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SHOOTOUT AT THE ECJ CORRAL:
MANAGEMENT 4, LABOR 0; EUROPEAN
LABOR DISPUTE LAW AFTER *VIKING LINE*

*Carol Daugherty Rasnic**

Hell hath no fury like a union scorned.¹

INTRODUCTION

With an economy that is becoming increasingly globalized, an undergraduate labor law course must include at least minimal coverage of European Union (EU) law. The usual perception of a union-friendly Europe has been surprisingly altered by four European Court of Justice (ECJ) decisions in late 2007 and 2008. Although this shift might be transitory if new directives revert to the prior secured rights of union members in Europe, it is a critical component of a labor law course for business students.

These decisions began with *International Transport Workers' Federation v. Viking Line ABP (Viking)*,² decided in December 2007, followed shortly thereafter by three similar defeats to union efforts to dictate management policies.³ The ire of labor unions, legal academics, and practitioners has provoked a flurry of activity at the European Commission level.

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¹ This is an adaptation of "Nor Hell a Fury, like a Woman scorn'd," from William Congreve's "The Mourning Bride." WILLIAM CONGREVE, *The Mourning Bride* act 3, sc. 1, l. 458, reprinted in THE COMPLETE PLAYS OF WILLIAM CONGREVE 320, 361 (Herbert Davis et al. eds., Univ. Chicago Press 1967) (1697).

² Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779.

³ Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767; Case C-346/06, Rüffert v. Land Niedersachsen, 2008 E.C.R. I-01989; Case C-319/06, Comm'n v. Grand Duchy of Luxembourg, 2008 E.C.R. I-04323.

This article explains some characteristics of domestic labor law in EU member states, the evolving nature of the EU, the four ECJ decisions, the primary bases for objections, and proposed changes in EU legislation. Intermittent comparisons with counterpart U.S. federal law are used to draw distinctions between labor-management laws that confront the American company engaged in business within the EU.

I. EUROPEAN DOMESTIC LABOR LAWS

Most European countries are social states, with workers normally entitled to numerous social benefits.⁴ For example, workers may benefit from unemployment compensation funded through taxes on the worker as well as his employer, much like social security in the United States.⁵ Additional social benefits include prolonged maternity and/or parental leaves, generally with pay. The longest are in Spain (seventy-two months), Germany (thirty-nine and one half months), Finland (thirty-eight months), France (thirty-seven and one half months), Sweden (thirty-six and one half months), and Portugal (thirty-six months).⁶ Annual paid leave policies also tend to be generous: four weeks in Great Britain,⁷ twenty-four working days in Germany,⁸ and thirty working days in Austria.⁹ In contrast, the U.S. Family & Medical Leave Act only provides a relatively short combined period of up to twelve weeks of *unpaid* leave for qualified

⁴ The term “social state” and “socialist state” are frequently confused. A social state is one that provides comprehensive social benefits through heavy taxation, whereas a socialist state is one controlled and owned, at least in part, by the government.

⁵ Social Security Act, 42 U.S.C. §§ 301–1397 (2006 & Supp. V 2011).

⁶ Christopher J. Ruhm, *Policies to Assist Parents with Young Children*, 21 FUTURE CHILD., Fall 2011, at 37, 41 tbl.2.

⁷ Working Time Regulations, 1998, S.I. 1998/1833, art. 2, ¶ 13 (Gr.Brit.).

⁸ Mindesturlaubsgesetz für Arbeitnehmer [BUrIG] [Minimum Leave Act for Employees], Jan. 8, 1963, BUNDESGESETZBLATT [BGBL. I], last amended by Gesetz [G], May 11, 2002, BGBL. I §§ 1, 3 (Ger.), available at <http://www.gesetze-im-internet.de/bundesrecht/burlg/gesamt.pdf>.

⁹ URLAUBSGESETZ [HOLIDAYS ACT] July 7, 1976, BUNDESGESETZBLATT [BGBL. I] No. 390/1976, § 2 ¶ 1 (Austria), available at <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008376&ShowPrintPreview=True> (mandating paid leave of thirty-six working days for a worker with twenty-five years of service).

workers for reasons including serious illness of the employee; serious illness of the employee's close family member (parent, child, or spouse); and/or birth or adoption of a child.¹⁰

European workers also commonly have substantial statutory job protections.¹¹ Domestic job protections throughout Europe are antithetical to American employment-at-will rules that prevail in many states.¹² Statutory works councils are typical in European domestic law and an employer must consult with this body of elected workers prior to making many decisions normally reserved for management in the American workplace, such as termination or reassignment of a worker and determination of workplace rules.¹³

Trade unions in European countries differ from those in the United States in three major respects. First, European countries do not have the usual public-private sector division. Private sector unions in the United States are governed either by the 1926 Railway Labor Act,¹⁴ which applies to railway and airline workers, or the Taft-Hartley Act,¹⁵ covering all other industries and businesses in the private sector. Federal workers are subject to the Civil Service Reform Act,¹⁶ and additional state statutes may apply to employees of the individual state governments.

¹⁰ 29 U.S.C. § 2612 (2006 & Supp. V 2011) (applying only to employers with at least fifty employees).

¹¹ See, e.g., Kündigungsschutzgesetz [KSchG] [Employment Protection Act], Aug. 25, 1969, BGBL. I at 1317, last amended by G, Mar. 26, 2008, BGBL. I at 444 (Ger.), available at <http://www.gesetze-im-internet.de/kschg/BJNR004990951.html#BJNR004990951BJNG000100311>.

¹² See Carol Daugherty Rasnic, *Balancing Respective Rights in the Employment Contract: Contrasting U.S. "Employment-at-Will" Rule with the Worker Statutory Protections Against Dismissal in European Community Countries*, 4 J. INT'L L. & PRAC. 441 (1995).

