LABOR LAW: NATIONAL LABOR RELATIONS ACT HELD INAPPLICABLE TO AMERICAN OWNED FLAG OF CONVENIENCE VESSELS

DURING the past ten years, the shipping needs of the United States have increasingly been met through the use of American owned vessels which are registered in and fly the flags of foreign nations and which have crews comprised of foreign nationals.[1] The increasing use of these flag of convenience ships[2] is primarily attributable to labor cost savings[3] and has resulted in a significant decline in the employment of American seamen.[4]

In an effort to protect American labor interests, the National Maritime Union (NMU) has sought to organize these vessels.[5] Accordingly, it recently filed a petition with the National Labor Relations Board (NLRB) seeking certification as the bargaining representative of all the foreign crews employed aboard certain Honduran flag vessels carrying on trade with the United States and owned by the United Fruit Company, an American corporation. The NLRB ordered the election.[6] On certiorari,[7] however, the United

[1] See Comment, *Panlibhon Registration*, 60 COLUM. L. REV. 711, 715 (1960); Comment, *The Effect of United States Labor Legislation on the Flag of Convenience Fleet*, 69 YALE L.J. 498-99 (1960).

[2] "Functionally, a 'flag of convenience' can be defined as the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels. In common usage, particularly in the daily press, the term is applied to the flags of Panama, Liberia, and Honduras (frequently contracted as "Panlibhon")." BOCZEK, FLAGS OF CONVENIENCE 2 (1962).

[3] *Id.* at 30. See Comment, 60 COLUM. L. REV. 711, 715 (1960); Brief for the United States as Amicus Curiae, p. 10, McCulloch v. Sociedad De Marineros De Honduras, 372 U.S. 10 (1963).

The wage costs of foreign vessels are only one-quarter to one-third the costs of American vessels. *Hearings on Vessel Transfer, Trade-in, and Reserve Fleet Policies, Before the Subcommittee on the Merchant Marine of the House Committee on Merchant Marine and Fisheries*, 85th Cong., 1st Sess. 142 (1957).

[4] Employment on American flag ships dropped from 160,000 at the end of World War II to less than 50,000 in 1960. Comment, 69 YALE L.J. 498, 502 (1960).

[5] The unions apparently believe that if such ships can be organized and their wage scales brought up to the prevailing American standard, there will be more jobs for American seamen—either because vacancies on the flag of convenience ships will be filled with American seamen or because the elimination of the wage differential will lead to the return of many of these ships to American registry. Brief for the United States as Amicus Curiae, p. 12. See Comment, 69 YALE L.J. 498, 502-03 (1960).

[6] United Fruit Co., 134 N.L.R.B. 287 (1961).

[7] The vessels' foreign owner (a wholly owned subsidiary of the United Fruit Co.) sought to enjoin the Board's Regional Director from holding the election, but was denied the requested relief. Empresa Hondurena DeVapores. S.A. v. McLeod, 200 F.

States Supreme Court in *McCulloch v. Sociedad Nacional de Marineros de Honduras*[8] reversed the NLRB and concluded that the jurisdictional provisions of the National Labor Relations Act (NLRA) do "not extend to maritime operations of foreign flagships employing alien seamen."[9] The Court thus deferred to the maritime tradition which allows the nation of a ship's flag to govern these matters.

It is well established that a vessel voluntarily entering United States' territorial waters is not exempt from this nation's jurisdiction and the application of its laws simply because the ship flies a foreign flag.[10] The NMU contended, therefore, that the jurisdictional provisions of the NLRA,[11] which give to the NLRB power to resolve "questions of representation" when American "commerce" is "affected," should be applied literally so as to give the NLRB power to order representation elections aboard any vessel entering American ports.[12]

However, the Board recognized that where the scope of a domestic statute is such that it could be applied to vessels flying the flag of another nation, general principles of maritime law and international comity require an accommodation to be made so as to minimize the possibility of collision between two sovereigns, each of whom

Supp. 484 (S.D.N.Y. 1961). On appeal, however, it was held that the Board did not have power to hold the election and the relief was granted. 300 F.2d 222 (2d Cir. 1962). The NMU, which had intervened in the proceeding, and the Regional Director petitioned to the Supreme Court for a writ of certiorari. Meanwhile, on an application of the vessels' foreign bargaining agent the members of the NLRB had also been enjoined. Sociedad Nacional De Marineros De Honduras v. McCulloch, 201 F. Supp. 82 (D.D.C. 1962). As a result, they too petitioned for a writ of certiorari. The Supreme Court granted each of the three petitions and consolidated the cases for argument. 370 U.S. 915 (1962).

