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American Legal Restrictions on the Use of Union Economic Weapons Against Multinational Employers

JEFFREY K. ROSS*

In recent years, the explosive growth of multinational corporations' (MNCs) has challenged a labor movement response in the developing field of international labor relations. This international sector, however, will create special and somewhat unique problems for the American labor movement. Union efforts will be confounded by unequal bargaining power and by diverse labor relations philosophies and structures. *

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1. Despite the many efforts of academicians and practitioners, there has been no substantial agreement upon a comprehensive definition of a multinational corporation. For the purposes of this article, a MNC is any corporation which does business in more than one country.

2. For a general discussion of the first tentative attempts to establish a transnational labor relations structure, see Seham, Transnational Labor Relations: The First Steps Being Taken, 6 LAW AND POL’Y INT’L BUS. 337 (1974).

3. In other business sectors throughout recent history, union strikes, pickets, and boycotts have been used to counterbalance the power of employers and obtain benefits for the workers involved. Unionization of the craft industries during the late 1800's and early 1900's was followed by the industrial organization of the 1930's and the public sector organization of the 1960's. Other areas in which organizing and collective bargaining are currently being contemplated are in prisons, in the military and in various community dispute settings. One would expect that American unions in dealing with multinational corporations will use these same tools to improve conditions for their workers.


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Most importantly, the labor movement will find that the United States legal framework for labor relations will severely restrict many potential union actions necessary to create a balanced labor relations system. Coordinated union tactics, of even greater importance in use against multinational corporations in international affairs than in the domestic arena, will still be restricted by various state and federal laws. The use of union weapons with secondary effects—strikes, pickets, and boycotts—will continually be prohibited. Moreover, certain union weapons, traditionally legal in the domestic sphere, will be censured when used against MNCs because of the conflict of law solutions made necessary by the foreign effects of the union actions. It is these limitations—the various and overwhelming American legal restraints on labor activity to challenge the power of MNCs—that this paper will examine.

In order to study the limitations, it is first necessary to determine the status of a multinational employer under the labor laws. This discussion will be followed by an analysis of the scope of jurisdiction of each of the relevant statutes over labor activity in the international sector. A series of probable union tactics will then be discussed to demonstrate the restrictive legal results. Finally, a number of potential solutions will be offered to remedy the legal inequities.

In addition, the Report of the International Law Association, Fifty-First Conference, Tokyo 1964, 304-592, contains an extensive discussion of the divergences between the various antitrust national legal systems.

5. For an analysis of these structural problems facing coordinated international labor activity in Europe, see NLU v. MNC, supra note 4. The authors of the Wagner Act in 1935 were well aware of the dysfunctional consequences of unequal bargaining power:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.


6. Discussion in this paper concentrates on the use of specific labor weapons against multinational corporations. The labor law requirements surrounding collective bargaining are not included. For a discussion of the MNC's duty to bargain over certain issues related to foreign affairs, see Kujawa, Foreign Sourcing Decisions and the Duty to Bargain under the NLRA, in American Labor and the Multinational Corporation (D. Kujawa ed. 1968).

7. While this paper is limited to actions by labor unions against multinational corporations, the MNC response to the minimal labor pressure exerted thus far is discussed in Roberts & May, The Response of Multinational Enterprises to International Trade Union Pressures, British Journal of Industrial Relations 403 (1974).
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I

MNC: SINGULAR OR PLURAL LEGAL ENTITY

The legitimacy of many labor weapons, especially secondary union activity under the National Labor Relations Act (NLRA), will depend on whether a given MNC is determined to be a single employer entity or is found to constitute numerous separate companies. Using economic form alone, a multinational corporation, like any other large corporation with separate branches, subsidiaries, and divisions, would seem to be a unitary employer. However, by employing a substantive analysis, the National Labor Relations Board and the courts have sought to effect the essential Congressional purpose behind the secondary prohibitions which was to insulate the neutral or innocent secondary employer and prevent the unnecessary spread of the union-management conflict by narrowing the areas of dispute. Consequently, the Board has struggled with a continuing series of fact situations in an attempt to elucidate the controlling factors which determine whether the separate components of a large company deserve NLRA protection from secondary union activity. In these analyses, the following factors have been accorded emphasis—an active or common control, an appreciable integration of operations and management policies, a common labor policy or employee exchange, a market price transaction of goods and services, and a mandatory centralization of programs, services, or benefits. Using these criteria, the Board has determined that the incor-

9. For a recent overview of the unitary-separateness doctrine as it applies to the various parts of a domestic enterprise, see Siegel, Conglomerates, Subsidiaries, Divisions, and the Secondary Boycott, 9 Georgia L. Rev. 329 (1975). See also note 13 infra.
10. See George Koch Sons, Inc., 201 N.L.R.B. 59, aff'd 490 F.2d 323 (4th Cir. 1973), wherein the Board stated:

The key consideration in any determination in this 8(b)(4)(B) area . . . is whether the pressured employer is truly the primary with whom the union had its dispute or whether in the particular circumstances of the particular case, the pressured employer was a neutral to the dispute.

201 N.L.R.B. at 61.
12. "[T]he common law of labor relations has created no concept more elusive than that of 'secondary' conduct; it has drawn no lines more arbitrary, tenuous and shifting than those separating 'primary' from 'secondary' activities." Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 386-87 (1969). The first Board case showing a willingness to take a substantive rather than a form approach was Alexander Warehouse and Sales Co., 128 N.L.R.B. 916 (1960), although in that case, the Board held that the various warehouses of an employer legally constituted a single employer.
13. While all of these factors probably need not be present, Hospital & Institutional Workers Local 250, 187 N.L.R.B. 218 (1971), the Seventh Circuit has upheld the NLRB
Corporated divisions of a parent corporation as well as the unincorporated divisions of a parent corporation may be deemed separate employers for the purpose of obtaining protection from secondary pressure. Therefore, it follows that the foreign and United States operations of a multinational corporation, depending upon their interrelationship, may be viewed as separate employers for the purposes of the NLRA prohibitions upon secondary activity.

Limiting this analysis, however, is the ally doctrine, which may serve as a defense to secondary union actions against the various operations of multinational corporations which have been found to constitute separate employers. This doctrine holds that where a secondary employer, by previous agreement, performs work during a strike which ordinarily would have been done by the striking employee of the primary employer, that secondary employer is an "ally" of the primary employer and hence not protected by the secondary boycott provisions of the NLRA. Certainly, proving the existence of an ally relationship between branches of a multinational corporation would not appear to be a difficult task. Furthermore, evidence of coordinated activity between two parts of an MNC may preclude a finding of separateness in the first place.

guidelines. NLRB v. General Teamsters Local 126, 435 F.2d 288 (7th Cir. 1970). The Second Circuit, however, has cautioned against the mechanical application of the Board's criteria as the sole determinants of separateness. It has suggested the necessity of a case-by-case analysis using other judicially determined criteria which seem appropriate, such as evidence of neutrality. NLRB v. Local 810 Teamsters, 460 F.2d 1 (2d Cir. 1972), cert. denied, 409 U.S. 1041 (1972). For a more detailed discussion of the history of the unitary-separateness problem, see Leonard, Coordinated Bargaining with Multinational Firms by American Labor Unions, 25 Lab. L.J. 753 (1974).


16. There is no reason to believe that the domestic separateness criteria will not receive similar application in an international setting. If anything, the foreign aspects of a MNC's activity will accentuate the divisible nature of the organization.


