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Labor Law--Injunctions--Order Restraining Election Aboard "Flag-of-Convenience" Vessel

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LABOR LAW—INJUNCTIONS—ORDER RESTRAINING ELECTION ABOARD “FLAG-OF-CONVENIENCE” VESSEL—Upon petition of the National Maritime Union, the National Labor Relations Board directed a representation election¹ among all unlicensed foreign seamen employed by Empresa Hondurena de Vapores, S.A., aboard a Honduran-registered ship. Empresa, a Honduran corporation which is a wholly-owned subsidiary of the United Fruit Company, sought injunctive relief in a federal district court. The petition alleged that the Board’s order violated treaty obligations,² the Constitution of the United States³ and principles of international law.⁴ The Regional Director of the NLRB moved to dismiss, asserting that the district court lacked jurisdiction to enjoin such an order and that the Board’s action was proper. The district court held that it had jurisdiction of the subject matter,⁵ but denied the injunction.⁶ On appeal, *held*, injunction granted. A federal district court may enjoin a representation election among foreign seamen where the NLRB has extended its jurisdiction into the foreign relations field by ordering such an election. *Empresa Hondurena de Vapores v. McLeod*, 300 F.2d 222 (2d Cir. 1962).

In order to avoid high domestic labor costs and obtain numerous tax advantages,⁷ many American shipowners have registered their vessels in

¹ United Fruit Co., 134 N.L.R.B. No. 25 (Nov. 15, 1961).

² Treaty of Friendship, Commerce and Consular Rights With the Republic of Honduras, Dec. 7, 1927, art. X, 45 Stat. 2618, T.S. No. 764.

³ See *Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949).

⁴ See COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* § 310 (4th ed. 1959); RIENOW, *THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL* 48-49, 77-78, 116, 152, 186-88, 214, 218-19 (1937). See also *Wildenhus’s Case*, 120 U.S. 1, 12 (1886); *The Ester*, 190 Fed. 216, 221 (E.D.S.C. 1911); *United States v. Flores*, 289 U.S. 137, 157-58 (1933) (dictum); Comment, *Labor Law, International Law and the Panlibhon Fleet*, 36 N.Y.U.L. REV. 1342, 1353-56 (1961).

⁵ The jurisdictional holding was on the ground that Empresa had made a colorable allegation of a denial of constitutional rights. See *Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949).

⁶ The injunction was denied on the grounds that the district court was not convinced of the probability of Empresa’s success or by its claims of irreparable damage from the election.

⁷ *Hearings on Transfer of American Ships to Foreign Registry Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. 16-17, 71-82 (1949), 2d Sess. 534-69 (1950).

foreign countries, particularly Panama, Liberia and Honduras (the Panlibhon fleet). Due to the expansion of this fleet and the resultant decline in the employment of American seamen,⁸ American maritime unions have attempted to organize the foreign seamen aboard these "flag-of-convenience" vessels. A notable amount of litigation has surrounded these union efforts, the bulk of it arising either in the courts to enjoin union picketing of the vessels, or before the NLRB in representation and unfair labor practice proceedings against the shipowners.⁹ In the principal case two significant questions are raised: (1) whether the NLRB has authority under the National Labor Relations Act¹⁰ to entertain representation proceedings in the flag-of-convenience area; and (2) if not, whether an employer can obtain injunctive relief against such proceedings in a federal district court.

The applicability of American labor legislation to flag-of-convenience shipping has been judicially considered in two principal areas: picketing and representation proceedings. In the picketing area, the Supreme Court has held that the NLRA¹¹ does not apply to a controversy resulting from the picketing of a foreign ship operated by a foreign crew under foreign articles while temporarily in an American port.¹² The Court's rationale was that Congress had not expressed any intent to apply the NLRA to such a situation and that it was not the Court's place "to run interference in such a delicate field of international relations."¹³ Three years later, however, the Court held that the Norris-LaGuardia Act¹⁴ applied to the picketing of a flag-of-convenience vessel and precluded a federal district court from enjoining such picketing.¹⁵ Hence, the unavailability of NLRA

⁸ See Shils, *The "Flag of Necessity" Fleet and the American Economy*, 13 LAB. L.J. 151 (1962); Comment, *Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts*, 60 COLUM. L. REV. 711, 715 (1960).

