this note, can be found in the *Allied* opinion. *See id.* at 1379-82. For a thorough treatment of Sherman Act applicability to political boycotts, *see* Comment, *Political Boycotts and the Sherman Act*, 32 BAYLOR L. REV. 617 (1980).

[49] 640 F.2d at 1370, 1379; 29 U.S.C. § 187 (1976). Section 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187(b) (1976), expressly authorizes private suits to recover damages but does not mention injunctions. Courts have consistently held that § 303 does not authorize suits for injunctive relief. *E.g.*, Iodice v. Calabrese, 345 F. Supp. 248, 270 (S.D.N.Y. 1972), *aff'd in part, rev'd in part on other grounds*, 512 F.2d 383 (2d Cir. 1975); Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Dixie Motor Coach Corp., 170 F.2d 902, 904, 907 (8th Cir. 1948). Although the Supreme Court has not addressed the issue of injunction actions under § 303, the Court has narrowly construed the cause of action authorized by that section. *See* Local 20, Teamsters v. Morton, 377 U.S. 252, 260-61 (1964) (section 303 suit limited to recovering actual damages proved; no punitive damages).

dary boycotts in section 8(b)(4)(B).[50] The court refused to apply the *Windward/Mobile* rule that a dispute between an American union and a foreign employer, not designed to elicit concessions directly beneficial to American workers, does not affect commerce.[51] The *Allied* court distinguished *Windward* and *Mobile* on the ground that the current primary dispute, albeit between an American union and a foreign entity, had spawned a labor-related dispute involving only Americans.[52] Since the ILA did not seek to influence the employment practices of a foreign concern, the Allied court held that *Windward* and *Mobile* did not preclude application of the Labor Management Relations Act to the ILA boycott.[53]

In addition to distinguishing Supreme Court precedent, the First Circuit disputed the Fifth Circuit's finding in *Baldovin* that the sole object of the ILA boycott was to voice a political protest.[54] The *Allied* court found that an object of the boycott was to force the plaintiff to cease importing Russian goods.[55] The court thus held that the boycott met the definition of a secondary boycott in section 8(b)(4)(B) of the Labor

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[50] 640 F.2d at 1370-79. The district court in *Allied* had granted the union's motion to dismiss the plaintiff's complaint for failure to state a claim upon which relief could be granted. *Id.* at 1369 n.1; *see* FED. R. CIV. P. 12(b)(6). Since the district court also had considered affidavits submitted by the parties, the circuit court treated the defendant's motion as one for summary judgment. 640 F.2d at 1369 n.1; *see* FED. R. CIV. P. 12(b). Thus the First Circuit's decision in *Allied* was limited to finding a properly stated cause of action against the ILA, and remanding the case to the district court for trial. 640 F.2d at 1379.

The district court had consolidated *Allied* with Walsh v. International Longshoremen's Ass'n, 488 F. Supp. 524 (D. Mass. 1980), *vacated and remanded*, 630 F.2d 864 (1st Cir. 1980). In *Walsh*, after the affected party (Allied) had filed unfair labor practice charges against the ILA, the NLRB sought a temporary injunction pursuant to 29 U.S.C. § 160(l) (1976). 630 F.2d at 865-67; *see* note 30 *supra*. On appeal of the district court order denying the injunction, the First Circuit dismissed the NLRB's petition on the ground of res judicata. 630 F.2d at 867. The court held that the district court decision in Baldovin v. International Longshoremen's Ass'n, No. 80-259 (S.D. Tex. 1980), which had denied the NLRB a § 160(l) injunction, barred the NLRB from bringing a similar action in *Walsh*. 630 F.2d at 867-75. The First Circuit did not dismiss the *Allied* suit on res judicata grounds because *Allied* involved different parties than those involved in both *Baldovin* and *Walsh*. 640 F.2d at 1378. While *Allied* was a suit by a private plaintiff, *Walsh* and *Baldovin* both involved suits between the ILA and the NLRB. *Id.*; 630 F.2d at 870-73.