¹³ See, e.g., Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Sept. 25, 2001, BGBL. I at 2518, last amended by G, July 29, 2009, BGBL. I at 2424 (Ger.), available at http://www.gesetze-im-internet.de/englisch_betrvg/englisch_betrvg.html#p0052 (requiring a works council for companies with five or more employees).

¹⁴ Railway Labor Act, 45 U.S.C. §§ 151-188 (2006).

¹⁵ Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. §§ 141-187 (2006).

¹⁶ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

A second difference is the scope of what constitutes the employer in a collective bargaining agreement. To be sure, there are multi-employer collective bargaining contracts in the United States, but the European concept is fundamentally different. Unions in Austria, Cyprus, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Norway, Portugal, Slovakia, Slovenia, Spain, and Sweden are organized at the industry level—all companies within a designated industry are covered by the same collective bargaining agreement.¹⁷ Other countries, such as Belgium and Romania, determine the content of union-employer contracts by statute.¹⁸

A third distinction is the saturation level of union membership in Europe. A 2011 survey by the European Trade Union Institute (ETUI)¹⁹ stated that the percentage of union membership in the workforce varies from 98% in Austria and France to 15% in Lithuania, with a trans-European average of 66%.²⁰ This contrasts starkly with U.S. figures, especially in the private sector, where union membership is estimated to be as low as 7.6%.²¹ Even in the more unionized public sector, the membership rate is still only 40.7%.²² The message for an American company doing business in Europe is that it must be prepared to contend with strong organized labor.

¹⁷ L. Fulton, European Trade Union Institute, *Collective Bargaining, WORKER-PARTICIPATION.EU*, <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe> (last visited Feb. 21, 2013).

¹⁸ *Id.*

¹⁹ ETUI is the research and training center for the European Trade Union Confederation, a self-described umbrella association of all European trade unions. *About ETUI*, EUR. TRADE UNION INST., <http://www.etui.org/About-Etui> (last visited Feb. 21, 2013).

²⁰ Fulton, *supra* note 17. Belgium, Slovenia, Finland, Portugal, and Sweden all have union membership of 90% or higher, and the Netherlands, Denmark, Italy, Cyprus, Spain, Norway, Greece, Germany, and Luxembourg are between 60% and 90%. *Id.*

²¹ Press Release, U.S. Bureau of Labor Statistics, Union Members—2011 app. at tbl.3 (Jan. 12, 2012), available at http://www.bls.gov/news.release/archives/union2_01272012.pdf.

²² *Id.* (noting federal workers at 33.2%, state workers at 35%, and local government workers at 46.6%).

II. THE CHANGING FOCUS OF THE EUROPEAN UNION

The moving principal behind what now constitutes the European Union was French Foreign Minister Robert Schuman, who believed that any lasting peace in post-World War II Europe necessitated an economic treaty.²³ The 1951 Treaty of Paris²⁴ created the European Coal and Steel Community, a single authority over all French and German production in those industries. The Treaty of Paris was augmented in 1957 by the Treaty of Rome,²⁵ which created the European Economic Community (EEC) and replaced the singular “community” with the plural “communities.”²⁶ The EEC was authorized to achieve common agricultural, transport, and competition policies; to establish a customs tariff and common commercial policies with regard to external countries; and to implement a common market.²⁷

The 1957 establishment of the first “pillar,” the economic community, was later expanded by the Treaty of Maastricht²⁸ in 1992 to include a second pillar on common foreign policy and security, and a third pillar on cooperation in the fields of “justice and home affairs.”²⁹ These expansions reflect the increasing scope of governance by the Community’s institutions. Subsequent treaties

²³ Eur. Comm’n, *Robert Schuman: The Architect of the European Integration Project*, EUROPEAN UNION, http://europa.eu/about-eu/eu-history/founding-fathers/index_en.htm#box_9 (follow “Read more about Robert Schuman” hyperlink) (last visited on Feb. 22, 2013).

²⁴ Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter Treaty of Paris]. The specific powers delegated to the Community can be found in Article 3 of the Treaty. *Id.* at 147. However, the Community’s powers expired fifty years after the Treaty entered into force. *Id.* at 227.

²⁵ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome]. The Treaty of Rome subsumed and supplanted the Treaty of Paris in 2002.

²⁶ Compare the various articles of Treaty of Paris, *supra* note 25, with Treaty of Rome, *supra* note 26.

²⁷ Treaty of Rome, *supra* note 25. For a discussion of the EEC’s original purpose, see JOHN FAIRHURST, *LAW OF THE EUROPEAN UNION* 5–7 (Pearson Educ. Ltd. ed., 8th ed. 2010).

²⁸ Treaty on European Union art. B, Feb. 7, 1992, 31 I.L.M. 253.

²⁹ *Id.*

adding to these social policies included the Treaty of Amsterdam³⁰ which declared the Community to have been founded upon “the principles of liberty, democracy, respect for human rights,”³¹ equality between the sexes, and improvement of the quality of the environment.³² The most recent document, the 2009 Treaty of Lisbon, entailed perhaps the most substantial expansion.³³ Lisbon merged the three pillars, replaced references to “Communities” with “European Union,”³⁴ and mandated that the EU “combat social exclusion and discrimination and . . . promote social justice.”³⁵ These newly legislated EU social rights have generated a wealth of legal academic literature.³⁶ What began in post-World War II Europe aimed at freeing the movement of goods, services, capital, and persons and dispensing with inter-country trade barriers, developed into a common market with economic free movement adding further to those original economic goals. Since Maastricht the EU has become more oriented toward social policy.³⁷ This relatively recent focus on social rights contrasts sharply with the ECJ’s original emphasis on market freedom.³⁸

In addition to the EU’s expansion of centralized powers over member states and its added social dimension, the EU has also increased the breadth of its geographic area. What began as six countries (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands) has grown in stages to twenty-seven countries, with

³⁰ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

³¹ *Id.* art. 1.

