

event, the contract was unfair to the corporation, because there was inadequate consideration flowing to it, inasmuch as Buck's agreement with the defendant provided for payment to him of a pension for past services only. If the rule is as stated above, an inquiry into the fairness of the contract would seem to be superfluous,¹² and in any situation where the court found an interested board, the corporation could avoid the contract. An investigation into the fairness of the contract would be necessary only where a disinterested board was found and the corporation was trying to avoid the contract. Thus, it would appear that the minority took an extra and unnecessary step in determining the question of fairness.

The controlling opinion, on the other hand, seems, in part at least, to support the *Veesser* rule.¹³ Since, in the opinion of the majority, the three directors whose interests were in question were motivated by the best interests of the corporation and not by self-interest, the action by the directors was adjudged not invalid; rather it comes within the meaning of *Veesser*, in that the resolution had the support of a majority of the disinterested directors. This approach appears to employ a "business judgment" test, in that if the board is disinterested and the directors show that they thought the contract was advantageous to the corporation, the court will not inquire into the fairness of the agreement.¹⁴ Yet the court did inquire into the fairness, as mentioned earlier. This step would appear to be unnecessary, where a disinterested board is found and a "business judgment" test is used.

If the four situations mentioned above arose in a Michigan court, it is unquestionable that both the majority and minority views would reject the contract in situation (1), where the board is interested and the contract unfair, and support the contract in situation (4), where the board is disinterested and the contract fair. Under the minority view, it is unclear whether a situation (2) contract, *i.e.*, fair contract entered into by an interested board would be upheld or rejected. A situation (3) contract, *i.e.*, an unfair contract entered into by a disinterested board, probably would be voidable. Similarly, the majority would probably support the contract in situation (2), but in a situation (3) it is uncertain whether they would accept or reject.

DAVID C. DONOHUE

Labor Law—Applicability of LMRA to the "Foreign-Flag-Fleet."—*Empresa Hondurena de Vapores v. McLeod*.¹—Plaintiff, a Honduran steamship corporation, is a wholly owned subsidiary of the United Fruit Company (UFCO), a New Jersey corporation. The bulk of UFCO's trade is between Central and South American sites and United States ports. It deals almost entirely through foreign subsidiaries such as plaintiff. UFCO

¹² Supra note 2.

¹³ Supra note 1, at 762.

¹⁴ Supra note 8.

¹ — F.2d —, 49 L.R.R.M. 2443 (2d Cir. 1962).

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organized plaintiff in 1941, supplied the capital for the venture and, as sole stockholder, elects plaintiff's directors. There are no interlocking directors, and plaintiff, in its day-to-day operations seems to function as a distinct corporate entity. The seamen employed by plaintiff are Honduran citizens and members of a Honduran labor union. Its business has been almost exclusively limited to chartering vessels to UFCO. A treaty between the United States and Honduras² provides that the flag of the ship shall determine its nationality³ and that while the ship is in port, a consular officer shall have exclusive jurisdiction over internal controversies.⁴ On a petition by the National Maritime Union of America, AFL-CIO, seeking to represent the unlicensed seamen aboard plaintiff's vessel, the NLRB determined⁵ that plaintiff's operation was not that of a foreign nation which the necessities of trade had brought into contact with the United States, but was, rather, a part of an American corporation's trade in foreign commerce and, therefore, subject to the provisions of the LMRA.⁶ On a motion to the federal district court to enjoin the NLRB from conducting a representation election, the Board claimed that there was no jurisdiction in the district court.⁷ The court took jurisdiction on the assertion of the deprivation of several constitutional rights, but deemed the petition premature as no irreparable injury would arise until the American union either won or tried to enforce the election results on plaintiff.⁸ On appeal the District Court was reversed. HELD: 1) The jurisdiction of the district court could not be based on the deprivation of constitutional rights nor on a violation of a specific mandate of the LMRA. But where a friendly foreign power would be adversely affected, the Board's action, even where not plainly wrong, is reviewable by a federal district court; 2) The prevailing interests of Honduras outweigh any contact with the United States so that the LMRA does not apply. Since the action by the Board would infringe on the jurisdiction of a foreign nation contrary to the intent of Congress, the court would act to prevent the election and minimize any offense to the foreign government.

