HOORAY FOR . . . TORONTO? HOLLYWOOD, COLLECTIVE BARGAINING, AND EXTRATERRITORIAL UNION RULES IN AN ERA OF GLOBALIZATION

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Of the five films competing for the upcoming [2003] Best Picture Oscar, only one features scenes shot in Hollywood. In fact, not a single frame of the five nominees was shot within 2,000 miles of the show-business capital. For that matter, not a full film's worth of scenes among them was shot in the United States.¹

I. INTRODUCTION

Globalization will be to the twenty-first century what the Industrial Revolution was to the nineteenth. Globalization means the decreasing importance of national borders as barriers to the flow of commerce, capital, communications, and concepts. American employers can easily transfer

parts of the production process from the United States to foreign countries where costs are lower and businesses face fewer restraints or receive subsidies; this is particularly true for the American employers who are part of multinational companies with foreign subsidiaries and affiliates. For American employers, globalization means the increasing mobility of capital across national borders in pursuit of higher profits. For American unions, globalization means the runaway shop on an international scale. For American employees, globalization means jobs lost to foreign workers. *Globalization means that American workers must compete in a world-wide labor market, often in a race to the bottom.*

The ease with which American employers can send production and

2. Although the term “America” can encompass any country in North America, Central America, or South America, in this article, the term “America” is limited to the United States. As used in this article, the terms, “American employer,” and “U.S. employer” include more than just business enterprises incorporated or owned in the United States. These terms include entities that have numerous contacts or a significant presence in the United States, even if they are incorporated or owned outside the United States. For example, the motion picture studio in Los Angeles, Paramount, is an American employer although Sony (Japan) owns Paramount. *Cf.*, James Bates & Thomas S. Mulligan, *A Swift, Sad Ending for Hollywood Drama*, L.A. TIMES, July 3, 2002, at C1 (describing problems associated with foreign ownership of U.S. entertainment companies); Richard Verrier & Anita M. Busch, *Under Intense Pressure, Vivendi's Messier is Forced Out as Chairman*, L.A. TIMES, July 2, 2002, at A1 (describing problems associated with foreign ownership of U.S. entertainment companies). For a similar definition of what is an “American corporation,” see the EEOC Policy Guidelines quoted in Wayne N. Outten & Jack A. Raisner, *Multinational Employment: U.S. Employees of Foreign Employers and Employees of U.S. Employers Abroad* at 628 (PLI Litig. & Admin. Practice Course Handbook Series No. 586, 1998) (stating that “[a]n American corporation is one that has numerous contacts here, even if it is incorporated elsewhere.”).


In this article, the terms “runaway production” and “runaway film production” are not meant to imply that an employer’s location of film production outside the United States is motivated by an unlawful purpose, violating § 8(a)(1), (3) of the Labor Act. It is not an unfair labor practice for an employer to transfer work or relocate its business for economic reasons. *Id.* at 314 (and cases cited therein).

4. In a race to the bottom, “governments compete against each other to see who can offer the most competitive (i.e., deregulated, low-cost, and even subsidized) environment for investment. The problem for unions is that such policies exert downward pressure on wages and other labor standards and often facilitate non-union or weak union environments.” Michael E. Gordon & Lowell Turner, *Going Global, in Transnational Cooperation Among Labor Unions* 3, 10 (Michael E. Gordon & Lowell Turner eds., 2000).
jobs outside the United States diminishes the bargaining power of American unions,\(^5\) whose influence is largely limited by national boundaries.\(^6\) Globalization and the exodus of production goes beyond weakening unions as workers’ agents in the economic realm; it harms unions as political actors on the national stage, undermining American government.\(^7\) Finally, globalization and the mobility of capital threatens the nation-state and democracy itself. “What is the point of democratic elections and processes if governments can no longer regulate the economy within their own borders?”\(^8\)

Is the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947 and subsequent statutes (hereinafter collectively referred to as the Labor Act) adequate to meet the challenges posed by globalization?\(^9\) Will unions be able to protect U.S. jobs through

\(^5\) Many scholars contend that globalization undermines unions’ bargaining power. For example, see id. at 4 (stating that “increasing global competition during the 1980s and 1990s has been associated with a declining labor movement . . . .”); Katherine Van Wezel Stone, Labor and the Global Economy: Four Approaches to Transnational Labor Regulation, 16 MICH. J. INT’L L. 987 (1995) (describing the impact of the global economy on labor); Kenneth G. Dau-Schmidt, Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law, 76 IND. L.J. 1, 20 (2001) (arguing that “it seems fair to say that globalization of the economy and the decline of lifetime employment and internal labor markets have been driving forces behind the decline of unions in the United States.”).

\(^6\) There have been significant obstacles to transnational union collaboration. See Gordon & Turner, Going Global, supra note 4, at 22-23 (describing obstacles to transnational union collaboration); Michael E. Gordon & Lowell Turner, Making Transnational Collaboration Work, in TRANSNATIONAL COOPERATION AMONG LABOR UNIONS, 256, 261 supra note 4 (arguing “[o]f the current union strategies for revitalization . . . , international collaboration . . . remains the smallest”). However, there are examples of such collaboration in the face of globalization. See, e.g., Stephen B. Moldof, The Extent to Which U.S. Labor Laws Apply When Activities of Carriers and Employees Extend Beyond the United States, SH094 A.L.I.-A.B.A. 867, 888 (Apr. 2003) (describing mutual support arrangements between pilots’ unions at Northwest Airlines and KLM, and between pilots’ unions at Northwest Airlines and Japan Air Systems).

\(^7\) One scholar argues that:

[I]f labor ceases to be a voice in national politics, then the democratic nature of our government is also undermined. Social theorists dating back to Toqueville have recognized that a robust democracy requires that there be a plethora of voluntary organizations [such as labor unions] in which citizens can participate. Voluntary organizations are the vehicle by which citizens’ private concerns are shared and translated into public issues, issues which can then generate pressure for legislative or electoral action. Without voluntary organizations, it is virtually impossible in a modern democracy for groups to articulate shared concerns and bring their interests into the political arena.

Van Wezel Stone, supra note 5, at 996-97.

\(^8\) Gordon & Turner, Going Global, supra note 4, at 4.

collective bargaining, or will American employees and their representatives have to go outside the bargaining arena to preserve their jobs? What steps will unions and employees take if labor laws and collective bargaining do not address their concerns? If unions and employees cannot, or do not, use collective bargaining to protect their jobs and standard of living, what does this mean for the future of collective bargaining as the centerpiece of American labor law? If collective bargaining becomes ineffectual in the twenty-first century, what institutions or processes will perform the economic, political, and social purposes, vital to both the American economy and democracy, now served by collective bargaining?¹⁰

At the outset, this article describes the economic and social effects of the flight of film production from the United States and the reasons for runaway production. Then, this article explores aspects of the American film industry (particularly, unique aspects of labor-management relations within the industry) to examine why the powerful Hollywood unions have failed to stop the flight of production via collective bargaining. Because these unions, through collective bargaining, have not restrained runaway film production, the Screen Actors Guild has addressed the challenge of globalization by implementing a creative, but problematic, internal membership rule: Global Rule One. Global Rule One prohibits a Screen Actors Guild member from working for a filmmaker anywhere in the world who does not agree to provide the protections of the Guild's collective bargaining agreement with American filmmakers. This article discusses

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¹⁰ Collective bargaining between unions and employers redresses the inequality of bargaining power between individual employees and their employers. The expectation is that collective bargaining will result in an improvement in economic and social conditions for workers and thereby benefit the economy as a whole. Collective bargaining empowers employees by giving them a voice in matters affecting their working lives; it creates industrial democracy. Finally, if individual employees are not protected from exploitation by employers with greater bargaining power, there will be pressure for greater government intervention to protect workers and to establish wages and working conditions. Thus, collective bargaining nourishes political democracy by allowing the parties to the employment relationship, not the government, to establish compensation and conditions of employment. For a discussion of the fundamental purpose of the Labor Act as fostering collective bargaining, and for a consideration of the economic, social and political purposes of collective bargaining, see Clyde W. Summers, Questioning the Unquestioned in Collective Labor Law, 47 CATH. U. L. REV. 791 (1998), and infra note 305 and discussion p. 114-15.
whether the Guild's enforcement or implementation of Global Rule One violates the National Labor Relations Act. Specifically, does Global Rule One, with its international scope, violate policies embedded in the National Labor Relations Act, as amended, a statute that is not extraterritorial? This article suggests an analytical framework and factors to consider in resolving that difficult question, and concludes with some observations about the fate of American unions and collective bargaining in a time of globalization.

II. THE HOLLYWOOD STORY OF GLOBALIZATION

The flight of film production from the United States and the plight of the Hollywood unions and their members is a compelling story of globalization. More and more American movies are being filmed outside the United States for economic reasons. Production crews commonly go to English-speaking countries such as Canada, the United Kingdom, Ireland, Australia and New Zealand. The entertainment industry may be

11. The "Hollywood unions" discussed in this article are: the Directors Guild of America, Inc.; the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada; the Screen Actors Guild, Inc.; the Writers Guild of America, West, Inc.; and, the Writers Guild of America, East, Inc. Other unions also represent employees in the film industry (e.g., the International Brotherhood of Teamsters and the craft unions affiliated with the AFL-CIO), but this article focuses on the labor organizations whose primary mission is representing employees in the film industry. There is a Producers Guild of America, but it is a professional association, not a labor union. Producers Guild of Am., at http://producersguild.org/pg/about_a/default.asp? (last visited Mar. 2, 2003) (describing the Producers Guild of America as a professional organization).

12. In this article, an "American movie" means a film that has been conceptualized in the United States and is intended for distribution and exhibition in the United States. Typically, the film appears to take place in the United States.

more glamorous than others that are leaving the United States, but the effects of globalization on film production employees is the same as in “grittier” industries like automobile production and garment manufacturing. The flight of film production means not only lost job opportunities for U.S. film industry workers; it also means lost opportunities for businesses in the American communities where filming might have taken place. Finally, the flight of film production means that the quintessential American product—the American movie—is no longer ours.

A. The Economic Effects of Runaway Film Production

It is impossible to quantify exactly the impact of runaway production on American workers and communities. There have been several extensive studies of the effects of runaway film production, but their numbers are not in total agreement. What does emerge from these reports is that a very
significant number of movies are being filmed outside the U.S. for financial reasons and that thousands of American jobs are at stake. A few statistics tell the story.

The U.S. Department of Commerce has reported on the economic losses caused by runaway production:

The principal destinations of U.S. runaway production are Canada, the United Kingdom, Ireland, and Australia. Of these countries, Canada is by far the largest host to U.S. film production. The estimated value of U.S. production in Canada ranges from US$573 million to US$2.24 billion in 1998. Either way, this value is significant. In addition, there is a clear trend towards an increase in U.S. film production in Canada. The second largest destination, the United Kingdom, reported the value of U.S. filming to be US$647 million in 1999, also a significant value. In Australia, the best estimate of U.S. production is close to US$175 million per year, while in Ireland, U.S. filming in 1998 reached US$53 million.

Hundreds of thousands of people work in the film production industry and allied services and may be harmed by runaway production. Official U.S. government statistics estimate that either 272,000 or 236,000 people were employed in film production or allied services in the U.S. in 1997. "[T]hese statistics do not measure the number of workers in secondary and tertiary industries that are indirectly involved in film production." Although it cautions that the following estimates seem high, a California government agency quotes a report prepared by an independent management consultant at the request of several unions:

From 1989 to 1998, a total of 125,100 full-time equivalent positions were lost due to "economic" runaway film production, a trend that the report expects to increase. Nearly four times as many jobs were lost in 1998, estimated at 23,500 full-time equivalent positions, as in 1990, estimated at 6,900 jobs. These

18. Id. at 18 (citing U.S. Bureau of Census statistics).
19. Id.
20. Id. at 5. Most of the people employed in film production are in California. California accounted for about 60% of the total employment in the industry. Id. at 25. In 2001, there were 185,000 jobs in the motion picture industry in California. JONES, supra note 16, at 7. Other states that account for most of the employment in the industry and have been affected by runaway production are New York, Texas, Florida, Illinois and North Carolina. U.S. DEP’T OF COMMERCE REP., supra note 13, at 25-26. Together with California, these states account for almost four-fifths of the total employment in the industry. Id.
estimates are direct job losses, not including multiplier effects.  

Even those American film production workers who are lucky enough to obtain work outside the U.S. are affected by runaway production. They and their families suffer as they work for weeks or months at a location far from home. "Although some families roll with the everyday realities of separation, others are rocked in ways both subtle and substantial."  

