International Longshoremen's Association v. Allied International, Inc.: Supreme Court Avoids Specific Guidelines to Determine Illegality of Politically-Motivated Secondary Boycotts

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION v. ALLIED INTERNATIONAL, INC.: SUPREME COURT AVOIDS SPECIFIC GUIDELINES TO DETERMINE ILLEGALITY OF POLITICALLY-MOTIVATED SECONDARY BOYCOTTS

I. INTRODUCTION

The National Labor Relations Act (hereinafter NLRA),1 protects both employers and employees from unfair labor practices. Accordingly, section 8(b)(4) of the NLRA prohibits secondary boycotts.2 Traditionally, a secondary boycott occurs when a labor organization exerts pressure on an employer with whom it is involved in a dispute (the primary employer) by coercing another employer, with whom the labor

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2. Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1976), is commonly known as the secondary boycott prohibition. However, the statute, by its terms, does not differentiate primary and secondary activity. In fact, the term "secondary boycott" does not appear in section 8(b)(4). Rather, section 8(b)(4) proscribes specified conduct if it is engaged in with specified objectives. Section 8(b)(4) provides in pertinent part:
   It shall be an unfair labor practice for a labor organization or its agents—
   (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

   (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

Title 29 U.S.C. § 152 (1976) defines the terms "person," "commerce," and "affecting commerce," and provides in relevant part that:

(1) The term “person” includes one or more individuals, labor organizations, partnerships, associations, or corporations . . . .

(6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, . . . or between any foreign country and any State . . . .

(7) 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.

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organization has no dispute (the neutral or secondary employer), to cease doing business with the primary employer. By causing a cessation of business between the primary and secondary employers, the labor organization attempts to further its goals in the dispute with the primary employer (the primary dispute). As a result, the labor organization entangles the secondary employer in the primary dispute.\(^3\)

In *International Longshoremen's Association v. Allied International, Inc.*,\(^4\) the United States Supreme Court declared that a labor organization's politically-motivated boycott of Soviet goods constituted a secondary boycott prohibited by section 8(b)(4)(B) of the NLRA.\(^5\) To reach this conclusion, the Supreme Court addressed three major issues: (1) whether the union's conduct was within the commerce jurisdiction of the NLRA;\(^6\) (2) whether the union's conduct constituted a secondary boycott within the NLRA proscription;\(^7\) and (3) whether prohibiting the union's conduct infringed upon the first amendment rights of the labor organization and/or its members.\(^8\)

The purpose of this casenote is to analyze the Supreme Court's resolution of each of these issues and the guidelines its reasoning provides for lower courts that will confront these issues in the future. This note suggests that the Court's resolution of the commerce jurisdiction issue injected some confusion into the traditional test of commerce jurisdiction while establishing only that the effects of union conduct are relevant to determining whether secondary activity is "in commerce." In addition, this note will show that the Court's analysis of the secondary boycott issue simply reaffirmed the "ruin or substantial loss" test used to determine whether secondary union conduct violates section 8(b)(4)(B), yet contributed little to the definition of ruin or substantial loss. Finally, because the Court failed to consider the political motivation behind the International Longshoremen's Association's conduct

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3. The following hypothetical presents an example of a successful secondary boycott:

A union is involved in a dispute with employer A. A is, therefore, the "primary" employer and the dispute between A and the union is the "primary" dispute. A does business with B, another employer, whose employees are represented by the union; B is not involved in the primary dispute. Therefore, B is the neutral or "secondary" employer. The union induces B's employees to refuse to work for B unless B ceases doing business with A. To avoid the costs of a work stoppage, B ceases doing business with A. As a result, A is forced to choose between losing further business as a result of further union action or capitulating to the union's demands in the primary dispute. Thus, A is pressured into complying with the union's demands in the primary dispute.

5. *Id.* at 218.
6. *Id.* at 220-22.
7. *Id.* at 222-26.
8. *Id.* at 226-27.
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and based its resolution of the first amendment issue entirely on its determination that the union's conduct was an illegal secondary boycott, its reasoning and holding simply reaffirmed the general rule that unlawful conduct is not protected by the first amendment. Therefore, this note will conclude that the Court's reasoning established only very broad general guidelines for the resolution of these issues in future cases.9

II. FACTS OF THE CASE

In January, 1980, Thomas Gleason, President of the International Longshoremen's Association (hereinafter ILA), issued a directive ordering ILA members to cease handling cargo bound for or originating in the Soviet Union. The boycott was announced to be a political protest of the Soviet Union's invasion of Afghanistan. As a result of the directive, longshoremen refused to service ships carrying Soviet cargo.10

Allied International, Inc. (hereinafter Allied) is a Massachusetts corporation which imports Soviet wood products for resale in the United States. Allied contracted with Waterman Steamship Lines (hereinafter Waterman), a New York freight company operating ships of United States registry, to ship wood from the Soviet Union to six ports in the United States, including Boston. Waterman employed a Massachusetts stevedore company, John T. Clark & Son of Boston, Inc. (hereinafter Clark) to unload its ships in Boston.11 Clark employed ILA longshoremen pursuant to a collective bargaining agreement between the ILA, Local 799, and the Boston Shipping Association, of

9. Courts may confront these issues again in the context of a politically motivated secondary boycott because, in December of 1981, the ILA announced a boycott of Polish cargo to protest the imposition of martial law in Poland. N.Y. Times, Dec. 22, 1981, at 11, col. 4. The announcement stated in part:

Out of sympathy with our striking Polish brothers, the ILA is directing its members not to handle any cargo to and/or from Poland on any vessel until such time as martial law, the detention of trade union leaders and the denial of the civil rights of the Polish people come to an end.


11. Walsh v. International Longshoremen's Ass'n, 488 F. Supp. 524, 525 (D. Mass. 1980), Allied Int'l, Inc. v. International Longshoremen's Ass'n, 492 F. Supp. 334 (D. Mass. 1980), was consolidated with Walsh. Therefore, some facts of Allied are found in Walsh. Walsh grew out of the same unfair labor practice charge filed by Allied against the ILA. NLRB Regional Director, Michael F. Walsh, petitioned the United States District Court for the District of Massachusetts for a section 10(e) injunction pending the NLRB's resolution of Allied's unfair labor practice charge.
which Clark is a member. As a result of the ILA boycott, Clark was unable to obtain longshoremen to unload Waterman's ships which were carrying Allied's imports. Consequently, Allied's shipments of Soviet wood products were completely disrupted.

Allied sued the ILA in the United States District Court for the District of Massachusetts, alleging that the ILA was engaging in a secondary boycott in violation of section 8(b)(4)(B) of the NLRA. Allied sought damages under section 303 of the Labor-Management Relations Act. The court dismissed the complaint, stating that it failed to allege a violation of section 8(b)(4)(B) because the ILA action was a political "primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods." As a primary boycott, the ILA action was not within the scope of section 8(b)(4)(B). The Court of Appeals for the First Circuit reversed and held that Allied had alleged a violation of section 8(b)(4)(B). The court found


(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) . . . may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.
16. 492 F. Supp. at 339. Allied advanced three theories to justify injunctive and monetary relief from the ILA's action: (1) violation of the NLRA secondary boycott provision; (2) violation of the Sherman Antitrust Act prohibition on restraints of trade; and (3) international interference with contractual relations. Id. at 335-36. The court held that Allied had failed to state a cause of action under any of the three theories asserted. Id. at 339.
17. Walsh, 488 F. Supp. at 531 (emphasis added). See 492 F. Supp. at 338 (ILA's boycott is "wholly politically oriented with no apparent economic benefit accruing to the union or its members.").
18. Title 29 U.S.C. § 158(b)(4)(B) (1976) contains a proviso which states "[t]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The district court in Walsh determined that the ILA action was a primary boycott of Soviet goods because the ILA has not induced a strike against Allied, Waterman, or Clark; nor does it seek to pressure those employers not to deal with one another. No picket lines have been established and no other employees have been prevented from work. Union members have simply declined to accept employment on certain ships, as a form of political protest.
19. Allied Int'l, Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368, 1379 (1st Cir. 1981). The court determined that the district court had properly dismissed Allied's
that: (1) the ILA conduct was within the commerce jurisdiction of the NLRA; (2) the ILA action constituted prohibited secondary activity; and (3) prohibiting the ILA from ordering employees to cease handling Soviet goods would not infringe upon the first amendment guarantee of free speech. The United States Supreme Court granted the ILA's writ of certiorari, adopted the reasoning of the court of appeals and affirmed its ruling.

