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## Labor Law - Jurisdiction of National Labor Relations Board - Picketing of Foreign Owned and Manned Vessels Is Arguably Subject to Jurisdiction of NLRB

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*Borg-Warner* may be viewed in a favorable light. It cannot be denied that one of its welcome effects will be to reduce the scope of potential industrial strife.

From the foregoing analysis, it does not necessarily follow that if the instant case had been granted certiorari by the Supreme Court it would have been overturned.<sup>24</sup> The degree to which the area of mandatory collective bargaining is to be narrowed or broadened, or influenced by government regulation, probably will not be determined in cases such as the instant case. A performance bond proposal possesses a unique place in the history of labor-management relations, and its handling by the Board and the courts is not necessarily indicative of a general attitude that will prevail in the treatment of other different but related proposals. It will take a proposal of more recent birth, newly arrived upon the bargaining scene, unburdened by the weight of judicial and administrative precedent, and related more intimately to the actual performance of work, to enable one to estimate accurately the final impact of the *Borg-Warner* decision upon the practice of collective bargaining.

*Thomas F. Caffrey*

LABOR LAW—JURISDICTION OF NATIONAL LABOR RELATIONS BOARD—  
PICKETING OF FOREIGN OWNED AND MANNED VESSELS IS “ARGU-  
ABLY SUBJECT” TO JURISDICTION OF NLRB.

*Inces S.S. Co., Ltd. v. Int'l Maritime Workers Union*  
(N.Y. 1961).

The Inces Steamship Company, Limited is a Liberian corporation wholly owned by Italian shareholders. Inces operates two Liberian-registered ships which are manned by foreign crews recruited abroad. These vessels run regularly scheduled cruises to certain Caribbean ports, the cruises originating at and returning to New York City. Inces has its main office in London, and it shares another office in New York with a subsidiary New York corporation which acts as its agent in booking passengers for the cruises and providing for supplies and repairs. Agents of the defendant union boarded Inces' two ships several times and spoke with the crew members regarding unionization. Upon the breakdown of negotiations on this subject between the union and Inces, the former picketed one of Inces' ships while it was docked in New York, charging Inces with unfairness in refusing to recognize the union and demanding better wages for the crew members. Under the persuasion

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24. *Cert. denied*, 82 S. Ct. 42, 30 U.S.L. Week 3112 (U.S. Oct. 10, 1961).

of the union, one hundred members of the crew left the ship, making it impossible for it to sail. Consequently, several cruises had to be cancelled. The union filed charges of unfair labor practices against Inces with the National Labor Relations Board which were still pending when Inces brought suit in the New York Supreme Court asking that the picketing be enjoined. The union challenged the court's jurisdiction to consider the suit, contending that under *San Diego Building Trades Council v. Garmon*,<sup>1</sup> the conduct complained of was at least "arguably subject" to the jurisdiction of the National Labor Relations Board as protected activity or as a prohibited unfair labor practice under § 7 or § 8 of the Labor Management Relations Act of 1947 (Taft-Hartley Act).<sup>2</sup> It was contended, therefore, that the court must yield to the exclusive primary jurisdiction of the federal Board. The court, however, granted the injunction, holding that defendant's acts were tortious and that the state court had jurisdiction to restrain them. The Appellate Division upheld the lower court, with certain modifications,<sup>3</sup> and cross-appeals were taken. The New York Court of Appeals, with three judges dissenting, reversed, *holding* that a dispute between an American labor union and a foreign corporation which operates a 'flag-of-convenience' ship making regular stops at a United States port is at least "arguably subject" to the jurisdiction of the National Labor Relations Board, and, therefore, without the jurisdiction of the federal or state courts. *Inces S.S. Co., Ltd. v. Int'l Maritime Workers Union*, 219 N.Y.S.2d 21, 176 N.E.2d 719 (1961).