When film production leaves the U.S., more than just film industry jobs are lost. Film production is a "locomotive industry" that drives the local economy and has a positive impact on many businesses that are not part of the entertainment industry. "In film production, the number of people directly working in the industry belies its true impact on the economy because many upstream, downstream, and peripheral industries depend on the primary industry." For example, production of the film Tin Cup took ten weeks to film in Houston, Texas. During that time, the production incurred the following expenses: $22,000 for dry cleaning; $121,000 for hardware and lumber, and $498,000 on location fees to privately-owned establishments. The Los Angeles Entertainment Industry Development Corporation has estimated that a typical feature film project shooting in Los Angeles spends about $200,000 per day. So, if an American film is produced outside the U.S., it is not only the film industry


(E)conomic runaway film and television productions are a persistent growing, and very significant issue for the U.S. In 1998, of the 1,075 U.S.-developed film and television productions in the study's scope ... 285 (27% of total) were economic runaways, a 185% increase from 100 (14% of total) in 1990. When these productions moved abroad, a $10.3 billion dollar economic loss (lost direct production spending plus the "multiplied" effects of lost spending and tax revenues) resulted for the U.S. in 1998 alone. This amount is five times the $2.0 billion runaway loss in 1990.


23. Id.

24. U.S. DEP'T OF COMMERCE REP., supra note 13, at 5 (defining "locomotive industry").


26. Id.

27. TIN CUP (Warner Bros. 1996).


employees who suffer the financial consequences; the surrounding business community also suffers.

B. The "Floating Factory"

It may seem surprising that such significant economic effects and job losses have gone relatively unnoticed by the general public. But the fact that these effects are not well-known does not mean they are not occurring. It is because of the nature of film production itself that these effects have failed to attract more attention. Employees in the filmmaking industry work in a "floating factory." Film crew members travel from location to location to shoot the scenes of the film, moving their equipment with them. Film production is a short-term project lasting only a few months. Performers and crew members are freelance workers who contract to work on every separate film project:

When production is lost, it neither generates the same tangible, visual image of unemployed workers standing outside the fence of a shuttered physical factory, nor does it elicit a cohesive nationwide industry response. However, the economic impact and job loss are no less real or important to local communities.

III. THE THREE PHASES OF PRODUCTION

To understand runaway film production and the role of collective bargaining in Hollywood, the reader needs to have at least a basic understanding of the film production process. Filmmaking occurs in several phases, not all of which involve runaway production.

The first phase of filmmaking—development—usually occurs in Los Angeles, the center of the American film industry. In this step, the concept or story for a movie is explored by a producer with studio or independent production company executives. A script and a budget for the movie are

31. Id. at 12-13.
32. "The 'entrepreneur' or producer puts all of these processes together, negotiating with agents and suppliers and generally overseeing actors, musicians, directors, producers, writers, technicians and laborers involved in creating the final product." Lois S. Gray & Ronald Seeber, The Industry and Unions: An Overview, in UNDER THE STARS 24 (Lois S. Gray & Ronald L. Seeber eds., 1996). The collective bargaining agreements between the Hollywood unions and the Alliance of Motion Picture and Television Producers identify the signatory studios and film production companies as "producers." To avoid confusion, this article will refer to studios and independent film production companies as "filmmakers" (not "producers") and will use the term "producer" to refer to an individual who is an entrepreneur.
prepared. Although a script is prepared in the early stages of filmmaking, the script may be rewritten and edited throughout the filmmaking process. Interview with Sanford Sternshein, MFA, Screenwriter, in Long Beach, Cal. (Sept. 15, 2002) (on file with author).

34. See infra Part IV.

35. See supra discussion accompanying note 3 (distinguishing between “runaway shop” and runaway production”); cf. Interview with Robert Bush, Geffner & Bush, in Burbank, Cal. (Sept. 26, 2002) (on file with author) (referring to the term “runaway production” as misleading, since every film is a new project, starting and finishing in different locations).

36. See supra discussion accompanying note 3 (defining “runaway shop”).

37. It is unlawful for an employer to make a collective bargaining agreement with a union that does not represent a majority of its employees in a unit appropriate for collective bargaining. Int'l Ladies Garment Workers' Union v. NLRB, 366 U.S. 731, 733 (1961). Therefore, a prehire agreement, in which an employer agrees to negotiate or to abide by a collective bargaining agreement with a union before the employer has hired its workforce, is an unfair labor practice. However, recognizing that under some conditions, prehire agreements are essential, the Labor Act specifically allows employers in the building and construction industry to make prehire agreements. 29 U.S.C. § 158(f) (2000). Given the short-term nature of construction projects, there is not enough time for the normal Labor Act union representation procedures and collective bargaining to occur, so prehire agreements may be made.

In many ways the film industry is like the building and construction industry: employees work on a short-term, project-by-project basis for various employers throughout the year. As in the building and construction industry, the conditions in the entertainment industry necessitate the use of prehire agreements. The film industry could not function without prehire agreements because on any film project, there is not sufficient time for the normal Labor Act representation procedures and bargaining to occur, and American film workers would not work without contracts. Moreover, a work stoppage in the middle of a film project can cost hundreds of thousands of dollars per day. John Amman, Union and the New Economy, in WORKING USA, Fall 2002, at 111, 125. So, although it may be technically unlawful, filmmakers and Hollywood unions (especially the Guilds) make prehire agreements for film projects within the United States. Telephone Interview with Jack Golodner, President Emeritus, AFL-CIO Department of Professional Employees (Sept. 10, 2002) (on file with author); Telephone Interview with Dr. Lois S. Gray, Professor, Cornell University, School of Industrial and Labor Relations (Sept. 10, 2002) (on file with
make every film, so when an independent production company or studio decides to shoot a film outside the U.S., there is no existing American employer that moves its operations outside the U.S. to make the film. Thus, the term “runaway film production” does not imply that the decision to film outside the United States, or the filming itself, violates the Labor Act.

If the studio or independent production company commits itself to making the film, then the next phase—pre-production—begins. In pre-production, all of the preparations necessary to shoot the film are performed.38 The President of the Alliance for Motion Picture and Television Producers (the “AMPTP”), J. Nicholas Counter III, has described it this way: “Preproduction work on a theatrical motion picture generally starts with the hiring of the director and includes breakdown of the script, casting sessions, hiring the principal and supporting cast, scouting locations for shooting and selecting the crew.”39 Obviously, parts of this process will take place outside the United States if the film will be shot outside this country.

The third phase of filmmaking—production—begins with filming and ends when the principal photography is completed.40 This is the stage of filmmaking that increasingly is leaving the U.S. for economic reasons. This phase is very labor-intensive, so if there is runaway production, many American job and business opportunities are lost.

In the final stage of filmmaking—postproduction—the film is prepared for distribution and exhibition in theaters, on television, or in other media outlets. For example, crews edit the film, add a soundtrack, and insert the title and the credits. This phase involves a whole new workforce, mostly technical employees working for postproduction companies that contract with the movie studio or independent production company that made the film. There is a problem of postproduction work leaving the U.S. but it is less serious, for now, than the problem of runaway film production.41

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40. U.S. DEP’T OF COMMERCE REP., supra note 13, at 15; see also Interview with Bernard D. Gold, Attorney at Law, Proskauer Rose, LLP, Adjunct Professor of Law, U.C.L.A. School of Law & Scott J. Witlin, Esquire of Proskauer Rose, LLP in Los Angeles, Cal. (Sept. 5, 2002) (on file with author).
41. Currently, the loss of postproduction work is less serious than the loss of
IV. THE REASONS FOR RUNAWAY PRODUCTION

Filmmakers leave the United States in pursuit of profits. Labor costs are significantly lower outside the United States even when the foreign production is governed by collective bargaining agreements with Canadian, British, Australian, or Irish unions. To provide just one example, under American collective bargaining agreements, a filmmaker’s contributions for employees’ health and pension benefits are higher than those under foreign agreements (particularly in countries that have a government-subsidized health care system). Other costs besides labor costs make foreign film production far less expensive than in the United States. Because the cost of living in the United States is generally higher than elsewhere, many of the location costs associated with making the film (e.g. food, hotels, dry cleaning, equipment rental, and gasoline) are lower outside the United States. In addition, “a strong [U.S.] dollar makes production in other countries even cheaper.” Most significantly, other countries’ national and local governments offer substantial financial incentives and subsidies to filmmakers to attract production. Again, Canada provides a good example:

At the federal level, the Canadian government offers tax credits to compensate for salary and wages, provides funding for equity investment, and provides working capital loans. At the provincial level, similar tax credits are offered, as well as incentives through the waiving of fees for parking, permits, etc. Postproduction is less labor-intensive than production, so fewer jobs are at stake. Postproduction work requires both a skilled workforce and a sophisticated infrastructure. Los Angeles still has the best postproduction facilities in the world, but other countries are beginning to develop the capacity to do postproduction work as film production spreads outside the United States. In the future, runaway postproduction may become a serious problem for the United States. U.S. DEP’T OF COMMERCE REP., supra note 13, at 15.

42. Interview with Bernard D. Gold & Scott J. Witlin, supra note 40.
43. Interview with A. Robert Pisano, National Executive Director, Chief Executive Officer, Screen Actors Guild, Tom La Grua, Vice President, Director of Strategic Planning, Screen Actors Guild, John T. McGuire, Senior Advisor, Screen Actors Guild, Sallie C. Weaver, Deputy National Executive Director for Contracts, Screen Actors Guild & David White, National General Counsel, Screen Actors Guild, in Los Angeles, Cal. (Oct. 9, 2002) (on file with the author) [hereinafter “Interview with A. Robert Pisano & SAG Officials”].

There are other labor cost savings in addition to lower health and pension plan contributions. For example, in Canada, a filmmaker can avoid costly residual payments to performers by making lump sum payments. This is not possible under the Basic Agreement between AMPTP and SAG. Interview with Bernard D. Gold & Scott J. Witlin, supra note 40.

44. JONES, supra note 16, at 3.
45. Id.
location and other local costs.\textsuperscript{47}

As a result of the lower costs, the incentives, and the currency exchange rate, studios and production companies can save about twenty-six percent by producing a film in Canada (the main destination for runaway films) rather than in the United States.\textsuperscript{48}

Recent technological advances, particularly digitalization,\textsuperscript{49} make it possible for filmmakers to leave the United States to pursue lower costs and incentives.\textsuperscript{50} "Today new technologies have allowed the film production process to become \textit{unbundled}—it is no longer necessary to have all of the people in the extensive chain of film production together in a single location."\textsuperscript{51} Other countries have developed the infrastructure and

\textsuperscript{47} \textit{Id.} at 72. The Department of Commerce Report notes that some of these incentives "sometimes require Canadian establishment, Canadian-controlled corporations, and/or a threshold of costs incurred in Canada"; these programs have become less stringent over time. \textit{Id.}

\textsuperscript{48} JONES, \textit{supra} note 16, at 48; Interview with J. Nicholas Counter III, President of Alliance of Motion Picture and Television Producers, in Encino, Cal. (Sept. 13, 2002) (on file with author).

\textsuperscript{49} Digitalization has been defined as "the conversion of images, sound and text into machine-readable form." JONES, \textit{supra} note 16, at 53. Digitalization allows the rapid transmission of data over long distances and thereby facilitates runaway film production. For example:

In times past, film editors would splice and dice reels of actual film, using an unimaginable combination of complex machinery to put together a polished product. Directors, actors, producers, and other specialists and technicians had to be at hand or within reach to review and approve the painstaking work being done by the various levels of film editors. Nowadays, once a film is shot, it is transferred to videotape format, digitalized, transmitted over the internet, and editors sitting at any location in the world can use powerful computers and sophisticated software programs to perform their tasks. The editor can then get feedback almost immediately from directors, actors, and others, no matter where they happen to be, and re-edit the "film" to produce the final product. Long distances and geographical borders are simply not as important as they once were.


\textsuperscript{50} "Ten years ago, it would have been inefficient to produce a film in many foreign countries, even if the country had lower labor costs." U.S. DEP'T OF COMMERCE REP., \textit{supra} note 13, at 65.

\textsuperscript{51} \textit{Id.} The Department of Commerce Report provides numerous examples of how technology allows filmmaking to be done in far-flung locations.

For example, a producer could film in a large foreign metropolitan area and digitally replace license plates, billboards, signs, and other elements in the scene to make them appear like their American counterparts. The ability to create the visual image of another location has provided film makers with increased flexibility in choosing production locations.

\textit{Id.} at 68.
skilled labor force necessary to support film production, so filmmakers have taken advantage of technological advances to make American films outside the United States.

Neither the Labor Act nor the collective bargaining agreements between the Hollywood unions and the AMPTP prevent this runaway production. The circumstances of the Screen Actors Guild’s (“SAG”) collective bargaining agreement with the AMPTP furnish an example. Every major American studio and almost every American independent production company has signed the Producer-Screen Actors Guild Codified Agreement of 2001 (“SAG’s Basic Agreement”). According to SAG officials, the Basic Agreement governs compensation and the terms and conditions of employment for performers when a signatory filmmaker shoots a film in the United States or when a signatory hires performers in the United States to make a film elsewhere. Many of the American signatories to the Basic Agreement are subsidiaries of large, multinational corporations that have foreign subsidiaries; the multinational parent companies and their foreign subsidiaries are not bound by SAG’s Basic Agreement. If a producer has a concept for an American movie that is to be filmed outside the United States, a foreign subsidiary of the American signatory’s parent company may acquire the intellectual property that will lead to the production of the film. Because the actual studio or production company that has signed SAG’s Basic Agreement is not involved, the project is not covered by that Basic Agreement. Significantly, every film project involves the creation of a new business entity and the hiring, by that entity, of a new workforce to make the particular film. The new entity

52. Id. at 65.
53. Interview with J. Nicholas Counter III, supra note 48; Interview with A. Robert Pisano & SAG Officials, supra note 43.
55. Letter from John Amman, supra note 37. For example:

Say [X] Pictures agrees to a provision in its union agreement requiring it to do all of its productions in the US. To get around that agreement it will make arrangements with a foreign subsidiary to produce the film on its behalf outside the US. The $$ would come from [X], but, ‘technically’ the film would be a non-[X] production. [X] could then distribute the film via its distribution wing (that is not covered by a collective agreement). Remember, all of these companies have different divisions, and they are vertically integrated, so they can be a union signatory and finance a non-union or foreign film.

