Winter 1-1-2004

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The Voyage of the *Neptune Jade*: The Perils and Promises of Transnational Labor Solidarity

JAMES ATLESON†

An injury to one is an injury to all.¹

If you’re not part of the solution, you’re part of the problem.

Sympathy strikes . . . are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centers. While pointing out that a number of distinctions need to be drawn here, . . . the [ILO Freedom of Association] Committee considers that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.²

† Distinguished Teaching Professor of Law, University at Buffalo. The author would like to thank Ellen Dannin for her careful comments on an earlier version of this paper, Alan Hyde, Patrick Macklem, Makoto Ishida, and Guy Mundlak for their suggestions, and Fred Konefsky for his unfailing support of this and all other projects. Jason Bowman, Kevin Hsi, John Haberstroh, and Erin Sobkowski provided valuable research assistance. Generous assistance was provided by the Baldy Center for Law and Social Policy and by Dean Nils Olsen.

Versions of this effort were presented in a number of forums including the 1999 Intell Conference, Cape Town, South Africa; the 1998 Law and Society Conference, Chicago, Illinois; and the 1999 Labor Law Group Conference, Scottsdale, Arizona. Short versions of this paper have been published as James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in *Labour Law in an Era of Globalization* 379 (Joanne Conaghan et al. eds., 2002) and James Atleson, “An Injury to one. . .”. in *Transnational Labor Solidarity and the Role of Domestic Law* 160 (James A. Gross ed., 2003).


2. INTERNATIONAL LABOR ORGANIZATION, *FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING* 74 (1994) [hereinafter FREEDOM OF ASSOCIATION].
This work is based on three propositions. First, that fairness—or rights—at work is critical to the functioning of a viable democracy. Senator Robert Wagner argued strenuously in the 1930s that fairness, participatory rights, and representation at work were critical if Americans were to take their political rights seriously. At a time when many argue that Americans have little interest in political participation, this connection may need to be remembered.

Second, and closely related, is the notion that labor rights are human rights, although labor advocates and human rights specialists have not had much to do with each other until recently. That is, these rights are important totally separate from their functional use for creating independent power centers or for cementing political democracy. Human rights advocates have been understandably concerned about serious threats to health and safety as well as the suppression of democratic rights. Except for, perhaps, discrimination, the plight of workers as workers has not been a critical issue. Yet both labor and human rights stem from international documents. Labor rights are set out not only in International Labor Organization ("ILO") conventions and recommendations but also in UN documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

Third, the recognition and protection of collective action is critical to the advancement of many kinds of rights, especially work-related rights. These rights are generally stated in individual terms, but all have a collective dimension. Many rights are meaningful only when exercised in a collective manner or, at least, can only be effectively achieved, recognized, and enforced in a collective manner.

Global forces are making it more rational for workers to engage in cross-border sympathetic action. The

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transnational aspect of capital, including the cross-border mergers that are occurring, will mean that labor disputes in one country will be of concern to workers in another, even if they are not employed by the same firm. Indeed, a good deal of cooperative activity already exists. Much of this type of activity, however, will be unlawful, but this will not be the first time that rational strike activity occurred in the face of hostile law. Thus, the use of collective action will often involve the expression of a right—not because one is entitled to it and not because there is a remedy for its violation.

The increasingly global nature of our economy has led many to consider whether labor rights could or should be deemed international human rights. The idea that all citizens of the world possess basic rights has gained currency in recent years, and it is certainly reasonable to argue that the workplace, the location in which people spend most of their lives, should not be exempted. Indeed, various international conventions and documents do indeed set forth specific workplace rights, and unions may be able to expand or enforce those rights by their own efforts.

Separate from the notion that labor rights are human rights, the recognition and protection of worker solidarity is fundamental to the law of many nations. Recently, some have advocated a return to notions of workplace equity and industrial democracy, ideas embedded in the labor legislation of many nations. In the United States, for


5. See generally James Gross, A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association, 3 EMPLOYEE RTS. & EMP. POL'Y J. 65 (1999); see also Lance Compa, UNFAIR
instance, the concept of solidarity is embodied in the National Labor Relations Act’s definition of “employee” which expressly extends beyond the boundaries of any individual employer. If worker solidarity is important to advance shared goals within one country, the increasingly global nature of work and the mobility of capital suggest that it is essential that worker solidarity exist across national boundaries. After all, the rise of transnational corporations makes it likely that in some instances worker solidarity efforts across national boundaries could be within the confines of one employer.

This concern forms the initial idea of this work, an endeavor that also involves comparative and domestic labor law and the problem that legal rules often create serious obstacles to expressions of transnational labor solidarity. Labor unions are beginning to consider how they can take part in the world market and engage in actions that aid fellow workers elsewhere in the world. The interest in solidarity is motivated by the effects of globalization and international economic forces that perhaps affect workers more than nations. As defined by the ILO, globalization refers to the “worldwide wave of liberalization of trade, investment and capital flows and the consequent growing importance of these flows and of international competition in the world economy.”

I. LABOR AND INTERNATIONALISM

Labor lawyers and unions, at least in the United States, have thus far not stressed international labor rights, and international human rights groups have not focused on

6. There is a clear parallel to the criminal conspiracy cases in the United States which also dealt with whether unions were legitimate players in the market. See Robert Steinfeld, The Philadelphia Cordwainers’ Case of 1806: The Struggle Over Alternative Legal Constructions of a Free Market in Labor, in LABOR LAW IN AMERICA (Christopher L. Tomlins & Andrew J. King eds., 1992).

labor rights, at least collective rights. Recently, however, the concern for internationalism unions voiced in the late 19th and early 20th centuries has returned, although most of it has focused on attaching some recognition of minimum standards to trade pacts. Whatever one thinks of the North American Agreement on Labor Cooperation ("NAALC"), the side agreement added to NAFTA because of union pressure on then candidate Bill Clinton, it has, in a weak way, provided a forum for raising labor rights issues. In a number of cases, unions and non-governmental organizations ("NGO's") have filed submissions arguing that other NAFTA signatories have failed to enforce their

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9. Between 1890 and 1914, Daniel Rodgers notes, labor politics had a decidedly international tone.

From the American Knights of Labor organizers canvassing for recruits in the English midlands in the 1880s to the British and American fraternal delegates trading places at their respective annual labor union gatherings to the work of Marx's successors and the Second Socialist International, there was no missing the sharply conscious international edge to labor politics.


For the possibilities of labor internationalism in the mid-1940s, see VICTOR SILVERMAN, IMAGINING INTERNATIONALISM IN AMERICAN AND BRITISH LABOR, 1939-1949 (2000).

10. Even world business leaders have agreed to promote human rights, improve labor conditions, and protect the environment in conjunction with the global compact proposed by Secretary-General Kofi Annan. The pact was signed by representatives of the International Chamber of Commerce and the International Organization of Employers. See ICC BUS. WORLD World Business Responds to Kofi Annan's Challenge on Shared Goals with the U.N. (July 5, 1999), at www.iccwbo.org/hom/news_archives/1999/world_business_responds_to_annan_challenge.asp.
own domestic law. Although it might have been assumed that most cases would involve complaints to the U.S. National Administrative Office that Mexico was failing to abide by the terms of the labor side agreement, a number of cases have been filed by Mexican unions complaining about the failure of the United States to enforce its own law.

In recent years, the subject of international trade has tended to dominate any assertion or discussion of international labor rights. The creation of new trading blocks and, especially, the World Trade Organization ("WTO"), have moved the possible linkage of worker rights and trade to the front page. Unions, and some developed nations, have argued that a natural connection exists. Moreover, if freer trade increases jobs, as, for instance, the "Washington Consensus" propounds, then the opposite must be true for imports. Between 1990 and 1995 in the United States, for instance, the value of exports more than doubled, but this number was exceeded by imports that tripled, thereby eliminating more jobs than those created by the increase in exports. Nevertheless, there are serious doubts whether trade agreements can be a likely, let alone

11. Moreover, the earlier U.S. Generalized System of Preferences permitted the United States to unilaterally apply trade pressure against a number of small countries to accord modest levels of labor rights. Lance Compa, Going Multilateral, 10 CONN. J. INT'L L. 337 (1995); Philip Alston, Labor Rights Provisions in U.S. Trade Laws, in HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 71 (Lance A. Compa & Stephen F. Diamond eds., 1996). Actually, there is something faintly humorous about U.S. unions filing submissions with the U.S. National Administrative Organization complaining that Mexico does not effectively protect strikers, that Mexican law is not effectively enforced, and that procedures take too long. Similar objections have long been raised about U.S. labor law.

The United States's post-NAFTA trade agreements with Chile, Jordan, and Singapore obliges signatories to not only to reaffirm their obligations as ILO members and their commitments pursuant to the ILO's Declaration on Fundamental Principles and Rights at Work, but also to ensure that international labor principles are "recognized and protected by domestic law." The principles listed are freedom of association, the right to organize and bargain collectively, the prohibition of forced or compulsory labor and the protection of children. Discrimination, one of the four fundamental principles of the Declaration, is not listed. See K.D. Ewing, Bilateral Trade Agreements and Labour Standards: Initiatives from the U.S., 10 INT'L UNION RTS. 12 (2003); see also Marley Weiss, Two Steps Forward, One Step Back—or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond, 37 U.S.F. L. REV. 689 (2003).

an effective, vehicle for the promotion of international labor rights. Clearly, worker interests cannot be divorced from trade, and not only because of the “race to the bottom” argument. The restriction of worker rights affects one nation’s trade advantage just as do subsidies to domestic manufacturers or import duties. Indeed, laws that fail to provide minimum labor standards, a decent or even subsistence level minimum wage, or which provide obstacles to union organization create a domestic trade advantage, discriminating against those nations that do set minimum wages or accord association rights consistent with ILO standards.

The WTO, however, has greatly restricted a nation’s ability to implement or enforce provisions for worker protection. Thus, a nation cannot, consistent with WTO standards, set labor or environmental standards which the WTO determines masks an intent to protect domestic industries. Nor may a nation bar the import of goods made in conditions it feels violate its own norms or standards, for instance, goods made by young children or produced in unsafe or unhealthy conditions. (The one exception is goods made by forced labor, which has led to a recent federal statute barring such goods from the United States market.) Even if a state internally bars the manufacture and transport of goods made, for instance, by children under a specific age, it may not bar such goods made


15. WTO rules generally prohibit a state from distinguishing among non-product related Production and Processing Methods (“PPMs”). LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY 174 (1999). In other words, states are barred from treating products differently on the basis of the way they are produced as opposed to their physical qualities or end uses. In addition, a WTO nation cannot treat another differently based on its labor, human rights or environment standards. Finally, governments themselves are barred from using noncommercial considerations when making government-purchasing decisions. Id.
elsewhere despite the effect on its own labor standards. Current WTO rules, in short, provide significant barriers to state-based methods for the protection of human rights.

The WTO could consider and adopt some kind of social clause, but this does not appear to be a likely possibility, despite the curious efforts in this direction by the United States. The role of the United States may seem "curious" because the United States has been reticent to sign on to the vast majority of ILO documents. The United States has approved only seven ILO documents, placing near the bottom of nations affirming international labor rights documents. Although the effort to use the WTO to establish international labor standards is continuing, adoption of a "social clause" in this body dominated by "free traders" and populated by third world governments, unions, and employers who perceive such efforts as limitations on their economic success, seems unlikely. The developing world's

16. Interestingly, a similar argument was made in support of the first U.S. effort to bar the interstate transport of goods made by child labor. Hammer v. Dagenhart, 247 U.S. 251 (1918).

For a spirited argument that the WTO and pre-WTO GATT panels have misinterpreted GATT Article XX, ignoring the extent to which nations are permitted to act to protect international human rights, see ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION 11-17 (2000).

17. For an argument that the United States should act unilaterally to protect labor rights, see Jerome Levinson, Certifying International Worker Rights: A Practical Alternative, 20 COMP. LAB. L. & POL'Y J. 401 (1999).

The asserted lack of reasonable connection between trade and labor rights is a sign of the importance of historical context as well as an indication of the success of neo-liberal ideas. The original vision of a post-war international economic order involved three institutions: the World Bank, the International Monetary Fund, and the International Trade Organization. The latter, negotiated in Havana in 1948 and signed by fifty-three nations, including developing countries, explicitly promoted labor rights. Indeed, the labor rights provision was strongly promoted by developing countries. The ITO's Havana Charter included sanctions for countries that did not pursue full employment policies, and it was designed to provide "all countries with a way to adapt and adjust to competitive pressures without having to sacrifice equity and social justice." However, the opposition of American business interests seriously threatened ratification by the Senate, and President Truman did not present the treaty to the body. The result was the death of the ITO and its replacement by GATT which eventually led to the WTO. See Mark Levinson, Trading Places: Globalization from the Bottom Up, NEW LAB. F. 23, 27-28 nn.3-9 (2002).

political leaders often are opposed, seeing international labor standards as a threat to their competitive advantage or afraid of respecting these standards due to the pressures of international trade competition. Although no nation may be an island, labor is deemed localized. Moreover, efforts to interfere with or to regulate the allegedly "free market" are routinely attacked as paternalistic or inconsistent with deeply held views. The current hegemony and acceptance of these views makes it difficult to raise claims based upon what may be seen as "weak" arguments based on human dignity, democratic values, justice, and worker rights.

The opposition of developing nations, when combined with the free traders and those extending the notion of "comparative advantage," makes for a powerful force. Yet, the latter notion takes no account of social policy or values other than narrow economic ones. The views of David Ricardo, after all, were based not only on a quite different world but also on exploitation of natural resources. The comparative advantage of low-wage workers when they are children or when their attempts at unionization are crushed presents a quite different situation. The concern is not with comparative advantage as such but, rather, with comparative exploitation. The exploited can rarely be expected to raise "free market," anti-regulation, limited government or sneaking imperialism arguments in response to notions of international labor rights.

In addition, we are generally not dealing with a nation's use of its workers but, usually, employment by transnational enterprises ("TNEs"), who may seek locales where, for instance, labor organization is not expected because of state opposition. Many developing nations, like southern states in the United States, advertise their "labor free" environment. Yet, if the focus is the opposition of the developing nations, one must ask who precisely these elites

19. For an excellent critique of comparative advantage, see Clyde Summers, The Battle in Seattle: Free Trade, Labor Rights, and Societal Values, 22 U. PA. J. INT'L ECON. L. 61, 65 (2001). Summers notes that even without the battle in the streets the conference might well have broken up if the United States had been serious about "studying" the issue of attaching labor rights to the WTO. Summers also notes that developing nations might oppose the introduction of labor rights because, although the "core" rights do not involve labor costs, the organization of workers into unions could raise wages. Moreover, unions historically represent another power center in society, often opposed to entrenched wealth and power and asserting broad social and political values.
represent and whether workers and unions in countries such as Malaysia or Thailand have the same view of international labor standards.\textsuperscript{20}

Apart from efforts to tie international labor rights with trade arrangements, the ILO can be looked to for standards. Yet, as Harry Arthurs has noted, "it does not claim to provide, in any true sense, a transnational forum with a mandate to evaluate the conduct of individual companies and unions."\textsuperscript{21} ILO standards are promoted by public pressure and, hopefully, embarrassment, as the ILO has no enforcement mechanisms and cannot even expel offending members.\textsuperscript{22} To build on the ILO's efforts, some mechanism

\textsuperscript{20} The views of developing countries should not be interpreted to mean that all in those countries share those views. For instance, a recent study indicates that an overwhelming majority of union leaders in these nations favor the linking of international trade and international labor rights. See Gerard Griffen et al., Trade Unions and the Trade-Labour Rights Link: A North-South Union Divide?, 19 INT'L J. COMP. LAB. & INDUS. REL. 469 (2003).

\textsuperscript{21} Arthurs, Collective Labour Law, supra note 18, at 145.


The ILO has some undefined, and generally unused, authority to enforce its standards. Article 33 of the ILO's Constitution grants broad authority to respond to countries that are not in compliance with the obligations of membership: "[T]he Governing Body may recommend that the Conference take such action as it may deem wise and expedient to secure compliance therewith." Article 33 was first invoked in 2000 against Burma. Following a complaint against Burma under Article 26, a Commission of Inquiry ultimately called on Burma to bring its laws and practices into compliance. After no response was received from Burma, the Conference approved a resolution that condemned Burma's refusal to comply with the Commission of Inquiry's recommendations, prohibited technical assistance except as necessary to implement the recommendations, and banned Burma from most meetings. In March 2000 the Governing Body requested member states to take appropriate measures with the Government of Myanmar [Burma] in relation to Burma's use of forced labor. The situation has not changed, at least formally, nor is it clear that the call for member action has had any effect. As Elliott and Freeman note, the ILO's "slow and tortuous response to Burmese intransigence underscores the unwillingness of the ILO membership to punish miscreants, even when the country in question is a small, poor, isolated one whose violations are egregious and well documented." Kimberly Elliott & Richard Freeman, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? (2003).
is necessary to make global firms, rather than states alone, responsible under ILO procedures.\textsuperscript{23}

Furthermore, the procedures of multi-state arrangements such as the NAFTA labor side agreement (the North American Agreement on Labor Cooperation), although perhaps useful for publicizing disputes and the lack of enforcement of domestic labor law, will be unlikely to advance or regulate collective bargaining relationships internationally. Even its proponents make the most claims thus far. Finally, while private efforts to create, for instance, corporate codes of responsibility show some promise, it seems that, as Harry Arthurs asserts, "across the global economy, and even within its most advanced regional economic systems, all collective labor relations regimes are essentially local regimes, even when they involve transnational corporations.\textsuperscript{24}

Thus, despite the history of attempts to set international standards for labor and employment, legal regimes are intensely local in character. As Lord Wedderburn noted, "one is struck by the contrast between the facility of the internationalization of capital and the obstacles that obstruct international trade union action. Capital is not tied, but each trade union movement is tied to the particular social history of the country in which it operates."\textsuperscript{25} Although labor law is basically national just as labor is still primarily based nationally, Lord Wedderburn’s comments in 1973 are still valid:

\textsuperscript{23} Keith Ewing argues that the “rubicon” has already been crossed in the ILO’s Tripartite Declaration on Multinational Enterprises. See K.D. Ewing, International Trade Union Rights for the New Millennium 31-33 (2000); Keith Ewing, Trade Union Rights in the Twenty-first Century, 5 Working USA, 19, 32-33 (2001).


\textsuperscript{25} K.W. Wedderburn, Industrial Relations, in Nationalism and the Multinational Enterprise 244, 249 (H.R. Hahlo et al. eds., 1973).
The true correlative to an international agreement securing to capital the right to move and, therefore, organize across the boundaries of national states would be an agreement securing to collective organisations of workpeople the right to take common action in negotiating, bargaining with and, if need be, striking against the multinational enterprises.... It is not free movement of labour but free international trade union action which is the true counterpart to free movement of capital.26

Attempts to forge international relationships among workers or to take action across borders will naturally involve national labor law systems. As the following discussion will reveal, a focus on domestic legal regimes will often reveal serious difficulties for unions who wish to promote international standards or the notion that labor rights should be treated as human rights. The "hollowed out state" turns out to be not so hollow after all. Just as many argue that states, far from ceasing to effectively function in the global world, actually legislate the rules and structure of the global economy, states regulate the freedom of workers within their borders to exert economic pressure. The focus of this Article is the secondary or sympathy labor boycott. A secondary boycott is generally defined as economic pressure directed against an employer, often treated as neutral in the labor dispute, to induce it to cease doing business with the primary employer or, alternatively, inducing the employees of those employers not to perform work that would aid the primary employer's business. Pressure by those "neutral" employees to aid workers elsewhere is referred to as sympathetic pressure. A third form of secondary action would involve pressure directed against a neutral employer through its customers rather than through its own employees, that is, causing economic pressure through a consumer boycott.

Importantly, secondary pressure is often a defensive rather than an offensive weapon. There is generally no need to even consider such action if a struck employer ceases production when struck. Secondary pressure is generally designed to counter an employer's efforts to continue production and offset the effect of the strike by using strike replacements. Where strike replacements are legal, as in the United States, secondary pressure seems a rational type

26. Id. at 256.
of pressure, and legal prohibition denies unions an effective countermove to the use of strike replacements.\(^{27}\) There is no question that workers can normally aid workers elsewhere with verbal or even financial assistance. When workers strike to aid workers elsewhere, however, the potential for legal prohibition rises just as the potential for union strength and effectiveness might well increase.

This, then, is a look at law from the ground up. Formal labor law, like other types of regulation, often looks different at the level it is applied, sometimes having greater effect than a sober reflection on the actual sanctions would suggest, sometimes having less effect than legislators hoped. Moreover, the ability to engage in acts of transnational labor solidarity is obviously limited to workers, primarily organized workers, who are in a position to exert economic pressure. Depending upon the nature of the work involved and the relative strength of the parties, sympathy actions may be highly effective or virtually impossible. In this sense, this article deals with a limited group of workers.