[51] 640 F.2d at 1373-74; *see* text accompanying notes 23 & 24 *supra*.

[52] 640 F.2d at 1374.

[53] *Id.*; *see* note 24 *supra*.

[54] 640 F.2d at 1374-77; *see* note 36 *supra*.

[55] 640 F.2d at 1374-77. The *Allied* court determined the object of the ILA boycott, as required by § 8(b)(4)(B) of the Labor Management Relations Act, 29 U.S.C. § 158(b)(4)(B), by looking to the inevitable consequences of the boycott. 640 F.2d at 1376; *see* NLRB v. Retail Store Employees Union Local 1001, 447 U.S. 607, 614 n.9 (1980) (holding union responsible for foreseeable consequences of its conduct). Since the ILA had ordered its members to refrain from handling the plaintiff's imports, the court held that an inevitable result of the union action was to force the plaintiff to cease doing business with its Russian suppliers. 640 F.2d at 1377; *see* 29 U.S.C. § 158(b)(4)(B) (1976); text accompanying note 27 *supra*.

Management Relations Act.[56] The First Circuit also ascribed more importance to the boycott's effect on American companies than did the Fifth Circuit in *Baldovin*.[57] The *Allied* court concluded that the impact of the ILA boycott on the American plaintiff was sufficient to bring the boycott within the scope of the Labor Management Relations Act.[58]

New Orleans Steamship Association v. General Longshore Workers[59] involved the second approach to enjoining the ILA boycott. In *New Orleans*, which arose from management attempts to enjoin the boycott in furtherance of mandatory arbitration provisions, the Fifth Circuit upheld an injunction issued to enforce an arbitration order, but vacated an injunction issued pending arbitration.[60] The Fifth Circuit consolidated the appeals of two cases involving four separate collective bargaining agreements with six union locals.[61] Each agreement contained a no-strike clause accompanied by a mandatory arbitration procedure.[62] In one case, the parties had submitted the disputes to arbitration.[63] The arbitrators ruled that the ILA boycott violated the no-strike clauses and ordered the unions back to work.[64] The employers of the ILA workers sued to enforce the orders under section 301(a) of the Labor Management Relations Act, which allows a party to a collective bargaining agreement to sue in federal court to enforce the agreement.[65] The district court ordered the union employees to return to work.[66] In the second case, the employer

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[56] 640 F.2d at 1374-78; *see* text accompanying note 27 *supra*; note 55 *supra*.

[57] 640 F.2d at 1371-74; *see* text accompanying notes 41-44 *supra*.

[58] 640 F.2d at 1374. The *Allied* court relied heavily on footnote 10 of the *Mobile* decision. *Id.* at 1373-74. That footnote stated that *Mobile* need not cast doubt upon cases holding that § 8(b)(4)(B) governs secondary activity in commerce even though the primary dispute is outside of commerce. 419 U.S. at 225 n.10 (citing *Grain Elevator* cases as examples); *see* note 40 *supra*. The First Circuit took the Supreme Court at its word and cited the *Grain Elevator* cases as support for holding that § 8(b)(4)(B) applied to the ILA's secondary action against its American employer although the primary dispute with the Soviets was outside commerce. 640 F.2d at 1373-74; *but see id.* at 1383 (Aldrich, J., dissenting) (dissenting judge stating that *Mobile* casts considerable doubt on *Grain Elevator* cases, footnote 10 of *Mobile* notwithstanding).

[59] 626 F.2d 455 (5th Cir. 1980).

[60] *Id.* at 467.

[61] *Id.* at 458-61. The Fifth Circuit consolidated appeals from New Orleans S.S. Ass'n v. General Longshore Workers, 486 F. Supp. 409 (E.D. La. 1980), and Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, No. 80-5089 (M.D. Fla. 1980).

[62] 626 F.2d at 459-60. Each union local in *New Orleans* had agreed not to engage in any strike or work stoppage. *Id.* at 459-60 nn. 1 & 2. The unions also had agreed to arbitrate any dispute involving issues subject to the respective collective bargaining agreements. *Id.* at 459-60. The arbitration requirements of each agreement excluded from arbitration disputes involving issues outside the scope of the agreement. *Id.* at 459-60 nn. 1 & 3.