The principal case presents the question to what extent, if any, does the LMRA apply to foreign flag ships within the territorial waters of the United States. Literally read the LMRA could have been intended to apply to all ships that come within the United States waters to carry on com-

² Treaty of Friendship, Commerce and Consular Rights with Honduras, Dec. 2, 1927, 45 Stat. 2618.

³ *Id.*, Art. 10.

⁴ *Id.*, Art. 22.

⁵ *United Fruit Co.*, 134 N.L.R.B. 25, 49 L.R.R.M. 1138 (1961).

⁶ 61 Stat. 136 (1947), 29 U.S.C. § 141 (1958). Section 159(c)(1) grants the Board authority to conduct an election on investigation.

⁷ The sole provision for judicial review of Board orders provided by the act is a review of final orders in a court of appeals. 49 Stat. 545 (1935), as amended, 29 U.S.C. § 160(e), (f) (1958). Prior to this case there were two judicially formulated exceptions to this general rule: (1) Where there was a substantial claim of denial of constitutional rights, *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949); (2) Where the Board acted in contravention of a specific mandate of the LMRA, *Leedom v. Kyne*, 358 U.S. 184 (1957).

⁸ *Empresa Hondurena de Vapores v. McLeod*, 49 L.R.R.M. 2303 (S.D.N.Y. 1961).

merce.⁹ In addition, it has long been clear that Congress can set its own conditions on the admission of foreign vessels to domestic waters.¹⁰ But it has been equally clear that, as a matter of comity, a policy of mutual forbearance is necessary to avoid retaliation.¹¹ Where, as here, there is a treaty involved which may be in conflict with subsequent legislation, an interpretation of the legislation is favored which will not so conflict.¹² In determining the effect of a federal statute, courts will confine its operations to the territorial limits of the United States so as to avoid possible conflict with a foreign sovereignty.¹³ But where Congress has expressly provided legislation to cover foreign ships in American ports, the principles of comity yield to overriding considerations of domestic policy, and the courts will not hesitate to enforce such legislation.¹⁴ In the case of *Benz v. Compania Naviera Hidalgo*,¹⁵ dealing with the extent of the coverage of the LMRA, the Supreme Court has decided that Congress had directed the act to create new legal rights of "American workingmen,"¹⁶ and, thus, refused to apply the act to foreign seamen on foreign vessels. But much of the force of the *Benz* case is lost by language limiting it to ships which happen to be temporarily in American waters.¹⁷ With the question of how much American contact is required to submit the foreign flag ships to the authority of

⁹ The term "commerce" includes, inter alia, trade, traffic, commerce, transportation or communication between any foreign country and any state. No distinction is expressly made between foreign and domestic entrepreneurs. 61 Stat. 136 (1947), 29 U.S.C. § 152 (1958).

¹⁰ *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923); *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812).

¹¹ *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Wildenhuis's Case*, 120 U.S. 1 (1887). See Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U. of Pa. L. Rev. 26 (1953).

¹² *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *The Head Money Cases*, 112 U.S. 580 (1884).

¹³ *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Sandberg v. McDonald*, 248 U.S. 185 (1918).

¹⁴ *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920).

¹⁵ 353 U.S. 138 (1957).

¹⁶ The use of the term "American workingmen" should not be construed as meaning only American nationals. See *Italia Societa per Azioni di Navigazione*, 118 N.L.R.B. 1113, 40 L.R.R.M. 1336 (1957), applying the act to aliens working in a foreign corporation with plants located within the United States.

¹⁷ It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made abroad under the laws of a foreign nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port, and American labor unions participated in picketing it.

353 U.S. 138, 142 (1957). See *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 362 U.S. 365 (1960); *Afran Transp. Co. v. National Maritime Union*, 169 F. Supp. 416 (S.D.N.Y. 1958); and *Inces S.S. Co. v. International Maritime Workers Union*, 10 N.Y.2d 218, 176 N.E.2d 719, 219 N.Y.S.2d 21, cert. granted, 368 U.S. 924 (1961), so distinguishing *Benz*. But see *Sociedad de Marineros v. McCulloch*, N.L.R.B. No. 4040-61, 49 L.R.R.M. 2435 (D.D.C. 1962), where the Honduran labor union involved in the principal case was granted an injunction restraining the Board from conducting the election. The court concluded that *Benz* was dispositive of the issue.