Yet transnational activity is clearly occurring, and its incidence seems to be growing. Indeed, for a number of reasons the increase in transnational labor actions can be rationally predicted. First, sympathetic or secondary pressure may often appear reasonable as more and more workers, despite their nationality and location, work for the same global firm. Second, even if not employed by the same firm, many workers will be affected directly or indirectly by labor conditions elsewhere. Third, the rationality of such action may overcome the likelihood in many countries that such actions will be deemed unlawful. Indeed, the relevant law is often unclear and rationales shaky in this area, although union success may not be promising in many nations. Historically, however, labor law has often changed when workers have asserted rights they believed they possessed, and pressure often alters prevailing understandings. This Article deals with the ability of workers to counteract capital, and many examples exist of such efforts. Finally, these cases of international action may

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27. Secondary pressure may also be used to strengthen a union's efforts in collective bargaining.
represent an ironic example of the unintended effect of international capital strategies.  

II. LABOR RIGHTS AND TRANSNATIONAL LABOR SOLIDARITY

Another avenue for promoting labor rights, one in which promising steps have already been taken, is the promotion of international labor rights through collective labor action. Concededly, there are great difficulties, not the least of which are obstacles to such action posed by domestic legal regimes. It is true that ILO Conventions include powerful statements concerning the right of freedom of assembly, the right to join unions and engage in collective bargaining, and the prohibition of child and forced labor and race and sex discrimination. Yet, most American labor lawyers, I am fairly certain, have not read, or perhaps even heard of, ILO standards, let alone the relevant UN documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. This would no doubt not apply to lawyers abroad, who are generally much more attuned to international and comparative developments. Outside the United States, international documents and, indeed, decisions of foreign courts, are often known and even cited in briefs. Harold Dunning, formerly Chief of Workers’ Relations in the ILO, has said that “[i]t would be all but impossible to find any trade union office in the world where Convention No. 87 is not only well known but also held in

28. Labor history reveals a series of attempts by owners to control workers and worker responses, often revealing unintended results. Thus, if factories in the 19th century were, at least in part, aimed at controlling workers better than the use of home workers (the “putting out system”), it had the effect of putting together many workers who could communicate their common interests. One more modern example is the “just in time” production system which, although not primarily introduced as a worker control device, has proven to be somewhat of a gift to unions.

high esteem." It would be difficult, however, to make the same assumption about unions and their lawyers in the United States.

Even if these documents were more widely known, it is less than certain they would have any impact on promoting worker rights. It is sobering that even lawyers who regularly engage in transnational legal practice have little faith in the value of international legal norms. Harry Arthurs found in interviews with forty lawyers who represent transnational firms in seven countries that none of them believed that international legal norms had much effect on their advice to clients or in litigation, either because national norms already exceeded those decreed internationally, or because labor lawyers knew little about international law. ILO conventions and codes of conduct seem not to have arisen in their practice. Others may believe that the ILO, while useful in setting standards, can be ignored because it has little ability to enforce those standards.

If trade agreements or the ILO documents provide thin support for the advancement of labor, where else might labor turn? The very forces of globalization may make it unlikely that domestic law can be relied on to advance worker rights and conditions when domestic law has been under assault by economic forces as well as organizations such as the IMF and World Bank. Nations cannot be insulated from global forces, and the labor law system of all nations will be affected by forces outside national control and, perhaps, outside the control of the participants. As Christopher Arup has noted, the state may find that it has limited range of options in relation to regulating global production.

For example, as a host site, it may become reluctant to insist upon high labor standards within its own territory, for fear of making local products noncompetitive and risking disinvestment and capital switching to more sympathetic regulatory environments by cost-conscious employers. As a home base for multinationals which source production off-shore, it may be reluctant to extend the reach of high labor standards beyond its territory, for fear of losing the commercial advantages of local domiciling and headquartering.\textsuperscript{34}

Thus, labor may have to rely on the possibility of self-help, directed internationally.

As Robert W. Cox has stated, the notion that states often acted as agents of employers was slowly replaced with the "realization of the potential of the state as an instrument to achieve labor's goals," notions that were reinforced by the Great Depression, the acceptance of Keynesian economics, and, more recently, attempts to forge national income policies through national planning bodies.\textsuperscript{35} Since the nineteenth century unions have attempted to gain control over the supply of labor, and their ideology stressed the international solidarity of workers.

The idea of international labor solidarity was sidetracked for some time by the Cold War, but the postwar growth of multinational firms rekindled an international vision. As Burton Bendiner has noted:

[i]n the past companies looked mainly overseas to assure themselves of a continuous flow of needed raw materials. With the stabilization of post-war Europe there were now greater incentives for direct investment abroad by these American corporations, which sought to promote their growth through the opening of new markets. It was advantageous to invest in the construction and operation of new subsidiary plants which would be an on-the-spot source of supply for the local areas rather than of exports.\textsuperscript{36}

The creation of the European Common Market induced European manufacturers to expand their operations abroad as well.


Although companies rely upon a variety of considerations to explain foreign expansion, union leaders tend to assert that the primary motive is the search for lower labor costs. Even though most foreign investment by TNEs has been directed to developed nations, for instance Western Europe, such investment has nevertheless created serious problems for unions. What is an advantage for one group of workers may obviously be a disadvantage for another, and international tensions among national unions have been engendered by firms which "consider" a variety of locations for new investment. As nations bid for a new plant, the result is considerable conflict among various national unions. The most serious problem, however, is the arbitrary and unilateral decisions made by the central administration at the highest level, often thousands of miles away, vitally affecting the employment and livelihood of workers in the overseas plants. Specifically these would cover decisions to transfer operations from one plant to another in a different country or to terminate production in one factory and open a new one somewhere else with resulting job losses or gains in various areas.

Moreover, it is often argued currently that corporations are able to move or threaten to move existing facilities to other locales. Instead of moving or locating plants to gain market advantage, to save on transportation costs for instance, plants can now more easily move to gain labor advantage, that is, a supply of low paid labor, often restricted by less than democratic regimes. Surprisingly, this proposition is challenged by a number of economists, yet firms like Levi-Strauss, Trico, and others commonly explain international transfers of operations in terms of relative wage costs. Moreover, as Gordon and Turner note, "most of the foreign investment in developing countries is aimed at cutting production costs rather than at expanding

37. Id. at 21-25.
38. Id. at 24.
product markets. Developing countries became competitive in world markets because of their relatively low wage structure, once they had imported sufficient capital and technology to protect and grow their industrial sectors.  

Using the geographer’s terminology, Jefferson Cowie notes that capital, unlike labor, has far greater ability... to transcend and use space; the cognitive geographies of the two groups were formed under different circumstances and for different purposes. Management is able to manipulate distance to fragment labor's collective power, and the countless variations in the economic topography offer unlimited terrain for corporations to seek out less costly labor or less aggressive working-class communities. By relocating, the corporation can peel back the layers of historical change accumulated at the old site. It can nurture and reinforce social and political tendencies of the local scene, or it can punish them by moving capital out of the area. Command of spatial relations, therefore, becomes a crucial weapon in management's arsenal, and its mobility increases the return on investment and holsters its ability to contend with competition.  

The search for labor cost advantage is hardly new, however, and can take place even without crossing national borders. Nineteenth century New England manufacturers of textiles and shoes, for instance, moved south, gaining the advantage of friendlier environs and, not incidentally, a cheaper labor force. Similarly, as Cowie has demonstrated, firms like RCA have moved within and without the United States to gain cheaper labor and, in addition, to avoid growing demands of workers in existing locations. Indeed, a good deal of what is loosely referred to as “globalization” is not new at all, but the continuation of capital’s search for greater profits and power. The “cheaper” labor force sought very often involves young, unmarried women. In the maquiladoras of Mexico or factories in other parts of the developing world, like many firms in history, usually explain that women are ideally suited for electronics or garment work. They are, it is said, more productive and,  

41. JEFFERSON COWIE, CAPITAL MOVES: RCA'S 70-YEAR QUEST FOR CHEAP LABOR 185 (1999).  
42. Id. at 185.
most important, have “nimble fingers” and greater dexterity than men.\textsuperscript{43} Nevertheless, the lessening of tariff barriers and greater ease of communication and travel sharpen the perception that the search for cheaper labor has sped up and, in any case, the perception creates tensions between unions in different nations that make coordinated efforts that much more difficult.

It is sometimes argued by neo-liberal economists that globalization and free trade will lead wage rates in developed and developing countries to converge due to migration and the free flow of capital and goods. Like all of these theories, there are some practical problems. First, and simply, labor does not move freely and most states attempt to exert control over their borders. But there is a factual problem as well. Divergence, not convergence, seems to be occurring. Thus, between 1960 and 1990, income in Organization for Economic Development (“OECD”) countries grew on average by 2.6% while income in other states grew only 1.8%. Moreover, the gap in income is growing, not lessening. The UN’s 1996 Human Development Report estimated that between 1960 and 1991 the share of global income of the richest fifth of the population rose from 70% to 85% while that of the poorest declined from 2.3% to 1.4%. In fact, Peter Stalker has stated that OECD countries have been “converging among themselves, while diverging with the rest of the world.”\textsuperscript{44} Indeed, considering the percentage of world trade and foreign direct investment, developing nations are worse off than they were twenty years ago.\textsuperscript{45}

The multinational corporate structure creates problems both of public and private democratic governance. Unions as well as nations find themselves dealing increasingly with corporations that “can more easily weather economic


\textsuperscript{44} PETER STALKER, WORKERS WITHOUT FRONTIERS 17 (2000).

\textsuperscript{45} Id. at 139.
struggles, conceal information, and transfer, or more credibly threaten to transfer, work to other locales [sic] or, indeed, other countries, than could their predecessor counterparts.” For unions, which are organized nationally, the likelihood that corporate decisions are made elsewhere, for instance, by the home-based parent company, makes it difficult to exercise countervailing influence or power. Moreover, unions know that bargaining as well as investment decisions are made in the light of the success of subsidiaries in other countries. To take one example, the U.S. autoworkers are aware that negotiations with General Motors (“GM”) is related to conditions at Vauxhall in the United Kingdom, Opel in Germany, Holder in Australia, Saab in Sweden, as well as GM plants in Latin and South America.

In short, many industrial disputes have an international dimension. Not only do employers, especially in the United States, often threaten to move abroad, but firms themselves are often foreign companies. According to Jay Mazur, one-third of the members of the United Food and Commercial Workers Union in the United States are employed by non-U.S. companies. Approximately two-thirds of AFL-CIO unions are engaged in some kind of international activity. Finally, the definition of a national company is far from clear, e.g., is it where the entity is incorporated, meaning many “U.S.” firms can opt out of U.S. regulations by reincorporating in a place like Bermuda, where the headquarters is located, where most of the stockholders reside? In many cases, the corporation has the ability to define its own nationality or seek to have none.

46. James Atleson, Reflections on Labor, Power, and Society, 44 MD. L. REV. 841, 842 (1985) [hereinafter Atleson, Reflections]. Approximately sixty-five million people are employed by TNEs, twenty-two million in host, not home, countries. This figure represents about 3% of the world’s total workforce. Not counted, obviously, are the large number of workers, employed by contractors, for instance, whose working conditions are in effect set by the TNEs. According to the World Bank, TNEs control 70% of world trade. “In 1990, the world’s largest 350 TNEs accounted for almost 40% of the world’s merchandise trade.... The top 500 TNEs control two-thirds of world trade.” TIM LANG & COLIN HINES, THE NEW PROTECTIONISM 34 (1993). Finally, over 40% of international trade involves intra-firm transfers. Id.
47. BENDINER, supra note 36, at 49.
The growing imbalance of union-management power has been accentuated by new production strategies, automation, and communication advances. Not only does capital flow easily across national borders, but borders are

49. Various definitions of “globalization” have been offered, often relating to the discipline of the offeror. The OECD, for instance, has provided an economic definition: “an evolving pattern of cross-border activities of firms involving international investment, trade and collaboration for purposes of product development, production and sourcing, and marketing.” ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GLOBALISATION OF INDUSTRY 9 (1996). Definitions favoring political and economic dimensions stress changes in the structure and operation of capitalism involving growing market integration, globalized firms, and, often, the weakening or “hollowing out” of the nation state. Sociologists deemphasize a purely economic focus, stressing “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.” ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 64 (1990) (quoting Peter Leisink, Introduction to GLOBALIZATION AND LABOUR RELATIONS 4-5 (Peter Leisink ed., 1999)).

Conventional accounts have been challenged, especially on the left, without challenging the notion that capitalism has become a more universal system and that market and economic transactions are increasingly global. But others have expressed doubts about how much production has really been internationalized, about how mobile industrial capital really is, about the very existence of ‘multinational’ corporations. Such critics have pointed out that the vast majority of production still goes on in nationally-based companies in single locales...[and] foreign direct investment has been overwhelmingly concentrated in advanced capitalist countries, with capital moving from one such country to another.

Ellen Meiksins Wood, Labor, Class, and State in Global Capitalism, RISING FROM THE ASHES? LABOR IN THE AGE OF “GLOBAL” CAPITALISM 4 (Ellen Meiksins Wood et al., eds. 1998). On the other hand, although there were certainly other times when there was rapid integration among nations driven by the liberalization of trade, investment and capital flows, technological change, the current period involves enterprises and workers “of nearly all the world’s countries, in the goods as well as in the services sector.” RAYMOND TORRES, TOWARDS A SOCIALLY SUSTAINABLE WORLD ECONOMY 1 (2001).

The ILO World Labour Report 1997-98 indicates the effect of globalization on unions in both the developed and developing world. For sixty-five countries between 1985 and 1995, 51% of the countries experienced a decline of union membership of more than 20% and 25% (sixteen) saw a decline of 5-20%. Only 11% (seven) had a stable union density, 3% (seven) had growth of 5-20%, and 11% (seven) experienced a growth of more than 20% in union membership. See WORLD LABOUR REPORT 1997-98, supra note 7, at 237-38 (including Table 1.2 of the Statistical Annex). In addition to the proffered benefits of freer trade, it is also “associated with greater labour market turnover, with particularly detrimental consequences for workers with only modestly transferable skills.” In addition, “wider income inequalities can be observed.” See TORRES, supra, at 1, 19, 22-32.
increasingly irrelevant to the marketing and production of goods. Specialized production methods also lessen the effectiveness of union pressure. For instance, in 1987 Olivetti, the Italy-based multinational, produced electric typewriters in its domestic factories, calculators in Mexico and Italy, and computers in Argentina. Labor conflict in any one country would not affect continued production of products in other locations.

Multinational firms have the ability when dealing with subsidiaries to set internally used parts and services so as to affect apparent costs and tax burdens. Thus, subsidiaries in different nations may be charged artificially high rates for shipment of parts or services from the parent organization or from one subsidiary to another. The purpose, of course, is to show a low profit for an affiliate or branch operating in a high-tax country. The procedure is reversed in low-tax areas where the company would like to have high profits shown. This is known as 'transfer pricing' and affects collective bargaining in different regions. Profitability or lack of it on the company's books, and the ability to pay or meet the cost of the union demands at the bargaining table, are naturally important factors in labor negotiations in each subsidiary.

International production systems and cross-border mergers have the no doubt unintended effect of uniting workers in different countries working for the same transnational firm. Internationalized production can also create compassion among national groups of workers, especially given different wage rates and terms of employment. Since as early as 1969 unions have coordinated action against multinational corporations in the countries in which the firms operated. Trade unions in Europe in some of the industries affected by the expansion

50. As Breen Creighton notes, the collapse of the U.S.S.R. has opened a huge new market for goods and services and, in addition, provided a substantial reserve of relatively cheap labor. Breen Creighton, The Internationalisation of Labour Law, in REDEFINING LABOUR LAW: NEW PERSPECTIVES ON THE FUTURE OF TEACHING AND RESEARCH 90, 93 (Richard Mitchell ed., 1995).

51. BENDINER, supra note 36, at 31-32.

of multinational firms, especially chemicals and metal trades, began to "advocate coordinated action by unions in different countries in which these corporations had operations."

The idea of bargaining with multinational corporations gave new life to the international trade secretariats ("ITSs"), international confederations of unions in the same industry, which had played a less significant role when unions had been primarily concerned with Cold War issues. The secretariats provide data for bargaining purposes and also coordinate communication and assistance among affiliates. Such assistance might involve unions in the same industry or working for the same TNE, but in different nations or unions. Certain secretariats, especially the International Metalworkers' Federation, have tried to coordinate bargaining across borders. Moreover, the passage of the labor side agreement to NAFTA has spurred collaborative efforts by United States and Mexican unions, even among those that could be considered rivals for the same work.


55. Herod, supra note 54, at 357; KIM MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM (1988). National unions have also begun to broaden their horizons. The U.S. AFL-CIO, for instance, has recently created a Solidarity Center to provide technical assistance to organize and support unions worldwide.

56. KIM MOODY, WORKERS IN A LEAN WORLD 239-42 (1997); DALE HATHAWAY, ALLIES ACROSS THE BORDER (2000).
Many of the secretariats began as craft organizations, but mergers and changes in industrial structure have caused almost all to become industrial or multi-industrial in form. The newest sectoral international is Union Network International ("UNI"), created from four older and separate organizations, to represent skilled workers' interests in areas such as entertainment, finance, media, and communications. UNI claims it has a network of 920 affiliated unions, representing 15.5 million members in 140 countries.\(^5\) Another approach, advocated by The International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations ("IUF"), is the creation of international framework agreements with multinationals. Indeed, IUF has signed several agreements with multinational firms within its broad jurisdiction.\(^6\)

According to a report in *International Union Rights*,\(^7\) at least twenty-one International framework agreements have been signed between global union federations and transnational firms. These agreements commit the company to respect minimum labor standards in worldwide operations. Unlike corporate codes, the IFAs permit unions to aid in defining and monitoring labor standards.

The most comprehensive organization is the International Confederation of Free Trade Unions ("IFCTU") based in Brussels. The current ICFTU was created in 1949 by national unions which withdrew from the World Federation of Trade Unions because of the influence of unions in the eastern block. The ICFTU, therefore, is a creation of the Cold War. The organization's membership consists, not of national unions, but, rather, of national union centers or confederations. Currently, there are 215 national union centers in 145 nations and territories, with approximately 125 million individual workers represented.\(^8\)

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60. ICFTU, *New Framework*, supra note 58; see also BENDINER, supra note 36, at 35-42; J.P. Windmuller & S.K. Pursey, *The International Trade Union Movement*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN*
International solidarity has been advocated both on altruistic grounds as well as by the more self interested desire to protect domestic labor standards, especially in developed nations, against lower foreign standards. More recently, unions have been concerned with internal corporate decisions involved with the transfer or location of production to low wage nations. In addition, the increasing merger and expansion of multinational firms makes it rational to build linkages with unions in other nations or to aid in the creation of unions where none may have previously existed. The hoped-for aim might be to aid struggles in other nations, workers in the same corporations or even to engage in transnational bargaining. Many difficulties exist, of course, but the rationality of such action may tend to offset the myriad problems, legal, institutional, and nationalistic that might exist.

One issue, little researched, is the extent to which domestic law hinders cooperative efforts across national boundaries.\(^1\) Beyond the considerable problems in requesting workers in other countries to undergo the economic hardships of sympathetic job actions, domestic legal systems have created obstacles to solidarity efforts. A good example of the problems posed by domestic labor law is the action of longshore workers in 1997 and 1998 in many locations in the world which illustrated just how vulnerable the new global economy might be to transnational labor pressure.

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\^1\) The obstacles caused by restrictions on secondary pressure can be seen in a domestic example which parallels the international contracting situation. Jobs for Janitors has attempted to organize workers employed by cleaning contractors by aiming pressure at building owners and managers in order to induce them to agree to use unionized contractors. Direct pressure on contractors is ineffectual because they are so easily replaced by lower-cost non-union contractors, even if they agree to union representation and terms. See Catherine Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, in *Organizing Immigrants: The Challenge for Unions in Contemporary California* 199 (Ruth Milkman ed., 2000).
III. THE DOCKERS DISPUTE IN THE UNITED KINGDOM: THE TROUBLED VOYAGE OF THE NEPTUNE JADE

"With the growth of multinational enterprise, management becomes to a large extent an international power—where is the countervailing power? . . . [W]e have management but neither government nor effective union power. The entire basis of our thinking on collective industrial relations and collective labor law is destroyed by this development."62

A United Kingdom dispute fueled by privatization and workforce reductions ultimately led to a concerted and effective secondary boycott effort across the globe. A strike by longshore workers in 1995 was followed by a refusal of Mersey Docks employees to cross their picket line. Reports are conflicting, some indicating that 500 dockers refused to cross a picket line set up by five workers dismissed after reportedly refusing to work additional unpaid overtime.63 Ultimately, Mersey terminated 329 employees for refusing to work, an action the Mersey dockers call a "lock out." The refusal to cross a picket line was followed by a lockout under the still applicable restrictive labor laws of the Thatcher government, the 1980 and 1990 Employment Acts, which barred secondary activity as well as limiting the scope of a labor dispute.

The dockers then formed a shop stewards' organization which began a campaign for reinstatement that spread from the United Kingdom to ports around the world. The dockers held an international conference among rank and file workers in the summer of 1996 where they called for an international effort on their behalf. Unlike other workers facing similar problems in recent times, the Liverpool workers became an international cause as the symbol of the “demise of England’s unionized longshore industry. They were the last union workers in the industry, which had


Liverpool seems to be the only dock in the United Kingdom still operating under a collective bargaining agreement. Alexander Cockburn, The Fate of the Neptune Jade, NATION, Mar. 23, 1998, at 9.
been privatized by Britain's then Prime Minister Margaret Thatcher.”

