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Longshoremen's Embargo of Soviet Goods: A Secondary Boycott or a Political Protest?

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Longshoremen's Embargo of Soviet Goods: A Secondary Boycott or a Political Protest?

In January of 1980 the International Longshoremen's Associaton, (ILA), boycotted any and all material destined for or originated from the Soviet Union. The boycott was announced as a political protest of the Soviet invasion of Afghanistan. Not surprisingly, the boycott spawned several lawsuits contesting the legality of the union action: *New Orleans Steamship Ass'n v. Longshore Workers;*[1] *Baldovin v. ILA;*[2] and *Walsh v. ILA.*[3] This comment will focus on these three decisions and their treatment of three major issues: first, whether the boycott is within the commerce jurisdiction of the National Labor Relations Board (NLRB); second, whether the boycott is within the labor dispute jurisdiction of the NLRB; and third, whether the boycott constituted a secondary boycott in violation of section 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA).[4]

I. Commerce Jurisdiction

A. *General Background*

The NLRB was created by Congress through the NLRA as an agency to supervise labor disputes and, as an agency created by Congress, it is well settled that NLRB jurisdiction is confined to labor disputes that affect commerce.[5] Section 2(6) of the Act[6] defines commerce in respect to

1. 626 F.2d 455 (5th Cir. 1980).
2. 626 F.2d 445 (5th Cir. 1980).
3. 488 F. Supp. 524 (D. Mass. 1980). *Walsh* was appealed to the First Circuit which vacated and remanded with instructions to dismiss the dispute on the basis of res judicata, 630 F.2d 864 (1st Cir. 1980). All references to *Walsh* will be to the opinion of the district court since the res judicata ruling is not relevant to this comment.
4. 29 U.S.C. § 158(b)(4)(ii)(B). The present National Labor Relation Act, 29 U.S.C. §§ 151-169 (1976), had its beginning with the National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935). The 1935 Act was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136. The Act was further amended by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 257, 73 Stat. 519. A final amendment was the Act of July 26, 1974, Pub. L. No. 360, 88 Stat. 395. All subsequent references will be to "the Act" unless otherwise specified.
5. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
6. 29 U.S.C. § 152(6) (1976).

the Board's jurisdiction: "commerce means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any state, Territory, or the District of Columbia . . . ." From this definition it is apparent that trade between any state and a foreign country is within the term "commerce". Section 2(7) of the Act provides the meaning of "affecting commerce", defining it as "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 free flow of commerce."[7] And section 10(a) of the Act provides for Board jurisdiction "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."[8] Originally, NLRB jurisdiction was predicated upon a showing that a labor dispute affected a substantial volume of commerce.[9] However, several Supreme Court opinions have expanded the jurisdiction of the Board[10] so that today, the Board is empowered to exercise jurisdiction over unfair labor practices without any requisite volume of commerce.[11]

Since NLRB jurisdiction is limited to disputes that affect commerce, the threshold question in judging the legality of the ILA boycott was whether that boycott qualified under the commerce jurisdiction of the Board. Although the Supreme Court has not decided this precise question it "has offered guidance in a series of cases that delineate the meaning of the all-encompassing words 'in commerce' as applied to boycotts remediable by domestic action."[12] One of the earlier Supreme Court opinions concerned a union's picketing at the secondary employer's place of business.[13] The Court concluded that when the union activity was arguably an unfair labor practice, the Board had jurisdiction to enjoin the picketing of

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7. 29 U.S.C. § 152(7)(1976).

8. 29 U.S.C. § 160(a)(1976).

9. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1936).

10. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); NLRB v. Fairbalt, 306 U.S. 601 (1939).

11. R. GORMAN, BASIC TEXT ON LABOR LAW 22(1976).

12. 626 F.2d at 450. In Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957), foreign crew members of a foreign ship struck against the foreign shipowners. The crew named an American union to represent them. Justice Clark, writing for the majority of the Supreme Court, stated that the Board lacked jurisdiction because federal labor laws did not cover foreign nationals employed by foreign entities. *Id.* at 147. The *Benz* rule was reaffirmed six years ater in McCulloch v. Sociedad Nacional de Marineras de Honduras, 372 U.S. 10(1963) and Incres S.S. Co. v. International Maritime Worker's Union, 372 U.S. 24 (1963). The underlying reason for denying Board jurisdiction was the lack of connection to any commercial element affecting Americans. The same rationale cannot be applied to a maritime union's refusal to handle substantial amounts of goods either entering or leaving the American marketplace.