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domestic statutes left open, the court in the instant case applied the criteria of the *Lauritzen*¹⁸ case to determine if the American contacts were sufficient to make the LMRA applicable. In arriving at its conclusion that the Honduran interests outweigh any American contacts, the court seems to have been considerably influenced by the intervention of the Departments of State and Defense which stressed "the important foreign relation considerations involved" and the possibility that assumption of jurisdiction by the Board would engender "a charge of violation of . . . international agreements."¹⁹ Numerous recent cases have, however, on similar facts, disregarded the corporate entity of the foreign subsidiary and applied an American statute to the internal affairs of the foreign flag ship.²⁰ These cases are examples of the increasingly invoked doctrine that an American owner cannot escape his statutory liability "merely by interposing a foreign corporation between himself and the vessel, both of which, for all practical purposes, he owns."²¹ Such a doctrine seems to be a logical extension of *NLRB v. Hopwood Retinning Co.*,²² where an attempt by a parent corporation to avoid the NLRA by transferring its assets to an out-of-state subsidiary was regarded as mere subterfuge to avoid the effects of the statute. While the creation of the "foreign flag fleet" was not intended to circumvent any policy of a statute, but rather to enable the United States to aid our allies without violating the Neutrality Act,²³ it has become obvious that the sole motivation for many shipowners in formally registering their ships abroad

¹⁸ *Lauritzen v. Larsen*, supra note 11, set forth the following standards to determine the applicability of the Jones Act: (1) Place of the wrongful act; (2) Law of the flag; (3) Allegiance or domicile of the injured; (4) Allegiance of the defendant shipowner; (5) Place of contract; (6) Inaccessibility of foreign forum (discounted); (7) The law of the forum.

¹⁹ See Brief for Appellant, p. 7. The Department of Defense has facilitated the transfer of American ships to Pan American registration to keep the ships in active service. In return the American owners agree to turn the ships over to the United States for defense purposes in emergencies. The fear of the State Department has been that if Pan American registration ceases to retain its advantages, American owners will seek foreign registration which, unlike Pan American registration, does not allow such return to the United States for defense purposes. *West India Fruit and S.S. Co.*, 130 N.L.R.B. 343, 47 L.R.R.M. 1269 (1961).

²⁰ *Bartholomew v. Universe Tankerships*, 263 F.2d 437 (2d Cir. 1959); *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S.D.N.Y. 1953); *Incres S.S. Co. v. International Maritime Workers Union*, supra note 17; *Navios Corp. v. National Maritime Union of America*, 402 Pa. 325, 166 A.2d 625, cert. denied, 366 U.S. 905 (1961).

²¹ *Bobolakis v. Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236, 238 (S.D.N.Y. 1958). See also *Gerradin v. United Fruit Co.*, 60 F.2d 927 (2d Cir. 1932), cert. denied 287 U.S. 642 (1932); *Jorgensen v. Hutton*, 243 App. Div. 31, 276 N.Y. Supp. 348, affirmed, 267 N.Y. 535, 196 N.E. 566, cert. denied 296 U.S. 602 (1935); Note, 17 Geo. Wash. L. Rev. 549 (1948).

²² 98 F.2d 97 (2d Cir. 1938). *Stevens, Corporations* 95 (2d ed., 1949).