According to labor author Kim Moody,

representatives from twelve ports in eight countries attended and agreed to put pressure on their own unions and International Transport Workers' Federation (ITF) . . . to call a day of action. The first such day, September 28, was only a partial success. But by 1997 the ITF had called on its members to join in a week of actions, beginning on January 20, in whatever way they could. An impressive list of unions around the world signed on.

Dockworkers in Seattle, Tacoma, and other United States West Coast ports were asked by the International Longshore and Warehouse Union ("ILWU") to stay off the job for one shift on Monday, January 20, 1997, in solidarity with the British dockworkers.  

Symbolic as well as direct labor actions occurred in over 100 ports, and workers in many locations refused to unload cargo from ships originating in Liverpool. In the United States the ILWU closed down the West Coast for eight hours on January 20, while Oregon ports remained closed for twenty-four hours. As Moody perceptively notes, the "Merseyside dockers had given world labor a lesson in how to counter the power not only of dock, shipping, and the other transportation firms, but of all the TNEs whose vast investments rest on this fragile transportation system."

The issue is even more dramatically highlighted by the voyage of the Neptune Jade, a 2,966 TEU freighter of

65. MOODY, supra note 56, at 250.
67. MOODY, supra note 56, at 250.
68. Bill Mongelluzzo et al., Just as Expected, Dockers Walk Out Across the Globe, J. COM., Jan. 22, 1997, at A1. I have not found any evidence that the East Coast union of longshoremen, the ILA, took any action. As will be noted, the ILA has also engaged in international action, although it historically has been moved by quite different political causes than the ILWU.
69. MOODY, supra note 56, at 251.
Singapore's Orient Lines. The Jade's cargo had been loaded in Thamesport, England, in 1997, during the dispute referred to above which had originally arisen in September, 1995. The Jade was believed to have been loaded by the unionists' former employer, although employer associations asserted that the owner of the Thamesport Dock facility was not related to Merseyside.

When the Neptune Jade arrived in Oakland, California, on September 28, 1997, it was met by a picket line composed of various groups, among them the Labor Party's Golden Gate chapter, students from a labor society at Laney College in Oakland, members of various unions, and members of the Industrial Workers of the World who rallied together via e-mail. Over a three-day period, longshore workers refused to cross the picket line and unload the ship.

Shipping industry officials claimed at the time that the work stoppage was costing the Neptune Orient Lines as much as $40,000 to $50,000 a day, but the ILWU contended that crossing the picket line would endanger their safety, a position accepted initially by the parties' arbitrator, Gerald Sutliff. The shipping and stevedoring companies responsible for the Jade in Oakland apparently sought to enjoin the picketing or at least limit the number of demonstrators and, in addition, to order their unionized workers to cross the picket line. Each effort failed to

70. The TEU designation reflects the new reality on the docks. No longer are ships routinely referred to by the tonnage they carry. Instead, ships like the Neptune Jade carry containers, representing about 80% of the cargo carried around the world. A TEU is a twenty-foot unit (20" x 8" x 8"), and thus, a TEU means a twenty-foot equivalent unit. Many ships now carry forty-foot units. Peter Waterman, Globalization, Social Movements, and the New Internationalisms 84 (1998).

71. Del Vecchio, supra note 64, at A20; Neptune Orient Lines, NOL HD:US Court Orders Dockers to Work on NOL, Asia Intelligence Wire, Oct. 3, 1997 (stating that seven of the 160 containers on the Jade were loaded at Thamesport).


accomplish the desired end. The parties' arbitrator, however, who initially refused to order the normally not meek longshoremen to cross the picket line since it was a hazard to their health, reversed his ruling on the following day, perhaps due to the presence of police on the second day of picketing. In addition, a California court limited the number of pickets to four, although picketers exceeded that number on the following day.  

After three days the ship left the port of Oakland without having been unloaded. The Jade then sailed to Vancouver, British Columbia, where a similar scenario unfolded, and, again, the ship was not unloaded. After five hours of picketing by approximately thirty pickets, the Jade left for Yokohama, Japan, where the All-Japan Dockworkers' Union refused to unload the ship. Reportedly, the Jade was finally unloaded in Taiwan.

Depending upon your point of view, the travails of the Neptune Jade may be a stimulating example of

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75. The business press stressed that Thamesport had announced that it was not a subsidiary of the Mersey Docks and Harbour Company and that therefore the "blacking" of the Jade was a mistake. David Osler, Thamesport Quashes Union Claim, LLOYD'S LIST INT'L, Oct. 4, 1997, at 10.


78. Rick Del Vecchio, Supports of Labor Rally Against Ship Industry Suit, S.F. CHRON., Feb. 27, 1998, at A21. Howard Kimmeldorf has noted that this story reflects the impact of the Cold War in a number of ways. For instance, it is doubtful that the ILA with its more conservative history would have participated in the boycott. Moreover, Taiwan itself is a product of the Cold War. See generally Ellen Schrecker, McCarthyism's Ghosts: Anticommunism and American Labor, NEW LAB. F., Spring-Summer 1999, at 7.
transnational labor solidarity.\textsuperscript{79} Given the international relationship of production and marketing, transportation workers take on a new importance.\textsuperscript{80} In addition, even non-transportation workers have been involved in cross border activity such as providing economic or staff support, for instance, to new independent unions in Mexico, or lending support to strikes or disputes in other countries. The Renault and UPS examples, to be subsequently discussed, are only two of many cases of cooperative efforts.

Moreover, the International Trade Secretariats have recently been active, for instance, in bringing together unions representing workers in subsidiaries of transnational enterprises ("TNEs"), and lobbying and public opinion campaigns have been waged by ITUs, unions, and international confederations of unions.\textsuperscript{81} Canadian unions have set up "international labor solidarity funds," paid via payroll deductions negotiated with employers aimed at helping unions and other organizations in other nations, especially in the south. The future role of such action, however, turns on the legality of such pressure under the domestic law of the state in which a union engages in

\textsuperscript{79} In early 1998, the Liverpool dockers decided to end their dispute. According to Jimmy Nolan, chairman of the Shop Stewards Committee of the Merseyside Dockers, the Labour government refused to intervene or use the power of the 14\% holding it possesses in the Mersey Dock and Harbour Company. Since the dockers had been made "redundant," each docker was entitled to compensation of 28,000 pounds. Interview by Suzanne Jones at the European Workers' Conference for the Abrogation of the Maastricht Treaty, Berlin, (Jan. 31, 1998); E-mail from Michael Eisencher to James Atleson, Professor of Law, University at Buffalo (May 8, 1998) (on file with author). Faced with a lack of support from those with power to assist them, the dockers took the best means available to support themselves and their families.

\textsuperscript{80} Mechanization and container shipping have reduced the size of U.S. longshore unions. The International Longshoremen's Union, representing workers on the East Coast, signed a contract to permit labor-saving production methods in 1969 when it had 27,000 members. Today, "after attrition and retirements, there remain only 2,700 active longshoremen." Ronald Smothers, \textit{New Day on the Docks: They're Hiring Brains, Not Brawn}, N.Y. TIMES, May 7, 2000, at B8. But for the first time in years, hiring is occurring as there are too few longshore workers to handle the growing volume of cargo in the harbors of New Jersey and New York. \textit{See id.}

sympathetic action. In the United States and the United Kingdom, such pressure directly confronts prohibitions on secondary or sympathetic action. In Japan, Canada, and other countries there are no explicit statutory bars to secondary or sympathetic labor action, but there are often statutes that limit the scope of labor activity only to employers directly involved in a dispute. Moreover, many nations explicitly bar political strikes or, like the United States, consider them within the secondary boycott laws.

When national laws restrict sympathetic or secondary actions by workers, whether wholly within one nation or cutting across national borders, they "deconstruct" class, emptying it of social reality and social significance. Indeed, one obvious purpose of secondary boycott restrictions may be precisely to limit the ability of workers to express solidarity as workers. Often, unions attempt to characterize a strike as something else, e.g., an expression of free speech or the advocacy of civil rights. Nevertheless, the labor laws of many nations treat the very real feeling of solidarity, revealed in the cases discussion below, as unworthy of recognition or protection.

IV. THE INTERNATIONALISM OF DOCKWORKERS

The use of political strikes is hardly new on the docks. Longshore workers have historically been known for their militancy and collectivism. In addition, a sense of internationalism goes with the job. Calvin Winslow and Bruce Nelson have documented a number of early actions, involving sympathetic actions as well as clearly political strikes. In 1920, for instance, New York longshoremen organized a strike in support of opponents of British rule in Ireland, protesting the imprisonment of the nationalist

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83. Suggested to author by Howard Kimmeldorf.
mayor of Cork.84 Even earlier, during the London dock strike of 1889, Australians sent 30,000 pounds sterling to the strike committee. This was followed one year later when British maritime workers responded to an Australian maritime strike with considerable financial support.85

Bruce Nelson reports at least two strikes in the 1930s on the U.S. West Coast to protest Mussolini’s war against Ethiopia and U.S. opposition to German ships bearing the swastika.86 Moreover, political action by dockworkers has occurred in many other locales. For instance, the ILWU participated in protests against General Pinochet’s dictatorship in Chile, and also refused to handle South African cargoes during the apartheid period.87 Furthermore, dockworker actions have been seen by some as effective tools in the fight for basic human rights. When Nelson Mandela visited the United States in 1991, he specifically thanked the ILWU for solidarity actions in the 1970s and 1980s, such as the refusal to handle South African cargoes, which he said had been crucial in “re-igniting” anti-apartheid action in the United States.88 On April 24, 1999, the ILWU shut down all West Coast ports as part of a national action to prevent the execution of a death row prisoner, Mumia Abu-Jamal. Perhaps unacquainted with the history just described, ILWU President Brian McWilliams stated that “[i]n our long history of social activism, the ILWU has never before closed the entire Coast for a social cause.”89

The immediacy of these issues is reflected by another recent dispute. On April 7, 1998, the Patrick Stevedores Company (“Patrick”) in Australia, with the strong support of the national government, fired over 2000 full and part-

85. See Peter Waterman, GLOBALIZATION, SOCIAL MOVEMENTS, AND THE NEW INTERNATIONALISMS 79-82 (1998); for other examples, see id. at 88-100.
87. See Cockburn, supra note 63, at 9.
time dockworkers or "warfies." In fact, the company had transferred its unionized workforce about a year previously to four wholly owned labor hire firms with no assets. It then leased back its labor force from these companies. It "fired" the workers by ending its lease contracts with these firms. Patrick then claimed it was not the employer of the workers.

The International Transport Workers' Federation ("ITF") warned shipping lines about using Patrick's facilities in Australia, noting that its United States affiliate, the ILWU, had mobilized its West Coast locals. The largest union in the Netherlands also promised to take action. In addition, unions in South Africa, the United States, and Japan announced plans to boycott any Australian shipping loaded by nonunion labor. Lloyd's List, the daily paper of the shipping industry, noted that the "power of the federation has been a major worry for ship owners who use Patrick," and it cited the success of the boycott against the Neptune Jade. Indeed, ILWU members refused to work on the Columbus Matson when it arrived in Los Angeles on May 9, 1998, because it was loaded by nonunion labor in Australia. This refusal led to an arbitrator's ruling that the strike breached the collective agreement, and he ordered the longshoremen back to work. To avoid contractual liability, the Union had argued that the strike was not sanctioned but was the result of personal decisions made by rank and file members. Despite the ruling, the parties apparently reached a settlement under which the employer would drop charges against the union and the union would only have to unload that part of the cargo, said to be the majority, which was loaded by union workers in Australia. "A statement has been made. The scab cargo will remain on the ship," said the ILWU's president Brian McWilliams.

Thus far, the Australian Federal Court has upheld a ruling that Patrick had entered into an illegal conspiracy to break the union, and an injunction against Patrick required

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91. UK: ITF Warns Trade Unionists Against Use of Patrick Facilities, AAP INFO. SERVS. PTY. LTD., Apr. 9, 1998.
it to rehire the sacked workers until the conclusion of an action brought by the union to contest the sacking of union workers. Government representatives strongly supported the company, arguing that reform and efficiency had to be brought to the docks to allow Australia "to compete against the best in the world."\

Indeed, there seems to be a repeated pattern of governments, mostly conservative ones as in the United Kingdom, Australia, and New Zealand, delimiting the scope of trade union rights and being particularly interested in longshore workers.

The International Metalworkers Federation, meeting in Sydney, resolved to "promote a campaign within the international trade union movement for recognition of sympathy strikes across borders." This resolution, endorsed by the Australian Manufacturing Workers' Union, came after the federal government promised to make secondary boycott laws more stringent.

There is a growing recognition among unions that in an interrelated economic world certain groups of workers can exert significant pressure. For instance, Australian dockers have promised militant action, including sympathetic strikes, against Melbourne-based BHP Billiton because of the sacking of forty workers at a smelter in Mozambique. Doug Cameron, union president, said that the union would take action in support of workers being treated inhumanely

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95. Some of these limitations have been altered by electoral victories of left or liberal parties. In Australia, for example, the Howard government in 1997 rejected the restrictive provisions of the prior government and reinstated prior provisions of the Trade Practices Act. Although the statutory structure is still complex, it seems that secondary actions are not per se illegal; instead, they are permitted if the purpose of the action relates to employment matters. See PAUL LATIMER, *AUSTRALIAN BUSINESS LAW*, 610-11 (19th ed. 2000); McClelland, *supra* note 94; Gregory McCarry, *Sanctions and Industrial Action*, 7 AUSTRALIAN BUSINESS LAW, REV. 198 (1994); Marilyn Pittard, *Industrial Conflict and Constraints: Sanctions on Industrial Action in Victoria*, 6 AUSTRALIAN BUSINESS LAW, REV. 159 (1993).
by BHP. "If that means we break unfair Australian laws, then so be it. We will not give up our rights to take action as trade unions because of these industrial laws."

The longshoremen's sense of internationalism is reflected even in primary disputes. In December, 1999, a shipping company, Nordana Lines of Norway, docking at South Carolina's State Ports Authority's Columbus Street Terminal in Charleston, announced that it had contracted with a nonunion stevedoring company after having used unionized longshoremen for over twenty years. Dockers, represented by the International Longshoremen's Association, engaged in three actions in response, each more emotional than the last. The first involved briefly blocking the authority's terminal entrance. With every call by a Nordana ship, however, tension increased. In early January, 2000, seventy-five longshoremen reportedly stormed through the terminal, disrupted Nordana's operations, spray painted several ships waiting to be loaded, sliced hoses on several container handlers, and damaged a mechanism on one of the port's cranes. These actions forced the ship to sail without some of its cargo.

The most serious clash occurred on January 20, and, unsurprisingly, there are radically different accounts on what occurred. Reports sympathetic to the union stress that workers entering the union hall at approximately 11:30 p.m., reporting that they had been harassed by police at union roadblocks. Local union president Ken Riley stated that about 130 workers filed out of the hall to meet a police line. Riley stated that the police "drew an invisible line that we were dared not to cross. The workers crossed the line, and the military units tried to push us back—poking

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97. JoAnn Wypijewski, Audacity on Trial: Talking Union Still Amounts to a Punishable Offense in Parts of the Old South, NATION, Aug. 6, 2001, at 20. The clash, however, took on a life of its own. Demonstrations were held in Charleston. Meanwhile, later accounts varied from the earlier ones. Thus, according to the Campaign for Workers' Rights in South Carolina, Riley and other officers created a buffer between the 600 officers and the picketers. Justice for the Charleston 5, available at http://www.aflcio.org/aboutaflcio/ecouncil/ec0801d2001.cfm (last visited Feb. 3, 2004). A police officer, it is claimed, ran out of formation and clubbed Riley in the head and a fight ensued. Id.; see also Report from Charleston, NEW LAB. F., Spring-Summer 2001, at 64.
us with clubs. Of course, a conflict ensued. When that happened, the police started beating on the guys.\textsuperscript{98} Violence clearly occurred, but whether it was initiated by the workers or police is not clear. According to press reports, generally dramatic and clearly not sympathetic to the workers, a large number of longshoremen, varying between 300 to 600 depending on the report, marched at midnight from the local union hall to the nearby terminal and clashed with police officers, estimated at anywhere between 100 to 600 strong. Police dispersed the workers with tear gas, concussion grenades, and at least one smoke grenade.\textsuperscript{99} Approximately ten persons, including two police officers, were sent to the hospital, according to press reports.

Some ILA members refer to the event as a “police riot,” and a clash provoked by the police presence, although some comments attributed to union officers seem to admit the accuracy of the police charge that members of the crowd threw items at police officers.\textsuperscript{100} These actions, many said, were uncharacteristic of peaceful relations in Charleston. As the owner of the Charleston Line Handling Corporation, Robert New, noted, “What happened was unacceptable and very un-Charleston-like.”\textsuperscript{101} Subsequently, five members of the ILA local were indicted on criminal trespass and rioting.

\textsuperscript{98} Fighting Racism and Union Busting in South Carolina, Interview with Ken Riley, 5 WORKING USA 119, 124 (2001) [hereinafter Fighting Racism].


\textsuperscript{101} Tony Bartelme, ILA Says Charleston Riot Was Aberration, J. COM., Feb. 7, 2000, at 1.
charges, and a court issued an injunction prohibiting mass picketing and interference with Nordana ships, and also limiting picketers to nineteen. There is a strong racial aspect to the dispute, aside from the location. The local is predominantly African American. Only two of the over 800 local 1422 members are white. The trial, scheduled for November 14, 2001, has been sidetracked by an agreement to plead no contest to a magistrate-level offense and pay fines of $100. The settlement was viewed by the union and its supporters as a significant victory.

Nordana is a small player on the Charleston docks, bringing in only two ships a month, but it was the first time a major shipping line challenged the union in this fashion. Apparently, larger shipping lines only use unionized longshoremen to load containers on the East Coast. The ILA, according to the Journal of Commerce, has lost virtually all of its bulk grain work on the Gulf Coast. Moreover, operators organized by the Teamsters have moved into general cargo at some ports, and the use of containers themselves has radically reduced longshore jobs. In addition, although ILA members dominate the Port's Authority's five public terminals, which handle approximately 80% of the port's freight, there are private docks and more are planned.

The simmering five-month long dispute was settled in April, 2001, when Nordana agreed to once again use union labor, and ILA agreed to apply its "small boat" agreement permitting smaller gang sizes and more flexible work rules.

One of the noteworthy features of the Nordana dispute is the language used by local officials. For example,

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102. There are two other locals—an all white clerical and checkers local and a third, involving maintenance and repair workers, 70% of which are African American. See Fighting Racism, supra note 98, at 120.


104. See Charleston Obtains Box Record, LLOYD'S LIST INT'L, Dec. 12, 2000, at 19.

105. Hopkins, Labor Dispute, supra note 100, at 1B.

Kenneth Riley, president of ILA Local 1422 stated, “This issue is global in nature.” The Spanish dockworkers union notified the captain of the ship loaded in Charleston that they would unload it but would refuse to work any further ships loaded “unprofessionally.” In announcing expressions of support from longshoremen in Spain, Denmark, England, and Australia, Riley also stated that he had received $100,000 from union dockworkers in San Francisco and Los Angeles, which are represented by the West Coast longshore union, the ILWU. Moreover, Riley asserted that “dockworkers around the world have pledged to shut down their ports on the first day of the criminal trials stemming from the police clash.” “The issue isn’t just about a small shipping line,” he said, “[t]he same thing is happening all over the world.” Indeed, the encroachment of private interests into ports has caused work stoppages in the last few years in India, Israel, Chile, Brazil, British Columbia, Canada, and Australia.

A second relevant aspect of the dispute was the role of the International Transport Federation, which reportedly told Nordana that a problem in Charleston meant the shipping line had “a problem around the world.” The ITF is an international trade secretariat representing 570 affiliated transport unions in 132 countries, with a total membership of five million workers. Reports sympathetic to the union, for example, indicate that during the dispute Spanish workers refused to handle Nordana ships.

108. Freda Coodin, Charleston 5 Celebrate Victory, LAB. NOTES (Detroit), Apr. 2002, at 5.
112. See McLaughlin, supra note 100, at 16.
V. RECENT EXPRESSIONS OF TRANSNATIONAL SOLIDARITY

Transnational solidarity actions have not been limited to longshore workers. Numerous sympathetic actions have occurred, although they are not often reported in the mainstream press. The U.S. Teamsters Union strike against UPS in 1997, for example, was widely discussed as the possible harbinger of renewed U.S. union militancy, but little reported were the efforts of foreign unions to support the strike. The International Brotherhood of Teamsters ("IBT") and the ITF\footnote{Road transport is one of the eight major sections of the ITF. See Winslow, \textit{supra} note 84, at 68. For a critique of the ITF, see Waterman, \textit{supra} note 70, at 88-89.} formed the World Council of UPS Trade Unions and implemented an international strategy aimed at threatening UPS operations abroad. (UPS has worldwide operations that include 340,000 employees, 500 aircraft, and 2400 facilities in over 200 countries.) Those operations were vulnerable because UPS, which dominates the U.S. market, operates in a much more competitive market in other areas, especially in Europe.