³² *Id.* art. 2.

³³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

³⁴ *Id.* art. 2.

³⁵ *Id.* art. 3.

³⁶ See, e.g., SOCIAL RIGHTS IN EUROPE (Grainne de Burca & Bruno de Witte eds., 2005); STEPHEN C. SIEBERSON, DIVIDING LINES BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES: THE IMPACT OF THE TREATY OF LISBON (2008).

³⁷ Reingard Zimmer, *Labour Market Politics through Jurisprudence: The Influence of the Judgments of the European Court of Justice (Viking, Laval, Rüffert, Luxembourg) on Labour Market Policies*, 7 GER. POL’Y STUD. 211, 213 (2011).

³⁸ See *id.* at 213–14 (analyzing the changing face of the EU).

Croatia scheduled to become the twenty-eighth member state in 2013.³⁹ The EU is a gargantuan trading bloc with which international businesses must be prepared to reckon, not only economically, but also with regard to social rights in the employment setting.

III. *VIKING* ET AL. AND RELEVANT EUROPEAN UNION LAW

A. INTERNATIONAL TRANSPORT WORKERS' FEDERATION V. *VIKING LINE ABP*⁴⁰

Viking Line ABP, a Finnish company that operated the vessel Rosella from Helsinki to Estonia, announced in October 2003 plans to reflag the ship to Estonia.⁴¹ Paying lower Estonian wages to crew members was one way to address the company's financial problems.⁴² Viking's collective bargaining agreement with the Finnish Seaman's Union (FSU) expired in November of the same year, but FSU took collective action to stop Viking from reflagging the vessel.⁴³ The union, determined to stop "social dumping,"⁴⁴ requested the London-based International Transport Workers' Federation (ITF) to ask its members outside of Finland not to negotiate with Viking.⁴⁵ Viking challenged the boycotts in a British court⁴⁶ thereby avoiding the more pro-labor Finnish courts.⁴⁷

³⁹ *From 6 to 27 members*, EUROPEAN COMMISSION, http://www.ec.europa.eu/enlargement/policy/from-6-to-27-members/index_en.htm (last updated Sept. 24, 2012); *Croatia*, EUROPEAN COMMISSION, http://www.ec.europa.eu/enlargement/countries/detailed-country-information/croatia/index_en.htm (last updated Oct. 10, 2012).

⁴⁰ Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line ABP*, 2007 E.C.R. I-10779.

⁴¹ *Id.* ¶ 6.

⁴² *Id.*

⁴³ *Id.* ¶ 13.

⁴⁴ Social dumping is the importing of laborers from countries with low wages to perform services in wealthier countries.

⁴⁵ *Viking*, 2007 E.C.R. I-10779 ¶¶ 7-8.

⁴⁶ The participants of the British labor union, ITF, vested British courts with jurisdiction according to the Brussels Regulation, 44/2001, as amended.

⁴⁷ *Viking*, 2007 E.C.R. I-10779 ¶ 22.

Viking's claim was based upon its freedom of establishment under European law.⁴⁸ In a referral action, the ECJ adopted a "proportionality" test. The Court held that although a union has the fundamental right to take collective action (the ECJ's first recognition of this right as fundamental), this right is not without restriction. The union has the burden of proving a serious threat of job loss to its members and if so, that the collective action is no greater than necessary to achieve the intended end.⁴⁹ Moreover, the ECJ held that the national court is the appropriate forum for determining whether an alternate dispute mechanism is available at the domestic judicial level.⁵⁰ The decision was criticized as a sudden prioritization of the right of establishment over a union's fundamental rights.⁵¹

B. LAVAL UN PARTNERI LTD V. SVENSKA
BYGGNADSARBETAREFÖRBUNDET⁵²

Baltic Bygg was a Latvian subsidiary of another Latvian company, Laval.⁵³ All employees of both were also Latvian, and a Latvian union maintained a valid collective agreement with Laval and its subsidiary.⁵⁴ Baltic was under contract to refurbish an old school in neighboring Sweden.⁵⁵ The Swedish Building Workers' Union (SBWU) demanded the Latvian employer pay its workers the amount payable to Swedish workers, an average of 145 Swedish krona per hour (U.S. \$16.74), two times the amount for which the workers had collectively bargained.⁵⁶ The company refused and

⁴⁸ *Id.* ¶ 7; Consolidated Version of the Treaty on the Functioning of the European Union art. 49, Mar. 30, 2010, 2010 O.J. (C 83) 47, [hereinafter TFEU].

⁴⁹ *Viking*, 2007 E.C.R. I-10779 ¶¶ 81–90.

⁵⁰ *Id.*

⁵¹ See K.D. EWING, THE INST. OF EMP'T RTS., THE DRAFT MONTI II REGULATION: AN INADEQUATE RESPONSE TO *VIKING* AND *LAVAL* ¶¶ 4–9 (2012).

⁵² Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767.

⁵³ *Id.* ¶ 27.

⁵⁴ *Id.* ¶ 28.

⁵⁵ *Id.* ¶ 27.

⁵⁶ *Id.* ¶¶ 30–31.

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SBWU blockaded the site of the school.⁵⁷ SBWU's blockade was joined by sympathy picketers, including the Swedish Electricians' Union, effectively preventing ingress and egress, which led Laval to ask the Swedish Labor Court to declare the collective action illegal.⁵⁸ Although the Swedish court refused to grant an injunction,⁵⁹ it forwarded the case to the ECJ for a determination of Swedish law's compliance with the EU Posted Workers Directive (PWD)⁶⁰ and the freedom to provide services.