19. The general requirements for invocation of the ally doctrine are that: (1) the work being done by the secondary employer is ordinarily done by the primary employer; (2) the work done will benefit the primary employer and thus have a strikebreaking effect; (3) there was a prior arrangement between the primary and secondary employer for such work to be done; and (4) the ally knowingly performs the struck work. See Irving, supra note 17, at 309.
With respect to union activity against multinational corporations, it is therefore clear that each case will have to be examined on an individual basis to determine the separateness or unitary nature of the employer(s). The legality or illegality of a given union action may well turn on just this determination. In all probability, the foreign operations of multinational corporations will be treated as separate employers, but in many of these cases, the ally doctrine may protect the legality of the union weapons being used.

II

INTERNATIONAL SCOPE OF THE RELEVANT STATUTES

A. National Labor Relations Act

On its face, the NLRA has a rather broad international scope of subject matter jurisdiction which its sponsors "based squarely upon the power of Congress to regulate commerce among the several states and with foreign nations." The definitions of terms such as "labor organization," "employer," and "employee" contain no requirements of American nationality. "Commerce" is expansively defined to include, in addition to interstate trade, "... trade... between any foreign country and any state... or between points in the same state but through... any foreign country." In fact, however, the National Labor Relations Board (NLRB) and the courts have severely narrowed the international subject matter jurisdiction of the NLRA. The determinative factor in the established series of cases denying jurisdiction has been the judicial desire to refrain from interference in the foreign affairs of the United States and the internal labor affairs of foreign countries. With respect to the Labor Management Relations Act (LMRA), the Supreme Court has stated that in the "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed" to support a finding that the Act confers jurisdiction on the Board. This

principle is equally applicable to the NLRA. Because that affirmative intention is rarely found, the Board has continually refused to accept jurisdiction over most cases containing foreign elements. Furthermore, the courts have consistently reversed more expansive interpretations attempted by the Board. Jurisdiction has been declined in organizational campaigns involving foreign employees and a foreign employer in a foreign jurisdiction, foreign employees and a foreign employer in United States jurisdiction, foreign employees and an American employer in a foreign jurisdiction, American employees and a for-

27. Even though the Board arguably possesses statutory jurisdiction, it may nevertheless decline to exercise such jurisdiction on the basis of administrative discretion.

28. One minor exception to this position is the recent case of Freeport Transport and Robert I. Carr, 220 N.L.R.B. 125 (1975), which granted Board jurisdiction in a discharge case where an American resident and citizen was employed in Canada and the United States, but was working out of the Canadian terminal of his American employer. The case arose from the employee's participation in an American union organizing campaign which for a time focused on the organization of Canadians. The Board held that the numerous American contacts were sufficient to establish that the employer was in commerce within the meaning of the NLRA and offered no discussion of possible interference with Canadian law, foreign policy, or foreign wage-cost decision-making.

29. For example, in McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963), the Court reversed a Board ordered representation election involving foreign crews of foreign flag ships because the Board's order was "in excess of its delegated powers and contrary to a specific prohibition of the Act." 372 U.S. at 16-17. NLRB jurisdiction has also been reversed when foreign policy questions are involved. NLRB v. Longshoremen's Ass'n, 332 F.2d 992 (4th Cir. 1964), reversing 146 N.L.R.B. 723 (1964).

30. The NLRB has, of course, taken jurisdiction over the domestic operations of American multinational corporations. The more difficult question is whether the activities of unions and employers, otherwise within the statutory requirements of NLRA jurisdiction, remain within such jurisdiction when they involve international considerations.

31. In McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963), the Supreme Court reversed the NLRB assertion of jurisdiction over an organizing campaign by foreign crew members of a foreign ship in a United States port because of a judicial desire to prohibit Board intrusion into the internal affairs of the ship. For the purposes of maritime law, a ship is considered part of the territory of the flag she flies. See Comment, Foreign Ships in American Ports: The Question of NLRB Jurisdiction, 9 CORNELL INT'L L.J. 50, 62 (1976) [hereinafter cited as Foreign Ships].

32. In accordance with the narrow jurisdictional interpretation of the scope of the NLRA, the Board has declined jurisdiction in cases where the employer enjoys a close relationship with a foreign government. For example, the NLRB declined to assert jurisdiction over the operations of the North American ticket agency because of the agency's close relationship with the British Railway Board, an arm of the British government. The agency was a wholly-owned subsidiary of BRB which formulated its labor and managerial policies. Furthermore, a number of the agency's employees were British nationals working under visas controlled by the BRB. British Rail International, 163 N.L.R.B. 89 (1987).

33. The NLRB has continually relinquished jurisdiction, as a matter of discretion, over attempts to organize foreign employees working for American employers in the Panama Canal Zone. For the purposes of commerce, the Canal Zone is considered a foreign coun-
eign employer in United States jurisdiction, and American employees and an American employer in a foreign jurisdiction. Under certain circumstances, the Board has even denied jurisdiction over American employees working for an American employer in the United States.

Board jurisdiction over unfair labor practices, such as organizational and secondary picketing, involving foreign parties has been discussed by the Supreme Court in a series of cases stemming from maritime affairs.

34. In Agip USA, 196 N.L.R.B. 177 (1972), the Board, in exercising its discretionary judgment on a representation petition, refused jurisdiction over the employees of a purchasing agency for an Italian corporation, the latter being owned by Italy. Virtually all the employees were United States nationals. While the question of actual statutory jurisdiction was not reached, the case turned on the close involvement of the NLRA-exempt foreign government. In a situation without such government involvement, the claim that the employer is a wholly-owned subsidiary of a foreign corporation is immaterial to the assertion of jurisdiction if the employer is within the statutory jurisdiction of the Board. Delta Match Corp., 102 N.L.R.B. 1400 (1953). See also The Royal Bank of Canada, 67 N.L.R.B. 903 (1946) (Board jurisdiction granted over Puerto Rican branch of a Canadian bank).

35. See, e.g., RCA, OMS, Inc., 202 N.L.R.B. 42 (1973), wherein the Board refused to grant a union’s petition to represent American employees of a United States corporation working at Distant Early Warning (DEW line) radar and communication stations located in Greenland because Greenland was a Danish possession.

36. International Air Serv. Co. and Pilot Safety Ass’n, 216 N.L.R.B. 152 (1975). A United States employer was held exempt from Board jurisdiction with relation to certain employees who were intimately related with the activity of a corporation which was exempt as an agency of a foreign government and as a foreign flag carrier. See also Facilities Management Corp., 202 N.L.R.B. 164 (1973) (discretionary declination of jurisdiction over Wake Island).

37. The Board has jurisdiction of unfair labor practices under NLRA § 10(a), 29 U.S.C. § 160(a) (1970), if they are practices “affecting commerce.”