A meeting was held in London in February, 1997, which included union officials and UPS shop stewards from ITF affiliated unions in Europe and the United States, and unions from Brazil and Ireland who planned to organize UPS workers in their countries. The representatives shared information about UPS and discussed issues that seemed to parallel those confronting the IBT, e.g., subcontracting, part-time workers, and health and safety issues. The group was formalized as the World Council of UPS Trade Unions, an organization that would create an information network and support structure especially in light of the upcoming UPS-IBT negotiations. Since the IBT represents two-thirds of UPS workers globally, the outcome of those negotiations was critical for non-U.S. unions.\footnote{See generally, John Russo \& Andy Banks, \textit{How Teamsters Took the UPS Strike Overseas}, WORKING USA, Jan.-Feb., 1999, at 75-87. A more detailed version of this article may be found in Andy Banks \& John Russo, \textit{The Development of International Campaign-Based Network Structures: A Case Study of the IBT and ITF World Council of UPS Unions}, 20 COMP. LAB. L. \& POLY J. 543 (1999). See also Jay Mazur, \textit{Labor's New Internationalism}, FOREIGN AFF., Jan.-Feb. 2000, at 79.}

A World Action Day was created in spring, 1997, and a World Council meeting was scheduled in Washington in
June of that year to coincide with the final period of the UPS-IBT negotiations. On May 22, 1997, over 150 job actions and demonstrations occurred at UPS facilities around the world, and some short work stoppages occurred in Spain and Italy. The second meeting of the World Council occurred in June, and members of the Council were introduced at the bargaining session. After the U.S. Teamsters struck, demonstrations and some sympathy strikes occurred at important distribution centers in Europe. European unions were requested to make public commitments to support the strike and to create boycott plans for UPS, information that would be delivered to the largest customers of UPS. In addition, European public sector unions were asked to appeal to their "members who were customs officers and labor inspectors to give greater scrutiny to UPS packages and UPS workplace-safety standards during the strike." The function of these steps, obviously, was to create doubts about the efficacy of UPS service during any strike.

In addition, various sympathetic actions occurred in Europe. Since sympathy strikes result in sanctions in the United Kingdom, sickouts occurred. A wildcat strike occurred among UPS distribution center workers in Belgium, although the UPS strike may have been a pretext for local health and safety concerns. Stoppages or interferences with deliveries occurred in India, the Philippines, and in Spain. The settlement in the United States occurred before planned sympathy actions could occur in Germany, France, and the Netherlands. Many of these unions may well have had grievances of their own or used the strike in the United States as an organizing tool. Nevertheless, these actions took place at great risk since many that occurred or were planned were probably illegal.

117. See Russo, supra note 116, at 79.
118. Id. at 82.
119. For other recent examples of transnational union activities, often involving cooperative activities with non-labor groups as well as unions, see WORLD LABOUR REPORT 1997-98, supra note 7. For the international activities of the CWA, see Larry Cohen and Steve Early, Defending Workers' Rights in the Global Economy: The CWA Experience, in WHICH DIRECTION FOR ORGANIZED LABOR? 143 (Bruce Nissen ed., 1999).

In November, 1990, the Ravenswood Aluminum plant in West Virginia locked out its 1700 employees and hired permanent replacements. The USWA
The recent actions against Renault in Europe demonstrate how "a transnational realm of European government presents a series of new opportunities and constraints for domestic social actors," as Renault's actions led to criticism by the European Union as well as domestic forms of worker action.\footnote{120} In February, 1997, the President of the Renault automobile company, Europe's sixth largest carmaker, announced the closure of its the heavily unionized plant in Vilvoorde, Belgium, because it had

began a sophisticated corporate campaign, which included visits to European locales, to put pressure on Marc Rich, a Switzerland-based billionaire fugitive from U.S. law who apparently controlled the company. \textit{See} TOM JURAVICH & KATE BRONFENBRENNER, RAVENSWOOD: THE STEELWORKERS' VICTORY AND THE REVIVAL OF AMERICAN LABOR (1999).


An excellent analysis of a corporate campaign by the United Steelworkers of America (USWA) against General Tire's Charlotte, North Carolina plant can be found in Thomas Greven, \textit{Transnational "Corporate Campaigns": A Tool for Labour Unions in the Global Economy?}, 19 \textit{INT'L J. COM. LAB. L. & INDUS. REL.} 495 (2003). The union used a sophisticated and sustained campaign of pressure on General Tire's German parent, Continental AG, in Germany. These efforts resulted in repeated media attention despite the often lukewarm support of German unions used to more cooperative methods of dispute resolution.

Another example involves the United Mine Workers Union 1993 strike against Peabody Holding Co., the largest coal company in the United States. Peabody is owned by Hanson PLC, an Anglo-American conglomerate and the sixth largest industrial corporation in the United Kingdom Union workers in Australia, employed by Peabody, and Hanson battery workers in South Africa went on a 24-hour solidarity strike. \textit{See} Kenneth Zinn, \textit{Solidarity Across Borders: The UMWA's Corporate Campaign Against Peabody and Hanson PLC}, in \textit{TRANSNATIONAL COOPERATION AMONG LABOR UNIONS} 223, 223-37 (Michael Gordon & Lowell Turner eds., 2000).

Communications International, representing 4.5 million telecom and postal workers around the world recently pledged joint international action aimed at U.S. multinational Sprint Corporation. The trade union secretariat also endorsed merging into a broader consortium that will represent over 15 million members of 800 affiliated unions in more than 140 countries. \textit{World's Telecom Unions Censure Sprint}, \textit{CWA News}, Oct. 1999, at 7.

suffered serious financial losses. The result was a protest from a number of European nations, concern from the EU, and the first “Euro-strike.”

Belgian, French, and European Union officials expressed outrage, in part because the action violated EU regulations concerning obligations to provide notice of plant closures and to negotiate. In addition, at the same time as the closing, Renault had planned to use EU structural funds to expand an existing plant in Spain. This led an embarrassed Spain to withdraw its plan to aid the expansion so as not to appear to replace a viable Belgium operation with a facility in a cheaper location. Worker demonstrations and strikes occurred across Europe. On March 7th, about half of Renault’s workforce in France and Spain struck. The level of support was especially noteworthy given the intensifying competition for jobs across the European Union.

Douglas Imig and Sydney Tarrow note that the dispute has come to an “uneasy conclusion.” Renault still ended up closing the plant but only after setting up “a more extensive social plan for the redundant workers.” Nevertheless, Renault may be brought before the European Court of Justice, and it was chastised by the European Parliament. A Belgium court has fined Renault 10 million Belgian francs ($264,000) for violating labor laws which require prior consultation and notice of major decisions to workers.

Other international solidarity efforts have occurred. For instance, one that followed a now fairly common pattern involved workers at Imerys’ Georgia Marble plant in Alabama. Imerys withdrew recognition from its union after it acquired English China Clays and combined its nearby plant with Georgia Marble. The union, the Paper, Allied-Industrial, Chemical and Energy Workers International Union (“PACE”) organized a successful global campaign against the Paris-based Imerys which included the creation of a Web site, a video, and assistance from

121. Id.
123. See, e.g., Zinn, supra note 119.
Imerys workers in United Kingdom and France. A U.S. delegation met with foreign workers, which led to press conferences and rallies.  

Pace has recognized that the majority of the employers it deals with are multinational conglomerates rather than U.S. based firms. As President Lloyd Young recently noted in his Presidential Message in an issue of the Union’s Pacesetter, “we are resolved to match this corporate globalization with global workers’ solidarity.” To accomplish this goal, PACE has sought the assistance of foreign unions to aid U.S. struggles as well as the strength that may come from the formation of a global union network to share information and take common action in the area of paper, oil, and chemicals. Young noted that the old cry of “Workers of the World Unite” had “new relevance as we begin the 21st century... [as] labor solidarity has no boundaries.”

VI. THE PORTS OF CALL: THE LEGAL RESPONSE TO SYMPATHETIC AND SECONDARY ACTION

The solidarity actions that took place in relation to the Neptune Jade in the United Kingdom, United States, Canada, and Japan were probably unlawful in each country. Indeed, most but not all legal systems prohibit sympathetic or secondary action, whether the legal system is based upon common or civil law, and despite differences in history and culture. However, though the same result may be reached, the legal route and rationale for that conclusion may vary considerably.

A. The United Kingdom

Throughout most of the 20th century strikes in the United Kingdom were regulated by the court-created common law of torts and contract. There was no positive right to strike, and, until the Thatcher period, no concept of legal or illegal strikes. The focus of judicial inquiry was whether the action was a tort or breach of contract, and penalties would have affected the individual worker as well.

125. Lloyd Young, A Message from the President, PACESETTER, May-June 2002, at 3.
as the union. "Industrial action is invariably a breach of the employment contract.... [T]he employer does not normally sue his striking employees for damages, but he may dismiss the worker for the breach, an unthinkable lawful power in systems with a 'right' to strike." 127

The absence of positive union rights was offset to some degree by the creation of statutory immunities from tort liability for acts "in contemplation of a trade dispute." Pursuant to these immunities, which are seemingly attempts to control hostile courts as well as protect labor activity, union actions, like strikes, have been considered a freedom not a right, or an immunity from tort or contract liability. 128 Nevertheless, many believed that unions and certainly picketing to be coercive. Hayek noted in 1960 that "even so-called 'peaceful' picketing in numbers is severely coercive....[I]t represents a kind of organized pressure upon individuals which in a free society no private agency should be permitted to exercise." 129 These views, obviously, ignore other aspects of picketing, e.g., its persuasive and communicative functions. Moreover, such views reject any notion that strikers have rights of speech and assembly that are embodied in picketing.

Even under the applicable law prior to the Thatcher administration, "union officials who took action to support industrial demands by colleagues overseas risked liability,


128. Lord Wedderburn has cautioned those in the United Kingdom pressing for positive legal rights that such a change would not produce judicial neutrality. Nations with statutory or constitutional recognition of union rights, for instance, reveal considerable variation in the scope of rights. For instance, the definition of a strike can vary widely. See id. at 74-98. A similar caution to would-be reformers of U.S. labor law is found in James B. Atleson, Confronting Judicial Values: Rewriting the Law of Work in a Common Law System, 45 Buff. L. Rev. 435 (1997) [hereinafter Atleson, Confronting Judicial Values].

Rachel Vorspan convincingly argues that, despite the statutory immunities, courts on their own regulated union action, primarily picketing, through the law of nuisance. Moreover, courts narrowly defined the statutory immunities and made sure that nuisance picketing law was outside of the legislation. Rachel Vorspan, The Political Power of Nuisance Law: Labor Picketing and the Courts in Modern England, 1987-Present, 46 Buff. L. Rev. 593 (1998).

despite the protections of the Trade Disputes Acts of 1906 and 1965. In 1966, for instance, an injunction was granted against three unions and two international federations barring them from “blacking” (Aristotle Onassis’) Olympic Airways, which was then in a dispute with its pilots union. The injunction was based upon interference with commercial contracts. Liability might also arise for a conspiracy to achieve an “unlawful means,” or for inducing breach of contract, or for deliberately interfering with contractual relations even short of inducing breach.

The historical immunities were severely restricted by the Thatcher government in a series of employment acts between 1980 and 1990, now consolidated in the Trade Union and Labour Relations (Consolidation) Act (“TULRA”) of 1992. In 1980 Parliament banned secondary or solidarity action and picketing away from a worker’s own place of work. In 1982 the definition of “trade dispute” was narrowed to disputes between workers and their own employer. In addition, action to help workers in another workplace gain union recognition or consultation rights was prohibited. In sum, workers’ influence was confined to their own workplaces. “[The statutes] prohibit the export of workers’ collective influence beyond the boundaries of their own employment unit, itself defined by the employer.”

The restrictions on secondary action in the United Kingdom are based on the notion of “enterprise confinement,” meaning that industrial action is lawful only if limited to the employer with whom a labor dispute exists. Thus, pressure by primary workers against a another employer with whom the primary deals will be deemed in breach of their contracts of employment and, thus, there will be no tort immunity. As in other nations’ laws, the notion of the “primary” employer is drawn narrowly and

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131. Id. at 241.
132. Wedderburn, Employment Rights, supra note 127, at 220; see also Paul Lewis, Law of Employment: Practice and Analysis 457 (1998). As Lewis notes, picketing even at the primary location has secondary effects, but such effects are lawful in the United Kingdom so long as the strike is in furtherance of a trade dispute. Such a secondary effect is also lawful in the United States, although the activity would be considered primary rather than secondary.

These restrictions significantly limited the scope of collective action because unions had begun to direct much of their picketing in the 1970s to secondary targets. Vorspan, supra note 128, at 677.
defined by the "legal scope of the employment unit; even if a dispute between one company and its employees in a group directly affects workers in another company within the same group. The workers in the second company cannot take supportive industrial action."3 In other words, the scope of lawful economic pressure is limited to the legally defined employment unit rather than to the zone of actual impact or legitimate concern. Thus, even workers employed by a subsidiary of the primary employer are deemed neutral, non-involved workers in relation to those who work for the parent firm. As will subsequently be discussed, these restrictions violate ILO standards. Indeed, the ILO's Committee of Experts has so ruled.134

The limitations do not recognize legitimate indirect interests of workers, let alone the more direct right to take concerted action. Employees of company A, for example, may not act to aid a worker's struggle at company B, even if B is a subsidiary of A or A has taken work previously done by B. As a result, U.K. "employers have responded to this development by taking steps to artificially divide their workforce, creating ostensibly separate 'buffer companies.'"135 The ILO, meanwhile, has made it clear that "the general banning of sympathy strikes is abusive, and workers should be able to carry out such actions provided the initial strike that they are supporting is legal."136 However, despite repeated criticism leveled at the United Kingdom by ILO committees, even the current Labour government does not plan to alter the statutory limitations of the Thatcher era.137

134. Id. at 434.
136. See Novitz, supra note 135, at 186 n.110.
137. The Labour government's Fairness at Work white paper does not deal with the definition of a trade dispute or alter the limitations on secondary action. Indeed, "the Foreword states simply that the days of secondary action are over." See id. at 186.

The Labour government's Human Rights Act of 1998 implements the government's commitment to incorporate the European Convention on Human Rights into domestic law. The Act places a burden on the courts to interpret legislation so far as possible in light of Convention rights. K.D. Ewing, however, argues that the act will have quite limited application to worker and union
The restriction most relevant to the Merseyside dispute is the confinement of protected industrial actions to disputes between workers and their own employer and at their own place of work. Thus, secondary actions lost the protection against common law civil liability and "trade dispute" was narrowed to protect only disputes between workers and their own employer relating to the workers' own conditions. A secondary action, under the recent legislation, will result in an injunction and tort remedies, and a refusal to handle "hot goods" will constitute a breach of contract by the individual employee. Even prior to the Thatcher era statutes, disputes, in order to gain immunity from tort law, had to be in furtherance of a "trade dispute," and that term was limited to a dispute between workers and their own employer. Thus, political disputes did not receive immunity.

British labor, however, has a long tradition of secondary or sympathetic actions by workers not employed by the primary or targeted employer to assist workers directly involved. These actions are now totally outside tort and

138. Trade Union & Labour Relations (Consolidation) Act, ch. 52 § 224(1) (1992) (U.K.). Primary action, on the other hand, is defined as a situation where the employer under the contract of employment in question is the employer party to the dispute. Id. at § 224(5). In addition, the statute reinforces the reluctance of courts to look behind the "veil" of incorporation to discover the reality of control and administration. Like the United States, the immunity for primary action is not listed simply because primary picketing has secondary effects. Id. at § 224(3). See Hepple, supra note 126, at 181-83; see also Paul Davies & Mark Freedland, Kahn-Freund's Labour and the Law 321-52 (1983); K.W. Wedderburn, Cases and Materials on Labour Law (1967); R.Y. Hedges & Allan Winterbottom, The Legal History of Trade Unionism (1930) (including a classic early history of U.K. labor law).


contract immunity after the recent legislation.\textsuperscript{141} The message is that employees have no legitimate interest in aiding other workers, thus limiting the scope of disputes to discrete workplaces. As Lord Wedderburn stated in 1985:

\begin{quote}
The collective strength of workers is to be limited by the boundaries of their employment units. These boundaries are of course set not by the workers of their unions, but by capital in the private sector, and in the public sector by the state and capital together. Industrial action in solidarity across the boundaries is unlawful; the concept of a trade dispute is not to flow over them; each subsidiary company in a small national or giant multinational group is to retain its own boundaries... In today's labor market in which a work force dreading unemployment... face employers increasingly buttressed by transnational connections, that represents a massive legal intervention against the 'collective power' which... is the only reality of workers' power.\textsuperscript{142}
\end{quote}

B. Canada: Common Law and Legislative Restraints

The right to strike is not constitutionally protected in Canada, although common law restrictions in most jurisdictions have generally given way to statutory protection. Since the 1940s collective bargaining has been recognized as national policy, and the right to strike is seen as an essential part of that policy.\textsuperscript{143} The Canadian situation is complex because both the federal and eleven provincial governments regulate labor. During World War II the federal government adopted labor legislation somewhat similar to the Wagner Act, but its jurisdiction is limited to federal civil servants and, in the private sector, to

\begin{itemize}
\item \textsuperscript{141} See Trade Unions \& Labour Relations (consolidation) Act 1992, ch. 52, § 224. Blomley, supra note 139, at 185-86, 191-192.
\item \textsuperscript{143} See generally Commission for Labor Cooperation, Labor Relations Law in North America 64-71 (2000) [hereinafter Labor Relations Law].
\end{itemize}
employees of what are called “federal undertakings”: banks, inter-provincial and international transporters, and communication enterprises, for example. Thus, provincial labor laws apply to 90% of the nation’s private sector workforce.144

The Charter of Rights and Freedoms, made part of Canada’s Constitution in 1992, protects certain fundamental rights that generally take precedence over federal and provincial legislation. These include the right to free speech, freedom of association, equality, and due process. However, in three major cases in the 1980s the Supreme Court of Canada, contrary to the ILO view, held that freedom of association did not include the right to strike or even the right to bargain collectively.145 “Freedom of association was viewed as only protecting the right of individuals to associate in activities which are lawful when performed alone,” that is, the Charter gave no rights to unions over and above those enjoyed by the individual.146 The argument parallels arguments raised in United States and English courts in the 19th century, but fails to consider the effect of the apparent legality of the boycott when individually performed.147 The Court’s decision limited the application of the Charter to governmental bodies, but courts applying common law were deemed not to be part of the “government.” Thus, the Charter did not apply to “private litigation.” Strike action, therefore, receives no special constitutional protection in Canada, and such activity is seen as properly regulated by legislation.

A distinctive aspect of Canadian labor legislation is that a strike’s legality is primarily determined by its timing. In short, strikes are statutorily banned during the term of a collective bargaining agreement, when disputes are mandated to be resolved via grievance arbitration.148 In other words, legislation accomplished in Canada what is normally resolved by contractual no-strike clauses in the

144. See Donald Carter, Canada, in STRIKES AND LOCKOUTS IN INDUSTRIALIZED MARKET ECONOMIES 39 (Roger Blanpain and Ruth Ben-Israel eds., 1994).
145. See Judy Fudge & Eric Tucker, Law, Industrial Relations, and the State, in 46 LABOUR LE TRAVAIL 251, 291 (2000); Carter, supra note 144, at 41.
146. Fudge & Tucker, supra note 145, at 291.
148. See generally LABOR RELATIONS LAW, supra note 143, at 66.
United States. Moreover, the definition of a strike normally includes any disruption of production if carried out in a concerted manner.\textsuperscript{149}

If a strike is not related to an underlying collective bargaining purpose, if it is a political or sympathy action, the "prevailing view in all Canadian jurisdictions is that disruption of production and concerted employee activity by themselves are all that is required in order for a work stoppage to constitute a strike and be subject to the statutory restrictions on the timing of such activity."\textsuperscript{150} Thus, the peace obligation is absolute, even if the dispute is not related to the collective agreement or falls outside of the grievance process. In U.S. terms, the obligation not to strike during the contract's term is broader than the obligation to arbitrate contractual issues.\textsuperscript{151}

Picketing is regulated primarily through the law of torts and is lawful only if the underlying strike is lawful. Yet, even picketing in support of a lawful strike may be deemed illegal if its impact is secondary, that is, if it has a "disproportionate impact upon a third party unconnected to the labour dispute."\textsuperscript{152} Thus, whether secondary or not, any strike during the term of an agreement will be deemed illegal even if the matter cannot be resolved through the grievance process. Indirectly, therefore, the peace obligation bars sympathetic strikes, but by a far different route than in the United Kingdom or the United States.

Moreover, sympathy strikes and boycotts in support of labor conflicts in other countries "require no different

\textsuperscript{149} British Columbia expressly exempts from the definition of a strike a refusal to cross legal picket lines, but in other jurisdictions such refusals can be deemed a strike as some aspect of concerted activity is present. See Carter, \textit{supra} note 144, at 43.

\textsuperscript{150} \textit{Id.} at 43; see generally \textit{LABOR RELATIONS LAW}, \textit{supra} note 143, at 64-71.

\textsuperscript{151} In all Canadian jurisdictions, the labor injunction is the basic, usually the exclusive, civil remedy for illegal strike activity. In some jurisdictions, the agency cease and desist order has replaced the judicial injunction. See Carter, \textit{supra} note 144, at 49-50.

\textsuperscript{152} \textit{Id.} at 51. The Supreme Court of Canada has held that picketing is a form of expression protected by the Charter, but it drastically limited the Charter's scope to actions of the government. Significantly, a judicial injunction is not to be treated as the act of the state. See also, Bernard Adell, \textit{Law and Industrial Relations: The State of the Art in Common Law Canada in THE STATE OF THE ART IN INDUSTRIAL RELATIONS} 128, 128-31 (Gerard Herbert et al. eds. 1988).
analysis than such action totally within one Canadian jurisdiction." Canadian law is "quite unsympathetic to 'secondary' action by employees. . . ."\textsuperscript{153} As in the United States, public appeals to boycott products would be legal, but such support becomes illegal if it takes the form of striking or refusing to handle "hot goods."