The first section of the Labor Management Relations Act of 1947 (Taft-Hartley Act) states that the purpose and policy of the Act is to promote the free flow of commerce and, in general, to provide orderly procedures for the enforcement of the rights of both employers and employees.<sup>4</sup> In order that the rights set up by the Act might be effectively and *uniformly* protected, the courts, both state and federal, have been

1. 359 U.S. 236, 79 S. Ct. 773 (1959).

2. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .";

61 Stat. 140-43 (1947), 29 U.S.C. § 158 (1958): "(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to dominate or interfere with the formation or administration of any labor organization . . . ; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ; (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title . . ."

3. 11 App. Div. 2d 177, 202 N.Y.S.2d 692 (1960).

4. 61 Stat. 136 (1947), 29 U.S.C. § 141(b): "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to provide orderly and peaceful procedures for preventing the interference by either [employer or employee] with the legitimate rights of the other, to protect the rights of individual employees and their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

deprived of original jurisdiction to consider any suits arising from activities which are "arguably" protected by § 7 or prohibited by § 8 of the Act.<sup>5</sup> It has been pointed out that the courts are not primary tribunals to adjudicate whether a particular activity is governed by § 7 or § 8; it is essential to the integrity of national labor policy that these determinations be left in the first instance to the National Labor Relations Board.<sup>6</sup> Special problems arise, however, when these general principles of jurisdictional determination are applied to situations involving disputes between employers and employees engaged in United States foreign commerce.

If a United States ship-owner hires men at wages below the union scale, the picketing activities of the protesting union would clearly come within the scope of the Labor Management Relations Act. The Act was obviously aimed at relations between employers and employees who are engaged in foreign commerce and both of whom are citizens of the United States. However, the American seaman is equally affected if the employer is an alien in name only, as is the case with domestic owners of 'flag-of-convenience' ships. The beneficial owners of such foreign-registered vessels might then successfully avoid the better wages and conditions which a crew of American seamen would demand. On the other hand, if the beneficial owners, as well as the corporate owners, are aliens, and the ship operates primarily between foreign ports, principles of comity among nations would certainly warrant an assumption that Congress intended no interference here, even though it is clear that Congress *could* dictate whatever rules it wished as a condition to entering United States waters.<sup>7</sup> The question of over what situations Congress intended to confer jurisdiction upon the National Labor Relations Board becomes a very difficult one, despite some judicial language to the contrary.<sup>8</sup> Further, due to the sometimes conflicting reasoning of the courts it has become very difficult to ascertain exactly what criterion is being employed to determine the National Labor Relations Board's jurisdiction.

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5. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959). This case dealt with picketing by a union of a lumber business. The employers, in refusing to accept an agreement to retain in their employ only those workers who were members of the union, contended that the union had not been designated by the employees as their collective bargaining agent. The employers claimed that the sole purpose of the picketing was to compel execution of the contract; the union contended that its aim was to persuade the workers to become members. The United States Supreme Court reversed the state court's decision awarding damages to the employer and held that, due to the potential conflict of inconsistent standards on the state and federal level, whenever an activity is "arguably subject" to § 7 or § 8 of the Labor Management Relations Act "the States as well as the federal courts must defer to the exclusive competence of the N.L.R.B. if the danger of state interference with national policy is to be averted." (at 245, 79 S. Ct. at 780) See also, *Garner v. Teamsters Union, Local 776*, 346 U.S. 485, 490-91, 74 S. Ct. 161, 165 (1953).

6. *San Diego Building Trades Council v. Garmon*, *supra* note 5, at 244-45, 74 S. Ct. at 179.

7. *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 142, 77 S. Ct. 699, 701-02 (1957); See also, *Wildenhuis' Case*, 120 U.S. 1, 7 S. Ct. 385 (1887).

8. *Benz v. Compania Naviera Hidalgo*, *supra* note 7, at 143, 77 S. Ct. at 702.