38. These cases have all arisen from longshoremen’s dissatisfaction with the conditions in the shipping industry caused by the flags of convenience fleets. Where jurisdiction has been declined in these foreign shipping cases, the Court has gone to great lengths to emphasize the decision-making influence of “the longstanding principles of comity and accommodation in international maritime trade.” Windward Shipping (London) Ltd. v. American Radio Ass’n, 415 U.S. 104, 112-13 (1974). Of equal importance has been the desire to avoid inquiry into the internal discipline and order of foreign vessels. See note 31 supra. Yet the jurisdictional limitations cannot be dismissed as pertaining only to maritime problems, for similar comity principles in international trade and similar distasteful involvement in foreign employment relations can also result from contemplated union actions against multinational corporations. For example, the petition for certification by an American union of the foreign employees of an American MNC subsidiary
In the first and leading case, *Benz v. Compania Naviera Hidalgo*, the Court held that picketing by an American union in support of a strike by foreign crew members on a foreign ship was outside the jurisdiction of the Act because the Act was intended as a "bill of rights for American workingmen and their employers." Six years later, in *Incres Steamship Co. v. International Maritime Workers Union*, the Supreme Court denied NLRB jurisdiction in a situation involving picketing by an American union of a foreign ship in an effort to organize the foreign crew because the dispute involved was not "in commerce" within the meaning of the NLRA. In 1969, in *Ariadne Shipping Co.*, the Court did grant Board jurisdiction over picketing of foreign ships to protest substandard wages paid to non-union American longshoremen because the initial dispute—payment of wages to American workers—was "in commerce" within the meaning of the Act. However, in the latest cases in this field, the Court has denied Board jurisdiction over picketing by American unions to protest the allegedly substandard wages paid foreign seamen who were employed by foreign ship owners under contracts made outside the United States. The Court, per Justice Rehnquist, in *Windward Shipping (London) Ltd. v. American Radio Ass'n, AFL-CIO*, held that this type of picketing fell within the rule of the *Benz* case because "[v]irtually 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 benefiting American workingmen which the LMRA was designed to regulate."

The full limiting effect of this test was demonstrated soon thereafter in *American Radio Ass'n v. Mobile Steamship Ass'n* which arose from the identical circumstances as *Windward Shipping*. In order to invoke NLRB jurisdiction, the unions characterized their picketing activity as prohibited secondary activity against the local stevedoring companies...
attempting to deal with the foreign ships. The Court acknowledged that this dispute involved American employees and American employers in United States territory. Nevertheless, the purpose of this picketing—to protest wages paid to alien crew members—meant that the activity itself was not in commerce. The union activity was not “affecting commerce” because of its potential foreign effect. The response of the stevedoring companies was “a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected,” and was likewise outside of the NLRB jurisdiction. Hence, the picketing activity against the stevedoring companies and the response by those companies were neither prohibited nor protected by the NLRA.

This test promulgated by the Supreme Court, of restricting NLRB jurisdiction because of the potential foreign effects of the activity in question, has severely limited the NLRA protection of labor activities in international affairs. This test could be applied to exclude employees in any and perhaps all industries with a global market when the union activity has a foreign wage-cost effect.

**B. STATE LAW**

Upon a determination that a certain type of labor activity is beyond the scope of NLRA jurisdiction, the federal preemption is automatically removed, and state courts become free to apply their own tort law to

46. Id. at 224.
47. Id.

It should be noted how unclear this “foreign economic effect” rule really is. In this age of transnational trade and international economics, there are many domestic labor activities which have a strong influence on foreign employers, employees, and markets. While the Court probably does not intend such a broad curtailment of NLRB jurisdiction, the test could be applied to exclude employees in any and perhaps all industries with a global market when the union activity has a foreign wage-cost effect.

49. The Court in Windward Shipping (London) Ltd. v. American Radio Ass’n, AFL-CIO, 415 U.S. 104, 107 (1974), held that the dispute “could not be accommodated by a wage decision on the part of shipowners which would affect only wages paid within this country.”


The removal of federal preemption in such cases results from the negative implication raised by the Garmon rule which states:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or
enjoin the labor activity. For example, in all the maritime shipping cases, the picketing activity of the American maritime unions was enjoined under the applicable state laws. While arguably some of the picketing activity could also have been enjoined under the NLRA, the net effect of the removal of Board jurisdiction was a prohibition upon most, if not all, of the traditional legal labor weapons. As will be seen, it is this combination of American legal rules which directly hinders the use of these labor weapons in international affairs.

For constitutional purposes, a state need have only the most minimal of contacts to apply its law and still meet the requirements of due process. In a choice between foreign and state law, a state court will

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constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

359 U.S. at 244. The Garmon court made clear that if the Board either found the conduct to be protected by § 7, or prohibited by § 8, or failed to determine the status of such conduct, the states were prevented from asserting jurisdiction. Id. at 245-46. See also Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

5. Sixteen states have enacted their own versions of the NLRA provisions regulating the use of the secondary labor weapons. See 1 CCH Lab. L. Rep., STATE LAWS ¶ 40,356 (1976). In such "baby NLRA" states, the union activity would be subject to similar prohibitions and protections as under federal law. However, in Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), the Supreme Court limited the possible scope of such state regulation by expanding the range of federal preemption. This was accomplished by the recognition that:

a particular activity might be "protected" by federal law not only where it fell within § 7, but also when it was an activity that Congress intended to be "unrestricted by any governmental power to regulate" because it was among the permissible "economic weapons in reserve . . . actual exercise [of which] on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." [The legislative purpose may . . . dictate that certain activity 'neither protected nor prohibited' be privileged against state regulation."

427 U.S. at 141. Nevertheless, most states continue in their efforts to regulate union conduct through the use of traditional tort statutes. See note 54 infra.

5. A list of the pre-1975 shipping cases resulting in state court injunctions may be found in Foreign Ships, supra note 31, at 60. Upon remand of Woodward from the United States Supreme Court to the Court of Civil Appeals of Texas, the union agreed to discontinue picketing. 524 S.W.2d 772 (1975).

5. See R. Cramton, D. Currie, & H. Kay, CONFLICT OF LAWS, Ch. 3 (2d ed. 1975).

In a recent case, however, the Supreme Court held that Texas could not apply its right-to-work law to seamen who performed 80 to 90 percent of their work on the high seas. Oil, Chemical and Atomic Workers Union, AFL-CIO v. Mobil Oil Corp., 426 U.S. 407 (1976). The Court held that an employee's predominant job situs, rather than a generalized weighing of factors or the place of hiring, was the controlling factor in determining the applicable law. This case may thus serve as a guide to the outer limit of the extra-territorial application of state labor laws such as those restricting union economic weapons.
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apply its own state law if doing so would be proper under the choice of law rules followed in that jurisdiction. Of course, the state's choice of law rules may dictate that application of the foreign law is appropriate. From a labor relations perspective, the significance of either result is that the state court is not preempted from affecting labor activity which is arguably protected or prohibited by the NLRA. It is the absence of this federal preemption in the international sector which allows disparate state law entanglement in interational affairs and leads to the strict curtailment of American labor activity against multinational corporations.

C. THE NORRIS-LAGUARDIA ACT AND ITS PROGENY

The Norris-LaGuardia Act creates a restriction on the power of the federal judiciary to issue injunctions in labor disputes. Based upon the constitutional power of Congress to regulate the Judiciary, the Act is in force whenever the jurisdiction of a federal court is involved. Hence there is no necessary minimum nexus with commerce as is required of statutes like the NLRA which are based upon the constitutional power of Congress to regulate commerce.

54. Since labor activity is often enjoined under tort statutes proscribing unlawful interference, the tort choice-of-law rules of the particular state forum typically would be applied. Under the traditional standard, the effect of tortious union activity within the territorial jurisdiction of the state would be sufficient for the application of the state law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969). Under the more modern approach, the decision to apply a given state law is made on the basis of an analysis of the relevant interests of the competing jurisdictions. See R. Cramton, D. Currie, & H. Kay, CONFLICT OF LAWS, Ch. 2 (2d ed. 1975).


59. "This Congressional purpose . . . was prompted by a desire to protect the rights of laboring men to organize and bargain collectively and to withdraw federal courts from a type of controversy for which many believed they were ill-suited. . . ." Marine Cooks & Stewards, AFL v. Panama S.S. Co., 362 U.S. 365, 369-70, n.7 (1960).