⁹ See Comment, *Labor Law, International Law and the Panlibhon Fleet*, 36 N.Y.U.L. REV. 1342, 1343 (1961).

¹⁰ 49 Stat. 499 (1935), as amended, 29 U.S.C. § 151 (1958).

¹¹ Labor-Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), as amended, 29 U.S.C. § 141 (1958).

¹² *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

¹³ *Id.* at 146.

¹⁴ 47 Stat. 70 (1932), as amended, 29 U.S.C. § 101 (1958).

¹⁵ *Marine Cooks v. Panama S.S. Co.*, 362 U.S. 365 (1960); *Hein v. Fianza Cia Nav.*, S.A., 279 F.2d 490 (9th Cir. 1960); *Afran Transport Co. v. NMU*, 169 F. Supp. 416 (S.D.N.Y. 1958), *motion to dismiss denied*, 175 F. Supp. 285 (S.D.N.Y. 1959). The district court in *Marine Cooks* had granted an injunction on the ground that the Norris-LaGuardia Act did not embrace foreign labor disputes and that the picketing was an unlawful interference with the internal economy of a foreign flag. 1959 Am. Mar. Cas. 340 (D. Ore.), *aff'd*, 265 F.2d 780 (9th Cir. 1959); see authorities cited note 4 *supra*. The Supreme Court, in distinguishing the *Benz* case, pointed out that the parties there were not engaged in a labor dispute, because the defendant unions were picketing the ships as a gesture of sympathy for the conditions of the alien crew, rather than in their own interests. However, the opinion in *Benz* did not seem to rest on this fact. The Court in *Marine Cooks* failed to point out that the two cases were decided under different statutes, and that an opposite holding in *Benz* might subject the flag-of-convenience fleet to the

administrative remedies, combined with the application of Norris-La-Guardia restrictions, would seem to preclude foreign shipowners from seeking protection from union picketing in any federal court or agency.¹⁶ Moreover, two state courts have refused to issue injunctions against shore-side picketing of flag-of-convenience vessels, on the basis that the NLRB "arguably" has exclusive jurisdiction.¹⁷ This seems to suggest that the NLRA might be applicable to foreign flag shipping, thereby giving the foreign shipowners some means of obtaining relief from picketing.¹⁸ However, the reluctance of both state and federal courts to provide a definitive solution has left a hiatus in which the foreign employer is unable to obtain any relief.

The applicability of the NLRA to flag-of-convenience vessels in representation proceedings had been considered only by the NLRB prior to the principal case. The Board has held that the act applies in any case where the facts show a sufficient impact upon American commerce,¹⁹ and has relied on a "substantial contacts" test²⁰ to justify its assertion of jurisdiction.

regulatory provisions of the NLRA, which the Court ostensibly did not want, while application of Norris-LaGuardia would not achieve such a result. See Comment, 36 N.Y.U.L. REV. 1342, 1346-47, 1358 (1961).

¹⁶ The fear of such a situation caused the Ninth Circuit to affirm the issuance of an injunction in *Marine Cooks v. Panama S.S. Co.*, 265 F.2d 780 (9th Cir. 1959), *rev'd*, 362 U.S. 365 (1960); *cf.* *Afran Transport Co. v. NMU*, *supra* note 15, at 425.

¹⁷ *Incres S.S. Co. v. International Maritime Workers*, 10 N.Y.2d 218, 176 N.E.2d 719, 219 N.Y.S.2d 21, *cert. granted*, 368 U.S. 924 (1961); *Navios Corp. v. NMU*, 402 Pa. 325, 166 A.2d 625 (1960), *cert. denied*, 366 U.S. 905 (1961).

¹⁸ Presumably, the only relief which could be applied for by the employer under the NLRA is a cease-and-desist order pursuant to § 8(b), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158 (1958), alleging that the picketing was an unfair labor practice.

¹⁹ *Eastern Shipping Corp.*, 132 N.L.R.B. 930 (1961); *West India Fruit & S.S. Co.*, 130 N.L.R.B. 343 (1961); *Peninsular & Occidental S.S. Co.*, 120 N.L.R.B. 1097 (1958).