In the present case, the employer-steamship company relied upon *Benz v. Compania Naviera Hidalgo*<sup>9</sup> as supporting its contention that it is not even "arguable" that Congress intended to extend the jurisdiction of the National Labor Relations Board to the dispute in question. In the *Benz* case, the ship flew a foreign flag, was owned by a foreign corporation, and was manned by a foreign crew. The United States Supreme Court declared that the damages awarded by the district court to the shipowners for the loss incurred by reason of a United States union's picketing of the ship while it was *transiently* in a United States' port should be allowed. The Court noted:

Our study of the Act [the Labor Management Relations Act of 1947] leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees.<sup>10</sup>

The Court further emphasized:

What was said [in Congress, upon adoption of the Labor Management Relations Act] inescapably describes the boundaries of the Act as including only the workmen of our own country and its possessions.<sup>11</sup>

There is little indication that the Court based its decision upon the narrow point of the vessel's minimal contacts with American commerce, although later cases have made much of this element.<sup>12</sup> In *Marine Cooks & Stewards v. Panama S.S. Co.*,<sup>13</sup> the Supreme Court again considered the *Benz* case. The fact situation was similar to that in *Benz*, except that no mention was made of the ship's being merely incidentally in American waters. The Court held that the lower federal court was without jurisdiction to issue an injunction against the union's picketing because it arose in connection with a "labor dispute" as defined by § 13 of the Norris-LaGuardia Act.<sup>14</sup> In distinguishing the *Benz* case, the Court said:

9. *Supra* note 7.

10. *Benz v. Compania Naviera Hidalgo*, *supra* note 7, at 143, 77 S. Ct. at 702.

11. *Id.* at 144, 77 S. Ct. at 703.

12. *E.g.*, *Navios Corp. v. National Maritime Union*, 402 Pa. 325, 166 A.2d 625 (1960), *cert. denied*, 366 U.S. 905, 81 S. Ct. 1047 (1961); *Inces S.S. Co., Ltd. v. International Maritime Workers Union*, 219 N.Y.S.2d 21 (1961).

13. 362 U.S. 365, 80 S. Ct. 779 (1960).

14. 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958): "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." § 1 of the Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958), states: "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . ."

Nothing was said or intimated in *Benz* which would justify an inference that because a United States District Court has power to award damages in state cases growing out of labor disputes it also has power to issue injunctions in like situations.<sup>15</sup>

The Court laid little stress upon the lack of regular contacts with the United States.

The union, in the instant case, ignoring the broad language of *Benz*, distinguished that case by emphasizing the regular course of business which the Incres ships conducted from ports of the United States. The union particularly stressed the *West India Fruit* case,<sup>16</sup> which was decided by the National Labor Relations Board, and the *Navios* case.<sup>17</sup> The fact that in the *West India Fruit* case the ship-owner was a Virginia corporation considerably weakens this case as authority for extending the National Labor Relations Board's jurisdiction to a dispute involving a vessel owned by a foreign corporation. However, the language of the Board in that decision is very significant. The criterion set up to determine the Board's jurisdiction was simply the effect of the dispute upon commerce.<sup>18</sup>

... this Board was created to advance the public interest in eliminating obstructions to commerce, not to adjudicate private controversies. Under such a statutory policy, it would be anomalous at best to base jurisdiction upon the citizenship and residence of the parties involved, rather than upon their relationship to the protected commerce of this nation.<sup>19</sup>

The Board pointed out that:

... it is the effect ... upon foreign commerce, not the source of the injury which is the criterion ...<sup>20</sup>

15. *Marine Cooks & Stewards v. Panama S.S. Co.*, *supra* note 13, at 369, 80 S. Ct. at 783. In this case, at 371, in footnote 12, the Court refers to another interesting distinction between this case and *Benz*. The Court points out that in *Benz*, the American union members did not belong to the union of the foreign crew members, but were merely picketing in sympathy with them; while in the *Panama* case, the unions were not interested in the internal economy of the ship, but in preserving job opportunities for themselves in this country. Is the Court suggesting that a case may arise where such a factor might be determinative of the N.L.R.B.'s jurisdiction? Further the Court seems to forget the fact that the foreign crew in the *Benz* case had designated the Sailors' Union of the Pacific, one of the defendants in the action, as its collective bargaining agent. *Cf. Navios Corp. v. National Maritime Union*, *supra* note 12.

