

# ENFORCING EUROPEAN CORPORATE COMMITMENTS TO FREEDOM OF ASSOCIATION BY LEGAL AND INDUSTRIAL ACTION IN THE UNITED STATES: ENFORCEMENT BY INDUSTRIAL ACTION

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## I. INTRODUCTION

Many European multinational corporations embrace the Universal Declaration of Human Rights and United Nations human rights covenants. They declare support for declarations and conventions of the International Labor Organization (ILO), industrial relations guidelines of the Organization for Economic Cooperation and Development, principles of the United Nations Global Compact, the Charter of Fundamental Rights of the European Union, and other international labor rights documents.

In similar measure, many European firms active on a global scale adopt corporate social responsibility principles, policies, programs, and codes of conduct on workers' rights. They join Corporate Social Responsibility (CSR) Europe, the Global Reporting Initiative, the European Business Ethics Network, the Caux Roundtable, the Consumer Goods Forum, the World Business Council for Sustainable Development, and other European CSR bodies. They deal forthrightly with workers' representatives in European trade unions and works councils, often celebrating the "social dialogue" that marks labor relations in Europe.

In all these instruments and settings, workers' freedom of association – the right to organize trade unions and to bargain collectively – is a centerpiece of human rights and corporate social responsibility pledges. European companies appear to hold a deep commitment to workers' human rights through their publicly declared statements and promises.

But what happens when these companies set up shop in the United States, where the law is less protective of workers' freedom of association?

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In some cases, European companies in the United States act directly contrary to ILO conventions and other international instruments, adopting practices common in the United States but anathema in Europe. In other cases they engage in threats and coercion that violate U.S. labor law as well as international standards.<sup>1</sup>

Some provisions of U.S. labor law violate international human rights standards on their face. For example, U.S. law allows employers to permanently replace workers who exercise the right to strike over economic issues, such as wages and benefits. U.S. law also allows employers to mount one-sided aggressive workplace pressure campaigns against workers' organizing efforts, marked by mandatory "captive-audience" meetings and one-on-one supervisor-employee meetings scripted by anti-union consultants, without comparable opportunities at the workplace for employees to hear from union representatives or for pro-union workers to convey their views to fellow workers.

Contrary to international standards, U.S. law excludes millions of workers from labor law protection: farm workers, household domestic workers, low-level supervisors, so-called "independent contractors" who are actually dependent on a single employer for their livelihood, and many more. The ILO's Committee on Freedom of Association has found further violations in weak and unavailable remedies for workers and unbalanced remedies favoring employers in the U.S. labor law system.<sup>2</sup>

Other U.S. legal provisions comply on their face with international standards but fail in application. For example, it is unlawful to threaten or to discharge workers covered by labor laws for trying to form a union. It is unlawful to engage in "bad faith" collective bargaining. But as noted above, these provisions are not adequately enforced in a remedial scheme marked by delays and slap-on-the-wrist penalties that fail to deter or punish violators, another breach of international labor rights.

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1. See HUMAN RIGHTS WATCH, *A STRANGE CASE: VIOLATIONS OF WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES BY EUROPEAN MULTINATIONAL CORPORATIONS* (2010) [hereinafter *A STRANGE CASE*].

2. For ILO decisions finding U.S. labor law not in conformity with international standards, see ILO Committee on Freedom of Association, *Complaint Against the United States*, Case No. 1543, Report No. 278 (1991) (permanent striker replacement); ILO Committee on Freedom of Association, *Complaint Against the United States*, Case No. 1523, Report No. 284 (1992) (union representatives' access to the workplace; secondary boycott strictures); ILO Committee on Freedom of Association, *Complaint Against the United States*, Case No. 2227, Report No. 332 (2003) (denial of remedies to immigrant workers); ILO Committee on Freedom of Association *Complaint Against the United States* (Case No. 2460), Report No. 344 (2007) (North Carolina public employee bargaining rights); ILO Committee on Freedom of Association, *Complaint Against the United States*, Case No. 2524, Report No. 349 (2008) (exclusion of low-level supervisors); ILO Committee on Freedom of Association, *Complaint Against the United States*, Case No. 2741, Report No. 362 (2011) (New York State public employees' right to strike).

In large part as a result of the weaknesses in U.S. law and practice, many employers respond to workers' organizing and bargaining efforts with aggressive, even ruthless campaigns of interference, intimidation, and coercion to break them. Such campaigns are commonplace among U.S. companies that operate in a corporate culture imbued with strong anti-union beliefs and practices. Such practices violate international standards and often even U.S. law itself. Unfortunately, otherwise respected European multinational firms are joining their ranks.

Nothing in U.S. labor law requires European (or any other) employers to aggressively campaign against workers' organizing efforts, break strikes with permanent replacements, or otherwise fail to meet international labor standards and their own proclaimed values and codes of behavior. But some of the largest and best known European employers in the United States seem to forget their sensitivity to social responsibility concerns and their much-publicized commitments to workers' rights. They break with home-based policies that are relatively respectful of workers' organizing efforts and collective bargaining and that view "social dialogue" as a core element of industrial relations. Instead, they exploit the loopholes and shortcomings in U.S. labor law contrary to international human rights standards. Sometimes they go even farther, committing unfair labor practices in violation of elements of U.S. law that are in line with international standards.

Other articles in this volume examine whether European companies' commitments to freedom of association can be enforced in U.S. courts using common law contract theories. For example, a cause of action might be found in companies' promises of respect for workers' organizing and bargaining rights if they constitute an implicit contract or an implied covenant of good faith and fair dealing. Another discussion is whether international framework agreements (IFAs) can be treated as enforceable collective contracts. Our presentation approaches the "enforcement" question from a different angle: whether trade unions can enforce European companies' international commitments through industrial action.

We believe it is important to discuss industrial action as one way to enforce commitments to abide by international labor standards in part because of the challenges of "hard" law enforcement, not only in an international context but also in the enforcement of domestic labor policies. Because of the challenges presented by "hard" enforcement of labor policy in both the domestic and international context, it is important to examine the dynamics that initially motivate the adoption of IFAs and other commitments to abide by international labor standards as an important aspect of their enforcement.

What unions and other advocates do to encourage enterprises to enter into these agreements in the first place should likewise be an important means of motivating them to carry through with the enforcement of such agreements. Agreements to abide by international codes of conduct and to enter into framework agreements arise at least in part out of an understanding that it is a proper and necessary way to do business. The challenge is to carry forward this understanding into effective enforcement of the agreements. Industrial action plays a part in the adoption of such codes and agreements, and in this Article we examine the movement from adoption to enforcement.

Part II lays the groundwork for case studies to follow, trying to define what we mean by "industrial action" for purposes of this discussion. Part III presents case studies that involve classic forms of industrial action such as strikes, stoppages, and boycotts that might be applied when European companies violate international standards in the United States.

Part IV applies a broader definition of "industrial action" to cross-border union campaigns called variously strategic campaigns, corporate campaigns, comprehensive campaigns, and the like, suggesting that these create models for enforcing European companies' commitments to freedom of association. Part V offers concluding observations and analysis and questions for further study.

## II. A CAUTIONARY START

From a technical legal perspective, not much new can be added to what we already know about enforcement of European corporate commitments to freedom of association in the United States by means of industrial action (as distinct from enforcing a contractual obligation as discussed earlier in this session). Here we take "industrial action" in the classic industrial relations sense: strikes, stoppages, picketing, boycotts, slowdowns, overtime bans, work-to-rule, and other forms of workers' withholding their labor to hamper management's business.

Any industrial action in the United States takes place within the four corners of the U.S. labor law system. It does not matter if the parent company is European, and it does not matter what commitments to freedom of association it has made. In many, even most cases, a firm's international commitments will not affect compliance or noncompliance with U.S. law when cases involve issues of:

- Protected versus unprotected activity;
- Section 8(a)(1) prohibited conduct versus § 8(c) permitted conduct;
- Majority status versus minority status;

- Mandatory versus permissive subjects of bargaining;
- Economic strikes versus unfair labor practice strikes;
- Temporary versus permanent replacements;
- Primary versus secondary actions; and,
- Inducing/encouraging/forcing/requiring versus publicity-other-than-picketing/truthful advising.