[63] *Id.* at 459-60 (discussing New Orleans S.S. Ass'n v. General Longshore Workers, 486 F. Supp. 409 (E.D. La. 1980)). At the district court level, the *New Orleans* case had involved three of the four collective bargaining agreements before the Fifth Circuit. 626 F.2d at 460.

[64] *Id.*

[65] *Id.* at 465; 29 U.S.C. § 185(a) (1976).

[66] 626 F.2d at 460. The order issued by the District Court of the Eastern District of

sought an injunction against the boycott pending arbitration.[67] The district court granted the management request.[68]

The principal issue on appeal in *New Orleans* was whether the Norris-LaGuardia Act's ban on labor injunctions prohibited the district court injunctions.[69] Section 4(a) of the Norris-LaGuardia Act deprives the

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Louisiana prohibited the union locals from engaging in work stoppages involving any ship carrying grain to the Soviet Union. *Id.* Two of the three arbitration orders the court sought to enforce applied only to the particular ship that the longshoremen had boycotted. *Id.* Thus, the district court order went significantly beyond those two arbitration orders. *Id.*; *see* note 76 *infra*.

[67] 626 F.2d at 460-61 (discussing Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, No. 80-5089 (M.D. Fla. 1980)). In *Jacksonville Bulk Terminals*, which involved one of the four collective bargaining agreements before the Fifth Circuit, the employer had sought a court order compelling the union to arbitrate in addition to a pre-arbitration injunction. 626 F.2d at 460-61. The district court issued such an order. *Id.*; *see* note 90 *infra*.

[68] *Id.* at 461.

[69] *Id.* at 463-64. In *New Orleans*, the Fifth Circuit confronted three potentially dispositive questions before determining the effect of the Norris-LaGuardia Act on the ILA boycott. The court first held that the departure of the boycotted ships did not render the case moot. *Id.* at 461-62. The court reasoned that since the dispute could not have been litigated completely prior to the ships' departures, and since there was a reasonable expectation that the complainants would face a similar boycott in the future, the case was not moot. *Id.* at 462. Secondly, the court held that the first amendment did not prohibit an injunction against the ILA boycott. *Id.* at 462-63. Finally, the *New Orleans* court held that an injunction against the ILA work stoppage would not violate the thirteenth amendment's proscription of involuntary servitude, since individual employees were free to terminate their employment at will. *Id.* at 463.

The question of whether an injunction against the ILA boycott would violate the first amendment also arose in the *Allied* case. 640 F.2d at 1378-79. The First Circuit in *Allied* agreed with the Fifth Circuit in *New Orleans* that an injunction would not violate the ILA's first amendment rights. *Id.* at 1379. The Supreme Court most often has considered the question of first amendment protection of union activity in the context of active union picketing. *E.g.*, NLRB v. Retail Store Employees Local 1001, 447 U.S. 607 (1980); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Local 10, United Ass'n of Journeymen Plumbers & Steamfitters v. Graham, 345 U.S. 192 (1953); Carpenters Local 213 v. Ritters Cafe, 315 U.S. 722 (1942). The physical presence of picketers can add considerable impact to the message that a union attempts to convey. NLRB v. Retail Store Employees Local 1001, 447 U.S. at 619 (1980) (Stevens, J., concurring). Nonetheless, the Court has held that when such picketing is in violation of legitimate governmental interests, the first amendment will not protect the pickets. American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 228-32 (1974); *c.f.* Teamsters Local 695 v. Vogt, Inc., 354 U.S. at 293-95 (fourteenth amendment does not prohibit state court injunction against picketing violative of legitimate state interests).