13. Hattiesburg Bldg. and Trades Council v. Broome, 377 U.S. 126 (1964)(per curiam).

the secondary employer, regardless of whether the operations of the primary employer were within "commerce".[14]

In 1974, the Supreme Court delivered two opinions in which the facts were similar to the ILA boycott situation: *Windward Shipping (London) Ltd. v. American Radio Ass'n*[15] and *American Radio Ass'n v. Mobile Steamship Ass'n.*[16] Both cases arose out of the same 1971 multiunion picketing that protested the use of foreign owned vessels to transport American cargo.[17] In *Windward,* the ILA picketed a foreign ship to protest the low wages paid to the non-American, nonunion crew.[18] The Supreme Court found that the dispute was beyond the scope of the Board's jurisdiction since the union sought to force a foreign entity to raise its wages, and thus interfere with the maritime operations of foreign vessels.[19]

The situation was slightly different in *Mobile* because it was the stevedore company, rather than the foreign shipowner, that sought to enjoin the union protest. This distinction, however, was not decisive in the majority opinion.[20] The Court concluded that the dispute was, again, between the union and the foreign shipowner and was, therefore, beyond the statutory authority of the Board.[21] However, the Supreme Court in *Mobile* expressly approved of prior lower court decisions that had recognized Board jurisdiction over secondary activities in violation of section 8(b)(4) of the Act when the secondary activities were targeted at domestic conditions, regardless of whether the primary employer was a foreign entity.[22]

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14. *Id.* at 126-27. *See also* Pennello v. ILA, 227 F. Supp. 164 (D. Md. 1964); International Longshoremen's Union, 161 N.L.R.B. 451, 63 L.R.R.M. 1284 (1966).

15. 415 U.S. 104 (1974).

16. 419 U.S. 215 (1974).

17. *Windward,* 415 U.S. at 106; *Mobile,* 419 U.S. at 217.

18. 415 U.S. at 107.

19. *Id.* at 115. The Court relied on its prior holdings in Incres S.S. Co. v. International Maritime Worker's Union, 372 U.S. 24 (1963) and Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957).

20. Justice Rehnquist wrote for the majority, joined by Chief Justice Burger, and Justices White, Blackmun and Powell. 419 U.S. at 217.

21. *Id.* at 234. The dissent, Justices Stewart, Douglas, Brennan, and Marshall, presented a persuasive argument to the contrary, pointing out that an American stevedore company alleging secondary pressure from an American labor union, arising from the union's dispute with another entity, was within the commerce and unfair labor practice jurisdiction of the Board. *Id.* at 234 (Stewart, J., dissenting). The dissenting opinion pointed out that the characterization of a dispute often determines whether it fits under the definition of commerce jurisdiction. The dissenters argued that the union picketing was a wrongful interference with an American stevedore company's lawful right to conduct business and was, therefore, in violation of § 8(b)(4)(ii)(B) of the Act. *Id.* at 235-36.

22. *Id.* at 225 n.10. *See* ILA Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970); Grain Elevator v. NLRB, 376 F.2d 774 (D.C. Cir.), *cert. denied,* 389 U.S. 932 (1967); Mad-

B. *Bladovin: ILA Boycott Is Not Within Commerce Jurisdiction*

Baldovin v. ILA[23] was a Fifth Circuit decision that consolidated two similar factual situations.[24] The union's refusal to handle cargo connected in some manner to the Soviet Union was common to both situations. The court in *Baldovin* observed that the Board had

> adopted as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by that entity's response to the activity in question.[25]

The consistent theme supporting the *Windward* and *Mobile* decisions was that, in each situation, the union activity would force a foreign entity to respond by either raising the wages of nonunion workers or by hiring longshoremen at the higher union rate. The Supreme Court in *Windward* and *Mobile* thought that the union activity would require a response from

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den v. Grain Elevator Workers, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965).

In *Ariadne*, the union picketed foreign ships in protest of low wages paid to American longshoremen. The Supreme Court decided that Board jurisdiction was proper since there was no interference with the internal affairs of the foreign ships. 397 U.S. at 200. *See also* ILA and Warehousemen's Union, 161 N.L.R.B. 451, 63 L.R.R.M. 1284 (1966); Marine Cooks and Stewards Union, 156 N.L.R.B. 753, 61 L.R.R.M. 1140 (1966); New York Shipping Ass'n Inc., 116 N.L.R.B. 1183, 38 L.R.R.M. 1419 (1956); *But see* Urauic v. F. Jarka Co., 282 U.S. 234 (1931).

Grain Elevator and *Madden*, collectively referred to as the *Grain Elevator* cases, arose out of the attempts of an American union to force its American secondary employer to cease doing business with its Canadian primary employer. The union tried to induce American workers, employed by the secondary employer, to refuse to handle cargo at an American port. The activity was found to be secondary, in violation of the Act. The Seventh Circuit approved Board jurisdiction, stating that any other conclusion would "nullify the secondary boycott provision of the Act." 334 F.2d at 1020 (footnote omitted).

23. 626 F.2d 445 (5th Cir. 1980).