Id. at ¶ 3; accord Interview with A. Robert Pisano & SAG Officials, supra note 43.
56. Letter from John Amman, supra note 37; Interview with A. Robert Pisano & SAG Officials, supra note 43.
57. Letter from John Amman, supra note 37, at ¶ 4. The creation of a new entity to produce the film is done for business reasons. Banks and investors who finance the film’s production do not want to make loans to an existing entity that may have existing creditors and obligations. Interview with A. Robert Pisano & SAG Officials, supra note 43.
that is formed to produce a film and hire workers may be a foreign company or affiliated with a foreign entity that is not bound by the Basic Agreement between SAG and AMPTP. In English-speaking and Western European countries, however, the filmmaker is likely to be bound by a collective bargaining agreement with the unions in the host country, so it does not escape all union obligations. Nevertheless, it does not operate under the more costly terms of an American collective bargaining agreement. An American studio or production company that has signed SAG's Basic Agreement may not become involved until after the film has been made. The completed film is licensed by the producing entity to that American studio or company for marketing and distribution work—work that is not covered by SAG's Basic Agreement with the AMPTP.

In summary, other countries have significantly lower costs, substantial financial incentives and subsidies, and weaker currencies, all of which attract American film production. New technologies enable filmmakers to follow these cost savings by performing separate parts of the film production process in far-flung locations. The dominance of multinational corporations and their ability to shift responsibilities from a subsidiary American filmmaker that is bound by a collective bargaining agreement, to a new business entity or foreign affiliate, insures that the runaway production process can advance without legal or contractual impediments. While in the past, Los Angeles sound stages and streets were the main locations for shooting American films, now the entire world is Hollywood's back lot.

V. LABOR-MANAGEMENT RELATIONS IN THE FILM INDUSTRY

Collective bargaining through unions in the film industry could provide a forum for stopping the flight of production from the United States. Yet, although they have tried, Hollywood unions have not attained a collective bargaining agreement that restricts runaway production.

58. Interview with A. Robert Pisano & SAG Officials, supra note 43.
59. Interview with Bernard D. Gold & Scott J. Witlin, supra note 40.
60. See Letter from John Amman, supra note 37.
61. It is surprising how little has been written about labor-management relations in the American film production industry. Telephone Interview with Dr. Lois Gray, supra note 37. For decades after a written study in 1955, academic research generally ignored this topic. Alan Paul & Archie Kleingartner, Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry, 47 INDUS. & LAB. REL. REV. 663, 664 (1994). However, there are some excellent exceptions: Amman, supra note 37, at 111-31; Lois Gray, Entertainment Unions Tune Up for Turbulent Times, NEW LABOR FORUM 122 (Fall/Winter 2001); Lois Gray, That's Entertainment, NEW LABOR FORUM 111 (Fall/Winter 2001); UNDER THE STARS, supra note 32; Archie Kleingartner, Collective Bargaining: Hollywood Style, NEW LABOR FORUM 113 (Fall/Winter 2001).
production. Does this mean that American labor laws governing collective bargaining are inadequate and need reform? Or is there some other explanation for the failure of Hollywood unions to prevent runaway production by collective bargaining?

In many respects, labor-management relations in the film production industry are unusual. The distinctive characteristics of the film industry especially make it conducive to a collective bargaining agreement restricting production outside the United States. Paradoxically, other unusual characteristics of the film production industry make collective bargaining to preserve U.S. jobs particularly difficult.

Unlike other industries, the entertainment industry is heavily unionized; perhaps it is the most heavily unionized industry in the United States. Unions in the entertainment industry have more bargaining power than in most production industries. "As evidenced by their penetration of the industry and their collective bargaining gains, entertainment unions may be viewed with envy by other parts of the American labor movement." Moreover, virtually every position involved in film pre-production and production is covered by a collective bargaining agreement between a labor organization and the AMPTP. "Worthy of note is... the favorable contract terms which have been achieved by these workers who are employed mainly on an intermittent and contingent basis." The employers' side of the labor-management relationship also suggests that if it were possible to restrict or prohibit foreign film production by collective bargaining, it might happen in the film industry. A few major studios greatly influence the entire industry (including its labor relations) and there are few nonunion employers. These facts increase the probability that U.S. employers can agree to industry-wide restrictions on foreign film production.

63. See infra Part V.
64. Gray, That's Entertainment, supra note 61, at 111; Interview with Robert Bush, supra note 35.
65. See Counter, supra note 39, at 32. "The motion picture industry is perhaps the most heavily unionized industry in the United States today."
68. See Gray, Entertainment Unions Tune Up for Turbulent Times, supra note 61, at 122; Interview with J. Nicholas Counter III, supra note 48.
69. Gray, That's Entertainment, supra note 61, at 111; accord Interview with Robert Bush, supra note 35.
A. The Employers' Side of the Bargaining Table

Since the film industry began in the early part of the twentieth century, it has been dominated by a few major studios.70 At one time, the major studios made most of the films, controlled the distribution of these films, and owned the theaters where the films were shown. As a result of the United States Supreme Court’s antitrust decision in United States v. Paramount,71 the major studios divested themselves of ownership of the theaters but continued to dominate the production of films. “When the U.S. Department of Justice in 1984 reviewed the consent decrees that served as the basis for enforcing the Paramount decision, the decrees were nullified and Hollywood studios reentered the distribution business.”72

Beginning in the 1950s, film production shifted from the major studios to a network of independent production companies and their subcontractors.73 Today, most films are made by hundreds of small production companies, not the major studios.74 However, the major studios control the distribution of films to media outlets (e.g. theaters) and have the capital to finance filmmaking by independent production companies. As a result, the independents remain tied to the major studios by contracts and financing.75 The major studios thus continue to dominate the industry.

70. JONES, supra note 16, at 11. At various times, the identity of the dominant major studios has changed.

As of the late 1990s, there were six major theatrical-film studios: The Walt Disney Company, Sony Pictures, Paramount, Twentieth Century Fox, Warner Bros., and Universal. Major studios of smaller size are Metro-Goldwyn-Mayer, Inc. and the so-called mini-majors such as New Line Cinema and DreamWorks. 


71. 334 U.S. 131 (1948).


74. Id. at 92-102.

75. One scholar wrote:

The form of vertical integration now emerging in media industries might be dubbed “virtual integration” to distinguish it from the classic models of integration, which imply ownership of production functions, and from the more disintegrated firm network production systems of the 1970s. Rather than owning the facilities and employing the personnel to produce entertainment products, the major film distributors are integrated largely by contract and investment. Although distributors such as Disney or Universal pay production costs and control personnel, budgets, and shooting schedules as well as
The major studios exert significant influence on the labor relations agendas of the employers. In 1982, the Alliance of Motion Picture and Television Producers ("AMPTP"), a trade association, was formed to unify all the film production companies into one multiemployer bargaining group. The AMPTP includes a council that negotiates collective bargaining agreements separately with each Guild and with the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO ("IATSE"). Representatives of the major studios and "mini-major" studios finance most of the AMPTP's work and dominate its decision-making bodies, including the bargaining council. Many independent production companies do not participate in the negotiations between the AMPTP and each union. Instead, after the collective bargaining agreement has been negotiated by the AMPTP, they agree to it and sign it. Almost all the employers in the film production industry are bound by these industry-wide agreements.

Since the film industry employers present a united front in collective bargaining with each Hollywood union, and there are few nonunion employers, film industry employers are in a better position than most to agree to restrict foreign production and preserve American jobs. If there are significant cost savings to be realized by producing outside the United States, American employers in any industry will have an incentive to move some or all of the production process outside the United States. However, a collective bargaining agreement can level the playing field for all unionized employers in an entire industry. The lure of low-cost foreign production can be stifled if all the employers in an industry make the same agreement with the union to bear the higher costs of producing in the U.S. and no employer is at a competitive disadvantage. Therefore, the facts that film industry employers participate in multiemployer collective bargaining, are parties to the same agreement, and that there are few nonunion

distributing the film, their productions are carried out by a legally but not economically separate firm. This firm, in turn, may subcontract with other firms to produce film or television products or provide production inputs.

Id. at 101-02.

76. The history of collective bargaining between entertainment unions and film companies goes back to the 1920s, before the National Labor Relations Act was passed. John Amman, The Transformation of Industrial Relations in the Motion Picture and Television Industries: Craft and Production, in UNDER THE STARS, supra note 32, at 114-18; see Lois Gray, Entertainment Unions Tune Up for Turbulent Times, supra note 61, at 125. As long ago as 1926, the film production companies were bargaining on a multiemployer basis, although there were several, separate multiemployer groups. See Amman, in UNDER THE STARS, supra note 32, at 114-18.

77. See Paul & Kleingartner, supra note 61, at 666.

78. Id.

79. Id.
employers improve the chances that they can agree to restrict foreign production to preserve U.S. jobs.  

B. The Unions' Side of the Bargaining Table

The film industry workforce is divided into above-the-line and below-the-line workers.  

The above-the-line workers include the various producers, some directors, the writers, and the performers. The producers are part of the management or supervision for the film project and as such, are not represented by any union. The other above-the-line workers belong to the Guilds: the Directors Guild of America (“DGA”), SAG, and the Writers Guild of America (“WGA”). Although these labor organizations do not call themselves “unions” and they operate in isolation from the rest of the labor movement in some respects, they are craft unions. Each Guild separately negotiates with the multiemployer bargaining group, the AMPTP, and makes a separate, industry-wide collective bargaining agreement with the AMPTP. Although the Guilds negotiate separate agreements, there is some coordination among the

80. This may not be desirable for the moviegoer who will pay higher prices to see a theatrical film. Although the effect of a collective bargaining agreement may be to increase the prices charged by producers of goods or providers of services, this does not mean that there is illegal price-fixing that violates the antitrust laws. Perry v. Int’l Transp. Workers’ Fed’n, 750 F. Supp. 1189, 1199 (S.D.N.Y. 1990) (stating that “[a] union’s activity is exempt even if its victory in its disputes adds to the cost of goods . . . .”).

81. Interview with John McLean, Executive Director, Writers Guild, West in Los Angeles, Cal. (Oct. 2, 2001) (on file with author) (referring to the “line” as a term-of-art derived from a line in a production budget that divides expenditures).


84. The performers include stars, supporting cast, day players, stunt players, and extras. Id. at 11.

85. The Producers Guild of America is a professional association, not a labor union. Producers Guild of America, supra note 82. If a producer also happens to be a director, writer, or performer, he/she will probably be a member of one of the Hollywood unions. For a list of the union affiliations, see supra note 11.

86. Gray, That’s Entertainment, supra note 61, at 111; Interview with John McLean, supra note 81.

87. Members of a craft union belong to the same trade or craft, although they may be employed by different employers. “The first national craft unions were founded in the 1850s—printers, machinists, molders, and locomotive engineers.” ARCHIBALD COX ET AL., LABOR LAW CASES AND MATERIALS 9 (13th ed., 2001). By contrast, members of an industrial union are employed by a single employer, although they have different jobs.

88. Copies of these collective bargaining agreements are on file with the author.
Guilds and an overlap in their contractual provisions. 89

Of the above-the-line workers, it is the members of the DGA and SAG (not the WGA) who are most affected by globalization. 90 Except for actors with marquee names and renowned directors located in the United States, a studio or production company making an American film outside the United States can hire many above-the-line workers in the country where the film is being filmed. 91

The workers whose job opportunities are most threatened by runaway production are below-the-line workers. Below-the-line workers are mostly skilled employees and technicians (e.g., sound engineers, electrical technicians, camera operators, unit production managers, grips, set designers, art directors, wardrobe department employees, hairdressers and make-up artists). 92 The IATSE is the principal union representing below-the-line employees in film production. 93 If an American film is made outside the United States, most of the below-the-line members of the film crew (except for key members) will be hired locally.

C. Labor Relations for Above-the-Line Workers: Relations Between the Guilds and the AMPTP

In many respects, the Guilds are unusually strong labor organizations. 94 If any union could be successful at limiting runaway production, it would seem to be one of the Guilds. Virtually every above-the-line worker is a member of the DGA, SAG or WGA. 95 Guild

89. See Paul & Kleingartner, supra note 61, at 665-67.

90. It is my belief that for the most part, members of the WGA can write and edit film scripts in the United States regardless of where filming takes place. Therefore, writers do not face the same global competition for their jobs.

