

International Longshoremen's Association, AFL-CIO and Coastal Stevedoring Company and Canaveral Port Authority and Port Canaveral Stevedoring, Inc., Patrick T. Lee, W. T. Cox, Jr., Mather Ward, George Scheidler, and Ben Pekin Family Partnership d/b/a Port Canaveral Stevedoring Limited. Cases 12-CC-1226, 12-CC-1227-1, and 12-CC-1227-2

June 18, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On November 24, 1993, the National Labor Relations Board issued its Decision and Order in this proceeding in which it found that the Respondent was responsible, under Section 8(b)(4)(ii)(B) of the Act, for threats made by Japanese unions to neutral persons (exporters, shippers, and importers) who are involved in the Florida-Japan citrus trade.¹ Thereafter, the Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its Order. In an opinion dated June 6, 1995, the court denied enforcement of the Board's Order and remanded the case to the Board for further proceedings consistent with the court's opinion.²

By letter dated November 22, 1995, the Board notified the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the court's opinion. Thereafter, the General Counsel, the Respondent, and the Charging Parties filed statements of position with the Board. In addition, the General Counsel and the Respondent filed responses to the Charging Parties' statements of position, and Charging Parties Canaveral Port Authority and Port Canaveral Stevedoring filed a response to the General Counsel's and the Charging Party's statements of position.³

Having accepted the remand in this case, we are bound by the court's opinion as the law of the case. Applying the principles set forth by the court, we find, for the reasons set forth below, that the complaint should be dismissed.⁴

¹ 313 NLRB 412.

² *Longshoremen ILA Assn. v. NLRB*, 56 F.3d 205 (D.C. Cir. 1995), cert. denied 116 S.Ct. 1040 (1996).

³ On April 3, 1996, the Respondent moved for leave to file a reply to the Charging Parties' statement of position. The Board granted the Respondent's motion on April 8, 1996. Thereafter, the General Counsel moved for an extension of time to file a response and the Charging Party also moved for leave to file a response. The Board granted the respective motions and thereafter received the parties' responses.

⁴ We deny the Charging Parties' motion to reopen the record to admit certain documents, as the granting of such motion would be

This case concerns the Respondent's dispute with certain nonunion stevedoring companies in Florida, and, more specifically, the threats of the Japanese unions to refrain from unloading citrus fruit that had been loaded by the nonunion stevedores. The Respondent made several requests for assistance from the Japanese unions in preventing the use of nonunion stevedores in Florida. The Japanese unions responded to these requests by communicating their concerns to shipping companies and to citrus importers and exporters. Some of these communications included a copy of a letter from the Respondent's president asking the Japanese unions not to unload the "picketed products."

Thereafter, a Japanese importer and its carrier diverted their ship from Fort Pierce, Florida, where it had been scheduled to go for loading by nonunion stevedores, to Tampa, Florida, for loading by employees represented by the Respondent. The Respondent then sent a letter to the Japanese unions acknowledging the efforts of the Japanese unions and asking for their continued support.

The Board's Decision and Order found that the Respondent violated Section 8(b)(4)(ii)(B) pursuant to a theory of agency law. Relying on the principles set forth in *Pipefitters Local 280 (Aero Plumbing Co.)*, 184 NLRB 398 (1970), the Board found that the Respondent had authorized and ratified certain threats made by Japanese unions to refuse to unload fruit loaded by nonunion stevedores in the United States. Having found authorization and ratification, the Board did not address the General Counsel's additional arguments that the Respondent was responsible for the conduct under another theory of agency, i.e., apparent authority, and under the theory of joint venture.

The court rejected the Board's finding that the Japanese unions were the agents of the Respondent. The court found that the record did not establish an agency relationship because the Respondent exercised no control over the Japanese unions. In addition, the court disagreed with the Board's reliance on *Aero Plumbing*, because that case involved a relationship among unions bound by a formal affiliation agreement, whereas, in the instant case, the Respondent and the Japanese unions were "completely different entities." The court added that "[i]f they were bound together at all, it was

beyond the scope of the court's remand. Moreover, the Charging Parties have failed to state, as required by Sec. 102.48(d)(1) of the Board's Rules and Regulations, that the additional documents would require a different result. Rather, they merely state that the additional facts strengthen and further support the theories of liability. Finally, we note that the Charging Parties agreed to waive a hearing before an administrative law judge and to submit the case directly to the Board for findings of fact. Thus, their contention that the documents were discovered in a Sec. 303 action subsequent to the Board's Decision and Order does not, as required, establish that such information was previously unavailable. Cf. *Suzy Curtains*, 310 NLRB 1245 (1993).

by a spirit of labor solidarity, but such a spiritual link is too frail to render one union the agent of another." 56 F.3d at 207-208.

