

Foreign Ships in American Ports: The Question of NLRB Jurisdiction

Don F. Dagenais

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Dagenais, Don F. (1975) "Foreign Ships in American Ports: The Question of NLRB Jurisdiction," *Cornell International Law Journal*: Vol. 9: Iss. 1, Article 3.
Available at: <http://scholarship.law.cornell.edu/cilj/vol9/iss1/3>

This Comment is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

COMMENT

FOREIGN SHIPS IN AMERICAN PORTS: THE QUESTION OF NLRB JURISDICTION

Don F. Dagenais

The National Labor Relations Act appears to include cases involving international labor disputes within the jurisdiction¹ of the National Labor Relations Board (NLRB), but in two recent cases involving the question of NLRB jurisdiction over disputes involving foreign ships docked in American ports, the Supreme Court has taken a more restrictive interpretation. Such factors as increasing labor costs to American shippers, the subsequent trend towards registry of United States vessels under foreign flags, and the anger this has aroused among unionized maritime workers in the United States have made this issue one of increasing importance.

The purpose of this Comment is to examine the Court's developing treatment of foreign flag vessel labor law disputes and to suggest a new scheme for decision in these cases which focuses on the effects of NLRB treatment and the existence of foreign or international law questions rather than on the narrow issue of economic consequences within this country.

I

BACKGROUND

A. DEVELOPMENT OF THE PANLIBHON FLEET

The practice of registering national ships under foreign flags is centuries old,² but only within the last five decades has it grown to the point

1. Since cases argued before the National Labor Relations Board will involve application of United States labor law, and cases presented in other forums, *e.g.*, state courts or federal admiralty courts, will be decided under tort or maritime principles, the real issue behind the surface "jurisdictional" question is that of which substantive law will apply. The term "jurisdiction," therefore, is used in this Comment in the conflict of laws, rather than in the procedural, sense.

2. In the sixteenth century many English merchants sailed their ships under the Spanish flag, for example, because of the monopolistic Spanish regulations governing trade with the West Indies. During the seventeenth century Newfoundland fishing boats, whose owners were in competition with English merchants, often sailed under the flag of France in order to avoid legal difficulties with England. Similarly, in the 1800's both British and

where it threatens the survival of the United States merchant marine. In the 1920's and 1930's the high cost of American labor,³ the expense of repairing vessels in the United States ports,⁴ and costly Coast Guard inspections⁵ caused United States shipowners to register increasing numbers of vessels under the flags of foreign countries, usually small nations seeking to build their merchant marine with foreign capital. Following World War II, Panama, Liberia, and the Honduras became the most popular countries of registry.⁶ Liberia, the fastest growing of the three, has increased its holdings dramatically over the past two decades⁷ and now, along with Panama, controls substantial percentages of the world's tonnage in ships.⁸ By late in the 1950's this so-called "Panlibhon" fleet had become the object of extreme anger for United States maritime unions.⁹ The unions called the vessels "runaway

Swiss vessels were known to sail under foreign flags in order to avoid legal problems with the mother country. These and other examples are cited in B. BOCZEK, *FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY* 4-11 (1962) [hereinafter cited as BOCZEK]. This work contains the best review of the history and reasons for flags of convenience. *Id.* at 26-63. See also Goldie, *Recognition and Dual Nationality — A Problem of Flags of Convenience*, 1963 BRIT. Y.B. INT'L L. 220, 224-26.

3. BOCZEK 30-32.

4. *Id.* at 32.

5. *Id.* at 32; see *Hearings on Vessel Transfer, Trade-in, and Reserve Fleet Policies Before the Subcomm. on the Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 85th Cong., 1st Sess., pt. 1, at 142 (1957).

6. Although a few ships were registered with Panama and Honduras during the interwar and World War II eras for a number of different reasons, it was the competitive shipping market following World War II which gave rise to the spectacular growth rate of the Panamanian and Liberian fleets. The history of this development is best described in BOCZEK at 9-25.

7. Between 1949 and 1971, Liberia increased its holdings from a mere 15 ships and 374,000 deadweight tons to a maritime fleet of 2,011 vessels weighing over 71 million deadweight tons, the largest in the world. MARITIME ADMINISTRATION, U.S. DEP'T OF COMMERCE, *MERCHANT FLEETS OF THE WORLD* 4, 8 (1972). Liberia's fleet is still growing. For example, in 1971 it added 171 ships and in 1972 another 128. *Id.* at 8; MARITIME ADMINISTRATION, U.S. DEP'T OF COMMERCE, *A STATISTICAL ANALYSIS OF THE WORLD'S MERCHANT FLEETS* 1 (1973). Slightly more than half of these represent transfers from other countries; the rest are new ships, recently built, which are registered from the first under Liberia's flag.

8. By the end of 1971, Liberia and Panama, the latter controlling nearly a thousand ships of its own, possessed 18.7 percent of the world's tonnage in merchant ships, including 26.7 percent of the world's tonnage in tankers and 25.1 percent of the tonnage in ore and bulk carriers. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *REVIEW OF MARITIME TRANSPORT 1971*, U.N. Doc. TD/B/C.4/Rev. 1 at 8-9 (1973). These tonnage figures represented about a 25 percent increase in the percentage share of world tonnage increase since 1965. Because of the dominant position of the Liberian and Panamanian fleets in the world total, the share of the developed market economy countries of the total tonnage dipped to only 55.8 percent by the end of 1971. *Id.* at 7-8.

9. "Panlibhon" is an acronym for *Panama, Liberia, and Honduras*. For a detailed

ships,"¹⁰ the shipowners preferred to term them "flags of necessity,"¹¹ but most writers have lent them a more neutral name: "flags of convenience."¹²

B. DEVELOPMENT OF LABOR UNION OPPOSITION

Opposition to flag of convenience vessels has existed in this country, particularly from maritime labor unions, for over forty years.¹³ Labor leaders point to the fact that, despite increases in the volume of sea commerce produced by this country, the use of American flag ships has dwindled over the past 25 years to virtually nothing.¹⁴ Consequently, berth employment opportunities for United States maritime workers have also decreased dramatically.¹⁵

In April of 1958 the United Nations Conference on the Law of the Sea adopted the Convention on the High Seas. At the urging of both American maritime unions and European shipowners, the Convention included a requirement in Article 5 that there be a "genuine link" between a flag of convenience ship and the State whose flag she flies.¹⁶ Later that

discussion of labor union reaction to the practice of sailing under foreign flags, see section I.B. *infra*.

10. See *Hearings on Vessel Transfer, Trade-in, and Reserve Fleet Policies*, *supra* note 5, pt. 1 at 684 *et seq.* (statement of Hoyt S. Haddock, Executive Secretary of the AFL-CIO Maritime Committee).

11. BOCZEK 5 & 6 n.11.

12. See, e.g., BOCZEK 4; Goldie, *supra* note 2, at 220; Comment, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing*, 69 YALE L.J. 498 (1960) [hereinafter cited as Comment, *The Flag of Convenience Fleet*].

13. American labor union opposition began in 1933. BOCZEK 65. For a general history of labor union opposition, see *id.* at 64-90. Examples of such opposition in the early 1960's are found in Shils, "Flags of Necessity," "Flags of Convenience," or "Runaway Ships"? 1962 LAB. L.J. 1009.

14. Between 1951 and 1973 the tonnage of sea commerce in the United States grew from 193.1 million tons to 662.9 million tons, an increase of 243 percent, while the percentage of that commerce borne in United States flag vessels dropped from 39.8 percent in 1951 to 6.4 percent in 1973. U.S. DEP'T OF COMMERCE, 1974 MARITIME ADMINISTRATION ANNUAL REPORT, App. XVII (1975).

15. Employment opportunities decreased from 56,600 twenty-five years ago to approximately 25,200 in 1973. U.S. DEP'T OF COMMERCE, 1974 STATISTICAL ABSTRACT OF THE UNITED STATES 588 (1974).

16. Convention on the High Seas, March 24, 1961, art. 5, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962). This article says, in pertinent part, that "ships have the nationality of the State whose flag they are entitled to fly," and that:

There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

This provision was somewhat less strict than one which the opponents of the Panlibhon fleet had been urging, see Comment, *The Flag of Convenience Fleet*, *supra* note 12, at 510

year United States maritime unions picketed foreign flag ships throughout the United States for four days as part of a world-wide campaign organized by the International Transport Workers' Federation,¹⁷ and in 1959 the National Maritime Union and the Seafarers International Union, longtime rivals on the United States maritime labor scene, combined to form a joint front to combat the problem.¹⁸

This struggle continued throughout the 1960's, although the focus shifted from the waterfront to the legislatures. Between 1961 and 1972 bills were introduced in practically every Congress to require that certain kinds of cargo or a minimum percentage of total American cargo be carried only on ships flying the United States flag.¹⁹ None gathered enough momentum to pass. In 1965, however, the California state legislature adopted a statute requiring persons issuing, selling, or offering tickets for passage aboard foreign vessels to "make reference to the country of registry of such vessel" and to state that such vessels are not subject to American safety regulations.²⁰ Similar statutes were subsequently enacted in other coastal states, including Florida,²¹ Maryland,²² and New Jersey.²³

Waterfront opposition to Panlibhon shipping surfaced again in late

n.86, and left to the determination of individual nations exactly how the requisite control over shipboard administrative, technical, and social matters was to be exercised. See Excerpt from the testimony of Arthur H. Dean, head of the United States delegation to the United Nations Conference, reprinted in RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 28, Reporter's Note 1 (1965). The practical impact of the article on the flag of convenience fleet, therefore, has been virtually nil.

17. N.Y. Times, Dec. 2, 1958, at 1, col. 2; *id.*, Dec. 3, 1958, at 73, col. 6; *id.*, Dec. 4, 1958, at 78, col. 1; *id.*, Dec. 5, 1958, at 62, col. 5.

18. BOCZEK 79. This joint organization, named the International Maritime Workers Union, later gave rise to at least one Supreme Court case, *Inces S.S. Co., Ltd. v. Int'l Maritime Workers Union*, 372 U.S. 24 (1963), in which Justice Clark observed that its primary purpose was that of "organizing foreign seamen on foreign-flag ships." *Id.* at 25-26. *Inces* is discussed at note 56 *infra* and accompanying text.