91. One of the reasons that filmmakers favor English-speaking countries as their destination to make American films is so they can employ English-speaking film industry workers. See supra discussion at note 13.

92. This is not a complete list of the below-the-line occupations. A chart listing the job classifications in the above-the-line and below-the-line categories can be found in U.S. DEP'T. OF COMMERCE REP., supra note 13, at 11.

93. Other unions, such as the International Brotherhood of Teamsters, also represent below-the-line employees. For an example, see the AGREEMENT OF AUGUST 1, 2001 BETWEEN PRODUCER AND STUDIO TRANSPORTATION DRIVERS, LOCAL #399 (on file with the author). This Article will focus on IATSE because it is primarily an entertainment industry union and because it represents such a large segment of the below-the-line workforce.

94. Although they are strong, the Guilds do face challenges and have problems. For an excellent discussion of the difficulties the Guilds face, see Gray, Entertainment Unions Tune Up for Turbulent Times, supra note 61 (describing how entertainment unions face challenges from new technology, and the increased bargaining power of global multinational conglomerates that now own the movie studios and other entertainment entities).

95. Paul & Kleingartner, supra note 61, at 663-64.
membership is virtually essential for obtaining work in the United States. Membership in a Guild is a mark of professional achievement and is highly prized. Most studios and independent production companies want to employ Guild members because of their experience and expertise. Moreover, virtually every major studio and independent film company has signed the industry-wide collective bargaining agreement between each of the Guilds and the AMPTP. As far as the Guilds are concerned, there is no significant problem of non-union employers producing films in the United States—or even outside the United States, for that matter.

While the rest of the union movement in the private sector has been in decline, the Guilds have experienced “explosive growth.” In the years between 1967 and 2000, the membership of each Guild increased dramatically. For SAG, membership increased 192% to 76,309 members; for the DGA, membership increased 238% to 11,829 members; and, for the WGA, membership increased 180% to 11,794 members.

97. Interview with J. Nicholas Counter III, supra note 48; Interview with A. Robert Pisano & SAG Officials, supra note 43.
98. Interview with J. Nicholas Counter III, supra note 48.
99. Even so-called “runaway production” does not generally involve a filmmaker making a non-union film. When a filmmaker makes a film in an English-speaking country, or a Western European country, usually it is bound by collective bargaining agreements negotiated with unions in that host country. Interview with Robert A. Bush, supra note 35; Interview with Bernard D. Gold & Scott J. Witlin, supra note 40.
The composition of each Guild's membership is unusually far-reaching for a labor union. Not only do employees protected by the Labor Act belong to each Guild, but so do directors, actors and writers who may not be covered by the Act because they are supervisors, managers or independent contractors.103 Therefore, some of the people who influence where a picture will be produced are themselves Guild members, as are the above-the-line workers affected by that decision.

The administrative structure of each Guild is unusual for a union. Each of the Guilds operates as a single, national union and does not charter local branches.104 (By contrast, in the typical American union, there is a national or international union that acts as an umbrella or oversight body, but charters local unions throughout the country.) Each Guild thus has centralized its bargaining strength, has established control over its bargaining agenda, and has forestalled any effort by employers to play off one local against another.

The Guilds' administrative structure is atypical from yet another perspective. Each Guild's officers (e.g., President, Vice President) are elected from the membership of the Guild, but unlike most unions, they do not aspire to full-time positions serving a labor organization. Instead, they lend their celebrity status and prestige to the Guild, but continue their primary careers in the entertainment industry. That there is a great deal of turnover in these elected positions and more "democracy" than in most unions provides evidence to support this.105 The actual management and administration of each Guild is turned over to a full-time, paid professional executive director—often a preeminent attorney or labor relations expert—who oversees a full-time paid professional staff. Perhaps this structure of professional administration is partly responsible for the innovative aspects of labor relations in the film production industry described below.

Each Guild bargains separately with the AMPTP. At times, the negotiations have been adversarial and the Guilds have called strikes to support their bargaining positions.106 However, the negotiations always

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104. Interview with Robert A. Bush, supra note 35.

105. Id.

106. Most of the disputes in labor negotiations between each Guild and the AMPTP have involved the sharing of wealth that will come from new media and new markets. For example, one issue in the 2001 WGA negotiations involved the Guild's demand for an extension of residuals to the internet market. The negotiations were successfully concluded
have been successful: they have ended in an industry-wide collective bargaining agreement between each separate Guild and the AMPTP. The Guilds have negotiated agreements that have unusually favorable terms for employees who are freelancers. Each agreement between the Guild and the AMPTP establishes minimum rates of pay ("union scale"), working conditions, benefits, and grievance procedures applicable to all covered employees. Unlike most collective bargaining agreements outside the entertainment industry, each Guild’s contract gives covered employees an economic interest in the future use of the product they create by requiring residual compensation for covered workers. The agreement between the AMPTP and each Guild contemplates that a covered employee may negotiate a supplemental individual contract providing for additional compensation (e.g., a percentage of gross receipts from the movie or a share of net profits) and additional terms or conditions of employment. This reflects that fact that some Guild members possess great individual bargaining power.

The AMPTP and the Guilds (and IATSE) work cooperatively in many ways that are not common in American industry. Despite a history of strikes and differences with the Guilds, the AMPTP does not look toward a day when the film industry will be non-union and does not vigorously oppose unionization—in marked contrast to many employers in other fields. The Guilds are “partners with employers in insuring the creative
and financial health of the industry as a whole, and . . . adversaries when bargaining over the share of the wealth from movie and television production that should go to the union members. A process of ongoing consultation has evolved between the AMPTP and the Guilds (and between AMPTP and IATSE). They have established joint labor-management cooperative committees to resolve disputes over the application or interpretation of the collective bargaining agreement or to discuss matters of mutual concern. For instance, a joint committee consisting of representatives of labor and management is studying runaway production to see if they can reach agreement on the facts underlying the issue.

In summary, the Guilds and the AMPTP have created a mature, successful and somewhat cooperative system of labor-management relations—despite their differences and disputes—with the Guilds remaining as strong unions. If collective bargaining can provide a solution to runaway production, an observer would expect to find it in an agreement between the AMPTP and a Guild.

D. Labor Relations for Below-the-Line Workers: Relations Between IATSE and the AMPTP

IATSE is the primary union representing below-the-line workers. It does not have the bargaining power of the Guilds, but it holds an enviable position compared with other unions in the private sector of the economy.

Unlike many other American unions, IATSE membership has grown significantly in recent years. Between the years 1967 and 2000, IATSE membership grew sixty-three percent to 98,700 members. This growth is largely the result of IATSE’s emphasis on organizing non-union employees.

It has been estimated that about ninety to ninety-five percent of film production in the U.S. is done under an IATSE contract. Although not every independent film production company has signed a collective bargaining with IATSE, the vast majority of production companies are

112. Kleingartner, supra note 61, at 121.
113. Counter, supra note 39, at 32, 35; Interview with J. Nicholas Counter III, supra note 48.
114. Interview with J. Nicholas Counter III, supra note 48.
115. Gray, Entertainment Unions Tune Up for Turbulent Times, supra note 61, at 125. IATSE President Thomas Short has emphasized that local unions must reach out to gain new members. Gray, That’s Entertainment, supra note 61, at 128.
117. Interview with J. Nicholas Counter III, supra note 48.
signatories. In addition, the size of the non-union sector is shrinking as more production companies hire IATSE members and sign agreements with IATSE. The relatively few companies that do not have an IATSE contract are not a sizable part of the industry; generally they are very small, low-budget filmmakers. Most film producers want to employ IATSE members because of their high level of expertise and training. Presumably, their skills would make IATSE members difficult to replace in the event of a work stoppage. This gives the union bargaining power.

In recent years, IATSE has taken steps to consolidate its organization and strengthen its bargaining power. When IATSE was formed in 1893, it was formed as a craft union, and was an early affiliate of the American Federation of Labor ("AFL"). Although nominally a craft union, IATSE represented (and still represents) a broad range of job classifications within the entertainment industry. Therefore, to be true to its craft union orientation, IATSE established separate locals for each craft. For example, IATSE chartered separate locals for camera operators and electrical technicians. IATSE also organized its locals by geographical area. For instance, there were three locals representing camera operators: one in the East Coast, one covering the Midwest and parts of the South, and one covering the West Coast. With this proliferation of locals, employers could pit one IATSE local against another. To centralize IATSE and, probably, to control the bargaining agenda, IATSE’s International President, Thomas Short, has encouraged many IATSE locals to merge. These steps, and the growth in membership, have helped to strengthen IATSE’s bargaining power.

IATSE has had a long history of organizing film production workers

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118. By contrast, virtually every production company signs an agreement with each Guild. Without such an agreement, a company could not get the best actors, writers or directors to work for it. Interview with Robert A. Bush, supra note 35; Interview with J. Nicholas Counter III, supra note 48.

119. Letter from John Amman, supra note 37.

120. Interview with J. Nicholas Counter III, supra note 48.

121. Id.


123. See discussion supra note 11 (defining "craft union").


125. Id. at 114.

126. Gray, Entertainment Unions Tune Up for Turbulent Times, supra note 61, at 128 (describing the proliferation of local unions). Employers were able to pit one local against another, particularly on the East Coast where each local had control over its bargaining agenda. On the West Coast, the international union exerted more influence over bargaining by the locals. Amman, in UNDER THE STARS, supra note 32, at 143-50.

and of collective bargaining with filmmakers. IATSE began organizing below-the-line employees in the 1920s, years before the National Labor Relations Act was enacted. As early as 1926, IATSE had a collective bargaining agreement with a multi-employer association representing five major studios. Currently, there is a Basic Agreement between IATSE on the one hand, and filmmakers and television production companies on the other. Each craft local may negotiate its own supplemental agreement with a signatory employer, provided that it is not inconsistent with the Basic Agreement.

E. Summary

Compared with the unions in any other production industry in America, the Guilds and IATSE are in a desirable position. They are strong, well-established unions with a long history of successful collective bargaining in the film industry. One would expect, then, that if any unions would be successful in negotiating restrictions on foreign production, it would be either IATSE, or even more likely, the Directors Guild of America or the Screen Actors Guild. Despite their strengths, none of these unions has negotiated an agreement that preserves U.S. jobs by prohibiting or restricting foreign film production. Why not? Do American labor law rules restrict them, or is there some other barrier to the unions attaining this collective bargaining goal?

Almost every person who was interviewed for this article, including neutral observers, representatives of filmmakers, and labor representatives,

128. Amman, supra note 124, at 115.
129. Id.
131. Interview with Robert A. Bush, supra note 35.
132. IATSE is less likely than SAG or DGA to negotiate a prohibition on foreign production because it is an international union with Canadian locals that benefit from runaway production. Therefore, IATSE leadership has to walk a fine line between representing the interests of Canadian members and American members. In addition, IATSE does not have the bargaining strength of the Guilds, so it is less likely to have the power to attain a restriction or prohibition on foreign production. Despite these obstacles, "The IATSE has worked with companies to keep production in the U.S. Some of this has been through modifying agreements [and] some of this has been accomplished through persuasion." Letter from John Amman, supra note 37.
133. Id. Many of the people interviewed for this article said that it was unlikely that the AMPTP would agree to a collective bargaining agreement prohibiting or restricting foreign film production. J. Nicholas Counter III, President, AMPTP, said that film production is a global industry and filmmakers will not agree to a restriction on foreign production. Interview with J. Nicholas Counter III, supra note 48. Although the AMPTP contends that a restriction on foreign production is not a mandatory subject of collective bargaining, Mr. Counter said that the AMPTP has not refused to collectively bargain about the matter. Id.
has stated that the primary problem facing the Hollywood unions is a problem of economics. The Hollywood unions and their members cannot compete in the global labor market. They cannot obtain a collective bargaining agreement that restricts foreign film production because they cannot afford to grant significant enough concessions to keep film production in the United States. Even if the unions were to make concessions that would markedly lower labor costs, runaway film production would still occur because of the subsidies and incentives offered by foreign governments, the lower location costs outside the United States, and the currency exchange rates. As in other industries (e.g., steel production and garment manufacturing), as long as the rest of the world offers significantly cheaper production costs, and as long as technological advances make it possible for production to leave the United States, American unions cannot keep their members' jobs in the United States via collective bargaining.

It is not just economics that prevents American unions from using collective bargaining to stop runaway production. As more fully discussed below, the Labor Act itself, as interpreted by the courts and the National Labor Relations Board does not help unions meet the challenges posed by globalization and a worldwide labor market.

VI. CONFRONTING RUNAWAY FILM PRODUCTION: THE HOLLYWOOD UNIONS' ALTERNATIVES TO COLLECTIVE BARGAINING

A. Lobbying for Favorable Legislation

Theorists argue that the institution of collective bargaining is valued in a democracy because it enables employers and workers' representatives to determine matters affecting the workplace, rather than have government dictate wages and employment conditions. What has happened in Hollywood demonstrates the truth underlying this concept. Because the Hollywood unions recognize the limitations of collective bargaining as a way to prohibit or prevent foreign film production, they have turned to government at all levels to help stop runaway film production.