The PWD provides that a firm hiring laborers from another member state must assure those workers the minimum protections of the host country's law, including minimum rates of pay.⁶¹ The directive also permits, but does not mandate, that the host company adopt policies that will apply to posted workers in cases "of public policy provisions."⁶² This minimum protection includes conditions in national collective bargaining agreements, provided that they are "universally applicable."⁶³

The ECJ again applied the *Viking* rule of proportionality.⁶⁴ Further, it construed the PWD as requiring only minimum statutory protections, and Sweden has no minimum wage statute.⁶⁵ Greater protections than the minimum are required only when the host country can show that collectively bargained terms constitute crucial public policy.⁶⁶ The ECJ held there was no such threat to any fundamental interest of society, and that requiring more would go beyond the rule of proportionality under *Viking*.⁶⁷ On remand, the same Swedish Labor Court that had refused to enjoin the unions' boycott applied the ECJ ruling, holding the unions liable to the

⁵⁷ *Id.* ¶ 34.

⁵⁸ *Id.* ¶¶ 38–39.

⁵⁹ Arbetsdomstolen [AD] [Labor Court] 2004-12-22 ref A 268/04 (Swed.).

⁶⁰ Directive 96/71/EC, of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services, 1997 O.J. (L 018) 1.

⁶¹ *Id.* art. 3.1(c).

⁶² *Id.* art. 3.10.

⁶³ *Id.* art. 3.1, 3.8.

⁶⁴ Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767, ¶ 94.

⁶⁵ *Id.* ¶ 24.

⁶⁶ *Id.* ¶ 117.

⁶⁷ *Id.* ¶ 119.

company in the amount of 2.7 million Swedish krona (U.S. \$410,965).⁶⁸

After the decisions in *Viking* and *Laval*, the events surrounding a labor dispute between the British Airline Pilots Association (BALPA) and British Airways (BA) generated claims that the ECJ's holdings had a chilling effect on union collective action.⁶⁹ In early 2008, when BA announced plans to establish a French subsidiary in order to service more markets, the BALPA voiced concerns that lower wages for the subsidiary's pilots might be used as leverage by BA in upcoming talks for a renewed contract.⁷⁰ When negotiations failed, BA voted to strike.⁷¹ To preempt any attempt by BA to enjoin the strike, BALPA filed a petition for declaratory judgment that the planned strike was lawful as proportionate to its interests under *Viking*.⁷² BA counterclaimed by seeking an injunction and damages for an estimated loss of 100 million pound sterling (U.S. \$158.4 million) per day.⁷³ Shortly after a hearing before the High Court but prior to a decision, BALPA withdrew its charges in the face of a strict deadline.⁷⁴ Under British statutory law, a vote to strike is valid for only four months.⁷⁵ A lengthy process in the British court system could have driven the union into bankruptcy.⁷⁶

A similar labor dispute occurred on American soil in 2011. The much-publicized controversy between the Boeing Company and

⁶⁸ Arbetsdomstolen [AD] [Labor Court] 2009-12-02 ref A 268/04 (Swed.).

⁶⁹ See, e.g., K.D. Ewing & John Hendy, *A Tale of Two Cities: Strasbourg and Luxembourg and the Rights to Collective Bargaining and to Strike*, Address at International Conference: The Evolution of Labor Law in Europe Under the Pressure of (Neo) Liberal Economics 2–4 (2009), available at http://www.terralaboris.be/spip/IMG/doc_Texte_EWI_NG_et_HENDY.doc.

⁷⁰ *Id.* at 2.

⁷¹ *Id.* at 3.

⁷² *Id.*

⁷³ *Id.* at 5–6.

⁷⁴ *Id.* at 4.

⁷⁵ Trade Union and Labour Relations Act, 1992, c. 52, §§ 223–24 (U.K.).

⁷⁶ See generally THE LAVAL AND VIKING CASES: FREEDOM OF SERVICES AND ESTABLISHMENT V. INDUSTRIAL CONFLICT IN THE EUROPEAN ECONOMIC AREA AND RUSSIA 172–73 (Roger Blanpain et al. eds., 2009) (detailing a chronology of these proceedings).

International Association of Machinists (IAM) also involved efforts of a powerful union to block a management decision purportedly made on economic grounds. Boeing, headquartered in Seattle, Washington, had constructed a \$750 million factory in South Carolina, where the company planned to build a new line of aircraft: the Dreamliner.⁷⁷ In September 2009, workers at the South Carolina plant voted to decertify IAM as their bargaining representative.⁷⁸

The Acting General Counsel of the National Labor Relations Board (NLRB) filed an unfair labor practice action against Boeing⁷⁹ charging it with coercion of and discrimination against union workers.⁸⁰ The requested remedy, an order that Boeing construct the Dreamliners at the Washington plant, rather than in South Carolina,

⁷⁷ Tim Devaney, *Boeing Opens \$750 Million Plant in South Carolina: Aerospace Giant Defying National Labor Relations Board's Complaint*, WASH. TIMES, June 10, 2011, <http://www.washingtontimes.com/news/2011/jun/10/boeing-opens-750-million-plant-south-carolina/>.

⁷⁸ Darrin Hoop, *Boeing Wins Decert Vote in S.C.*, 707 SOCIALIST WORKER (Oct. 6, 2009), <http://socialistworker.org/2009/10/06/boeing-wins-decert-vote>. Some reports incorrectly referred to South Carolina as a “non-union” state, rather than a right-to-work state, leaving the inference that workers were prohibited from joining a union. (Section 14(b) of the 1947 amendments to the 1935 Wagner Act permitted states to enact legislation making unenforceable a collective bargaining agreement that required union membership as a condition of continued employment. National Labor Relations Act, 29 U.S.C. § 164 (2006). States with such laws are referred to as right-to-work states.) See, e.g., Noel Brinkerhoff & David Wallechinsky, *Boeing Launches First Non-Union Airplane*, ALL GOV (May 07, 2012), <http://www.allgov.com/news/top-stories/boeing-launches-first-non-union-airplane?news=844437>. However, that prohibition is expressly barred by federal law. Norris-LaGuardia Act, 29 U.S.C. § 103 (2006).