The Board has narrowly interpreted *Benz v. Compania Naviara Hidalgo, S.A.*, 353 U.S. 138 (1959), to stand for the proposition that the Board has no jurisdiction over labor activities involving a vessel whose only contact with American commerce is its transitory presence in an American port. There may be a further ground of distinction for, as the court in the principal cases states, "the *Benz* case did not directly involve the application of the panoply of labor regulation embodied in §§ 7, 8, 9 and 10 [of the NLRA], but only the provisions of § 303 of the Taft-Hartley Act [LMRA] relating to picketing" Principal case at 234. See Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 YALE L.J. 498, 518-19 (1960).

²⁰ In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), the Supreme Court listed seven factors which it considered in determining whether sufficient contacts existed between an injured seaman, a shipowner-employer and American commerce to warrant recovery under the Jones Act, 41 Stat. 1007 (1920), as amended, 46 U.S.C. § 688 (1958). Of these, the law of the flag was deemed most important. 345 U.S. at 584-86. The flag law doctrine is a rule of customary international law—that the flag a ship flies is evidence of her national character, and that the law of the flag nation governs in any controversy. See authorities cited note 4 *supra*. The Second Circuit subsequently applied this test in *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959), where the court placed significant reliance on the ultimate American ownership of the shipowner-employer; "the practice . . . of looking through the façade of foreign registration" was felt to be "essential unless the purposes of the Jones Act are to be frustrated

But such a test is subject to various interpretations. In the proceedings before the Board which resulted in the election order in the principal case, the Board determined that substantial contacts with American commerce were present;²¹ the court disagreed with the Board's findings and held that the NLRA should not be applied because the foreign interests substantially outweighed the domestic interests.²² Nevertheless, the "substantial contacts" test, albeit incapable of precise delineation, appears to be the most feasible line-drawing device presently available. The solutions available, at the extremes, would be that the NLRA should be held to apply to every foreign ship that enters an American port or, alternatively, that regulatory labor legislation was intended by Congress to resolve disputes only between American employers and American employees.²³ The trend evinced in the NLRB decisions²⁴ and in the principal case would seem to militate against either of the extreme positions. Furthermore, due to the rapid growth of the Panlibhon fleet, conditions have substantially changed since the enactment of the NLRA, and American labor has considerable interests worthy of protection.²⁵ Thus, a "substantial contacts" test would appear to be the better solution,²⁶ but the balancing of foreign and domestic interests in the flag-of-convenience labor area should arguably not be left to the courts without the guidance of a clearer standard enunciated by Congress. Possible factors, or "contacts," which might be taken into consideration are: the nationality of the seamen; their affiliation with other unions, foreign or domestic; the nationality of the shipowner; and the shipowner's connection with American interests, such as stock owner-

by American shipowners intent upon evading their obligations under the law by the simple expedient of incorporating in a foreign country and registering their vessels under a foreign flag." 263 F.2d at 442. In finding that this practice was well established, the court cited *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S.D.N.Y. 1953), where the American stock ownership of the employer (the same as in the principal case) was held to be a controlling factor in finding sufficient American contacts for applying the Jones Act. See also *Firipis v. The S.S. Margaritis*, 181 F. Supp. 48 (E.D. Va. 1960); *Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A.*, 168 F. Supp. 236 (S.D.N.Y. 1958). *Contra*, *Moutzouris v. National Shipping & Trading Co.*, 194 F. Supp. 468 (S.D.N.Y. 1961); *Mproumeriotis v. Seacrest Shipping Co.*, 149 F. Supp. 265 (S.D.N.Y. 1957); see Note 1959 DUKE L.J. 130, 136.

²¹ The Board found that Empresa's maritime operations were "a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of . . . the United Fruit Company," and were "an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation. . . ." *United Fruit Co.*, 134 N.L.R.B. No. 25 (Nov. 15, 1961).

²² "The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed . . . by Honduras' interests." Principal case at 234.

²³ *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-44 (1957).

²⁴ See cases cited note 19 *supra*.

²⁵ See authorities cited note 8 *supra*.