Since the first amendment limits congressional power, a congressional proscription of picketing alone cannot justify restriction of otherwise lawful picketing. NLRB v. Retail Store Employees Local 1001, 447 U.S. at 618 (Stevens, J., concurring). The harmful effects of the union activity must be weighed against the right of free expression. *Id.* According to the First and Fifth Circuits, the ILA activity was a secondary boycott as defined in the Labor Management Relations Act. 640 F.2d at 1374-78; 626 F.2d at 448-49. Because the union's mode of expression thus violated public policy, restrictions on that expression were permissible. 640 F.2d at 1378-79; 626 F.2d at 463. Even if the Labor Management Relations Act were not applicable to the case, as in *Baldovin*, 626 F.2d at 452-53, the first amendment

federal courts of jurisdiction to issue labor injunctions.[70] This ban on federal court injunctions is limited to cases involving labor disputes.[71] The *New Orleans* court held that the ILA boycott, though instituted purely for political reasons, was a labor dispute for Norris-LaGuardia Act purposes.[72] The Norris-LaGuardia Act's proscription of injunctions thus applied to the ILA activity.[73]

Application of the Norris-LaGuardia Act to the ILA boycott, however, did not mandate that the *New Orleans* court vacate the district court injunctions.[74] The Fifth Circuit noted that the Supreme Court has held that section 301(a) of the Labor Management Relations Act created an exception to the Norris-LaGuardia Act by permitting injunctions to enforce valid arbitration orders.[75] The court thus upheld the injunction

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would not shield the ILA activity if the activity violated state law. *See* American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. at 230-32 (first amendment does not protect union activity that state court held violative of state law).

[70] 29 U.S.C. § 104(a) (1976). Section 4 of the Norris-LaGuardia Act states, in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) ceasing or refusing to perform any work or to remain in any relation of employment; . . .

29 U.S.C. § 104 (1976).

[71] Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 372 (1960). Section 13(c) of the Norris-LaGuardia Act defines a labor dispute as a controversy over terms or conditions of employment, or over representation of employees. 29 U.S.C. § 113(c) (1976).

[72] 626 F.2d at 465. In holding that a political protest strike is a labor dispute under § 113(c) of the Norris-LaGuardia Act, the Fifth Circuit resolved a conflict within the court. *Id.* In 1975 and 1976 decisions, separate panels of the Fifth Circuit disagreed on the applicability of the Norris-LaGuardia Act to a political protest action. *Compare* West Gulf Maritime Ass'n v. International Longshoremen's Ass'n, 531 F.2d 574 (5th Cir. 1976) (*affirming summarily* 413 F. Supp. 372 (S.D. Tex. 1975), which held political protest strike not labor dispute; Norris-LaGuardia Act inapplicable) *with* United States Steel Corp. v. United Mine Workers, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976) (political protest strike is labor dispute; Norris LaGuardia Act applicable). In *New Orleans*, the Fifth Circuit overruled *West Gulf Maritime* and adopted the *United States Steel* rule that a political strike is a labor dispute, expressing preference for a written decision over a summary affirmance. 626 F.2d at 465. The *New Orleans* holding that a political strike is a labor dispute subject to the Norris-LaGuardia Act overruled another district court decision within the Fifth Circuit, Harrington & Co. v. International Longshoremen's Ass'n Local 1416, 356 F. Supp. 1079 (S.D. Fla. 1973) (political strike not labor dispute for Norris-LaGuardia Act purposes), and conflicts with the view of the Second Circuit. *See* Khedivial Line, SAE v. Seafarers' Int'l Union, 278 F.2d 49, 51 (2d Cir. 1960) (political strike not labor dispute under Norris-LaGuardia Act definition).

[73] 626 F.2d at 465.

[74] *Id.* at 465-68.