60. "[T]he question whether Congress intended the federal courts to stay out of the labor injunction business involves significantly different considerations from the question whether Congress intended the [LMRA] to apply to the type of picketing . . . involved
To invoke the Norris-LaGuardia Act, only the broad definitional terms of Section 13 need be met. A non-enjoinable labor dispute is there defined as "... any controversy concerning terms or conditions of employment ... regardless of whether or not the disputants stand in the proximate relation of employer and employee." 61 There is no limitation in the statute to American employees, employers, or labor disputes. As a result, the Supreme Court has held that the Act bars injunctions in controversies between American unions and foreign employers. 62 There are a number of exceptions to the broad prohibition of the Act, 63 but the courts have consistently refused to create an exception on the basis of foreign economic effects and influence, or even on the basis of alleged treaty violations. 64

Thirty-four states have enacted "baby Norris-LaGuardia Acts" which similarly bar state court injunctions in labor disputes. 65 In such jurisdictions, a non-NLRA covered union activity against a multinational corporation is not enjoinable under the state tort law. However, an employer frequently may sue for damages from the "unlawful interference" caused by the union. 66 While "baby NLRA's" in a few states may provide further protection to certain union activity, precluding even employer damage recovery, 67 only twelve states have both a "baby NLA" here. Windward Shipping (London) Ltd. v. American Radio Ass'n, 415 U.S. 104, 115 n.14 (1974).

62. In Marine Cooks & Stewards, AFL v. Panama S.S. Co., 362 U.S. 365 (1960), the Supreme Court applied the Norris-LaGuardia Act to picketing of foreign ships by American unions to protest the alleged substandard wages paid to the foreign crewmembers, without concern for the legality of the activity under the NLRA.
64. In Port of Houston Authority of Harris County, Texas v. International Organization of Masters, Mates and Pilots, AFL-CIO, 456 F.2d 50 (5th Cir. 1972), cert. denied, 409 U.S. 894 (1972), the employer had urged the creation of such an exception because the union activity in question was arguably in violation of a treaty with Libya and it constituted an "impermissible interference with foreign commerce between this country and friendly foreign countries." 456 F.2d at 52. In agreement with Marine Cooks, the court refused to create a judicial exception to the Norris-LaGuardia ban on federal court injunctions in a labor dispute involving informational picketing.
66. The situation is similar to a union action in violation of NLRA § 8(b)(4) which cannot be enjoined by an employer in federal court, but which can be the basis of an LMRA § 303 suit for damages. Under the NLRA, however, the additional component in the statutory framework is that the Board could seek to obtain an injunction against the alleged § 8(b)(4) action. 29 U.S.C. § 160(e) (1970).
67. See text, part II(B) supra.
and a “baby NLRA,” the statutory combination necessary to ensure the same protection accorded federally covered labor activity.68

D. THE SHERMAN ANTITRUST ACT

The Sherman Antitrust Act69 has been proclaimed the “Magna Carta of free enterprise.”70 In passing the Act, Congress intended to exercise the full extent of its powers under the Commerce Clause to effectuate the purposes of the enactment.71 As a result, but particularly with respect to international trade, the statute itself provides the basis for the broad interpretation of its jurisdictional scope.72 Two important statutory sections provide in part:

Section 1. Every contract, combination... or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .
Section 8. The word “person” or “persons”... shall be deemed to include corporations and associations existing under [American law] or the laws of any foreign country.

To come within the purview of the Sherman Act, a restraint must occur either in the course of interstate or foreign commerce, or it must substantially affect such commerce.73 Thus, MNC activity and labor union responses are subject to the Sherman Act, even if the locus of the restraining events occur overseas,74 as long as the mandatory nexus with commerce is in evidence.75

68. 1 CCH LAB. L. REP., STATE LAWS ¶ 40,356 (1976).
71. REPORT OF ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 77-80 (1955).
72. There is, however, no general agreement among nations as to the permissible extraterritorial scope of domestic antitrust laws. J. RAHL, COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT 67 (1970).
73. Although the Sherman Act has the same constitutional basis as the NLRA, the Congressional intent behind the passage of the statute has been interpreted to reach international trade restraints affecting domestic trade. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). For a discussion of the somewhat conflicting analyses of the scope of the Sherman Act for various types of international restraints, see Baker, Antitrust and World Trade: Tempest in an International Teapot, 8 CORNELL INT’L L.J. 16 (1974); Rahl, American Antitrust and Foreign Operations, What is Covered?, 8 CORNELL Intl’L L.J. 1 (1974). Under either evaluation, American union restraints would clearly be within the jurisdiction of the Act.
74. Although free trade has not in fact been the accepted policy in civil law countries, the EEC, from the outset, has emphasized the need for this approach. See TREATY OF ROME, Arts. 85-94, 298 UN.T.S. 3 (1958).
75. An example of the extremely broad scope of the Sherman Act was demonstrated in
Labor unions, of course, have had a long history of dealings with the antitrust laws. While the application of the Sherman Act to union activities is now greatly restricted, the Court has applied the Sherman Act to labor practices in a number of situations where the union has combined with a non-labor group to severely restrain trade. The international setting under discussion would, in all probability, not alter the application of the broad scope of the Sherman Act to this type of non-protected activity. Yet the most potent union weapons for use against multinational corporations may well fall within these Sherman Act prohibitions of labor activity. As such, the labor movement response to the multinational corporations will provide a fertile environment for breeding this type of illegal agreement.

Pacific Seafarer's, Inc. v. Pacific Far East Lines, Inc., 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969), where the Act was held applicable to restraints in shipping between foreign ports involving United States government financed shipments transported on American ships.

The Sherman Act, originally passed in 1890 to break up the large business cartels, was used extensively against worker organizations. Although Congress had intended to exempt labor unions from the antitrust laws by enacting § 6 and § 20 of the Clayton Act (ch. 323, 38 Stat. 730 (1914)), the Supreme Court held otherwise in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). The Court reasoned that the secondary boycott involved in that case was not a "lawful" activity protected by § 6, nor was it a dispute with an immediate employer and thereby protected by § 20. See also Bedford Cut Stone v. Journeyman Stone Cutters Ass'n, 274 U.S. 37 (1927).

The so-called labor exemption was only finally established in 1941. In United States v. Hutcheson, 312 U.S. 219 (1941), the Supreme Court interpreted the Sherman Act, Clayton Act and the Norris-LaGuardia Act "as a harmonizing text of outlawry of labor conduct." 312 U.S. at 231. As Justice Frankfurter stated in his now famous passage:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under [the antitrust laws] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

312 U.S. at 232. The general purpose of the labor exemption was to prevent the socially unacceptable depression of wages which inevitably resulted from severe competition in the sale of individual services. Instead, the collective bargaining system was supported and reinforced by the national labor legislation as the means for controlling labor relations.

In the years since Hutcheson, the Supreme Court has attempted to balance the conflicting governmental policies of free trade and a stabilized industrial relations system through the use of the exception to the labor exemption, the "combination with non-labor groups." Ironically, one of the original purposes behind the passage of the NLRA was to prevent labor strife which would quickly burden the free flow of commerce. See NLRA § 1, 29 U.S.C. § 151 (1970).