19. See, e.g., H.R. 1204, 87th Cong., 1st Sess. (1961); H.R. 1074, 88th Cong., 1st Sess. (1963); H.R. 8315, 88th Cong., 1st Sess. (1963); H.R. 9603, 89th Cong., 1st Sess. (1965); H.R. 10799, 89th Cong., 1st Sess. (1965); S. Con. Res. 58, 90th Cong., 2d Sess. (1968); H.R. Con. Res. 640, 90th Cong., 2d Sess. (1968); H.R. Con. Res. 641, 90th Cong., 2d Sess. (1968); H.R. 4513, 92d Cong., 1st Sess. (1971).

20. CAL. BUS. & PROF. CODE § 22302 (West 1973). These statements are required to be "prominently displayed." The requirement of a statement concerning safety regulations was added in 1973.

21. FLA. STAT. ANN. § 358.08 (1968).

22. ANN. CODE MD. art. 27, § 195(b-1) (1971).

23. 2A N.J. STAT. ANN. §§ 170-77:12 to 170-77:13 (1971). These New Jersey statutes were held unconstitutional by New Jersey state courts in 1967 as an infringement upon the Congress' commerce power as granted by the federal Constitution. *Cunard S.S. Co. v. Lucci*, 92 N.J. Super. 148, 222 A.2d 522 (1961), *aff'd*, 94 N.J. Super. 440, 228 A.2d 719 (1967). None of the other state statutes, however, have been attacked on this ground.

1971 during the coast-to-coast dock strike. The International Longshoremen's Association²⁴ and the International Longshore Workers Union²⁵ struck simultaneously to shut down virtually all American ports for the first time. Partly from a desire to join their fellow unions in putting economic pressure on shipowners²⁶ and partly in response to the deteriorating employment situation in American ports resulting from increased use of foreign vessels, leaders of six other maritime unions met in late October to organize a picketing campaign at several U.S. ports directed against foreign vessels.²⁷ This campaign attempted to apprise the American public of the "substandard" nature of wages and benefits paid foreign seamen aboard these ships and the resulting injury to American maritime laborers. The pickets requested the public to refrain from patronizing such vessels.²⁸

It was this last burst of picketing activity which led to the two cases which recently engaged the attention of the Supreme Court.²⁹ Those

24. The ILA controls most maritime labor on the East and Gulf Coasts.

25. The ILWU represents maritime workers on the West Coast.

26. Other maritime unions could not legally picket or strike in support of their fellows in the ILA and ILWU because of the secondary boycott provisions in § 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 8(b)(4)(ii)(B)(1970). The other unions were not involved in the principal strike because the major issue in that dispute, the guaranteed annual income provision of the ILA and ILWU contracts, was not common to the other unions.

27. Record at 68-73, *Windward Shipping (London) Ltd. v. Am. Radio Ass'n, AFL-CIO*, 415 U.S. 104 (1974) (testimony of George P. McCartney, representative of the Seafarers International Union of North America). Among the six unions represented at the meeting was the American Radio Association, whose name appears in the subsequent cases concerning this picketing.

Testimony by Mr. McCartney indicated that the meeting was called to "attempt to take some measures to correct a desperate situation." Focusing on the deteriorating job situation of United States maritime workers, McCartney said:

It was pointed out . . . that this could be traced to the competition of foreign flag vessels, the substandard wages and conditions of these vessels, in direct competition with the American Merchant Marine; and it was felt . . . that the best possible course of action for us to follow was publicity picketing to call this to the attention of the American public, to request their support and cooperation, to ask them to patronize American ships and, in conjunction with this, to assist the American seaman.

Id. at 71.

28. The signs carried by the pickets advised the public that wages paid to foreign crewmen were "substandard" and claimed that "this results in extreme damage to our wage standards and loss of our jobs." The pickets requested that the public not patronize the picketed vessel. *Windward Shipping (London) Ltd. v. Am. Radio Ass'n AFL-CIO*, 415 U.S. 104, 107 (1974); *see also American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n*, 419 U.S. 215, 217-18 n.2 (1974).

29. *Windward Shipping (London) Ltd. v. Am. Radio Ass'n, AFL-CIO*, 415 U.S. 104 (1974) and *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n*, 419 U.S. 215 (1974).

cases, which changed the focus of prior law on the subject of NLRB jurisdiction over picketing of Panlibhon vessels, must be seen against the backdrop of earlier labor law on the subject.

II

THE QUESTION OF NLRB JURISDICTION³⁰

A. EARLY CASES

Section 2(6) of the National Labor Relations Act³¹ defines "commerce," over which the National Labor Relations Board has jurisdiction,³² as trade, traffic, commerce, transportation or communication "between any foreign country and any State, Territory, or the District of Columbia" or "through any other State or any Territory or the District of Columbia or any foreign country." The legislative history of this definition indicates that it was intended to give the NLRB all the power constitutionally delegable under the commerce clause.³³

Although the question of the Board's jurisdiction over flag of convenience fleet vessels did not arise until 1950,³⁴ the Board asserted jurisdiction as early as 1936 to determine the appropriate bargaining units for seamen on vessels traveling between the United States and foreign

30. Previous discussions of these legal questions include BOCZEK; H. MEYERS, *THE NATIONALITY OF SHIPS* 56-68 (1967); Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 SUPREME COURT REV. 34; Goldie, *Recognition and Dual Nationality — A Problem of Flags of Convenience*, 1963 BRIT. Y.B. INT'L L. 220; Note, *Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts*, 60 COLUM. L. REV. 711 (1960); Comment, *Flags of Convenience and NLRB Jurisdiction*, 60 NW. U.L. REV. 195 (1965); Note, 8 N.Y.U.J. INT'L L. & POL. 111 (1975); Note, *Labor Law, International Law and Panlibhon Fleet*, 36 N.Y.U.L. REV. 1342 (1961); Note, 8 VAND. J. TRANSNAT'L L. 239 (1974); Comment, *The Flag of Convenience Fleet*, *supra* note 12.

31. 29 U.S.C. § 152(6) (1970).

32. Under § 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a) (1970), the Board "is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce."

The Constitution of the United States grants to Congress the power to "regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 2. The power of Congress to use this clause to delegate power to the National Labor Relations Board over labor matters was upheld in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936).

33. The basic jurisdictional definitions were "based squarely on the power of Congress to regulate commerce among the several States and with foreign nations . . ." H.R. REP. No. 969, 74th Cong., 1st Sess. 8, 6 Legis. Hist. NLRA 2918 (1935). The same comment was repeated at H.R. REP. No. 972, 74th Cong., 1st Sess. 8-9, 6 Legis. Hist. NLRA 2964 (1935); H.R. REP. No. 1147, 74th Cong., 1st Sess. 10, 6 Legis. Hist. NLRA 3057 (1935).

34. *Compania Maritima Sansoc Limitada*, cited in 1 CCH LAB. L. REP. ¶ 1610.1723 (1972).

ports. The issue first arose in *Panama Railroad Co.*,³⁵ where the employer as part of its transportation business maintained four large steamships which traveled between New York, Haiti, and the Canal Zone. The NLRB found no difficulty in establishing jurisdiction; the company, it said, was "directly engaged in traffic and commerce between the United States and foreign countries" and the seamen in question were "directly engaged in such traffic and commerce."³⁶ The union involved was promptly certified.³⁷

The next year the Board followed its decision in *Panama Railroad* and took jurisdiction over ships involved in foreign commerce in *International Freighting Corp.*³⁸ and *Curtis Bay Towing Co.*,³⁹ two other representation cases. In 1940 the Board took another step, extending its jurisdiction in *American-West African Lines, Inc.*⁴⁰ to cover an unfair labor practice case in which the employer involved was in the business of international freight shipping. All these decisions were followed in subsequent cases.

Not until 1957 did the Supreme Court rule on the subject, but when it did, its decisions dealt the Board a sharp reversal.

35. 2 N.L.R.B. 290 (1936).

36. *Id.* at 292.

37. Unions are certified as bargaining agents by the NLRB following Board determination that the union represents a majority of the employees. See § 9(c) of the Act, 29 U.S.C. § 159(c) (1970).

38. 3 N.L.R.B. 692, 695 (1937).

39. 4 N.L.R.B. 360, 363 (1937).

40. 21 N.L.R.B. 691 (1940). Decisions of the NLRB relating to jurisdiction over businesses in foreign commerce were not, of course, limited to cases involving shipowners. In *The Royal Bank of Canada*, 67 N.L.R.B. 403 (1946), the Board for the first time decided a case in which the employer involved was actually a foreign corporation. The case involved a bank with its principal office in Montreal, Canada, which operated a branch in San Juan, Puerto Rico. The branch bank, the Board found, had "a close, intimate and substantial relation to trade, traffic, and commerce within the Territory of Puerto Rico" *Id.* at 417. *Royal Bank* was followed in a subsequent decision concerning a wholly owned subsidiary of a Swedish corporation which was authorized to do business in Louisiana. *Delta Match Corp.*, 102 N.L.R.B. 1400, 1401 n.2 (1953).

Another case decided in the early 1950's, although it did not involve the NLRB, is also indicative of the Board's expanding jurisdictional concepts. In *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W.2d 94 (1950), an American union in conjunction with a Canadian union picketed a Canadian ship docked at a port in the United States in an attempt to prevent a grain company incorporated in Illinois and doing business in Minnesota from dealing with the Canadian shipping firm. A state court in Minnesota issued an injunction at the grain company's request, but the Supreme Court of Minnesota disagreed since it felt that the NLRB had federal jurisdiction which would preempt the state court's jurisdiction of the case. *Id.* at 107, 46 N.W.2d at 103. For a brief discussion of the labor law doctrine of federal preemption, see note 57 *infra*.

B. THE SUPREME COURT SPEAKS: BENZ, McCULLOCH, AND ARIADNE

The first case decided by the Supreme Court on the issue of NLRB jurisdiction over ships in foreign commerce, *Benz v. Compania Naviera Hidalgo, S.A.*,⁴¹ involved a flag of convenience fleet vessel. A Panamanian ship flying a Liberian flag was docked in Portland, Oregon, when its crew members began a strike over internal matters. The crewmen named a United States union on shore as their collective bargaining representative, and the designated union and others promptly began picketing the vessel. The case arose on an attempt by the shipowner to enjoin the picketing. The Court squarely held that the NLRB lacked jurisdiction to consider the dispute. Since the controversy concerned "a foreign employer operating under an agreement made abroad under the laws of another nation,"⁴² the Court said, a jurisdictional grant would have to be found in the intentions of Congress.

The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act.

. . . .