[75] 626 F.2d at 466; *see* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 405 (1976) (no federal statutory impediment to court enforcing arbitration award); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) (federal court can order compliance with arbitration award); text accompanying note 65 *supra*.

enforcing the arbitrators' back to work orders.[76]

In addition, however, the *New Orleans* court ruled that the Norris-LaGuardia Act required reversal of the district court order enjoining the union boycott pending arbitration proceedings.[77] The Fifth Circuit relied on two landmark Supreme Court cases dealing with the effect of the Norris-LaGuardia Act on pre-arbitration injunctions.[78] In *Boys Markets v. Retail Clerks Union*,[79] the Supreme Court held that a court may enjoin a union action prior to arbitration if that action arises from a dispute that the parties are contractually bound to arbitrate.[80] In *Buffalo Forge Co. v. United Steelworkers*,[81] the Court emphasized the limited reach of the *Boys Markets* exception to the Norris-LaGuardia Act.[82] The *Buffalo Forge* Court vacated an injunction against a union sympathy strike because the collective bargaining agreement did not address the issue that had precipitated the strike.[83] The contract contained a no-strike clause and a mandatory arbitration requirement.[84] Although the question of whether the sympathy strike violated the no-strike clause was an arbitrable issue,[85] the Court held that the *Boys Markets* exception did not apply because the underlying dispute was not over an arbitrable issue.[86] Thus, a pre-arbitration injunction was improper.[87] In

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[76] 626 F.2d at 469. Although the Fifth Circuit held in *New Orleans* that the district court acted properly in ordering enforcement of the arbitration orders, the circuit court remanded the case to the district court for modification of the injunction as it applied to two of the three arbitration orders. *Id.* The Fifth Circuit held that with respect to the arbitration orders that addressed the boycotting of a particular ship, the injunction must be limited to the boycotting of that ship in order to avoid judicial expansion of the arbitrator's order. *Id.* at 468; *see* note 66 *supra*.

[77] 626 F.2d at 469; *see* text accompanying notes 67 & 68 *supra*.

[78] 626 F.2d at 466-67.

[79] 398 U.S. 235 (1970).

[80] *Id.* at 249-53.

[81] 428 U.S. 397 (1976).

[82] *Id.* at 404-13.

[83] *Id.* at 412-13. The striking union in *Buffalo Forge* had no dispute with its employer. *Id.* at 404-05. The union struck in support of other local unions that were striking the same employer over a contract dispute. *Id.* at 405.

[84] *Id.* at 399-400. In consideration of the employer's promise to arbitrate, the union in *Buffalo Forge* agreed not to strike over any issue subject to the arbitration procedure. *Id.* at 407.

[85] *Id.* at 410. The question of whether the sympathy strike in *Buffalo Forge* violated the no-strike clause in the collective bargaining agreement was an arbitrable issue because the contract embodied the promise not to strike, and all contractual grievances were subject to arbitration. *Id.*

[86] *Id.* at 407-11. Since the sole cause of the *Buffalo Forge* strike was the union's desire to support other unions, the strike was not related to any issue subject to arbitration under the agreement between the union and management. *Id.* at 407-08. The *Buffalo Forge* Court feared that extending the *Boys Markets* exception beyond cases involving strikes over contractually mandated arbitrable issues would frustrate the Norris-LaGuardia Act's purpose of limiting the role of the federal courts in labor disputes. *Id.* at 410-12.

[87] *Id.* at 412-13.

New Orleans, the Fifth Circuit applied *Buffalo Forge* to the ILA appeal of the injunction issued pending arbitration.[88] Since the union had called the strike as a political protest, and since no arbitrator could resolve the ILA's complaint with the Soviet Union, the ILA boycott did not fall within the narrow *Boys Markets* exception to the Norris-LaGuardia Act.[89] Therefore, the court vacated the district court's pre-arbitration injunction.[90]

In *Hampton Roads Shipping Association v. International Longshoremen's Association*,[91] the Fourth Circuit reached the same conclusion regarding a pre-arbitration injunction against the ILA boycott as did the Fifth Circuit in *New Orleans*.[92] The *Hampton Roads* court apparently assumed that the boycott was a labor dispute within the meaning of the Norris-LaGuardia Act.[93] The court held that since the dispute between the ILA and the Soviet Union was not over an arbitrable issue, the Norris-LaGuardia Act and *Buffalo Forge* prohibited a pre-arbitration injunction.[94]

The *Baldovin*, *Allied*, *New Orleans*, and *Hampton Roads* cases denote the unique problems facing an employer or other affected party when employees walk off the job because of a political dispute such as the ILA protest against the Soviets. As in the sympathy strike situation, the union has struck over an issue outside the normal complement of

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[88] 626 F.2d at 466-67.