[8] 372 U.S. 10 (1963).

[9] *Id.* at 13.

[10] See Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142 (1957); Wildenhus's Case, 120 U.S. 1, 11 (1887); The Exchange, 11 U.S. (7 Cranch) 116, 143 (1812).

[11] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 141-87 (1958).

[12] "The term 'commerce' means trade, traffic, commerce, transportation, or communication . . . between any foreign country and any State, Territory, or the District of Columbia . . . ." 29 U.S.C. § 152 (6) (1958).

"The term 'affecting commerce' means in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U.S.C. § 152 (7) (1958).

"Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing." 29 U.S.C. § 159 (c) (1) (1958).

may desire to apply its own laws to the same transaction. To comply with this principle, the NLRB reiterated the "balancing of contacts" theory which it had enunciated earlier in *West India Fruit & S.S. Co.*[13] By this theory, the applicability of the NLRA to a foreign flag vessel depends upon a weighing of the vessel's contacts with the United States against those with the flag country. If the former preponderate, then the vessel comes within the ambit of the Act.[14]

To permit application of the NLRA to a foreign flag ship, however, the Board had to make a rather tenuous distinction of the Supreme Court's holding in *Benz v. Compania Naviera Hidalgo*,[15] which found that the NLRA had not been fashioned to resolve labor disputes between nationals of other countries operating ships under foreign laws and, consequently, was not applicable to a foreign ship operated and owned by foreign nationals and temporarily in an American port. The NLRB maintained that the case decided merely that the Act was inapplicable to a foreign flag ship whose points of contact with the United States were as insubstantial as those of the vessel there involved.[16] Therefore, in the instant case, upon finding that beneficial American ownership and continuous American trade were substantial additional points of United States contact which outweighed any foreign contacts, the Board applied the NLRA. On appeal, however, the Supreme Court clarified the *Benz* holding by unequivocally rejecting the validity of the "balancing of contacts" theory in determining the applicability of the NLRA to foreign flag ships. The Court reasoned that to sanction the exercise of local sovereignty in this "delicate field of international relations" required

[13] 130 N.L.R.B. 343 (1961).

[14] For early NLRB cases using a contact theory to support the application of the NLRA to foreign flag vessesl with alien crews, see Owens-Illinois Glass Co., 136 N.L.R.B. No. 32 (1962) (American owned vessels carrying on extensive trade with the United States); Hamilton Bros. Inc., 133 N.L.R.B. 868 (1961) (American owned vessels carrying on extensive trade with their flag countries).

Consistent with this approach the NLRB has refused to apply the NLRA where in its judgment American contacts were outweighed by foreign contacts. Dalzell Towing Co., 137 N.L.R.B. No. 48 (1962) (American owned vessels carried on only nominal trade with the United States).

[15] 353 U.S. 138 (1957).

[16] Applying this interpretation of *Benz*, the Board has held the NLRA applicable when it has found sufficient American contacts. Owens-Illinois Glass Co., 136 N.L.R.B. No. 32 (1962); Hamilton Bros., Inc., 133 N.L.R.B. 868 (1961); Peninsular & Occidental S.S. Co., 132 N.L.R.B. 10 (1961); West India Fruit & S.S. Co., 130 N.L.R.B. 343 (1961).

"the affirmative intention of the Congress clearly expressed," which intent the NLRA did not manifest.[17]

In regard to land enterprises, the jurisdictional grants of the NLRA have been found to cover labor relations in the plants or offices of foreign corporations located within the United States,[18] even when their work forces are alien.[19] But application of American statutes to labor relations of alien seamen on board foreign vessels, which, unlike the plants and offices of foreign corporations, are only transitorily in United States waters, presents different problems and must be considered in a different light.[20] The virtue and utility of seaborne commerce lies in its frequent and important contacts with more than one country. Ships, such as in the instant case, which enter Amerian ports and fly Honduran flags have contacts with each country to form the basis for applying that nation's law to the maritime commerce involved.[21] Thus if to serve some immediate interest a country exploited its international maritime contacts to the limit of its power, it is not difficult to see "that a multiplicity of conflicting and overlapping burdens would blight international commerce."[22]

This is particularly true in the field of labor relations. Domestically, it has been recognized in NLRA pre-emption cases that, because of the essentially integral character of labor relations, only one jurisdiction can effectively regulate the problems of union organization and collective bargaining in a single operating unit.[23] The problems and potential clashes arising from dual regulation of labor relations are obviously even more serious where the two sovereignities involved are independent nations. A dramatic illustration of this point is provided by the instant case. The seamen in-

[17] 372 U.S. at 21, 22.