The court rejected the agency theory urged by the Board, which it described as "untenable." 56 F.3d at 207. The court also discussed the doctrine of agency in general terms, and stated that "the Japanese unions were *in no sense* the agents of the [Respondent]." (Emphasis added.) 56 F.3d at 213. In view of the court's analysis of the agency issue, we read the court's opinion as having rejected, in very broad terms, any notion that an agency finding could form the basis for finding a violation of Section 8(b)(4)(ii)(B) of the Act in this case. Not only did the court find that the Respondent lacked the control over the Japanese unions necessary for finding the threats to have been authorized, it also concluded in sweeping terms that the record provided no basis for finding that an agency relationship existed. Accordingly, we believe the court's opinion precludes a finding of agency under any theory of law in this case.

Our dissenting colleague contends that the court left open the issue of whether agency could be found under theories of ratification or apparent authority. We think it clear that the court did not do so, and that its statement that "in no sense" were the Japanese unions acting as agents of Respondent forecloses further consideration of all allegations of agency, including those based on theories of ratification and apparent authority.

While the court did not specifically discuss the theory of ratification, it is apparent that the court ruled out any finding of agency based on that theory. First, the court rejected "the Board's agency theory," which was that the Respondent had both authorized and ratified the Japanese unions' conduct. Second, the court rejected the applicability of *Aero Plumbing*, which the Board had relied on in finding both authorization and ratification.⁵

As for the General Counsel's theory of apparent authority, although this theory was not addressed by the Board, it, too, was discussed and rejected by the court in connection with the court's analysis of agency theory generally. Noting that the doctrine of apparent authority depends on the reasonable perceptions of third parties, the court stated that "nothing in the record suggests that any party perceived the Japanese unions to be the agents of the [Respondent], nor that such a perception would have been reasonably justified had it arisen." 56 F.3d at 215. Because the court's opinion is controlling as the law of the case, we believe we are

⁵ With respect to ratification, our colleague concedes that the court rejected *Aero Plumbing* as support for the ratification theory. However, he says that there are other cases which can support such a theory. Although we do not pass on that issue, we have reservations concerning the propriety of relying on a case as a basis for a decision, and then, after a court has rejected that decision, coming back a second time with other cases as support.

precluded by this finding from further consideration of any theory of agency based on apparent authority.

Having concluded that there is no basis on remand for finding an agency relationship between the Japanese unions and the Respondent, we now consider whether the Respondent can be held responsible under the one theory alleged by the General Counsel that is not a theory of agency, i.e., the theory of joint venture.⁶ Like the apparent authority theory, the joint venture theory was argued by the General Counsel but was not addressed in the Board's Decision and Order. Unlike the apparent authority theory, however, the joint venture theory was not addressed by the court. It is less than clear, therefore, whether the court intended for the Board to consider on remand whether the Respondent violated Section 8(b)(4)(ii)(B) under a theory of joint venture.

Parts of the court's decision, most notably the rejection of the agency theories and the remand for further consideration consistent with the court's decision, suggest that it would be appropriate for the Board to further consider the merits of the joint venture argument. Other parts of the court's opinion, however, most notably the statement that "our conclusion with respect to the Board's agency theory fully resolves the dispute between the parties," 56 F.3d at 210, and the statement that "the Board erred in attributing the actions of the Japanese unions to the [Respondent] for the purpose of an unfair labor practice finding under NLRA section 8(b)(4)(ii)(B)," 56 F.3d at 215, are broad enough to suggest that the court did not intend for the Board to engage in further consideration of any of the General Counsel's allegations, including the joint venture argument. Indeed, it is possible that the court read the Board's decision as an implicit rejection of both the apparent authority and joint venture arguments, inasmuch as the General Counsel alleged a violation based on these theories and the Board neither found merit to these theories nor stated that it was finding it unnecessary to pass on them.