24. The first situation arose in Houston, Texas when the ILA refused to load American corn onto a vessel destined for the Soviet Union. *Id.* at 448. The Texas Farm Bureau, Kansas Farm Bureau and the American Farm Bureau all brought charges to the NLRB alleging that the Union was engaging in an unlawful secondary boycott. The regional director of the NLRB investigated and found reason to believe that a possible violation was occurring. A petition was filed with the district court in southern Texas for a preliminary injunction under § 10(1) of the Act, 29 U.S.C. § 160(1)(1976). The injunction was denied. 626 F.2d at 448. The second situation arose in Georgia when ILA locals refused to unload cargo from the Soviet Union. The regional director petitioned for a preliminary § 10(1) injunction and the injunction was granted. *Id.*

25. 626 F.2d at 452. The court quoted from the Supreme Court opinion in Incres S.S. Co. v. International Maritime Worker's Union, 372 U.S. 24, 27 (1963): "Maritime operations of foreign-flag ships employing alien seamen are not 'in commerce' within the meaning of [the Act]."

a foreign entity which would constitute interference with the maritime operations of that foreign entity.[26] Similarly, the court in *Baldovin* concluded that the ILA boycott would interfere excessively with the foreign policy of the Soviet Union;[27] thus, the court reasoned that the boycott was beyond the jurisdiction of the NLRB.

Essentially, the court in *Baldovin* characterized the ILA's boycott objective as merely a political protest against the Soviet Union.[28] When compared to the union activities in *Windward* and *Mobile*, the boycott was even "further removed from the type of domestic labor relations that the Act was intended to cover . . . . When the dispute is over a foreign government's invasion of a remote nation, it is more emphatically not 'in commerce.' "[29] Relying on language in *Mobile*, the court in *Baldovin* remarked that, "[w]hile the ILA refusal to work has affected American farmers who produce the grain, American transportation companies who move it to ports and the American stevedores who load it aboard vessels, it is patent that this was an incidental effect and not the objective."[30] Therefore, according to the court in *Baldovin*, the dispute was not within "commerce", as defined by the Act, and the injunction was denied.[31]

C. *Analysis of Baldovin*

Both the express language of the Act and the case law support a conclusion opposite to the decision in *Baldovin*.[32] "Commerce," as defined by section (2)(6) of the Act, includes trade between any state in this country and a foreign country.[33] Thus, trade and transportation of cargo to or from the Soviet Union should be considered within commerce.

Additionally, the court in *Baldovin* should have found that the boycott

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26. *Windward*, 415 U.S. at 115; *Mobile*, 419 U.S. at 219.

27. 626 F.2d at 453.

28. *Id.*

29. *Id.*

30. *Id.* at 452. *See Mobile*, 419 U.S. at 226.

31. 626 F.2d at 454. In direct contrast to the decision reached in *Baldovin*, the court in Walsh v. ILA concluded that the union activity clearly "affected commerce" within the meaning of the Act since the "controversy concerns the actual passage of goods from the U.S.S.R. to a consignee in the United States." 488 F. Supp. at 528.

The decision in *New Orleans*, a companion case to *Baldovin*, did not expressly address the commerce jurisdiction issue, but deferred to the opinion in *Baldovin*. 626 F.2d at 465 n.9.

32. *See* notes 6 and 7 *supra*, and accompanying text. *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34 (1937), in which the Court concluded that the criterion is the effect on commerce; if there is a substantial relationship to interstate commerce, appropriate for regulation, then Congress and its delegated agent, the NLRB, cannot be denied jurisdiction. *Id.* at 5.

33. 29 U.S.C. § 152(6)(1976).

affected commerce. The basic premise is that courts should focus on the domestic effects of a union's activity. If the activity affects domestic commerce, without regard to the *amount* of commerce affected, then the Board should have commerce jurisdiction.

The observation that the boycott would have only an incidental effect on American farmers, shippers, stevedores and others was perhaps an attempt by the court to ignore the domestic impact of the union activity. A constructive analysis of this portion of the court's opinion is difficult since the court gave no indication of the scale on which it measured the consequences inflicted on the American farmers, employers and other parties. However, whether the domestic consequences were incidental or not, the boycott undeniably affected commerce within the meaning of the Act since no relative volume of commerce need be affected under section 2(7) of the Act.[34] The boycott obstructed the free flow of commerce, and, in the words of the Supreme Court, "it is the effect on commerce, not the source of injury, which is the criteria. . . ."[35] For these reasons, the court in *Baldovin* was incorrect to deny commerce jurisdiction.

As the Supreme Court has made clear, the critical distinction to be made in determining Board jurisdiction is the impact of the union's activity.[36] In *Mobile*, the Court noted that simply directing a boycott at a foreign entity does not automatically preclude NLRB jurisdiction.[37] Hence, the opinion in *Mobile* yields a rule applicable to the ILA boycott: when union activities impact domestic conditions, the Board has jurisdiction whether or not the primary employer is a foreign entity.[38] The court in *Baldovin* noted, but could not distinguish, the *Grain Elevator* cases in which a union sought to induce workers at an American firm to strike in order to force the American employer to terminate its business connections with a foreign entity.[39] In the *Grain Elevator* cases, the court held that the union activity was an unfair labor practice.[40] However, the importance of these cases was the courts' focus on the domestic effect of the would-be strike. Although the union directed its activity at the foreign

34. *Id.* at § 152(7).

35. 301 U.S. at 32.

36. *See* NLRB v. Enterprise Ass'n of Pipefitters, 429 U.S. 507, 520 (1977); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). *See also* Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 648 (1944); Electro-Coal Transfer Corp. v. General Longshore Workers, 591 F.2d 284 (5th Cir. 1979).