[18] See, *e.g.*, Compagnie Generale Transatlantique, 118 N.L.R.B. 1327 (1957) (foreign steamship office); Delta Match Corp., 102 N.L.R.B. 1400 (1953) (foreign chemical company).

[19] See, *e.g.*, Italia Societa per Azioni di Navigazione, 118 N.L.R.B. 1113 (1957) (foreign steamship office).

[20] See BOCZEK, *op. cit. supra* note 2, at 156-87; McDougal, *Maintenance of Public Order at Sea*, 54 AM. J. INT'L L. 25, 34-36; Comment, 69 YALE L.J. 498, 504 (1960).

[21] See Lauritzen v. Larsen, 345 U.S. 571, 582 (1953); McDougal. *supra* note 20, at 35-36

[22] Lauritzen v. Larsen, *supra* note 21, at 581.

[23] La Crosse Tel. Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18, 25 (1949) (dual regulation is "fraught with potential conflict"). See also UMW v. Arkansas Flooring Co., 351 U.S. 62 (1956); Weber v. Anheuser-Busch Inc., 348 U.S. 468 (1955); Garner v. Teamsters Union, 346 U.S. 485 (1953).

volved have always been represented by a Honduran union, and Honduran law holds "that no foreign union can represent the interests of seamen who work on ships sailing under the Honduran flag."[24] Thus if the NMU were selected as the employees' bargaining representative, the employer would violate American law if he did not bargain with it and would violate Honduran law if he did. Furthermore, each country could impose its own laws in its own ports.[25] The end result would be an unsettling of labor relationships, which it is the avowed goal of the NLRA to stabilize.[26]

To resolve such difficulties as this, commerical nations have generally restricted the application of their domestic statutes so as to avoid unnecessary international conflicts.[27] By adhering to such a restrictive statutory construction, these nations have allowed international maritime principles to govern these matters.[28] According to these principles the internal affairs of a vessel including its labor relations should be controlled by the flag state.[29]

[24] Ruling of the Honduran Ministry of Labor. See Brief for the United Fruit Co. as Amicus Curiae, p. 11. This ruling was based on the Honduran Labor Code §§ 490, 504.

"No union may be permitted to act as such nor to exercise the functions prescribed to it by law or by its respective by-laws, nor to exercise its rights so long as it does not have recognition of its juridic personality, and may act as such only during the time it is so recognized." *Id.* at § 490.

"No union may function whose personnel is not composed of at least ninety percent of Honduran citizens. No matter what is the form of direction of the union, no alien is eligible for directive posts." *Id.* at § 504.

[25] McCulloch v. Sociedad Nacional De Marineros de Honduras, 372 U.S. 10, 21 (1963). See Brief for the United States as Amicus Curiae, p. 35. Compare Romero v. International Terminal Operating Co., 358 U.S. 354, 384 (1959), which denies the application of American tort law in a comparable situation because of the detrimental effect of applying a shifting standard of tort liability as a vessel passes from one port to another.

[26] See National Labor Relaions Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 141 (1958).

[27] The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See 83 Sup. Ct. at 678; Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 65 (1959); *cf.*, Stathern S.S. Co. v. Dillon, 252 U.S. 348 (1920), where the United States broadly interpreted a statute and applied it to foreign seamen because so doing would be in furtherance of American shipping interests.

[28] Lauritzen v. Larsen, 345 U.S. 571, 581 (1953). See The Scotia, 81 U.S. (14 Wall.) 170 (1871); The Sally, 12 U.S. (8 Cranch) 382 (1814); De Lovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

For a general discussion of these principles and their importance as rules of comity to supplant unilateral law making in the field of international commerce, see Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 28-29, 792, 803-16 (1952).