See text, parts III(H) and III(I) infra.
III
POTENTIAL UNION TACTICS AGAINST MULTINATIONAL CORPORATIONS: HYPOTHETICAL AND REAL

The American legal framework facing unions in the international sector, as outlined above, will severely restrict the use of economic weapons against multinational corporations. The following cases describe a number of the possible fact situations that may arise in future international labor settings and demonstrate the effect of the present American legal arrangement. For the purposes of the case discussions, a generally reasonable assumption will be made that a foreign subsidiary of a given MNC will be treated as a separate employer. In addition, it is also assumed that state law will prohibit, in one form or another, union weapons subject to state jurisdiction. Although not all states would reach such a restrictive result, most, in fact, will.

A. Case 1: Sympathy Strike

A multinational corporation has two unionized plants, one in the United States and one in a foreign country. As with many collective bargaining agreements in the United States, the contract with the American union contains a broad, binding arbitration clause. When the foreign union goes on strike, the American union, as a sympathy action, joins the strike to further pressure the MNC with respect to its foreign subsidiary. The MNC moves to enjoin the American strike in federal court.

Analysis: The recent Supreme Court decision in Buffalo Forge Company v. United Steelworkers of America, which held that a federal court may not enjoin a sympathy strike pending an arbitrator's decision on the legality of the strike under the no-strike clause in the parties' bargaining agreement, would seem to preclude injunctive relief. In the

80. See text, part I supra.
81. See text, part II(B) supra.
82. 428 U.S. 397 (1976).
83. In Boy's Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), the Supreme Court held that a binding arbitration clause in a contract was the quid pro quo of a no-strike clause for the duration of the contract and hence an injunction stopping such a strike was permissible when the strike would so frustrate the arbitral process established by Congress in the LMRA. However, the Court in Buffalo Forge held that a sympathy strike does not involve a dispute between management and the union engaging in the sympathy strike. Since there was no arbitral issue, the enjoining of the sympathy strike would run counter to the Norris-LaGuardia ban on labor injunctions without serving any goal of the LMRA.

The enjoinability of sympathy strikes has been a hotly contested issue in recent years.
international situation proposed, the potent weapon of the sympathy strike would likewise seem non-enjoinable as the Norris-LaGuardia Act remains a bar to a federal court injunction against the strike.84

However, the balance of power in international labor relations will not be determined so much by an employer's power to provisionally enjoin a particular labor weapon as it will by the actual legality or illegality of such a union action. Regardless of the immediate non-enjoinability of sympathy strikes, *Buffalo Forge* clearly states that an "employer thus [is] entitled to invoke the arbitral process to determine the legality of the sympathy strike and to obtain a court order requiring the Union to arbitrate. . . ."85

Upon an arbitrator's determination that a sympathy strike is in violation of a no-strike agreement, an employer may apply for, and a federal court may issue, a court order upholding the arbitrator's decision and enjoining the sympathy strike. The Court in *Buffalo Forge* found no dispute with the assertion that a sympathy strike could indeed be violative of a broad binding arbitration agreement such as that found in the *Buffalo Forge* labor contract as well as in many other American labor contracts.86 In addition, the sympathizing union could be liable under Section 301 of the LMRA for breaching the collective bargaining contract.87 Given this legal framework, sympathy strikes provide a short-term usefulness of only dubious significance in international labor relations.88

Furthermore, the importance of this labor weapon is not likely to increase despite conceivable attempts by unions in future contract nego-

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*Buffalo Forge* reflects the culmination of a split in the Courts of Appeals—the Second, Fifth, and Sixth Circuits deciding in favor of the legality of sympathy strikes, and the Third, Fourth, and Eighth Circuits opting for enjoinability.


84. The definitional requirements of NLA § 13, 29 U.S.C. § 113 (1970), are met by the proposed case, and NLA § 4(a), 29 U.S.C. § 104(a) (1970), specifically lists a refusal to work as a non-enjoinable union action.
86. Id. at 406.
88. Although an improperly issued injunction may often have the effect of destroying the momentum of a concerted labor action, the refusal to issue an injunction in the face of conduct that will probably be viewed as violative of a collective bargaining agreement is not necessarily supportive of concerted activity. In *Buffalo Forge*, for example, the union, although opposing any injunctive relief, was willing to submit the issue to arbitration "on one day's notice." 428 U.S. at 402.
tations to limit the scope of binding arbitration and no-strike agreements. Employers, especially multinational corporations cognizant of the awesome potential of a legitimized sympathy strike weapon in international labor affairs, will ardently oppose such union proposals.\textsuperscript{89}

### B. CASE 2: COORDINATED BARGAINING

An American union and a foreign union agree to bargain for similar collective bargaining packages to prevent their MNC employer from shifting production on the basis of labor costs. Besides pushing for similar wages, hours, and working conditions, the unions plan to insist on a common expiration date\textsuperscript{90} so that a unitary and non-enjoinable strike effort may be used if necessary. 

**Analysis:** Coordinated activity of this type between two American labor unions is squarely within the labor exemption to the antitrust laws. The question which immediately arises, however, is whether a foreign union is a “labor group” or a “non-labor group” within the meaning of the Hutcheson case.\textsuperscript{91} A finding of “non-labor group” status would subject the coordinated international union activity to Sherman Act scrutiny. In *American Federation of Musicians v. Carroll*,\textsuperscript{92} the Supreme Court adopted the present test for determining the status of a particular organization. As the lower court maintained, the focal point of analysis was:

> the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the [party in question]. If such a relationship existed the [party in question was] a “labor group” and party to a labor dispute under the Norris-LaGuardia Act.\textsuperscript{93}

\textsuperscript{89} Another factor inhibiting the grafting of sympathy strike exceptions onto no-strike clauses is the reciprocal nature of collective bargaining. An employer cannot offer the binding arbitration, no-strike compromise on this issue because there is no arbitrable dispute between the employer and the sympathizing union. The real dispute is in another collective bargaining framework and is not resolvable by any arbitration with the sympathizing union.

\textsuperscript{90} Upon expiration of a contract and a subsequent strike in a domestic dispute, a single picket line at each of the various domestic facilities of an employer will usually shut down operations as the other unions refuse to cross the picket lines. In an international dispute, it is difficult or next to impossible to set up picket lines in foreign countries, hence the importance of the common expiration date in international labor activity. For a more detailed discussion of common expiration dates as a union tactic for coordinated bargaining against multinational corporations, see Leonard, *supra* note 13, at 748-50.

\textsuperscript{91} 312 U.S. 219 (1941). See note 77 *supra*.

\textsuperscript{92} 391 U.S. 99 (1968).

Based on the fact that there could be a direct wage competition with American workers in the American union, foreign unions should probably be classified as labor groups.\(^4\)

Analysis of the NLRA, nevertheless, reveals a less generous treatment. It is true that coordinated bargaining is protected under the Act and the demand for common contract expiration dates is a mandatory subject of bargaining over which the American union may strike.\(^5\) Once an employer accedes to all the demands of the American union, however, the insistence by the American union on conditioning agreement upon the successful negotiation of the foreign contract or the common expiration date will be treated as an unlawful attempt to expand the bargaining unit.\(^6\) Thus, the attempt of the American union to exert economic pressure in support of the identical labor demands of a foreign union will be prohibited.\(^7\)

**C. Case 3: Common Situs Picketing**

As soon as a major new oil deposit is discovered in international water, an American multinational oil company hires, through its foreign subsidiary, large numbers of low-paid foreign workers to do the necessary

\(^{94}\) Although there have been no cases in point, from a policy perspective, the extension of the labor exemption to coordinated international union activity would be appropriate since the purpose of the labor exemption is to prevent competition between employers on the basis of labor costs. Coordinated union activity would prevent American and foreign employers from driving down the cost of labor by placing the two groups of employees in competition for available work. It might be argued that coordinated labor activity will raise wage costs for employers in many foreign countries and that this would injure the ability of foreign business to compete in American markets. Yet the purpose of the labor exemption was to prevent exactly this type of unwanted competitive advantage—an advantage based on the price of labor.