III. Historical Setting

A. Legislation

Prior to 1932, there were no federal statutes designed to govern labor relations. However, the Sherman Antitrust Act of 1890 functioned as a significant curb on secondary union activity because federal courts used it as authority to issue injunctions against "virtually every collective activity of labor as an unlawful restraint of trade." Responding to union protests, Congress enacted the Clayton Act of 1914 which prohibited federal courts from issuing injunctions in controversies "involving, or growing out of, a dispute concerning terms or conditions of employment." Subsequent judicial interpretation of the Clayton Act revealed that it immunized primary, but not secondary, union activities from the antitrust laws. Thus, federal courts could still enjoin secondary union activities as unlawful restraints of trade.

The Norris-LaGuardia Act of 1932 was the first legislation

allegation of (1) violation of the Sherman Antitrust Act and (2) international interference with contractual relations. Id. at 1379-82.
20. Id. at 1371-74.
21. Id. at 1374-78.
22. Id. at 1378-79.
24. 456 U.S. at 218.
28. 386 U.S. at 621 (quoting § 20 of the Clayton Act).
29. Id. at 621-22. See also Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).
30. 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1976). The belief that industrial strife interfered with the public interest in the free flow of commerce led Congress to enact labor legislation pursuant to its power to regulate interstate commerce. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963). See H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. (1947), reprinted in 93 CONG. REC. 6369 (daily ed. June 4, 1947) ("experience has demonstrated that certain practices by some labor organizations have the effect of burdening commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce"). See also U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . to regulate Commerce with foreign Nations,
designed to regulate employer-employee relations. It prohibited federal courts from issuing injunctions "in any case involving or growing out of any labor dispute." Because the term "labor dispute" was defined broadly, federal courts could enjoin neither primary nor secondary union activities. Therefore, the Norris-LaGuardia Act severely limited the use of injunctions to halt secondary boycotts. As a result, unions were free to engage in secondary boycotts without judicial interference.

Violence associated with disputes between newly formed unions and employers led Congress to enact the NLRA. The NLRA secured to employees the right to organize and bargain collectively with employers. It required employers to bargain in good faith and proscribed certain forms of employer conduct as unfair labor practices.

and among the several States . . . "). Consequently, the federal labor laws govern only labor controversies which are "in commerce" or are "affecting commerce." See supra note 2 for statutory definitions of "commerce" and "affecting commerce." Congress sought to put workers in a bargaining position equal to that of employers by ending easy access by employers to injunctions against workers attempting to organize for the purpose of improving working conditions. See S. REP. No. 163, 72d Cong., 1st Sess. 9-10 (1932), reprinted in R. Koretz & B. Schwartz, Statutory History of the United States: Labor Organization 173-74 (1970) (primary object of Norris-LaGuardia Act to protect rights of employees to freedom of association, to organize, and to be represented by unions in negotiations with employers).}

31. 29 U.S.C. § 101 (1976). Section 101 provides that "no court of the United States . . . shall have jurisdiction to issue any . . . injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter . . . ."

32. 386 U.S. at 622-23. See also H.R. REP. No. 669, 72d Cong., 1st Sess. 8 (1932). Section 13(c) of the Norris-LaGuardia Act provides:

When used in this Act, and for the purposes of this Act—

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

33. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 141-87 (1976)). The NLRA is also known as the Wagner Act. Section 141(b) sets forth the intent and purpose of the NLRA and reads in part:

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

35. Id. at § 159(a).
36. 29 U.S.C. § 158(a) (1976). Interference with the formation or administration of un-
However, the NLRA imposed no similar requirement on unions, nor did it prohibit abusive union conduct. Furthermore, because Congress did not repeal the Norris-LaGuardia Act, union abuses could not be enjoined. As a result, secondary boycotts became powerful weapons used by unions to gain recognition and economic benefits for their members. Thus, instead of equalizing bargaining power, the NLRA had the effect of tipping the balance in favor of the unions.\textsuperscript{37}

To restrain union abuses which arose under the Norris-LaGuardia Act and the NLRA, Congress enacted the Labor-Management Relations Act of 1947.\textsuperscript{38} As an amendment to the NLRA, the statute proscribed union unfair labor practices, including secondary boycotts,\textsuperscript{39} and revived the use of the labor injunction to a limited extent by permitting the NLRB (but not private parties) to obtain injunctive relief from union unfair labor practices without the restrictions imposed by the Norris-LaGuardia Act.\textsuperscript{40} In addition, it gave employers a private right of action in federal court for damages caused by union unfair labor practices.\textsuperscript{41}

The prohibition of secondary boycotts was originally incorporated into the NLRA as section 8(b)(4)(A).\textsuperscript{42} The secondary boycott prohibi-
tion was intended to preserve the right of unions to bring pressure to bear on offending employers in primary disputes and to protect neutral parties from pressures resulting from controversies in which they are not directly involved. It thus prohibited unions from inducing or encouraging "the employees of any employer to engage in, a strike or concerted refusal . . . to . . . handle . . . any goods" of a primary employer. In an effort to close major loopholes which had emerged from its language, Congress subsequently amended section 8(b)(4)(A) in the Labor-Management Reporting and Disclosure Act of 1959. However, these changes did not alter the basic thrust of the secondary boycott prohibition.

B. Pre-Allied Judicial Interpretations

1. Commerce jurisdiction

The ILA boycott of Russian goods generated several lawsuits in addition to Allied: Baldovin v. International Longshoremen's Association, New Orleans S.S. Association v. General Longshore Workers, The Senate Committee Report characterized the conduct prohibited by section 8(b)(4)(A):

Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute).

S. REP. No. 105, 80th Cong., 1st Sess. 22 (1947). See also Local 1976, United Bhd. of Carpenters and Joiners v. NLRB, 357 U.S. 93, 100 (1958) (Congress "aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers . . . "); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951) (secondary boycott provisions serve the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.").

44. Three major loopholes had emerged from the language of § 8(b)(4)(A). Because only inducement of "employees" was proscribed, direct inducement of a supervisor or the secondary employer was not prohibited. Because only a "strike or a concerted refusal" was proscribed, pressure upon a single employee was not unlawful. Finally, because railroads and municipalities were not "employees" within the NLRA, inducing or encouraging their employees was not forbidden. Subsequent to the Labor-Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin amendments), § 8(b)(4)(A) became § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976). See NLRB v. Fruit & Vegetable Packers and Warehousemen, 377 U.S. 58, 64-66 (1964).