134. The individuals who suggested to the author that this problem is one of economics, not law, asked not to be identified with this position.
135. "Industrial pluralists... continue to argue that the institution of collective bargaining is worthy of support because it is the only practical alternative to governmental direction of the terms and conditions of employment." Lewis B. Kaden, The Potential of Collective Bargaining in An Era of Economic Restructuring, in LABOR LAW AND BUSINESS CHANGE: THEORETICAL AND TRANSNATIONAL PERSPECTIVES 7, 13 (Samuel Estreicher & Daniel G. Collins, eds., 1988); accord Summers, supra note 10, at 791.
The Hollywood unions, with the support of the AMPTP, have been lobbying federal, state, and local governments to enact laws that would grant subsidies and incentives for film production to take place in the United States or in a particular state or locality. For example, the unions lobbied members of Congress to pass the United States Independent Film and Television Production Incentive Act of 2001. If enacted, this statute would have granted a tax credit for wages and fringe benefits paid in connection with specified films made in the United States. Similarly, the Hollywood unions, with the AMPTP's support, urged the California government to pass legislation that would grant a state tax credit for wages paid in connection with film and television production in California. In many instances, the unions and the film industry have been successful in getting state and local laws enacted that reward film production in a particular state or place. But these state and local subsidies and incentives are not generous enough to compete with the economic advantages of filming outside the United States.

What does such legislation mean for American society as a whole? In effect, taxpayers are being asked to subsidize the film industry. Perhaps taxpayers are willing to subsidize an industry so that American production can continue and U.S. workers are not competing with developing world workers who earn starvation wages under exploitative conditions. But does this picture fit the American film industry? American film workers are losing work. But so are workers in other U.S. industries. Presumably,

136. The AMPTP has supported the Hollywood unions' efforts to obtain legislation that gives incentives for film production to take place within the U.S., but the unions have played the leading role in advocating the legislation. Interview with J. Nicholas Counter III, supra note 48. Perhaps the American studios and independent production companies cannot lead the campaign for such legislation because often they are affiliated with multinational companies and foreign companies that would be adversely affected by such laws.

137. Letter from John Amman, supra note 37.


140. For instance, California enacted the Film California First Program that reimburses qualified production companies for certain expenses when filming on public property in California. JONES, supra note 16, app. at 90. Florida has enacted legislation that grants various sales tax exemptions in connection with the production of a film, commercial or sound recording in the state. Id. app. at 91. New York City grants sales tax exemptions, low-interest loans, empowerment-zone incentives, and a waiver of parking and permits, free police services and no-fee locations for production. Id. at 94. See also id. at app. 107-20 (listing and describing the federal bills and California bills that have been introduced to provide incentives for production to remain in the U.S. and in California); id. at app. 89-97 (describing the incentive programs that have been passed by states and some local governments).
there will be little public support for long-term subsidies and incentives intended exclusively to keep film production in the United States.

In the long run, subsidy legislation usually does not reflect sound public policy. Subsidies may discourage any industry from adopting cost-saving efficiencies that would benefit consumers and the economy as a whole. In addition, if the federal government or the states were to embark on a generous program of subsidies for American film production, it is likely that foreign governments would respond by increasing their own incentives and subsidies. In the end, all governments involved would be in a losing competition as they shift more revenue to the film industry. This would be like a race among nations to set higher and higher tariffs to keep out foreign goods and protect domestic industry; the U.S. has mostly eschewed that course in favor of a policy of free trade. Shouldn't the same approach prevail when it comes to subsidizing a domestic industry? After all, subsidies and tariffs are two sides of the same coin.141

What has happened in Hollywood is a model of what can happen in any industry. To the extent that collective bargaining fails to satisfactorily address the problem of runaway production, we can expect that more and more industries will be seeking government subsidies for domestic production. In the long run, government-provided incentives will not solve the problem of runaway production in a way that addresses the underlying reasons for the problem. There must be a better way for the industry participants (with government support) to confront the challenges of globalization. To the extent that a search for legislation becomes the participants' solution to runaway film production, the institution of collective bargaining will become increasingly irrelevant in the twenty-first century.

B. SAG's Global Rule One Campaign

With the ever increasing problem of “runaway production” reaching critical proportions, it's time to stand together once again and declare that our SAG contract goes with us wherever we go in the world, or we don't go!142

141. It is interesting to speculate whether the incentives and subsidies offered by foreign governments to lure American film production violate trade agreements and treaties such as the North American Free Trade Agreement (NAFTA). Some American film workers and their representatives believe that the subsidies and the incentives could be challenged successfully as violative of various trade agreements and treaties. Letter from John Amman, supra note 37. It is beyond the scope of this article to discuss international trade agreements.

Implicitly recognizing that collective bargaining is unlikely to prevent runaway film production, SAG officials have responded to the problem with a creative but troubling approach: Global Rule One. Global Rule One does not directly prevent runaway production; in fact, it assumes that it exists. It tries to insure that if a SAG member who resides in the United States performs outside the U.S., he/she will be covered or protected by SAG’s Basic Agreement. SAG is attempting to achieve, through an internal union rule, what it cannot get at the bargaining table: application of SAG’s Basic Agreement to film production outside the United States.\textsuperscript{143}

Global Rule One is an international extension of Rule One of SAG’s Rules and Regulations which states, in relevant part: “No member shall work as a performer or make an agreement to work as a performer for any producer who has not executed a basic minimum agreement with the [Screen Actors] Guild which is in full force and effect.”\textsuperscript{144}

Rule One has been part of SAG’s Constitution since 1933, but until recently, SAG had applied it only to its members working on film production in the United States.\textsuperscript{145} On May 1, 2002, SAG extended enforcement of Rule One to SAG members working on film projects anywhere in the world—hence the term “Global Rule One.”\textsuperscript{146} Under Global Rule One, a SAG member who is offered employment on a film project outside the United States must refuse the work if the filmmaker does not agree to provide the member with the protections of SAG’s Basic Agreement. If a SAG member violates Global Rule One, SAG may

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\textsuperscript{143}. According to SAG officials, during collective bargaining with the AMPTP, SAG proposed that a filmmaker that has signed SAG’s Basic Agreement would be responsible for the actions of any subsidiary of the same parent company as the signatory. SAG could not get such a commitment. Interview with A. Robert Pisano & SAG Officials, \textit{supra} note 43.


1. No member shall work as a performer or make an agreement to work as a performer for any producer who has not executed a basic minimum agreement with the [Screen Actors] Guild which is in full force and effect.

   (A.) No member shall perform any services as a performer nor make an agreement to perform services as a performer for any producer against whom the Guild is conducting a strike, nor shall any member otherwise violate any strike order of the Guild.

\textit{Id.} at 33.

\textsuperscript{145}. Press Release, Screen Actors Guild, Global Extension of Rule One on the Horizon (Aug. 29, 2001) (on file with SAG); \textit{see also} Kiefer, \textit{supra} note 143, at S1 (discussing May 1, 2002 as proposed start date for Global Rule One).

conduct a trial and discipline the member by a reprimand, censure, fine, suspension, or expulsion from the Guild.\textsuperscript{147} Suspension or expulsion from SAG is a harsh punishment; a performer who is not a member of SAG is unlikely to find work in the United States.\textsuperscript{148}

Global Rule One, as described by SAG officials, applies very broadly. It applies to SAG members working on any film production, anywhere in the world, if the film is intended for international distribution, although it does not apply to the foreign production of a foreign "indigenous" film.\textsuperscript{149} Global Rule One applies to SAG members regardless of the domicile or place of business of the entity that is producing the film.\textsuperscript{150} It applies to SAG members who are U.S. residents, regardless of their citizenship,\textsuperscript{151} regardless of their membership in a foreign performers' union, and regardless of whether they are covered by a foreign union collective bargaining agreement governing the foreign film project.\textsuperscript{152}

To understand Global Rule One's impact, the reader should consider a likely scenario. Suppose that a movie with an American storyline has been developed in the United States, has been financed with American dollars, but will be filmed in Canada rather than the United States for economic reasons.\textsuperscript{153} Assume that the production company making the film in Canada is a Canadian business entity but eventually the film will be marketed and distributed by a major U.S. studio. The film is intended for either a U.S. or an international audience so it is not an indigenous

\textsuperscript{147} \textsc{Screen Actors Guild, Constitution and By-Laws, supra} note 143, at 28; \textit{see also} Press Release, Screen Actors Guild, SAG Pursues Disciplinary Charges Against Members (Feb. 15, 2001) (on file with SAG) (discussing SAG disciplinary rules and processes).

\textsuperscript{148} \textit{See generally} Chi, \textit{supra} note 96, at 1.

\textsuperscript{149} Interview with A. Robert Pisano & SAG Officials, \textit{supra} note 43.

\textsuperscript{150} \textit{Id.} By applying Global Rule One to its members working on productions by foreign companies, SAG defeats the ability of multinational companies to use foreign entities to make films and thereby avoid their agreements with the Hollywood unions.

\textsuperscript{151} SAG officials indicated that Global Rule One would apply to foreign citizens who are SAG members if they are U.S. residents. Interview with A. Robert Pisano & SAG Officials, \textit{supra} note 43. However, some newspaper articles have reported that Global Rule One only applies to U.S. citizens. \textit{See, e.g.,} Etan Vlessing, \textit{Canadians Support SAG's Global Rule One, Hollywood Reporter, Apr. 18, 2002, at 1.}

\textsuperscript{152} Interview with A. Robert Pisano & SAG Officials, \textit{supra} note 43. Many SAG members are also members of a foreign union that represents performers such as England's "British Equity," Australia's "Media Entertainment and Arts Alliance," and Canada's "Alliance of Canadian Cinema, Television and Radio Artists." Interview with A. Robert Pisano & SAG Officials, \textit{supra} note 43; Kiefer, \textit{supra} note 144, at S1, S3.

\textsuperscript{153} For example, "Rudy," a made-for-TV movie aired in April 2003 on USA Network, is about events taking place during former New York City Mayor Rudolph Giuliani's term in office, but was filmed primarily in Montreal for economic reasons. "Ironically, Giuliani as mayor frequently championed shooting films and TV shows in New York in lieu of places such as Canada." James Bates, \textit{TV Movie About NYC's Giuliani to Be Shot in . . . Montreal, L.A. Times, Oct 28, 2002, at C1.}
Canadian production. Further, the reader should assume that the Canadian production company has a binding collective agreement with a Canadian performers’ union such as the Alliance of Canadian Cinema, Television and Radio Artists (“ACTRA”) or the Union of British Columbia Performers (“UBCP”). Assume that the Canadian collective agreement establishes at least minimum compensation and conditions of employment for all performers making the film in Canada, but a performer may negotiate an individual, supplemental agreement establishing additional compensation or conditions of employment.

If a SAG member who is a U.S. resident—but also a Canadian citizen and a member of ACTRA or UBCP—is offered work on that film production in Canada, Global Rule One makes it incumbent on that member to insist that the Canadian production company provide the protections of SAG’s Basic Agreement. If the filmmaker does not agree, the SAG member cannot accept the job; if the filmmaker does agree, other difficulties arise.

If the Canadian production company has a binding collective agreement with a Canadian union covering all performers (including the SAG member) the filmmaker must find a way to coordinate the provisions of SAG’s Basic Agreement with the Canadian collective bargaining agreement that is binding under Canadian labor law. According to SAG officials, the difficulties of coordination will vary for each nation, depending on the nature of the foreign collective agreement and the labor laws that govern.5 In the case of Canada and ACTRA, SAG officials have speculated that the Canadian agreement would be binding and would provide some protections for SAG performers that are greater than the protections usually accorded under American labor law and collective agreements. In addition, SAG officials have assumed that the Canadian filmmaker would have to sign a supplemental or memorandum agreement with the SAG member stating that the terms of SAG’s Basic Agreement are also applicable.5 SAG officials hypothesized that this supplemental or memorandum agreement would be enforced by ACTRA, not SAG.5

If a SAG member/U.S. resident is successful in his/her negotiations with the filmmaker, SAG and the performer will get the best of all worlds: The protection of Canadian labor laws and the Canadian collective

155. Id. SAG officials were careful to say that they would not be negotiating collectively with a foreign filmmaker who has a relationship with a foreign union. This supplemental or memorandum agreement would be negotiated by the individual SAG member with the foreign filmmaker, perhaps with SAG’s advice or assistance. Whether SAG is negotiating collectively on behalf of SAG’s members would be a question of fact that might ultimately be a significant issue in any legal proceeding challenging the enforceability of Global Rule One. See discussion infra Part VIII.B.
156. Id.
bargaining agreement, plus whatever additional terms or benefits SAG's Basic Agreement provides.\textsuperscript{157} If the member is unsuccessful in the negotiations, he/she has to turn down the work or risk being disciplined by SAG.