²⁶ Such a test should also be applied in determining the applicability of the Norris-LaGuardia Act and the NLRA.

ship, charterers and amount of trade conducted in and through United States ports.

Assuming that substantial contacts do not exist with American commerce and that the Board has no authority under the NLRA to assert its jurisdiction, the second issue presented by the principal case is the reviewability of the NLRB election order, *i.e.*, whether a foreign employer can prevent such an unauthorized assertion of jurisdiction by means of an injunctive suit in a federal district court. The NLRA provides for very limited judicial consideration of representation proceedings. Congress, in enacting the NLRA, set itself firmly against direct judicial review of representation matters due to the risk that time-consuming review might defeat the very objective of the act—rapid determination of labor disputes and the resultant promotion of industrial peace through collective bargaining.²⁷ It was feared that both union and management would be able to use litigation as a tactic to delay the initiation of collective bargaining.²⁸ When the act was amended in 1947, another attempt was made to provide for direct review in the courts of appeals.²⁹ However, the proposed amendment was eliminated in conference.³⁰ Therefore, representation matters are presently made subject to judicial review only as a part of the record in proceedings to review final orders.³¹ The Supreme Court has held that a representation determination is not a final order.³² However, in *Leedom v. Kyne*³³ the Court made an exception to the limited opportunity for review. *Leedom v. Kyne* held that federal district courts have jurisdiction to enjoin NLRB representation orders where the Board has acted contrary to a "clear and mandatory" provision of the act.³⁴ In subsequent interpretations of the holding, it has usually been stated that unless the Board engages in action characterized by a departure from either statutory requirements, or those of due process, a federal district court does not have jurisdiction to enjoin NLRB section 9 representation proceedings.³⁵ The

²⁷ 93 CONG. REC. 6444 (1947) (remarks of Senator Taft). See Note, 29 GEO. WASH. L. REV. 948 (1961).

²⁸ S. REP. NO. 573, 74th Cong., 1st Sess. 5-6 (1935); see H.R. REP. NO. 1147, 74th Cong., 1st Sess. 7 (1935); *cf.*, *Leedom v. Kyne*, 358 U.S. 184, 191-95 (1958) (dissenting opinion).

²⁹ H.R. REP. NO. 245, 80th Cong., 1st Sess. 59-60 (1947).

³⁰ 93 CONG. REC. 6444 (1947) (remarks of Senator Taft); *cf.* H.R. REP. NO. 245, 80th Cong., 1st Sess. 94 (1947) (minority report).

³¹ § 9(d), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(d) (1958).

³² *AFL v. NLRB*, 308 U.S. 401 (1940).

³³ 358 U.S. 184 (1958).

³⁴ The Board refused to take a vote among the professional employees pursuant to § 9(b)(1) of the NLRA, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(b)(1) (1958), to determine whether a majority of them would vote for inclusion in a bargaining unit consisting of both professional and non-professional employees in the certified bargaining unit. The Court held that the certification was made contrary to a specific provision of the act, and that injunctive relief was available to the injured union in a federal district court.

³⁵ See, *e.g.*, *Boyles Galvanizing Co. v. Waers*, 291 F.2d 791 (10th Cir. 1961); Department

advocates of a narrow view of *Leedom v. Kyne* contend that to permit review where the Board has merely misconstrued the act would allow the same scope of review as that following a final order in an unfair labor practice case, thereby permitting review of the same issues twice.³⁶ Furthermore, a narrow interpretation of the *Leedom v. Kyne* exception would appear to prevent employers and unions from engaging in dilatory tactics which would tend to frustrate the promotion of collective bargaining. However, the delay of the collective bargaining process is not the aim of the flag-of-convenience employers. Each idle day in an American port subjects them to irreparable injury. Apparently, therefore, the possible use of dilatory tactics was not a consideration in the principal case.