45. 626 F.2d 445 (5th Cir. 1980).
and *Walsh v. International Longshoremen's Association.* In *Baldovin*, the most significant of these cases for purposes of understanding the significance of the *Allied* decision, the Fifth Circuit held, contrary to the *Allied* Court, that the ILA boycott of Russian goods was not within the commerce jurisdiction of the NLRA. The *Baldovin* court was asked to determine whether the NLRB had jurisdiction over the ILA's action in accordance with section 10(a) of the NLRA which defines the powers of the NLRB with respect to unfair labor practices. Section 10(a) provides that "[t]he Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce." Because unfair labor practice charges had been filed against the ILA, the NLRB petitioned for injunctive relief pursuant to section 10(1) of the NLRA. Stating that "[t]he object of the dispute determines whether or not it is 'in commerce,'" and observing that the object of the ILA's boycott was Soviet military policy in Afghanistan, the court determined that the ILA's dispute was not remediable by domestic action. Therefore, the boycott was not "in commerce" within the meaning of the NLRA and the NLRB lacked

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47. 630 F.2d 864 (1st Cir. 1980).
48. 626 F.2d 445 (5th Cir. 1980).
49. *See infra* notes 168-83 and accompanying text.
50. 626 F.2d at 449-50.
51. *Id.* at 449.
53. 626 F.2d at 448. The ILA was charged with violating section 8(b)(4)(B). *Id.* *See supra* note 2 for text of statute.
54. Section 10(1) of the NLRA requires the Regional Director of the NLRB to petition for a temporary injunction when an unfair labor practice charge has been filed and he has reason to believe that the charge is true. Section 10(1) provides in relevant part:

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of § 8(b)(4) . . . a preliminary investigation of such charge shall be made forthwith . . . If, after such investigation, the officer . . . has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to [the unfair labor practice charge] . . . .

55. 626 F.2d at 453.
56. *Id.* at 453-54.
57. *Id.* at 449. Citing § 10(a) of the NLRA, 29 U.S.C. § 160(a) (1976), the court noted that "[t]he NLRB's jurisdiction over secondary boycotts is also confined to secondary activity 'affecting commerce.'" *Id.* Moreover, the court recognized the general limitation of the NLRA that activities governed thereby must be in or affect commerce. *Id.* Thus, the court also determined that the ILA boycott was not "in commerce" within the meaning of § 8(b)(4). *Id.* Furthermore, the court determined that the ILA refusal to handle Soviet cargo was a secondary boycott within the meaning of § 8(b)(4). *Id.* Analyzing the language and intent of the statute, the court stated:
power to enjoin the boycott.\textsuperscript{58}

Prior to \textit{Allied}, the Supreme Court had determined that primary labor disputes between American unions and foreign entities are not within the commerce jurisdiction of the NLRA when assertion of jurisdiction would inescapably interfere with foreign labor relations, foreign trade, and comity among nations. This principle derived from a series of decisions\textsuperscript{59} involving primary labor activity undertaken by American unions against foreign carriers. Those cases, however, raised no questions concerning injury to American neutrals.

In the leading case, \textit{Benz v. Compania Naviera Hidalgo, S.A.},\textsuperscript{60} the Supreme Court held that the NLRA was not applicable to primary la-
bor disputes between foreign employers and their foreign employees. Benz involved picketing by three American unions against a foreign vessel in support of a strike by its foreign crew against their employer, a foreign shipowner.61 The foreign employer sought damages in federal court under the NLRA.62 The Court held that the controversy was outside the jurisdictional scope of the NLRA because the United States labor laws were not intended to govern labor disputes between foreign nationals arising under foreign laws.63 The Benz Court relied upon the legislative history of the NLRA to determine that Congress intended the NLRA to govern only labor strife between American employers and employees.64 In addition, the Benz Court recognized the strong likelihood that assertion of NLRB jurisdiction in this setting would promote international discord because it would directly interfere with the laws governing foreign-flag carriers and thus contravene principles of comity in international trade.65 Consequently, the Court held that the controversy was outside the jurisdictional scope of the NLRA and deferred to Congress the task of determining American policy in such a "delicate field of international relations."66

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61. Id. at 139-41.
62. Id. at 138-39.
63. Id. at 143. The foreign seamen were employed under a British form of articles of agreement setting forth employment terms. Id. at 139.
64. Id. at 142-44. The Court noted the statement of Representative Hartley, coauthor of the Labor-Management Relations Act, that "the bill herewith reported has been formulated as a bill of rights both for American workingmen and for their employers." Id. at 144 (emphasis added) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947). Thus, the Court concluded that "Congress did not fashion [the NLRA] to resolve labor disputes between [foreign] nationals . . . . [T]he Act is concerned with industrial strife between American employers and employees." 353 U.S. at 143-44 (footnote omitted).
65. Id. at 146-47.
66. Id. at 147. The Court stated:
For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.

Id. The Allied Court noted that a similar analysis was followed six years later in McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963), and Inres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963). 456 U.S. at 220 n.16. In McCulloch, an American union petitioned the NLRB to order an election aboard a foreign vessel to determine union representation of foreign seamen employed by a foreign shipowner. 372 U.S. 10, 13-14 (1963). In Inres, foreign shipowners sought injunctive relief under the NLRA from organizational picketing by an American union seeking to represent foreign seamen aboard a foreign vessel. 372 U.S. 24, 26 (1963). In both cases, the Supreme Court held that the controversy was outside the jurisdictional scope of the NLRA because "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of [the NLRA]." Id. at 27; McCulloch, 372 U.S. at 13. The Court fo-
The Court’s application of the Benz rationale in *Windward Shipping (London) Limited v. American Radio Association*⁶⁷ and its companion case, *American Radio Association v. Mobile Steamship Association, Inc.* ⁶⁸ established that when assertion of jurisdiction over union conduct interferes in the realm of international affairs, it is immaterial to resolution of the commerce jurisdiction issue whether the union’s conduct is characterized as “primary” or “secondary.” In *Windward*, American unions picketed foreign vessels to protest low wages paid foreign seamen by foreign shipowners and to publicize the adverse impact of these low wages on American seamen.⁶⁹ The Court found that because the unions’ picketing sought to force the foreign shipowners to pay their foreign crews higher wages and thus raise the operating costs of the foreign vessels, it had a significant impact on the maritime operations of the foreign vessels.⁷⁰ Therefore, the Court held that the unions’ conduct was controlled by the Benz rationale and thus was not within the commerce jurisdiction of the NLRA.⁷¹

The secondary effects of the conduct at issue in *Windward* came before the Court in *Mobile*. In *Mobile*, American stevedores and shippers employed to service the picketed foreign vessels in *Windward* sought injunctive relief from the unions’ picketing.⁷² They contended that the *Windward* Court held only that maritime operations of foreign vessels were not “in commerce” and that a different result was required when picketing was viewed in the context of its effect on American employers clearly engaged “in commerce.”⁷³ The *Mobile* Court rec

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⁶⁹. 415 U.S. at 106-07. The difference between foreign and domestic seamen’s wages gave foreign vessels a substantial competitive advantage over domestic vessels which resulted in a decline in the number of jobs available to union members. *Id.*
⁷⁰. *Id.* at 114-15.
⁷¹. *Id.* at 115.
⁷². 419 U.S. at 220.
⁷³. *Id.* at 221-22. The Court noted the fundamental inconsistency between the unions'
jected this argument and determined that the Benz line of cases did not allow a "bifurcated view of the effects of a single group of pickets . . . ." Accordingly, the Court held that the change in complainants did not alter the jurisdictional reach of the NLRA and therefore, as in Windward, the unions' picketing was not in commerce and thus not governed by the NLRA.75

The determination in Mobile that the picketing was not "in commerce" rested upon the primary nature of the activity—the attempt to directly pressure foreign shipowners to raise the wages paid their seamen—and the necessary effect of this primary activity on foreign maritime operations. Therefore, the combined effect of the holdings in Windward and Mobile is that primary conduct which interferes with foreign maritime operations is not within the commerce jurisdiction of the NLRA, regardless of whether the complainant is a primary or secondary employer.