⁷⁹ Brief for Defendant, *Boeing v. Int'l Ass'n of Machinists and Aerospace Workers District Lodge 751* (N.L.R.B. 2011) (No. 19–CA–32431); Hans A. von Spakovsky & James Sherk, *National Labor Relations Board Overreach Against Boeing Imperils Jobs and Investment*, 66 LEGAL MEMORANDUM (Heritage Found.), May, 11, 2011, at 2, available at http://thf_media.s3.amazonaws.com/2011/pdf/lm66.pdf; Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N.Y. TIMES, Apr. 20, 2011, http://www.nytimes.com/2011/04/21/business/21boeing.html?_r=0.

⁸⁰ Von Spakovsky, *supra* note 83, at 3. This would constitute a violation of federal law. See Labor Management Relations Act, ch. 120, sec. 101, § 8(a)(1), (3), 61 Stat. 136, 140–41 (1947).

provoked political outrage.⁸¹ Claiming that Boeing had engaged in an unlawful “runaway shop,” the General Counsel was faced with the established “but-for” test: proof that the company’s decision to produce the aircraft at the South Carolina plant would not have been made but for anti-union animus.⁸² In determining the lawfulness of transferring work to another plant, the NLRB looks to many factors; proof of animus alone will not render a decision unlawful if it would have been made in the absence of ill will toward the union.⁸³

The company responded that (1) its Washington workers suffered neither job losses nor negative employment consequences, and customer demand had actually increased production at the main plant; (2) “no work [had] been transferred from Washington to South Carolina;” and (3) “the decision . . . was made for legitimate economic . . . reasons,” including the costly fifty-eight-day IAM strike in 2008.⁸⁴ If the NLRB had received the remedy it requested, the effect would have been a de facto closure of the South Carolina facility.⁸⁵

⁸¹ See, e.g., Amy Bingham, *Obama Breaks Silence About Boeing v. NLRB*, ABC NEWS (July 19, 2011) available at <http://abcnews.go.com/blogs/politics/2011/06/obama-breaks-silence-about-boeing-v-nlr/>. See also Greenhouse, *supra* note 80.

⁸² See *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 67 (3d Cir. 1978) (discussing the need for anti-union animus).

⁸³ See, e.g., *id.*; Robert A. Swift, *Plant Relocation: Catching up with the Runaway Shop*, 14 B.C. L. REV. 1135 (1973) (discussing the proving of the runaway shop).

⁸⁴ Steven M. Bernstein, *The NLRB’s Dreamliner Complaint: a Tangled Web of Legal-Political Controversy*, 24 AIR & SPACE LAW., 550, 551 (2011) (citing George Will, *The Dreamliner Nightmare*, WASH. POST, May 13, 2011, http://articles.washingtonpost.com/2011-05-13/opinions/35232327_1_workers-in-washington-state-dreamliners-nlr/); Glenn M. Taubman, *The NLRB v. Boeing: Can Unionized Employers Expand into Right to Work States?*, NEW FED. INITIATIVES (Fed. Soc’y) May 26, 2010, at 2, available at <http://www.fed-soc.org/publication/s/detail/print/the-nlr-vs-boeing-can-unionized-employers-expand-to-right-to-work-states>.

⁸⁵ Bernstein, *supra* note 88, at 551. Compare Henry Knight with Angie Cowan Hamada & Thomas D. Allison, *Boeing v. NLRB*, ABA SECTION OF EMPLOYMENT AND LABOR LAW FLASH (ABA Section of Emp’t and Labor Law, Chicago, IL) Oct. 2011 (Knight explaining Boeing’s position and Cowan & Allison explaining the NLRB’s position) available at

Between the hearing before an administrative law judge and his decision, the parties settled, and IAM withdrew its charges on December 8, 2011.⁸⁶ Boeing agreed to wage increases and expanded production for the Washington employees, and the union withdrew its objection to the work at the South Carolina plant proceeding as planned.⁸⁷ Costs arising from the dispute were profligate on both sides, and the resulting bitterness led to the introduction of the Job Protection Act by Senator Lamar Alexander (R. Tenn.).⁸⁸ If enacted, this law would have amended section 10 of the Taft–Hartley Act to expressly strip the NLRB of the power to order or prevent an employer from relocating, shutting down, or transferring any existing or planned facility.

How would the Board and the courts have decided this dispute? The five-member NLRB decreased to only two members in December 2011, and the process might have been in indefinite limbo⁸⁹ because the Supreme Court had previously held that the NLRB was void of its statutory powers with fewer than three members.⁹⁰ President Obama appointed three additional members during a Congressional recess in January 2012,⁹¹ but how or when the full Board would have decided Boeing is conjecture. One recognized legal scholar, Rodney Smolla, president of Furman University and former dean of law schools at University of Richmond and Washington and Lee University, predicted before the settlement that the actions of the company would ultimately be

http://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1110_aball_flash/1110_aball_flash_boeing_nlr.html.

⁸⁶ Lawrence E. Dubé, *NLRB's Controversial Boeing Case Closed; Lafe Solomon Praises 'Win-Win' Settlement*, BLOOMBERG BNA DAILY LAB. REP., (237 DLR AA-1, Dec. 9, 2011).

⁸⁷ Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 9, 2011, at B3.