In our view, the court's remand of this case "for further proceedings consistent with [its] opinion," can arguably be read either as a remand to consider the merits of joint venture issue or as a remand merely for the purpose of vacating our prior Order and dismissing the complaint. We find it unnecessary, however, to choose between these conflicting interpretations of the

⁶ Charging Parties Canaveral Port Authority and Canaveral Stevedoring contend that the Board should now consider whether the Respondent may be held responsible for the Japanese unions' conduct under a tort theory of intended consequences. We disagree. It is the General Counsel, not the charging party, who determines the theory of the case. *Operating Engineers Local 12 (Sequoia Construction)*, 298 NLRB 657 fn. 1 (1990). Such a theory was never part of the General Counsel's complaint and the Charging Parties' effort is, therefore, an impermissible attempt to enlarge on the General Counsel's theory of the case. Accordingly, it shall not be considered.

court's opinion. Even assuming the court has remanded the case for further consideration of the joint venture allegation—rather than for merely vacating the order and dismissing the complaint—we find that the record facts do not support the joint venture theory, and that dismissal of the complaint is therefore warranted.

The question as to whether the record established a joint venture between the Respondent and the Japanese unions is “a question of fact to be determined upon all the evidence and in light of all circumstances.” *Bricklayers (I.C. Minium)*, 174 NLRB 1251, 1261 (1969).

In order to establish a joint venture among unions, “it must be established that the [unions] participated in a planned course of action, jointly conceived, coordinated and adopted to attain a mutually agreed upon object.” *Sheet Metal Workers Local 19 (Declar Associates)*, 316 NLRB 426, 434 (1995). In the instant case there was no such joint planning and there was no joint conception, coordination, or adoption of a plan. Rather, the Respondent simply asked for the assistance of the Japanese unions, and the latter agreed to give it. The particulars (e.g., how, when, and where the Japanese unions would exert their pressure) were left entirely to the Japanese unions. In short, this case is not about joint planning; it is about a request for help and the granting of that request. Such conduct does not, by itself, establish a joint venture.

The court found that the only common bond between the Respondent and the Japanese unions was “the fact that both seek to further the goals of organized labor worldwide.” 56 F.3d at 213. We find that this bond is insufficient to create a joint venture relationship. The Japanese unions had no benefit to be gained from the success of their threatened boycott. The only arguable benefit at stake for these unions was the benefit sought by all acts of labor solidarity, i.e., the hope that other unions might come to the aid of the Japanese unions in the event of a future labor dispute in Japan. Such a benefit, however, was entirely speculative. Moreover, it was not dependent on the ultimate success of the Japanese unions' actions in the instant controversy. At best, it was dependent merely on their willingness to lend their support to the Respondent.⁷ In view of these circumstances, we find that

the assistance the Japanese unions gave to the Respondent in its dispute with nonunion stevedores, designed solely to promote labor solidarity, did not create a joint venture between the Japanese unions and the Respondent.

In sum, we find that the court's opinion precludes a finding that the Japanese unions were in any way the agents of the Respondent, and, to the extent that our consideration of the joint venture allegation is permissible under the scope of the court's remand, we find that the record fails to establish the existence of a joint venture relationship by which the Respondent could be held responsible for the Japanese unions' conduct. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

CHAIRMAN GOULD, dissenting.

My colleagues find that the court's opinion, at most, allows for consideration of whether the Respondent violated Section 8(b)(4)(ii)(B) under a theory of joint venture. I do not read the court's opinion so narrowly. Contrary to my colleagues, I do not believe that the court has completely precluded further consideration of whether an agency relationship existed between the Japanese unions and the Respondent. For the reasons set forth below, I believe the court's opinion allows for further consideration of agency issues in this case, and that such further consideration warrants a finding that the Respondent, through its agents, violated the Act.

This case involves the Respondent's dispute with the certain nonunion stevedoring companies in Florida, the Respondent's request for assistance and support from certain Japanese unions, and the subsequent threats made by the Japanese unions in response to the Respondent's requests. Prior to the 1990–1991 citrus import season, the Respondent's representatives met with representatives of the Japanese unions and requested their assistance in preventing the use of nonunion stevedores in loading citrus fruit to be shipped to Japan from Fort Pierce and Port Canaveral, Florida. In response, the Japanese unions communicated with various stevedoring companies, citrus importers, and shipping companies, warning that Japanese dockworkers would not unload fruit that had been loaded in the United States by nonunion labor.