What about strikes when no contract is in force? Or what about secondary picketing? Even secondary picketing aimed at consumers is of questionable legality. Perhaps the most well known, or infamous, Canadian case is \textit{Hersees of Woodstock v. Goldstein},\textsuperscript{154} in which the Ontario Court of Appeals held illegal secondary picketing aimed at inducing consumers to boycott products made by a sportswear company with which the union had been unable to secure a collective bargaining agreement. Hersees, a menswear store, objected to picket signs urging consumers to "look for the [union] label." The court held, first, that the purpose of the picket line was to force a breach in the contract between Hersees and the primary employer, despite the language of the signs and the doubtful evidence that such a contract existed. Second, the court held that the primary purpose of the union was to injure the plaintiff store rather than to advance a union purpose, although the intent to harm the plaintiff was clearly designed to strengthen its collective bargaining demands.

The court said that even if the picketing was lawful in the sense that it was intended to communicate information, it should nevertheless still be restrained because it was likely to injure the plaintiff's right to engage in its business. "Therefore, the right, if there be such right of the respondents to engage in secondary picketing of appellant's premises must give way to appellant's right to trade. . . ."\textsuperscript{155} As wonderfully noted by Harry Arthurs, the court made "a leap of faith from social premise to legal result"; the court's reasoning "therefore, . . . propels the learned judge across the chasm which yawns between premise and result."

\textsuperscript{153} Brian Langille, \textit{The Canadian Law of Collective Bargaining} 17 (unpublished manuscript, on file with author).


\textsuperscript{155} \textit{Id.} at 86.

The vigor of the *Hersees* approach is seen in a 1995 decision on secondary consumer picketing by the Ontario Court of Justice (General Division). The court held that secondary picketing is a form of expression protected by the Canadian Charter of Rights and Freedoms but, in a reminder of U.S. rulings, the judge explicitly excluded secondary labor consumer picketing from protection. The court referred to a number of decisions holding such picketing unlawful, including one from British Columbia. There, the provincial Federation of Labor had launched a boycott of U.S. grape imports to assist U.S. farm workers attempting to secure decent working conditions. Non-labor picketing was different, according to an opinion cited by the Ontario court, because it could be the exercise of the right of freedom of expression, “whereas, union picketing can sometimes be much more than an exercise of expression and can trigger a work stoppage which effectively closes a business.” This differentiation,arguable in its own right, does not distinguish labor from non-labor picketing when consumers are the target.

Nevertheless, the Ontario decision held that *Hersees* no longer held sway in non-labor contexts. Despite the Canadian Supreme Court’s earlier holding that the Charter does not cover actions between private parties, the Ontario court noted that the Supreme Court nevertheless held that the Charter should be used to “apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution.” In a subsequent action for a permanent injunction, the Ontario Court of Justice (General Division) upheld the earlier ruling, holding that there was no reason in law or policy for restraining a consumer boycott that is

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158. See Slade & Steward Ltd. v. Retail, Wholesale and Dep't. Store Union, Local 580 [1969] 69 D.L.R.(3d) 736. The order declaring all grapes imported from California and Arizona to be “hot” was said to interfere with contracts of service between the employees of the plaintiff and the plaintiff.
161. *Id.*
an entirely lawful form of expression not essentially different from advertising.\textsuperscript{162}

Except for the above Ontario case, labor picketing even directed at consumers is often treated differently from non-labor picketing, even when both are "secondary" in nature. In British Columbia, for instance, where the \textit{Neptune Jade} was boycotted, attempts to boycott "hot cargo" have been held to violate the province's labor statutes.\textsuperscript{163} If consumer boycotts are sometimes questionable in Canada, then it is clear that efforts to induce "neutral" employees to strike or not handle "hot goods" are also unlawful.

There has been an undercurrent of resistance to the \textit{Hersees}' approach, however. The weakness of distinguishing labor from other kinds of boycotts, indeed, the basic distinction between primary and secondary activity is of very questionable validity. Indeed, a recent decision of the Canadian Supreme Court makes clear that secondary action is not per se unlawful at common law, criticizing the assumption at the heart of \textit{Hersees}, on all the grounds cited repeatedly by U.S. scholars. The Court held that all picketing is to be protected unless it "involves a tort (a civil wrong) or a crime (a criminal wrong)."\textsuperscript{164} Furthermore, the court held that the Charter protects free expression, and that secondary picketing, a form of speech, cannot be absolutely precluded by the common law.

Although the location of the picketing was not to be the relevant focus, the Court held that the "character and impact" of the picketing \textit{would} be relevant to a tort proceeding. It is unclear whether this means more types of union activity will be protected given the common judicial opposition to secondary pressure. For instance, the Court mentioned that the interest of secondary employers will be protected by the use of such torts as "trespass, intimidation, nuisance and inducing breach of contract. . . ."\textsuperscript{165} Moreover, the Court seemed to hold that legislation, as opposed to the


\textsuperscript{163} See \textit{G.V.Adams, CANADIAN LABOUR LAW} ¶ 11.21-.31 (2d ed. 1996).


\textsuperscript{165} \textit{Pepsi-Cola Canada Beverages (West) Ltd. v. RWDSU Local 558}, [2002] \textit{D.L.R.}(4th) 412.
common law, could restrict the weapon.\textsuperscript{166} Thus, it would be
difficult, especially for a non-Canadian, to venture a guess
as to the actual effect of this decision.

C. Japan: The Scope of Dispute Acts

In Japan, where dockworkers also refused to unload the
Neptune Jade, workers can take part in “dispute acts,” a
concept broader than strikes, as embodied both in post-war
legislation and in the Constitution. Article 28 of the 1947
Constitution of Japan guarantees the “right to act
collectively.” The Trade Union Law (“TUL”) of 1945 and the
Labor Relations Adjustment Law (“LRAL”) of 1946 created
and defined the concept of a “dispute act” to set the scope of
legal protection to collective action. LRAL article 6 states
that a “labor dispute shall be defined as a disagreement
over claims regarding labor relations arising between the
parties concerned with labor relations . . . . ,” and article 7
states that an “act of dispute shall mean a strike, a
slowdown, a lock-out or other act or counteract hampering
the normal course of work of an enterprise, performed by
the parties concerned with labor relations with the object of
attaining their respective claims.” Article 1 of the TUL,
states that one purpose of the statute is the protection of
the right of association and collective action “to encourage
the practice of collective bargaining. . . .”

Although not apparently compelled by the above
sections, it is generally believed that dispute acts “must be
aimed at achieving an objective of collective bargaining.”\textsuperscript{167}

\textsuperscript{166} Thus, the court stated:
If the Saskatchewan Legislature had enacted a comprehensive scheme
to govern labour disputes, then it might be argued that allowing
secondary picketing would disturb a carefully created balance of power.
In the absence of a legislative scheme, however, we find it difficult to
say that determining illegal picketing on the basis of tortious or
criminal conduct—an approach that prevailed at common law prior to
Herses—will unduly undermine the power of employers vis-à-vis
employees . . . . Nothing in these reasons forestalls legislative action in
this area of the law.

\textit{Id.} at 415-16. This approach parallels those opinions of the U.S. Supreme Court
that say that the First Amendment, meant to limit Congressional action, is less
important if Congress passes a statutory enactment.

\textsuperscript{167} Kazuo Sugeno, \textit{Japan: Legal Framework and Issues, in Strikes and
Lockouts in Industrialized Market Economies} 101, 106 (Roger Blanpain &
Ruth Ben-Israel eds., 1994); see also Tadashi Hanami and Fumito Komiya,
Unlike the United States, Japan has no secondary boycott provision. Nevertheless, the absence of such a provision is of doubtful significance given the definition of a lawful strike. Although it is difficult to find reported decisions, it is generally believed, because dispute acts must be aimed at achieving some collective bargaining aim, that neither political nor sympathy strikes are permissible because they do not involve issues resolvable with the employees’ employer.

Given the enterprise structure of Japanese unions, however, the issue has not frequently arisen. Indeed, there has been only one reported decision holding sympathetic action to be unlawful. For some years the eight major coal companies and the Kishima coal company bargained with Tanro, an industrial union with sixty-five affiliates. In 1953, all nine coal companies joined together and locked out their workers in anticipation of a strike by Tanro. The situation was somewhat reversed in 1957, when after the union at Kishima went on strike, Tanro ordered its sixty-five affiliated unions to go on strike in support of the Kishima union. In other words, the other unions struck the other eight coal companies in sympathy with the Kishima union, but this occurred in a situation in which pattern bargaining had occurred and the coal companies had acted jointly only four years earlier.

The eight struck companies successfully sued for damages, and the court held that under Japan’s constitution collective action in labor disputes is allowed only when its purpose is to improve conditions through collective bargaining. There was no labor dispute between Tanro and the eight companies, and it was impossible for them to resolve the union’s dispute with Kishima. Although the Tanro union was obviously involved with a bargaining dispute with Kishima, it apparently could not extend that dispute to parties with whom it had no collective bargaining “purpose.” Thus, the strike was an illegal sympathy strike.\footnote{Dispute Acts, in \textit{International Encyclopaedia for Labour Law and Industrial Relations} 283, 283-90 (Roger Blanpain ed., 1999). See generally \textit{John Price, Japan Works: Power and Paradox in Postwar Industrial Relations} (1997).}

\footnote{Information is based upon a translation of a comment on the Kishima Tanko Roso Case by Professor Kazuo Sugano, Jurist No. 656, 1/15/78. The decision was by the Tokyo District Court, 10/21/75. Article 28 of the Japanese}
Though the courts seem to have decided both are unlawful, commentators in Japan are divided on the legality of political and sympathetic actions, with the disagreements mirroring the variety of approaches throughout the world. Some commentators find both types of action unlawful since they are both directed toward goals that cannot be attained through collective bargaining. Thus, sympathetic action, aimed at workers elsewhere, or political action, aimed at the society's political apparatus or state policies, are similarly unlawful. Others, however, argue that there is a close connection between political and economic goals and the interests of workers in different workplaces, and they are concerned that limitations infringe the constitutional protection for strikes. Finally, some in this latter group would limit the legality of political strikes to those related to the interests of workers represented by the union taking the action.169

Interestingly, the ILO Committee on Freedom of Association, like the Committee of Experts, "considers the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement."170 That is, "workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests."171 Moreover, "a ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association."172 The ILO's position will be discussed

Constitution sets out three labor rights: the right to organize, to collectively bargain, and the right to group action. My deepest thanks to Professor Makoto Ishida of Washeda University in Tokyo for sending this case to me. Translation occurred in the United States.

subsequently, but first we turn to the nation with the most whimsical rules on solidarity actions.

D. Secondary and Sympathetic Labor Action in the United States

Since it is generally believed there is no constitutional right to strike in the United States, secondary labor activity is treated under the vague, open-textured but very restrictive provisions of the NLRA. There are two primary aspects of this problem in the secondary context. First, as in Canada, courts have treated secondary labor boycotts differently than labor-generated consumer boycotts. The former involves attempts to urge employees of a neutral employer to strike or restrict their labor in order to aid workers working for the primary employer. The latter seeks to enlist consumers of a neutral employer to boycott the primary employer’s goods or totally cease dealing with the secondary employer. Another type of labor boycott is an unsolicited but sympathetic strike by workers at a neutral employer in order to support and increase the leverage of workers at the primary employer. In short, greater protection is granted to unions to employ pressure on a neutral employer exerted through its consumers than through another employer’s workers.

Let us focus initially on secondary action directed at the consumers of the secondary (or neutral) employer. One example would be a consumer boycott directed against a supermarket chain for carrying products of a struck firm. Although unions have more freedom to engage in consumer pressure, not all types of such pressure will be lawful. This is a critical issue since a violation of the NLRA leads not only to an injunction or cease and desist order by the NLRA but employers can avoid the NLRB entirely and bring a damage suit in federal court.

In significant ways, legal decisions have turned largely on whether the secondary consumer pressure is exerted by handbills or via a picket line. Despite its secondary nature, labor consumer handbilling, somewhat surprisingly, has been protected in U.S. courts. On the other hand, the Supreme Court has stated that picketing directed at

consumers is not always protected. Yet, secondary picketing is sometimes permitted; for instance, the Court has permitted striking workers to picket a secondary site if the union seeks only to urge consumers not to purchase the specific products of the struck employer, rather than urging consumers to completely cease doing business with the secondary business. Thus, not only is secondary consumer handbilling generally permitted, but secondary consumer picketing, often distinguished by the Court, is sometimes permitted. The Court's rulings on secondary labor boycotts should be compared with the judicial reaction to quite similar, but non-labor actions. For example, in *Claiborne Hardware*, a case involving a boycott of merchants by the NAACP seeking anti-discrimination and equal opportunity goals, violence was threatened and, indeed, did occur. The Court held, however, that the boycott effort was protected as First Amendment free speech, especially in light of its noble cause. Yet, the Court excluded labor boycotts from constitutional protection on the ground that some boycotts were different than others: labor boycotts could be prohibited by "Congress' striking of the delicate balance between union freedom of expression and ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." Consumer pressure, however, is based on persuasion, not coercion, although, as the Court stated in a subsequent decision, picketing has aspects of violence not found in simple handbilling.

Yet, secondary picketing, as noted above, is not completely barred. Thus, secondary labor picketing is sometimes deemed essentially violent in nature and, therefore, not protected by the constitutional right of free speech, unless the union is merely following the products of

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173. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). The Court noted that it could protect handbilling because it was "much less effective than labor picketing." *Id.* at 580. Whereas handbills "depend entirely on the persuasive force of the idea," picketing exerts "influences, and it produces consequences, different from other modes of communication." *Id.* at 580 (citations omitted).


176. See *Id.* at 912 (quoting *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 617-18 (1980)).
the primary employer. Moreover, labor union picketing at
the primary site is expressly protected by the NLRA. Primary picketing, under American law, is somehow not as
potentially violent as secondary picketing, which cannot be
permitted except on some occasions. Non-Americans
puzzled at these doctrines are no more in the dark than
U.S. lawyers.

Moreover, as *Claiborne Hardware* makes clear, labor
action is treated differently than similar activity by non-
labor groups. Organizations like the NAACP are
constitutionally protected when they protest by either
picketing or handbilling, yet the Court has consistently
permitted the application of the secondary boycott provision
of the NLRA, section 8(b)(4)(ii), to labor's appeal to
consumers of a secondary boycott if done by picketing
rather than by handbilling.177 Labor's picketing of
consumers is deemed sufficiently different than handbilling
to justify legislative prohibition, and foreclose constitutional
protection, even though non-labor groups could legally
engage in the same action. The justification for the
distinction was the age old U.S. refrain—picketing involves
the threat of force, even if there is no evidence of such a
threat and even though protected actions by the NAACP in
*Claiborne* actually involved both threats and actual
violence. Yet, as already noted, the Court itself recognized
the speech aspects of even consumer picketing in *Fruit &
Vegetable Packers*178 reading or misreading the legislative
history so as to take product picketing out of the statutory
prohibition. This accommodation, which has its own First
Amendment problems, nevertheless allowed some
secondary picketing, despite the Court's later view that
picketing was inherently violent.179

177. There is voluminous literature in the United States, primarily noting
the inherent irrationality of U.S. law. For the most recent and imaginative
treatment, see Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807 (1993); GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* (1999). The classic attempt to make sense out of
secondary boycott law is Howard Lesnick's *The Gravaman of the Secondary
179. The whimsicality of U.S. secondary boycott law borders on the
excessive perhaps, but one additional wrinkle is relevant here. The Court has
sometimes, but not always, referred to secondary picketing as "speech plus,"
something more than "pure" speech. The "plus" can be regulated by law without
These decisions mean that labor action is treated differently than actions by other groups, and *Claiborne Hardware* rationally dispenses with the asserted “violence” distinction. Nor is economic harm the determinative factor, because proof of harm is generally not required by the statute, and the economic damage of the boycott in *Claiborne* was at least as great as the likely effect of union inducement of consumers.

The Court at various times has employed other justifications for its approach to union economic pressure tactics. Thus, it sometimes has treated union picketing as a “signal,” a message to other unionized workers to cease work, presumably enforced by internal union disciplinary procedures. Whether this is factually true in any case is not deemed relevant or, even if true, why the argument makes sense is generally not explained.\(^1\) In any event, the “signal” rationale has no application when the target of the union’s activity is the public and not other workers.

To begin to complete the circle of questions, the Court has explained its *Claiborne* ruling by arguing that the action of the NAACP, one having “elements of majesty,”\(^2\) was *political* while labor action was merely *economic*. The argument responds to an earlier formulation of the First Amendment which placed political speech higher than other types of speech on the ladder of protection.\(^3\) The distinction is questionable for a number of reasons. First, in the very case before the Court, the goals of the NAACP included jobs for African-Americans, surely an “economic” or at least labor-related aim. Second, the Court has in recent years

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begun to weaken or eliminate the distinction between political and economic speech and, concomitantly, the different levels of First Amendment analysis. More significantly for this discussion, why cannot labor activity be deemed political action? As many have argued, labor standards and communication certainly seem to involve public issues, and the public is the target group in consumer boycott situations.

But the proposed political/economic distinction was reduced to nothing when the Supreme Court permitted the application of the secondary boycott statute even to a clearly political action—the withholding of labor by the International Longshoremen's Association ("ILA") in protest of the Soviet invasion of Afghanistan. The application of the statute would not, said the Court, infringe upon the First Amendment rights of the ILA and its members. "We have consistently rejected the claim that secondary picketing by labor unions in violation of Section 8(b)(4) is protected activity under the First Amendment. . . . It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment."

The withholding of labor, then, without even the use of picketing, is treated as conduct "designed . . . to coerce. . . ." Given this underlying belief, all other arguments by the ILA would be unavailing. The Court was even willing to assume that the union's aim might be "understandable and even commendable" (but not, apparently, containing elements of "majesty" as did the NAACP's moral cause in *Claiborne*), but nevertheless its action placed a burden on neutral employers. Even a moral aim, or one aimed at "freeing employees from handling goods from an objectionable source," is punishable because, said the Court's majority, a union must be responsible for the economic consequences of its actions. Of course, all economic pressure, even clearly legal primary strikes and

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183. See *Labor Picketing and Commercial Speech*, *supra* note 180, at 950-60.
186. *Id.* at 226.
187. *Id.* at 223.
188. *Id.* at 224.
picketing exerts economic pressure on other employers. Moreover, the Court was unable to rely on the purported violent aspects of picketing or distinguish other rulings permitting certain types of secondary picketing. Students in labor law classes begin to despair at this point, assuming it has not occurred earlier.

In addition, it was irrelevant that the secondary pressure by the ILA did not involve a primary employer with whom the union had a dispute. In fact, in the ILA case, there was apparently a secondary boycott with no primary dispute! Although the actual dispute was with the Soviet Union, the Court found that there was no exception for politically based actions. Indeed, despite the Court's use of the political/economic distinction in Claiborne, "the distinction between labor and political objectives would be difficult to draw in many cases." But this is just the point. With the Court's apparent internment of the political/economic" distinction, interested observers in the United States are left with no articulated rationale for the lack of protection for secondary labor picketing (as opposed to secondary picketing by non-labor groups), let alone for the distinction between secondary labor handbilling and picketing.

Not all secondary actions appeal to consumers, of course, and the courts' apparent fear of class-based solidarity actions would seem most engaged when a union seeks the aid of "neutral" workers to aid them in a primary dispute. This involves the second major branch of secondary boycott law in the United States. This aspect involves appeals to "neutral" workers (not consumers) to cease all or some work in order to aid workers involved in a strike or dispute in another firm or even the unsolicited decision by the neutral workers to aid workers employed elsewhere. A union clearly may not appeal to neutral workers to cease work either completely or, at a minimum, not to work on "hot goods." Nor may the neutral workers cease work on their own, unbidden by the striking union, for this would be a "strike" with the forbidden object within section 8(b)(4)(i). There is a narrow exception for cases in which the alleged neutral has actually involved itself in the dispute, for instance, by accepting work which would have been performed by the strikers. Outside of very narrow limits,

189. Id. at 225.
however, workers have no right to seek aid from neutrals or take sympathetic action via the withholding of labor. Unlike the consumer area, these forms of secondary activity do not generate nearly as much ambiguity.

Workers for neutral employers, it is traditionally said, have no dispute with their own employer, that is, they have no primary dispute with their own employer which would justify their work stoppage. Their own interests, of course, are not really of judicial significance, and the courts seem to rely on the early common law notion that one needs some self interest to justify the causing of economic harm. As under the common law, courts decide for themselves whether unions have sufficient interest to exert economic pressure. Moreover, to argue that secondary workers have no interest in disputes elsewhere or in the work they perform is historically wrongheaded. Not only are workers concerned with those in other firms, but workers personally may feel morally or politically offended by being forced to handle or work on struck goods. In addition, their work on "hot goods" may well weaken the strike effort. It could fairly be argued, therefore, that these workers indeed have a dispute with their employer since they are required—upon pain of discharge—to do work which violates their sense of integrity.