2. Secondary boycott

Due to the "chameleon-like qualities of the term 'secondary boycott,'" the Supreme Court has relied upon the legislative history and purpose of section 8(b)(4)(B) to determine whether union activity constitutes a prohibited secondary boycott.77 From its analysis of the legislative history of section 8(b)(4)(B), the Court has determined that Congress intended section 8(b)(4)(B) to shield neutral employers and others from pressures in controversies not their own by prohibiting union conduct "tactically calculated to satisfy union objectives elsewhere."

Because the term "secondary boycott" does not appear in section 8(b)(4)(B), the Court has recognized that its prohibitions do not recog-
nize a distinction between primary and secondary activity.\textsuperscript{80} Instead, the Court has interpreted section 8(b)(4)(B) to proscribe specific union conduct engaged in with specific objectives which experience has shown to be undesirable.\textsuperscript{81}

The Supreme Court has described the elements of a prohibited secondary boycott as follows: “Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person.”\textsuperscript{82} Furthermore, the Court has stated that it is not necessary to find that the sole object of a union’s strike or boycott is to cause a cessation of business between neutral parties; the objective prohibited by section 8(b)(4)(B) need only be an object of union activity.\textsuperscript{83} Recognizing the difficulty of assessing the object of union conduct under section 8(b)(4),\textsuperscript{84} the Court has held that a union’s intent or purpose may be shown by the nature of its conduct.\textsuperscript{85}

In \textit{NLRB v. Fruit & Vegetable Packers Local 760} (“Tree Fruits”),\textsuperscript{86} the Court held that union secondary product picketing targeted at one of many products sold by a secondary employer does not violate section 8(b)(4)(B).\textsuperscript{87} In \textit{Tree Fruits}, a union picketed Safeway stores to induce customers not to purchase Washington State apples because of a labor dispute between the union and fruit packers and warehousemen in Washington.\textsuperscript{88} The picketing was carefully limited to the struck product, Washington State apples, which was “only one of numerous food products sold in the [Safeway] stores.”\textsuperscript{89} Noting that “the prohibition of § 8(b)(4) is keyed to the coercive nature of the [union’s] conduct,”\textsuperscript{90} the Court held that the union’s picketing did not coerce neutral

\begin{itemize}
\item \textsuperscript{80} See supra note 2.
\item \textsuperscript{81} NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 62-63 (1964).
\item \textsuperscript{82} Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 98 (1958).
\item \textsuperscript{83} Denver Bldg. & Constr. Trades Council, 341 U.S. at 688-89. Section 8(b)(4)(B) prohibits specified union activities where “an object thereof” is one of the specified results. 29 U.S.C. § 158(b)(4) (1976) (emphasis added). See supra note 2 for text of statute.
\item \textsuperscript{84} Local 761, Int’l Union of Elec., Radio & Mach. Workers v. NLRB, 366 U.S. 667, 674 (1961) (to determine object of union conduct under § 8(b)(4)(B), the NLRB and the courts have “attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause.”).
\item \textsuperscript{85} Id. See also NLRB v. Local 825, Int’l Union of Operating Eng’rs, 400 U.S. 297, 304-05 (1971) (union responsible for foreseeable consequences of its conduct).
\item \textsuperscript{86} 377 U.S. 58 (1964).
\item \textsuperscript{87} Id. at 72-73.
\item \textsuperscript{88} Id. at 59-60.
\item \textsuperscript{89} Id. at 60.
\item \textsuperscript{90} Id. at 68.
\end{itemize}
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parties and therefore did not violate section 8(b)(4)(B).91

On the other hand, in NLRB v. Retail Store Employees Union Local 1001,92 the Court held that the kind of union conduct which violates section 8(b)(4)(B) is conduct "that reasonably can be expected to threaten neutral parties with ruin or substantial loss . . . "93 The Court also provided a guideline to aid lower courts in determining what constitutes "ruin or substantial loss." In Retail Store Employees, a union which represented employees of Safeco Title Insurance Co., a title insurance underwriter, picketed five title companies, asking customers to cancel their Safeco policies because contract negotiations between the union and Safeco had reached an impasse.94 The Court determined that, because the picketed title companies derived over ninety percent of their gross income from the sale of Safeco policies95 and because the union's picketing effectively asked customers to cease patronizing the title companies altogether, the title companies were forced to become involved in the primary dispute between the union and Safeco by the threat of financial ruin.96 Therefore, the Court held that the union's product picketing contravened the intent of section 8(b)(4)(B) "to protect secondary parties from pressures that might embroil them in the labor disputes of others"97 and thus constituted a prohibited secondary boycott.98

At the time Allied was decided by the Supreme Court, the lower courts were generally in agreement that the absence of a primary labor dispute does not preclude a finding that section 8(b)(4)(B) has been violated.99 The courts, however, disagreed as to whether the NLRB

91. Id. at 72-73.
93. Id. at 614-15.
94. Id. at 609-10.
95. Id. at 609.
96. Id. at 613-14.
97. Id. at 612.
98. Id. at 615.
99. Title 29 U.S.C. § 152(9) (1976) defines the term "labor dispute" to include "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

In Soft Drink Workers Union, Local 812 v. NLRB, 657 F.2d 1252 (D.C. Cir. 1980), the District of Columbia Circuit Court of Appeals held that § 8(b)(4)(B) is applicable even when there is no primary labor dispute to which the union conduct could be secondary. Id. at 1259. In Soft Drink Workers, a union picketed a retail beverage store asking customers to purchase only locally manufactured soft drinks. Id. at 1255-56. Finding a violation of § 8(b)(4)(B), the NLRB issued a cease and desist order against the union. Id. at 1256-57. The court rejected the union's argument that, because there was no conventional labor dis-
may exercise jurisdiction absent a labor dispute as defined by section 2(9) of the NLRA.100

3. First amendment

The first amendment101 guarantee of free speech applies to unions as well as individuals.102 However, the Supreme Court has held consistently that conduct made unlawful by legitimate legislation is not protected by the first amendment.103 Therefore, in International Brotherhood of Electrical Workers v. NLRB,104 the Supreme Court held that “[t]he [NLRA] prohibition of inducement or encouragement of secondary pressure . . . carries no unconstitutional abridgment of free speech.”105 Thus, before Allied, the Court had determined that because

100. NLRB v. International Longshoremen's Ass'n, 332 F.2d 992, 995 (4th Cir. 1964) (NLRB lacked jurisdiction to enjoin union boycott because “there can be no [NLRB] jurisdiction where the complaint presents a controversy unrelated to the resolution of a ‘labor dispute’ as defined [by § 2(9) of the NLRA].”). Accord United States Steel Corp. v. UMW, 519 F.2d 1236, 1247-48 (5th Cir. 1975) (union strike to protest importation of South African coal was an unarbitrable political dispute and therefore not exempt from Norris-LaGuardia Act), cert. denied, 428 U.S. 910 (1976); Danielson v. Fur Dressers, Local No. 2F, 411 F. Supp. 655, 657-59 (S.D.N.Y. 1975) (NLRB petition to enjoin union picketing of fur processor which, in compliance with requirements of foreign governments, imported only processed skins, denied because no labor dispute or because protected primary picketing); Douds v. Sheet Metal Workers Int'l Ass'n, Local Union No. 28, 101 F. Supp. 273, 278-79 (E.D.N.Y. 1951) (no secondary boycott in absence of primary labor dispute between union and heating company). Cf. Baldovin v. International Longshoremen's Ass'n, 626 F.2d 445, 450 (5th Cir. 1980) (union refusal to load grain bound for Soviet Union to protest Soviet invasion of Afghanistan was secondary boycott despite absence of primary labor dispute); National Maritime Union v. NLRB, 346 F.2d 411, 414-15 (D.C. Cir. 1965) (NLRB empowered to enjoin union's conduct in dispute with rival union despite the absence of conventional labor dispute), cert. denied, 382 U.S. 840 (1965); National Maritime Union v. NLRB, 342 F.2d 538, 541-42 (2d Cir. 1965) (union picketing to induce work stoppages among employees of secondary employers constituted a secondary boycott even though picketing was a retaliatory measure against rival union rather than a conventional labor dispute), cert. denied, 382 U.S. 835 (1966).

101. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ").

102. See NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980).


105. Id. at 705.
secondary boycotts are illegal under the NLRA, they are not protected by the first amendment.

IV. REASONING OF THE COURT

The threshold issue for the Allied Court was jurisdictional in nature: whether the ILA’s work stoppage was within the scope of the NLRA, i.e., whether it affected commerce. The Court began its analysis of the commerce jurisdiction issue by interpreting the language of section 8(b)(4). The Court reasoned that because Allied, Waterman and Clark were engaged “in commerce,” the ILA’s action “affected commerce” within the statutory definitions. Consequently, a literal interpretation of the statutory language invoked the commerce jurisdiction of the NLRA.

In addition, the Court rejected the ILA’s contention that its action was not “in commerce” as the Court had previously interpreted that term. The Court distinguished Benz and its progeny, determining that the ILA’s work stoppage did not affect the maritime operations of foreign vessels. The Court reasoned that, by refusing to handle Soviet goods, the ILA did not attempt to alter the terms of employment for foreign seamen aboard foreign ships and did not seek to extend to foreign seamen and shipowners rights given American employees and employers by the NLRA. Moreover, this “drama was ‘played out by an all-American cast’” and involved no dispute with a foreign employer. Consequently, the Court reasoned that the international trade policy considerations prevalent in the Benz cases were irrelevant in Allied. As a result, the Court held that the ILA conduct did not fall within the Benz limitation of NLRA commerce jurisdiction and therefore was governed by the NLRA.

By analyzing the language and legislative intent of section 8(b)(4)(B), the Allied Court held that the ILA’s refusal to handle Soviet cargo constituted a prohibited secondary boycott. Section 8(b)(4)(B) prohibits union conduct where “an object thereof” is forcing any person to cease doing business with another person. As a result, the Court’s method of analysis required it to find that one of the objects of

106. 456 U.S. at 221-22. See supra note 2 for text of statutes.
107. Id. at 221.
108. See supra notes 59-75 and accompanying text.
109. 456 U.S. at 221-22.
110. Id. at 222-26. “By its terms the statutory prohibition applies to the undisputed facts of this case.” Id. at 22. See supra note 2 for text of section 8(b)(4)(B). For a discussion of the relevant legislative history, see notes 25-44 and accompanying text.
the ILA’s action was to disrupt business among Allied, Waterman and Clark. To make this determination, the Court focused on the foreseeable economic effects of the ILA’s action\textsuperscript{112} and stated that “when a purely secondary boycott ‘reasonably can be expected to threaten neutral parties with ruin or substantial loss’ the pressure on secondary parties must be viewed as at least one of the objects of the boycott . . . .”\textsuperscript{113} However “understandable” and “commendable” the ILA’s ultimate objective of protesting Soviet military aggression in Afghanistan might have been, the predictable result of the ILA’s action was to threaten Allied, Waterman and Clark with financial ruin or substantial loss. Therefore, the Court held that the disruption of their business was “an object” of the ILA’s action.\textsuperscript{114}

The Court rejected the ILA’s argument that section 8(b)(4) was inapplicable because the ILA boycott involved a political dispute with a foreign nation rather than a labor dispute with a primary employer.\textsuperscript{115} The Court recognized that the ILA sought no labor objective from, nor had any labor dispute with, Allied, Waterman, or Clark and that the ILA refusal to unload Soviet cargo was entirely politically motivated.\textsuperscript{116} The Supreme Court, however, declined to limit the application of section 8(b)(4)(B) to secondary boycotts involving labor disputes,\textsuperscript{117} and instead held that Congress had purposefully given section 8(b)(4)(B) a broad scope to protect neutral parties from economic pressure resulting from the disputes of others.\textsuperscript{118}

\begin{footnotesize}
\begin{enumerate}
\item[112.] 456 U.S. at 224.
\item[113.] \textit{Id} (citing NLRB v. Retail Store Employees Union, 447 U.S. 607, 614-15 (1980) ("Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B).")); The Court characterized the ILA’s boycott as purely secondary activity because the boycott was directed against Allied’s goods even though the ILA conceded it sought no labor objective from, nor had any dispute with Allied, Waterman or Clark. The boycott was designed to protest Soviet foreign policy and thus was clearly calculated to achieve union objectives elsewhere. 456 U.S. at 222 n.19.
\item[114.] \textit{Id} at 224.
\item[115.] \textit{Id} at 224-25.
\item[116.] \textit{Id} at 222-25. The Allied Court’s reasoning parallels the Fifth Circuit’s analysis of the labor dispute jurisdiction issue. In New Orleans S.S. Ass’n v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980), the Fifth Circuit determined that “a strike called to further the political goals of the union” does not involve a labor dispute. \textit{Id} at 465. Upholding two injunctions issued by district courts against the ILA, \textit{Id} at 458, the court found that because the ILA boycott did not “involve or grow out of any labor dispute,” the anti-injunction provisions of the Norris-LaGuardia Act were inapplicable. \textit{Id} at 464-65.
\item[117.] 456 U.S. at 224-25.
\item[118.] \textit{Id} (citing H.R. REP. No. 245, 80th Cong., 1st Sess. 23 (1947) (secondary boycott prohibition designed to protect “helpless victims of quarrels that do not concern them at all.”)); The Court also noted that Congress had refused to narrow the scope of section
\end{enumerate}
\end{footnotesize}
In addition, the Court declined to exclude politically-motivated secondary boycotts from the scope of section 8(b)(4), noting that to do so would create a "far-reaching exemption" from a statute purposely drafted in broad terms. The Court further noted that section 8(b)(4) contains no exception for political disputes.

The Allied Court held that application of section 8(b)(4)(B) to the ILA’s boycott of Soviet cargo would not violate the first amendment rights of either the ILA or its members. The Court reiterated its position that secondary picketing by labor unions in violation of section 8(b)(4) is not protected activity under the first amendment. Therefore, "[i]t would seem even clearer that conduct designed not to

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8(b)(4)(B) in response to a claim that all secondary boycotts were not harmful. 456 U.S. at 225 n.23.

119. 456 U.S. at 226. Recognizing that the "distinction between labor and political objectives would be difficult to draw in many cases," the Court was apparently concerned that, if political disputes were exempted from section 8(b)(4), a union could engage in secondary activity and escape sanctions simply by proclaiming that its activity was a political protest. Id. See supra note 118 and accompanying text.

120. 456 U.S. at 226.

121. Id. The Fifth Circuit had reached the same conclusion in New Orleans S.S. Ass’n v. General Longshore Workers, 626 F.2d 455 (5th Cir. 1980). In New Orleans, the court recognized that, although first amendment guarantees extend to labor unions, union conduct made unlawful by legislation enacted for purposes other than to suppress free expression is not protected by the first amendment. 626 F.2d at 462-63. Therefore, because the ILA’s boycott violated the arbitration provisions of the NLRA, it was not protected by the first amendment. Id. at 463.