Thereafter, by letter dated October 4, 1990,¹ the Respondent's president informed the Japanese unions of its plans to picket the nonunion stevedoring companies and asked for their continued support in refusing to unload the picketed products. The Japanese unions circulated copies of this letter to citrus importers, exporters, and shipping companies, and indicated to them

¹ All dates hereafter are in 1990 unless stated otherwise.

⁷ For this reason, we find distinguishable *Carpenters Seattle District Council (Cisco Construction Co.)*, 114 NLRB 27 (1955). In that case, a joint venture was found, in part, because the union at issue had a substantial interest in seeing that certain employees, who worked in the same area as employees represented by the union, either became represented by another union or at least received the same level of wages as the unionized employees. Otherwise, the wages the union at issue could negotiate for the employees they represent might have been undermined. In the instant case, the Japanese unions could claim no similar benefit at stake for the employees they represent, because they work in different countries than the employees represented by the Respondent and are subject to different laws and different conditions of employment.

that they would comply with the Respondent's request for assistance. In response to these communications, a Japanese importer and its carrier directed its ship to go to Tampa for loading by employees represented by the Respondent rather than to Fort Pierce, as scheduled, for loading by nonunion stevedores. Subsequently, in a letter dated November 6, the Respondent informed the Japanese unions that the diversion was a direct result of the efforts of the Japanese unions, and that "[y]our continued efforts on our behalf will be most appreciated."

Although the Board's Decision and Order found that the Respondent violated Section 8(b)(4)(ii)(B) by authorizing and ratifying the threats made by the Japanese unions, the court rejected the Board's agency finding on the ground that the Respondent "exercised no control over the conduct of the Japanese unions." *Longshoremen ILA Assn. v. NLRB*, 56 F.3d 205, 213 (D.C. Cir. 1995). The ability to exercise control, however, is significant only to the issue of whether the Respondent authorized the threats made by the Japanese unions. It does not preclude an agency finding based on the other theories of agency put forth by the General Counsel, i.e., ratification and apparent authority. In view of the court's remand for further consideration, the absence by the court of any mention of the theory of ratification, and the absence of any discussion in the Board's earlier decision of the General Counsel's theory of apparent authority, I believe it is appropriate on remand to consider whether the agency doctrines of ratification and apparent authority provide any basis for finding that the Respondent violated Section 8(b)(4)(ii)(B) of the Act.

As noted above, the court did not mention the Board's ratification finding. The court did find, as noted by my colleagues, that *Pipefitters Local 280 (Aero Plumbing Co.)*, 184 NLRB 398 (1970), which the Board relied on to support its findings of both authorization and ratification, was inapplicable to the facts of the instant case. Thus, while the court's opinion appears to foreclose any finding of ratification that relies on *Aero Plumbing*, it does not follow that all consideration of the ratification issue is now foreclosed on remand. Had that been the court's intent, it would have stated so directly rather than leaving it to interpretation. I therefore believe, contrary to my colleagues, that it is incumbent on the Board to further consider whether—apart from the *Aero Plumbing* case—an agency relationship existed under the doctrine of ratification. I find that the record supports such a finding.

The Board has defined ratification as either "(a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or (b) conduct by him justifiable only if there were such an election." *Service Employees Local*

87 (*West Bay Maintenance*), 291 NLRB 82, 83 (1988), citing Restatement 2d, Agency §83 (1958). In *West Bay Maintenance*, the Board found union ratification of picketing where the union knew the picketing was being conducted with signs bearing the union's name, and the union did not disavow the picketing, attempt to retrieve the picket signs, or in any other way seek to divorce itself from the picketing.

Union ratification has also been found when the president of a striking union was present in his official capacity at a motel where members of the public protested the housing of strike replacements. The Board concluded that, by endorsing the acts of those present in the mass gathering, the union president established an agency relationship between the union and the participants. See *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 (1991), *enfd.* 977 F.2d 1470 (D.C. Cir. 1992).

In the instant case, the record supports a finding that the Respondent ratified the threats of the Japanese unions. As mentioned above, the stipulated facts show that, in response to the Respondent's requests for assistance in its dispute with nonunion stevedores, including a request to refrain from unloading products loaded by nonunion stevedores, the Japanese unions warned numerous stevedoring companies, citrus importers, and shipping companies that their members would not unload any fruit loaded by nonunion workers in Florida. As a result of these threats, a Japanese importer and its carrier directed their ship to go to Tampa, Florida, for loading by union stevedores rather than to Fort Pierce, Florida, for loading by nonunion stevedores, as originally scheduled.