²³ Note, *Panhiblon Registration of American-Owned Merchant Ships: Government Policy and the Problems of the Courts*, 60 Colum. L. Rev. 711 (1960); Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies against Shoreside Picketing*, 69 Yale L.J. 498 (1960).

has been to avoid the statutory regulations imposed on American ship-owners.²⁴ Consequently, courts have "pressed beyond the formalities of more or less nominal foreign registration to enforce against American ship-owners the obligations which our law places upon them."²⁵

Considering the finding by the NLRB that

Empresa's maritime operations are a part of a single integrated maritime operation under the continuous direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation . . . ,²⁶

it is difficult to reconcile the instant case with the recent line of cases applying domestic statutes to the internal affairs of a foreign flagship, used in domestic commerce, and beneficially owned by an American entrepreneur. The court's attempt to distinguish prior cases²⁷ as involving for the most part application of the Jones Act and not involving inconvenience to a foreign government seems unconvincing in view of the Supreme Court's prior refusal to apply the Jones Act to *bona fide* foreign ships *on the very ground* that it would be "disruptive of foreign commerce,"²⁸ or would "sharply conflict with the policy and letter of [a foreign state's] law."²⁹ The Board has constantly taken the position that the established application of the Jones Act would be no less onerous to the foreign government than would application of the LMRA, whether the vessel be of *bona fide* foreign registry or flying a foreign flag of convenience.³⁰ While it is not apparent, nor perhaps conceivable, that Congress intended to expose world shipping which merely touched our shores to the high labor standards of American unions, it is submitted that where the undertaking is essentially an American enterprise operating almost exclusively in American commerce, it is at least arguable that the provisions of the LMRA should be applied regardless of the formal registration in Honduras or the employment of Honduran union workers.³¹ Lacking any clear-cut legislation in the area, it would

²⁴ *Lauritzen v. Larsen*, supra note 11, at 587. In addition to tax advantages, it has been estimated that the total operating expenses of foreign-flag vessels are about one-half those of an American-flag vessel, while wage payments are about one-fourth as high. 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., pt. 1, at 142 (1957).

²⁵ *Ibid.*

²⁶ *United Fruit Co.*, 134 N.L.R.B. 25, 27, 49 L.R.R.M. 1138, 1140 (1961).

²⁷ Supra notes 20, 21.

²⁸ *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959).

²⁹ *Lauritzen v. Larsen*, supra note 11, at 575.

³⁰ *West India Fruit and S.S. Co.*, supra note 19; *Peninsular & Occidental S.S. Co.*, 120 N.L.R.B. 1097, 42 L.R.R.M. 1113 (1958). The Board has recently taken jurisdiction in a foreign flag operation of four tug boats irrespective of one boat's never having entered domestic waters. *Owens-Illinois Glass Co.*, 49 L.R.R.M. 1777, 136 N.L.R.B. No. 32 (1962).

³¹ Since, however, [the United States policy of recognizing the flag of a foreign vessel] does not deter the federal courts from looking behind such flags in cases involving federal regulatory statutes like the Jones Act, for instance, it may reasonably be inferred that neither should it deter the National Labor

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seem that the applicability of the LMRA to these foreign flag ships should lie in the discretion of the Board.

The preliminary question remains, however, whether the federal district court had jurisdiction to review the Board's decision that the LMRA was applicable. Traditionally, judicial relief is available to one injured by an act of a government official in excess of his express or implied powers.³² But where, as here, Congress has provided the means for judicial review in a court of appeals, a party aggrieved by the official's act has been forced to rely solely on the manner of review provided.³³ A distinction must be drawn, however, between questions which Congress has left to the discretion of the governmental agency and questions which require the agency's performance of a ministerial act. In the latter case, persons aggrieved by action or inaction of the agency which is of a ministerial nature have access to review in a district court, regardless of Congressional provision for review elsewhere.³⁴ But when the agency "is given questions of judgment requiring close analysis and nice choices,"³⁵ the courts will not interfere without express command of Congress.³⁶ In allowing jurisdiction in the instant case, the court relies initially on *Leedom v. Kyne*³⁷ where an order of the NLRB in clear violation of the act was held to be reviewable in the district court. But the *Leedom* case did not involve a review of a matter within the discretion of the Board, but rather, a violation of an explicit statutory requirement.³⁸ The instant case does not involve the express limitation on the Board's authority.³⁹ Freely to allow jurisdiction in cases involving the Board's discretion would justify the charge that *Leedom* had opened a "gaping hole" in the Congressional intent to limit time-consuming delay and had limited the beneficial effect of the Board.⁴⁰ The court justifies

Relations Board from looking behind such flags in cases involving the National Labor Relations Act.

Navios Corp. v. National Maritime Union of America, supra note 20 at 338, 166 A.2d at 632.