122. 456 U.S. at 226 (citing NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 616 (1980); American Radio Ass’n v. Mobile S.S. Ass’n, 419 U.S. 215, 229-31 (1974); International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 705 (1951)). The cases cited by the Court stand for the proposition that union conduct which violates section 8(b)(4)(B) is not protected by the first amendment. In Retail Store Employee, the Court held that section 8(b)(4)(B) does not abridge constitutionally-protected speech when applied to "picketing that predictably encourages consumers to boycott a secondary business . . . ." 447 U.S. at 616. See supra text accompanying notes 92-98.

The Mobile Court held that a state injunction of union picketing did not violate the first amendment because states are allowed wide discretion in "protecting various competing economic and social interests." 419 U.S. at 229. In Mobile, the state enjoined union picketing of foreign ships designed to protest substandard wages paid foreign seamen and to publicize the adverse impact of these wages on American seamen. Id. at 217. The Court found that the state's injunction was supported by a "valid public policy" in favor of preventing wrongful interference in business and consequently did not violate the first amendment. Id. at 230-32. However, because the Court held that the union's conduct was outside the commerce jurisdiction of the NLRA, it did not address the issue of whether the union’s conduct was prohibited by section 8(b)(4)(B); nor did it decide whether prohibiting such conduct under section 8(b)(4)(B) would violate the first amendment. See supra notes 72-75 and accompanying text.

In Electrical Workers, the Court held that peaceful union picketing was not protected by the first amendment because its object was prohibited by section 8(b)(4)(A). 341 U.S. at 705. See supra note 104 and accompanying text.
communicate but to coerce merits still less consideration under the First Amendment.” Moreover, noting that the labor laws reflect a balancing of interests, the Court concluded that the ILA and its members could express their political views regarding Soviet foreign policy in other ways which would not infringe upon the rights of others.

V. ANALYSIS: THE SIGNIFICANCE OF ALLIED

A. Commerce Jurisdiction: Object or Effect?

To determine that the ILA boycott was within the commerce jurisdiction of the NLRA, the Court focused on the domestic effects of the ILA’s action—interference with contractual relationships—rather than its foreign objective—to protest Soviet foreign policy in Afghanistan. Thus, although the Allied Court claimed that it was “[a]pplying the principles developed in . . . [the Benz line of] cases,” it actually departed from the Benz analysis, which emphasized the objective sought by the union to determine whether the union’s conduct was within the commerce jurisdiction of the NLRA. Consequently, it is

123. 456 U.S. at 226 (citing NLRB v. Fruit & Vegetable Packers (“Tree Fruits”), 377 U.S. 58 (1964)). The Court apparently recognized that section 8(b)(4) does not prohibit all secondary activity by unions but only certain secondary activities designed to achieve specific prohibited objectives.

The Tree Fruits Court noted that “a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.” 377 U.S. at 63. In Tree Fruits, a union involved in a labor dispute with employers of fruit packers and warehousemen in Washington picketed retail stores which sold Washington State apples packaged by the primary employers. The picketing was limited to asking customers of the retail stores not to buy Washington State apples. The Court held that the union’s conduct did not violate section 8(b)(4) because it was directed only at the struck product and did not ask customers to cease dealing with the retail stores altogether. Id. at 71-72. Therefore, the union’s conduct did not coerce neutral parties to become involved in the primary dispute. Id. at 68. The Court stated that “the prohibition of § 8(b)(4) is keyed to the coercive nature of the [union’s] conduct, whether it be picketing or otherwise.” Id. Consequently, non-coercive secondary activity is not prohibited by section 8(b)(4)(B) and is protected by the first amendment.

124. Id. (citing NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 617 (1980) (Blackmun, J., concurring)). Justice Blackmun concurred in the result in Retail Store Employees because he was reluctant “to hold unconstitutional Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.” 447 U.S. at 617-18.

125. 456 U.S. at 227.
126. Id. at 222-23.
127. Id. at 221.
128. See supra notes 59-75 and accompanying text.
129. Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) (object of union’s picketing was representation of foreign seamen aboard foreign vessel); McCulloch v. Sociedad Na-
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unclear whether the Allied Court (1) implicitly overruled the Benz “object” approach; (2) reaffirmed the object approach but limited its application to situations which involve the maritime operations of foreign vessels; or (3) adopted the bifurcated view rejected in Mobile, thus implicitly overruling that decision and permitting courts to focus on effects in unfair labor practice cases and objectives in all other situations.

Although the Allied decision created some uncertainty as to when the Court will focus on the objective rather than on the effects of union activity involving foreign entities to determine whether commerce jurisdiction exists, the Allied Court’s focus on the effects of the ILA’s action was nevertheless appropriate because Allied involved no primary dispute that affected the rights of foreign entities. In each of the Benz cases, with the exception of Mobile, foreign primary employers (the foreign shipowners) sought relief under the NLRA from primary union conduct. In Mobile, secondary domestic employers sought injunctive relief from primary union conduct directed against foreign entities. Assertion of jurisdiction under the NLRA would have required the Court in these cases to determine the rights of foreign entities under domestic law, thus interfering in the area of foreign relations. In contrast, the domestic secondary employers in Allied sought damages under the NLRA for purely secondary union conduct. Assertion of jurisdiction required the Court to determine only the rights of domestic entities, resulting in no interference in foreign relations.

The United States Constitution specifically gives Congress and the

130. See supra notes 68-75 and accompanying text.
131. “[I]t is not even arguable that Allied was feeling the secondary effects of a primary dispute protected by the Act.” 456 U.S. at 224 n.22 (emphasis in original).
132. See supra notes 59-75 and accompanying text.
133. See supra notes 72-75 and accompanying text.
134. 456 U.S. at 224.
135. The Court stated that “[t]he longstanding tradition of restraint in applying the laws of this country to ships of a foreign country . . . is irrelevant to this case.” Id. at 221.
President concurrent power over international affairs.\textsuperscript{136} Thus, when foreign relations would be affected directly by determining the rights of foreign entities under federal labor laws, as was the case in \textit{Benz} and its progeny, it is more appropriate for the Court to use the object approach to the commerce jurisdiction issue. Otherwise, the Court would exceed the scope of its power under the Constitution by exercising a power reserved to Congress and the President. When, however, the determination of rights under the federal labor laws threatens no interference in the realm of foreign affairs, as was the case in \textit{Allied}, it is appropriate for the Court to analyze the effects of union conduct to determine whether or not the conduct is in commerce. In this situation, the Court's assertion of jurisdiction does not exceed its constitutionally granted power.

The \textit{Allied} Court's focus on the effects of the ILA's action rather than on its foreign objective was appropriate because a secondary boycott allegation was at issue. Section 8(b)(4)(B) of the NLRA prohibits union conduct which furthers union goals in a dispute with one employer while adversely affecting another employer.\textsuperscript{137} Thus, section 8(b)(4)(B) is designed to shield neutral secondary employers from the adverse effects of union activity in disputes in which the secondary employer is not otherwise involved.\textsuperscript{138} Because section 8(b)(4)(B) is concerned with the secondary effects of union conduct, it would be anomalous for the Court to focus exclusively on the object of the primary dispute to determine the commerce jurisdiction issue and disregard the secondary effects of that dispute which section 8(b)(4)(B) specifically prohibits. To accomplish the purpose of section 8(b)(4)(B), the Court must consider how and in what degree a secondary employer is affected by union conduct. Therefore, the object of the primary dispute should not be dispositive of the commerce jurisdiction issue in the context of a section 8(b)(4)(B) action.