For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision when the possibilities of international discord are so evident and retaliative action so certain.⁴³

Faced with this setback, the Board at first distinguished the case in its maritime labor decisions⁴⁴ and later fell to creating an entirely new rule which, though not in direct conflict with *Benz*, ignored its thrust. The key case, *West India Fruit & Steamship Co.*,⁴⁵ involved a Virginia corporation charged with an unfair labor practice arising out of an incident which took place in Cuban waters aboard a ship of Liberian registry carrying a crew of Cuban nationals. Taking its lead from an earlier Supreme Court case on the jurisdiction of United States courts over cases under the Jones Act,⁴⁶ the Board formulated a "balancing of con-

41. 353 U.S. 138 (1957).

42. *Id.* at 142.

43. *Id.* at 142, 147.

44. *See, e.g.*, *Peninsular & Occidental S.S. Co.*, 120 N.L.R.B. 1097, 1101 n.7 (1958).

45. 130 N.L.R.B. 343 (1961).

46. *Lauritzen v. Larson*, 345 U.S. 571 (1953). The Jones Act, 46 U.S.C. § 688 (1970), covers seamen injured in the course of their employment. In *Lauritzen* the Court, in an opinion by Justice Jackson, sought to establish guidelines for the application of the Jones Act to foreign shipping operations. Among these were the nationality of the owners, situs of the injury, country of recruitment or signing of the seamen, nationality or residence of the seamen, and the home port of the vessel. For a discussion of the *Lauritzen* case see

tacts" test to govern the question of jurisdiction. It did have jurisdiction over the case at hand, the Board held, since a strike of the ship's crew would have immediate effects on United States commerce.⁴⁷ The Board formulated the controlling question as "whether or not the facts in the present situation which constitute contacts between the operation of the [ship in question] and the United States are substantial — that is, more than minimal but not necessarily preponderant."⁴⁸ *Benz*, it said, involved greater foreign contacts than the situation it now faced, and thus was consistent with the broad principle just established.⁴⁹

For several years *West India* dominated the Board's treatment of the foreign flag jurisdictional issue, but in 1963, in two cases arising on similar facts, the Court declared that not only did the NLRB lack jurisdiction over labor disputes involving the internal affairs of foreign flag vessels, but that state courts could entertain efforts by shipowners to outlaw the picketing.

In the first of the 1963 cases, *McCulloch v. Sociedad Nacional de Marineros de Honduras*,⁵⁰ the National Maritime Union petitioned the NLRB for certification as the bargaining agent for unlicensed alien crew members employed on Honduran-flag vessels. The vessels were operated by a wholly-owned subsidiary of an American corporation, but their labor relations were governed by several provisions of the Honduran Labor Code.⁵¹ When the Board decided to exercise jurisdiction and or-

G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 472 (2d ed. 1975). The NLRB treated the case and its progeny in 130 N.L.R.B. at 354-55.

47. Said the Board:

Clearly a strike of the *Sea Level's* crew would have immediate effects within the territory of the United States, whether or not that strike occurred in Cuba or Belle Chasse [Louisiana]. It is the foreign commerce of the United States that is involved in this proceeding, and that surely is a domestic interest of the United States

130 N.L.R.B. at 352-53.

48. *Id.* at 355.

49. *Id.* at 361-63. In *Benz*, however, the Court had spoken of "the possibilities of international discord" in such situations, *see* quotation cited accompanying note 43 *supra*, and the Board in *West India* had before it a plea from the Department of State that the NLRB abstain from jurisdiction since Board treatment might violate treaty commitments. Following *West India*, moreover, protests from Panama, Liberia, and the Honduras were raised. BOCZEK 186. Despite these protests, the Board retained jurisdiction. Portions of the Department of State documents are reprinted in 9 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 27-33 (1963).

50. 372 U.S. 10 (1963). *McCulloch* was actually a consolidated treatment of three cases arising upon similar facts.

51. According to the opinion by Justice Clark, these Honduran laws established minimum qualifications for any union which might represent crew members aboard Honduran-flag vessels and also recognized the qualified Honduran union as the sole bargaining agent. *See* 372 U.S. at 14.

dered an election to be held among the seamen,⁵² both the shipowners and the Honduran union which claimed to represent the crew filed suit in lower federal court to enjoin the election. The Court unanimously⁵³ upheld their claims, and found the Board without jurisdiction. Observing that the "balancing of contacts" approach might lead the Board to "inquire into the internal discipline and order of all foreign vessels," which would be contrary to the international law doctrine that the law of the flag governs a ship's internal affairs,⁵⁴ the Court focused on the necessity of avoiding "embarrassment in foreign affairs."

. . . The possibility of international discord cannot therefore be gained. Especially is this true on account of the concurrent application of the Act and the Honduran Labor Code that would result with our approval of jurisdiction.⁵⁵

McCulloch thus reasserted the principle of *Benz* that the labor relations of a foreign vessel and her crew cannot be governed according to United States labor law.

Inces Steamship Co., Ltd. v. International Maritime Workers Union,⁵⁶ the companion case to *McCulloch*, took the ouster of NLRB jurisdiction one step further and held, in accordance with the labor law doctrine of federal preemption,⁵⁷ that a state court has jurisdiction to

52. In cases where two separate unions contest the right to act as the bargaining agent for a designated group of workers, the NLRB is empowered under § 9(c) of the Act, 29 U.S.C. § 159(c) (1970), to direct an election by secret ballot to resolve the controversy. The mechanism of section nine of the Act is discussed more fully in notes 92-93 *infra* and accompanying text.

53. The vote was 8 to 0. Justice Goldberg did not participate.

54. 372 U.S. at 19-21. For further discussion of the "internal affairs" doctrine see note 69 *infra* and accompanying text.

55. 372 U.S. at 21.

56. 372 U.S. 24 (1963).

57. The labor law doctrine of federal preemption, created and articulated in a series of Supreme Court cases of which *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) is the prime example, holds that, within the area staked out by the NLRB's monetary jurisdictional guidelines, the Board possesses exclusive jurisdiction over disputes involving activities which are "arguably" either protected or prohibited by the National Labor Relations Act, as amended. A principal corollary to this doctrine is that in cases in which the NLRB does *not* have jurisdiction, state courts may proceed to decide labor law disputes.

This doctrine is, of course, subject to some exceptions. Suits for breach of the collective bargaining agreement, for example, can be brought in state courts by aggrieved persons against either the employer or the union under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1970), whether or not the activities complained of constitute unfair labor practices. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). Persons suffering personal or property damage can maintain state court actions against unions for damages if union activity violates § 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4) (1970), under LMRA § 303, 29 U.S.C. § 187 (1970). Union members can sue their union in a state court

entertain such disputes when the NLRB is barred from doing so. This presents the puzzling anomaly that state courts can plunge into a field fraught with foreign relations while the federal National Labor Relations Board, for that very reason, cannot. In reaching such a result in *Ingres*, the Court appears to have extended established doctrine beyond its original rationale.⁵⁸

In 1969 the Court decided another flag of convenience fleet case, but this one arose on slightly different facts and the Justices, with a close eye on the essential elements of *Benz* and *McCulloch*, distinguished their prior cases and arrived at a different result. *International Longshoremen's Association, Local 1416, AFL-CIO v. Ariadne Shipping Co.*,

for damages on the theory of a breach of the duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171 (1967). And state courts may proceed under the state police power to consider questions involving labor law where an "overriding state interest" is of concern. *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1958).

These exceptions, however, are just that — exceptions — and the general principle stated above is normally applied, as in *Ingres*. For discussions of the doctrine of federal preemption see 3 CCH LAB. L. REP. ¶¶ 5505-5505.99 (1972); THE DEVELOPING LABOR LAW 785-807 (C. Morris ed. 1971).

58. The rationales of the federal preemption doctrine have been (1) to create uniformity in the field of labor law, and (2) to entrust to the agency Congress created for that purpose the job of developing nationwide rules of labor law. It would seem, therefore, that the principle that where the NLRB has no jurisdiction state courts can decide labor law issues should apply only where the cases involve matters within the cognizance of both the state courts and the Board. In most situations both the state courts and the Board are competent to deal with the issues, but *Ingres* should have been recognized as an example of a new class of cases: there the Board lacked jurisdiction because the case, which trod into matters of foreign relations, was beyond the competence of the agency. This being so, the Court should have dismissed *Ingres* from the jurisdiction of the state courts as well as the NLRB since they, presumably, are no more capable of dealing with the issue than the federal agency. Instead, the Court followed the traditional rules of federal preemption and assumed without discussion that, since the case was found beyond the realm of the Act, the state courts were competent to decide the issue. 372 U.S. at 27.

The ultimate embarrassment of *Ingres* would be for a state court to refuse to enjoin the union picketing, thus allowing an American union to gain a hold on the internal affairs of a foreign flag ship, a result which would defeat the purpose of the Court's decisions in *Benz* and *McCulloch*. Fortunately, no major case since *Ingres* has had this result; all have resulted in injunctions against the picketing. See, e.g., *Ryan v. Hirsch*, 174 Ohio St. 461, 190 N.E.2d 262 (1963); *State ex rel. Seafarer's Int'l Union of North America, Great Lakes District v. Common Pleas Court of Lucas County*, 174 Ohio St. 466, 190 N.E.2d 263 (1963); *Int'l Longshoremen's Ass'n, Local 1416, AFL-CIO v. Eastern S.S. Lines, Inc.*, 211 So.2d 858 (Fla. 1968); *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n*, 291 Ala. 201, 279 So.2d 467 (1973), *aff'd*, 419 U.S. 215 (1974). Several pre-*Ingres* cases had reached the same result, including *Fruit Dispatch Co. v. Nat'l Maritime Union of America*, 138 So.2d 853 (La.Ct.App. 1962) and *Upper Lakes Shipping, Ltd. v. Seafarer's Int'l Union of Canada*, 18 Wisc.2d 646, 119 N.W.2d 426 (1963). *Contra*, *Marlindo Campania Naviera S/A v. Seafarer's Int'l Union of North America*, 47 CCH LAB. CAS. ¶ 18,252 (1963). This criticism was also recently made in Note, 8 N.Y.U.J. INT'L L. & POL. 111, 124 (1975).

Ltd.,⁵⁹ involved peaceful picketing in Florida ports by United States unions to protest "substandard wages paid by foreign-flag vessels to American longshoremen working in American ports"⁶⁰ rather than attempts by United States unions to represent alien crewmembers, as had the prior cases. The owners of the picketed ships, a Liberian corporation and a Panamanian corporation, attempted to enjoin the picketing in the state courts, but the Supreme Court held the NLRB to have jurisdiction and thus preempt the state courts from hearing the cases.⁶¹ *Benz* and *McCulloch*, it observed, involved instances in which NLRB handling of the labor relations in question "would necessitate inquiry into the 'internal discipline and order' of a foreign vessel,"⁶² while the controversy in the case at hand was distinguishable:

The participation of some crew members in the longshore work does not obscure the fact that this dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law.⁶³

Because of this essential factual difference in the cases, the Court saw no need to bar the NLRB from jurisdiction. The Board would be dealing with American labor relations here, not the controversies of foreign ship-owners and their foreign workingmen.