Let us take a hypothetical company based in Europe called EuroCo Ltd. We go to its website and find a declaration that says: “In keeping with our commitment to freedom of association and social dialogue under ILO principles, we pledge to honor ILO core labor standards and core conventions, bargain collectively with trade unions chosen by our employees, to engage in information-sharing and consultation with our works councils, and to welcome two employee representatives onto our board of directors.”

EuroCo Ltd. bargains with three unions, each representing one-third of its hourly employees. The company meets quarterly with its Works Council to provide information and to consult on the state of the business. One trade unionist and one representative chosen by non-union white-collar staff sit on the board of directors.

Now let us assume that EuroCo Ltd. has a U.S. subsidiary called EuroCoUSA and consider these questions:

- If EuroCoUSA is unorganized, could a union that signs up one-third of the facility’s workers compel management to bargain “with a union chosen by your employees”?
- If management says “No,” would it be lawful for the union to picket the workplace demanding recognition?
- If a union did represent EuroCoUSA employees, could a dissident minority faction that secedes from the union compel management to bargain with it, again as a “trade union chosen by your employees?”
- Would it be lawful for the union to strike over a demand for quarterly information sharing and consultations with management on the state of the business?
- Would it be lawful for it to strike to gain a seat on the board of directors?
- If the union strikes over strictly economic issues and EuroCoUSA hires permanent striker replacement, could the union claim it is an unfair labor practice strike because permanent replacements violate ILO standards?
- Would it be lawful for the union to set up pickets at EuroCoUSA’s suppliers or customers to halt deliveries because management

violated its European parent company's commitments on freedom of association by hiring permanent replacements?

- In sum, could the union take industrial action to enforce EuroCo Ltd.'s commitments to international labor standards on freedom of association?

As we know, U.S. labor law disputes are normally decided on a case-by-case basis taking into account unique facts and circumstances. We, however, do not think we go too far out onto a limb by suggesting that the answers to the above questions are "No." Unions need majority status to compel management to bargain.<sup>3</sup> Section 8(b)(7) of the National Labor Relations Act (NLRA) prohibits organizational picketing. National Labor Relations Board (NLRB) decisions make it virtually impossible for subgroups of a certified bargaining unit to carve themselves away into a new bargaining unit. A union is entitled to information needed for bargaining or to process grievances, but gaining information about the general state of the business and future plans is not a mandatory subject of bargaining, nor is gaining a seat on the board of directors.

The permanent replacement doctrine in U.S. labor law precludes any claim by an American union that its economic strike is converted to an unfair labor practice strike because management is violating international norms. Perhaps most forcefully, harsh strictures against secondary boycotts prohibit what would otherwise be a powerful form of industrial action to enforce international commitments.<sup>4</sup>

The striker replacement issue provides a stark example. Many European companies adopt principles, charters, codes, policies, and other statements proclaiming their commitment to the ILO core labor standards. Sometimes they do so directly, and sometimes they incorporate ILO core standards by reference to the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, the U.N. Global Compact, codes of conduct to which companies subscribe, and other instruments that embrace the ILO core.

Freedom of association heads the list of ILO core labor standards. The ILO's Committee on Freedom of Association has found that U.S. labor

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3. Charles J. Morris has made a powerful argument to the contrary, but his position has not been adopted by U.S. labor law authorities. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2004),

4. An important exception can be found in the Railway Labor Act, which does not contain the prohibition on secondary action. This opens the field to such action in the railroad and airline industries. For treatment of the latter, see Stephen B. Moldof, *Union Responses to the Challenges of an Increasingly Globalized Economy*, 5 RICH. J. GLOBAL L. & BUS. 119 (2005) (discussing actions of pilots' unions at KLM, Delta, Air France, and Cathay Pacific; Prof. Moldof also discusses several of the same cases we recount here).

law's permanent striker replacement doctrine violates workers' freedom of association.<sup>5</sup> If EuroCo Ltd.'s freedom of association policy declaration says, "We honor the ILO core labor standard on freedom of association," its U.S. subsidiary, EuroCoUSA, should say: "We promise not to use permanent replacements for economic strikers because of EuroCo's commitment to ILO core labor standards."

We are likely to wait in vain for such a statement. In case studies of real, not hypothetical, European companies in the 2010 Human Rights Watch report *A Strange Case: Violations of Workers' Rights in the United States by European Multinational Corporations*, U.S. managers hauled employees into captive audience meetings and told them, "If you vote for a union and the union pulls you out on strike for better wages and benefits, we can and we will hire permanent replacements to take your jobs, and you will remain on a waiting list to return only if and when a replacement vacates a position. Vote NO to avoid permanent replacement." In some instances, European companies went ahead and hired permanent replacements, contradicting their parent companies' commitments to international standards.

On these facts, a union has no basis for an unfair labor practice charge under U.S. labor law. Where European employers violated their international commitments but not U.S. law – such as threatening or using permanent replacements – they suffered no legal consequences.

Here are other examples drawn from the Human Rights Watch report of European companies' actions in the United States contrary to their international commitments:

- Robert Bosch declares its commitment to ILO standards on freedom of association, but in violation of those standards threatened to permanently replace workers who exercised the right to strike.
- Deutsche Telekom has a Social Charter based on ILO standards and the OECD Guidelines statements on freedom of association, but T-

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5. In a 1991 report on a complaint against the United States filed by the AFL-CIO on the permanent-replacement doctrine in U.S. law, the ILO Committee on Freedom of Association concluded:

The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests. The Committee considers that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally. The Committee considers that, if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights.

*See* Int'l Lab. Org., Comm. on Freedom Ass'n, Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Report No. 278, Case No. 1543, para. 92 (1991).

Mobile management spied on workers engaged in organizing and defined “employees engaging in group behavior” and “talking about rights” as dangerous activity to be immediately reported to management.

- Deutsche Post has a code of conduct based on the Universal Declaration of Human Rights, ILO conventions, and the UN Global Compact, but its DHL management threatened and discriminated against workers who sought to exercise the rights set forth in these instruments.
- Saint-Gobain proclaims “Principles of Conduct respecting the philosophy and spirit of the Global Compact,” but U.S. management refused to bargain with workers’ chosen union about key terms of employment.
- Sodexo says, “Since its creation, Sodexo has always recognized and respected trade unions,” but it threatened, interrogated, and fired workers who tried to form trade unions in the United States.
- Tesco says it “is committed to upholding basic Human Rights and supports in full the U.N. Universal Declaration of Human Rights and the International Labour Organisation Core Conventions,” but its U.S. Fresh & Easy management set a priority of “maintaining non-union status” and stifled workers’ organizational activity.
- Group4 Securicor holds up a “Business Ethics Policy” committed to the Universal Declaration of Human Rights, but Wackenhut management threatened, spied on, and fired workers exercising rights established in the UDHR.
- Kongsberg Automotive cites the U.N. Global Compact, ILO core labor standards, and OECD guidelines in its corporate social responsibility pledges, but U.S. management in Van Wert, Ohio, offensively locked out union members while negotiations were still ongoing and brought in replacement workers.
- Gamma Holding signed a code of conduct that embraces the right to organize under ILO Conventions 87 and 98, but its management at National Wire Fabric in Star City, Arkansas, hired permanent replacements, in contravention of ILO standards, to take the jobs of workers who exercised the right to strike.
- Siemens points to the U.N. Global Compact, the Universal Declaration of Human Rights, the ILO Tripartite Declaration, and the OECD Guidelines as the underpinnings of its corporate social responsibility program, but for years U.S. management in Monroe County, New York, unlawfully refused to bargain with workers.