International cooperation may involve the withholding of labor or inducing others to do so, rather than an appeal to consumers. Without presenting courts with the embarrassment of explaining why appeals to consumers should be treated differently based on the identity of the speaker, appeals to workers seem to face an uphill battle in countries like the United States and Canada. Neither country has approved a distinction between political and

190. Self interest, however, can be defined narrowly or broadly. Narrow approaches were taken by some courts, for instance, by Massachusetts's courts. See, e.g., Vegelahn v. Guntner, 44 N.E. 1077 (1896). Not all state courts, however, read self interest so narrowly, and at least one state, New York, permitted even secondary actions since self interest was clearly involved so long as labor action did not fall into any existing category of tort or crime. See GREGORY, supra note 147, at 76-82.

191. Even aside from the NLRA secondary boycott provisions, such action has traditionally been treated by American courts as unprotected action which could lead to discharge or discipline. See e.g., JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 44-66 (1983) [hereinafter ATLESON, VALUES].
economic strikes; indeed, the distinction has generally been rejected. This assumes, of course, that some rational distinction can be made between economic and political aims. In any case, in both Canada and the United States the primary emphasis is placed upon the protection of neutral employers.\textsuperscript{192} It is at this point that courts make a fundamental choice between two views of neutrality. Unions and their members may well believe that firms which continue to work on goods from a struck firm or continue to supply such companies are less than "neutral." Unions may well believe in that saying of the 1960s, "if you're not part of the solution, you're part of the problem." After all, what unions are generally trying to achieve is a fully effective strike, one that ends production at the struck firm. Should that be achieved, there is obviously no production upon which workers at other firms can work.\textsuperscript{193}

Unlike most other countries, the United States actually has had cases involving international solidarity actions. The most noteworthy recently have dealt with the legality of secondary action \textit{outside the United States} whose purpose was to benefit unions \textit{in the United States}. Two courts of appeals have reached opposite conclusions on the legality of the union's action. Unsurprisingly, this dispute again involved longshoremen, this time the East Coast ILA. As part of an ongoing dispute between ILA-represented longshoremen and two unorganized Florida shippers, Japanese longshore unions were asked to aid the union by refusing to unload ships in Japan which had been loaded by nonunion workers in Florida. When Japanese workers refused to unload such cargoes, the targeted exporters and shipping companies redirected their ships to ports using

\textsuperscript{192} A further irony is that under the Railway Labor Act, which preceded the NLRA and covers airlines as well as railways, secondary boycotts by unions are permitted. \textit{See}, \textit{e.g.}, Burlington Northern R.R. Co. v. Bhd. of Maintenance of Way Employees, 481 U.S. 429 (1987).

union labor for loading. This is, then, a case of international labor solidarity.

Prior to a ruling on the merits of the employers' unfair labor practice charge, the NLRB sought an injunction in federal court under section 10(l) of the NLRA, another provision aimed at suppressing secondary activity, on the ground that the secondary boycott actually occurred in the United States as it was directed at U.S. firms and the economic pain was felt in Florida. The 11th Circuit Court of Appeals upheld the injunction, holding that the application of the statute was not extraterritorial and, moreover, the action of the Japanese unions could be attributed to the ILA based on legal doctrines of agency, ratification or joint venture. 194

Subsequently, after the NLRB held on the merits that the ILA's actions constituted a violation of NLRA section 8(b)(4), the court of appeals for the District of Columbia held that there was no illegal secondary boycott for a variety of reasons, including the belief that the action was not taken by "employees" within the Act, since the Japanese were not individuals engaged in "commerce" as defined by the NLRA. The court also denied the applicability of agency or ratification doctrines, while not clearly focusing on the interesting issue of the possible application of the NLRA beyond U.S. borders.

The 11th Circuit's decision, which upheld the temporary injunction, was based upon a quite credible argument. American anti-trust law, for instance, already applies to anti-competitive agreements even though made abroad if the effects are felt in the United States. 195 The ILA, on the other hand, argued that the boycott, the actual refusal to unload the ships, occurred in Japan by Japanese workers who were clearly not covered by the U.S. statute, and that clearly was factually true. Yet, the application of the statute would have been clear if all activity had occurred in the United States, for the statute would then

194. See Dowd v. ILA, 975 F.2d 779 (11th Cir. 1992).
have applied to the workers either doing the actual boycotting or encouraging them to so act. Does it make sense to separate where the action occurs from where the pain, the injury for which the statute was passed, occurs? Yet, it is clear that no U.S. based remedial action could have been taken against Japanese longshore workers.

Nevertheless, a strike \textit{in the} United States in aid of striking or locked-out workers \textit{in another county} is likely to be treated as an illegal secondary boycott, leading initially to an injunction by the NLRB via section 10(l) of the NLRA and subsequently to a cease and desist order after a ruling on the merits. In addition, the NLRA permits employers to seek damages directly in federal court. The secondary boycott provision in the NLRA covers strikes to induce a "person" (generally an employer) to cease dealing with another "person." Given the Court's ruling in the ILA's boycott against the Soviet Union, the moral basis of the workers' actions are less important than the effects.

Throughout U.S. labor history, courts have preferred narrow economic forms of labor action over broader, more political forms. In the eyes of most judges, legitimate collective action is narrowly self interested rather than altruistic, directed at maximizing pecuniary awards rather than influencing the 'basic scope of the enterprise,' and confined to the immediate employer-employee relationship rather than involving outside workers and communities. The paradigm of a lawful labor dispute is the strike for higher wages by employees of a single employer.\textsuperscript{196}

The prohibitions in U.S. law ignore a number of factors. For instance, the law deems irrelevant the interest that the "secondary" actors may have in the primary dispute. Unlike the explicit recognition in the anti-injunction Norris-LaGuardia Act that workers do have an interest in other workplaces,\textsuperscript{197} there is no assumption in NLRA jurisprudence that workers in the same union or industry are "interested" in the dispute. Moreover, the purposes of the boycott are also treated as irrelevant. Third, also not considered are the resources and power of the union which organized the boycott. For example, a union may be too


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weak vis-à-vis an employer to mount an effective strike. As a consequence, the prohibitions remove a possibly effective weapon from unions and affect the resulting balance of power.\(^{198}\) Fourth, as already noted, the restrictions ignore the personal and, thus, primary objections workers may have to working on “hot goods.” In any event, the ability to strike effectively is the foundation upon which U.S. labor relations law rests. The viability of the strike and boycott are, therefore, crucial to the goal of industrial democracy.

The saga of the *Neptune Jade* may raise special issues, but there is little reason to believe the result would have been different had the statute been invoked. After all, in the Soviet Union case, the Court found a secondary boycott even though there did not seem to be any primary dispute. Moreover, the language of the act clearly was designed to prohibit sympathetic action, and it is not clear why it should matter that the workers being supported are citizens of another country.

VII. THE RISKS OF SYMPATHETIC ACTION FOR POLITICAL ACTORS

The *Neptune Jade* incident raised at least two other interesting issues under U.S. law. First, the protesters at the Oakland, California, docks were union members, activists, a few IWW members (who had learned of the arrival of the *Neptune Jade* by e-mail), and other groups including the Laney College Labor Society. The protesters were sued by the Pacific Maritime Association (“PMA”), arguably in the nature of “SLAPPS” suits.\(^{199}\) The stevedores, it seems, respected a picket line but, apparently, did not initiate it. This kind of “non-labor union” picket line is

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198. OTTO KAHN-FREUND & BOB HEPPLE, LAWS AGAINST STRIKES 33-34 (1972) [hereinafter KAHN-FREUND].


This action highlights what is reported to be a more militant litigation strategy by the PMA to bring unfair labor practice and damage actions against the union, which they feel is abusing the traditional arbitration system. Bill Mongelluzzo, Internal Arbitration Thrown Overboard; Work Stoppage Disputes Now May Prompt Suits, J. COM., Dec. 18, 1997, at A12 [hereinafter Mongelluzzo, *Overboard*].
apparently protected under the First Amendment by *Claiborne Hardware*, but the defendants incurred significant legal costs fighting the PMA action. No action was brought against the ILWU, raising the question whether the stevedores could respect this line as an aspect of their rights of free speech. That is, if the picketing, like that in *Claiborne Hardware* is constitutionally protected, why should respecting such a picket line result in legal penalties?

The defendants in Oakland argued that their picket line was a form of expression protected by the First Amendment and the workers had simply honored a peaceful picket line. The PMA, on the other hand, argued that the longshore workers "were intimidated and threatened by demonstrators who illegally conspired to interfere with the ship's business and defied a court order." The action by the PMA, joined by Yusen Terminals and Centennial Stevedoring Services, was filed against two leading demonstrators, three pro-labor groups, including the Peace and Freedom Party, students in the Laney College labor group, and a number of unnamed individuals. Plaintiffs filed discovery motions seeking the names of anyone connected with the pickets and the membership lists and minutes of meetings of all unions and organizations involved, including all correspondence, faxes, and e-mails.

Robert Remar, an attorney who represented one union activist defendant who had participated in the picket line, noted that the companies were "worried that political and labor issues that have broad-based concern for the community do not get expressed by average citizens in the form of demonstrations on the docks. The companies are very unhappy that they and any other institution are subject to First Amendment activities." The suit led to a series of protest demonstrations, and at least two songs

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201. Id.

were written commemorating the *Neptune Jade* saga.\(^{203}\) In July, 1998, longshore workers shut down the Port of Oakland during the day a court was hearing the union's motion to block the PMA attempt to acquire documents to provide information on the participants in the picketing of the *Neptune Jade*.\(^{204}\)

The PMA's manager of operations and development, Josephine Parr, explaining why the company sued the demonstrators, stated that the company's action did not concern labor-management relations but, rather, the nature of the shipping industry and the individuals who had acted illegally.\(^{205}\) The suit, she said, focused less on the legality of the picket line itself and more on the manner it was carried out. Parr stated that the picketers "blocked the entrance to the terminal and had cars and railroad ties and things like that. Another space was provided for them to demonstrate, but they didn't use it." Parr also claimed that some of the pickets threw bottles and distributed leaflets that said "[c]rossing a picket line can be hazardous to your health."\(^{206}\)

The president of the PMA, Joseph Miniace, also rejected the First Amendment argument on the ground that the demonstrators "were threatening the safety of our workforce."\(^{207}\) Although the precise facts may not be clear, it seems doubtful that the picketers were "threatening" the longshoremen, a group not generally known for excessive passivity. Nevertheless, the PMA's suit threatened a strategy advanced by some to form union-community alliances to take advantage of the First Amendment rights of non-labor groups.\(^{208}\)

Relying upon the First Amendment, an Alameda County Superior Court judge dismissed the PMA action

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\(^{205}\) Del Vecchio, *Dockworkers to Protest*, supra note 200, at A21.


\(^{207}\) Del Vecchio, *Dockworkers to Protest*, supra note 200, at A21.

against Jack Heyman, an executive board member of Local 10 of the Inland Boatmen's Union, and the Labor Party's Golden Gate Chapter, granting attorney's fees, but permitted the action to continue against Robert Irminger, an informal picket line captain and a member of the Inland Boatmen's Union, and against the Peace and Freedom Party. After Laney College refused a PMA subpoena for names, the Laney College Labor Studies Group was also dropped as a defendant. According to reports, a judge in a different proceeding apparently ruled that the picketing was peaceful but in violation of an injunction limiting the pickets to four, and then assessed only a $100 fine or two days of community service.\textsuperscript{209}

In late November, 1998, the PMA dropped its remaining action in the \textit{Neptune Jade} dispute. With new contract negotiations coming up, such an action may have seemed like the wisest choice. Robert Irminger deemed the action a "humiliating defeat," although the effect of the yearlong action cannot be measured.\textsuperscript{210} The costs of the PMA's litigation may hinder non-labor action in the future, no doubt its intended purpose.

But even when community action does occur, another serious obstacle to transnational labor action arises, even apart from the secondary boycott laws. Taking the \textit{Neptune Jade} situation as an example, the ILA, like most unions, agreed to a no-strike clause in its collective agreement. The legal question then focuses upon the scope of the clause, for if the action respecting the picket line violates the union's no-strike clause, the union can be both enjoined and sued for damages.\textsuperscript{211} Moreover, Supreme Court decisions have made it clear that even without a no-strike clause, or despite the breadth of such a clause, a strike over a matter that can be resolved by arbitration is a breach of contract which can lead to either an injunction or damages under


\textsuperscript{211} Atleson, \textit{The Circle of Boys Market}, supra note 74.
NLRA section 301.\textsuperscript{212} In this type of case, however, there is a good argument that the dispute, since it does not involve the terms of the contract, is not a violation of the arbitration clause.\textsuperscript{213} Nevertheless, unions must give serious consideration to the costs of litigation. Given the PMA's litigation effort in recent years, the threat of litigation poses a serious threat for the union. As Steve Stallone, editor of the ILWU's \textit{Dispatcher} noted, "[c]learly, we don't have millions of dollars."\textsuperscript{214}

The law in this area is not clear, although some courts have read no-strike clauses broadly.\textsuperscript{215} The Supreme Court, however, in a relatively old decision, \textit{Mastro Plastics},\textsuperscript{216} interpreted no-strike clauses as barring only strikes over contractual, workplace issues, and, therefore, such clauses did not bar a strike over unfair labor practices.\textsuperscript{217} The union's likely argument, therefore, is that secondary or sympathetic actions also do not involve the parties' collective agreement, an ironic application of the belief that sympathetic actions do not actually involve the primary employment relationship. The continuing viability of this decision, however, is in doubt since the Court has permitted damage and injunction actions to enforce arbitration clauses, when the causes of strikes could have been arbitrated. Given the Court's demonstrated affinity for enforcing at least its view of arbitration clauses, \textit{Mastro Plastics} may be seen as an anomaly or, possibly, no longer much of an asset for unions. Yet, a "strike" over a foreign


\textsuperscript{213} See Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976). A different situation may exist, however, if the employer can grieve under the parties' collective agreement.

\textsuperscript{214} Bill Mongelluzzo, \textit{Internal Arbitration Thrown Overboard; Work-Stoppage Disputes Now May Prompt Suits}, J. COM., Dec. 18, 1997, at 12A.

\textsuperscript{215} Reversing its earlier position, the NLRB held in 1985 that a generally worded no-strike provision barred sympathetic action. See Alvin Goldman, \textit{The USA, in STRIKES AND LOCKOUTS IN INDUSTRIALIZED MARKET ECONOMIES} 208, 217-18 (Roger Blanpain & Ruth Ben-Israel eds., 1994).

\textsuperscript{216} Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

\textsuperscript{217} The NLRB, however, has limited \textit{Mastro Plastics} to apply only to strikes over serious unfair labor practices.
dispute or one over a foreign nation's politics generally cannot be arbitrated under most contracts.218

VIII. THE ANALYTIC PROBLEMS OF LEGAL DOCTRINES

Although the domestic law of most developed nations, in line with ILO rules, may protect strikes in general, strikes in certain situations may not be protected. Strikes may violate specific statutory prohibitions or, as in the United States, court-created, implicit contractual bars to certain strikes.219 Obviously, restrictive rules and statutes hinder solidarity actions and limit the ability of unions to respond to the new global world.220 As we have seen, statutes in some countries have not altered the common law hostility to sympathetic or secondary actions, even directed at consumers. Other countries confine protected strikes to the specific workplace in which the dispute occurred. Thus, in all the countries in which the boycott against the Neptune Jade occurred, the refusal to unload the ship was unlawful and perhaps a breach of contract as well. The story thus far, therefore, is that domestic legal restrictions provide serious obstacles to transnational labor activity, although unlawful action will nevertheless occur. The practical effect of such legislation, in Lord Wedderburn's words, "is to fragment and inhibit trade union action while the power of internationalized capital is constitutionally guaranteed the maximum flexibility."221

218. A report, however, indicates that an arbitration proceeding did occur under the PMA/ILWU agreement, with the arbitrator initially ruling that the presence of pickets created unsafe working conditions, and, thus, the ILWU did not have to cross the picket line. Bill Mongelluzzo, ILWU Protest May Disrupt Oakland, J. Com., Feb. 26, 1998, at 10A. That ruling was, however, reversed the following day.


220. There also may be specific legislation that prohibits or hampers the ability of national workers' organizations to affiliate with international confederations. See World Labour Report 1997-1998, supra note 7, at 37-38.

221. Nationalism and the Multinational Enterprise 256 (H.R. Hahlo et al. eds., 1973). In the United States, at least, this is not surprising. U.S. courts and the NLRB have already made it difficult for unions to deal with multi-unit and multiple-location firms and, especially, to respond to the economic power of
Interestingly, whatever the domestic labor law scheme, similar questions tend to arise. For instance, can the collective action be deemed a strike? The answer might seem to be obvious, but this has not proved to be the case. Usually, the answer is affected by the reason the question is asked. Since strikes are generally protected in western nations, as well as by ILO documents, the issue often involves whether the pressure device falls within the scope of legal protection. Yet, not all strikes are protected, and certain "strikes" or work stoppages may be illegal under a statute because of their purpose or their timing.

Moreover, such action may not violate a statute but nevertheless be unprotected in the sense that participants may be discharged. In the United States, for instance, certain strikes have been found to fall outside the broadly worded protection of sections 7 and 13 of the NLRA because they violate what the courts believed to be implicit policies imbedded in the act, e.g., strikes or collective actions which violated other federal statutes or the policy insuring respect for the integrity of collective bargaining agreements. Other collective actions short of a full withdrawal of labor, such as sit-downs, slowdowns or intermittent strikes, have also been held unprotected, although the arguments for these decisions are far from clear. Although unprotected actions in the United States are not necessarily statutory violations leading, for instance, to an injunction or cease and desist order, the threat of discharge may be just as effective as a deterrence. Similar restraints exist in other nations. In France and Belgium, for instance, the slowdown or "work to rule" action is unlawful because there is no cessation of work. In other words, such limited actions are not deemed strikes. They are not a "concerted cessation" of labor but instead are seen as a "defective execution of work."

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222. ATLESON, VALUES, supra note 191, at 44.
224. WEDDERBURN, EMPLOYMENT RIGHTS, supra note 132, at 87-88, 287-88.
Germany and Sweden, on the other hand, protect such actions as "strikes."

Thus, at some times the union ironically desires the collective action to be considered to be something other than a strike because strikes may be legally or contractually barred. Indeed, the most serious obstacle to secondary or sympathetic action may be explicit statutory prohibitions such as the secondary boycott provisions in U.S. law.

A. Is There Any Way to Rationally Distinguish Primary From Secondary Strikes?

Solidarity and sympathy strikes logically direct us to an examination of the workers’ interests. All European systems, other than the United Kingdom, “reserve some area of legality for solidarity or sympathetic action of some kind.” U.S. courts, on the other hand, have long disfavored labor boycotts, often viewing such actions as predictable preludes to violence.

In the late 19th and early 20th centuries even picketing at a primary site was typically viewed as violent or at least potentially so. Yet, a strike is merely a labor boycott—the workers stop working for the employer with whom they have a dispute. This action may have secondary effects, disrupting production and, thus, disturbing the normal interactions between the primary employer and other firms doing business with it. Indeed, one of the purposes of a picket line at the primary site is to urge workers employed by other firms to respect the line and, thereby, induce other employers to "cease dealing with" the struck employer. Although this activity is clearly protected under the NLRA, and not violative of the secondary boycott provision, the activity falls within the broad language of the statutory provision.

225. Similarly, unions may want a job action to be deemed not a strike since strikes may be prohibited by a contractual no-strike clause, but, instead, an action protected by NLRA section 502, which protects the “quitting” of labor in response to substantial risks to health and safety. See Atleson, Threats to Health and Safety, supra note 219.

226. Wedderburn, Employment Rights supra note 132, at 296.


228. See, e.g., Vegelahn v. Guntner, 44 N.E. 1077 (Mass. 1896). For a listing of various early and often colorful judicial views on picketing, see Labor Law, supra note 193, at 186-89.
Thus, all primary picket lines have secondary effects, and the real task of the law in the United States is to distinguish between types of secondary effects and not between primary and secondary activity. Generally, picketing at "neutral" firms who do business with the struck firm is a violation of the statute, even though the effect on the alleged neutral would be the same as a strike and legitimate, primary picket line which forces the struck employer to close during the strike. In such situations, of course, there are no "hot goods" for the secondary employer to handle or work on.

The intellectual problem is that all strikes have secondary effects, which most of the time are intentional. Thus, a perfectly legal primary picket line and strike is usually intended to keep away neutral truck drivers or others dealing with the primary employer. Moreover, to complicate the situation, in the United States not all strike activity at a secondary location is prohibited. Yet, most attempts to induce workers at other firms to aid the strikers will run afoul of the statute. Just as important, even without a secondary picket line, workers at other firms may not legally strike in aid of workers elsewhere, even though the work they do helps the struck employer continue operating during the strike.

The normal argument is that the workers taking the sympathetic or secondary action have no real dispute with their own employer and, thus, are causing a neutral employer to suffer economic harm unfairly. A common response by the critics of legal restrictions is that "outsiders may well stand to lose or benefit by the outcome of the dispute." That is, the target of the secondary pressure may have an economic interest in the labor conditions at the primary employer. Moreover, the employees at the secondary site may have a personal interest in the labor conditions at the primary site.

In any case, an argument challenging the traditional view exists: if an employer insists that workers handle

229. Workers may, for instance, picket another employer who performs work during the strike which the strikers would otherwise perform. See Douds v. Local 231, Metro. Fed'n of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948).