The chain of Supreme Court cases beginning with *Benz* and concluding with *Ariadne*, therefore, constructed a scheme of rules which attempted to guarantee that United States labor law, which should not govern internal labor relations of foreign flag vessels,⁶⁴ would apply only

59. 397 U.S. 195 (1970).

60. *Id.* at 196. None of those doing longshore work for the ship, however, belonged to the union. *Id.* This, coupled with the fact that the pickets also distributed handbills to the effect that the ship was unsafe, *id.* at 196 n.1 (see note 21 *supra* for a citation to the Florida law authorizing such publicity), indicates that the real purpose of the picketing was to protest the overall injury to the American merchant marine rather than the wage conditions at one particular spot.

61. For a discussion of the doctrine of federal preemption in labor law, see note 57 *supra*.

62. 397 U.S. at 198.

63. *Id.* at 199 (footnote omitted).

64. This statement must be qualified to some extent with recognition of another and quite different line of cases which were decided in the 1960's and which arose on facts similar to those of the cases discussed in this Comment. In these other decisions the focus was whether or not state courts could enjoin the picketing of foreign flag vessels despite the bar of § 1 of the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. § 101 (1970), which forbids United States courts from issuing injunctions in a "labor dispute" except in certain circumstances. In 1960 the Supreme Court held that Norris-La Guardia, unlike the NLRA, did indeed apply to flag of convenience fleet situations, and that injunctions were barred. *Marine Cooks & Stewards v. Panama Shipping Co.*, 362 U.S. 365 (1960). For a

where the union was protesting economic injury to workers of this country, and not where it was attempting to influence shipboard labor relations. As a tool for making this distinction, the cases examined the possibility of conflict with foreign law.⁶⁵

C. JURISDICTION IN MARITIME LAW

While the principles of asserting or declining jurisdiction over vessels with foreign contacts are unfamiliar in the realm of labor law, they are more common to maritime law. The doctrines enunciated in the *Benz* through *Ariadne* line of cases comport very comfortably with traditional notions of maritime jurisdiction.

Under general principles of maritime jurisdiction,⁶⁶ an American court has the power to judge events of a maritime nature regardless of where

recent case along this same line, see *Port of Houston Authority of Harris County, Texas v. Int'l Organization of Masters, Mates, and Pilots, AFL-CIO*, 456 F.2d 50 (5th Cir. 1972), cert. denied, 409 U.S. 894 (1972).

65. Compare *Benz*, 353 U.S. 138, 142 (NLRB has no jurisdiction because the controversy was between "a foreign employer and a foreign crew operating under an agreement made abroad under the laws of another nation") and *McCulloch*, 372 U.S. 10, 21 (NLRB has no jurisdiction because of the "international discord" which could result from "the concurrent application of the Act and the Honduran Labor Code") with *Ariadne*, 397 U.S. 195, 200 (NLRB has jurisdiction since there was no interference which was "likely to lead to conflict with foreign or international law"). This tool of analysis is discussed in depth in section III.C.3 *infra*.

As early as 1964 lower federal courts had grasped and were applying this legal framework. In *NLRB v. Int'l Longshoremen's Ass'n*, 332 F.2d 992 (4th Cir. 1964), for example, the Fourth Circuit reviewed an NLRB complaint by a Bermuda shipping corporation to enjoin an American union from refusing to unload any ships which traded with Cuba. The union policy had been adopted at the height of the Cuban missile crisis. The court held the Board to be without jurisdiction because the case involved a political question rather than a labor dispute, but on the foreign flag issue the court decided in favor of the NLRB. *Benz* and the others, it said, "all relate to shipboard labor relations, something very different from the present case." *Id.* at 995. This same distinction was utilized in *Mountain Navigation Co., Inc. v. Seafarer's Int'l Union of North America*, 348 F. Supp. 1298 (W.D.Wisc. 1971), which involved picketing by American unions of Liberian flag vessels in protest of the economic damage suffered by United States workingmen. Concluding that the NLRB had jurisdiction in that case, the court noted that:

Ariadne confined the *McCulloch* and *Inces* holdings to the proposition that the NLRA does not apply to foreign vessels with foreign crews *only* in those situations where an American union attempts either to organize and represent the foreign crew or to aid the crew in a dispute involving the internal discipline and order of a foreign vessel. In other respects, the NLRA does apply to matters relating to foreign ships with foreign crews.

Id. at 1302 (emphasis in original).

66. For a discussion of maritime jurisdiction, see G. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 14-54 (1939) [hereinafter cited as ROBINSON]. An excellent summary of maritime jurisdictional principles can also be found in 7A J. MOORE, MOORE'S FEDERAL PRACTICE ¶¶ .190-.244 (2d ed. 1972).

the events may have occurred,⁶⁷ and may retain such jurisdiction so long as the court in its discretion feels that justice will be served.⁶⁸ There is no immunity from the jurisdiction of United States courts for privately owned vessels in American waters. To this rule, however, there is one exception: in matters involving the "internal affairs" (or "internal economy") of a foreign vessel, United States courts normally will not take jurisdiction.⁶⁹

According to the "balancing of interests" approach to the application of admiralty law,⁷⁰ United States courts will even take jurisdiction over maritime lawsuits between foreigners, although a certain amount of discretion is exercised in these cases.⁷¹ And a court may decline jurisdiction by use of *forum non conveniens*.⁷² The question of whether the matter is governed by foreign law is one of the primary considerations in the exercise of this discretion.⁷³ In accordance with admiralty jurisdic-

67. ROBINSON 15. Robinson cites pertinent cases at 15-20. In personam or quasi in rem jurisdiction must exist before judgment can be rendered, of course, but as far as the subject matter is concerned American admiralty courts have jurisdiction over all contracts of a maritime nature and all torts occurring on navigable waters. MOORE, *supra* note 66, at ¶ .200[2].

68. For a discussion of the use of the discretionary principle in admiralty cases, see notes 71-74 *infra*.

69. ROBINSON 20. This doctrine is closely associated with a provision in many treaties between the United States and other nations that the local consul has jurisdiction over these "internal economy" cases rather than domestic courts. *Id.* at 20. Whether the principle has a force independent of those treaty provisions is unclear, although the source cited indicates that the doctrine stands on its own.

In certain cases involving criminal actions aboard foreign ships docked in American ports, domestic courts have cast aside the "internal economy" limitation and taken jurisdiction over the prosecution since the incident has disturbed the "public peace." *Wildenhuis' Case*, 120 U.S. 1, 18 (1888).

70. 2 C.J.S. *Admiralty* § 12 (1972). See also *Lauritzen v. Larson*, 345 U.S. 571 (1953), discussed at note 46 *supra* and accompanying text.

71. This important principle received Supreme Court blessing in *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 457 (1869):

. . . it seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, but the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.

Sixteen years later in another case the Court said that

. . . the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong

The Belgenland, 114 U.S. 355, 365 (1885).

72. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 51-52 (2d ed. 1975).

73. In *The Belgenland*, 114 U.S. 355 (1885), the Court noted that one of the major factors in the balance was whether the question was "governed by the laws of the country to which the parties belong" *Id.* at 363.

tion, American courts have retained lawsuits involving foreign flag vessels, including flag of convenience fleet ships, where no substantial injustice would result.⁷⁴ Where the legal questions are based entirely on foreign law, however, jurisdiction may be declined.⁷⁵

Consonant with this broad maritime jurisdiction, Congress has since the late decades of the nineteenth century supported laws designed to hinder foreign competition to American shipping operations. Some of these provisions impose absolute bans on certain operations by foreign ships, such as transporting passengers between United States ports,⁷⁶ dredging in United States waterways,⁷⁷ or carrying cargo from one place to another in this country.⁷⁸ Others merely impose regulations, thus

74. See, e.g., *Usatorre v. The Victoria*, 172 F.2d 434 (2d Cir. 1949) (District Court has discretion to retain jurisdiction over dispute between Argentine crew members and Argentine shipowner for salvage and wages); *Kloekner Reederei und Kohlenhandel, G.m.b.H. v. A/S Hakedal*, 210 F.2d 754 (2d Cir. 1954), *appeal dismissed*, 348 U.S. 801 (1954) (District Court abused discretion by declining jurisdiction over suit between German cargo owner and Norwegian corporation where the alternative forum would be inconvenient for a witness); *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*, 239 F.2d 463 (5th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957) (District Court abused discretion in declining jurisdiction over controversy between foreign nationals arising out of collision on high seas where there was no showing that taking of jurisdiction would have worked an injustice); *Burie v. Overseas Navigation Corp.*, 205 F. Supp. 182 (S.D.N.Y. 1962), *aff'd per curiam*, 323 F.2d 873 (2d Cir. 1963) (District Court may retain jurisdiction over case involving discharged seamen and a foreign flag vessel when libellants' remedy in another forum is uncertain); *Volkswagen of America, Inc. v. S.S. Silver Isle*, 257 F. Supp. 562 (D. Ohio 1966) (District Court was within discretion in retaining jurisdiction over suit by U.S. nationals against a Canadian vessel for damage to cargo in absence of showing by respondents that they would be deprived of substantial justice in a United States court); *Petition of Chadade Steamship Co.*, 266 F. Supp. 517 (D. Fla. 1967) (District Court had jurisdiction over case where Panamanian shipping company asserted limitation of liability following incident in which the ship burned and sank); *Poseidon Schiffart, G.m.b.H. v. M/S Netuno*, 361 F. Supp. 412 (S.D.Ga. 1973) (District Court refused to decline jurisdiction in action between foreign parties over collision between foreign vessels where no special circumstances affirmatively established that retention of jurisdiction would work an injustice).

75. See, e.g., *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930) (District Court may decline jurisdiction in case between British corporations for recovery of general average deposit where English law would govern).

76. 46 U.S.C. § 289 (1970), first passed in 1866, prohibits foreign vessels from transporting passengers between U.S. ports "under a penalty of \$200 for each passenger so transported or landed." This provision was designed to prevent foreign companies from competing with American operators for the passenger trade in this country. See *The Granada*, 35 F. Supp. 892 (E.D.Pa. 1940).