So does this mean we have nothing to say about enforcing European corporate commitments to freedom of association by industrial action in the

United States? On the contrary. Part III discusses concrete cases that involved the threat or the exercise of industrial action to enforce workers' organizing and bargaining rights. Part IV offers a wider definition of "industrial action" going beyond classic tactics to include other forms of collective activity to enforce firms' international commitments.<sup>6</sup>

### III. THREE CASE STUDIES INVOLVING REAL "INDUSTRIAL ACTION"

Classical industrial action means strikes, work stoppages, boycotts, overtime bans, sickouts, "work-to-rule," and other collective steps to win workers' objectives by directly hampering the employer's business. Staying with our hypothetical EuroCoUSA facility, a perfect template would involve violations by U.S. management of EuroCo Ltd.'s workers' organizing and bargaining rights under international standards, but not under U.S. law, and workers respond with industrial actions in the United States and in Europe to enforce the company's commitments to freedom of association.

We are not aware of a case perfectly on point. But we can draw from a variety of cases to create a composite picture of industrial action that could be brought to bear on European companies' commitments to freedom of association. Most involve efforts by U.S. trade unionists reaching out to foreign counterparts to support American workers' organizing and bargaining efforts. Here are three such cases involving either the threat or the use of cross-border industrial action, including strikes and secondary boycotts, to support workers' organizing and bargaining efforts.<sup>7</sup>

#### A. *Trico Marine*

##### 1. Background

Headquartered in Houston, Texas with an operational base in Houma, Louisiana, Trico Marine Services provides services and supplies to oil rigs

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6. A linguistic note, "enforcement by industrial action" is not quite the right formulation. Labor law authorities enforce. Industrial action involves self-help efforts by workers and their unions *without* turning to the authorities or to courts for enforcement. We might better express what we discuss here as "persuasion" or "compulsion" by industrial action. To stay in step with the theme of the conference, we are going to continue using the term "enforce," understanding that we mean persuading or compelling (usually by pressure tactics) a European company to live up to its commitments to international standards on workers' freedom of association.

7. We focus on cases derived from labor disputes originating within the United States. Thus, we do not include international industrial action on behalf of British dock workers locked out by their employers in 1997, a case study treated magisterially by James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* (Joanne Conaghan et al. eds., 2002).

in the Gulf of Mexico. In 2000, a coalition of AFL-CIO maritime unions called Offshore Mariners United (OMU) launched an organizing campaign among Trico boat crewmembers.

Trico management responded with a typical U.S. style anti-union campaign, hiring consultants to script captive audience meetings and dismissing key leaders among employees. It involved dismissals of ship officers who qualified as supervisors, one of them (as alleged by the union) because he refused to oppose the workers' organizing efforts. No recourse could be had under the NLRA since these employees were excluded from protection of the Act.

The Company also denied requests by OMU representatives for access to the employer's premises to meet with workers. ILO standards insist that employers should provide access to union representatives so that workers can hear from them at the workplace (always in a manner not interfering with work). But U.S. labor law does not provide for access. The union had no basis for an unfair labor practice charge.

In addition to these workplace anti-union tactics, Trico management also joined the local Chamber of Commerce and other local businesses in creating an intensive community campaign against the OMU. Measures here included taking out newspaper and radio ads about "outsider" unionists threatening the well being of the local economy and pressuring (according to the union) or requesting (according to the Chamber) local businesses and homeowners to post anti-OMU posters prominently on their property.

## 2. International Reach

Trico Marine Services was not a just a local supplier to Gulf of Mexico rigs. Trico was (and is) a large multinational corporation with subsidiaries providing similar services for British and Norwegian oil rigs in the North Sea, Brazilian oil rigs in the Atlantic, and other offshore oil-drilling sites. In fact, a majority of the Company's revenues came from overseas operations, and full 40% came from its North Sea operations with Norway's oil company, Statoil.

Mindful of the Company's global reach, the OMU developed relations with trade union counterparts in countries where Trico had overseas operations. A delegation from the Norwegian oil workers union (NOPEF) visited Houma in 2001 and saw management's and the Chamber's anti-union campaign up close. They met with workers, who told them of management's anti-union meetings and propaganda, and toured the community where they saw the sea of anti-OMU posters. Local police

moonlighting as company guards chased the visitors away from work yard entrances.

Moved by their experience, NOPEF representatives promised to look for ways at home to support the organizing struggle in Louisiana (as we shall see in discussing the Coastal Stevedoring case below, it is important that the NOPEF group initiated this effort; there is nothing in the record suggesting that the OMU or the AFL-CIO importuned them to take action).

### 3. The Boycott Hammer

As it turned out, NOPEF had a hammer. While secondary boycotts are strictly prohibited under U.S. law, Norwegian law permits secondary boycotts. The law applies a “proportionality” test, and the union must seek preliminary review and approval by a Norwegian court to undertake a secondary boycott.

In 2001, NOPEF sought judicial permission under Norwegian law to boycott the North Sea operations. A key issue in the Norwegian case was whether U.S. labor law and practice conformed to ILO freedom of association norms. Under Norwegian law, the union’s boycott would be legal only if it could show systematic U.S. violations of ILO standards. NOPEF and Trico’s Norwegian counsel each called expert witnesses from the United States to testify whether U.S. law and practice violate ILO core standards on freedom of association. The Norwegian court’s finding that U.S. law failed to meet international standards would let the NOPEF boycott proceed.

Rather than us characterizing the case further, Trico’s CEO went to the heart of the matter in his plaintive testimony to a congressional committee:

For almost two and a half years Trico and its employees have been the subject of an intense and harassing corporate campaign to organize Trico’s mariners by a U.S. federation of maritime unions called The Offshore Mariners United, or OMU, which is supported by the AFL-CIO’s Center for Strategic Research, Department of Corporate Affairs.

Trico was chosen as the target company, I believe, because the OMU and its international allies had to focus their resources on one company and because of Trico’s status as a public corporation and its overseas operations – particularly in Norway. Public corporations and corporations with foreign subsidiaries are more susceptible to labor union pressures and harassment during disputes or organizing membership drives. . . .

On October 18, 2001, the Norwegian Oil and Petrochemical Workers Union, known as NOPEF, a large and powerful union which represents the dock and platform workers in the North Sea, filed a lawsuit under Norway’s boycott statute against Trico Supply. . . . NOPEF filed the suit

at the call of the largest federation of transportation unions in the world – the International Transport Workers Federation (ITF) – of which it is a member. The case is lodged in the small town of Volda, and a three week trial is scheduled to begin on November 4. NOPEF seeks court pre-approval of an announced boycott against Trico Supply's vessels operating in the North Sea. The only issue at trial in Norway will be Trico's conduct in the U.S. . . .

Secondary boycotts are illegal under the U.S. National Labor Relations Act, but may be legal in Norway if deemed fair and without a disproportionate impact. . . . NOPEF is asking the district court in Volda to rule that Trico's compliance with U.S. law – the National Labor Relations Act (NLRA) – does not offer a defense to the boycott since U.S. labor law does not adequately protect U.S. citizens. . . .

NOPEF is contending that the NLRA is defective by the standards of the International Labor Organization Conventions 87 and 98, unratified by the U.S., that deal with the right to organize and freedom of association. NOPEF also contends that U.S. labor law does not meet "European humanistic standards."

Following the trial, a ruling could be issued that U.S. labor law, the National Labor Relations Act, does not sufficiently protect its own citizens and that Trico's compliance with U.S. law offers no defense and that NOPEF's planned boycott against Trico's vessels in the North Sea is legitimate. I have been told that no court from a first world nation, or for that matter, any nation, has ever passed judgment on the legitimacy of U.S. labor law. Such a ruling would become precedent in Norway. Any U.S. company operating in Norway, but involved in a domestic or international labor dispute or membership drive, could be boycotted even when in compliance with U.S. labor law – without a predetermination trial.