37. 419 U.S. at 225 n.10.

38. *Id.*

39. 626 F.2d at 453 n.5. The court in *Baldovin* noted that the *Grain Elevator* cases are distinguishable from the present cases: "the distinction is solely one of degree and we cannot say that a bright line can be drawn between them and the present cases." 626 F.2d at 453 n.5.

40. *Id.*

entity, the courts properly focused on the domestic impact or the domestic target. Similarly, the court in *Baldovin* should have examined the obvious domestic effects of the ILA boycott, rather than brushing off the effects as incidental.[41]

The ILA boycott was characterized by the Union as targeted against the Soviet Union; however, the effect was the hinderance of the free flow of commerce between the two nations. This point is best seen in an "ends-means" analysis: the "end" of the boycott, the announced objective, was to make a political statement against the Soviet invasion of Afghanistan; the "means," the method of effectuating the objective, was the actual boycott. The predictable consequence of the ILA boycott was the disruption of trade and commerce between the American employers and a foreign entity. Had the court in *Baldovin* focused on the means employed by the union to make its statement, and the predictable consequences of those means, it could have found that the boycott was well within the commerce jurisdiction of the NLRB.

II. Labor Dispute Jurisdiction

A. *General Background*

As a general rule, the exercise of Board jurisdiction requires that the controversy both affect commerce and be a labor dispute.[42] Nevertheless, inquiry into these areas is separate and distinct.[43] Section 2(9) of the Act defines labor dispute as: "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, . . . maintaining, changing . . . terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relations of employer and employee."[44]

The disputes arising out of the ILA boycott were not typical labor disputes. The union was not protesting against any employer,[45] but rather, sought to make a political statement. When union activities, strikes or boycotts have had political motivations, courts have had difficulty determining if the dispute was within the Board's labor dispute jurisdiction. Some courts, particularly the Fourth Circuit, concluded that a political strike or boycott was not a labor dispute and, therefore, not subject to

41. 626 F.2d at 452.

42. 29 U.S.C. §§ 152(6),(7)(1976). NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963).

43. 626 F.2d at 465 n.9. *See also Windward*, 415 U.S. 104 (1974).

44. 29 U.S.C. § 152(9) (1976).

45. "The ILA concedes that it has no dispute with any person doing business at the Port . . . and that its sole dispute is with the U.S.S.R." *Baldovin*, 626 F.2d at 448.

Board jurisdiction.[46] Other courts tended to construe narrowly the Fourth Circuit's absolute approach to the labor dispute issue,[47] and both the Board and the D.C. Circuit have disregarded it altogether.[48] However, it is not necessary to resolve whether a political dispute constitutes a labor dispute. The ILA boycott is allegedly an unfair labor practice; and a labor dispute "in the strict sense" is not necessary for NLRB jurisdiction over an alleged *unfair labor practice.*[49]

Two decisions illustrate this general rule: *United States Steel Corp. v. United Mine Workers*[50] and *Penello v. ILA.*[51] In *Penello,* the ILA responded to the Cuban missile crisis by boycotting all ships arriving from Cuba and those ships known to have traded with Cuba. The court concluded that the boycott violated the secondary boycott provisions of the Act, and, most importantly, concluded that unlawful boycott actions often are purely political and, therefore, not ordinary labor disputes, but they are nevertheless within the Board's jurisdiction.[52] A similar result was reached in *United States Steel,* which concerned a union strike to protest the importation of South African coal. Although the strike was not aimed at the employers in the traditional labor dispute sense, the court looked to the impact of the strike and concluded that Board jurisdiction was proper.[53] Hence, when the controversy centers around an alleged unfair labor practice, the only serious constraint on Board jurisdiction is the commerce provision.[54]

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46. NLRB v. ILA, 332 F.2d 992 (4th Cir. 1964). Although West Gulf Maritime Ass'n v. ILA, 413 F. Supp. 372 (S.D. Tex. 1975), *aff'd summarily,* 531 F.2d 574 (5th Cir. 1976), stated that a strike called for political reasons was not a labor dispute, the precedential value of this opinion is questionable since the Fifth Circuit in *New Orleans* impliedly overruled this portion of *West Gulf,* noting that *West Gulf* was only a summary affirmance. 626 F.2d at 464-65.

47. NLRB v. Twin City Carpenters, 422 F.2d 309, 312-13 (8th Cir. 1970); National Maritime Union v. NLRB, 342 F.2d 538, 541 (2d Cir.), *cert. denied,* 382 U.S. 835 (1965).

48. National Maritime Union, 147 N.L.R.B. 1317, 1317-18 n.3, 56 L.R.R.M. 1397 (1964), *enforced,* 346 F.2d 411, 414-16 (D.C. Cir. 1965).

49. Harrington & Co. v. ILA Local 1416, 356 F. Supp. 1079, 1083 (S.D. Fla. 1973). *See also* Khedivial Line, SAE v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960).