⁸⁸ S. 964, 112th Cong. § 1 (2011).

⁸⁹ Joseph Williams, *President Obama appoints three to NLRB*, POLITICO, Jan. 4, 2012, <http://www.politico.com/news/stories/0112/71086.html>.

⁹⁰ *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010).

⁹¹ Williams, *supra* note 93.

deemed protected under both the Constitution and federal labor statutes.⁹²

The federal appeals court for the District of Columbia ruled in January 2013 that these presidential appointments exceed the power of the executive under the recess appointments clause.⁹³ The court reasoned that the intra-session break was not a “recess,” or time between sessions, during which such power becomes operative.⁹⁴ The NLRB is expected to appeal this decision; but if it stands, the result could be invalidation of all orders of this Board. NLRB Chairman Mark Pearce’s opinion that the appellate court’s decision “applies only to one specific case”⁹⁵ is not shared by many prominent labor attorneys, including G. Roger King. On February 13, 2013, Mr. King testified on behalf of the Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace before a congressional committee that this ruling would nullify the nearly one thousand Board decisions made since the expiration of the former chairman’s term on August 27, 2011.⁹⁶

C. RÜFFERT V. LAND NIEDERSACHSEN⁹⁷

A *Niedersachsen* (Lower Saxony) state law in Germany required all companies with public construction contracts in the amount of 10,000 Euro (U.S. \$16,212) or more to pay workers the wages in the construction sector collective bargaining agreement, a commitment

⁹² Rod Smolla, *Analysis: Legal scholar deconstructs Boeing case*, CHARLESTON REGIONAL BUS. J., Nov. 21, 2011, available at <http://www.charlestonbusiness.com/news/41851/print>.

⁹³ U.S. CONST. art. II, § 2, cl. 3.

⁹⁴ *Noel Canning v. NLRB* Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).

⁹⁵ *Statement by Chairman Pearce on Recess Appointment Ruling*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov-news-statement-chairman-pearce-recess-appointment-ruling> (last visited Mar. 18, 2013).

⁹⁶ *The Future of the NLRB: What Noel Canning v. NLRB Means for Workers, Employers, and Unions*, Hearing Before the H. Comm. on Educ. and Workforce Subcomm. on Health, Employment, Labor, and Pensions, 113th Cong. 11 (2013) (testimony of G. Roger King, Counsel, Chamber of Commerce of the United States and Coalition for a Democratic Workplace), available at <http://www.uschamber.com/sites/default/files/FutureoftheNLRB-NoelCanningTestimony-21313.pdf>.

⁹⁷ Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 E.C.R. I-01989.

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that also attached to subcontractors.⁹⁸ One subcontractor paid its fifty-three Polish workers less than half the union contract amount, and the government terminated the agreement.⁹⁹ When the main contractor went into liquidation, the receiver, Ruffert, petitioned a German court to award an amount available for creditors' losses sustained from the terminated contract.¹⁰⁰ The *Bundesverfassungsgericht* (German Constitutional Court) upheld the law and held against the petitioner, but referred to the ECJ the question of compliance with European law addressing cross-border services.¹⁰¹

The Court applied the PWD as construed in *Laval*, holding that the union contract did not meet the "universally applicable" test for two reasons: First, the *Bundestag* (German legislature) had adopted a law specifying the means in which a collective bargaining agreement could be rendered universally applicable,¹⁰² and this procedure had not been followed.¹⁰³ Second, the state law applied only to public contracts.¹⁰⁴

The law in *Ruffert* is indistinguishable from a long-standing statute in the United States, the Davis–Bacon Act (Davis–Bacon).¹⁰⁵ Despite the absence of any express mention of collectively-bargained wages in the American law, the act has impacted them by aligning the prevailing wage in highly unionized sectors with the union contract.¹⁰⁶ Davis–Bacon stemmed from lawmakers' post-Depression concerns that black workers were underpaid.¹⁰⁷ This law requires private companies engaged in contracts with the federal government for \$2000 or more to pay the locality's prevailing wage in the particular industry, as determined by the Secretary of Labor.¹⁰⁸

⁹⁸ *Id.* ¶¶ 29–30.

⁹⁹ *Id.* ¶ 37.

¹⁰⁰ *Id.* ¶ 3.

¹⁰¹ *See id.* ¶ 136; *see also* TFEU, *supra* note 49.

¹⁰² BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 25, 1969, TARIFVERTRAGSGESETZ I [TVG] 1323, § 5.

¹⁰³ *Ruffert*, 2008 E.C.R. I-01989 ¶ 27.

¹⁰⁴ *Id.* ¶¶ 27–33.

¹⁰⁵ 40 U.S.C. §§ 3144–3148 (2006).

¹⁰⁶ *See id.*; Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in American Wage Inequality*, 76 AM. SOC. REV. 513, 518–19 (2011).

¹⁰⁷ *See* U.S. DEP'T OF TRANSP., <http://www.fhwa.dot.gov/highway/history/road/s13.cfm> (last visited Feb. 22, 2012).

¹⁰⁸ *See* 40 U.S.C. §§ 3144–3148.

It has not been repealed or amended, and in light of Davis–Bacon, the U.S. courts would likely have approved a statute such as that in *Rüffert*.

