

FREE BUSINESS MOVEMENT AND THE RIGHT TO STRIKE IN THE EUROPEAN COMMUNITY: TWO VIEWS

The European Court of Justice's decisions in *Laval*¹ and *Viking*² are generating a substantial body of commentary—as well they should.³ We are pleased to add the comments of Ronnie Eklund and Giovanni Orlandini to the mix.

Viking concerned a Finnish union's boycott of a ferry company that had re-registered a ship from the Finnish to the Estonian flag—it plied the waters between the two—to subject its crew to the lower labor standards that obtained in Estonia. *Laval* concerned industrial action by a Swedish union against an employer of Latvian workers seconded to work on a construction project in Sweden; they were governed by a Latvian collective agreement, but the Swedish union sought to bring them under the more generous terms its collective agreement. Both unions' actions were disallowed by the ECJ, whose reasoning is addressed in the papers that follow.

The North American readership of the *Journal* is accustomed to learning of developments in Continental law for practical reasons and for intellectual stimulation, but also for the possibility that some European law might be worthy of transplantation or adaptation. Here, it might be useful for our Continental readership to acquire a nodding acquaintance of how the United States, another federal system, deals with these issues.

The strike engaged in by the Swedish union (and possibly the Finnish one as well) would be conceived of in the United States as an “organizational” strike, *i.e.*, a strike to pressure an employer to recognize the striking union as its employees' representative and to make a collective agreement with it. This tactic is disallowed where

1. *Laval v. Svenska Byggnadsarbetareförbundet*, Case C-341/05 (Judgment 8 December 2007).

2. *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line*, Case C-438/05 (Judgment 11 December 2007).

3. Most recently by Paul Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 *INDUS. L.J.* 126 (2008).

there already is an incumbent union that represents these employees *under the U.S. collective bargaining law*.⁴

Inasmuch as the U.S. law of collective bargaining is federal, organizational strikes directed at employers doing business in one state whose employees are collectively represented under the laws of a sister state of the federal union are legally impossible. However, there is decisional law on the role of U.S. collective bargaining law—and so of potential representation by U.S. unions—regarding the crews of foreign ships, represented by foreign unions, who ply U.S. ports: that potential has been disallowed by the United States Supreme Court on the ground that even as Congress could extend federal jurisdiction that far, it hasn't.⁵

This body of law does not speak to non-transient workers, however. United States employees engaged to work in the United States by a foreign employer are covered by U.S. collective bargaining law⁶; but, beyond that, it is unclear whether American unions could demand to represent that employer's foreign workers employed in the United States when they are already represented by a foreign union. The leading decision on the former proposition is no help on the latter question for the American union sought only to represent the U.S. workers of the foreign enterprise; it declined to seek to represent those foreign nationals employed in the United States who were represented by a foreign union and governed by a collective agreement with it.⁷ Because federal law prohibits picketing to secure representation where there is an incumbent union duly recognized as a bargaining agent under U.S. law, a U.S. union conceivably could engage in recognitional picketing for foreign workers who are represented under foreign law; but that appears to be an open question.

However, even as a rival union may not picket to supplant one recognized under U.S. law and that has a current collective agreement with the targeted employer, the rival may engage in so-called "area standard" picketing, *i.e.*, picketing that truthfully advises the public that that collective agreement's provisions for compensation are below the standards the union has set in the local product or service

4. 29 U.S.C. § 158(b)(7)(A).

5. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957). Thus a U.S. union could not engage in an organizational strike against an Estonian vessel in a U.S. port whose crew was represented by an Estonian union.

6. *State Bank of India v. NLRB*, 808 F.3d 526 (7th Cir. 1986).

7. *Goethe House New York, German Cultural Center*, 288 NLRB 257 (1988), *election enjoined* 685 F. Supp. 427 (SDNY), *rev'd* 869 F.2d 75 (2d Cir.).

market. That picketing may proceed even if it causes economic harm to the targeted employer so long as there is no representational objective.⁸ It is a fine line. Even so, there would seem to be scant reason under U.S. law for “area standards” picketing of non-transient foreign workers working in the United States, but governed by a foreign collective agreement, to be disallowed.

The situation of Europe’s nationally-based unions vis-à-vis the mobility of undertakings—and workers—engenders analogous legal issues, but the approach taken by the ECJ differs from that in the United States for want of a community-wide legal regime for collective bargaining. Further, even as the U.S. law—prohibiting a demand to bargain for employees represented by another union, but allowing picketing to protest that union’s below standard wages and benefits—is not without conceptual (and practical) difficulty,⁹ U.S. law might be worth considering in terms of balancing the economic liberties of geographically mobile employers and the economically protective function of localized unions.¹⁰

Of course, this glance at the United States would proceed from the immutability of the legal structure upon which *Laval* and *Viking* rests. But the federalist approach of U.S. law might also be worth considering as it constituted, at the time of its origins in the 1930s, a higher standard of employee protection than would have been available had state labor laws been allowed to control under the guise of subsidiary.

We are indebted to Professors Eklund and Orlandini for illuminating the European legal scene on a question the contentiousness of which is reflected even in the United States. Theirs is a valuable contribution to the debate.

The Editors

8. Robert A. Gorman & Matthew W. Finkin, Basic Text on Labor Law § 11.4 (2d ed. 2004).

9. *Id.*

10. The work done in *Laval* was on a public construction project. Since the Great Depression, the Davis-Bacon Act in the United States has mandated that employees engaged for federal construction projects be paid “prevailing wages,” which invariably are union area standard wages. This was meant to eliminate wage competition as an element of price competition in federal construction and so to deter lower wage competitors from outside the jurisdiction from entering the market and competing on that basis.