Two other sections, however, 46 U.S.C. §§ 289a and 289b (1970), establish a limited exception for Canadian vessels in cases where no American flag passenger service exists.

77. 46 U.S.C. § 292 (1970), first passed in 1906.

78. 46 U.S.C. § 883 (1970). This section bars such carriage "in any other vessel than a vessel built in and documented under the laws of the United States . . ." Similar provi-

increasing the cost to foreign shipowners,⁷⁹ or assess discriminating duties on goods transported in foreign flag bottoms.⁸⁰ Regardless of the nature of their effect, however, these laws represent a willingness on the part of American lawmakers to extend the reach of our legal system to cover foreign shipping operations in the interest of protecting the livelihood of United States laborers.⁸¹

Under traditional maritime law, acts of Congress, and the *Benz* through *Ariadne* interpretations of United States labor law, therefore, it was until recently recognized that this country would not hesitate to resolutely apply its own law to foreign shipping operations where the essence of the matter was the welfare of American workingmen, and not the private business of foreign companies.

D. RECENT DEVELOPMENTS: WINDWARD SHIPPING AND MOBILE STEAMSHIP

Not until 1974 did the scheme of labor law jurisdiction outlined in the *Benz* through *Ariadne* decisions show any signs of instability. In that year the Supreme Court in two major cases dramatically changed the rule of law in this area and developed a major new test, the ramifications of which are still uncertain.

Both of the 1974 cases arose out of the 1971 multi-union picketing campaign of Gulf and West Coast ports in protest of the competition for work opportunities presented by flag of convenience fleet vessels.⁸² This effort engendered attempts by foreign shipowners in both Houston, Texas and Mobile, Alabama to enjoin the picketing. The Houston case reached the Supreme Court first.

In *Windward Shipping (London) Ltd. v. American Radio Association, AFL-CIO*,⁸³ the Supreme Court held that the Texas state courts, and not the National Labor Relations Board, had jurisdiction to consider the dispute. In an opinion by Justice Rehnquist, the Court recognized that the picketing activities before it "do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and

sions were passed as early as 1898. The purpose is to protect the American merchant marine from foreign competition. See *Marine Carriers Corp. v. Fowler*, 429 F.2d 702 (2d Cir. 1970), cert. denied, 400 U.S. 1020 (1971).

79. 46 U.S.C. §§ 313-15 (1970).

80. 19 U.S.C. § 128 (1970). Unless overridden by a treaty, this section imposes a ten percent *ad valorem* duty on goods imported in vessels "not of the United States." The intent is to secure for American vessels the sea cargo business. See 21 OP. ATT'Y GEN. 597 (1897).

81. On the purposes of the federal statutes, see the cases and opinions cited in notes 76-78 and 80 *supra*.

82. For a description of this picketing campaign, see notes 24-28 *supra* and accompanying text.

83. 415 U.S. 104 (1974).

Inces," but said that the prior cases had not exhausted the definition of "the threshold of interference with the maritime operations of foreign vessels" which would define the parameters of NLRB jurisdiction.

The Court then articulated a new basis for decision in foreign flag ship cases. Since the picketing by American unions was an attempt to "exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers," the Court said, the accomplishment of the unions' aim would undoubtedly have "more than a negligible impact" on the foreign ships' operations here and throughout the world. Regardless of whether the reaction of foreign shipowners would be to boycott American ports or to raise the wages of their crewmen, and therefore their overall costs, the economic effects extended beyond United States borders. Concluded the Court:

Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefitting American workmen which the LMRA [Labor Management Relations Act] was designed to regulate. This case, therefore, falls under *Benz* rather than *Ariadne*.⁸⁴

Windward Shipping thus stands for the proposition that it is not only the possible conflict with the internal affairs of foreign vessels but also the scope of the economic impact of the picketing involved which determines NLRB, and thus state court, jurisdiction.

Having lost their argument in *Windward Shipping* that picketing of foreign flag vessels was protected under the National Labor Relations Act and was as a result within the jurisdiction of the NLRB, the six unions involved took the opposite approach and argued in the Mobile, Alabama case that the picketing was *prohibited* by the Act and, therefore, that the Board should be held to have jurisdiction for that reason.⁸⁵

84. *Id.* at 114 (footnote omitted). The Labor Management Relations Act, 61 Stat. 136 (1947), otherwise known as the Taft-Hartley Act, amended the National Labor Relations Act, 49 Stat. 449 (1935), by adding the section 8(b) provisions for union unfair labor practices. *Windward Shipping*, which involved a protest against union activity, would have been decided under those amendments had it been within the jurisdiction of the NLRB.

Justice Brennan, joined by Justices Douglas and Marshall, dissented in *Windward Shipping* on the ground that "the Court effectively deprives American seamen, among all American employees in commerce, of any federally protected weapon with which to try to save their jobs." 415 U.S. at 116. Reviewing the *Benz* through *Ariadne* line of decisions, Brennan concluded that *Ariadne* was the controlling precedent:

Respondents' target is to persuade shippers not to patronize foreign vessels, and respondents have no concern with the form of the shipowners' response that makes their efforts succeed.

Id. at 121.

85. Under the language of the *Garmon* decision on federal preemption, see note 57

In *American Radio Association, AFL-CIO v. Mobile Steamship Association, Inc.*,⁸⁶ the Court, in another opinion by Justice Rehnquist, rejected these arguments as well. Although the *Mobile Steamship* litigation was instituted primarily by stevedoring companies seeking to service the foreign ships,⁸⁷ rather than by the foreign shipping companies themselves, as was the case in *Windward Shipping*, the Court thought this difference was of no consequence.

While we . . . spoke in *Windward* of the effect of Houston pickets on the maritime operations of foreign ships, . . . we fully recognized that this effect would not be produced solely by the pickets and the messages carried by their signs. It would be produced in large part by the refusal of American workmen employed by domestic stevedoring companies to cross the picket line in order to load and unload cargo coming to or from the foreign ships.⁸⁸

Thus, the Court held, employers of workers who obeyed the picket line and refused to service foreign flag ships were not "in" commerce within the meaning of the National Labor Relations Act any more than were the foreign flag shippers themselves. The employers' "response," the Court said, was "a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected."⁸⁹ Under the rationale of *Windward Shipping* as amplified by *Mobile Steamship*, therefore, no union or employer whose members or employees might respond in ways which could affect the economic interest of foreign flag ships falls under the NLRA definition of "commerce," and thus within National Labor Relations Board jurisdiction.

Windward Shipping and *Mobile Steamship*, taken together, represent

supra, acts either protected or prohibited by the NLRA or its amendments are exclusively within the realm of the NLRB.

86. 419 U.S. 215 (1974).

87. The *Mobile Steamship Association, Inc.*, is the collective bargaining agent for several stevedoring companies in the Mobile area. It originally brought suit in an Alabama state court seeking to enjoin the picketing of the foreign flag vessels since its workers had refused to cross the picket lines and had disrupted the companies' business at the port. A Mobile County farmer seeking to ship his soybeans was also allowed to intervene as a plaintiff. *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n*, 291 Ala. 201, 204, 279 So.2d 467, 469 (1973).

88. 419 U.S. at 224.

89. *Id.* The Court in *Mobile Steamship* also disposed of two constitutional questions raised by the unions and decided that the state's injunction against the picketing violated neither the first nor the fourteenth amendments since the state was enforcing a valid public policy and the picketing was for a prohibited purpose.

Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, dissented, primarily on the ground that the case involved a secondary dispute between the stevedoring companies and the union and should be within the province of the NLRB under the *Ariadne* decision. *Id.* at 237.

a dramatic departure from the principles established in the *Benz* through *Ariadne* line of cases. The focus on the possible economic effects of union activity and employers affected by such activity encompasses situations that, under the old test, would never have been of concern. A primary strike in this country of unionized manufacturers of factory equipment, for example, might well produce adverse secondary economic consequences for foreign flag shippers who would otherwise be transporting the articles abroad. They could be forced to limit their operations, lower wages, or even stop calling at certain ports altogether, and under the recent cases, the Court could bar the NLRB from considering the dispute. A primary strike of longshoremen would have an even more direct impact; it could well force foreign flag operators to curtail their operations for a considerable length of time. Again, the NLRB could be ousted from jurisdiction. By extending the rationale a step further, the Court could conclude that the mere certification of an American union among domestic maritime workers could lead to union activity which would adversely affect such shipping operations and extend beyond "the sort of wage-cost decision the LMRA was designed to regulate."⁹⁰ Thus, even that innocuous activity could be beyond the Board's realm.

It is reasonable, of course, to assume that the Court when presented with future cases on this problem will develop distinctions which cut the extension of *Windward Shipping* and *Mobile Steamship* somewhat short of the results contemplated here. Until it does, however, lower courts are left to struggle with a test and supporting language so broad that, until the limits are better defined, virtually all maritime labor activities may be left to the state courts rather than to the NLRB.⁹¹

The awkwardness of the Court's new approach, moreover, reveals a more fundamental flaw in the Court's historic treatment of this problem. In a world where national economies are international in scope rather than confined within national boundaries, and where the labor relations of one enterprise may have substantial impact upon those of another, foreign enterprise, perhaps limited and inward-looking con-

90. *Windward Shipping (London), Ltd. v. Am. Radio Ass'n, AFL-CIO*, 415 U.S. 104, 115 (1974).

91. This situation creates a special exception for maritime labor disputes which does not apply to other types of labor conflicts which may affect international operations. Labor relations in the airline industry are governed by the National Railway Labor Act, 45 U.S.C. §§ 151-63, 181-88, and the National Mediation Board (NMB) established thereunder. Several cases have held that the NMB has jurisdiction to consider labor disputes concerning airlines which have at least some flights in the United States. *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685 (D.C.Cir. 1951); *Air Line Stewards & Stewardesses v. Northwest Airlines*, 267 F.2d 170 (8th Cir. 1959). There is no substantial difference between the jurisdictional principles governing the NLRB and the NMB.

cepts of jurisdiction are no longer so practical. Until a truly multinational system of law is developed, of course, no one national legal scheme can decide international cases, but individual legal systems can, with imagination, undertake to consider a number of competing factors and decide to apply their law in cases of international scope whenever the rights of other legal systems are not infringed. The Court, in deciding the foreign flag shipping cases, should try to develop such a principle rather than key its analysis on more limited considerations. It is to this problem, therefore—the question not of what the jurisdictional rules have been, but of what they should be—that we must now turn.