Thereafter, by letter of November 6 the Respondent's special consultant, Ernest Lee, informed the National Council of Dockworkers' Unions of Japan that the diversion of the ship to Tampa was "a direct result of your timely and effective notices to relevant parties in Japan of your support for our efforts. . . . Thank you." Lee added that "[y]our continued efforts on our behalf will be most appreciated."

It is clear, from the foregoing facts, that the Respondent ratified the conduct of Japanese unions. Not only did the Respondent fail to disavow the widely disseminated threats made by the Japanese unions (indeed, the Respondent requested that the threats be made), the Respondent, by its November 6 letter, explicitly endorsed the prior threats and acknowledged that they were made on behalf of the Respondent. By this conduct, the Respondent manifested the intent to treat the threats made by Japanese unions as authorized by the Respondent, and thus created an agency relationship under the doctrine of ratification.

To the extent that the court's opinion found the doctrine of ratification inapplicable on the ground that the Respondent exercised no control over the conduct of

the Japanese unions, I respectfully disagree with the court's opinion. Ratification, by its definition, does not require the existence of an actual right of control. Indeed, its definition does not even require that the principal have knowledge of the acts until after they are done. Therefore, that the Respondent and the Japanese unions were not bound together by some formal affiliation, as were the unions in the *Aero Plumbing* case, does not preclude a finding that there existed an agency relationship under the doctrine of ratification.

Accordingly, I conclude that the Respondent is responsible, under Section 8(b)(4)(ii)(B) of the Act, for the threats made by Japanese unions because it took deliberate steps to ratify those threats as their own.

I further find, contrary to my colleagues, that the doctrine of apparent authority may be appropriately applied to find that the Respondent violated the Act. As noted by my colleagues, the court mentioned this theory of agency in its opinion and stated that it found nothing in the record supporting such a theory. The Board's Decision and Order, however, did not address the General Counsel's allegation of apparent authority.² Indeed, the court's discussion of apparent authority did not mention the specific facts that created the apparent authority. Therefore, as the apparent authority issue was not before the court, the court's statements about this allegation are nothing more than dicta and as such do not preclude our further consideration of apparent authority in this case. Consequently, I believe the Board is obligated to fully consider the merits of this allegation on remand. Indeed, such consideration adds further support to the finding of an 8(b)(4)(ii)(B) violation.

The Board has defined the doctrine of apparent authority as "a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. . . . Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. . . . Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity." (Citations omitted.) *West Bay Maintenance*, supra at 82-83.

Under this doctrine, the Board has found an employer responsible for the coercive remarks and actions

of a community group when the employer was one of two principal private employers in a small community, had attempted to influence community opinion against the union, and had given aid to the community group. The Board held that the activities of the community group were attributable to the employer unless it sufficiently disavowed such activity. *Star Kist Samoa, Inc.*, 237 NLRB 238 (1978).

In similar circumstances, the Board has found an employer responsible for threats of plant closure published in a newspaper editorial by the mayor of the small town where the employer was located. *Henry I. Siegel Co.*, 172 NLRB 825 (1968), enfd. in pertinent part 417 F.2d 1206 (6th Cir. 1969). See also *Cagle's Inc. v. NLRB*, 588 F.2d 943 (5th Cir. 1979), where the Court of Appeals of the Fifth Circuit affirmed the Board's finding that the employer was responsible for the unlawful attempts by the executive director of the chamber of commerce to get employees to form their own union. The court found that, under the circumstances, the employees could reasonably conclude that the executive director was serving as an organ of communication from management.

I find that the instant facts fall well within the line of cases discussed above. The record establishes that, by letter dated October 4, the Respondent's president informed the Japanese unions that the Respondent was planning to picket the nonunion stevedoring companies, that the Respondent hoped to have the support of the Japanese unions, and that "[y]our further support in denying the unloading and landing of those picketed products in your country will also be most helpful to the members of the International Longshoreman's Association." The Japanese unions circulated copies of the October 4 letter to various citrus importers, exporters, and shipping companies, and indicated their intention to carry out the Respondent's request. Subsequently, Japanese importers expressed concern to Florida exporters that citrus fruit loaded by the nonunion workers would not be unloaded by the Japanese dockworkers. Thereafter, as mentioned above, a Japanese importer and its carrier directed their ship to a different location in order that it be loaded by union stevedores.