230. Underlying this situation is the U.S. rule that strikers can be permanently replaced, although firing alone would constitute discrimination under the statute. See ATLESON, VALUES, supra note 191, at 48-49.

231. KAHN-FREUND, supra note 198, at 31.
cargo which the workers find inconsistent with their principles, usually called "hot cargo," either because they wish to aid workers elsewhere or to express political revulsion about the source of the "hot goods," why is this not deemed a primary and not a secondary strike? In other words, when workers refuse to work on "hot goods" in order to aid workers elsewhere, can it be said that they have no real dispute with their employer? The workers' boycott, that is, the withholding of their labor, may well be based on deeply held beliefs. The answer, no doubt, lies in the limited status courts assign to workers, a status revealed in cases in which workers seek to control some aspect of their work.  

Why is this type of action more important than a strike to obtain higher wages or, as in the United States, the right to handbill consumers? One could certainly argue that the right to dispose of your labor, especially to defend or assist others, is a more keenly felt and significant interest than the right to persuade consumers how to spend their money.

Yet, on the ground that sympathy or secondary strikes affect employers not in a position to satisfy worker demands, a number of countries bar such solidarity efforts. As noted earlier, Japan and, in particular, the United Kingdom limit the legality of strikes to those connected to collective bargaining. A strike for wholly "political purposes" is not a protected "trade dispute" in the United Kingdom because statutes define the term as involving only industrial matters.

On the other hand, this is not a uniform position. A number of European nations protect solidarity strikes if the sympathetic workers can demonstrate a sufficient interest with the primary workers, although the definition and scope of "interest" may vary and may be tested objectively or subjectively. Italian courts, for instance, have held solidarity actions to be protected so long as workers are

232. Decisions have long held that workers may not stay at work and decide which parts of their work or assigned tasks they will perform. Similarly, slowdowns are not protected. See Atleson, Values, supra note 191, 44-45, 52.

233. New Zealand's Employment Contracts Act of 1991 makes all secondary and sympathetic strikes unlawful in this way. The recently elected center-left government has enacted an Employment Relations Act which alters some of the provisions of the prior legislation but makes no change in this prohibition. See Gordon Anderson, Modest But Progressive Reforms, 7 Int'l Union RTS. 6, 6-7 (2000).
acting in defense of what they perceive to be their interest in the primary dispute. The demands of striking workers, therefore, must be related to their employment but need not be aimed primarily at the workers' own employer. Spain, Ireland, and France take a similar position, and in Belgium sympathy strikes are lawful unless contrary to an absolute peace obligation. Indeed, except for political strikes, "industrial conflict is characterized by the almost complete freedom to engage in industrial warfare."

Many countries, including Germany, take the position that industrial action can only legally be started when the goal is to conclude a collective agreement. Therefore, only parties to such an agreement can engage in industrial action, making political as well as sympathy strikes illegal. According to Manfred Weiss, the extent to which solidarity strikes were lawful was in doubt until a 1985 decision of

234. The right to strike is protected in the Italian Constitution of 1948 but only if exercised within the law. The only statute dealing with strikes, however, deals with public employees, so the private sector is regulated by case law. Workers may strike to pursue collective economic interests but also political or other interests. Consequently, "the pursuit of any interest relevant to the working environment or the economy in general is a legitimate goal of a strike. Thus, solidarity strikes in support of a strike by other groups of workers have been held to be legitimate." Similarly, political strikes are legal, but only if they relate to some interest of a group of workers. See 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 5-34 (William L. Keller ed., 1997).

235. See WEDDERBURN, EMPLOYMENT RIGHTS, supra note 127, at 293-96; Roger Blanpain, Belgium, in 3 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW & INDUSTRIAL RELATIONS 1, 393 (Roger Blanpain ed., 2002) [hereinafter Blanpain, Belgium].

The issue in France turns on the definition of the scope of the right to strike. Strikes are protected by the French constitution, but, as in most countries, courts have created limits to the right's expression. Courts may decide on the "disproportionality" between the aims of the strike and the disruption it causes. Second, and relevant here, courts decide whether strikes are "extraprofessional"—that is, not related to the employer-employee relationship. If so found, the actions are treated as illegal regardless of motive. Strikes for purposes other than the protection of workers' own interests are not allowed. Therefore, political strikes are considered unlawful, but sympathy strikes (greve de solidarite') are protected if the courts find that the two groups of workers have common interests. It is asserted generally that French courts "have on the whole been prepared to recognize the legitimacy of sympathetic strikes." KAHN-FREUND, supra note 193, at 31; see also Rojot, supra note 223, at 3-26; MICHEL DESPAX & JACQUES ROJOT, LABOUR LAW AND INDUSTRIAL RELATIONS IN FRANCE 295-96 (1987).

236. See ROGER BLANPAIN, LABOUR LAW IN BELGIUM 284 (1996); Blanpain, Belgium, supra note 223, at 388.
Germany's Federal Labor Court. Although such strikes are still allowed in a narrow range of cases, such as those involving an alleged neutral that has taken over production from the struck employer or when it could be said the two employers were the same entity, the exceptions are far too limited to "allow solidarity strikes to become a relevant feature of industrial conflict in Germany." Although based upon a quite different legal system than the United States, legal results are similar in the two countries.

Some nations, on the other hand, have recognized and protected labor boycotts even in a transnational context. Sweden, for example, has recognized the union right to engage in this type of solidarity action. Such actions are lawful so long as they do not violate any peace obligation in the union's contracts, where the union acts in accordance with its own rules, and where the initial strike is itself lawful. Indeed, even these restrictions have been relaxed if the first strike occurs abroad. In a case involving a strike to support a boycott of goods from post-coup Chile, for instance, the Swedish Labor Court noted that Swedish workers have no opportunity to influence the social policies of another nation where the dispute originated. Similarly, Greece amended its labor laws in 1982 to protect sympathetic action, and unions have a right to take such action against multi-national firms where action abroad can affect domestic working conditions. The most extreme example of the recognition of solidarity strikes is Denmark, where such actions are protected so long as they are altruistic, even when they violate the peace obligation. Altruism means "[s]econdary strikers must not have a material interest of their own in the primary dispute. . . ."

237. See Germany, in 1 INTERNATIONAL LABOR COMMITTEE, INTERNATIONAL LABOR AND EMPLOYMENT LAWS 4-50 (2003).
240. WEDDERBURN, EMPLOYMENT RIGHTS, supra note 127, at 293-94.
241. Id. at 300.
242. Id. at 294.
These decisions may support an argument that transnational solidarity actions should be protected even if such pressure, when all actions are domestic, is not.

Looking at private international conflicts of law rules, it is generally accepted that the legality of strikes can only be determined according to the law of the place where such action occurs. The legality of international boycotts and sympathetic actions is far less clear. Morgenstern, writing in 1984, suggests that some Western nations may permit local boycotts intended to aid workers in other countries. The legality of sympathetic actions, like that of strikes, is usually determined by the law of the place where the sympathy action occurs. Morgenstern suggests that some protection for such actions exists as she notes that legality will depend on the domestic law regulating sympathetic action in general: “the most usual requirements in that respect being that the strike being supported must itself be lawful and that the sympathy action must have direct connection with it.” There may, however, be special rules dealing with the support of foreign strikes and the manner in which the general restrictions are applied to foreign situations. As Morgenstern notes, however, court decisions in “support of foreign strikes are isolated and relatively old. . . .

ILO consulates have issued decisions supporting the views of nations which recognize the validity of solidarity actions. The ILO Committee of Experts, for instance, in a decision dealing with the Thatcher government’s proscription of secondary action, found that the statutes provided “excessive limitations” upon the right to strike. The U.K. statutes, the Committee stated:

[Appears to make it virtually impossible for workers and unions lawfully to engage in any form of boycott activity, or ‘sympathetic’ action against parties not directly involved in a given dispute. . . . Where a boycott relates directly to the social and economic concerns of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then

244. Id. at 114.
245. Id.
246. Id. at 115.
that boycott should be regarded as a legitimate exercise of the right to strike.\(^{247}\)

Ironically, the very mechanisms that induce the creation of multinational firms, mergers for instance, may also provide openings for unions. In the case of Chrysler workers in the United States, for example, can they now strike to aid workers at a Daimler-Benz factory in Bavaria? Many believe that Daimler-Chrysler involved a takeover and not a merger, but in any event both sets of workers labor for the same company. And then there are the workers at Japan’s Mitsubishi, of which Daimler Chrysler now has a 34% controlling interest. That control was exercised recently in the naming of Rolf Eckrodt, not a typical Japanese name, as Mitsubishi’s chief executive, in order to turn the company’s fortunes around.\(^{248}\)

Pressure on one’s own company in order to aid foreign workers in the same firm may not be deemed secondary. Thus, the definition of “neutral” takes on a new significance. As technologies, systems, and parts are shared by components of an international firm, the argument that national borders are irrelevant to the definition of the “primary” grows stronger. In many nations wholly owned affiliates or subsidiaries are considered separate, “neutral” firms for purposes of secondary boycott restrictions, but the internationalization of firms in the same sector weakens the argument for neutrality.\(^{249}\) There are only a few U.S. cases dealing with the issue, most treating affiliates of the same firm as “neutrals” for purposes of the NLRA. Active unions may challenge such decisions, which are clearly political rather than based on the language of the statute or its legislative history.

Thus, the international merger of companies may create openings for truly international labor solidarity. If this does take place it will be an ironic but hardly unprecedented occurrence. Labor history is filled with thrust, counterthrust and the often unexpected effects of those strategic moves. If capital in the 19th century, for

\(^{247}\) 1989 REP. OF THE COMM. OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS III pt. 4A, at 238; see also supra text accompanying note 2; Swepton, supra note 22, at 186-90.

\(^{248}\) See Mitsubishi Says Charges Will Double Expected Loss, N.Y. TIMES, Mar. 29, 2001, at W1.

\(^{249}\) See generally Atleson, Reflections, supra note 46.
instance, moved from the “putting out” system, or use of home workers, to factories at least partly to control labor, the unexpected result was the formation of a group of workers with common interests who could form a union. In recent times, the efficiency-generated just-in-time production process created a windfall for certain unions. In the auto industry, for instance, strikes at particular GM factories in the United States closed down factories in other locales, just as a national strike against GM in Canada quickly affected plants in the United States. Finally, many countries, especially the United States, now find themselves with international workforces with personal ties all over the world. The situation is hardly a new one for the United States, but it has been some time since the workforce was as immigrant based as it is at present.

B. Is There a Distinction Between Economic and Political Strikes?

The attempt to distinguish the economic and political concerns of unions rests on the misguided premise that unions can represent the economic interests of workers effectively without engaging in political activity. If this was ever more than a myth, it is certainly not the case in a post-laissez-faire society in which government intervention and regulation in most spheres of economic and social life is a daily event.

The reason for considering the possibility of a distinction between political and economic strikes is that constitutional protections may protect political expression even, arguably, when the speakers express themselves by withholding their labor. Civil rights or consumer groups may engage in boycott activity because they are protected by some higher law like the Charter of Rights in Canada or the U.S. Constitution, but it is nevertheless common to treat labor action as quite different. It is certainly possible to argue that all strikes are political as they often challenge

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existing distributions of income, the validity of existing law, and often involve appeals to the public.  

Generally, however, the law of many states begins with the assumption that the objectives of the strike must be legitimate, and most assume that these must relate to work demands and the process of collective bargaining. German law reflects the approach of many states. Since strikes are legal only if their purpose is to arrive at a collective agreement, it follows that political, secondary, and sympathy strikes are illegal, although narrow exceptions may exist. For instance, in response to a request for support from dockworkers' unions in the British port strike in 1970, German unions noted that it would be unlawful for them to engage in a sympathy boycott. Weiss notes that this position has been challenged on the ground that collective bargaining is only one device for regulating labor relations, and it may becoming less important than state regulation.

Some countries, Austria and the Netherlands, for example, apply a principle called "proportionality" or "reasonableness" to solidarity actions, permitting pressure against firms dealing with the primary firm but not against other companies not involved in the labor dispute. In France, Italy, and Spain, where the right to strike is constitutionally protected, it is usually said that solidarity actions are allowable so long as workers have a community of interest with those workers engaged in the primary dispute.


255. See Weiss, Federal Republic, supra note 238, at 174.

256. See generally Lance A. Compa, Unfair Advantage: Workers' Freedom
Yet, it is not uncommon for strike demands to have wider social or economic objectives. First, in a political strike, the effort is "not directed against the employer but rather against the state. Acceptance of the strikers' demands by the state will result in changing government policy or amending legislation, and will not be expressed in signing a collective agreement." The pressure is felt by the employer, although it is not in a position to grant the demands.

The difficulty in separating political from economic strikes is shown in the Italian experience. Traditionally the distinction existed, and political strikes were unlawful either because they did not fall under conventional notions of a strike defined as pressure focused upon workers’ specific economic interests, or because a political strike was thought not to be within constitutionally protected strike purposes. Decisions of the Constitutional Court in the 1960s, however, broadened the notion of the "economic" to include all strikes designed to defend workers’ interests, relying upon an extensive list of interests expressly listed in the Constitution. Thus, a strike for basic social reforms would be lawful.

Still, the notion of some "pure" type of political strike persists, e.g., one aimed at a general political direction or orientation. But the Italian court rejected the notion of an objective distinction between an economic and a political strike as untenable, "much in the same way as in the present state of our society it is impossible to separate economic and political decisions, since there is in fact no area of economic activity, and consequently of workers' interests, not affected by politics and vice versa." Similarly, a 1962 decision of the Constitutional Court made clear that solidarity strikes were legitimate so long as there was sufficient community of interest between the two worker groups, a legal approach giving broad discretion to the courts.

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257. Ben-Israel, supra note 239, at 51-56.
258. See T. Trev, Italy, in 8 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR AND INDUSTRIAL RELATIONS 216 (Roger Blanpain ed., 2002).
259. Id. at 217.
The argument for broad right to engage in solidarity actions starts with the most central, internationally recognized, right of workers—freedom of association. The ILO, for example, has established special procedures and committees to review complaints about its violation and, indeed, recognizes that freedom of association has a unique status among the basic human rights it recognizes:

It is a prerequisite for progress towards social justice; it enables the workers to give expression to their aspirations; it strengthens their position in collective bargaining, by reestablishing a balance in the strength of the parties; it constitutes a healthy counterweight to the power of the State, by enabling labor to participate in the framing and carrying out of economic and social policies; and, last but not least, it is essential for the proper functioning of an organization like the ILO based on tripartism, that is to say cooperation on an equal footing between workers, employers, and governments.

More generally, the ILO has traditionally stated that justice as well as rationality supports the adoption of and enforcement of labor standards such as freedom of association. Thus, Raymond Torres states that the right to organize and bargain collectively

is an essential element of success in the global economy. Trade unions, collective bargaining and tripartite dialogue are necessary elements for creating an environment that encourages innovation and higher productivity, attracts FDI and enables societies and economies to adjust to external shocks, such as financial crises and natural disasters.

Ironically, however, the right to strike is not explicitly expressed in the ILO constitution or in such important ILO conventions as numbers 87 or 98. Despite this absence, the right is understood in various ILO conventions to be basic, and this would suggest that the right to strike applies to solidarity actions taken in one nation to aid workers in another. ILO Convention 87 recognizes the right of

261. TORRES, supra note 49, at 64.
262. FREEDOM OF ASSOCIATION, supra note 2, at 2-5; see also Gernigon et al., supra note 170, at 441-45 (1998); Keith Ewing, Ten Years of Progress?, 9 INT'L UNION RTS. J. 14 (2002).
national trade union to affiliate with international organizations of workers and confederations also have rights to freedom of association.263

The ILO Committee on Freedom of Association considers the right to strike "a basic right," but it has noted that it "seemed to have been taken for granted" in the discussions which led to ILO Convention 87.264 Despite the lack of explicitness regarding the right to strike in ILO documents, both the ILO Committee of Experts and the Committee on Freedom of Association have created a considerable body of law by implication from a number of articles in Convention 87, and deem the right "one of the essential means available to workers and their organizations for the promotion of their social and economic interests."265

Furthermore, the Freedom of Association Committee has taken a broad view of the scope of the right, including even sit-ins, slowdowns, and work to rule efforts so long as they are peaceful.266 Nevertheless, the Committee recognized that the right to strike cannot be considered an absolute right. A general prohibition is improper, however, except in cases of acute national crisis and only then for limited periods. Moreover, the right should only be restricted for military and police forces and, perhaps, for other essential services affecting public health and safety.

263. See id. at 14.

264. See id. at 62-64. The Charter of the Fundamental Rights of the European Union includes many rights relevant to labor, and Article 28 includes the right to negotiate and conclude collective agreements, and for workers, "in cases of conflicts of interest, to take collective action to defend their interests, including strike action." The use of "conflicts of interests" following the right to engage in bargaining may arguably limit the right to disputes with particular employers, although the reference to "interests" could be read more broadly.


The right to strike has been expressly recognized in regional human rights documents and bodies. The European Social Charter of 1961 included the first express protection for the right to strike in a human rights document. Such recognition, however, in documents such as the European Union's Community Charter of the Fundamental Social Rights of Workers and the North American Agreement on Labor Cooperation, is limited by domestic law. See COMPA, supra note 256, at 40-50.

266. See Gernigon et al., supra note 170, at 444.
As for political strikes, the Committee "has stated that strikes that are purely political in character do not fall within the scope of freedom of association." But the Committee noted it is often difficult to distinguish between the political aspects of a strike and those that directly involve the working conditions of striking workers. The Committee of Experts has also recognized workers' rights to criticize government policy, and noted that legitimate worker concerns go beyond securing better working conditions or collective work claims, but also involve advocating for solutions to social and economic problems:

In the view of the Committee, organizations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solution to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living.

Thus, the Committee on Freedom of Association has stated that banning or declaring illegal a national strike in protest of a government's economic policies and their social and labor consequences would constitute a serious violation of freedom of association. Moreover, the Committee declared legitimate a 24-hour general strike seeking an increase in the minimum wage, respect for collective agreements in force, and a change in economic policy.

Unsurprisingly, this has proved to be a controversial position, and "[i]n all countries strikes which are purely

267. See id. at 446. Tonia Novitz believes that European jurisprudence and ILO committee decisions tend to consider sympathy strikes and secondary action legitimate, although strikes against government policies are protected, but only when directed to collective bargaining issues. Tonia Novitz, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE: A COMPARATIVE STUDY OF STANDARDS SET BY THE INTERNATIONAL LABOUR ORGANIZATION AND THE COUNCIL OF EUROPE AND THE EUROPEAN UNION 287-97, 347-48 (2003).

268. See id. at 445-47.

269. See RUTH BEN-ISRAEL, INTERNATIONAL LABOUR STANDARDS: THE CASE OF FREEDOM TO STRIKE 96-98 (1988); Gernigon et al., supra note 170, at 446. Keith Ewing assumes that Convention 87 "impliedly protects [both] the right to strike generally" and the right of trade unions to take industrial actions in support of workers in another country. Ewing, supra note 262, at 33. Nevertheless, Ewing advocates a clearer statement that international solidarity actions are protected by international law. Id.
political in nature are in principle considered as unlawful. Many countries believe that such strikes might "affect the system of representative democracy or the competence of the constitutional bodies, especially where their mode of expression endangers the sovereignty of public institutions and prevents them from freely evaluating the request advanced by other groups." Yet, some countries have permitted political strikes for short durations, and many have wrestled with the fact that political and occupational aspects may be intertwined in a specific dispute. While Japan, Belgium, and the United Kingdom have pronounced such political strikes illegitimate, Italy, Spain, France, Israel, and the Netherlands have generally recognized them at least so long as they involve defense of worker interests.

The right to strike in France, for example, includes actions in "defense of the workers' occupational interests, and the admixture of political objectives is accepted, but to a different degree in civil and criminal courts." In Italy, the constitutional right to strike does not extend to "purely" political strikes, but political strikes are not automatically illegal. In 1974, provisions of the penal code were declared unconstitutional "in so far as they penalized 'a political strike not aimed at subverting constitutional order nor at hindering or obstructing the free exercise of the legal

270. A. T. J. M. Jacobs, The Law of Strikes and Lockouts, in COMPARATIVE LABOR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 423, 431. Despite these conclusions, unions have been known to strike or threaten to strike in opposition to government proposals or policies. See generally The Return of Trade Unions, ECONOMIST, Dec. 4, 1993, at 53.

Political strikes do occur without public response, reflecting a reluctance to enforce existing curbs in some situations. Recently, for instance, dockers across Europe struck to protest a European Union directive which aims to privatize ports and engender competition. The United Kingdom's port industry is almost completely private but often the owner of the port is also the only terminal operator. Almost all ports on the continent are publicly owned although they often rent facilities to private companies. See generally Europe View: Deregulation for Ports at Last, J. COM., Nov. 7, 2001. European Industrial Relations Observatory Online, Strike Action in Ports Over Proposed Directive, at http://www.eiro.eurofound.eu.int/2003/10/inbrief/gr0310101n.html (last visited Mar. 24, 2004).


272. See id. at 432.

273. WEDDERBURN, EMPLOYMENT RIGHTS, supra note 127, at 285-89.
powers in which popular sovereignty is expressed.' Such strikes are granted a "liberty" under the labor laws, while the full right to strike applies to "strikes in pursuit of 'politico-economic' demands...."