III

IN SEARCH OF A BETTER RULE

A. EFFECT OF NLRB JURISDICTION

The first and most obvious consideration which an American court must balance when faced with a flag of convenience fleet case is the effect which application of United States labor law would have upon the foreign parties to the dispute.

If an American labor union attempts to organize the alien crew of a foreign flag ship in the hopes of becoming its bargaining representative, the resulting conflict between employer and union is handled through the mechanism of section nine of the National Labor Relations Act.⁹² Under this series of provisions, unions wishing representation and employers desiring to resolve claims among competing unions may petition the Board for assistance and the matter will be resolved by means of an NLRB-supervised election among the employees.⁹³ If a union is certified as the bargaining representative, both union and employer have a duty to “meet at reasonable times and confer in good faith”⁹⁴ with one another over mandatory subjects⁹⁵ of bargaining. Actions by an employer tending to frustrate the operation of this mechanism, coerce employees in the exercise of their right to bargain collectively, and to refuse to bargain with a certified union are among those activities which can be

92. 29 U.S.C. § 159 (1970).

93. 29 U.S.C. § 159(c)(1) (1970). An essential prerequisite to such an election, according to this section, is that the Board have “reasonable cause to believe that a question of representation affecting commerce exists” The elections are conducted by secret ballot.

94. This obligation is contained in § 8(d) of the Act, 29 U.S.C. § 158(d) (1970).

95. Defined in the above section as “wages, hours, and other terms and conditions of employment” *Id.* An entire body of law has developed on the question of what subjects are “mandatory” items under this language. See 2 CCH LAB. L. REP. ¶ 3020 at 7609-11 (1972).

labeled unfair labor practices by the Board⁹⁶ and made the occasions for NLRB sanctions to be enforced in federal court.⁹⁷

Because of the close and direct involvement of the Board in this important stage of the collective bargaining relationship, the impact of United States labor law on a foreign flag shipper in this situation would be quite immediate. His actions during the course of an election campaign, if found discriminatory, could lead to a Board injunction or invalidation of an employer victory at the ballot box. A refusal to deal with the certified union might result in a bargaining order from the Board. And, of course, any contest of these sanctions would involve him in litigation in American federal courts. No more immediate a business interest exists for an employer than his economic relationship with his workers, and interference with this aspect of a foreign flag vessel's operations would invade the very essence of the internal economy of the vessel.⁹⁸ Traditional principles of comity⁹⁹ and maritime jurisdiction¹⁰⁰ bar the application of United States labor law in this situation, where its impact upon the foreign flag shipper is so far-reaching.

In other circumstances, however, the extent of NLRB supervision over the bargaining relationship is not so extensive, and the question of the Board's jurisdiction becomes much more difficult. Suppose, for example, that a United States union pickets a flag of convenience fleet vessel in support of efforts by the ship's own crew to organize themselves for collective bargaining purposes. Such activity would likely be a violation of labor law principles¹⁰¹ and could therefore be enjoined by the Board.¹⁰² In order to obtain this result, however, the shipper, if the Board had jurisdiction, would have to file a complaint and present his arguments in that forum. Under current law, by contrast, the employer, under *Ingres*,¹⁰³ must resort to a state court instead of the NLRB and present his case under theories of traditional tort law¹⁰⁴ rather than labor law.

96. Section 8(a) of the Act, 29 U.S.C. § 158(a) (1970), establishes five categories of unfair labor practices for employers. Unions, of course, can be guilty of unfair labor practices as well. These are enumerated in section 8(b), 29 U.S.C. § 158(b) (1970).

97. Under § 10(e), 29 U.S.C. § 160(e) (1970), the Board may petition a United States Court of Appeals for enforcement of its orders.

98. Comment, *The Flag of Convenience Fleet* 514.

99. See notes 111-14 *infra* and accompanying text.

100. See section II.C. *supra*.

101. Section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4) (1970), the so-called "secondary boycott" provision, makes illegal union coercion for the purpose of forcing an employer to bargain with an uncertified union.

102. The Board has authority to issue injunctions under §§ 10(a) and (c), 29 U.S.C. § 158(a) and (c) (1970).

103. See notes 56-58 *supra* and accompanying text.

104. Foreign flag shippers have generally obtained injunctions from state courts on the theories that the picketing interferes with the business affairs of the vessel and disturbs

Although the substantive legal argument would change under NLRB jurisdiction, the involvement of the foreign flag shipper in United States tribunals and the probable result of the effort would be identical under either alternative. Rather than being on a different footing than American employers¹⁰⁵ the shippers in question would enjoy no more extensive protections than those available to their domestic counterparts. Moreover, it would be they who would be seeking the assistance of American labor law, rather than having such provisions forced upon them. In this type of situation, therefore, the effect of the United States labor scheme would not be so pervasive as in the first example, and the jurisdictional question might well hinge on factors other than the mere effect of NLRB treatment.

Finally, consider a situation such as that presented in *Windward Shipping and Mobile Steamship*,¹⁰⁶ where an American union pickets foreign flag vessels not to interfere with their labor relations, but to protest declining employment opportunities for United States workers because of foreign flag competition. Again it is the shipper who would seek legal protection, not the union. In the hands of the state court, an injunction barring the picketing would surely issue.¹⁰⁷ Before the NLRB, the case would involve complicated arguments of substantive labor law, thus perhaps presenting the union with a somewhat more favorable forum. Nonetheless, the likelihood is that an injunction would issue from the Board as well.¹⁰⁸ As was the case in the previous example,

existing contractual relationships. For a thorough discussion of these points, see the state court opinion in *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n*, 291 Ala. 201, 279 So.2d 467 (1973). See also the cases cited in note 58 *supra*.

105. Comment, *The Flag of Convenience Fleet* 520.

106. Discussed in part II.D. *supra*. See also notes 24-28 *supra* and accompanying text.

107. In virtually all state court cases since *Inces*, where the state tribunal is clearly held to have jurisdiction rather than the NLRB, the court has issued an injunction against the picketing on the authority of the tort law doctrines mentioned in note 104 *supra*. The cases are collected in note 58 *supra*.

108. Such picketing on the surface would appear to be illegal under §§ 8(b)(4)(ii)(C) and 8(b)(7)(C) of the Act, 29 U.S.C. §§ 158(b)(4)(ii)(C) and 158(b)(7)(C) (1970), which prohibit unions from forcing an employer to bargain with a non-certified union or recognize a union which has not petitioned with the Board. In *Int'l Hod Carriers Union, Local No. 41 (Calumet Contractors Ass'n)*, 133 N.L.R.B. 512 (1961) and *Houston Bldg. & Constr. Trades Council (Claude Everett Constr. Co.)*, 136 N.L.R.B. 321 (1962), however, the Board held that in cases where the union picketed to protest wages paid by employers which were substandard to those paid by other employers in the area whose employees were represented by the picketing unions, such picketing was not organizational picketing within the meaning of those sections. This, rather, was "area standards" picketing protected by the Act. Whether the union picketing in a case such as that in our hypothetical would qualify as "area standards" picketing is questionable. Even if that hurdle were passed, however, the picketing would still have to surmount the tests of *Sailor's Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950), designed to ensure that the

therefore, the actual effect of the NLRB handling of the case is that it moves the foreign flag shipper's lawyers from one legal forum to another — an impact not so devastating as to make the jurisdictional issue turn on this consideration alone.

In summary, only in the first of the three situations above — where an American union is attempting to organize and represent a foreign crew — is the involvement of the NLRB in the shipper's internal affairs so complete as to require a rejection of Board jurisdiction on this consideration alone. In the other examples it is the employer, and not the union, which will seek from the Board a declaration of unfair labor practices. The worst that could happen under NLRB jurisdiction, from the foreign flag shipper's point of view, would be for the Board to refuse to enjoin the picketing. This would result in economic pressure placed on foreign enterprises on behalf of American workers—an activity practiced for many years by the government itself¹⁰⁹ and by no means a violation of international law.¹¹⁰

B. OTHER CONSIDERATIONS

Where the results of possible NLRB jurisdiction are not conclusive on the question of whether or not such jurisdiction should be allowed, other factors must come into play as well. Principal among these are considerations of international comity, the extent to which the dispute involves questions of foreign relations, and the desire of uniformity in labor law.

International comity consists not of binding rules but of practices undertaken by states out of what one international law author has called "politeness, convenience and goodwill."¹¹¹ Under rules of international comity, one nation will generally extend recognition within its own territory to the legislative, executive and judicial acts of another.¹¹² Ameri-

picketing specify the primary dispute and avoid implications of secondary pressure, before it could be held legal under the Act. For a general discussion of the labor law applicable to secondary picketing, see 1 CCH LAB. L. REP. ¶ 1436 (1972).

109. See, e.g., the federal statutes enacted to protect American maritime workers from foreign competition discussed in notes 76-80 *supra* and accompanying text. Virtually every American tariff, of course, can be cited as an example of this kind of pressure. A more notorious such act was the 1973 Arab oil embargo against the United States, Britain, and other countries.

110. Oppenheim, for example, observes that "no special right or rights of intercourse between the States exist according to the Law of Nations," and concludes that where states interfere with international trade they "do not act in contravention of International Law." 1 L. OPPENHEIM, INTERNATIONAL LAW 321, 323 (8th ed. Lauterpacht 1955).

111. *Id.* at 34.

112. Comity is, as one United States court has recently said, "a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws." *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 433 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

can courts have long followed the doctrine,¹¹³ but have also recognized that it may be withheld where its acceptance would be contrary to the interests of this country.¹¹⁴ In foreign flag shipping cases, there is always a possibility that the foreign vessels' economic interests may be protected under the governmental policy of foreign states.¹¹⁵ Where such protection exists, the jurisdictional question may depend on a balance between comity considerations and the interest of domestic workers involved. While the policy of respect for the actions of foreign governments is important, it should not take precedence over a national interest in the protection of maritime workers, if indeed the court finds such an interest.

A second factor, closely related to the first, is the extent to which the dispute involves questions of foreign relations. Where the politics of diplomacy are of concern, courts in this country have traditionally been very reluctant to interfere with the processes of coordinate branches of government,¹¹⁶ and the foreign flag shipping situation should present no exception. As the Court has recognized, however, some aspects of international law "touch more sharply on national nerves than do others," and where an issue is relatively less important for our foreign relations, the justification for deference to the political branches is correspondingly weaker.¹¹⁷ The place at which the instant cases come to rest on this sliding scale is open to question, but should it be near the point of

One of the better statements of comity principles is the following by Judge Andrews of the New York Court of Appeals:

Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship. It assumes the prevalence of equity and justice. Experience points to the expediency of recognizing the legislative, executive and judicial acts of other powers. We do justice that justice may be done in return.