50. 519 F.2d 1236 (5th Cir. 1975), *cert. denied,* 428 U.S. 910 (1976). (The Supreme Court in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) cited the *U.S. Steel* decision as "in accord" with the Second Circuit decision affirmed by the Supreme Court in *Buffalo Forge.* 428 U.S. at 404 n.9).

51. 227 F. Supp. 164 (D. Md. 1964).

52. *Id.* at 170.

53. 519 F.2d at 1247.

54. The Board shall have jurisdiction to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1976).

B. New Orleans: ILA Boycott Is Within Labor Dispute Jurisdiction

The decision in *New Orleans*[55] was another Fifth Circuit opinion that consolidated two similar factual controversies.[56] Each controversy arose out of the ILA's refusal to load cargo destined for the Soviet Union. The Stevedores sought an injunction and enforcement of the arbitration clauses, and, in response, the Union asserted that there was no labor dispute jurisdiction because the boycott was only a political protest.[57] Prior Fifth Circuit opinions had reached inconsistent conclusions on the issue of whether a political boycott was a labor dispute. In *West Gulf Maritime Ass'n v. ILA*,[58] the court held that a political boycott was not a labor dispute. However, in *United States Steel*, the court expressly found labor dispute jurisdiction over a politically motivated boycott.[59] After careful consideration, the court in *New Orleans* stated:

> We find it difficult satisfactorily to reconcile these decisions. To the extent that they are inconsistent, we consider the rationale of *United States Steel Corp.* to be more persuasive . . . . Adhering to the earlier and more fully expressed opinion, we find that a strike called to further the political goals of the union does "involve or grow out of any labor dispute" for purpose of the . . . Act.[60]

Thus, the court in *New Orleans* held that an injunction could issue, and

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55. 626 F.2d 455 (5th Cir. 1980).

56. The first controversy arose in New Orleans, Louisiana when ILA locals refused to load American corn on board a vessel destined for the Soviet Union. The second controversy arose in Jacksonville, Florida when ILA locals refused to load superphosphoric acid on board several Norwegian vessels destined for the Soviet Union. In both situations the union had signed a collective bargaining agreement containing arbitration and no-strike clauses with the primary employer, the stevedores. In both cases, the stevedores invoked the arbitration clauses and sought to enforce the no-strike clauses. *Id.* at 459. The principle issue in *New Orleans* was whether an injunction could issue under *state* law. The court in *New Orleans* held that, since the Board did not have jurisdiction, state law was not preempted and an injunction could issue under state law.

The court in *Baldovin* did not address the labor dispute jurisdiction issue. The court in *Walsh* apparently disregarded the matter, by stating that Board jurisdiction was proper whenever the Board showed reasonable cause to believe jurisdiction existed in a § 10(1) proceeding, 488 F. Supp. at 529. "This standard has been applied to determinations of jurisdiction in § 10(1) proceedings, where the exercise of jurisdiction depends upon the discretionary policy of the Board." *Id.* (*citing* Hoffman v. Retail Clerks Union, 422 F.2d 793, 795 (9th Cir. 1970) and McLeod v. Building Serv. Employees Int'l Union, 227 F. Supp. 242, 244-45 (S.D.N.Y. 1964)).

57. 626 F.2d at 464.

58. 413 F. Supp. 327 (S.D. Tex. 1975), *aff'd summarily*, 531 F.2d 574 (5th Cir. 1976).

59. 519 F.2d 1236, 1247 (5th Cir.), *cert. denied*, 428 U.S. 910 (1976).

60. 626 F.2d at 465. However, the court deferred to the opinion in *Baldovin* on commerce jurisdiction. *Id.* at 465 n.9.

the arbitrator's decisions could be enforced without violating the Act.[61]

C. *Analysis of New Orleans*

Ordinarily, the exercise of NLRB jurisdiction requires the controversy to be a "labor dispute".[62] Nevertheless, the need to protect neutral parties from the economic pressures of secondary boycotts has stretched the Board's jurisdiction into situations that are not a typical "labor dispute." NLRB jurisdiction over secondary boycotts, in which the union, by definition, does not have a labor dispute with the employer, is a necessary and desirable consequence of Board jurisdiction over unfair labor practices, as provided by the Act.[63] Therefore, the court in *New Orleans* was correct in its observation that, for the purposes of the Act, a political boycott satisfies the labor dispute jurisdiction requirements. A holding to the contrary would prevent regulation of unfair labor practices hidden beneath a politicl protest. Unions or employers could escape NLRB scrutiny by combining their unlawful strikes with political protests; that result would effectively negate NLRB implementation of the Act and the intent of Congress.

III. Secondary Boycott

A. *General Background*

Section 8(b)(4) of the Act states that it is an "unfair labor practice" for a union to engage in or to encourage other employees to strike, or to refuse to handle materials, or to threaten or coerce any person, when the object of that activity is to force or restrain any person from conducting business with any other person.[64] Seizing upon the actual language of the

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61. 626 F.2d at 463.

62. 29 U.S.C. § 152(9) (1976).

63. 29 U.S.C. § 160(a) (1976).