16. *West India Fruit & S.S. Co.*, 47 L.R.R.M. 1269 (1961).

17. *Navios Corp. v. National Maritime Union*, 402 Pa. 325, 166 A.2d 625 (1960), *cert. denied*, 366 U.S. 905, 81 S. Ct. 1047 (1961).

18. The Board pointed out that it was empowered to prevent unfair labor practices "affecting commerce" under § 10(a) of the National Labor Relations Act, as amended in 1947. Under § 2(6), commerce is defined as: "... traffic ... between any foreign country and any state." "Affecting commerce" is defined by § 2(7) as "... burdening or obstructing commerce or the free flow of commerce, as having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

19. *West India Fruit & S.S. Co.*, *supra* note 16.

The Board was speaking of the effect of the citizenship of the crew upon the jurisdiction of the Board.

20. *Id.* The Board quoted favorably from *Edison v. Labor Board* 305 U.S. 197, 222, 59 S. Ct. 206, 214 (1938).

Under such a broad standard as this, it could be said that every dispute involving any ship which does sufficient business with the United States to affect its commerce is "arguably subject" to the jurisdiction of the Board. Surely Congress never intended to extend the provisions of the Labor Management Relations Act to all such foreign shipping. Some language may be found in the *West India Fruit* case itself which would make one hesitate to draw such a sweeping implication. For example, the Board stated:

Thus, the task before us, as we read the cases, is to determine whether or not the facts in the present situation which constitute contacts between the operation of the *Sea Level* [the ship involved] and the United States are substantial — that is more than minimal but not necessarily preponderant. The question is shortly answered, for here we have substantial continuing American foreign commerce and the American employer. These factors, we find, warrant application of the Labor Act in the proceeding.<sup>21</sup> (Emphasis added.)

Further, when speaking of some of the union's contentions, the Board declared:

It is, nevertheless, maintained that flag law governs all and that *American ownership and commerce* are not, as we have concluded, *decisive factors*.<sup>22</sup> (Emphasis added.)

It should be noted again that the ship-owner in question was a United States' corporation. The same was true in the *Navios* case,<sup>23</sup> upon which the court in the instant case relied, and in the other decisions which it cited favorably.<sup>24</sup> In the instant case, however, the court found the broad language of the Board in *West India Fruit* a sufficient indication that the dispute was, at least, "arguably subject" to the Board's jurisdiction, even though the beneficial owners of *Incres* were Italian shareholders.

In trying to determine the jurisdiction of the National Labor Relations Board, the intent of Congress necessarily must be the controlling consideration. When the bill presenting the Labor Management Relations

21. *Ibid.*

22. *Ibid.*

23. *Navios Corp. v. National Maritime Union*, *supra* note 17. In this case, the primary owner of the ship in question was a Liberian corporation, which was owned by another Liberian corporation, which, in turn, was owned by two United States' citizens. *Navios*, the time charterer, was also a Liberian corporation, which was owned by another Liberian corporation, which, in turn, was owned by the United States Steel Corporation.

24. *Afran Transport Co. v. National Maritime Union*, 169 F. Supp. 416 (S.D.N.Y. 1958). Here, the Liberian corporation and the Panamanian corporation were primarily owned by "leading United States Oil and bulk carrier companies" (at 419). *Peninsular & Occidental S.S. Co.*, 120 N.L.R.B. 1097 (1958). *Peninsular* was a Connecticut corporation which had organized another corporation and incorporated it in Liberia. The ships were nominally owned by this latter corporation, but the Board had no trouble in piercing the corporate veil to find the true owners.