It is clear from the foregoing facts that the Respondent's October 4 letter was an integral part of the threats made to the neutrals. Because the letter was incorporated into the threats made by the Japanese unions, the neutrals could reasonably conclude in these circumstances that the Japanese unions were not merely acting in solidarity with the Respondent, but rather were acting for, and on behalf of, the Respondent.

Moreover, as with the November 6 letter discussed above, the Respondent, although fully aware that the Japanese unions were making such threats, took no action to disavow itself from the conduct. Indeed, the Respondent, having requested that the Japanese unions

²I disagree with the suggestion that the Board, by not making findings in its earlier decision, implicitly rejected the contentions of the General Counsel that the Respondent violated the Act under the theories of apparent authority and joint venture. Rather, I believe that the Board found it unnecessary to pass on these theories in view of their findings of authorization and ratification.

refrain from unloading the goods at issue, acted in no way inconsistent with the notion that it had authorized the Japanese unions to make such threats on its behalf. Thus, I find that the threats to refuse unloading the Florida citrus fruit are properly attributable to the Respondent under the doctrine of apparent authority, and that these circumstances further support the conclusion that the Respondent violated Section 8(b)(4)(ii)(B) as alleged.³

Although I find, from the foregoing facts, that the Japanese unions acted as the agents of the Respondent, I do not believe that such a finding would necessitate an agency finding in most circumstances involving union solidarity or support. Indeed, I have long recognized the significance of international labor solidarity,⁴ and I do not believe the Act should be interpreted so as to necessarily hinder the typical act of union solidarity. In the instant case, it is not the existence of labor solidarity alone that created the agency relationship. Rather, it was the specific circumstances, namely, the Respondent's October 4 letter which became an integral part of the threats made to neutrals, the failure to disavow the threats, and the Respondent's November 6 letter endorsing the prior threats and acknowledging that they were made on its behalf, that established the agency relationship under the law. As mentioned above, a finding of a violation here would not, without more, necessarily give rise to a finding of agency in other circumstances involving the typical act of solidarity shown by one union toward another. Consequently, my conclusion concerning the foregoing facts should not be construed as having broader applications with respect to other relationships that are formed for purposes of promoting international labor solidarity.

In its remand to the Board, the court suggested that a finding of unlawful conduct based on an agency theory would be impractical because, in future circumstances, a union could evade an unfair labor practice finding by merely publicizing its labor dispute, thereby suggesting that foreign unions lend their support, and thereafter disclaiming responsibility for any assistance offered by the foreign unions. I find the court's suggestion unpersuasive. As Justice Frankfurter said about Section 8(b)(4): "The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives." *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93, 98 (1958). Indeed, there is a significant difference between (a) suggesting that foreign

unions lend their support, and (b) expressly ratifying threats made by foreign unions and/or creating the circumstances necessary for an apparent authority agency relationship with the foreign unions making the threats. Thus, that the Respondent could have easily taken steps to ensure that its conduct would fall outside the parameters of the Act is immaterial. It is the statutory scheme endorsed by Congress in the Taft-Hartley amendments which condemns some tactics and allows for others. This is the teaching of *Sand Door* and secondary boycott law as it has emerged over these past 50 years. Therefore, only Congress, not the Board or the judiciary, may alter this.

Finally, I agree with the Board's original determination that the conduct attributable to the Respondent is within the Board's jurisdiction. The Respondent has argued to the Board and the court that the unlawful activity at issue in this case, namely, the threats by the Japanese unions that they would not unload fruit in Japan that had been loaded in Florida by nonunion labor, occurred outside the geographic territory of the United States and are, therefore, beyond the intended application of the National Labor Relations Act. Whether the Board has jurisdiction in these circumstances is essentially a matter of determining the intent of Congress as to the coverage of the Act, and, since the object and effect of the conduct in question was to implement a secondary boycott within the United States, I believe that the alleged violation of Section 8(b)(4)(ii) by the Respondent falls within the scope of the National Labor Relations Act.

It is undisputed that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949). The question of whether Congress has exercised that authority is a matter of statutory construction, and "the canon of construction teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 285. The principle underlying this presumption against extraterritorial application is that Congress is primarily concerned with domestic conditions. The presumption further serves to protect against international discord resulting from unintended clashes between our laws and those of other nations. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). In applying this rule of statutory construction, the courts look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*, 336 U.S. at 285.