\(^{96}\) A union local which refuses to execute an agreement until the conclusion of negotiations involving another local and another employer is in violation of the Act. NLRB v. Longshoremen Ass’n, 443 F.2d 218 (5th Cir. 1971). Accord, Standard Oil Co. v. NLRB, 322 F.2d 40 (6th Cir. 1963). Likewise, a union which attempts to include employees in the bargaining unit who are exempt from NLRA coverage is guilty of a refusal to bargain. One party to collective bargaining negotiations may not deny the Board’s authority to determine the appropriate unit and unilaterally demand a change in that unit. District 50, UMW, 142 N.L.R.B. 930 (1963).

\(^{97}\) Unions cannot lawfully insist on companywide bargaining as a condition of settlement since it is not a mandatory subject of bargaining. AFL-CIO Joint Negotiating Comm. for Phelps Dodge, 184 N.L.R.B. 976 (1970). But see Joint Negotiating Comm. v. NLRB, 469 F.2d 374 (3d Cir.), cert. denied, 409 U.S. 1059 (1972) (parallel negotiation demands without cross discussions are not violative of the Act).
construction, drilling and support work for production. The new fuel is refined and pumped onto the company’s supertankers, which also employ foreign laborers, and is brought to the United States. The Oil, Chemical and Atomic Workers International Union (OCAW), protesting that these jobs were given to low-paid foreign employees rather than American workers, establishes a picket line at the entrances to the American-based docking facilities of the foreign subsidiary. The OCAW picketing is carefully confined within the guidelines promulgated in Moore Dry Dock\(^9\) for permissive picketing on the premises of a secondary employer. A representative of the foreign subsidiary seeks to enjoin the picketing.

Analysis: If the multinational oil company is found to be a unitary employer, the picketing could be enjoined in federal court under the Boy’s Market exception to the Norris-LaGuardia Act.\(^9\) In all probability, however, the foreign subsidiary would be deemed a separate employer and, consequently, a finding of NLRB jurisdiction would insure federal protection of the picketing activity. Note, however, that this case is simply a transformation of the fact situation of Windward Shipping into the context of a multinational labor problem for we find an American union picketing at the American site of a foreign employer to protest substandard wages paid to foreign employees. Presumably, therefore, the courts will decide that the foreign subsidiary response to the picketing goes beyond “the sort of wage-cost decisions benefitting American workingmen which the LMRA was designed to regulate.”\(^10\) With the NLRB jurisdiction so limited, the foreign subsidiary employer will be free to pursue appropriate state court action to obtain an injunction to the picketing.\(^10\) Thus, an otherwise legitimate weapon will be removed from the union arsenal because of the international repercussions of the labor activity in question.\(^10\)

D. CASE 4: CONSUMER PRODUCT PICKETING

The American union of a multinational corporation, fearful of job losses to the foreign subsidiary of its employer, engages in a “Buy American” campaign. The union establishes product picketing at major consumer retailers and urges the public not to purchase certain products

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99. See note 83 supra.
101. But see the discussion of “baby NLA’s” in the text, part II(C) supra.
102. The Supreme Court has held that there are no constitutional infirmities under the First and Fourteenth Amendments created by enjoining such picketing. American Radio Ass’n v. Mobile S.S. Ass’n, 419 U.S. 215, 228-30 (1974).
manufactured abroad by the MNC. A picketed retailer attempts to enjoin the picketing in state court.

**Analysis:** This case demonstrates the dangerous extremes to which the holding in *Mobile Steamship* can logically be carried. In *Mobile Steamship*, the "illegal" secondary picketing in United States territory by the American maritime workers against the American stevedore companies was held to be outside NLRB jurisdiction. In the hypothetical, we also have picketing in United States territory by an American union against a secondary United States employer. However, this time, the secondary picketing is legal under the *Tree Fruits* doctrine, which holds that peaceful consumer picketing at the premises of a secondary employer is not prohibited by the Act's secondary boycott provisions. The legality of the picketing, of course, will be of no assistance in the union attempt to extend NLRB jurisdiction. As in *Mobile Steamship*, the secondary employer retailer will be free to enter state court to enjoin this "unlawful interference" under state law. As a result, another legitimate and otherwise powerful union weapon has lost its potency in the domain of international labor affairs.

**E. CASE 5: INDUCING SYMPATHY ACTIONS FROM FOREIGN SUBSIDIARY UNIONS**

In 1979, the United Rubber Workers (URW) contract with Firestone Rubber Company again expires without a settlement. As in 1976, Union President Peter Bommarito flies to Geneva to meet with union officials representing workers employed by the major United States tire manufacturers in nine foreign countries. Bommarito induces them to join in solidarity with the striking American rubber workers and to refuse to perform any overtime work so as to prevent an increase in output to offset the loss caused by the American strike. Workers in foreign plants are also asked to monitor shipments to see that none are diverted to markets normally supplied from the United States. A foreign subsidiary of Firestone attempts to enjoin the URW activity.

**Analysis:** The question of NLRB jurisdiction in this context is a diffi-

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103. See text, part II(A) supra.
105. It is ironic to note that under the *Tree Fruits* holding, the peaceful consumer picketing at the premises of the secondary employer is not prohibited in spite of the fact that this "interference" will have a detrimental economic effect upon the secondary employer.
106. The outlined facts are virtually identical to the preliminary tactics of the United Rubber Workers at the beginning of the 1976 strike. See Unions in Foreign Subsidiaries to Help Rubber Strikes in U.S., N.Y. Times, Apr. 27, 1976, at 17, cols. 1, 2.
cult one. The Board will have to balance its aversion to intruding into foreign affairs with the fact that the primary dispute—between an American employer and American employees—is clearly governed by the NLRA. Whether the alleged unfair labor practice against the foreign employer will be held to affect commerce within the meaning of the Act will be the determinative issue. In the *Ariadne* case, 107 the Court held that the picketing of foreign ships by an American union in a dispute over wages paid to American employees was “in commerce” within the meaning of the Act. That the “dispute centered on the wages to be paid American residents” 108 was deemed the crucial variable in the decision indicates that the Court gave weight to the fact that the interference in foreign affairs, which normally would remove NLRB aid, did not independently exist. The reasoning of the *Ariadne* court is sufficient under the facts of the hypothetical case 109 to insure NLRA control. 110

Upon exercising jurisdiction, the NLRB will find a Section 8(b)(4) violation whether or not the foreign subsidiary is deemed an employer under the Act, an issue not determined in *Ariadne*. This conclusion is mandated by the 1959 amendments to the NLRA which extended Section 8(b)(4) protection from secondary pressure to all “persons,” regardless of their status as employers. 111 Thus, the foreign subsidiary would be immunized from the American labor activity. 112