SAG's motivation for the Global Rule One campaign depends on the observer's viewpoint. The Guild's avowed purpose for Global Rule One is to ensure that SAG members have the protections afforded by SAG's Basic Agreement regardless of where they work. Without SAG's Basic Agreement, a filmmaker would not make any contributions to the industry-wide Producer-Screen Actors Guild Pension and Health Plans on behalf of a SAG performer working outside the United States.\textsuperscript{158} In addition, SAG's Basic Agreement generally provides greater protections for performers' creative rights and for residual payments than are provided under foreign laws and foreign collective agreements.\textsuperscript{159} Furthermore, according to SAG officials, the Basic Agreement ensures that there will be a safe working environment, and adequate rest periods, along with travel and lodging protections for performers.\textsuperscript{160}

SAG officials say that the Global Rule One campaign strengthens the Guild as an entity protecting its members. All SAG members must see that the highest-profile performers work under a SAG agreement, regardless of where they work.\textsuperscript{161} This has a positive effect on the image and power of SAG and builds loyalty among its members.\textsuperscript{162} SAG officials suggest that it is important for filmmakers to realize that SAG's Basic Agreement cannot be circumvented by traveling outside the United States.\textsuperscript{163}

A skeptical observer would say that Global Rule One seeks to impose provisions of the SAG agreement in many situations where there already is

\textsuperscript{157} Id.
\textsuperscript{158} Id.; Interview with Robert A. Bush, supra note 35. The Producer-Screen Actors Guild Pension and Health Plans are governed by the PRODUCER-SCREEN ACTORS GUILD CODIFIED BASIC AGREEMENT OF 2001, at § 34, 103-10 (on file with author).
\textsuperscript{159} Interview with A. Robert Pisano & SAG Officials, supra note 43; accord Interview with Robert A. Bush, supra note 35 (noting that Global Rule One is in part intended to protect payment of residuals). One of the reasons that filmmakers want to film outside the U.S. is because they will not be bound by the high residual payments required by the collective bargaining agreements between the Hollywood unions and the AMPTP. Interview with Bernard D. Gold & Scott J. Witlin, supra note 40.
\textsuperscript{160} Interview with A. Robert Pisano & SAG Officials, supra note 43; Press Release, Screen Actors Guild, SAG Rule One Campaign (Sept. 9, 2001) (on file with SAG); see also James Bates, SAG Calls for Guild Contracts Overseas, L.A. TIMES, Apr. 29, 2002, at C1.
\textsuperscript{161} An integral part of the Global Rule One campaign is SAG's enlisting the open support of its campaign by movie stars. Bates, supra note 160, at C1. SAG hopes that if the biggest stars demand that a filmmaker on a foreign production honor the SAG basic agreement provisions, it will benefit less powerful SAG members working on the same film project. Interview with A. Robert Pisano & SAG Officials, supra note 43.
\textsuperscript{162} Interview with A. Robert Pisano & SAG Officials, supra note 43.
\textsuperscript{163} Id.
an enforceable collective bargaining agreement between the filmmaker and a foreign performers’ union. Therefore, the moral justification that allows a union to discipline its members who work for a non-signatory employer (i.e., stopping the spread of substandard nonunion compensation and employment conditions) is not a compelling justification for Global Rule One in many instances. SAG officials would point out, however, that Global Rule One does prevent the spread of compensation and employment conditions that do not rise to the standards of SAG’s Basic Agreement.

A cynical observer would stress that SAG’s interests as an institution—apart from the welfare of its members—are served by Global Rule One. SAG faces an “unremittingly grim financial picture,” and Global Rule One ensures that there will be contributions by employers to the ailing industry-wide pension and health plans. SAG has estimated that from 1996 to April 24, 2002, the pension and health funds lost revenue of $22.9 million as a result of productions being filmed outside the United States with SAG performers who were working without a SAG agreement. SAG has estimated that the lost revenue would have risen to $35.8 million if SAG had not implemented Global Rule One. Of course, the financial condition of the health and pension funds affects not just SAG as an entity, but also SAG members individually. For example, “due to its pinched pocketbook, the SAG pension and health plan will be raising the earnings requirements for [member] qualification on two of its basic health plans beginning [January 1, 2003].” The skeptical observer could also see another reason for SAG’s enforcement of Global Rule One: Global Rule One means that SAG will continue to receive members’ dues regardless of the production location. Without Global Rule One, a SAG member could perform services abroad and would not pay SAG union dues while involved in that work. SAG estimates that if it had not implemented Global Rule One, it would have

164. Id. This may not be relevant for Eastern European countries where it is not as likely, as it is in English-speaking and Western European countries, that the film production will be governed by a collective agreement.
165. Kiefer, supra note 144, at S1, S3.
166. Id. at S3. “According to the Guild, SAG’s pension and health plan has lost an estimated $23 million between 1996-[20]00, with further losses expected in the ballpark of $36 million over the next five years.” Id. SAG President Melissa Gilbert has stated that the SAG health plan has not escaped the impact of the current national crisis in health care. Peter Kiefer, Gilbert Rallying SAG Troops for Big Year Ahead, HOLLYWOOD REPORTER, Jan. 2, 2003, at 1, 13.
168. Id.
169. Kiefer, supra note 144, at S1, S3.
170. Based on author’s interview with A. Robert Pisano & SAG Officials, supra note 43.
lost dues of $5 million over the next five years. Because there are many different ways of viewing SAG’s motivation for Global Rule One, and because there are so many conflicting interests that are affected by SAG’s campaign, the responses to Global Rule One have varied.

Do foreign unions see Global Rule One as a kind of American union imperialism? In effect, SAG is telling its counterpart performers’ unions that their labor laws and collective bargaining agreements may be good enough for foreign performers, but are not good enough for SAG members who are U.S. residents. SAG implicitly is challenging the foreign unions’ jurisdiction.

One union-side attorney has said that foreign performers unions have welcomed Global Rule One because it creates higher standards. However, a trade newspaper has reported that in May 2002, five guilds from Australia, Ireland, the United Kingdom, Canada, and New Zealand allied to oppose Global Rule One. These guilds issued a statement: “The (SAG) rule is not legally binding since foreign countries are not bound by American collective agreements outside of the U.S.” The statement by the foreign guilds affirmed that they—not SAG—have jurisdiction to negotiate collective agreements in their respective countries.

Although foreign unions may have opposed Global Rule One initially, it is possible that these same labor groups will eventually cooperate with SAG in its Global Rule One campaign. For instance, in September 2002, SAG and its Australian counterpart union reached a compromise agreement on how Global Rule One would be applied to Australian film productions.

The reactions of foreign unions (who will understandably guard their jurisdictions) suggest that SAG will have to coordinate the implementation

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172. Interview with Robert A. Bush, supra note 35.


174. Id.

175. Id. at 48.


177. Ray Bennett & Peter Pryor, SAG, Aussies Reach Accord, HOLLYWOOD REPORTER, Sept. 17, 2002, at 75. According to the agreement, “Australian citizens, permanent residents, New Zealand citizens and non-U.S. citizens working on Australian productions will be exempt from SAG’s Global Rule One ....” Some lower-budget productions will also be exempt, provided that pension payments are made according to SAG’s Basic Agreement. Id. See also Blake Murdoch & Peter Kiefer, Aussie Actors Union, SAG Ink Compromise, HOLLYWOOD REPORTER, Sept. 13, 2002, at 16.
of Global Rule One with them. SAG may have to compromise by applying Global Rule One to SAG members who are U.S. citizens, not to the broader class of SAG members who are U.S. residents.

As one would expect, representatives of U.S. and foreign filmmakers have denounced Global Rule One. The AMPTP contends that Global Rule One is a breach of its collective bargaining agreement with SAG and that it is otherwise unlawful and unenforceable. Domestic and foreign producers associations have contemplated taking legal action against Global Rule One.

Although some foreign unions, and domestic and foreign filmmakers, may object to Global Rule One, the greatest burden of the Rule has fallen on SAG members. In some cases, SAG members have been unable to get a filmmaker working outside the U.S. to agree to apply the provisions of SAG’s Basic Agreement. Rather than violating the Rule and testing its enforceability, SAG members have declined the work.

Global Rule One’s legality may be challenged in several ways. As noted above, the AMPTP contends that the Rule violates its collective bargaining agreement with SAG. Foreign filmmakers might challenge the validity of Global Rule One under the laws of another country. If SAG were to decide a member had violated Global Rule One and were to assess a fine against that member, perhaps the SAG member might

179. Id.
180. Id.; Vlessing, supra note 151, at 1 (Canadian Film and Television Production Association will see how SAG applies Global Rule One before taking legal action to challenge it).
181. Interview with A. Robert Pisano & SAG Officials, supra note 43; Interview with Bernard D. Gold & Scott J. Witlin, supra note 40. However, a trade publication reported that after one year of SAG’s implementation of Global Rule One, there has not been any major infraction of the Rule by SAG members. Ray Bennett & Peter Pryor, SAG Deems Its Year-Old Global Rule 1 a Success, HOLLYWOOD REPORTER, May 6, 2003, at 56. Both SAG members and “even producers have been very compliant,” according to the chair of SAG’s Global Rule One Committee. Id.
182. Although there may be several bases to question the legality of Global Rule One, it is unlikely that Global Rule One would violate federal antitrust laws. See Perry v. Int’l Transp. Workers’ Fed’n, 750 F. Supp. 1189 (S.D.N.Y. 1990) (discussing the application of antitrust laws to labor activities). There is a broad exemption from the antitrust laws for labor unions and employers in regard to labor activities and collective bargaining. See generally JOSEPH Z. FLEMING, ANALYSIS OF RELEVANT LABOR, EMPLOYMENT DISCRIMINATION AND HUMANITARIAN RELIEF LAWS AFFECTING SPORTS, ARTS AND ENTERTAINMENT INDUSTRIES 461 (ALI-ABA Continuing Legal Education Series No. 34, 1997).
183. Interview with J. Nicholas Counter III, supra note 48. This article cannot evaluate that claim because its determination depends on the resolution of difficult factual questions (e.g., the bargaining history, the parties’ understanding and intention with respect to language in the agreement, the past practice of the parties).
184. Vlessing, supra note 151, at 1.
challenge the reasonableness of the fine’s amount under principles of state law, in a state court lawsuit. But the most manifest question of Global Rule One’s legality is whether its implementation or enforcement by SAG is an unfair labor practice that contravenes the Labor Act.

VII. DOES GLOBAL RULE ONE VIOLATE THE LABOR ACT?

SAG’s implementation of Global Rule One could be called into question under Section 8(b)(1)(A) of the statute. Section 8(b)(1)(A) states that it is an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act. Section 7 states, in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities... Section 8(b)(1)(A)’s prohibition on a union’s restraining or coercing employees in the exercise of their statutory rights is limited by a significant proviso: “Provided, [t]hat this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein...” Does Section 8(b)(1)(A) prohibit SAG from implementing and enforcing Global Rule One?

A. Union Membership and Section 8(b)(1)(A) of the Labor Act

In a series of cases, the United States Supreme Court has decided when a union’s internal rule, binding on its members, violates Section 8(b)(1)(A) of the Labor Act.

In *Allis-Chalmers*, the Court held that a union did not violate Section 8(b)(1)(A) by imposing fines on members who had returned to work during a lawful, authorized strike, and by seeking to collect those fines in a state court action. Considering the language and the legislative history of Section 8(b)(1)(A), the Court concluded that Congress never intended Section 8(b)(1)(A) to apply to “traditional internal union discipline in general, or disciplinary fines in particular.” The Section’s prohibition on a union’s restraining or coercing employees does not apply to union discipline as long as the union-imposed fines are reasonable in amount, are imposed according to authorized union rules adopted as a result of fair and democratic procedures, and are enforced by the union through internal means. If the union has met these conditions, it may govern its members’ conduct free from the application of Section 8(b)(1)(A). In *Allis-Chalmers*, because the union’s implementation and enforcement of its rule was not proscribed by Section 8(b)(1)(A), the Court did not have to

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190. *See Pattern Makers’ League of N. Am. v. NLRB, 473 U.S. 95 (1985)* (finding a violation when a union fined members who resigned during a strike); *Booster Lodge No. 405, Int’l Ass’n of Machinists and Aerospace Workers v. NLRB, 412 U.S. 84 (1973)* (finding a labor violation when a union fined former members for crossing picket lines during a strike); *Boeing Co., 412 U.S. 67 (1973)* (holding that the Board may not inquire into the reasonableness of a union’s fines); *NLRB v. Granite State Joint Bd., Textile Workers Union of Am., 409 U.S. 213 (1972)* (finding a violation when a union sought to impose fines on former members after they had resigned); *Scofield v. NLRB, 394 U.S. 423 (1969)* (establishing that a union may enforce union rules that reflect a legitimate union interest, impair no labor law policy, and are enforced against union members who are free to leave the union); *NLRB v. Indus. Union of Marine & Shipbuilding Workers of Am. 391 U.S. 418 (1968)* (finding an unfair labor practice when a union expelled a member for filing charges with the Board without exhausting intra-union grievance procedures); *NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)* (holding that unions may impose fines on strikebreaking member during a lawful strike).

191. 388 U.S. 175 (1967).


193. 388 U.S. at 190.

194. *Id.* at 186.