64. National Labor Relations (Wagner) Act § 8(b), 29 U.S.C. § 158(b) (1976) provides in relevant part:

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

Act and the intent of Congress, the Supreme Court formulated a two-pronged test to determine if any particular union activity constitutes a secondary boycott:[65] First, was there a strike, or strike-like activity; or, in the alternative, was there a threatening or coercive action made by the union to any other person? And, second, was the objective of either the strike-like action or the threatening activity designed to force one party to cease doing business with another party?[66] In short, the test reflects the legislative intent to protect neutral employers or other persons from economic pressures inflicted by a union when the union's dispute is really with another party.[67]

Something less than a full strike is enough to satisfy the first prong. For example, in *United Brotherhood of Carpenters v. NLRB*,[68] the Supreme Court held that a work refusal was a strike-like activity within the meaning of the first prong of the test. In that case, union workers refused to handle non-union construction material at the secondary employer's place of business.[69] The Supreme Court concluded that, notwithstanding a contract provision requiring the use of union-made material, the refusal to work violated the prohibition on secondary boycotts.[70]

Similarly, determining whether the second prong is satisfied is often difficult. Recently, the Fifth Circuit, in *Electro-Coal Transfer Corp. v. General Longshore Workers*,[71] restated the distinction between primary and secondary objectives as originally formulated by the Supreme Court in *National Woodwork:* "[W]hether the union's objective was primary or secondary turns on whether their activities were 'addressed to the labor relations of the contracting employer vis-à-vis his own employees,' and therefore primary, or 'tactically calculated to satisfy union objectives else-

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other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

65. National Woodword Mfrs. Ass'n v. NLRB, 386 U.S. 612, 624 (1967); United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 98 (1958).

66. 386 U.S. at 624. *See also* Electro-Coal Transfer Corp. v. General Longshore Workers, 591 F.2d 284 (5th Cir. 1979).

67. Hoffman v. International Bhd. of Teamsters, 617 F.2d 1234 (7th Cir. 1980); National Woodworker Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

68. 357 U.S. 93 (1958).

69. *Id.* at 95.

70. *Id.* at 110. The Court concluded that the work refusal was intended to force the contractor to cease doing business with the subcontractor, who was the supplier of the non-union material. *Id.*

71. 591 F.2d 284 (5th Cir. 1979). The employer owned and operated grain loading facilities and normally employed only union workers. However, the 1975 Soviet wheat deal brought in thousands of tons more grain than usual. In response to the deluge of grain, the employer hired nonunion workers. *Id.* at 286.

where,' and thus unlawful secondary conduct."[72] In other words, a union may lawfully object and strike or refuse to work if its dispute is directed at its employer, based on the labor relations between the union and that employer. However, it is unlawful secondary activity if the union strikes against its employer or a secondary employer when there is no conflict or dispute between the union and that employer. Thus, if the union strikes or refused to work in order to achieve some desired objective that has no bearing on the employer or the labor relations between the two, then the activity is unlawful under the Act.

A related problem occurs when a union has both primary (lawful) objectives behind its strike or work refusal, as well as secondary (unlawful) objectives. The Supreme Court has ruled that the second prong of the secondary boycott test is satisfied once any secondary objective is found.[73] In other words, secondary objectives need not be the union's sole purpose.[74] Hence, if there are several objectives behind a union strike or boycott, and one of those objectives is an unlawful secondary objective, then the union activity will be deemed an unfair labor practice and within the jurisdiction of the NLRB.

B. Walsh: ILA Boycott Is Not a Secondary Boycott

The dispute in *Walsh v. ILA*[75] arose in Boston Harbor when the ILA, pursuant to the union boycott, refused to work on three American vessels loaded with Soviet cargo.[76] The importer-exporter corporation petitioned the Board alleging that the union's boycott constituted a secondary boycott with the objective of forcing the importer to cease doing business with the steamship company, the stevedores, and the Soviet Union.[77] The regional director of the Board agreed and petitioned the district court for a preliminary section 10(1) injunction.[78] The court in *Walsh* reviewed the

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72. 591 F.2d at 290 (*quoting National Woodwork Mfrs.*, 386 U.S. at 644-45).

73. NLRB v. Enterprise Ass'n of Pipefitters, 429 U.S. 507, 530 (1977).

74. *See*, NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). "It is not necessary to find that the *sole* objective of the strike was that of forcing the contractors to terminate the subcontractor's contract." *Id.* at 689 (emphasis in original).

75. 488 F. Supp. 524 (D. Mass. 1980).