[89] *Id.* The *New Orleans* court followed the *Buffalo Forge* reasoning and held that though the question of whether the ILA work-stoppage violated the no-strike agreement was an arbitrable issue, the union could not be enjoined pending arbitration because the dispute precipitating the strike was not arbitrable. *Id.* at 467; *see* text accompanying notes 83-87 *supra*.

[90] 626 F.2d at 469. The *New Orleans* court upheld the district court's pre-arbitration order to the extent that the order compelled the parties to arbitrate the question of whether the ILA had violated the no-strike clause of the contract. *Id.* at 465-66, 469; *see* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457-59 (1957) (§ 301(a) of Labor Management Relations Act empowers federal courts to compel arbitration and creates exception to Norris-LaGuardia Act); note 67 *supra*.

[91] 631 F.2d 282 (4th Cir. 1980).

[92] *Id.* at 284-86. In *Hampton Roads*, as in *New Orleans*, employers of ILA members sued to force the employees to return to work. *Id.* at 283; *see* text accompanying notes 65 & 67 *supra*. The district court enjoined the boycott, citing union violations of the no-strike clause and mandatory arbitration requirements contained in the collective bargaining agreement between the union and the employers. *See* 631 F.2d at 283-84.

[93] *See id.* (applicability of Norris-LaGuardia Act not questioned); *but see* note 72 *supra* & accompanying text.

[94] 631 F.2d at 286. As in *New Orleans*, the *Hampton Roads* court found that the question of whether the ILA boycott violated the no-strike clause was an arbitrable issue. *Id.* at 285; *see* note 85 *supra*. The Fourth Circuit, however, also agreed with the *New Orleans* conclusion that the arbitrability of the boycott's propriety was insufficient to support a *Boys Markets* injunction. 631 F.2d at 285; *see* note 89 *supra*. Because the union's real dispute was with the Soviets, and because no arbitrator could resolve that dispute, the Fourth Circuit held that the ILA work-stoppage was not enjoinable. 631 F.2d at 285-86.

issues negotiated by labor and management.[95] After the union has taken such action, the bargaining table is of little help in resolving the dispute.[96] Therefore, the aggrieved parties must rely on means other than direct labor-management communication to end the strike.

The conflicting decisions of the *Baldovin* and *Allied* courts regarding the applicability of the Labor Management Relations Act to the ILA boycott create doubt concerning the success of future attempts to end politically motivated walkouts by soliciting the aid of the NLRB. Although the First and Fifth Circuits agree that the ILA action was a secondary boycott in violation of the Act,[97] the Fifth Circuit would deny the NLRB jurisdiction to enjoin the boycott,[98] while the First Circuit apparently would allow a temporary injunction.[99] Yet even under the Fifth Circuit rule that such a boycott does not affect commerce, and consequently is not subject to NLRB regulation, the complainant is not necessarily without a means to enjoin the work stoppage. The Supreme Court has held that if sections seven or eight of the Labor Management Relations Act do not apply to a dispute, state law will control the action.[100] Therefore, if the federal courts deny the NLRB jurisdiction, the complainant may sue in state court under applicable state law.[101] The complainant may benefit from a decision holding the Labor Management Relations Act inapplicable, because state law may permit injunctions in more situations than would the federal statute.[102] The complainant

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[95] *See* Freed, *Injunctions Against Sympathy Strikes: In Defense of* Buffalo Forge, 54 NEW YORK U. L. REV. 289, 303 (1979) [hereinafter cited as Freed]; Lowden & Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of* Buffalo Forge, 45 GEO. WASH. L. REV. 633, 658 (1977) [hereinafter cited as Lowden & Flaherty]. Discussions dealing with sympathy strikes are cited as illustrative of the political strike situation because the nature of the dispute underlying a sympathy strike is similar to that underlying a political strike. Both kinds of strikes involve issues outside the scope of typical labor-management bargaining.