If the NLRB were to decline jurisdiction in this case, the potential for

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108. *Id.* at 199.
109. Although the dispute in *Ariadne* involved primary rather than the secondary picketing posited in this case, the type of picketing would seem irrelevant to the scope of the NLRA jurisdiction.
110. The Court in *Ariadne* never determined whether the foreign shipper was in fact an “employer” under the Act. However, even if the foreign subsidiary is not deemed an “employer” within the statutory provisions, NLRA coverage still exists. On two occasions, the Supreme Court has held that even though the Board does not have jurisdiction over the primary labor relations of a party, it is nonetheless competent to consider secondary disputes involving such party. Thus in Local 25, Teamsters v. N.Y., N.H. & H.R.R., 350 U.S. 155 (1956), and Plumbers Local 298 v. County of Door, 359 U.S. 354 (1959), a railroad and a county, both of which were the secondary-employer objects of a primary strike between parties subject to the NLRA, were barred from seeking relief in state courts from the secondary boycotts. These two non-employer parties were directed to the NLRB since NLRA coverage activated the federal preemption doctrine.
111. In addition to the modification noted in the text, the 1959 amendments expanded the phrase restricting union secondary pressure from “the employees of any employer” to “any individual employed by any person engaged in commerce or in an industry affecting commerce. . . .” NLRA § 8(b)(4)(i), 29 U.S.C. § 158(b)(4)(i)(1970).
112. To minimize foreign interference, the NLRB order might simply forbid union members to travel out of the United States with the intent to engage in foreign picketing activity.
state court injunctive relief would again arise. This time, however, there would be a serious question concerning the jurisdictional authority of a state to regulate American union activity centered in a foreign country. Under most of the generally accepted conflict of laws theories, a state would not apply its own law to any labor activity occurring abroad. A state could, however, enjoin any labor activity relating to such secondary activity that occurs in the United States and thereby substantially nullify the effect of the picketing.

F. Case 6: Secondary Product Boycott

A large electric equipment multinational corporation imports electronic components from its foreign subsidiary which are then assembled into finished products in the United States. When the foreign union goes on strike, the leaders of the International Brotherhood of Electrical Workers (IBEW) at the American assembly plant convince the American employees to support the foreign union and to refuse to work on any products containing the imported electronic parts. The multinational corporation files with the NLRB for an injunction against this alleged secondary boycott.

Analysis: Initially, NLRB jurisdiction of this case would appear to involve the same unwarranted intervention into the foreign labor affairs that removed NLRB jurisdiction in Mobile Steamship. However, that case cited with approval the two Court of Appeals cases which held the Board has jurisdiction over secondary activity by an American union against its American employer where the primary dispute was between a foreign union and a foreign employer. The Supreme Court differentiated the Mobile Steamship situation by stating that in the previous two cases, the fact situations revealed that the union actions were “in commerce,” while in the case under review, the union actions were not. The basis of this differentiation of identical fact patterns escapes reasoned inquiry. Yet the boycott by the American union in the hypo-

113. See note 54 and accompanying text supra.
114. One might presume, for example, that a state could enjoin individual union members from traveling abroad to violate the prohibitions contained in the labor injunction.
115. In the Court of Appeals cases, the NLRB successfully enjoined American union leaders from persuading Continental Grain Co. workers in the United States not to unload the ships of a Canadian employer being struck by a Canadian union. Madden v. Grain Elevator Workers, Local 418, 334 F.2d 1014 (7th Cir. 1964), cert. denied, 379 U.S. 967 (1965); Grain Elevator Workers, Local 418 v. NLRB, 376 F.2d 774 (D.C. Cir.), cert. denied, 389 U.S. 932 (1967).
116. See note 38 supra.
117. Justice Stewart, who joined the majority opinion in Windward Shipping, authored the dissenting opinion in Mobile Steamship. He believed that the latter fact pattern was
American Legal Restrictions

A theoretical case could be prohibited by the NLRB,\textsuperscript{118} regardless of the foreign contacts, if the NLRB finds the boycott to be "in commerce" as it has done, with court approval, in similar cases.

G. CASE 7: STRUCK WORK AGREEMENTS

An American union signs a collective bargaining agreement with an American multinational corporation that forbids American employees from doing any overtime work attributable to production shifts by the MNC to avoid the effect of the economic pressure resulting from a foreign strike against the foreign subsidiary of the multinational corporation. Upon commencement of a foreign strike, the MNC attempts to enjoin the American union's refusal to perform the struck work.

Analysis: The question of NLRB jurisdiction again hinges on whether the unfair labor practice affects "commerce" or merely impinges on foreign wage-cost decisions. Since the clear purpose of the agreement is to put economic pressure on the foreign subsidiary employer in the primary dispute with the foreign union, the resulting economic effect on foreign labor markets removes the agreement from the jurisdiction of the NLRB despite the fact that the two parties in privity were American.\textsuperscript{119}

Furthermore, the existence of the "voluntary" agreement would seem to preclude any state court injunction predicated on tortious interference. There also are no apparent Sherman Act problems, for the clause is part of a collective bargaining agreement which seems to be sufficiently related to wages, hours and conditions of work of the American employees.\textsuperscript{120}

The viability of struck work agreements in American contracts as a potent international labor weapon against multinational corporations, however, may well prove to be illusory. A multinational corporation is unlikely to agree to such a clause voluntarily. In addition, any economic pressure to obtain such an agreement could be enjoined in state court\textsuperscript{121}

\begin{footnotesize}
\footnotetext[118]{clearly in commerce and used the two fact patterns of the Court of Appeals cases to support this position. 419 U.S. 215, 241 n.3 (1974)(Stewart, J., dissenting).}
\footnotetext[119]{Note that a valid ally doctrine defense would be of no avail to the union. Even if the absence of a secondary employer would negate any § 8(b)(4) violations by the IBEW leadership, the union boycott itself could still be enjoined under Boy's Markets. See note 83 supra.}
\footnotetext[119]{119. The conclusion that the alleged § 8(e) agreement would be outside NLRB jurisdiction is founded upon the parallel fact situation in Mobile Steamship, where the alleged § 8(b)(4) violation by an American union against an American employer was outside NLRB jurisdiction.}
\footnotetext[120]{But see text, part III(I) infra.}
\footnotetext[120]{Note that the ally doctrine defense would probably not be available in state court. On the other hand, if such a labor weapon arose under NLRA coverage, the ally doctrine

\end{footnotesize}
in the same manner as other such labor activity not within the jurisdiction of the NLRA.

H. Case 8: Restriction on Imports

The United Steelworkers of America forces a leading steelmaker to sign a collective bargaining contract containing a clause that forbids the importation into the United States of steel made abroad by the MNC's foreign subsidiary.\(^\text{122}\) The Steelworkers freely admit that this boycott is a job protection effort that will prohibit the foreign metal from competing on the United States market. Despite the contract, the multinational corporation sues the American union alleging an unlawful boycott in violation of the Sherman Act.

Analysis: As domestic industries become international in scope, unions will increase the use of protective measures to preserve their employees' present jobs and income. When forced upon an employer in a collective bargaining agreement, such a strategy runs the risk of falling outside the labor exemption to the Sherman Act if it severely restrains trade and is not closely related to the traditional sphere of wages, hours, and working conditions.\(^\text{122}\) The agreement in this case may well be subject to the Sherman Act. It is not in any direct fashion related to the wages, hours, and conditions of work of the American employees—the traditional and protected subjects of bargaining. Rather, it is a direct restraint on competition, a coerced boycott of a foreign product. In the very first labor antitrust case to reach the Supreme Court after

\(^{122}\) The ability of the American MNC to prevent importation from the foreign subsidiary would preclude a finding that, for the purposes of the Sherman Act, the MNC and the foreign subsidiary were separate business entities. See generally United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951). See Report of the Attorney General's National Committee to Study the Antitrust Laws, 30-36, 88-90 (1955). Care should be taken to prevent confusing this separateness test with the labor law separateness test for the purpose of secondary pressure. See text, part I supra. If the MNC were to be treated as two separate competitors for Sherman Act purposes, the case being discussed would approximate Allen-Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945), where a union which conspired with certain electrical contractors to exclude outside competitors from the New York City market was held in violation of the Sherman Act.