Furthermore, in secondary boycott situations involving foreign entities, strict adherence to the "object" approach to resolve the commerce jurisdiction issue could potentially undermine the purpose of section 8(b)(4)(B)—to prevent neutral secondary employers from bearing the economic burdens of the disputes of others. In \textit{Allied}, the object of the ILA's conduct—Soviet military policy in Afghanistan—was arguably not in commerce within the meaning of the NLRA.\textsuperscript{139} If only

\begin{thebibliography}{139}
\bibitem{136} U.S. Const. art. II, § 2.
\bibitem{137} See supra note 2.
\bibitem{138} See supra notes 38-43 and accompanying text.
\bibitem{139} 456 U.S. at 222-23.
\end{thebibliography}
the object of the union’s conduct were considered in resolving the commerce jurisdiction issue, the ILA’s conduct would probably fall outside the commerce jurisdiction of the NLRA and section 8(b)(4)(B) would not be applicable. The result would be that injured secondary employers would be barred from recovering under the NLRA.

Carrying the “object” analysis to its extreme, a union could circumvent the secondary boycott provisions of the NLRA and engage in otherwise prohibited secondary activity by claiming that its action was a political protest against the policies and/or actions of a foreign nation. For example, to protest the imposition of martial law in Poland, the plumber’s union might have refused to install a particular brand of pipe because it was made from copper mined in Poland. The object of the union’s conduct would have been to protest Polish military policy. Therefore, even though American manufacturers, wholesalers, and retailers of that brand of pipe would have been injured by the union’s action, the “object” analysis would deny them recovery under section 8(b)(4)(B) because the union’s object was not “in commerce.” Because the United States engages in a large volume of trade with numerous foreign countries, great potential exists for unions to undermine the purpose of section 8(b)(4)(B) by claiming to have political disputes with foreign nations. Therefore, because a secondary boycott allegation was at issue in *Allied*, the Court properly focused on the effects of the ILA’s action to resolve the commerce jurisdiction issue.

**B. Secondary Boycott**

1. Ruin or substantial loss: how foreseeable?

The Court’s conclusion that the ILA’s action was prohibited by section 8(b)(4)(B) rested on its finding that the cessation of business between Allied, Waterman and Clark was an object of the ILA’s action. To make this determination, the Court applied the standard set forth in *NLRB v. Retail Store Employees Union Local 1001*, which established that union activity violates section 8(b)(4)(B) if it “reasonably can be expected to threaten neutral parties with ruin or substantial loss.” Thus, *Allied* stands for the proposition that when union conduct foreseeably threatens neutral parties with financial ruin or substantial loss, that effect is an object of the union’s conduct prohibited by section 8(b)(4)(B).

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140. *Id.* at 224. See *supra* notes 111-14 and accompanying text.
142. *Id.* at 614.
The Allied Court extended the applicability of the Retail Store Employees "ruin or substantial loss" test in the area of secondary boycotts. Retail Store Employees involved secondary product picketing, i.e., union picketing designed to persuade customers of a secondary employer not to purchase a product sold by the secondary employer because that product is manufactured by an employer with whom the union has a dispute. Allied, however, did not involve secondary product picketing. The ILA did not actually picket Allied, nor did it ask Allied's customers not to purchase Soviet products. Instead, the ILA simply refused to handle Soviet goods. Because the Court did not distinguish the union conduct at issue in Retail Store Employees from that in Allied, it appears that the Court does not intend the Retail Store Employees test to be confined to secondary product picketing cases, but intends it to have a broader application.

Moreover, the Allied Court employed the "ruin or substantial loss" test to determine both that the cessation of business between Allied, Waterman and Clark was an object of the union's conduct and to determine that the ILA's conduct violated section 8(b)(4)(B). However, in Retail Store Employees, the Court held that the union's picketing violated section 8(b)(4)(B) because it threatened the secondary employers with ruin or substantial loss. Thus, after Allied, the "ruin or substantial loss" test is applicable to determine not only whether union conduct violates section 8(b)(4)(B), but also to determine what objective is sought by a union secondary boycott. As a result, the "ruin or substantial loss" test may now apply in all secondary boycott situations.

The Allied Court's holding narrowed only slightly the parameters of the "ruin or substantial loss" test as defined by Retail Store Employees and Tree Fruits. Retail Store Employees established that when the secondary employer derives ninety percent or more of its income from sales of a struck product, secondary product picketing threatens neutrals with ruin or substantial loss. In Retail Store Employees, the secondary employers (the title companies which sold Safeco insurance

143. See supra notes 86-91 and accompanying text.
144. See supra notes 10-14 and accompanying text.
145. 456 U.S. at 224. See supra notes 110-14 and accompanying text.
147. 447 U.S. at 609. See supra notes 92-98 and accompanying text. The Court noted in Retail Store Employees that "[i]f secondary picketing were directed against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product, neither Tree Fruits nor today's decision necessarily would control." 447 U.S. at 615 n.11.
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policies) derived ninety percent of their business from the sale of the struck product (Safeco insurance policies). The Court found that the union's product picketing threatened the secondary employers with financial ruin because it effectively asked customers to cease patronizing them altogether. Therefore, the Court held that the union's conduct was an illegal secondary boycott. Tree Fruits, on the other hand, established that when the struck product is but one of many products sold by the secondary employer, secondary product picketing limited to the struck product does not coerce neutral parties and therefore does not violate section 8(b)(4)(B).

In holding that the ILA's action had the objective of causing a cessation of business between the neutral secondary employers and thus violated section 8(b)(4)(B), the Allied Court followed the reasoning of Retail Store Employees. Approximately eighty-five percent of Allied's imports, amounting to twenty-five million dollars annually, came from the Soviet Union. Therefore, the Court held that the ILA's refusal to handle those imports threatened Allied with ruin or substantial loss. As a result, the holding in Allied moved the upper limit of "ruin or substantial loss" from ninety percent or more of the secondary employer's income to eighty-five percent or more of the secondary employer's income—not a substantial change. Consequently, the holding in Allied contributed little to the definition of "ruin or substantial loss" which will render union conduct violative of section 8(b)(4)(B).

2. Nature of primary dispute irrelevant to section 8(b)(4)(B) violation

The Allied Court's holding that section 8(b)(4)(B) is applicable even in the absence of a primary labor dispute recognized the legislative purpose and intent of section 8(b)(4)(B). Section 8(b)(4)(B) was drafted to prevent neutral parties from becoming the victims of controversies in which they are not involved. To limit application of section 8(b)(4)(B) to union secondary activity that involves only labor-related primary disputes would destroy the protection Congress in-

148. 447 U.S. at 609.
149. Id. at 614.
150. Id. at 614-15.
151. See supra text accompanying notes 86-91. See also Soft Drink Workers Union v. NLRB, 657 F.2d 1252 (D.C. Cir. 1980).
153. 456 U.S. at 224.
154. See supra note 43 and accompanying text.
tended to give neutral secondary employers. Such a limitation would permit unions to engage in secondary activity and avoid the prohibition of section 8(b)(4)(B) simply by claiming to have a primary dispute which is not labor-oriented.

The potential danger for abuse by unions would be even greater if political disputes were exempted from section 8(b)(4)(B). A union could readily find some political justification for its conduct and thus escape the prohibition of section 8(b)(4)(B).155 As a result, secondary employers would lose the protection afforded them by section 8(b)(4)(B) and would have to endure secondary pressure simply because the union's action was politically motivated. As the Allied Court noted, such a result would be contrary to both the language and purpose of section 8(b)(4)(B).156

C. First Amendment: Illegality v. Compelling Government Interest

To determine that enjoining the ILA boycott did not infringe upon the ILA's freedom of speech, the Allied Court applied the established principle that illegal activity is not protected by the first amendment.157 Thus, once the Court found that the ILA's conduct violated section 8(b)(4)(B),158 it summarily concluded that it was not protected activity under the first amendment.159 The Court relied upon labor picketing cases to determine that the ILA's boycott was illegal and thus not protected by the first amendment.160 Allied, however, involved neither labor picketing nor any labor controversy. Rather, to voice its opposition to Soviet military policy in Afghanistan, the ILA simply declined to handle Soviet goods.161 Thus, the ILA's action did not entail the physi-
cal obstruction and/or intrusion ordinarily associated with picket lines. Therefore, the Court's reliance upon labor picketing cases to determine the first amendment issue was inappropriate.