Since the vast majority of U.S. corporations operating in the offshore oil and gas industry in both the Gulf of Mexico and in the North Sea are non-union in their U.S. Gulf operations, a successful boycott against Trico will likely spawn more boycotts against U.S. companies that operate in both locations.

Such a decision rejecting U.S. labor law could also impact U.S. corporations throughout the world. In addition to potential boycotts, the decision could be used by foreign companies against U.S. companies competing for business. It could be argued that a particular piece of foreign business should not be awarded to a U.S. company because U.S. law has been found not to protect U.S. citizens adequately by a competent European court.<sup>8</sup>

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8. See Testimony of Thomas E. Fairley, President & Chief Exec. Officer, Trico Marine Services, Inc., before the House Committee on Education and the Workforce, U.S. Congress, Oct. 8, 2002.

#### 4. Trico's NLRB Charge

Trico Marine filed an unfair labor practice charge against the OMU alleging an unlawful secondary boycott in violation of § 8(b)(4) of the Act. Trico built its argument on an agency theory, insisting that NOPEF was acting as an agent of the U.S. union in threatening a boycott. Therefore, the OMU could be held liable for the actions of its agent, violating the prohibition on secondary boycotts.

Citing precedent in the Coastal Stevedoring case (discussed below), the NLRB General Counsel's office dismissed the charge "because there is insufficient evidence of a joint venture or agency relationship between OMU and NOPEF."<sup>9</sup> The GC also noted that:

[T]here is no evidence here that NOPEF's threats were directed against persons "engaged in commerce" . . . none of the allegedly unlawful conduct was initiated in the United States by OMU, and there is no evidence that the Norwegian unions and alleged neutrals are engaged in trade with companies located in the United States. . . . Absent such evidence, NOPEF's boycott threat may well be lawful as not affecting interstate commerce, even if OMU were liable for it.<sup>10</sup>

#### 5. Headed for Trial – and Settlement

NOPEF overcame motions to dismiss and other procedural hurdles, and the case was set for trial at a district court. Without tracing all the arguments, the key issue was whether U.S. labor law complied with, or ran afoul of, ILO conventions 87 and 98 on freedom of association and protection of the right to organize. A court ruling that U.S. law violated international standards would allow NOPEF to launch a boycott of Trico operations in the North Sea.

A former Democratic member of the NLRB and another analyst, the author of the 2000 Human Rights Watch *Unfair Advantage* report, were set to serve as NOPEF's expert witnesses for the proposition that U.S. law violates international standards. Trico called a former Republican member of the NLRB and the chief U.S. employer representative to the ILO, Edward Potter, to serve as expert witnesses for the company.

Ironically, the union's main documentary submissions included, in addition to the Human Rights Watch *Unfair Advantage* report, Edward Potter's own 1984 book *Freedom of Association: The Right to Organize and Collective Bargaining—The Impact on U.S. Law and Practice of*

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9. See NLRB Division of Advice, Advice Memorandum, Offshore Mariners United (Trico Marine Operators, Inc.), Case 15-CC-832 (Sept. 27, 2001).

10. *Id.*

*Ratification of ILO Conventions No. 87 & No. 98.* In what is still “the Bible” for U.S. management on this issue, the author argued against U.S. ratification of the ILO’s freedom of association conventions. He detailed the many ways in which U.S. law is *not* in compliance with the conventions and concluded that ratification would amount to bypassing Congress to amend U.S. labor law.

On the day the trial opened, NOPEF and Trico Marine Services settled the case, calling off the clash of experts and lifting the boycott hammer. Under the settlement agreement, Trico promised to halt its use of what the unions called coercive tactics, such as threats and dismissals of organizing leaders. Although a boycott did not materialize, the Trico case signaled the potential impact of ILO core standards in the United States. As the company’s president noted, similar cases could arise in the future as trade unions increase their cross-border solidarity work.<sup>11</sup>

## 6. Applying an Analogy

What lessons can we draw from the Trico Marine case? It involved an U.S. company claiming to comply with U.S. law but arguably violating international standards, rather than a European company that had promised to adhere to international standards. But the case could have led to an international secondary boycott based on the company’s failure to meet international standards.

By analogy, many European companies that engage in U.S. management-style anti-union campaigns that arguably breach the companies’ international commitments could be vulnerable to international industrial action. And not just in Norway. Most European countries’ labor laws permit some form of secondary industrial action under varying conditions (often, as in Norway, involving a “proportionality” test).<sup>12</sup> In laymen’s terms, this means a court would not let a big strong union crush a small weak secondary employer, but might would let a big strong union take on a big strong secondary company whose actions affect the primary dispute.

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11. The organizing drive later ended without an election or other resolution. The unions say that the legacy of Trico’s earlier tactics had a continuing effect of undermining the organizing campaign. Trico says that employees were not interested in union representation.

12. See JURI AALTONEN, METALWORKERS FED. FIN., INTERNATIONAL SECONDARY INDUSTRIAL ACTION IN THE E.U. MEMBER STATES (1998) (on file with authors); STEFAN CLAUWAERT, INTERNATIONAL/ TRANSNATIONAL PRIMARY AND SECONDARY COLLECTIVE ACTION – AN OVERVIEW OF INTERNATIONAL, EUROPEAN AND NATIONAL LEGISLATION (2002).

B. *Dropping the boycott Hammer in Japan*

1. Background

The boycott hammer dropped in another case—the Coastal Stevedoring case, which involved a dispute between the ILA and two non-union stevedoring companies on the east coast of Florida in early 1990s.<sup>13</sup>

Japan was a major importer of Florida citrus fruits, and Japanese shipping companies were using the services of the two non-union stevedoring companies (Coastal and Canaveral) that were competing with ILA-organized stevedoring companies. The International Longshoremen's Association (ILA) the East Coast dockworkers' union, had made efforts to organize employees of Coastal and Canaveral, but management in both firms had resisted union organization with aggressive anti-union campaigns permitted under § 8(c) of the NLRA – arguably in violation of international standards, but legal under U.S. law.

The ILA reached out to the Japanese stevedoring unions for support. The facts about what the ILA did to enlist the support of the Japanese unions and the results of those efforts were not in dispute in the ensuing litigation. The stipulated facts were recounted in the D.C. Circuit court decision examined in more detail below:

Before the 1990–91 citrus export season, ILA representatives visited Japan and met with representatives of several Japanese unions to express concern that Japanese importers were using the services of nonunion stevedores at Port Canaveral and Fort Pierce, and to request assistance in their ongoing dispute with nonunion companies. In response, the Japanese unions asked numerous stevedoring companies, citrus importers, and shipping companies to ensure that all citrus fruit they imported from Florida was loaded by union workers. Further, the Japanese unions warned that they would refuse to unload any fruit loaded by nonunion workers.<sup>14</sup>

The court stated that in addition to their visit, an ILA official wrote a letter to officials of the Japanese stevedoring union reiterating their request for help. The letter stated, “Your further support in denying the unloading and landing of these picketed products in your country will also be most helpful to the members of the [ILA] and organized labor in the United States which supports our effort.”<sup>15</sup> In the ensuing litigation, a key question was whether such requests (and the positive response of Japanese union)

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13. The ultimate case name was *International Longshoremen's Ass'n, AFL-CIO v. N.L.R.B.*, 56 F.3d 205 (1995) and, on remand to the Board, *International Longshoremen's Association, AFL-CIO (Coastal Stevedoring Co.)*, 323 NLRB No. 178 (1997).

14. *AFL-CIO*, 56 F. 3d at 208.

15. *Id.*

created an agency relationship in which the actions of the Japanese union could be imputed to the ILA.