[29] The Belgenland, 114 U.S. 355, 367 (1885). See Benz v. Compania Navier Hidalgo, 353 U.S. 138 (1957); Wildenhus's Case, 120 U.S. 1, 12 (1887). For a general discussion

However, while adopting such a strict statutory construction in the instant case and thus rejecting the contact theory in matters concerning labor relations, the Court did suggest that a contact theory might be relevant in determining the applicable law aboard a foreign vessel in other situations.[30] For example in *Lauritzen v. Larsen*[31] the Court apparently utilized a contact theory in determining the applicable law in a personal injury tort action[32] under the Jones Act.[33] In fact, it was from this case that the NLRB derived its contact theory concerning the NLRA.[34]

However, the choice of law to govern a maritime tort raises different questions than a claim of jurisdiction to regulate labor-management relations.[35] A maritime tort is a private law case in-

of the internal order doctrine and its purposes see COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 285 (4th rev. ed. 1959).

In a similar case to the instant one the Canadian Labor Relations Board has also held that the law of the flag should govern labor relations. Seafarers' Int'l Union of North America v. Iron Ore Transp. Co., CCH CANAD. LAB. L. REP. ¶ 16075 (1957). See Brief for Canada as Amicus Curiae, p. 7.

The principle that the flag and registry of a vessel determine the law applicable to internal matters has sometimes been viewed as based on the theory that a ship is part of the territory of the nation whose flag she flies. United States v. Flores, 289 U.S. 137, 155 (1933); Patterson v. Bark Endora, 190 U.S. 169, 176 (1903). On the other hand, this theory of territorial expansion has been described as "a figure of speech, a metaphor." Cunard S.S. Co. v. Mellon, 262 U.S. 100, 123 (1923). This case applies the law of the flag "on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her." Lauritzen v. Larsen, 345 U.S. 571, 585 (1953).

[30] 372 U.S. at 19, n.9 (cites the Jones Act as one such situation).

[31] 345 U.S. 571 (1953).

[32] A similar case also involving the Jones Act has utilized the same "balancing of contacts" theory. Romero v. International Terminal Operating Co., 358 U.S. 354, 381-84 (1958). See EHRENZWEIG, CONFLICT OF LAWS § 222 (1962). But see, Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L.J. 1, 39; Currie, *The Silver Oar and All That: A Study of the Romero Case,* 27 U. CHI. L. REV. 1, 65 (1959). In the latter work it is asserted that the *Lauritzen* and *Romero* cases do not apply a "balancing of contacts" theory at all but rather were decided upon a statutory construction basis. The contention here is that the courts will construe a statute to be applicable to international matters when the policy behind the statute shows that to do so will advance the national or governmental interest. The instant case's rejection of the contact theory and its acknowledgment of controlling international interests reflect such an analysis.

A study of the Jones Act cases involving alien seamen aboard American owned flag of convenience vessels shows that ultimate ownership of these vessels combined with actual control thereof are contacts sufficient for the application of the Act. BOCZEK, *op. cit. supra* note 2, at 180.

[33] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

[34] See, *e.g.,* Hamilton Bros., Inc., 133 N.L.R.B. 868 (1961); West India Fruit & S.S. Co., 130 N.L.R.B. 343 (1961).

[35] BOCZEK, *op. cit. supra* note 2, at 186-87; Comment, 69 YALE L.J. 498, 511 (1960); *cf.* McDouglas, *supra* note 20, at p. 41.

volving a single isolated transaction while the collective bargaining relationship is a matter concerning public law and has a continual and integral charcter that debars constructive regulation by more than one jurisdiction.[36] Thus, courts have allowed recovery under American law to individual alien seamen employed aboard foreign flag vessels on the theory that a varying standard of tort liability will not conflict with American interests or interfere with the internal order of the particular vessel involved.[37] However, even in these tort actions under the Jones Act, the *Lauritzen* case acknowledged that courts in order to avoid unnecessary conflicts with other nations must "give cardinal importance to the law of the flag."[38]

Furthermore, refusal by the United States to strictly construe the provisions of the NLRA so as to avoid conflicts with Honduran and Liberian flags would be contrary to present treaty obligations with these nations.[39] Also, due to an implicit and historically accepted arrangement with the Panlibhon nations, American owned flag of convenience vessels will be made available to the United States in the event of an emergency.[40] These ships represent about fifty percent of our total active emergency shipping capability, and it is the considered judgment of the Secretary of Defense that sustaining NLRB jurisdiction over them might cause their sale to foreign nations, thus making them inaccessible to the United States and raising grave problems of national defense.[41]

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[36] See cases cited note 23, *supra*.