76. *Id.* at 526. Three different employers were adversely affected by the ILA boycott: Allied Int'l, Inc., an importer-exporter; Waterman Steamshiplines, a transporter of cargo and owner of many vessels; and Clark, Inc., a stevedoring corporation. Allied and Waterman had contracted with a Soviet agency, by direct negotiations, prior to the embargo and the boycott. These contracts with the Soviet Union did not pertain to material affected by President Carter's grain embargo. *Id.*

77. *Id.*

78. *Id.* It is interesting to note the ease with which the court in *Walsh* dismissed the jurisdictional obstacles found so insurmountable in *Baldovin* and *New Orleans*. "In *Baldovin*, and in the present case, the controversy concerns the actual passage of goods from

two-pronged Supreme Court test and concluded that it was applicable to this type of boycott.[79] However, the court found that this boycott was not a secondary boycott. The court focused on whether there had been a strike or inducement to strike and concluded that the ILA had not induced a strike against the exporter, the shipping firm or the stevedore corporation, nor, the court continued, had the union attempted to pressure those employers to terminate business ties among themselves. The court emphasized that no picket lines had been formed and that no other work of the employer had been disturbed. The boycott was characterized as a simple refusal by union members to work on selected ships as a political protest.[80] Upon this basis, the court reasoned that the union had not engaged in a secondary boycott. In short, the boycott was a primary boycott against Soviet cargo with only incidental effects on the employers who dealt in Soviet goods.[81] The court emphasized the first amendment rights of the union to protest: "Indeed, if the bare refusal to work in the circumstances shown should be held illegal, the union would be deprived of its right of expression and the proviso of section 8(b)(4)(ii)(B) would be emptied of meaning."[82] For these reasons, the court denied the preliminary injunction.

C. *Analysis of Walsh*

The opinion in *Walsh* focused on the absence of a strike or a picket line. Unfortunately, that focus was incorrect and completely ignored the

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the U.S.S.R. to a consignee in the United States. In [the court's view], this is clearly commerce, and clearly distinguishable from the cited Supreme Court cases." *Id.* at 528.

79. *Id.* at 530.

80. *Id.* at 530-31.

81. *Id.* at 531. The court noted that a secondary boycott could not result from a union's inducement of American firms to cease doing business with the Soviet Union because the Soviet Union could not be classified as "any other person" under the Act. *Id.* at 531 n.5. However, that may misstate the law. "Person" is defined in the Act as: "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers." 29 U.S.C. § 152(1) (1976). The Supreme Court has previously found that a county is a person within the meaning of the Act and entitled to NLRB protection from unfair labor practices. Plumbers Local 298 v. County of Door, 359 U.S. 354 (1959). The opinion in *Walsh* disclosed that the petitioners contracted with an agency of the Soviet Union, *i.e.*, a legal representative of the Soviet Union. The opinion did not disclose whether an agency of the Soviet Union was analogous to a corporation created by the United States government. In any event, the court in *Walsh* should not have foreclosed this conclusion without properly exploring the definition of "person."

82. 488 F. Supp. at 531 (*quoting* NLRB v. ILA, 332 F.2d 992, 997 (4th Cir. 1964) (holding that the ILA's boycott of vessels which had traded with Cuba during the missile crisis was not a secondary boycott)). In contrast to *Walsh*, the court in *New Orleans* held that a refusal to work "occasioned only by words is not to be distinguished from one occasioned by a picket line." 626 F.2d at 463.

language of the Act. Section 8(b)(4) clearly states that an unfair labor practice may take the form of either a strike or a "refusal in the course of . . . employment to use, manufacture, possess, transport, or otherwise handle or work on any goods, articles, materials. . . ."[83] Thus, it was irrelevant whether the union had struck or picketed the employers or the vessels because the ILA had, in fact, engaged in a work stoppage within the meaning of the Act, albeit selective in scope. The court in *Walsh* did not address this fact; if it had, it would probably have concluded that the union activity satisfied the first prong of the secondary boycott test.

In its discussion of the second prong of the test, the court in *Walsh* characterized the objective of the union as a political protest of a selective nature with only incidental effects on the American employers.[84] A recent Supreme Court decision, however, has distinguished between primary objectives, those dealing with the employer,[85] and secondary (unlawful) objectives, those dealing in other areas or with parties other than employers.[86] The objective of the union boycott in *Walsh* did not concern a dispute with any of the employers,[87] although it surely had a significant impact on them. Because the objectives of the union were not calculated to further any labor dispute between it and the employers, the union alleged a lack of labor dispute jurisdiction. However, the objectives were calculated to satisfy union goals elsewhere;[88] such objectives are secondary, unlawful, and within the Board's unfair labor practice jurisdiction.

The actual and very real domestic effect of this political boycott cannot be overlooked. A boycott by a maritime union at American ports disrupts the economic flow of goods from producers to consumers. The predictable consequence of a boycott of this nature is the disruption of commerce, and this must have been the intention of the union. In the final analysis, the ILA engaged in a work stoppage with the intended objective of disrupting commerce and with the effect of placing unfair economic pressures on various employers and other neutral parties which were totally unrelated to any legitimate labor dispute.

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83. Section 8(b)(4) is quoted in note 64, *supra*. Additionally, an unfair labor practice includes either a strike or a refusal to work. 29 U.S.C. § 158 (1976).

84. 488 F. Supp. at 531.

85. NLRB v. Enterprise Ass'n of Pipefitters, 429 U.S. 507, 511 (1977); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 645 (1967).

86. *Pipefitters*, 429 U.S. at 511; *National Woodwork*, 386 U.S. at 644.

87. *Baldovin*, 626 F.2d at 448.