Japanese labor law does not contain the same strictures against secondary boycotts as does § 8(b)(4) of the NLRA.<sup>16</sup> Acting lawfully in Japan, the Japanese stevedoring union told Japanese importers that its members would not unload fruit from a boat loaded in nonunion Florida ports. A key Japanese importer directed that fruit be loaded by ILA-represented workers in union ports in Florida, and other importers followed suit. As a result, much of the fruit shipped to Japan during the 1990–1991 season was diverted from nonunion ports and loaded by union stevedoring companies instead.

The nonunion companies, Coastal and Canaveral, lost their Japanese business. Afterward, the ILA wrote a letter to the Japanese unions thanking them for their supportive action. This further implicated the agency issue: was the union's letter a "ratification" of an agency relationship?

## 2. The Secondary Boycott Charge

The targeted stevedoring companies filed charges with the NLRB alleging that the ILA's actions in reaching out to the Japanese unions violated the NLRA's prohibition against unlawful secondary pressure. The NLRB's General Counsel issued a complaint charging that the ILA's actions were a violation of § 8(b)(4)(ii)(B) of the Act. The General Counsel sought to prohibit the ILA from threatening various parties neutral to its labor dispute with Coastal and Canaveral. In this case, the actual threats were made by Japanese unions, but the General Counsel relied on an agency theory to impute the threats to the ILA.

If upheld, the General Counsel's complaint would require the union to repudiate its written solicitation of aid from the Japanese unions. After issuing the complaint, the General Counsel sought an injunction under § 10(l) of the Act, which requires such a step upon issuance of a complaint.

The U.S. District Court in Florida granted the injunction, and the 11th Circuit Court upheld the District Court's ruling.<sup>17</sup> The Circuit Court decision reasoned that under a "liberal application of agency concepts appropriate in the labor context, a contractual right to control and direct the performance of another is not required to impose responsibility under

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16. Oversimplifying—in the post-World War II occupation era Japan got the Wagner Act without the Taft-Hartley Act, in large part because U.S. unions, especially the United Auto Workers, acted as key labor advisors to the occupying U.S. administrators.

17. *Dowd v. Int'l Longshoremen's Ass'n*, 781 F. Supp. 1565 (M.D. Fla. 1991), *aff'd*, 975 F.2d 779 (11th Cir. 1992).

section 8(b) where an employer or union has encouraged or requested another to engage in unfair labor practices on its behalf.”<sup>18</sup>

The NLRB decided the underlying case in 1993 and held the ILA had violated § 8(b)(4)(ii)(B). The Board said that the ILA “acting through the Japanese Unions, threatened, coerced or restrained shipping agents, shipping companies, citrus exporters, citrus importers, the Canaveral Port Authority, and other persons engaged in commerce, who are neutral to the dispute between the Respondent and Canaveral and other nonunion stevedoring companies[.]”.<sup>19</sup>

### 3. Appeal and Reversal

Faced with substantial financial liability for losses suffered by the nonunion stevedoring companies, the ILA entered an appeal to the District of Columbia Circuit court. The union’s argument focused on the agency issue, stressing that it exercised no control over actions of its Japanese counterpart. Alongside the ILA’s argument, a labor rights NGO filed an amicus brief focusing on international labor standards. Here are some portions of the amicus brief:

The weight of international law on the issue of trade union solidarity appeals and action is more tolerant than the U.S. regime. The International Labor Organization (ILO) is the principal international body that treats these issues. It has developed a body of international labor law based on 75 years of institutional experience.

ILO Convention 87 expressly recognizes the international dimension of trade union activity, with a guarantee of unions’ right to join international organizations. The ILO’s Committee on Freedom of Association has stated:

In order to defend the interests of their members more effectively, workers’ and employers’ organizations should have the right to form federations and confederations of their own choosing, which should themselves enjoy the various rights accorded to first-level organizations, in particular as regards their freedom of operation, activities and programs. International solidarity of workers and employers also require that their national federations and confederations be able to group together and act freely at the international level.

Applying ILO principles, the NLRB should not penalize a U.S. union for exercising its right of freedom of association in requesting help from a Japanese union. . . .

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18. 975 F.2d at 785.

19. Int’l Longshoremen’s Ass’n, 313 N.L.R.B. 412, 418 (1993).

Regarding trade union sympathy appeals and action under Convention 87, the ILO is clear:

Sympathy strikes, which are recognized as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalisation of work centers. While pointing out that a number of distinctions need to be drawn here (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.), the Committee of Experts considers that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.

...

Congressman Hartley's 1947 House Report on the Labor Management Relations Act made clear Congress's concern about secondary boycotts: "Illegal boycotts take many forms . . . . The effects of boycotts upon business, and particularly upon small commercial enterprises in metropolitan centers, such as New York, Philadelphia, and Pittsburgh, have often been disastrous." Similarly, Congressman Landis, commenting on the secondary boycott provisions of what became the Taft-Hartley Act, noted: "As a result of these secondary boycotts many of *our* citizens have been deprived of the deliveries of milk, bread, meal, fruits vegetables, and essentials of life."

If the citizens of Tokyo, Osaka and Yokohama go without Florida grapefruit because of actions by Japanese dockworkers, that is a matter for Japanese labor law and the Japanese authorities to regulate.<sup>20</sup>

In a decision written by Judge Harry Edwards (a prominent labor law professor before ascending to the bench), the D.C. Circuit reversed the NLRB ruling. The court held that the NLRB's central conclusion in the case, finding the Japanese unions acting as agents of the ILA, could not be sustained. Instead, the court found the ILA had no actual or apparent authority or control over the Japanese unions and therefore the Japanese unions could not be seen as agents of the ILA. As Judge Edwards stated:

Here, the ILA exercised no control over the conduct of the Japanese unions. To the contrary, the ILA and the Japanese unions are completely independent entities, bound together only by the fact that both seek to further the goals of organized labor worldwide. We discern nothing in the law of agency to support a theory transforming one union into the agent of another based upon the spirit of labor solidarity alone.<sup>21</sup>

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20. See *Int'l Longshoremen's Ass'n v. N.L.R.B.*, Brief of Amicus Curiae International Labor Rights Education and Research Fund, February 10, 1995 (on file with authors).

21. 975 F.3d at 213 (Edwards, J.).

The D.C. circuit remanded the case to the NLRB for “for further proceedings consistent with this opinion.” The Board in turn held that the D.C. Circuit court opinion “precludes a finding that the Japanese unions were in any way an agent” of the ILA.<sup>22</sup>

The Edwards decision remains the law of the D.C. Circuit and the NLRB has not had a case before it with these issues since the Coastal Stevedoring case. The 11th Circuit decision upholding the issuance of an injunction, before the Board decided the underlying case, also not been challenged since it was issued.

#### 4. Applying the Analogy

Under the reasoning of the D.C. Circuit Court decision, U.S. unions are not limited by the NLRA from appealing to foreign unions to undertake secondary industrial action in their own countries – action that likely would be unlawful secondary activity were it to occur in the United States. Applying this reasoning when European companies resist union organizing in the United States, or hire permanent striker replacements, or otherwise act lawfully under U.S. labor law but contrary to international standards, U.S. unions could ask European unions to take industrial action against them (or indeed when companies violate U.S. law).

The European trade unions would be bound by their countries’ laws on secondary action. As noted above European secondary boycotts laws are generally more accommodating than the NLRA’s § 8(b)(4), though they still have limitations – most commonly, a proportionality test, and in Norway, a requirement for preapproval by a court of boycott action. Under the D.C. Circuit’s Coastal Stevedoring decision, the U.S. unions would not face secondary boycott liability at home for European labor unions’ actions in their home.

#### C. *The 1997 Teamsters Strike at UPS*

International staffers with the International Brotherhood of Teamsters (IBT) and the International Transport Federation organized secondary action in Europe and other countries in the union’s 1997 strike against UPS. It was mostly symbolic action such as leafleting and rallies without work interference. But some forms of genuine industrial action took place.