195. *Id.* at 192-93 (footnotes omitted). In a subsequent decision, the Court disavowed the *Allis-Chalmers* dictum that the National Labor Relations Board or a court could consider the reasonableness of the amount of a union fine. In *Boeing Co.*, 412 U.S. at 67, the Court held that the National Labor Relations Board is not authorized to consider the amount or reasonableness of a union fine when determining if the union’s discipline violates § 8(b)(1)(A).


197. *Id.* at 184-86, 195. This distinction between internal and external enforcement of union rules is significant. *See infra* notes 204-12 and discussion in text.
decide whether the union’s actions were sheltered by the proviso to Section 8(b)(1)(A). Moreover, because the union’s conduct did not fall within Section 8(b)(1)(A), the Court did not have to engage in a traditional analysis of balancing the union’s legitimate interests against the employees’ exercise of Section 7 rights, to determine if the union’s conduct was an unfair labor practice.

Allis-Chalmers establishes that a union has a wide range of discretion, unregulated by Section 8(b)(1)(A), to make and enforce internal membership rules. However, a central reason why Congress intended union self-government to be unchecked by Section 8(b)(1)(A) is based on the premise that the union was chosen by a majority of employees in an appropriate unit as their exclusive collective bargaining representative.

SAG’s Global Rule One does not seem to fit within this Allis-Chalmers justification for granting a union wide discretion in the matter of self-government. When it enforces Global Rule One, SAG is not acting as the exclusive representative of any specific unit of employees, and it has not been chosen by a group of employees to represent them in dealings with a particular employer. In fact, SAG’s Global Rule One may interfere with the relationship that exists between a particular filmmaker and another foreign union that has been chosen by the employees as their bargaining representative under the labor laws of another nation. It is questionable whether SAG’s union rule can be considered within the wide range of discretion granted to unions in matters of self-government, as discussed in Allis-Chalmers. The answer to this question is not in the case law—the published court and National Labor Relations Board opinions do not seem to discuss the validity of a union rule like Global Rule One.

In a case after Allis-Chalmers, the Supreme Court established that Section 8(b)(1)(A) may apply to a union’s implementation of an internal membership rule. National Labor Relations Board v. Scofield stresses

198. Allis-Chalmers, 388 U.S. at 180 n.29. See also language of § 8(b)(1)(A) proviso supra note 186.
199. See infra Part VII.B.
201. There are some cases that assume the validity of a union rule prohibiting a union member from working for a nonunion, nonsignatory employer, however, the author did not find a case involving enforcement of such a rule concerning an employer outside the United States. E.g., NLRB v. Int’l Bhd. of Elec. Workers, Local 340, 481 U.S. 573, 592 (1987) (stating that no-contract/no-work rule is designed to prevent any union member from working for an employer that does not pay union scale).
202. Even if a union’s implementation or enforcement of a rule is subject to § 8(b)(1)(A) of the Act, it does not follow inexorably that the union has committed an unfair labor practice. The determination of whether the union’s conduct is unlawful depends on the outcome of “balancing the employees’ Section 7 rights against the legitimacy of the union interest at stake . . . .” Serv. Employees Int’l Union (Brandeis University), 332 N.L.R.B. 1118, 1122 (2000). See also United Steelworkers of Am. Local 9292 (Allied
the limitations that Section 8(b)(1)(A) places on union self-government. In *Scofield* the union had adopted a rule imposing a daily production ceiling on its members (who were paid on an incentive basis). When the union fined and suspended several union members who had exceeded the ceiling and tried to collect these fines in a state court action, these members alleged that the union’s rule, its enforcement, and its attempt to collect the fines violated Section 8(b)(1)(A) of the Labor Act. Although the Supreme Court determined that the union’s conduct was not an unfair labor practice, the Court discussed how Section 8(b)(1)(A) limits a union’s implementation or enforcement of an internal membership rule.

In *Scofield*, the Court refined a distinction that it had drawn in *Allis-Chalmers* between a union’s permissible enforcement of rules by internal means and its impermissible enforcement by external means. A union may not affect a member’s employment status to enforce its rules. A union may not “use the emoluments of the job to enforce the union’s rule,” because it is the policy of the Labor Act to insulate an employee’s job from his union activities. So, while a union does not violate Section 8(b)(1)(A) by imposing internal discipline (e.g., fines, suspension, or expulsion from union membership or office), generally a union may not punish a member by inducing the employer to affect the member’s job (e.g., by discharging or demoting the member).

The Court’s distinction between permissible internal enforcement and impermissible external enforcement of a union’s rule calls into question the legality of Global Rule One. Global Rule One requires a SAG member to refuse an offer of employment if the employer does not agree to the terms of SAG’s agreement. Does this mean that SAG is unlawfully using the “emoluments of the job” to enforce its Rule? According to *Scofield*, there

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203. A member could exceed this production ceiling, but could not necessarily be paid by the employer for the excess work. The union rules permitted the employer to “bank” the employee’s pay in excess of the daily production ceiling and pay it to the employee on days when his/her production does not reach the ceiling. *Scofield*, 394 U.S. at 424-25.

204. *Id.* at 428.

205. *Id.*

206. *Id.* at 429.

207. *Id.* at 428 n.4.

208. *See* Healthcare Employees Union Local 399, (City of Hope Nat’l Med. Ctr.), 333 N.L.R.B. 1399 (2001) (union’s threat to negotiate to have employer outsource dissident union members’ work violated Section 8(b)(1)(A) because the union had threatened to interfere with the members’ employment relationship). There are some circumstances when a union may interfere with a member’s employment status. If there is a lawful union security clause and a union member fails to pay an initiation fee or periodic dues that are uniformly required, the union may seek the member’s discharge from employment. Labor Act §§ 8(a)(3), 8(b)(1)(a) and 8(b)(2), 29 U.S.C. §§ 158(a)(3), (b)(1)(A)-(2) (2000).
is no problem with Global Rule One in this respect. In *Scofield*, the Court treated the union's production ceiling as a matter of internal enforcement although the union rule did have an impact "beyond the confines of the union organization."209 The union rule "may result in the member's refusal to accept work offered by the employer,"210 (as did the valid union rule in *Allis-Chalmers*211), but the rule is internally enforced if the union does not use the employer to enforce it, according to the Court.212

According to *Scofield*, even if a union rule is enforced by permissible internal means, the rule may still be unlawful. "*[I]t has become clear that if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1).*"213 The Court then stated the standards to be used in determining if a union rule or its enforcement is subject to § 8(b)(1)(A): "*[Section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.*"214

Applying these standards to the facts in *Scofield*, the Court stated, "*[T]here is no showing... that the fines were unreasonable or the mere fiat of a union leader," thus the implementation of a production ceiling was proper.215 The Court also determined that union members were free to resign from the union and escape the union's production ceiling, although they were governed by a union security clause in the collective bargaining agreement.216 The major issues before the Court were whether the union's rule served a legitimate union interest and "the extent to which any policy of the Act may be violated by the union-imposed production ceiling."217 The Court concluded that the rule served legitimate union interests, violated no policy of the Act, and was therefore valid.218

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209. 394 U.S. at 432.
211. In *Allis-Chalmers*, the union rule required members to refuse employment during a strike. 388 U.S. at 177.
212. See United Paperworkers Int'l Union, 295 N.L.R.B. 995 (1989) (holding a union's ban on employees taking temporary, non-unit positions is an internal rule even if it is intended to interfere with its member's employment).
214. *Id.* at 430 (emphasis added).
215. *Id.*
216. *Id.* at 424 n.1, 435 (describing a union security clause as one that generally gives each employee the option of becoming and remaining a member after a designated waiting period and stating that resignation from the union is permissible).
217. *Id.* at 431.
218. *Id.* at 436. The Court Stated:

The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no
After the Supreme Court decided *Scofield*, the National Labor Relations Board interpreted *Scofield* so narrowly so that § 8(b)(1)(A) generally will not apply to a union’s discipline of members at least in cases of intra-union politics. In *Office and Professional Employees International Union (Sandia Corporation)*, the Board ruled that a union’s discipline of its members and its elected officials for opposing the union’s president did not violate § 8(b)(1)(A). Although the Supreme Court had written in *Scofield* that a union’s rule would be subject to § 8(b)(1)(A) if it violated policies “imbedded in the labor laws,” the Board stated it would consider only policies of the National Labor Relations Act, as amended, and not other labor laws, in making this determination. Significantly, the Board also stated in *Sandia Corporation* that it would be improper to consider the union’s motivation for adopting an internal rule or for disciplining a member.

As a result of *Sandia*, in almost all subsequent cases in which a union disciplined a member because of an intra-union dispute or intra-union dissident activity, the Board has found that the union’s conduct was not proscribed by § 8(b)(1)(A). In other words, *Sandia* has given unions a relatively free hand to discipline dissident members and to enforce union rules in purely intra-union political or factional conflicts. It remains to be seen whether, as Board membership changes, the Board will continue to follow *Sandia* and narrowly interpret *Scofield*, particularly in

discrimination by the employer against any class of employees, and represents no dereliction by the union of its duty of fair representation. In light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act.

*Id.*

220. *Id.* at 1429.
221. 394 U.S. at 430.
222. In *Sandia Corporation*, the Board stated, “To the limited extent that the Board . . . held that internal union discipline fell within the reach of § 8(b)(1)(A), it did so only in narrowly defined circumstances, namely, where that discipline impaired fundamental policies of the Act itself.” 331 N.L.R.B. at 1420.
223. *Id.* 1426-27 (noting that the Supreme Court interpreted the Act in this way in its *Scofield* decision).
224. See, e.g., *Truck Drivers & Helpers Local No. 170, Int’l Bhd. of Teamsters, 333 N.L.R.B. No. 152, slip op. at 30398 (May 3, 2001); Textile Processors, Local 311 (Mission Indus.), 332 N.L.R.B. No. 143, slip op. at 1352 (Dec. 15, 2000); Local 466, Int’l Bhd. of Painters & Allied Trades (Skidmore Coll.), 332 N.L.R.B. No. 41, slip op. at 445 (Sept. 29, 2000); see also Local 254, Serv. Employees Int’l Union, 332 N.L.R.B. No. 103, slip op. at 1118, 1123 (Oct. 31, 2000) (finding that even if the Board assumes union discipline impacts members’ relationship with an employer and is subject to § 8(b)(1)(A), union rule is still valid, as union interests outweigh members’ § 7 rights).
225. In *Sandia Corporation*, three of the five National Labor Relations Board Members subscribed to the Board’s opinion, and they were the Board’s three Democratic appointees: Chairman John C. Truesdale, and Members Sarah M. Fox and Wilma B Liebman. Member
distinguishable cases (like SAG’s Global Rule One) where the union’s discipline does not involve intra-union politics.

Since Scofield, there have been many Board and court decisions considering whether a union violated § 8(b)(1)(A) by adopting or enforcing an internal membership rule that undermines a policy imbedded in the Labor Act. For example, the Board has found that when a union rule had compelled members to observe a picket line or to participate in a work stoppage that either violated a provision of the Labor Act or was unprotected by the Act, the union violated § 8(b)(1)(A). Likewise, a union violated § 8(b)(1)(A) when its rules had forced members to engage in an activity that was a breach of the union’s agreement with the employer or otherwise undermined the collective bargaining process. If a union’s rule had effected a unilateral change in the terms and conditions of employment and thereby involved bad faith bargaining by the union, the union violated § 8(b)(1)(A). Decisions such as these suggest that if Scofield standards

J. Robert Brame, a Republican, dissented and would have found that the union had violated § 8(b)(1)(A). The other Republican then serving on the Board, Member Peter J. Hurtgen, agreed with the dissent’s reasoning, but believed that the Board should not accept jurisdiction of the matter, so he concurred in the Board’s decision to dismiss the Complaint. 331 N.L.R.B. 1417 (2000). It remains to be seen how Sandia will be interpreted and applied by a National Labor Relations Board whose membership is dominated by appointees of Republican President George W. Bush. See also Analysis/News and Background: NLRB Achieves Full Complement by Swearing in Four New Members, 171 LAB. REL. REP. (BNA) 205, 206 (Dec. 30, 2002) (stating that traditionally, the Board has two Democratic members, two Republican members, and a fifth member from the President’s party). Will a newly-constituted Board be as willing to find that union self-government does not violate § 8(b)(1)(A)?

226. Local 520, Int’l Union of Operating Eng’rs, 298 N.L.R.B. 768 (1990) (deciding that union violated § 8(b)(1)(A) by fining members for crossing unlawful recognitional picket line and by causing them to resign); Hoisting & Portable Local 101, Int’l Union of Operating Eng’rs, 297 N.L.R.B. 485 (1989) (finding that union violated § 8(b)(1)(A) by fining members for crossing unprotected recognitional picket line and by fining member to exert unlawful secondary pressure on neutral employer); Graphic Communication Union, Local No. 229 (Daily Printing, Inc.), 272 N.L.R.B. 1088, 1093 (1984) (holding that union’s ban on members working overtime and related work restrictions violated § 8(b)(1)(A), as it induced members to engage in unprotected partial strike); Local 714, Int’l Union of Operating Eng’rs (Contractors Found. Drilling Co.), 262 N.L.R.B. 1161, 1162 (1982) (finding that union violated § 8(b)(1)(A) by fining member for working for a neutral employer at a common site with another employer whom union was picketing).