In *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), and *McCulloch*, *supra*, the Supreme Court addressed the question of whether Congress intended

³In view of my finding that the conduct of the Japanese unions is attributable to the Respondent under the theories of ratification and apparent authority, I do not pass on whether the conduct is also attributable to the Respondent under the joint venture theory discussed by my colleagues.

⁴See Gould, *The World's Workers May Yet Unite*, Los Angeles Times, Sept. 1, 1975 at part II,5.

the Act to apply extraterritorially to foreign-flag ships. Despite the Act's broad language that referred by its terms to foreign commerce,⁵ the Court concluded that the "whole background of the Act is concerned with industrial strife between American employers and employees." *Benz*, 353 U.S. at 143-144. The Court stated

In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have occurred to those sponsoring the bill. The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman Hartley, stated that "the bill herewith reported has been formulated as a bill of rights for American workingmen and for their employers." The report declares further that because of the inadequacies of legislation "the American workingman has been deprived of his dignity as an individual," and that it is the purpose of the bill to correct these inadequacies. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." [353 U.S. at 143-144. Citations omitted; emphasis in the original.]

Subsequent cases make it clear that while Congress did not intend the Act to apply extraterritorially, Congress did intend the Act to apply to domestic activity even though that activity involved matters occurring outside the geographic boundaries of the United States. In *Longshoremen ILA v. Allied International*, 456 U.S. 212 (1982), the Court recognized the Board's jurisdiction through Section 8(b)(4) over domestic secondary activity undertaken in furtherance of a primary dispute with a foreign entity. The Court found that the ILA's refusal to unload cargo shipped from the Soviet Union in protest of the Afghanistan invasion violated Section 8(b)(4) since the union's activity was "in commerce" and within the scope of the Act. Distinguishing the *Benz* line of cases,⁶ the Court stated that the ILA's boycott

did not aim at altering the terms of employment of foreign crews on foreign-flag vessels. It did not seek to extend the bill of rights developed for American workers and American employers to foreign seamen and foreign shipowners. The long-standing tradition of restraint in applying the laws of this country to ships of a foreign country—a tradition that lies at the heart of *Benz* and every subsequent decision—therefore is irrelevant to this case. [456 U.S. at 221.]

In contrast to the *ILA* case, the unlawful activity at issue here occurred in Japan. However, this unlawful activity is not wholly extraterritorial. Letters requesting and ratifying the threats by the Japanese union were sent from the United States, and the intent and effect of the overseas pressure was to effect a secondary boycott in the United States. It is long-settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory.⁷ The courts have confirmed that the Sherman Act,⁸ the Commodity Exchange Act,⁹ and the Securities and Exchange Act¹⁰ reach conduct occurring outside the United States which causes foreseeable and substantial effects within the United States.¹¹ Accordingly, where the object of the unlawful threats is to gain an advantage in a domestic labor by effecting a secondary boycott in the United States, the fact that the principal threats were made by Japanese unions in Japan is of little jurisdictional significance. Legislation to protect domestic economic interests can legitimately reach

foreign crews employed under foreign articles); *American Radio Assn. v. Mobile S.S. Assn., Inc.*, 419 U.S. 215 (1974) (picketing by an American union to protest substandard wages paid to foreign crews employed under foreign articles). The conduct at issue in these cases was within the geographic reach of American law, but the Court held that the Act did not apply to the internal management and operation of foreign vessels.

⁷ See *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

⁸ See *In re Insurance Antitrust Litigation*, 938 F.2d 919, 931-934 (9th Cir. 1991), cert. denied sub nom. *UnionAmerica Insurance Co. v. California*, 509 U.S. 921 (1993).

⁹ See *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir. 1984), cert. denied 469 U.S. 871 (1984).

¹⁰ See *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir. 1991), cert. denied 502 U.S. 1005 (1991).

¹¹ The territorial effects doctrine is derived from Sec. 18 of the Restatement (Second) of Foreign Relations Law of the United States (1965). See *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), rev'd. on other grounds 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied sub nom. *Manley v. Schoenbaum*, 395 U.S. 906 (1969). The territorial effects doctrine is not an extraterritorial assertion of jurisdiction. Jurisdiction only exists when significant effects were intended within the prescribing jurisdiction and when there is personal jurisdiction or "jurisdiction to adjudicate." In the instant case, it is undisputed that an object of the Respondent's conduct was to affect a primary dispute with Coastal and Port Canaveral Stevedoring, that the Japanese unions' threats to refuse to unload fruit constituted coercive economic pressure on neutral employers within the United States, and that the Board is acting against a domestic labor organization subject to regulation under the Act.