The Teamsters represented 185,000 UPS workers in the United States who struck in the summer of 1997. In addition to normal bargaining

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22. Int’s Longshoremen’s Ass’n, AFL-CIO, 323 N.L.R.B. 1029, 1031 (1997).

concerns over salaries and benefits, the union was especially concerned about growing use of part-time workers with no benefits. A key union demand on management was movement of thousands of part-timers to full-time employment.

A year before the strike started, Teamsters international affairs staffers began laying a foundation for cross-border action. The London-based International Transport Federation (ITF), one of the global union federations related to the then-International Confederation of Free Trade Unions (ICFTU, now the International Trade Union Confederation (ITUC)), formed a World Council of UPS unions, chaired by a Teamster director. The Council identified UPS air hubs and distribution centers throughout Europe and in many other countries, and planned a World Action Day for May 22, 1997 – just before negotiations opened between the IBT and UPS.

The ITF's World Council claimed 150 World Action Day job actions or demonstrations at UPS sites around the world. They mostly involved leafleting and rallying without extending to work stoppages, but at some locations in Spain and Italy, the actions turned into half-day stoppages.

World Action Day was a dress rehearsal for what followed when the Teamsters' strike actually got underway. In England, workers at a newly organized UPS distribution center staged a "sick-out" in support of UPS strikers. In France, Germany and Holland, UPS unions took strike votes and were preparing to strike on August 21 when IBT and company negotiators settled the conflict on August 19.<sup>23</sup>

Again, we offer this case as an imperfect analogy suggesting what might be possible in the industrial action arena. UPS is a U.S. company, not a European company. Workers struck for economic and job security goals. As an "economic strike" under U.S. labor law, it did not involve management practices that could implicate international standards on freedom of association. Nor had UPS at that point made any commitments invoking international standards. Still, the solidarity actions by European and other foreign unions reflect a collective cross-border response that could be brought to bear on a European company violating workers' rights in the United States today.

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23. For a fuller account, see Andrew Banks & John Russo, *The Development of International Campaign-Based Network Structures: A Case Study of the IBT and ITF World Council of UPS Unions*, 20 COMP. LAB. L. & POL'Y J. 453 (1999). For an employer-side view of corporate campaigns, see JAROL B. MANHEIM, *THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATTACK ON THE CORPORATION* (2000).

#### IV. EXPANDING THE DEFINITION: STRATEGIC CAMPAIGNS AS INDUSTRIAL ACTION

A definition of “industrial action” going beyond classic forms such as strikes, boycotts, sickouts, overtime bans, work-to-rule, etc. opens the field to examination of other collective action strategies. Going under various names that include “corporate campaign,” “comprehensive campaign,” and “strategic campaign,” one such strategy involves trade unions’ efforts to build alliances with not only trade union counterparts in other countries, but also with friendly nonlabor entities such as churches, human rights and civil rights groups, community organizations, and others. Such labor-community alliances then bring pressure to bear on a targeted firm at any points of perceived vulnerability.

Advocates might take aim at environmental violations, safety violations, misclassification of employees as independent contractors and other forms of “wage theft,” corporate misgovernance, management self-enrichment, board of directors’ malfeasance, questionable financial practices, alleged use of “sweatshop labor” abroad, and other causes for criticism besides anti-union practices. Many unions have built “strategic research” departments to ferret out such information, and then use it to launch “naming and shaming” campaigns of public exposure. In some cases, where companies depend on public authorities for licensing or contracting approvals, labor advocates challenge their applications or bids based on the company’s documented bad behavior in other areas.

In recent year, unions have highlighted the potential risk to shareholders of badly behaving companies. Many unions have created “capital strategies” departments to analyze companies’ operations and finances and to work with pension fund and socially responsible investment fund administrators on shareholder proposals and shareholder actions at companies’ annual meetings.

In many such campaigns, the U.S. practices of European companies come under scrutiny. In cases examined below, cross-border collaboration among trade unions did not take the form of classic industrial actions like strikes and secondary boycotts. But they did involve collective action and support measures that got results.

##### *A. First Student*

The Teamsters’ First Student organizing campaign is an example of an American union benefiting from a corporate responsibility code adopted by a parent company in Europe. Working closely with the European trade union that represented the parent company’s workforce at home, the

Teamsters used the firm's own proclaimed corporate responsibility statements to achieve an effective neutrality agreement that led to substantial union organizing gains.

In 2004 the Teamsters and the Service Employees International Union (SEIU)<sup>24</sup> launched a nationwide campaign to organize the school bus drivers employed by First Student, the largest operator of privately contracted school bus services in the United States with more than 60,000 U.S. employees. First Student was the U.S. subsidiary of First Group, Ltd., the United Kingdom's largest rail and bus transportation company.

Based in Aberdeen, Scotland, First Group's domestic workforce was represented by the Transport and General Workers Union (TGWU). Under pressure from the TGWU, First Group had adopted a corporate social responsibility policy that referenced international human and labor rights. Top company management made declarations at Annual General Meetings (AGMs – annual shareholders' meetings) pledging full support for ILO core labor standards and ILO conventions on freedom of association.

In the United States, however, First Student management failed to apply these principles. Instead, they launched aggressive, threat-filled anti-union campaigns wherever workers tried to organize, contrary to international standards and to U.K. management policy (and often in violation of the NLRA).

A key part of the Teamster campaign to organize the bus drivers at First Student was to convince the parent company to honor its corporate responsibility policy in the United States. Working closely with the TGWU, the Teamsters engaged in an extensive campaign that included meetings, public forums, and other activities involving financial backers of the company, members of Parliament and others. The activities took place in both the United States and England and helped to focus attention on problems with Student First's operations in the United States, including management's failure to live up to the company's corporate responsibility policy.

In an initial response to the campaign, First Group management promised to remain neutral in union organizing campaigns. When U.S. management ignored the promised neutrality pledge, the Teamsters sponsored reports by academics documenting the aggressive anti-union campaign being waged at First Student facilities across the country, in clear violation of the neutrality pledge and in violation of international human rights standards.

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24. By mutual and amicable agreement with the Teamsters, the SEIU decided not to pursue organizing school bus drivers, so the Teamsters carried the campaign forward.

These reports and other concerns were publicized in England and presented at the annual stockholder meeting of the parent company in Scotland by the Teamsters and the TGWU.<sup>25</sup> Throughout the multiyear campaign, the TGWU worked closely with the Teamsters in organizing and promoting a wide range of activities, including initiating a parliamentary inquiry into First Student's behavior in the United States.

Responding to these forms of industrial action in the broad sense we are using it here, First Student adopted a strong neutrality policy with an effective enforcement mechanism in 2008. Since then, more than 20,000 bus drivers in First Student locations around the United States have succeeded in forming unions (most with the Teamsters, though the policy applies across-the-board and has benefited workers who joined other unions, too). In 2011, First Student and the Teamsters reached a national "master agreement" for IBT-represented bargaining units.<sup>26</sup>

## B. Using the OECD Guidelines: the Brylane Case

### 1. Background

U.S. unions have often turned to the OECD and its *Guidelines for Multinational Enterprises* in labor disputes with European companies in the United States. Here we recount just one such case, showing how unions can achieve their goals by creative use of such international mechanisms. In an expanded version of this Article to follow, we may add other OECD cases with other interesting and instructive features.

#### a. The OECD

Like most international bodies, the OECD lacks real enforcement power. But it provides a "soft law" forum in which corporations can be held accountable for violating workers' rights.

The OECD began as the "rich man's club" among international organizations in 1961. For a quarter-century, membership was limited to the United States and Canada, wealthy Western European countries, and

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25. In one dramatic exchange at the 2007 AGM, First Group's chairman said he was advised by U.S. managers that the company had settled most unfair labor practice complaints issued by the General Counsel of the NLRB with a "non-admission clause," meaning that critics could not impute unlawful conduct to the company. At this point a former General Counsel of the NLRB, accompanying the trade unionists' delegation, explained the process for finding "merit" in an unfair labor practice charge and how issuance of a complaint *does* imply unlawful conduct, notwithstanding a later settlement.