D. COMMISSION V. LUXEMBOURG¹⁰⁹

The Luxembourg Parliament enacted a law mandating that companies hiring non-domestic workers comply with “public policy provisions” in that industry’s union contract that covered the entire country. The European Commission (EC) challenged the legality of this law under the PWD. In order to meet the “public policy” element, the EC required Luxembourg to prove that non-enforcement would pose a serious threat to a fundamental societal interest. Not only was this burden not met, but the ECJ added that a collective bargaining agreement applicable to all companies in a sector did not constitute “public policy.”¹¹⁰

Summarizing the issues in the four cases, it is significant that Articles 43 and 49 of the TFEU and the PWD were the only provisions in the vast body of European law that the ECJ was asked to address. The jurisdiction of the ECJ is substantially limited by the treaties such as the EC Treaty, which establish the jurisdictional boundaries of the supra-national ECJ.¹¹¹ Except for one Article 226 case (*Luxembourg*),¹¹² the other cases were all Article 234 referral

¹⁰⁹ Case C-319/06, *Comm’n v. Grand Duchy of Luxembourg*, 2008 E.C.R. I-04323.

¹¹⁰ *Id.*

¹¹¹ The two most frequent types of cases heard by the ECJ are those filed under Article 226 (formerly Article 169) in which the European Commission challenges a member state for non-compliance with EU law, and Article 234 (formerly Article 177), the referral provision, in which a national court requests a decision on compatibility of domestic law with EU law. Less frequently, the Court might hear a member state challenge the Commission under Article 230 (formerly Article 173), alleging that one of the EU law-making bodies has acted beyond its granted authority. An Article 230 charge is sometimes described as a “reverse Article 226” case. Consolidated Version of the Treaty establishing the European Community arts. 226, 230, 234, Dec. 24, 2002, 2002 O.J. (C 325) 125 [hereinafter EC Treaty].

¹¹² *Comm’n v. Grand Duchy of Luxembourg*, 2008 E.C.R. I-4323; see *supra* Part III.D.

cases.¹¹³ The ECJ is exclusively limited to considering and applying EU law.¹¹⁴

IV. SUBSEQUENT DIRECTIVE AND PROPOSED REGULATION

EU statutory law comes in two forms: regulations and directives. While both a regulation and directive are directly enforceable in all member states, directives are more commonly used. Directives mandate that member states achieve a designated result prior to a prescribed date by implementation of their own chosen mechanism under domestic law.¹¹⁵ The directive has no counterpart in American law.

The Services Directive,¹¹⁶ known as the Bolkestein Directive, is also relevant, as would be the proposed Monti II regulation if it had been adopted. Similar to popular names for U.S. statutes, these titles indicate their respective proponents: Frederick “Fritz” Bolkestein of the Netherlands, the former Commissioner for the Internal Market, and Mario Monti, the current Prime Minister of Italy.

A. *THE SERVICES DIRECTIVE (“BOLKESTEIN”)*

The Bolkestein Directive aims to apply the EU’s “country of origin” rule for goods to services as well. This principle assures that “goods produced in [any member state] can be sold in any other [member state].”¹¹⁷ The principle has been maligned by labor as instigating a downward spiral for labor standards and strongly criticized as a tacit approval of social dumping.¹¹⁸ A substantially altered version of the Bolkestein Directive was finally approved.¹¹⁹

¹¹³ See *supra* Part III.A–C.

¹¹⁴ See Treaty of Lisbon *supra* note 34, at 19–22.

¹¹⁵ *Id.*

¹¹⁶ Directive 2006/123/EC, of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, 2006 O.J. (L 376) 36.

¹¹⁷ Simon Basketter, *Bolkestein: the monster haunting Europe*, SOCIALIST WORKER (Jan. 24, 2006), <http://www.socialistworker.co/printart.php?ed=8072>.

¹¹⁸ *Id.*

¹¹⁹ Declaration of Euro. Trade Union Confederation, Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive

The country of origin principle is not expressly included, but the language of the directive reminds member states of the doctrine of free movement by introducing a mutual-recognition rule in order to harmonize consumer protections while simultaneously maintaining a high quality of services.¹²⁰

B. THE PROPOSED MONTI II REGULATION

If it had been adopted, Monti II would have refined the PWD in an effort to achieve a balance between facilitating cross-border services and protecting posted workers.¹²¹ However, advocates for organized labor were displeased with Monti II, deeming it at best inadequate and at worst an enforcement of the court-imposed restrictions on trade union activity in *Viking* and *Laval*.¹²² The European Trade Union Confederation (ETUC) unequivocally renounced the draft because it (1) maintained the limits on workers' collective action right; (2) strengthened *Viking's* proportionality test; and (3) did not recognize social rights as having a priority over economic freedoms.¹²³ Professor of Public Law at Kings College London, K.D. Ewing, also chastised the drafters of Monti II for deferring to national courts¹²⁴ in determining whether planned union action is suitable to achieve its objectives.¹²⁵ He found this particularly problematic in countries without specialized labor courts, where such matters are decided by commercial courts with no experience in labor law.¹²⁶

Whatever effect Monti II would have had is now moot. On September 11, 2012, the European Committee for Employment and Social Affairs announced the withdrawal of the proposed

of the Posted Workers Directive (Apr. 19, 2012) [hereinafter ETUC Declaration], available at <http://etuc.org/a/9917>.

¹²⁰ *Id.*

¹²¹ *Proposal for a Council Regulation on the Exercise of the Right to Take Collective Action Within the Context of the Freedom of Establishment and the Freedom to Provide Services*, at 10, COM (2012) 130 final (Mar. 21, 2012).

¹²² ETUC Declaration, *supra* note 124.

¹²³ *Id.*

¹²⁴ See EWING, *supra* note 52.

¹²⁵ *Id.* at 13–14.

¹²⁶ *Id.* at 14.