Act was reported to the Senate it was stated that, ". . . the bill herewith reported has been formulated as a bill of rights both for *American* workingmen and for their employers."<sup>25</sup> (Emphasis added.) It was declared further that the American workingman had been deprived of his dignity as an individual, and it was the purpose of the bill to correct the inadequacy of legislation which had contributed to this condition.<sup>26</sup> Certainly, protection of the American workingman is needed in regard to the policies of those ship-owners who maintain a 'flag-of-convenience' fleet. Many American owners, by registering their vessels under a foreign flag, effectively evade the requirement that their ships be manned with a certain percentage of American seamen. Thus, the American seaman is deprived of employment which would ordinarily be available to him. If we consider this as the basic dispute in most cases involving the picketing of 'flag-of-convenience' ships, then what must be determined in attempting to fix the scope of the Board's jurisdiction is the presence of those factors which would deprive an American seaman of employment he would ordinarily receive. If the ship-owner is a citizen of the United States, there is sound reason for finding that Congress intended to cover such a situation, since the American workingman is most certainly adversely affected. However, if not even the beneficial owners of a 'flag-of-convenience' ship are American, it is difficult to see what legitimate interest an American union has in the wages or conditions of the crew, since there can be no claim that the under-paid foreign crew-member is filling an American seaman's place. Of course, shipping which is essentially foreign but which carries American products in commerce does, to a degree, affect the United States seaman, since those shipping the goods will tend to place their products upon those vessels which offer the lowest freight rates, and such rates are certainly affected by the wages of the crew. However, if all other aspects of the commerce are foreign, well-established principles of comity should certainly outweigh this rather indirect effect. Therefore, without ultimate American ownership, the union can claim little interest, even though the vessel is a 'flag-of-convenience' ship.

In this respect, the Board in *West India Fruit* seemed to miss the point of the precedents which were before it. It is generally conceded that Congress could impose innumerable restrictions, not only upon ships affecting commerce, but upon all ships voluntarily entering the territorial waters of the United States.<sup>27</sup> The vital question is whether Congress intended to do so. As has been pointed out, traditional notions of comity among nations regarding shipping regulations is of prime importance and it cannot be supposed that Congress intended to sweep away all such ideas with the enactment of the National Labor Relations Act. The

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25. See, H. R. REP. No. 245, 80th Cong., 1st Sess. 4 (1947).

26. *Ibid.*

27. See *supra* note 7.

danger of enactment of similar legislation restricting United States' shipping by the countries which would be affected must be carefully considered. And, as has been pointed out, the fact that a vessel is a 'flag-of-convenience' ship gives the United States' seaman no real interest in it unless the owners are American.

It must be conceded, however, that, whatever may ultimately be declared by the courts to be the limits of the National Labor Relations Board's jurisdiction in this area, the language of the Board in the *West India Fruit* case raises the possibility that it would claim jurisdiction over the present case. Since such a possibility exists it would seem that, in view of the *Garmon* case, the courts would be obliged to defer to the primary jurisdiction of the Board. However, upon closer analysis there arises a serious question whether the courts must await a determination by the Board in a case which involves the scope of the subject matter covered by the federal statute itself. Admittedly, the National Labor Relations Board is especially competent to consider whether certain acts of parties subject to the Act are unfair labor practices or protected activities under the statute. Regarding the very scope of the statute, however, the courts are at least equally well equipped to make such determinations as is the Board. Questions concerning the parties intended to be governed by the Act are not the exclusive concern of the Board and, consequently, it would seem that the court need not be bound by the Board's ruling in the *West India Fruit* case. This argument would especially commend itself in cases, such as the present one, where the issue of coverage involves delicate international considerations not notably within the competence of a domestic regulatory agency. The *Garmon* case, since it did not deal with the coverage of the statute, is not contrary to such a view. Therefore, it appears not only that Congress did not wish to bestow upon the National Labor Relations Board jurisdiction over controversies involving shipping which is essentially foreign, but also that the state court in the present instance could justifiably have made such a determination, instead of concluding that it was obliged to await the action of the Board. It is submitted that the United States Supreme Court may ultimately dispose of the problem on this basis.<sup>28</sup>

Thomas A. Hogan

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○ 28. The United States Supreme Court has granted certiorari. *Inces S.S. Co. Ltd. v. International Maritime Workers Union*, 30 U.S. L. WEEK 3180 (U.S. Dec. 4, 1961) (No. 469).