26. See Ryan Gray, *Teamsters, First Student Sign "Historic Agreement" for School Bus Driver Labor*, SCH. TRANSP. NEWS, June 6, 2011, <http://www.stnonline.com/home/latest-news/3417-teamsters-first-student-sign-historic-agreement-for-school-bus-driver-labor>.

Japan, Australia, and New Zealand. Since then Mexico, Korea, and Turkey became OECD members, as did E.U. member states. Later some of the most advanced “countries in transition” from the socialist bloc – the Czech and Slovak Republics, Poland, and Hungary, gained OECD membership.

Besides its now thirty member countries, the OECD maintains formal “partnerships” with dozens of other nations. Among these nonmember partners, eleven countries also have signed on to the *Guidelines for Multinational Enterprises*. They are Argentina, Brazil, Chile, Estonia, Egypt, Israel, Latvia, Lithuania, Peru, Romania, and Slovenia.

The OECD is a coordinating “think tank” for member countries.<sup>27</sup> A large professional staff at OECD headquarters in Paris collects and analyzes data to produce comparative research reports and policy recommendations. It focuses on economic policy, but with a wide definition of economics. Besides economic policy, OECD departments also treat education, environment, labor and employment, science and technology, agriculture, finance and tax policy, and other fields.

*b. TUAC, BIAC, and the NGO Community*

Organized labor and employer groups have formal, permanent roles in official OECD advisory groups: the Trade Union Advisory Committee (TUAC) for labor and the Business and Industry Advisory Committee (BIAC) for employers. In the United States, the AFL-CIO and the U.S. Council for International Business play key roles in these two advisory committees.

For decades the TUAC and BIAC were the only nongovernmental groups allowed to participate in OECD affairs. They still maintain this official privilege, but in recent years the OECD has also opened dialogue with environmentalists, human rights advocates, sustainable development activists, global trade and finance watchdog groups, and other civil society organizations in an annual OECD Forum.

The opening to civil society was a hard win. Pressure from activist groups, especially in a successful 1997–1998 campaign to kill the OECD’s proposed Multilateral Agreement on Investment (MAI), forced the organization to come out of its Paris-based shell and engage civil society.<sup>28</sup>

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27. See James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS. 189 (2005). A former OECD official, Salzman describes it as “a management consulting firm for governments.” *Id.* at 191.

28. See *id.* at 196–201 (calling the anti-MAI campaign “a watershed experience for the OECD”). The MAI would have codified among OECD countries NAFTA-style investor-state rules allowing international investors to sue governments for actions that lowered the value of their investments. For a

c. *The OECD Guidelines for Multinational Enterprises*

The OECD first adopted its *Guidelines for Multinational Enterprises* in 1976 and last revised the Guidelines in May 2011.<sup>29</sup> A mix of events in the 1970s prompted the OECD to create the Guidelines:

- Revelations in 1975 Senate hearings of American-based ITT Corp.'s payments to coup plotters in Chile (leading to the Pinochet military dictatorship) and other corporate skullduggery put pressure on the United States and other "home country" OECD governments to halt abuses by their multinational firms in "host country" nations.<sup>30</sup>
- Trade unions were concerned about many multinational companies' interference with workers' organizing rights and practice of threatening "runaway shops" (as they were then called – the term "outsourcing" is more common now) to force down wages and working conditions in collective bargaining contexts.<sup>31</sup>
- The United Nations was considering proposals from developing countries to put new conditions on foreign direct investment in the name of a "new international economic order," an initiative fiercely resisted by OECD countries and multinational companies.<sup>32</sup>

The OECD saw a voluntary set of guidelines as a way to preempt stronger action. The OECD Guidelines call on foreign-investing companies to act responsibly in human rights, environment, consumer protection, science and technology, antitrust, taxation and employment, and industrial relations. While it is a classic "soft law" mechanism focusing on voluntary compliance rather than strict legal enforcement,<sup>33</sup> the Guidelines provide a valuable mechanism for promoting high standards.

discussion of the labor implications of the MAI, see Lance Compa, *The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection*, 31 CORNELL INT'L L.J. 683 (1998).

29. ORG. ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (1976) [hereinafter GUIDELINES], available at [http://www.oecd.org/document/39/0,3746,en\\_2649\\_34889\\_1933095\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/39/0,3746,en_2649_34889_1933095_1_1_1_1,00.html).

30. See *Multinational Corporations and United States Foreign Policy: Hearings before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations (the "Church Committee")*, 94th Cong., 1st sess., 381–86 (1975).

31. See Richard J. Barnett and Ronald E. Müller, *Global Reach: The Power of the Multinational Corporation* (Simon & Schuster, 1974).

32. See Adeoye Akinsanya & Arthur Davies, *The Third World Quest for a New International Economic Order: An Overview*, 33 INT'L & COMP. L.Q. 208 (1984).

33. The first clause in the Guidelines bluntly states: "The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable." GUIDELINES, *supra* note 29. For an extended discussion of the "soft law" concept, see Dinah L. Shelton, *Soft Law*, in HANDBOOK OF INTERNATIONAL LAW (David Armstrong ed., 2008).

*d. Guidelines on Employment and Industrial Relations*

Chapter V of the OECD Guidelines covers labor concerns. First, companies must honor the core labor standards of the International Labor Organization (ILO): respecting workers' organizing and bargaining rights, halting child labor and forced labor, and ensuring nondiscrimination in the workplace. Beyond the ILO core standards, the Guidelines call for information and consultation with workers' representatives, safe and healthy jobs, advance notice of workplace closures and efforts to mitigate their effects, refraining from outsourcing threats in contract negotiations, and other good faith measures in labor relations.

*e. The Guidelines' Complaint Mechanism and the Role of National Contact Points*

Each OECD country has a National Contact Point to receive and handle complaints under the Guidelines. The NCP is usually an office in a relevant department or ministry, sometimes part of an inter-agency setup. In the United States, the NCP is located an office housed in the State Department's Bureau of Economic, Energy and Business Affairs. The Bureau is part of the International Finance and Development unit in the State Department's Office of Investment Affairs.

The Guidelines' procedures give wide latitude to NCPs on how to handle complaints. NCPs "contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances." They "offer a forum for discussion . . . to deal with the issues raised." They "offer good offices to help the parties involved to resolve the issues."<sup>34</sup>

NCPs may "facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues." Finally, if the parties involved do not reach agreement, NCPs can "issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines."<sup>35</sup>

2. The Brylane Case

*a. The OECD Complaint*

A complaint under OECD guidelines can be relatively informal, compared with a complaint in civil litigation. But the complaint must still

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34. GUIDELINES, *supra* note 29.

35. *Id.*

be carefully crafted by counsel familiar with international labor law and OECD proceedings. This was the case in the trade union UNITE's campaign to help hundreds of warehouse employees at the U.S. subsidiary of a French multinational company after local managers launched a typical U.S. management-style antiunion campaign against workers' organizing efforts.

Brylane, Inc. is the U.S. distributor subsidiary of the French firm Pinault-Printemps-Redoute (PPR) (the parent company of Gucci and other famous brands as well). PPR issued declarations of support for ILO core labor standards and respect for workers' rights in its facilities around the world. But when employees at a Brylane warehouse in Indiana tried to form a union in the early 2000s, Brylane responded with a standard U.S. management-style anti-union campaign, bringing in consultants to advise them on captive-audience meetings, supervisor-employee one-on-one meetings, and other settings in which management smeared the union as scoundrels interested only in collecting dues, told workers that bargaining starts at zero and they could lose everything they had, that if the union pulls them out on strike the company will hire permanent replacements, and other exercises of "employer free speech" under the U.S. labor law system.