⁵ Sec. 10(a) of the Act empowers the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. §160(a). The Act defines "commerce" as "trade, traffic, commerce, transportation or communication . . . between any foreign country and any State." 29 U.S.C. §152(6). The Act defines "affecting commerce" as "in commerce, or burdening or obstructing commerce." 29 U.S.C. §152(7).

⁶ *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957) (picketing by an American union to support striking foreign crews employed under foreign articles); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (Board ordered election involving foreign crews of foreign-flag ships); *Windward Shipping (London) Ltd. v. American Radio Assn.*, 415 U.S. 104 (1974) (picketing by an American union to protest substandard wages paid to

conduct occurring outside the United States intended to damage the protected interests within the United States. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

There can be no doubt that Section 8(b)(4) was intended to limit the scope of primary labor disputes and protect the "helpless victims of quarrels that do not concern them at all." H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947). Section 8(b)(4)(ii) of the Act forbids a union to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" with an object of "(B) forcing or requiring any person to . . . cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). Section 8(b)(4) embodies 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 pressure in controversies not their own." *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). The Supreme Court has recognized that Section 8(b)(4) "was drafted broadly to protect neutral parties"; that Congress "intended its prohibition to reach broadly"; and that it is a "statutory provision purposefully drafted in broadest terms." *Longshoremen ILA v. Allied International, Inc.*, 456 U.S. 212, 225 (1982).

In this case, the Respondent's primary dispute is with Coastal and Canaveral Stevedoring and the parties agree that the importers, exporters, and shipping companies contacted by the Japanese unions were neutral to that primary labor dispute. In early December 1990, Japanese importers such as Japan Produce Corp. informed various U.S. exporters, such as Gulf Stream Citrus Sales, that their ships would be loaded at Tampa instead of Port Canaveral. Further, all citrus shipments from Florida to Japan during the 1990-1991 export season were shipped through the port of Tampa where they were loaded by stevedores represented by the Respondent. Accordingly, it is clear that the threats of the Japanese unions in furtherance of the Respondent's primary labor dispute brought direct economic pressure on admittedly neutral parties and resulted in economic harm. Thus, the conduct alleged in this case is pre-

cisely the type of conduct Congress intended the Act to regulate.

The Board's assertion of jurisdiction poses no threat of interference with comity among nations and International trade. The instant case involves American neutral employers directly and adversely affected by purely secondary conduct violative of Section 8(b)(4). The Board has not and does not now seek jurisdiction over the Japanese unions involved in the secondary boycott. The possibility of interference with labor laws of Japan or the employment conditions of Japanese employees is further diminished by the absence of a statutory prohibition on secondary boycotts in Japan. Japan's Trade Union Law retains the Wagner Act's condemnation of illegal conduct by employers but lacks the Taft-Hartley Amendments' condemnation of similar activity by unions.¹² Accordingly, because the interests protected by the presumption against extraterritorial application are not jeopardized, the Board's action cannot be viewed as an inappropriate extraterritorial application of the Act. In the instant case, while the threats were made in Japan, it is undisputed that those threats were solicited from the United States by the Respondent, an American union, with the object of forcing neutrals to cease doing business with Coastal, Canaveral, and other nonunion stevedoring companies and to alter their business relationships concerning the shipment of citrus fruit from Fort Pierce and Port Canaveral, Florida.

In sum, I find that the Japanese unions acted as the agents of the Respondent when it made threats to neutral persons involved in the Florida-Japan citrus trade, and that this conduct is within the jurisdiction of the Board. I also believe that these findings are well within the parameters of the court's remand. Accordingly, I would find that the Respondent violated Section 8(b)(4)(ii)(B) as alleged.

¹² While at the time of the enactment of the Trade Union Law, the Taft-Hartley amendments had been law for 2 years, restraints similar to those accepted in the United States were ruled out by the protections afforded unions by art. 28 of the Japanese constitution. See W. B. Gould, *Japan's Reshaping of American Labor Law*, p. 40, MIT Press (1984).