As to the differing governmental interests involved in public and private law cases, see Currie, *The Constitution and The Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 51 (1958).

[37] See, *e.g.*, Gerradin v. United Fruit Co., 60 F.2d 927 (2d Cir.), *cert. denied*, 287 U.S. 642 (1932); *cf.* 1 BENEDICT, ADMIRALTY 257 (6th ed. 1940), for a general history of the Jones Act reflecting sympathy for injured seamen and hence its liberal application. The instant case also suggests this point. 372 U.S. at 19.

[38] 345 U.S. 571, 584 (1953).

[39] 372 U.S. at 21, n.12; Brief for the United States as Amicus Curiae, p. 43.

The Treaty of Friendship, Commerce and Consular Rights with Honduras, Dec. 7, 1927, art. X, 45 Stat. 2618, 2625-26, T.S. No. 964, provides that merchant vessels flying the flags and having the papers of either country "shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown." A similar provision is contained in the Treaty of Friendship, Commerce and Navigation With the Republic of Liberia, Aug. 8, 1938, art. XV, 54 Stat. 1739, 1745, T.S. No. 956.

[40] Consequently for national defense purposes, these vessels are said to be under "effective United States control." Comment, 69 YALE L.J. 498, 500 (1960). See BOCZEK, *op. cit. supra* note 2, at 188-208; Comment, 60 COLUM. L. REV. 711, 718-21 (1960).

[41] Brief for the United States as Amicus Curiae, p. 11.

Besides giving due regard to the differing interests advanced by the varied aspects of maritime law and taking into account its own national defense considerations and treaty obligations, the United States must also concern itself with its self-interest in the unhampered flow of international commerce. As the bulk of American foreign trade is carried in foreign vessels, with over one-third of it in American owned Panlibhon vessels, the continued free flow of international commerce is imperative to American shipping interests.[42] Authorizing the unilateral denial of flag law opposes this interest because such denial invites retaliation by other nations and will deter foreign ships from entering American ports and handling American trade.[43]

Consequently, in considering the application of the NLRA to foreign flag vessels, the problem was properly viewed in *McCulloch v. Sociedad Nacional De Marineros De Honduras* as being broader than a labor bargaining issue.[44] Thus the Court, while acknowledging the plight of American seamen, properly denied NLRB jurisdiction by recognizing that applicaiton of the NLRA to foreign flag vessels would collide with overriding international considerations which made it imperative from the standpoint of American interests that the application of the Act be restricted.

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[42] See *The Role of the United States Merchant Marine in National Security*, NATIONAL ACADEMY OF SCIENCES—NATIONAL RESEARCH COUNCIL 10 (1959) (NAS-NAR Pub. No. 748).

[43] See Comment, 69 YALE L.J. 498, 516 (1960); N.Y. Times, Sept. 1, 1961, p. 45, col. 6 ("the Government's fear that maritime union pressure will drive urgently needed ship tonnage from United States control is well-founded"); *accord*, McDougal, *supra* note 20, at 34-36, 41, 54; Comment, 35 N.Y.U.L. REV. 1049, 1067 (1960).

Panama, Liberia and Honduras have all expressed grave concern over any application of American law to matters which they consider to be within their jurisdiction. Brief for the United States as Amicus Curiae, pp. 47-50.

The Republic of Panama has openly spoken of the likelihood of reprisals if the United States should extend its jurisdiction to Panamanian flag vessels. Brief for the Republic of Panama as Amicus Curiae, p. 7; BOCZEK, *op. cit. supra* note 2, at 185 (Panamanian Foreign Minister threatened to extend local labor law to all American flag vessels entering Panamanian ports); N.Y. Times, Sept. 1, 1961, p. 45, col. 7 (Panama threatened to extend Panamanian sovereignty over adjoining waters to twelve miles).

[44] See BOCZEK, *op. cit. supra* note 2, at 187; Harolds, *Some Legal Problems Arising Out of Foreign Flag Operations*, 28 FORDHAM L. REV. 295, 313 (1959); Moley, *The U.S. v. The U.S.—III*, Newsweek, Feb. 4, 1963, p. 84.