*b. The International Campaign*

UNITE filed a complaint to the U.S. NCP in July 2002 arguing that company tactics ran afoul of the OECD Guidelines. As with many "soft law" forums, the efficacy of the OECD procedure lies less in its legal formalities than in the opportunity it provides for concrete cross-border solidarity among trade unions and allied NGOs. The OECD Guidelines provided a triggering mechanism for a wider international campaign in the Brylane case.

On their side of the Atlantic, French and Dutch unions representing PPR workers in France and Holland filed counterpart complaints with the NCPs of those countries, driving home the point that the labor dispute in an Indiana warehouse was now an international affair. The chairman of the TUAC weighed in with a call for strong, prompt action by all governments to put a stop to the anti-union tactics of PPR's U.S. warehouse management.

At the same time as the NCP filings, the AFL-CIO Office of Investment organized a forum in New York for fifty European and U.S. stock analysts and institutional investors to present findings on serious weaknesses in PPR's corporate governance practices. The AFL-CIO presented a report by the French corporate responsibility research center

CFIE (*Centre Français d'Information sur les Entreprises*) criticizing PPR's governance, and also aired reports of illegal "sweatshop" conditions at factories producing apparel for PPR in India, Indonesia, Philippines, and Thailand.

The French and Dutch trade union actions did not stop with the OECD complaint. Along with NGO allies, they mounted demonstrations at PPR headquarters in Paris and at Gucci headquarters in Amsterdam protesting Brylane's interference with workers' organizing at the Indiana warehouse. At the same time, French union leaders met privately with top PPR management urging a solution to the crisis at its U.S. subsidiary.

### *c. The Victory*

The combined European pressure led to PPR's top management instructing U.S. managers to halt their anti-union campaign and agree to a "card check" procedure for establishing majority representation status. A solid majority of workers quickly chose union representation, and in May 2003, Brylane and UNITE reached agreement on a three-year contract providing a 9% wage increase, substantial benefits improvements, and a strong health and safety committee.

Union advance did not stop there. Based on the Brylane campaign, UNITE targeted Swedish retailing giant H&M for its next campaign to organize employees of a European multinational firm. Instead of filing an OECD complaint, though, UNITE's Swedish trade union allies met with management and laid on the table what a Brylane-style campaign would look like, starting with OECD complaint using the Swedish government's contact point. To avoid such a bitter exchange, H&M management agreed to respect its U.S. employees' organizing rights through a card-check/neutrality system similar to that agreed to by PPR. A majority of workers at an H&M distribution center quickly joined the union, gained recognition, and negotiated a favorable collective bargaining agreement.

## V. SOME CLOSING OBSERVATIONS

The First Student, Brylane and other strategic campaign cases summarized here provide examples of collective actions by U.S. and European unions to make Europe-based corporations live up to their commitments on freedom of association. With some variations, the same tactics can apply against any European company that resists workers' organizing and bargaining. Note, however, that these unions' campaigns fall short of "industrial action" in the classic sense that was contemplated in the Trico Marine, Coastal Stevedoring, and UPS cases. They involved

public statements, press conferences, rallies, leafleting, political pressure, shareholder actions, labor-management meetings, and other tactics, but never reached a point of primary or secondary strikes, picketing, slowdowns, or other methods of industrial action strictly defined.

### *A. Two Trade Union Cultures*

A not-so-secret tension between U.S. and European unions limits the possibility for outright industrial action against European firms. The tension arises from differing labor management cultures and histories. In Europe, “social dialogue” is the industrial relations watchword. Unions and management resolve their differences in “peak” bargaining contexts at a national level. The same peak bargaining model applies at a Europe-wide level in the case of E.U. directives susceptible to negotiations between the European Trade Union Confederation (ETUC) and BusinessEurope – formerly UNICE, the pan-European management group.

Many European unionists who see fruitful dialogue with top corporate officials think their U.S. counterparts go too far with what they see as the latter’s overly confrontational, company-bashing campaigns and expectations that European unions should be equally belligerent in attacking management. European union leaders will go so far as to distribute literature and put some members in front of corporate headquarters holding signs, but they see their real point of influence in private meetings with top company officials to persuade them to rein in their U.S. managers.<sup>36</sup>

Many U.S. trade unionists are skeptical about “social dialogue” in the United States. They would take the European model if they could get it. But they are more likely to believe that most management in U.S. firms, whether domestic or foreign-owned, detest unions and will stop at nothing to thwart them, making “dialogue” with management impossible. Instead, U.S. union activists feel compelled to be equally aggressive in standing up to management power. They fear that their European comrades are too invested in social dialogue and dangerously deluding themselves that management at home would not, given the chance, be as union busting as their U.S. managers.

U.S.-style anti-unionism is making inroads in Europe, more in the United Kingdom to date than on the continent. Several U.S. consultant groups that specialize in stifling workers’ organizing efforts have opened shop in Britain and introduced captive-audience meetings, one-on-one

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36. A contrary view might point to NOPEF’s willingness to boycott Trico Marine’s North Sea operations. But one plausible explanation for the case settling at the last hour was NOPEF’s ambivalence about the boycott.

supervisor-employee pressure tactics, scaremongering about strikes and the “dangers” of collective bargaining, and other hallmarks of U.S.-style unionbusting.<sup>37</sup> As this tendency expands, the two union styles might converge, with European trade unions becoming more aggressive in defending their interests. Such a convergence might bridge the cultural differences and put classic forms of industrial action back in the game in organizing and bargaining disputes involving European companies in the United States.

### *B. A Research and Strategy Agenda*

We have examined several case studies of efforts to compel companies doing business in the United States to live up to commitments to comply with international labor standards. We have categorized these approaches into either efforts to persuade foreign unions to engage in job actions designed to pressure targeted employers or strategic campaigns joined by foreign unions and others. While there is little in U.S. labor law to enforce such commitments (with the possible exception of contract or tort law), the case studies suggest U.S. unions have tried a variety of approaches to enforce international standards, with varying degrees of success.

There have been enough such efforts to begin to evaluate the results. How do the case studies we have examined as well as other examples help us answer the following questions:

- What were the most successful efforts and why did they succeed?
- What were some of the principal challenges faced?
- What kinds of campaigns, issues, and strategies seem to be the most/least promising?
- What are the circumstances or contexts that seem to be the most/least promising?
- What are the issues that are most likely to win international support?
- Which international standards, if implemented, are likely to make the most difference in domestic organizing campaigns?
- Whose support should U.S. unions seek to enlist?
- Counterpart unions abroad?
- Domestic and/or international trade union federations?
- Political structures/leaders (executive, legislative, administrative)?

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37. See generally JOHN LOGAN, U.S. ANTI-UNION CONSULTANTS: A THREAT TO THE RIGHTS OF BRITISH WORKERS (2010), [http://www.lotidningen.se/media/lotidningen/media/dokument/vt2008/logan\\_report.pdf](http://www.lotidningen.se/media/lotidningen/media/dokument/vt2008/logan_report.pdf).

- NGOs?
- Others?
- What are the best approaches to building such relationships and winning active/effective support?
- Does new technology (Internet, social media etc.) create opportunities for new forms of industrial “cyberactions”?<sup>38</sup>

What seems clear is that the implementation of international labor standards has been a factor in the success of several U.S. campaigns. It seems worth the effort to better understand their full potential and limitations.

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38. *See, e.g.*, ERIC LEE, *THE LABOUR MOVEMENT AND THE INTERNET: THE NEW INTERNATIONALISM* (1997) (groundbreaking work); *THE CYBERUNION HANDBOOK: TRANSFORMING LABOR THROUGH COMPUTER TECHNOLOGY* (Arthur B. Shostak, ed., 2002); *LABOURSTART*, [www.laborstart.org](http://www.laborstart.org) (last visited June 5, 2012); *CYBERUNIONS: BUILDING A FREE SOFTWARE LABOUR MOVEMENT*, <http://cyberunions.org> (last visited June 5, 2012).