\(^{123}\) By its very nature, a collective bargaining agreement is a union combination with a non-labor group which falls within the specific exception to the labor exemption. See note 77 supra. In Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), the Court recognized a non-statutory exemption from the antitrust laws for agreements that were sufficiently related to traditional union objectives and did not greatly affect the character of the competition in the industry. A balance was made between the labor interests sought to be protected and the concomitant restraint on trade produced by such an agreement.
Hutcheson, such a boycott was held violative of the Sherman Act. While the result of such a boycott would clearly benefit the Steelworkers and even other American steel producers, the decrease in competition on the United States steel market would be adequate reason to prohibit such a union tactic.

I. CASE 9: COERCED STRANGER AGREEMENTS

The International Ladies’ Garment Workers’ Union (ILGWU), in an ambitious job protection effort, pickets and eventually coerces a leading American textile company into signing an agreement which prohibits the sale of textile materials to foreign clothing manufacturers who then export the finished articles to the United States. The ILGWU represents employees of American clothing manufacturers, but does not represent any employees of the textile firm. The textile company attempts to enjoin the picketing and then sues the ILGWU for violation of the Sherman Act.

Analysis: Under the NLRA, the garment industry proviso to Section 8(e) fully sanctions this type of refusal-to-deal agreement. Likewise, picketing to obtain an agreement excepted from the restrictive terms of Section 8(e) does not violate the Section 8(b)(4)(A) prohibition on picketing to force an employer to sign a Section 8(e) agreement. The effect of such a refusal-to-deal agreement upon foreign labor cost decisions of foreign employers, however, might be sufficient to remove NLRB jurisdiction. If it does, state courts again would be free to enjoin the otherwise legal labor picketing.

Another problem arises with respect to the Sherman Act. The scope of the garment industry proviso might not cover textile companies. If it does not, the hypothetical case resembles the recent fact situation of Connell Construction Co. v. Plumbers Local 100, wherein the Supreme Court held that a union loses antitrust immunity by coercing an employer to sign a “hot cargo” agreement not sanctioned by NLRA.

125. The garment industry proviso essentially exempts the following parties from the § 8(e) restrictions: “persons in the relation of a jobber, manufacturer, contractor, or sub-contractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry....” See 29 U.S.C. § 158(e)(1970).
Section 8(e). Thus, regardless of the concomitant Section 8(e) violation—\textsuperscript{128} or the lack thereof because of the limited NLRA jurisdiction—the ILGWU would face severe antitrust problems.

CONCLUSION

The new and oftentimes unwarranted restraints on labor union activity that exist in certain international settings may generate support for domestic law reform such as the trade restrictions embodied in the recent Burke-Hartke proposal.\textsuperscript{129} While other federal controls on multinational corporations might be created,\textsuperscript{130} pressures may soon develop for the formulation of an international labor code\textsuperscript{131} to deal with the labor problems in international trade.

Alternatively, consideration may be given to the legitimization of certain otherwise unlawful labor weapons that are especially effective against multinational corporations—such as secondary pressures—\textsuperscript{132} even if such weapons remain illegal for domestic purposes.\textsuperscript{133} Favoring

\textsuperscript{128} The Court in \textit{Connell} stated:

There is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA. 421 U.S. at 634.

\textsuperscript{129} Strongly supported by unions, this bill, which was ultimately rejected by Congress, would have placed limitations on foreign investment which had an adverse effect on the United States job market.

\textsuperscript{130} One rather simple, yet far reaching, Congressional action would be to amend the NLRA so that NLRB jurisdiction, like Sherman Act jurisdiction, is extended to its Constitutional limit under the Commerce Clause. Then, NLRA protections would be offered even if the labor actions had a foreign effect. As it now stands, it is precisely those labor weapons which have a foreign effect that are most in need of NLRA protection.

It has been argued that a more diligent application of existing legal controls, rather than the creation of new federal law to curb multinational corporations, is all that is necessary to protect the interests of labor. For example, the ICFTU has passed a resolution urging member unions to press for strict enforcement of all national antitrust laws to curb any abuses of power by an MNC. See W. Feld, \textit{Transnational Business Collaboration Among Common Market Countries} 93 (1970).


\textsuperscript{132} One rather simple method of legalizing secondary pressures against multinational corporations would be to make it more difficult for an MNC to obtain a non-unitary status. If only a unitary status could be achieved by a given MNC, secondary pressure against a subsidiary would thereby become primary pressure against the MNC.

\textsuperscript{133} The legitimization in the international arena of otherwise prohibited labor weapons will surely lead to problems in determining which employers qualify as multinational corporations and are therefore subject to the new pressures.
this proposal is the lack of protective labor legislation in many foreign countries which jeopardizes the protections available to American workers and grants multinational corporations the power to take labor related actions that would otherwise be prohibited in a domestic sphere. Since the United States would have great difficulty regulating MNC labor activity abroad, it seems equitable to remove most restrictions on American labor activity in relation to foreign labor affairs so as to equalize the freedom of action.

This technique could be coupled with a choice-of-law interest analysis approach which examines the policies underlying the enactment of the American and foreign laws. Different situations, such as those just discussed, could be analyzed then on a case-by-case basis by examining and balancing the relevant national interests before deciding whether to apply American labor law. While this approach would undoubtedly lead to a more expansive interpretation of federal labor law jurisdiction, the NLRB might still decline jurisdiction if the foreign elements involved outweighed the American legal interests. In either case, the national labor policies of the affected countries would decide the issue, and needless refusals of jurisdiction as well as unwarranted interference in foreign affairs would be avoided. In addition, meddlesome state law involvement would be removed.

This more rational use of domestic tools combined with a more permissive use of traditional labor weapons may well balance the unequal power relationships in international labor relations. As Judge, later Justice, Holmes observed in a dissent in a domestic labor relations case, it is only fair that the inequitable balance of power be redressed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that

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134. For an excellent discussion of the relevant factors to be considered in an interest analysis approach for NLRB jurisdiction in maritime affairs, see Foreign Ships, supra note 31, at 69-81. In a general framework, the relevant variables would include issues of international comity, the involvement in foreign relations, the uniformity of labor law treatment, the relative economic power of the parties involved, the protection of national citizens, and the avoidance of the infringement of both the rights of foreign citizens and the laws of foreign states. The final test in whether to grant NLRB jurisdiction arguably should be based upon the nature of the parties involved, the interests of these parties, and the potential conflicts with foreign or international law.

135. One might argue that the decisions by the Supreme Court permitting state court injunctions against maritime union activity were attempts to judicially redress the inequitable balance of power in favor of the unions in that industry. Whether the Burger Court will expand NLRA jurisdiction in the international sector to protect labor union activity against multinational corporations to redress the balance of power in that field is a different question.
of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other side is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.\textsuperscript{136}

Legal support for this "desirable counterpart," rather than the legal restriction that presently exists, will insure a healthier system of international trade\textsuperscript{137} and promote an improved standard of living for the workers of the world.

\textsuperscript{137} Indeed, the authors of the Wagner Act in 1935 recognized these beneficial aspects of a comprehensive industrial relations system:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.