[96] *See* Freed, *supra* note 95, at 303; Lowden & Flaherty, *supra* note 95, at 658.

[97] 640 F.2d at 1379; 626 F.2d at 449; *see* text accompanying note 27 *supra*.

[98] 626 F.2d at 454; *see* text accompanying notes 29-31.

[99] 640 F.2d at 1370-74; *see* note 30 *supra*. *Allied* involved a private suit and thus did not concern the NLRB's jurisdiction as did *Baldovin*. 640 F.2d at 1371. The First Circuit recognized, however, that the question of the applicability of the Labor Management Relations Act to the ILA boycott was the same in *Allied* as in *Baldovin*. *Id.*

[100] American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 228 (1974); *see* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); note 22 *supra*.

[101] *See* American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. at 228 (upholding state court exercise of jurisdiction after finding § 8 of Labor Management Relations Act inapplicable). Examples of state statutes under which employers may seek injunctive relief include ALA. CODE § 25-7-9 (1975) (prohibiting interference with peaceable exercise of lawful industry); ARIZ. REV. STAT. ANN. § 23-1321 (1956) (providing injunctive relief for target of secondary boycott); PA. STAT. ANN. tit. 43, § 211.6(2)(d) (Purdon) (1964) (outlawing secondary boycotts); TEX. REV. CIV. STAT. ANN. art. 5154f (Vernon) (1971) (prohibiting secondary boycotts).

[102] *See* 27 ALABAMA L. REV. 649, 673 (1975).

should be aware, however, that some states have enacted their own version of the Norris-LaGuardia Act, denying the state courts jurisdiction to issue labor injunctions.[103]

Although a suit instituted in federal or state court to enjoin a work stoppage similar to the ILA's political boycott may ultimately succeed, the proceedings will have taken a considerable amount of time.[104] Since the complainant's desire is to end the strike quickly to minimize business losses, even a victory after protracted litigation can be extremely harmful. In a situation in which the party affected by the political protest is an employer of the union members, as in *New Orleans* and *Hampton Roads*, the employer can take measures to prevent such harm. A mechanism for expedited arbitration would protect management against the costly delays inherent in attempts to have a court enjoin the union action.[105] An expedited arbitration provision in the collective bargaining agreement should apply expressly to a no-strike clause specifically forbidding political protest strikes.[106] No question of the arbitrability of whether the union walkout violates the no-strike clause could then arise.[107] In addition, management should be able to trigger expedited arbitration without prior union consent, thus preventing union circumvention of the dispute resolution process.[108]

If the employer can obtain a favorable arbitration award quickly, the need for a pre-arbitration injunction is reduced greatly, and the *Buffalo Forge* problem of arbitrability of the underlying dispute is avoided.[109]

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[103] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-113 (1958); N.Y. LAB. LAW (McKinney) § 807 (1977); PA. STAT. ANN. tit. 43, § 206 a-r (Purdon) (1964).

[104] *See generally* Veglahn, *Arbitration Costs/Time: Labor and Management Views*, 30 LAB L.J. 49 (1979).

[105] *See* Ferguson & DiLorenzo, *Forging a Strategy to Combat Sympathy Strikes*, 29 SYRACUSE L. REV. 817, 844-45 (1978) [hereinafter cited as Ferguson & DiLorenzo]; Lowden & Flaherty, *supra* note 95, at 654, 667-68.

[106] *See* Daniel Construction Co., 239 N.L.R.B. No. 190, 100 L.R.R.M. 1201, 1202 (1979) (no-strike clause must specifically cover sympathy strikes to find sympathy striker in violation of agreement); Ferguson & DiLorenzo, *supra* note 105, at 845-48.

[107] *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. at 410 (strike when contract contains broad no-strike clause creates arbitrable issue).

[108] *See* Ferguson & DiLorenzo, *supra* note 105, at 848; Lowden & Flaherty, *supra* note 95, at 664-65.