³² *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 621-22 (1912); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902).

³³ *Switchman's Union v. Mediation Board*, 320 U.S. 297 (1943).

³⁴ *Harmon v. Brucker*, 355 U.S. 579 (1958), where jurisdiction of a district court was upheld despite the provisions of the applicable statute [58 Stat. 286 (1944), as amended, 38 U.S.C. 693(h) (Supp. V, 1958), as recodified, 72 Stat. 1105 (1958), 10 U.S.C. 1153 (1958)], that the findings of the Army Review Board were final subject only to review by the Secretary of the Army.

³⁵ *Panama Canal Co. v. Grace Line*, 356 U.S. 309, 319 (1958).

³⁶ *Ibid. Work v. Rives*, 267 U.S. 175 (1925).

³⁷ 358 U.S. 184 (1958). The argument, based on *Fay v. Douds* (supra note 6), that the violation of the treaty with Honduras was unconstitutional in that there was no clear intent of Congress to violate the treaty was disposed of as a matter of statutory interpretation, not of constitutional right.

³⁸ Cases since *Leedom* have limited it to the violation of clear, mandatory statutory language. *Leedom v. IBEW*, 278 F.2d 237 (D.C. Cir. 1960); *Leedom v. Norwich, Conn. Printing Specialties*, 275 F.2d 628 (D.C. Cir. 1960).

³⁹ See note 31, supra, and accompanying text.

⁴⁰ Mr. Justice Brennan, dissenting in *Leedom v. Kyne*, 358 U.S. 184, 191 (1958). See note, *The Discretionary Jurisdiction of the NLRB*, 71 Harv. L. Rev. 527 (1957).

its departure by the fact that relations with a friendly foreign government are involved. In view of the extreme extraterritorial effect which the Board's ruling might have, and the intervention of the State Department, the court seems justified in this unprecedented departure. But the implication of the court's language in arriving at its decision,

We cannot believe Congress would have wished to limit the role of the courts in that situation to cases where the Board had violated a 'clear statutory command,'⁴¹

seems to create authority for blanket judicial determination "whether in a particular case Congress would or would not have wished them to intervene"⁴²

It is to be hoped that such language will be strictly limited to the peculiar facts of this case, lest the inroads to judicial review, and subsequent defeat of the time-saving objectives of national labor policies, be too readily accessible to the "ingenuity of counsel."⁴³

JOHN D. O'REILLY, III

Labor Law—Labor Management Relations Act § 303—Non-Applicability of State Statute of Limitations.—*Fischbach & Moore, Inc. v. International Union of Operating Eng'rs.*¹—Two corporations and a joint venture prosecuted this claim under Section 303 of the Labor Management Relations Act of 1947 (LMRA—popularly known as Taft-Hartley)² for damages arising out of alleged unfair labor practices by defendant unions. The union activities constituting the alleged unfair labor practices included strikes, pickets and work stoppages occurring in 1957. The complaint was filed three and one half years after the gravamen of the offense. Defendant's motion to dismiss on the grounds that the action was barred by the California three-year statute of limitations³ was denied. HELD: The state statute of limitations does not apply to bar plaintiffs' right created by a federal statute with no limitation period. The Taft-Hartley Act is a statute of national concern which implies a policy of uniform application to all persons subject to it. The court felt this compelled the conclusion that diverse state statutes may not be permitted to qualify or undermine the federally created right. Of the five possible solutions⁴ to the problem of what time limitation federal courts should place on similar actions, this court

⁴¹ Supra note 1, at 2446-47.

⁴² Ibid.

⁴³ Supra note 40.

¹ 198 F. Supp. 911 (S.D. Cal. 1961).

² 61 Stat. 158 (1947), 29 U.S.C. § 187(b) (1958).

³ Cal. Code of Civil Procedure § 338.1.

⁴ Judge Clarke listed the five possibilities as: (1) utilization of state statutes of limitation; (2) utilization of an arbitrary, judicially enacted, period to be applied in all similar cases; (3) utilization of an analogous federal statute of limitations; (4) utilization of the equitable doctrine of laches; (5) utilization of no period of limitations at all.