Russian Socialist Federated Soviet Republic v. Cibarío, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923). See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40, Reporter's Note 2 (1965).

113. See generally *Hilton v. Guyot*, 159 U.S. 113 (1895).

114. See, e.g., *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971). An example of such a policy is the refusal of American courts, despite principles of comity, to enforce the penal and revenue laws of other states. OPPENHEIM, *supra* note 110, at 328 & n.4. For a detailed discussion of this matter, see Note, *A New Approach to the Act of State Doctrine: Turning Exceptions Into the Rule*, 8 CORNELL INT'L L.J. 273, 281-86 (1975).

115. For example, Liberia contended in an amicus brief filed with the Supreme Court in the *Windward Shipping* case that an approval of NLRB jurisdiction would conflict with provisions of its own statutes. Similar arguments on behalf of foreign nations have been advanced before the NLRB by the State Department. See note 49 *supra*.

116. This reluctance was demonstrated in the very first flag of convenience fleet dispute decided by the Supreme Court, the *Benz* case. See note 43 *supra* and accompanying text.

117. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

exclusivity a court may find this factor controlling in the question of NLRB jurisdiction.

A final consideration may weigh into the balance in support of the other side. It is undisputed that in the interests of predictability and equality of treatment, labor law questions should be treated by means of a uniform national system of law;¹¹⁸ any limitation of National Labor Relations Board jurisdiction should be carefully scrutinized with this value in mind. The instant cases, presenting as they do possible exceptions to such a concern, could turn in a close situation on the interests of labor law uniformity.¹¹⁹

These factors are only facets of a much more basic principle which, because of the countervailing considerations on both sides, should govern the question of how far national jurisdiction should extend over activities which have international ramifications. It has long been recognized that each nation has the right to govern the activities of its own citizens, and even to extend the reach of its laws into other territories where acts harmful to it are being perpetrated.¹²⁰ The converse of that

118. The need for national labor law uniformity, in fact, was one of the major reasons for the creation of the National Labor Relations Board. A prominent illustration of the uniformity principle in operation is the doctrine of federal preemption, discussed in note 57 *supra*.

119. An additional factor, less obvious than the others but nonetheless important, is the ability of labor unions to react on a multinational level to the concerted activity of corporations and groups of corporations across national boundaries. It has become clear that multinational corporations have the capacity and willingness to shift production among their various national plants to maximize their bargaining effectiveness. Seham, *Transnational Labor Relations: The First Steps Are Being Taken*, 6 *LAW & POLICY IN INT'L BUSINESS* 337, 343 (1974); see also Comment, *National Labor Unions v. Multinational Corporations: The Dilemma of Unequal Bargaining Power*, 11 *COLUM. J. TRANSNAT'L L.* 124, 125 (1972); M. BROOKE & H. REMMERS, *THE STRATEGY OF MULTINATIONAL ENTERPRISE* 287-90 (1970). National labor unions, however, have not been able to deal on a multinational level with such corporations, and a major reason for this inability has been that "national laws on the subject have never before been applied in a transnational setting . . ." Seham, *Transnational Labor Relations*, *supra*, at 358-59. The need for workable conflict of laws rules in the international labor sphere, thus, has never been more paramount. By applying United States labor laws in the foreign flag cases, American courts could begin to clarify the question of which law governs.

120. *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 18 (1965) (a state may prescribe a rule of law to attach sanctions to conduct occurring outside its territory if the conduct has substantial adverse consequences within the state); 1 C. HYDE, *INTERNATIONAL LAW* § 241 *et seq.* (2d rev. ed. 1945). This principle has often been invoked by United States courts. For example, in *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944), the court held that the Federal Trade Commission has the power to issue cease and desist orders when it discovers unfair trade practices being committed by American businessmen doing business in Latin America. Said the court:

The right of the United States to control the conduct of its citizens in foreign countries in respect to matters which a sovereign ordinarily governs within its own

precept should also be true: where it is a legal protection which is sought, rather than a legal sanction, the jurisdiction of the protecting country should extend far enough to afford that protection, so long as similar rights of other states are not infringed.¹²¹ Any jurisdictional coverage short of that point fails to uphold national interests in areas where there is no real danger from doing so.

C. THE TESTS FOR JURISDICTION

Application of the above principle to flag of convenience fleet cases is extremely difficult. The gray area between permissible and impermissible jurisdiction is so broad that the rule is unworkable without specific tests to assist in the line-drawing.¹²² Of the factual and legal tests which can be utilized for this purpose, three seem to be the most useful: identifying the parties to the dispute, discovering the intentions of the union in undertaking its actions, and examining possible conflicts with foreign or international law.

territorial jurisdiction has been recognized repeatedly . . . Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done by citizens outside the territorial limits of the United States.

Id. at 35. This was neither an invasion of the sovereignty of other countries nor an "attempt to act beyond the territorial jurisdiction of the United States."

For similar holdings, see *SEC v. Briggs*, 234 F. Supp. 618 (N.D. Ohio 1964) (upholding jurisdiction over a United States citizen served in Canada for violation of registration and anti-fraud provisions of American securities laws) and *Scotch Whiskey Ass'n v. Barton Distilling Co.*, 489 F.2d 809 (7th Cir. 1973) (holding that the court had jurisdiction in a trademark case involving international commerce). *But see* the RESTATEMENT, *supra*, at § 38, Reporter's Note 1.

121. *Cf.* Charter of the Organization of American States, art. 9, April 30, 1948, [1948] 2 U.S.T. 2394, T.I.A.S. No. 2361, entered into force Dec. 13, 1951, where it is said that each State has the right to defend itself, to "provide for its preservation and prosperity," to legislate its laws and "administer its services," and to "determine the jurisdiction and competence of its courts," but that "[t]he exercise of these rights is limited . . . by the exercise of the rights of other States in accordance with international law." A similar principle was stated in *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941):

. . . [T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.

See also *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-87 (1952); *Scotch Whiskey Ass'n v. Barton Distilling Co.*, 489 F.2d 809, 812 (7th Cir. 1973).

122. While the following tests are meant to provide assistance in the determination of jurisdiction, we should carefully note that they are mere tools and nothing more. The real principle is still that which is articulated in the text, and any attempt to substitute simple tests for broad principle will lead to mistaken analysis and disserve the interests of a workable jurisdictional rule.

1. Parties to the Dispute

Where the parties to a flag of convenience labor dispute are all American, as in *Mobile Steamship*,¹²³ the interests at stake are paramount for the domestic litigants but are likely to be minimal to the foreigners involved. It is the United States litigants who have either sought the forum or chose to defend themselves in it, and it is they, and not the foreign shippers, who will be directly affected by its decision.

Concomitantly, litigation involving a foreign flag shipping company as a direct party in interest is far more likely to have immediate effects upon that party's internal affairs. Subject as it would be to the variety of orders which can be issued by the National Labor Relations Board — and punishment by contempt for refusing to obey an order which is enforced¹²⁴ — the internal affairs of the shipping company would to a large extent be in the hands of American law. This, of course, would conflict with the right of the company's own country to prescribe legal rules governing such matters, and thus would be a violation of the jurisdictional principle proposed above.

2. Intentions of the Union

A union design to represent and become the collective bargaining agent for alien crewmembers is far more likely to lead to litigation involving American forums in the private affairs of foreign shipowners than is a union picketing campaign which is meant only to publicize declining job opportunities for domestic workers.¹²⁵ If the union has undertaken its picketing with an intent to involve itself with the working relationship between the shipping company and its crew so much that the company will at some time be forced to bargain with the union, then any sanction the NLRB might give that activity would permit a disruption of the ship's internal affairs by American labor law. On the other hand, if such an intention is not present, the Board should be able to take the dispute and judge it on its merits without fear that internal disruption will result.

123. See notes 86-89 *supra*.

124. Where the orders of the NLRB are enforced by one of the United States Courts of Appeals, see note 97 *supra*, disobedience of them is punishable by means of contempt, as is the case with any other order of the court.

125. In *Mountain Navigation Co., Inc. v. Seafarer's Int'l Union of North America*, 348 F. Supp. 1298 (W.D. Wisc. 1971), the court formulated the distinction between *Benz* and *Ariadne* in terms of whether or not an American union "attempts . . . to organize and represent the foreign crew" or aid the crew in an internal dispute. See the quotation in note 65 *supra*.

3. Conflicts with Foreign or International Law

As early as 1957, in the *Benz* case, the Supreme Court thought that "possibilities of international discord" presented a major obstacle to NLRB jurisdiction in foreign flag shipping cases. By 1963, in *McCulloch*, concurrent application of foreign and American law was thought to prohibit jurisdiction. The 1969 *Ariadne* decision held the other way, at least in part, because no likely conflict was found with foreign or international law.¹²⁶

Where the possibility of conflict with foreign law exists, the likelihood of an infringement upon a foreign nation's right to protect its own citizens increases. The mere possibility, however, should not block such jurisdiction.¹²⁷ Rather, a court should engage in a complete search of the relevant foreign and international law to determine whether such discord in fact exists. If so, jurisdiction is likely barred. If not, there is no reasonable barrier, at least on this ground, to an extended application of United States labor law.

In order to fully evaluate all possible conflicts, a court utilizing this tool of analysis should examine three separate bodies of law: (1) the labor law of the foreign nation in question, (2) the basic "public policy" of that nation's law, especially its labor law,¹²⁸ and (3) rules of international law which may possibly be controverted.

Examination of the relevant foreign law should not be difficult. Although foreign law was for many years treated in United States courts as a question of fact to be proven by the parties,¹²⁹ recent state statutes¹³⁰

126. See note 65 *supra*. The foreign law analysis was used more recently by Justice Brennan in his *Windward Shipping* dissent. *Windward Shipping (London) Ltd. v. Am. Radio Ass'n, AFL-CIO*, 415 U.S. 104, 121 (1974) (Brennan, J., dissenting).

127. In the Supreme Court cases summarized in note 65 *supra*, the Court never explored the question beyond the mere determination of a theoretical conflict. In its restatement of the rule, the American Law Institute took this approach for granted and asserted that "applying the Act to conduct in U.S. ports would have controlled conduct abroad." *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 38, Reporter's Note 1 (1965); see also *id.* § 28, Reporter's Note 2.