On the other hand, one might distinguish domestic and internationally focused disputes on the ground that other channels to affect the labor policies of transnational firms are not available. "A greater international solidarity of workers should be developed and this could be a good argument for allowing political industrial action when ordinary channels are not available." The same, of course, may be said for the foreign control of a local firm over which local entities, state or union, may have few channels to exert political or social pressure. Trade unions have few avenues to influence international capital, yet it is clear that capital can influence national labor law.

C. Is the Right to Strike a Fundamental Human Right?

Should strikes which aim at supporting workers elsewhere be deemed to involve basic rights, protected either by constitutions or, as in Canada, the Charter of Rights? The question is why the withholding of labor is not deemed as basic a human right as the right to persuade consumers not to purchase products. Picketing or handbilling consumers causes, or at least is intended to cause, economic harm, and the refusal to work is certainly protected in other situations. As noted above, workers who cease work on, for instance, certain "hot goods" can be said to have a dispute with their own employer, and they are expressing deeply held views about the solidarity of labor.

274. See id. at 49.
275. See id. at 285-86.
276. See id.
277. See id. at 253-54.

Indeed, one of the clear effects of globalization is the connecting of global forces and labor and employment legislation and policy. One poignant example was the call by COSATU, the militant South African union, for a general strike and national demonstrations in May, 2000 against private sector job losses and the refusal of businesses to reinvest in the country, although the dispute is also focused on government policies such as tariff reductions and job losses at state owned facilities. COSATU noted that socio-economic strikes were protected by section 77 of South Africa's Labour Relations Act. E-mail from press@icftu.org to James Atleson, Professor of Law, University at Buffalo (May 9, 2000) (on file with author).
In a passing reference, the U.S. Supreme Court remarked that there is no absolute constitutional right to strike. This statement is often relied upon in the United States to explain why the right to withhold labor is not part of the liberty interest enshrined in the U.S. Constitution. This counterargument is certainly rational, but it will likely be deemed exceedingly naive to even raise such a question. Again, the state cannot constitutionally bar my civic group from picketing or handbilling. And in the United States, unions have a right to engage in even secondary handbilling—although not picketing—because the Court thought the opposite result under the NLRA would raise serious constitutional issues. The question, therefore, is why the interest in striking to protect or augment workplace protections and benefits does not fall within the First, Fifth and Fourteenth Amendments. A strike involves collective action and the withholding of labor, appearing rationally to trigger the liberty interest protected by the U.S. Constitution as well as the basic documents of other nations. If the "right to carry on business" is often deemed protected, why not the right of workers to seek to improve the conditions under which they work? The courts have recognized the freedom of even public sector workers to organize unions as part of the freedom of association, and the issue is whether that freedom should encompass the right to strike as well. "A union that never strikes, or which

278. "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." Dorchy v. Kansas, 272 U.S. 306, 311 (1926). The Kansas statute upheld by a unanimous Court made it a crime to induce employees to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of mining. Dorchy, vice-president of a local union of the United Mine Workers of America, was convicted for calling a strike designed to force a mine company to pay a disputed claim to a former worker. The Court, via Justice Brandeis, stated that the right to carry on business had value, and it was unlawful to interfere with this right "without just cause." Id. The Court then held that an intent to collect a "stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose." Id. A court was the proper forum to decide the claim, but "[t]o enforce payment by a strike is clearly coercion." Id.

For an imaginative argument that the Thirteenth Amendment can be employed to protect the right to organize, see James G. Pope, The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-first Century, 51 Rutgers L. Rev. 941 (1999).
can make no credible threat to strike, may wither away in ineffectiveness."

Finally, in analyzing whether labor rights should be considered human rights, what accounts for the assumptions in restrictive legal systems which permit strikes over wages or working conditions but bar the withholding of labor for other reasons, e.g., to protest working conditions elsewhere or to assist workers embroiled in a dispute in another company or nation? Secondary or sympathetic actions have been restricted by U.S. courts, except for a brief period in the 20th century, on the grounds that such actions unduly widened a labor dispute, involved others without an interest in the dispute, or unfairly pressured neutral employers and employees. Each of these justifications has serious weaknesses, and, I suspect, contains a judicial fear of class-based action. In any event, it seems to me that the right to withhold one's labor is entitled to great respect, and the traditional labor concern for not working on "hot" goods is arguably as worthy as striking to improve wages or the right to distribute leaflets or even to picket consumers.

There are, of course, many nations which do protect the freedom of association, to form labor unions, and some even constitutionally protect the right to strike. Such recognition, however, would not at all mean that strikes would receive more protection than in states only recognizing such actions legislatively. Indeed, as Bob Hepple has noted, by making such rights fundamental and constitutionally enforceable "we shift the resolution of disputes from the political and industrial spheres to the sphere of public lawyers and the judiciary." The concern, of course, is that judges will interpret the law, whether legislative or constitutional, according to their own value systems, informed by property and individualistic notions embedded in the common law. Where the state

279. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 885 (D.D.C. 1971) (Wright, J., concurring), aff'd mem., 404 U.S. 802 (1971); see also County Sanitation Dist. 2 v. L.A. County Employees Ass'n, Local 660, 699 P. 2d 8355 (holding that it is not unlawful for public employees to engage in concerted work stoppage for the purpose of employment unless it is determined that the work stoppage poses an imminent threat to public health or safety), cert. denied, 474 U.S. 995 (1985).


281. See generally Atleson, Confronting Judicial Values, supra note 128.
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participates in the setting of labor law ground rules, however, no resolution of this problem has yet been discovered. Critically necessary to the recognition and protection of labor rights are vibrant, militant unions, and perhaps a new vocabulary that "treats workers as a valuable, organic part of the enterprise, as long-term participants with a valuable investment and citizenship stake in the operation."  

Michael Eisenscher has noted that, although international solidarity is not guaranteed by the U.S. Constitution per se,

it is nevertheless a universal human right which can not be 'granted' by government, although it can be recognized and sanctioned, as for instance by the International Labor Organization and various UN conventions. It is founded on bonds forged between workers across national borders by the kinship of labor. It is an extension of the bonds of human interdependence. To deny my right to express solidarity with workers down the street or in another land is to deny my place within the human family. It deprives me of my humanity. I refuse to recognize or accept the power of any court or government to deny me claim to these bonds that transcend nationality, race, ethnicity, religion, and politics. If the Bill of Rights were abolished tomorrow, I would still claim a right to demonstrate in solidarity with workers in struggle, whether here or in Liverpool.

CONCLUSION

The very pressures that are inducing the creation of transnational firms may provide openings for unions, albeit based domestically. For instance, assume Chrysler workers in the United States strike to aid workers at a Daimler-Benz factory in Bavaria. Pressure against one's own company in order to aid foreign workers in the same firm may not be deemed secondary, and, thus, the definition of "neutral" takes on a new significance. As technology, parts, and production systems are shared by subsidiaries of international firms, the argument that national borders are irrelevant to the definition of the "primary" grows stronger.

282. See id. at 455-56.
283. E-mail from Michael Eisenscher, to James Atleson, Professor of Law, University at Buffalo (May 8, 1998) (on file with author).
In many nations wholly owned affiliates or subsidiaries are considered separate firms for purposes of secondary boycott restrictions, but the internationalization of firms in the same sector weakens the argument for neutrality. Moreover, as Charles Levinson has noted, "[i]f it is legally permissible for a foreign parent company directly to control and decide on management policy from abroad, then it should be equally permissible for workers to act together with other workers of the same company abroad in their common interests without it being held to be an illegal sympathy strike or secondary boycott."

Thus the international merger of companies may create the opening for truly international labor solidarity. If so, it will lead to an ironic, but hardly unprecedented situation. Labor history is filled with thrust and counterthrust and the often unexpected effects of those efforts. If capital in the 19th century, for instance, moved from home-based production to factories at least partly to control labor, the unexpected result was the formation of a group of workers with common interests who could form a union. In recent times, the efficiency-generated just-in-time production process created a windfall for certain unions. In the auto industry, for instance, strikes at particular GM factories in the United States closed down factories in other locales, and, similarly, a national strike against GM in Canada quickly affected plants in the United States.

Globalization may create a more "international" worker, aware of common interests with workers in other counties. The possible "internationalization" of unions, however, will confront obstacles of domestic labor law. In some cases arguments may be made that the firm against which pressure is being placed is not wholly neutral, that it is an integrated part of a larger corporation against which a foreign union has a dispute. Unions might attempt to argue that a refusal to work on "hot cargo" is not secondary action at all; instead, the refusal is motivated by personal or moral values. Arguments may also be made, especially in the case of political strikes, that traditional assumptions do not apply when the focus of concern extends beyond a nation's

284. See, e.g., CHARLES LEVINSON, INTERNATIONAL TRADE UNIONISM 111 (1972); Atleson, Reflections, supra note 46.
285. See LEVINSON, supra note 284, at 111.
286. See MOODY, supra note 55, at 10.
borders. The scope of domestic legal restrictions on sympathy strikes will be affected by the actions and resulting litigation. Further, unions may attempt to directly challenge statutory and judicial prohibitions by arguing that the choice of protecting an allegedly neutral company denigrates a valuable human right, the right to withhold one’s labor in aid of others. The right to withhold labor is entitled to great respect, and the traditional labor concern for not working on “hot” goods is as worthy of protection as striking to improve wages.

Finally, worker action may place the issue of labor rights in the forefront. Labor standards are proposed by the ILO but granted and enforced, if at all, by governments. Unions have a political role, obviously, in lobbying for standards, and a collective role in enforcing them. Labor rights, however, even those recognized in international documents must be won by collective action.287

Nevertheless, the apparent necessity for transnational union cooperation should not disguise the difficulty of seeking and obtaining this goal, even aside from the legal difficulties described above. Differences of culture, language, and history provide serious obstacles to cooperation, joined with differences in labor law and the extent of development, and it is far from clear that international solidarity will arise from the global labor market.288 Moreover, non-U.S. unions may well be suspicious of the ultimate aims of U.S. unions. Broader concerns may exist. For instance, national unions may fear the loss of autonomy and the possible costs of supporting workers elsewhere. Just as serious are the barriers by TNEs themselves, the difficulty of discovering accurate information about TNEs and, of course, their powerful opposition to international collaboration or solidarity.

Some of the problems can be seen by considering two unions, the Canadian Automobile Workers’ Union (“CAW”) and United Automobile Workers’ Union (“UAW”) in the United States, which seem to have strong common interests. For instance, to a considerable degree there is a

hemispheric auto market, reflected in the Canadian-United States automobile pact and the fact that the Big Three automakers have plants throughout the hemisphere. Asian auto makers like Toyota and Honda have achieved substantial market penetration in the hemisphere, and these firms have established plants within the borders of the three NAFTA countries as well as in countries in South America. In addition, each union is concerned about the threat of layoffs and plant closings in their respective countries due to subcontracting or "outsourcing," downsizing or because of the transfer of production to plants in other countries. Moreover, each union is troubled by the practice of inducing union locals to compete with each other for work. In a competition that need not respect borders, the companies are free to seek concessions or beneficial arrangements from locals in different plants in exchange for provision of new work or maintenance of prior production.

Another concern of both unions is the tendency of the auto firms, especially General Motors recently, to spin off parts factories as independent firms. These plants then compete for production contracts with non-union parts manufacturers. Moreover, various auto plants have recently engaged in a form of "in-sourcing." Both GM and Volkswagen in Brazil, for instance, have recently placed employees of suppliers, or subcontractors, on the assembly plant floor so that workers in the same plants will have different wage and benefit packages and some will not be unionized.

Finally, local strikes in the United States, for instance, in Flint, Michigan, idled thousands of workers throughout the United States and Canada, once again demonstrated the potential of cross-border labor strategies. The automakers' "just in time" strategy, ironically, has made them more susceptible to local strikes while, at the same time, purely domestic disputes routinely have transnational impacts.

On the other hand, the concern of each union for maintaining jobs and facilities creates sources of possible inter-union conflict. First, there are the historical sources of tension between the CAW and the UAW. The two automobile workers' unions have functioned separately...
since the Canadian branch of the U.S. union broke away from the UAW. Institutionally, the causes of the breakup may well be relevant to the possibility of joint action by the two unions.

Recently, however, the Presidents of the CAW and UAW have cautiously expressed some interest in exploring ways to work more closely together. Since the companies the unions deal with operate in a continental as well as global market, and disputes in one country have effects in the other, there is a growing interest in rethinking purely national bargaining arrangements.

All of this, of course, does not mean that the unions—or companies or governments—necessarily favor transnational bargaining, not least because workers, suppliers, communities, states and provinces and countries are all in competition for production facilities and for the jobs and taxes which they generate. Workers in different countries may well see foreign workers as competitors, as part of “the problem.” Historically, after all, unions have been national in structure. Nevertheless, if unions like the two autoworkers’ unions are serious about closer coordination, they will have to confront the serious problems created by domestic laws.

The perception that labor must focus globally as well as nationally is obviously based upon the closer integration of economies. We do seem to be faced with a new phase of capitalism, where all the world is a stage, or at least more of a stage than ever before. Free market ideology dominates, although there is evidence of growing resistance all over the globe. But we should not treat the existence of global movement of capital as completely new or responsible for all the travails of workers around the globe. This means, also, that we should resist assuming that global forces are the source of all of labor’s plight, for the effects of global capital on children, women, and all workers are not completely unprecedented.

Indeed, global corporations and international movement of capital are not at all a new phenomenon. As

Karl Marx noted in 1848, "[t]he need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe. It must nestle everywhere, settle everywhere, establish connections everywhere." The East India and Hudson Bay corporations, although perhaps heavily under the sway of the British government, existed for several centuries. And a good deal of land development in the United States colonies was accomplished by corporations seeking immigrants to increase the value of land.

Moreover, the search for cheaper workers, whether located domestically or elsewhere, is nothing new. New England workers in the shoe manufacturing and textile industries, for example, faced unemployment in the latter part of the 19th and early 20th centuries when firms moved to the southern United States.

I concede, however, that the power of TNEs seems to have markedly increased, affecting the lives of millions of workers. Trade and foreign investment, as well, play a larger role in the world's economic activity than they did in the past. Kim Moody notes, for instance, that the United Nations "estimates that TNEs accounted for two-thirds of the value of all exports by 1993. Half of this, or one-third of total world trade, was intra-firm trade; that is, cross-border transactions between affiliates of the same corporation."

Despite significant increases in foreign investment and the growth of manufacturing in the "south," the distribution of wealth between the north and south has not changed for the better over the years. The wealthiest countries of the north still produce the largest portion of the world's production and absorb or consume most of its investment and trade.

Similarly, neither the movement of workers across national boundaries nor the reasons people leave their homelands are unprecedented. The use of guest workers in Europe or the Middle East is not a new phenomenon, of course. Moreover, as Bernard Bailyn has demonstrated, the great migration to the United States in the 17th and 18th

291. Moody, supra note 55, at 44 (quoting Karl Marx, Manifesto of the Communist Party 13 (1943)).
292. Suggested to me by my colleague, Fred Konefsky.
293. Moody, supra note 55, at 48.
centuries reflected the movement of workers from place to place in Europe, and finally to North America.\footnote{294}

Detailed analyses of immigrants around the world find that differences in wage rates do not correlate positively with reasons for immigration. Indeed, workers are generally leaving developing areas and cities, areas of rapid growth, not poor, agricultural areas. Instead, workers are seeking capital and families are seeking ways to diversify their income sources to reduce economic risks.\footnote{295}

Finally on this point, discussions of the new workforce tend to omit the fact that, at least in the United States, a workforce made up of recent immigrants with different languages, religion, and cultures parallels the situation in many U.S. industries in the early part of the 20th century.

International labor solidarity activists should also be prepared for the possibility that labor activity or social clauses in future trade agreements will ameliorate the often appalling conditions in many workplaces around the world to a more limited extent than is often believed. For instance, many of the workers now toiling in terrible conditions, including sweat shops in the first world like the United States, work for domestic, not international, markets. Attaching labor rights to international trade agreements may not help all the workers that should be aided, although, like the minimum wage, there may be some generalized benefit.

Moreover, many of the world's workplaces are populated by workers who have limited choices. Diane Wolf

\footnote{294. More recently, analysis of immigration to the United States in the early part of this century reveals that, up to World War I, about half or more of immigrants wanted to return to their homelands. More surprisingly, 40 to 50% actually did. \textit{See} Gabriel Kolko, \textit{Main Currents in Modern American History} 68-72 (1976).

295. Douglas Massey stated that:
Studies consistently show that international migrants do not come from poor, isolated places that are disconnected from world markets, but from regions and nations that are undergoing rapid change and development as a result of their incorporation into global trade, information, and production networks. In the short run, international migration does not stem from a lack of economic development but from development itself.
\textit{Douglas S. Massey et al., Worlds in Motion: Understanding International Migration at the End of the Millennium} 277 (1998). One hypothesis, therefore, is that pacts like NAFTA will actually increase undocumented immigration into the United States. \textit{See Id. at} 277-80.
BUFFALO LAW REVIEW has discussed women factory workers in rural Java. Women workers, she found, worked for less than subsistence wages because they said they wanted money of their own to buy things like their own soap, they thought their status would be enhanced because the work would be cleaner and cooler than agricultural work, they could leave their parents’ homes, and they could meet young men. Interestingly, these workers moved to factories for the same reason women traveled in the 19th century to places like Lowell, Massachusetts: to acquire some income, get away from agricultural work and their families, find a husband, and acquire some modern, hip belongings. Importantly, a large number of workers like these, including child laborers around the globe, work in industries that produce for the domestic market.

Despite the many obstacles to transnational solidarity efforts, sympathetic and secondary labor activity across national borders may well increase. Recent struggles suggest that even the restraints of domestic law may not hinder collective activity that seems reasonable, supportive or just self interested. Ironically, global capital may help to create the global worker as the right to engage in cross-border solidarity action is seen as the correlative to the global free movement of capital. These clashes of interests will highlight the often uneasy rationales for legal restrictions on the right to use one’s labor to support others.

Appendix

SAGA OF THE NEPTUNE JADE

The British crown thought Namibia would best remain unfree
But the British dockers went on strike in solidarity
So the docks were privatized and the workers they were fired

And the *Neptune Jade* was loaded by the scabs they newly hired  
The Bosses thought the Oakland Union would not interfere  
A no strike, no picket contract stops disruption there!  
But Laney students picketed the docks to the *Neptune Jade*’s  
dismay  
And retirees joined the picket, kept the scab cargo at bay, sayin’  
CHORUS:  
Set sail, set sail, Oh, *Neptune Jade*, you will not anchor here.  
You can travel round the globe with your cargo in the hold.  
But you will not unload here!  
Set sail, set sail, oh *Neptune Jade!* You might as well stand clear.  
Till the lads reinstate, we won’t unload your freight. No  
you needn’t anchor here!  
Bosses said, “You Oakland stevedores can easily push by  
those schoolgirls picketing your docks,” but the stevedores just  
smiled  
Sayin’ “An Injury to One is an Injury to All!”  
“It’s a health and safety issue boys, we’re back to the union hall!”  
CHORUS  
The court sided with the bosses, the cargo to unload  
“Striking workers can be fired!,” Oakland dockers they were told  
The Labor Party took the picketing up on day number two  
And the dockers swore that they were just too ornry to get through  
The Oakland PMA dock bosses just could not believe  
That community supporters could have them so stymied  
The point of cutting workers up by nationality  
Is to determine their rights if they don’t show unity  
CHORUS  
The picketing in Oakland was by day and night I’m told  
Berth fees were racking up, cargo rotting in her hold  
The Liverpool dock bosses saw they would not get their way  
So they set out on day four for the San Francisco Bay  
Well the Frisco dockers told ‘em, “Don’t even bother here.  
We have lost wages now in then over many of these years  
Refusing to unload to stop apartheid, genocide.  
You can’t buy a stevedore, with a day’s wages for his pride.”  
CHORUS  
So the ship went to Vancouver, its cargo to unload  
But likewise there the dockers turned the pay down cold  
Not a cargo box was altered when the Pacific too was crossed  
At Yokohama and Kobe, Japan the *Neptune Jade* was lost.  
The *Neptune Jade*’s in anchor now, her cargo in her hold.  
You can buy her for a song in Hong Kong’s port I’m told.  
But if you use her to bust unions, race baiting even worse
Name her the Flying Dutchman, and hear everywhere this curse:

**CHORUS**

**THE BALLAD OF THE NEPTUNE JADE**

Sailed into Oakland on a Sunday morn
Moored at the dockside blowin her horn
But the Captain’s lookin a bit forlorn
There’s a picket of the *Neptune Jade*

The company say we gotta cross the line
Took us to the courtroom 4 more times
Singing “time is money and the money’s all mine
So get them boxes movin”

Midnight Tuesday she was in a spin
Sailed around the Bay tried to come back again
But the picket was holding and we wouldn’t go in
We’re a longshore union

The *Neptune Jade*’s had a change of name
She’s the Flying Dutchman once again
Hapag Lloyd must be insane
To call in Liverpool

Headed up to Canada lookin for a berth
Thamesport’s screaming for all that they are worth
On Saturday the picket brought them down to earth
Vancouver’s in the union

So sail around the world with your hot cargo
Order us to scab and we’ll say no
Dockers of the world are set to blow
We’re all from Liverpool

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