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regulation.¹²⁷ This marked the first time the “yellow-card” procedure added by the Treaty of Lisbon¹²⁸ was used.¹²⁹ If at least one-third of the EU member states are of the opinion that proposed legislation is contrary to the subsidiarity principle, they can collectively “flag” the proposed law, triggering a procedure that mandates review by the EC. The principle of subsidiarity originated in the Treaty of Rome that established the European Community.¹³⁰ This cardinal rule of European law provides that the EU will not act in areas where the national lawmaking bodies are best suited to rule. Further, the Treaty on the Functioning of the European Union (TFEU)¹³¹ expressly states that the EU will defer to member states on the regulation of the right to strike.¹³² Thus, despite the leviathan of power that European law holds over its member states, the subsidiarity principle and the fledgling “yellow card” procedure illustrate some limits to that power.

V. ILO CONVENTIONS AND PROVISIONS OF EUROPEAN
CONVENTION ON HUMAN RIGHTS, AND THE EUROPEAN
SOCIAL CHARTER

Much of the criticism railed against the ECJ has stemmed from the incongruity of *Viking* and its successor decisions with the International Labor Organization’s (ILO) guarantees of freedom of association and the right to organize¹³³ as well as the right of workers to bargain collectively.¹³⁴ Most EU member states are also parties to

¹²⁷ *Brussels Drops Plans for EU Law Limiting Right to Strike*, EURACTIV.COM, <http://www.euractiv.com/socialeurope/ec-drops-regulation-right-strike-news-514793> (last visited Mar. 18, 2013).

¹²⁸ Treaty of Lisbon, *supra* note 34, Protocol no. 1, art., Protocol no. 2, art. 7.2.

¹²⁹ *The European Commission Gets Its First “Yellow Card”*, LANDESORGANISATIONEN I DANMARK, <http://www.lo.dk/English%20version/News/yellowcard.aspx> (last visited Mar. 18, 2013).

¹³⁰ Treaty of Rome, *supra* note 25, art. 5.

¹³¹ TFEU, *supra* note 49.

¹³² *Id.*

¹³³ See EWING, *supra* note 52.

¹³⁴ See Int’l Labour Org. [ILO], *Right to Organise and Collective Bargaining Convention*, ILO No. 98, 96 U.N.T.S. 257 (July 18, 1951). See also ILO, *Freedom of Association and Protection of the Right to Organise Convention*, ILO No. 87 (July 9, 1948).

the two ILO Conventions.¹³⁵ Similarly, EU member states share common membership in the 1950 European Convention on Human Rights (ECHR)¹³⁶ and the 1961 European Social Charter (ESC).¹³⁷ The ECHR guarantees freedom of association¹³⁸ and the ESC, as revised in 1996, expressly recognizes the workers' right to strike.¹³⁹ Moreover, some legal academics view ECHR case law as recognizing a general right to work.¹⁴⁰ Finally, the Charter of Fundamental Rights of the European Union includes the right to strike,¹⁴¹ made binding on EU member states by the Lisbon Treaty in 2009.¹⁴² This obligation under the Treaty of Lisbon might have presented the most compelling argument against the ECJ's decisions in *Viking* and *Laval* had its obligatory status not post-dated the decisions.

An American company on its home turf is not faced with a multi-national oligarchy over the federal government like companies in EU member states. Although European law holds priority over the national laws of member states,¹⁴³ the latest stance of the ECJ restricting collective rights of workers is a welcome respite for the international business from the more usual protection of workers in Europe.¹⁴⁴ Nonetheless, if Monti II is revised in accordance with pro-union demands, this might be short-lived.

¹³⁵ *Alphabetical List of ILO Member Countries*, INT'L LABOUR ORG., <http://www.ilo.org/public/english/standards/relm/country.htm> (last updated Sept. 17, 2012).

¹³⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

¹³⁷ European Social Charter (revised), May 3, 1996, E.T.S. No. 163, art. 11(1) [hereinafter Social Charter].

¹³⁸ See ECHR, *supra* note 138, art. 11(1).

¹³⁹ See Social Charter, *supra* note 139, art. 6(4).

¹⁴⁰ See, e.g., Rory O'Connell, *The Right to Work in the ECHR*, 2 EUR. HUM. RTS L. REV. 176 (2012).

¹⁴¹ Treaty of Lisbon, *supra* note 34, art. 28.

¹⁴² *Id.* art. 156. Protocol 10/09 permitted Poland and the United Kingdom (and subsequently the Czech Republic) to opt out of ECJ jurisdiction over issues arising under the Charter.

¹⁴³ See Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

¹⁴⁴ *Id.*

Traditionally, domestic laws in European countries with their combined labor-social legislation have been considerably more labor-friendly than in the United States. The employment-at-will laws of many American states are alien to European law; European lawyers and law students may have difficulty grasping the unemployment concepts of “available for work” and “actively seeking work” as prerequisites to eligibility of unemployment compensation. Moreover, European workers have substantial annual paid-leaves and lengthy compensated maternity and paternal leaves.¹⁴⁵ This contrasts starkly with the unpaid twelve weeks provided only for employees who meet the work time provisions of the FMLA.¹⁴⁶

The BALPA dispute evidences the impact of *Viking* and its progeny, but the demise of Monti II has prohibited any legislative confirmation of the judiciary’s limitations on workers’ collective rights. In contrast, federal legislation in the United States specifying mandatory subjects of bargaining would be unlikely to include a management decision to import laborers to do specified contract work within the concept of “terms and conditions.” The ECJ’s limitation on unions’ right to interfere with a business’ right to establishment altered the European labor-management legal environment to closer resemble the structure of U.S. statutory law, at least temporarily.

The cases examined in this article provide a comparative look at EU law in an area significant to businesses engaged in trade within Europe. EU countries are not only heavily unionized, but also have concomitant domestic and international social obligations under EU, ECHR, and ESC treaties. The international company and its counsel must understand the relative bargaining strengths and restrictions of management and labor unions imposed by these various transnational laws.

¹⁴⁵ See *supra* discussion at Part I.

¹⁴⁶ See *supra* text accompanying note 11.