[109] *See* text accompanying notes 79-87 *supra*. Employers have been unsuccessful in attempts to circumvent *Buffalo Forge* and obtain a pre-arbitration injunction against strikes by describing the underlying dispute in terms consistent with arbitrable issues in the collective bargaining agreement. *See* Ferguson & DiLorenzo, *supra* note 105, at 843. Counsel for Jacksonville Bulk Terminals, Inc. (JBT), *see* text accompanying notes 67 & 68 *supra*, has made an ingenious attempt to characterize the ILA boycott as a strike over an arbitrable issue. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, *reported as* New Orleans S.S. Ass'n v. International Longshoremen's Ass'n, 626 F.2d 455 (5th Cir. 1980). In its petition for certiorari, JBT asserted that the union boycott was an ILA attempt to decide with whom JBT does business. 49 U.S.L.W. at 3585 (summ. of cert. pet.). JBT argued that the dispute was thus arbitrable since the contract expressly reserved to management

Since management can enforce an arbitration order in the courts,[110] the sooner the order issues the sooner the employees must return to work. Although an expedited arbitration mechanism can substantially reduce the time required to end a union political strike, persuading the union to agree to expedited arbitration may be difficult for management.[111] Because *Buffalo Forge* allows a union to strike over an unarbitrable issue without the threat of a pre-arbitration injunction, a union may be disinclined to agree to an expedited arbitration provision that effectively shortens the period of Norris-LaGuardia Act protection of the strike.[112] Thus, management's foresight and negotiating prowess are critical in preventing business losses due to political protest strikes.[113]

The boycott of Russian cargoes by the International Longshoremen's Association has inconvenienced a number of American businesses. Because the tripartite dispute involving the ILA, the Soviets, and the American companies does not concern traditional American labor issues, the dispute does not fit neatly into federal labor law. The recent Fifth Circuit cases demonstrate that the federal statutes are ill equipped to handle disputes engendered by union action that is neither directed at an American employer[114] nor motivated by traditional labor demands.[115] Congress could remedy the former situation by declaring its intention that the Labor Management Relations Act extend to disputes involving foreign entities that affect business concerns in the United States.[116] Such congressional action would cure the present anomaly of disparate state laws governing union activity that could result in severe disruption of interstate commerce and could adversely affect United States foreign relations.[117] In the latter situation, Congress could exclude from Norris-LaGuardia protection union walkouts motivated by political views. Such an exclusion would protect American business from the

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the right to make such business decisions. *Id.* JBT also asked the Supreme Court to decide whether the ILA boycott was a labor dispute as defined in the Norris-LaGuardia Act, *see* text accompanying notes 69-73 *supra*, and to reconsider *Buffalo Forge*. *Id.*

[110] Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 405 (1976); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960); *see* text accompanying note 75 *supra*.

[111] *See* Lowden & Flaherty, *supra* note 95, at 654.

[112] *See id.*

[113] For examples of expedited arbitration provisions in collective bargaining agreements, *see* Agreement between the Johns Hopkins Hospital and District 1199-E, Nat'l Union of Hospital and Health Care Workers (1980), § 15.3, *reprinted in* 28 COLL. BARGAINING (B.N.A.) 13 (May 17, 1979); Agreement between United States Steel Corp. and United Steelworkers (1981-83), § 7B, *reprinted in* 29 COLL. BARGAINING (B.N.A.) 14 (Sept. 18, 1980).

[114] Baldovin v. International Longshoremen's Ass'n, 626 F.2d at 452-54; *see* text accompanying notes 13-44 *supra*.

[115] New Orleans S.S. Ass'n v. General Longshore Workers, 626 F.2d at 467; *see* text accompanying notes 59-90 *supra*.

[116] *See* note 17 *supra*.

[117] *See* text accompanying notes 100 & 101 *supra*.

burden of labor's political activism while maintaining the Norris-LaGuardia Act's protection of employee rights to act in concert to further their economic position.[118]

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[118] *See* New Orleans v. General Longshore Workers, 626 F.2d at 464 (Norris-LaGuardia Act designed to protect unions' economic weapons); text accompanying notes 70 & 71 *supra*.