It might appear, in fact, that the principal case could have been disposed of under a limited interpretation of *Leedom v. Kyne*, and that the court unnecessarily extended it. The NLRA was found to be inapplicable to the situation. The Board's election order would therefore seem to have been an assertion of authority over a subject-matter not within its jurisdiction, and, hence, an "action taken in excess of its delegated powers."³⁷ On the other hand, it may be contended that since the inapplicability of the NLRA does not appear on the face of the act, the principal case cannot fit within a limited interpretation of *Leedom v. Kyne*. The *Kyne* case appears to require that the Board's action violate the express language of the statute and not merely an underlying policy.³⁸ Assuming a more extended judicial review is necessary to its resolution, the principal case has either created a new exception to the policy against limited review, although severely limiting this exception to the Board's assertion of jurisdiction over foreign flag shipping, or it has extended the *Leedom v. Kyne* exception to include a situation where the Board has asserted its jurisdiction contrary to an underlying policy of the act.³⁹ While the question

& Specialty Store Employees' Union v. Brown, 284 F.2d 619 (9th Cir. 1960); *Leedom v. IBEW*, 278 F.2d 237 (D.C. Cir. 1960); *International Ass'n of Tool Craftsmen v. Leedom*, 276 F.2d 514 (D.C. Cir.), *cert. denied*, 364 U.S. 815 (1960). In contrast to this strict interpretation, others have viewed *Leedom v. Kyne* as representative of a new liberality in judicial review. Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127, 134 (2d Cir. 1960) (dissenting opinion); Cox, *The Major Labor Decisions of the Supreme Court, October Term 1958*, in GELLHORN & BYSE, *ADMINISTRATIVE LAW* 441-48 (4th ed. 1960); Hart, *The Supreme Court 1958 Term*, 73 HARV. L. REV. 84, 222 (1959); Polner, *Representation Rights of Professional and Technical Employees*, 10 LAB. L.J. 405 (1959).

³⁶ Once the election has been held and the bargaining unit certified, the employer can obtain judicial review by refusing to bargain and subjecting himself to a cease-and-desist order for an unfair labor practice. See Hart, *supra* note 35, at 220.

³⁷ *Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

³⁸ In *Leedom v. Kyne* the Board's order was made "in excess of its delegated powers and contrary to a specific prohibition in the act. Section 9(b)(1) is clear and mandatory." 358 U.S. at 188.

³⁹ Mr. Justice Brennan, dissenting in *Leedom v. Kyne*, feared "that the ingenuity of counsel will, after today's decision, be entirely adequate to the task of finding some

is a close one, it appears that the latter view is the more likely. The court did not believe that Congress intended to limit the role of the courts to situations where the NLRB had acted in plain contravention of a specific statutory mandate.⁴⁰ *Leedom v. Kyne* is to be given a broader interpretation in the field of foreign affairs than in the usual case of purely domestic significance.⁴¹ "If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the best time to stop it is before the offense occurs, not somewhere along the line."⁴²

In view of the significance of an extension of *Leedom v. Kyne*, the court's failure to set forth clear standards to determine in which other cases an extension can or should be made is troublesome. The suggestion is made⁴³ that each court faced with such a situation should make up its mind whether Congress would or would not have wished it to intervene in the representation proceedings. The vagaries of such a standard would appear to preclude its use as an effective control over Board action, particularly in the flag-of-convenience labor area. The court attacked the issue of applicability of the NLRA to flag-of-convenience shipping *after* it had determined that the district court had jurisdiction to enjoin the representation proceeding, applying apparently different standards to each issue. An ostensibly better approach would be to predicate injunctive immunity on the applicability of the regulatory labor legislation. Using a "substantial contacts" test,⁴⁴ if substantial American contacts are found, the Board is justified in asserting jurisdiction. But if the foreign interests outweigh the domestic, the Board would be acting outside of its authority in asserting jurisdiction, and injunctive relief would be available to the shipowner-employer in federal district courts to restrain the Board from interfering with the labor relations aboard flag-of-convenience vessels.

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alleged 'unlawful action,' whether in statutory interpretation or otherwise, sufficient to get a foot in a district court door . . ." 358 U.S. at 195. Perhaps that door has now been opened.

⁴⁰ Principal case at 229.

⁴¹ See Local 1545, *United Bhd. of Carpenters v. Vincent*, 286 F.2d 127 (2d Cir. 1960), where the court could find no violation of a "clear and mandatory" statutory provision.

⁴² Principal case at 229.

⁴³ *Ibid.*

⁴⁴ See cases cited note 20 *supra*.