The Allied Court's summary resolution of the first amendment issue failed to consider adequately the political motivation behind the ILA's boycott. Assembling for the purpose of peaceful action is not unlawful. Moreover, political expression is the kind of speech most jealously protected by the first amendment. The ILA's action was political expression by an organized group and thus constituted an exercise of the union members' right to associate to express political beliefs. The fact that the group expressing its political beliefs was a union should have no bearing on whether the group's conduct was or was not protected by the first amendment.

The Allied Court could have reached the conclusion that the ILA's boycott was not protected activity under the first amendment by a different means less restrictive of first amendment rights. Incidental infringement of first amendment rights may be justified if there exists a compelling government interest. The NLRA was enacted to protect and promote the free flow of commerce. Section 8(b)(4) was specifically designed to prevent the spread of industrial strife. Either or both of these objectives may be considered sufficiently compelling to justify infringement of the ILA's first amendment rights.

A balancing of interests would have been a sounder approach to the first amendment issue than the Allied Court's analysis because it would have considered the political motivation behind the ILA's boycott. Moreover, it would not have required the Court to adopt the somewhat strained analogy between the ILA's refusal to handle Soviet goods and labor picketing.

162. See International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284, 289 (1957) ("'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'") (quoting Bakery Drivers Local v. Wohl, 315 U.S. 769, 776 (1942) (concurring opinion)).
164. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.").
166. See supra note 33 and accompanying text.
167. See supra text accompanying notes 42-44.
D. Procedural Distinctions: Another Facet of Russian Boycott Litigation?

Although the dispute in Allied, like that in Baldovin v. International Longshoremen's Association, 168 New Orleans S.S. Association v. General Longshore Workers, 169 and Walsh v. International Longshoremen's Association, 170 originated in the ILA's boycott of Russian goods, the procedural context in which Allied arose differed in several respects from that in which the other three cases arose. Allied was an action between private parties. Baldovin and Walsh were actions brought by the NLRB. 171 In addition, Allied was an action for damages, whereas Baldovin, New Orleans, and Walsh were each actions for injunctive relief. 172 As a result of these differences, the jurisdiction of the NLRB under section 10(a) 173 and the procedural requirements of section 10(1) 174 were not at issue in Allied; nor were the anti-injunction provisions of the Norris-LaGuardia Act. 175 Therefore, the Allied Court distinguished the issue addressed by the courts of appeals in Baldovin, New Orleans and Walsh—the jurisdiction of the NLRB over union unfair labor practices under section 10(a) of the NLRA—from that presented in Allied—the scope of the secondary boycott prohibition of the NLRA. 176 Thus, the Court framed the issue in Allied narrowly—determination of the scope of section 8(b)(4) in the setting of a boycott of foreign goods. 177 The distinction drawn by the Allied Court can be made only by reading the phrase “affecting commerce” which appears in both sections 8(b)(4) and 10(a) of the NLRA as though it had a different meaning in each section. This seems a somewhat artificial dis-

168. 626 F.2d 445 (5th Cir. 1980).
170. 630 F.2d 864 (1st Cir. 1980).
171. New Orleans, like Allied, was an action between private parties. However, because New Orleans involved the enforcement of arbitration awards, and thus the arbitration provisions of the NLRA, it is factually distinguishable from Allied. See New Orleans, 626 F.2d at 465.
172. See supra notes 45-58 and accompanying text for discussion of these cases.
173. See supra text accompanying notes 48-58.
174. See supra note 54 and accompanying text.
175. See supra note 31 and accompanying text.
176. 640 F.2d at 1371. In Allied, the Supreme Court stated that it “granted certiorari to determine the coverage of the secondary boycott provisions of the National Labor Relations Act in this setting.” 456 U.S. at 218 (emphasis added). The court of appeals in Allied Int'l Inc. v. International Longshoremen's Ass'n, 640 F.2d 1368 (1st Cir. 1981), stated that “this case does not, as did Baldovin and Walsh, require consideration of the jurisdiction of the National Labor Relations Board . . . .” Id. at 1371 (citations omitted).
177. 456 U.S. at 218. See supra note 101 and accompanying text.
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tinction: NLRB jurisdiction over unfair labor practices extends to persons engaging in unfair labor practices "affecting commerce," whereas the secondary boycott prohibition protects any person "engaged in commerce or in an industry affecting commerce" from certain union activities.

It is difficult to imagine a situation where a prohibited secondary boycott would not affect commerce given that the victim of the secondary boycott must be engaged in commerce or in an industry affecting commerce to fall within the proscription. Moreover, the definitions of the terms "commerce" and "affecting commerce" in section 2(6) and (7) apply whenever those terms appear in the NLRA. Therefore, the distinction made by the Court in Allied is tenuous at best.

Because the Allied Court did not overrule Baldovin and because it implicitly affirmed the lower court's narrow statement of the issue in Allied, it is conceivable that Baldovin and Walsh still have preclusive effect over section 10(1) injunctions in the context of a boycott of foreign goods. The court of appeals in Allied held that the NLRA applied to the action brought by a private party against a union even though the NLRB's jurisdiction over the unfair labor practice was barred by res judicata. Therefore, it is an open question whether the NLRB may enjoin this type of unfair labor practice even though it would sustain a private damages remedy. From a practical standpoint, it is unlikely that the Court would deny NLRB jurisdiction to enjoin a secondary boycott while simultaneously granting private parties monetary relief from the boycott. To do so would allow the boycott to continue and thus allow recoverable damages to increase unnecessarily.

IV. CONCLUSION

The Court framed the issue presented in Allied narrowly—determination of the scope of section 8(b)(4) in the context of a politically-motivated boycott of foreign goods. The Court's opinion is carefully tailored to address only that issue. Therefore, Allied's effect on subsequent cases that arise in a different procedural setting may be limited.

Because the Court framed the question presented in Allied so nar-

179. See supra note 2 for text of § 8(b)(4)(B).
180. See supra note 2 for text of § 2(6) and (7).
182. See supra notes 102-11 and accompanying text.
183. 640 F.2d at 1370. See supra note 111 and accompanying text.
184. 456 U.S. at 218. See supra notes 168-74 and accompanying text.
rowly, its resolution of each of the three major issues involved may also carry little weight in future litigation. Although the Court focused on the effects of the ILA’s conduct to determine the commerce jurisdiction issue, it implicitly affirmed the Benz “object” approach.\(^{185}\) Thus, the Allied Court injected some confusion into the traditional test of commerce jurisdiction. Because the Court’s resolution of the secondary boycott issue was based on the fact that eighty-five percent of Allied’s imports came from the Soviet Union,\(^ {186}\) its holding will provide little guidance in cases where the amount of lost income is less than eighty-five percent. Finally, because the Court’s resolution of the first amend-ment issue was based on an inappropriate analogy to labor picketing cases and did not consider the political expression aspect of the ILA’s boycott, its reasoning is of little value for future litigation. Therefore, the holding in Allied is extremely narrow and provides only general guidelines for lower courts to decide these issues in future cases involving politically motivated secondary boycotts.

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185. *See supra* notes 112-15 and accompanying text.
186. *See supra* notes 116-20 and accompanying text.