128. The Hungarian author Szaszzy took a careful look in 1968 at the problem of applying labor law in forums other than that of its origin, and determined that:

It has been accepted as a universally valid principle, even where statutes are silent about it, that the otherwise applicable labour law cannot be applied when to do so would conflict with *public policy* (emphasis in original)

I. SZASZZY, *INTERNATIONAL LABOUR LAW* 179 (1968) [hereinafter cited as SZASZZY].

129. See, e.g., *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). The common law doctrine that foreign law should be treated as a question of fact had its origin with Lord Mansfield in the eighteenth century and continued until its recent modification by the Federal Rules and some state statutes. The history of the doctrine is discussed in Sass, *Foreign Law in Civil Litigation: A Comparative Study*, 16 *AM. J. COMP. L.* 332, 335-39 (1968).

130. For examples of such statutes, see N.Y. CIV. PRAC. R. 4511 (McKinney 1972); 2

and Rule 44.1 of the Federal Rules of Civil Procedure,¹³¹ have made the determination of foreign law a question for the judge and not the jury. Counsel would ordinarily be expected to present the foreign law to the court although, at least in federal courts, the court itself can undertake independent research if it wishes.¹³² Judicial notice of foreign law, therefore, can easily¹³³ be taken under our system.¹³⁴ If, having taken such judicial notice, the American court finds no provisions of foreign labor law which would be contravened by NLRB treatment of the dispute, there should be no bar on this ground to granting the NLRB jurisdiction.

Evaluation of the second branch of this three-pronged analysis, the labor law public policy of the country involved, may be somewhat more difficult. The leading commentator on this question has observed that

the principle of public policy . . . precludes the application of foreign rules of law whose application or actual effects in a given case, would conflict with the moral, ideological, social, economic and cultural ideas of the [foreign nation], its concepts of equity and justice, the fundamental institutions of the legal order . . . and the principles of its social and economic life.¹³⁵

VA. CODE ANN., tit. 8, § 8-273 (1957); CAL. EVID. CODE §§ 310-11, 450-60 (West 1966). See also UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, art. IV, approved by the Commissioners on Uniform State Laws in 1962. For a discussion of some of the state statutes and the Federal Rule, note 131 *infra*, see Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 16-23 (1973).

131. Federal Rule 44.1 provides that in cases where the law of a foreign country is in issue, "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party, or admissible under the Federal Rules of Evidence." The court's determination is treated as a ruling on a question of law. This Rule was added in 1966. See also FED. R. EVID. 902.

132. While the Note of the Advisory Committee formulating the Rule pointed out that "in determining [foreign] law the court is not limited by material presented by the parties," decisions since the adoption of the Rule have indicated that courts will not usually undertake such research on their own without the help of counsel. See, e.g., *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968).

133. The principal problem of determining foreign law in this country is that of finding available research materials. The international and foreign law collections of most American law libraries, however, are growing, and the presumption behind the trend outlined in notes 130-32 *supra* and accompanying text is that research in foreign law is no longer an insurmountable problem. See R. SCHLESINGER, *COMPARATIVE LAW* 48-49 (3d ed. 1970) and sources cited therein.

134. This is especially true in cases involving flag of convenience fleet vessels. Many of the cases involve Liberian ships, and Liberian research materials are, fortunately, readily available in English. The codes, court decisions, attorney general opinions, and legal articles of Liberia have been compiled according to familiar form since the Liberian Codification Project began its work under the direction of Professor Milton Konvitz at Cornell University in the 1950's.

135. SZASZY 180. The author was actually speaking of situations in which the court of a

Ascertainment of such broad principles may be obtained from the testimony of witnesses familiar with the foreign state's law,¹³⁶ international conventions to which the state is a party, rules of international law in which the nation acquiesces,¹³⁷ and presumptions that foreign public policy is similar to our own.¹³⁸ Foreign courts which have analyzed the public policy of extraterritorial forums appear to have done so without undue difficulty.¹³⁹ If a foreign public policy is found to hold values alien to those of American labor law, the court should not grant the NLRB jurisdiction.

The third area of exploration under this tool of analysis is that of international law rules. Judicial cognizance of international law is easier than that of foreign law,¹⁴⁰ and American courts are familiar with the basic doctrines.

The most likely principle to be invoked is that of foreign state sovereignty. Ever since the days when individual states derived their power from the monarch's ability to control large areas of land,¹⁴¹ a "territorial" sovereignty giving the government power over acts within its territory has been basic to the law of individual nations.¹⁴² The concept

forum state would be called upon to apply rules from a foreign nation, but the analysis appears equally applicable to the situation at hand.

136. Even where foreign law is a question for the court to determine, testimony of expert witnesses is common. One court, in fact, has held that presentation of the text of a foreign statute, without demonstration of its subsequent interpretation, is not enough. Application of Chase Manhattan Bank, 191 F. Supp. 206, *on reargument*, 192 F. Supp. 817 (S.D.N.Y.), *aff'd*, 297 F.2d 611 (2d Cir. 1961).

137. Where a domestic scheme of labor law is "at variance with cogent rules of international law," the principle of inconsistency with public policy will "assert itself." Szasz 180.

138. It is a familiar doctrine of American courts that basic principles of law are common to all civilized countries and that, in the absence of a contrary showing, the principles of one country will be presumed consistent with those of another. *See, e.g.,* Parrot v. Mexican Cent. Ry. Co., 207 Mass. 184, 93 N.E. 590 (1911).

139. Pertinent cases are cited in Szasz at 182-83.

140. It was established early in this country's legal history that:

International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The Paquete Habana, 175 U.S. 677, 700 (1899). *See also* Skiriotes v. Florida, 313 U.S. 69, 72-73 (1940); Hilton v. Guyot, 159 U.S. 113, 169 (1894).

International law, in contrast to the old "fact" doctrine of foreign law, *see note 129 supra* and accompanying text, is easily subject to judicial notice. *See, e.g.,* Ocean Ins. Co. v. Francis, 2 Wend. 64, 69 (N.Y. 1828); Peters v. McKay, 195 Or. 412, 425, 238 P.2d 225, 230 (1951), *petition for rehearing denied*, 246 P.2d 585 (1952).

141. J. BRIERLY, LAW OF NATIONS 142 (4th ed. 1949).

142. OPPENHEIM, *supra* note 110, at 116-18. As recently as 1949 the International Court of Justice recognized that "between independent States, respect for territorial sovereignty is an essential foundation of international relations." Corfu Channel Case, [1949] I.C.J.

of national sovereignty has been subject to increasing encroachment in recent years, however.¹⁴³ As multinational rules of law become more widely recognized, individual national governments may no longer have the last say over the law which governs their citizens;¹⁴⁴ one international court already has the authority to overturn decisions of national tribunals.¹⁴⁵ In cases in which investigation into foreign and international law is used as a tool of analysis, American courts will have to review this trend and gauge the importance of state sovereignty in the case at hand.

Another pertinent international law rule is the familiar one that a vessel is governed by the law of the nation whose flag she flies.¹⁴⁶ This doctrine was codified by the United Nations Convention on the High Seas,¹⁴⁷ and by a ruling of the Permanent Court of International Justice in the case of the *S.S. Lotus*.¹⁴⁸ The rule is not absolute, however. Several provisions of United States shipping laws, for example, make it illegal for any common carrier entering American ports to pay or allow rebates, to resort to discriminatory or unfair trade practices such as refusing available space accommodations, and the like.¹⁴⁹ Again, in individual cases the court will have to judge whether this principle, such as it is, would be violated by applying United States labor law. If so, then such labor law would, by definition, be "governing" the foreign vessel, a strong indication that NLRB jurisdiction would be improperly granted.

Along with these rules, of course, the court will have to consider other international legal arguments advanced by the parties.

4, 35. The Court in that very case, however, limited the sovereign powers of Albania by holding it liable to Great Britain for damage caused by Albanian mines to a British ship in the Corfu Channel, when Albania had given no forewarning.

143. See, e.g., 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 121 (3d ed. 1957). The trend is discussed in 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 233-82 (1963). Expanding concepts of national jurisdiction, see notes 120-21 *supra*, are further evidence of this movement.

144. The following is stated in Oppenheim, *supra* note 110, at 119:

The very notion of International Law as a body of rules of conduct binding upon States irrespective of their Municipal Law and legislation implies the idea of their subjection to International Law and makes it impossible to accept their claim to absolute sovereignty in the international sphere.

145. This is the European Court of Human Rights, established by Article IV of the Convention for the Protection of Human Rights and Fundamental Freedoms, done Nov. 4, 1950, 213 U.N.T.S. 222, reprinted in 45 AM. J. INT'L L. 24 (Supp. 1951).

146. This rule was mentioned by the Court in *McCulloch*, see note 50 *supra*, but was not explored in detail. 372 U.S. at 21.

147. U.N. Convention on the High Seas, U.N. Doc. A/CONF. 13/L.53, art. 6(1) (1958).

148. Case of the *S.S. "Lotus"*, [1927] P.C.I.J., ser. A, No. 9, at 25.

149. See, e.g., 46 U.S.C. §§ 812, 816 (1970).

A careful evaluation of the three questions outlined above should prove extremely valuable to courts considering whether American labor law should govern flag of convenience fleet cases. While answers to the individual consideration will not usually dispose of the overall problem, each will yield a better understanding of the underlying ramifications of granting jurisdiction to the Board. Knowledge of each of the possible effects should enable a court to make a more fully reasoned decision than those which have hitherto been made in foreign flag shipping cases, and such decisions, cognizant as they will be of the international jurisdictional principles involved, will more readily sustain the heavy burden placed on national courts in an international world.

CONCLUSION

As more and more American shippers have in recent years resorted to registering their vessels under the flags of foreign nations, the question of whether or not the National Labor Relations Board has jurisdiction over labor disputes involving these vessels has become a point of strong contention between the NLRB and the Supreme Court. A series of cases in the last twenty years seemed at last to have settled the dispute, but with the recent *Windward Shipping* and *Mobile Steamship* decisions, the Court has created new rules of questionable logic with unknown ramifications. The Court's decisions, however, have served one useful purpose: they have illustrated the dangers of oversimplifying the problem and grasping for easy tests rather than facing the broad jurisdictional questions which are inevitably involved.

This Comment has addressed the problems of which international jurisdictional principles should govern these cases and of how to implement them. Whether the approach taken here is used, or whether another is developed, however, is relatively unimportant. The essential point is that the flag of convenience fleet cases, like an increasing number of cases in the international sphere, are beginning to pose the key issue of how to reconcile the competing values of protecting American legal interests and staying within the strictures of international comity. Until now the point at which the balance is struck has not been carefully chosen. Until it is, one set of interests will continue to suffer the needless expense of overprotecting the other.