88. It is doubtful the ILA seriously believed that its boycott would force the Soviet Union to withdraw its army from Afghanistan. It is more realistic to believe that the union intended to disrupt and possibly cut off maritime trade, within its means, between the two nations in an attempt to inflict hardship on the Soviet leadership or even to bolster the union's public image. Neither objective has any relation to the employers; and consequently, the indirect pressure placed on the employers was secondary, in violation of the Act.

The purpose and intent of the secondary boycott provisions of the Act were to protect neutral parties from secondary economic pressures exerted by unions. The decision in *Walsh* is contrary to this legislative purpose and intent. The conclusion reached in *Walsh* permitted the ILA to interfere with the conduct of trade between the employers and the Soviet Union, as well as among the employers themselves.

The court in *Walsh* apparently misplaced emphasis on the political free speech aspect of its opinion. Freedom of speech applies to unions as well as individuals.[89] The ILA boycott, however, was more than simple speech, it was a political protest accompanied by a work stoppage. The Supreme Court has repeatedly addressed the comparison between section 8(b)(4)(ii)(B) and first amendment freedoms.[90] It has repeatedly stated that the unfair labor practice provision imposes no unconstitutional restrictions upon speech protected by the first amendment.[91] Consequently, the court in *Walsh* should have decided the secondary boycott issue separately from its concerns for the union's right to make political statements. The proper analysis ultilizes the secondary boycott test first, without regard to free speech. Once an unfair labor practice has been found to exist, an injunction may issue without conflicting with the first amendment. Indeed, the court in *New Orleans* stated that an injunction would not prevent the ILA from speaking, but only from engaging in a work stoppage.[92] Although the opinion in *Walsh* correctly identified the applicable test, it appears that the court misapplied both prongs of that test.[93]

IV. Conclusion

The boycott of Soviet cargo by the ILA violated the secondary boycott provisions of the Act and was, therefore, enjoinable as an unfair labor practice under the Board's jurisdiction. First, sections 2(6) and 2(7) indicate that trade between two nations is "commerce", and the obstruction of the free flow of that commerce "affects commerce" within the meaning of the Board's commerce jurisdiction. The boycott was targeted against the sale of domestic goods to the Soviet Union by American companies,

89. NLRB v. Retail Store Employees Union (Safeco), 100 S. Ct. 3273 (1980); American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215 (1974); International Bhd. of Electrical Workers v. NLRB, 341 U.S. 695 (1951).

90. American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 229-31 (1974); NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 56, 78 (1964); Internatonal Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957).

91. *Safeco*, 100 S. Ct. at 2378.

92. 626 F.2d at 463.

93. The court in *Baldovin* concluded that the boycott was secondary within the meaning of the Act, but dismissed the suit on "jurisdictional" grounds. 626 F.2d at 449. The court in *New Orleans* did not reach the secondary boycott issue.

as well as the purchase of Soviet goods by American companies. Contrary to the *Baldovin* opinion, the domestic secondary effect is within the commerce jurisdiction of the NLRB.

Second, although NLRB jurisdiction ordinarily requires the controversy both to affect commerce and constitute a labor dispute, the Act has provided for Board jurisdiction in secondary boycott situations even if the dispute is not typically a labor dispute.[94] In this way, the Act recognizes that, although secondary activities, by their very nature, may not encompass the typical labor dispute situation, Board jurisdiction must be available to protect neutral parties from secondary economic pressures. Consequently, as the court in *New Orleans* recognized, the ILA boycott need not fit neatly within the labor dispute language of the Act in order for the Board to exercise jurisdiction.[95]

Finally, a strike or a refusal to work, accompanied by the intent to force or pressure neutral parties to terminate business relations with another party satisfies the secondary boycott test. The ILA boycott was a refusal to handle Soviet cargo and, thus, a refusal to work. Additionally, the employers were pressured either to terminate their business relations with the Soviet agency or find willing nonunion workers with the necessary skill to perform the job safely and efficiently. The objective of the boycott was secondary since it was intended to disrupt trade between the employers and the Soviet Union. Although the dispute was with the Soviet Union, the American employers had to cease doing business with the Soviet agency and among themselves, at least in relation to Soviet goods. The boycott was not designed to affect foreign nationals, nor to interfere with the foreign policy of another country. The boycott would have no measurable effect on Soviet policy in Afghanistan. Instead, the boycott was conceived for its predictable consequences, to disrupt maritime commerce between the two nations. The effect was on secondary groups in America. In simple terms, the boycott was a work stoppage with coercive effects on neutral employers and other parties and should have been enjoined.

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94. An argument can be made that the boycott does in fact meet the labor dispute requirement of the Act. The definition of labor dispute includes a dispute over the terms and conditions of working. 29 U.S.C. § 152(9). During the boycott, the union informed the employers that union workers would not work on Soviet ships or handle Soviet cargo, essentially a term or condition of employment. Therefore, the boycott may well be seen as a "labor dispute".

95. This comment does not address the restrictions on state jurisdiction over labor controversies, nor the federal preemption doctrine. A brief discussion of these issues in relation to the grant of an injunction can be found in *New Orleans*, 626 F.2d at 462-63.