227. Local 12419, Int’l Union of Dist. 50, United Mine Workers of Am. (Nat’l Grinding Wheel Co.), 176 N.L.R.B. 628 (1969), overruled on other grounds, Int’l Union of Operating Eng’rs Local 18, 238 N.L.R.B. 652 (1978) (finding that union could not compel its members to violate contractual no-strike clause); Local 254, Serv. Employees Int’l Union (Brandeis Univ.), 332 N.L.R.B. No. 103, Slip op. at 1118, 1123 (deciding that union’s removal of dissident member from committee created by collective bargaining agreement did not offend policy of Act favoring adherence to contract terms).

228. NLRB v. Sys. Council T-6, Int’l Bhd. of Elec. Workers, 599 F.2d 5, 9 (1st Cir. 1979) (finding that union rule prohibiting member from accepting temporary management positions effected a unilateral change in terms and conditions of employment, violating §§
are applied to Global Rule One, the legality of SAG's conduct will turn on whether Global Rule One violates a policy imbedded in the Labor Act.\textsuperscript{229}

There is much to dislike about Global Rule One. The hardship it imposes on SAG members will fall most heavily on the performers who are least able to bear it: the union members who do not have the individual bargaining power to persuade a filmmaker working outside the U.S. to give them the protections of SAG's Basic Agreement.\textsuperscript{230} Global Rule One smacks of arrogance. It seeks to inject the provisions of the SAG agreement into the relationship between a filmmaker and a foreign union that is sanctioned by foreign law, thereby suggesting that the foreign union, the foreign collective agreement, and the foreign labor laws are not good enough to protect American performers. By promulgating Global Rule One, SAG is acting in the manner of a nation-state, having jurisdiction over the conduct of its nationals on foreign soil under international law, as well as that wielded within its own territory.\textsuperscript{231} It appears to be an overbearing exercise of power for a union.

Global Rule One may be distasteful in some ways; nevertheless, that

\textsuperscript{229} Does SAG's Global Rule One meet the Scofield standard that union members be free to resign from the union and escape from the rule? As a practical matter, a performer who wants to work within SAG's jurisdiction may not be able to resign from SAG. See Chi, \textit{supra} note 96, at 2. However, the cases applying \textit{Scofield} seem to consider legal obstacles to a member's resignation from the union, not factual barriers, as invalidating a union rule. For a court to decide that a union's influence over the labor market makes it impossible for a union member to escape from the union's rule (within the meaning of \textit{Scofield}) would be to create one legal standard for rules by strong unions, like SAG, and a more lenient standard for rules made by weaker unions. Surely that should not be the effect of the National Labor Relations Act. Therefore, \textit{Scofield} standards probably should focus on legal barriers to a member's resignation from the union.

\textsuperscript{230} To avoid the hardship of the Rule falling on SAG's weakest members, SAG's hope is that the most sought-after performers working outside the U.S. will successfully negotiate for SAG contract protections, and their negotiations will "bring along" other SAG members with less bargaining power. See Bates \textit{supra} note 160 and Interview with A. Robert Pisano & SAG Officials, \textit{supra} note 43.

\textsuperscript{231} A nation-state may exercise jurisdiction over conduct within its territory. It also has inherent jurisdiction over the conduct of its nationals anywhere in the world, unless exercise of that jurisdiction conflicts with local law. Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948) (stating that Congress has the power, under certain circumstances, to regulate actions of its citizens outside the sovereignty of the U.S.), \textit{reh'g denied}, 336 U.S. 928 (1949); James Michael Zimmerman, \textit{Extraterritorial Application of Federal Labor Laws: Congress's Flawed Extension on the ADEA}, 21 \textit{CORNELL INT'L L.J.} 103, 113 (1988) (discussing \textit{Vermila-Brown} and the debate regarding the extraterritorial application of U.S. labor laws).
does not make it unlawful. Whether it violates § 8(b)(1)(A) depends on whether it frustrated the policies imbedded in the Labor Act. Arguably, Global Rule One undermines several of the Labor Act's policies: the Act's promotion of collective bargaining in good faith and its fostering of adherence to collective agreements; the law's prohibition on secondary pressure; and the Act's principles relating to the scope of an appropriate unit for collective bargaining and exclusive union representation. Each of these arguments presents significant unsettled questions. One of the most intriguing issues is whether SAG's conduct in connection with Global Rule One violates § 8(b)(1)(A) because it undermines a principle imbedded in the Labor Act: the statute does not apply outside the territory of the United States.

B. Extraterritoriality, the Labor Act, and Global Rule One

It is well-established that the Labor Act is not extraterritorial. That

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232. If the National Labor Relations Board changes or overrules the principle of Sandia Corporation, the legality of Global Rule One may be judged by reference to policies imbedded in labor statutes in addition to the Labor Act. See supra note 222, and discussion infra p. 97.

233. It may be argued that Global Rule One frustrates the policy of the Labor Act to promote collective bargaining and to foster adherence to collective bargaining agreements. Is Global Rule One a breach of the AMPTP-SAG Basic Agreement, as the AMPTP contends? Does Global Rule One effect a unilateral change in the terms and conditions of employment (a change in past practice) so that SAG has refused to bargain in good faith? See supra note 227, and discussion infra p. 98.

234. E.g., Hoisting & Portable Local 101, Int'l Union of Operating Eng'rs, 297 N.L.R.B. 485 (1989); Int'l Union of Operating Eng'rs (Contractors Found. Drilling Co.), 262 N.L.R.B. 1161 (1982); see supra note 226, and discussion infra p. 98.

235. Section 9(a) of the Labor Act, 29 U.S.C. § 159(a) (2000), states that unions representing a majority of employees in an appropriate unit "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." Section 9(b) of the Act, 29 U.S.C. § 159(b), defines the scope of an appropriate unit as "the employer unit, craft unit, plant unit, or subdivision thereof . . . ." The argument against the legality of Global Rule One is that SAG is seeking to bargain with employers in other countries on behalf of employees in foreign nations who could not possibly be an appropriate unit under § 9(a), and under circumstances where SAG could not be the bargaining representative of those employees. SAG officials deny that they are seeking to bargain on behalf of SAG members with employers outside the U.S.; SAG may simply be assisting individual performers (SAG members) in their individual negotiations with filmmakers. Interview with A. Robert Pisano & SAG Officials, supra note 43.

236. Each of these issues merits extended, separate treatment beyond the scope of this article.

is to say, the Labor Act does not apply to the conduct of employers outside U.S. territory, even in relation to their American employees working abroad.\(^{238}\) Although the Act itself is not extraterritorial, it does not follow that a union governed by the Act cannot propound an internal membership rule that is extraterritorial in application. To illustrate, the Railway Labor Act is not extraterritorial, but unions and the air carriers (employers) governed by that statute may forge enforceable collective bargaining agreements that have extraterritorial effects.\(^{239}\) Because of the nature of air travel, the air carriers and the unions governed by the Railway Labor Act have long recognized that it is impractical to draw national boundaries around the effect of their collective bargaining agreements.\(^{240}\) Like the Railway Labor Act, the purpose of the Labor Act is to foster collective bargaining and to promote agreements.\(^{241}\) In an era of globalization when commerce among nations forms a seamless web of economic relationships, any collective bargaining agreement in any industry governed by the Act may have an extraterritorial impact.\(^{242}\)

Marineros de Honduras, 372 U.S. 10 (1963); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957); see also Asplundh Tree Expert Co., 336 N.L.R.B. No. 116, slip op. at 31162, 31164 (Nov. 30, 2001) (holding that NLRA is not extraterritorial but does protect Americans who are employed by an American employer in the United States, but who were working on a brief, temporary assignment in Canada); GTE Automatic Elec., Inc., 226 N.L.R.B. 1222, 1223 (1976) (deciding that employees working outside the United States for a foreign-incorporated subsidiary of a U.S. company are not within a bargaining unit and are not covered by a collective bargaining agreement).

238. Computer Scis. Raytheon, 318 N.L.R.B. 966, 969 (1995) (finding that NLRB does not have jurisdiction over American citizens working for American employer on U.S. military bases outside the United States); RCA OMS, Inc., 202 N.L.R.B. 228 (1973) (finding that NLRA does not apply to employees working in Greenland although they were hired in the U.S. by a U.S. employer, were required to have U.S. Government security clearances, were paid from the U.S. and returned to the U.S. after completion of their jobs).


240. Id.

241. See Summers, supra note 10, at 791; see also infra Part VII.A.

242. Presumably, many collective bargaining agreements made pursuant to the Labor Act do have an impact beyond the geographical area within the agreement’s scope. For example, the AMPTP, PRODUCER-SCREEN ACTOR GUILD CODIFIED BASIC AGREEMENT OF 2001 (on file with author) recognizes SAG “as the exclusive bargaining agent for performers in the production of motion pictures in the motion picture industry within the territorial limits of the United States of America.” Id. at § 1.A, 1. However, when a signatory producer has a base of production within United States territory but goes on location in Canada, the Basic Agreement (except the union security provisions) “shall apply to all performers hired by Producer at such location.” Id. at § 1.B(2), 2. The Basic Agreement also covers work outside United States territory if the signatory producer employed the performer within United States territory. Id. at § 1.B(3), 2. See also Stephen B. Moldof, The Extent to Which U.S. Labor Laws Apply When Activities of Carriers and Employees Extend Beyond the United States, SH094 ALI-ABA 867, 889 (April 3-5, 2003) (describing
Moreover, American multinational employers commonly apply internal rules developed in the United States to their operations outside this nation; it seems that a union should be permitted to apply its internal rules outside the United States as well. Thus, the mere fact that Global Rule One applies outside the United States, while the Labor Act does not have extraterritorial application, should not in itself condemn the Rule without further inquiry. The issue is whether Global Rule One is unlawful because its extraterritorial impact violates a policy imbedded in the Labor Act. Why has the United States Supreme Court held that the Labor Act does not have extraterritorial effect? What do the Court’s reasons mean for the legality of Global Rule One?

In a line of cases beginning with Benz v. Compania Naviera Hidalgo, S.A.,\textsuperscript{243} the United States Supreme Court has limited the extraterritorial effect of the Labor Act.\textsuperscript{244} Each decision in the Benz line presents essentially the same issue arising from similar facts. In each instance, an American labor union became embroiled in a labor dispute with a foreign-flag ship docked in United States port. In most instances, the foreign-flag ship was owned by a foreign company.\textsuperscript{245} In each case, the question before the Court was whether the labor dispute was a matter in “commerce” or “affecting commerce” covered by the Labor Act and therefore, preempting collective bargaining agreements between the Air Line Pilots Association and American air carriers under the Railway Labor Act that have extraterritorial effects).

\textsuperscript{243} 353 U.S. 138 (1957).

\textsuperscript{244} id. (noting that the Labor Act does not apply to American union’s picketing of a foreign ship docked in the United States because labor dispute was between foreign ship and its foreign crew); see also Am. Radio Ass’n v. Mobile Steamship Ass’n, 419 U.S. 215 (1974) (holding that the dispute between American shippers and stevedoring companies and American unions who were picketing a foreign-flag ship with a foreign crew docked in the U.S., was not covered by the Labor Act); Windward Shipping Ltd. v. Am. Radio Ass’n, 415 U.S. 104 (1974) (finding that the Labor Act does not apply to American unions’ picketing of foreign-flag ships docked in the U.S., to protest the substandard wages paid to foreign crews); Int’l Longshoremen’s Ass’n Local 1416 v. Ariadne Shipping Co., 397 U.S. 104 (1974) (finding that the Labor Act does not apply to American unions’ picketing of foreign-flag ships docked in the U.S., to protest the substandard wages paid to American longshoremen working in the port); Incres Steamship Co. v. Int’l Mar. Workers Union, 372 U.S. 24 (1963) (holding that the National Labor Relations Board does not have jurisdiction to prevent unfair labor practices on a foreign-flag ship employing foreign seamen that regularly docks at an American port); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (holding that National Labor Relations Board does not have jurisdiction to conduct an election on a foreign flag-ship employment a foreign crew. The Labor Act does not apply to foreign ships with foreign crewmen, although the ship has American contacts.).

\textsuperscript{245} In one case, the foreign employer that owned the ship was a subsidiary of an American corporation. Nevertheless, the Court treated the employer as a foreign entity. McCulloch, 372 U.S. at 20. In Mobile Steamship, the Court stated that it is irrelevant whether the foreign-flag ship is American owned. 419 U.S. at 219 n.5
the application of state law. Because a foreign-flag ship is considered the territory of the foreign nation and foreign laws govern its internal affairs even when it is in a United States port, the Court implicitly treated each case as raising the question of whether the Labor Act applies extraterritorially. From the Court's perspective, it was as if the American unions were acting on foreign soil. In every case but one, the Court decided that the Labor Act does not apply, although it is possible to read the jurisdictional provisions of the Act literally as covering conduct outside United States territory. To understand what Benz and its progeny mean for the legality of Global Rule One, we must consider these decisions and their rationale. What are the reasons why the Labor Act is not extraterritorial, and what do they mean for the legality of an extraterritorial union membership rule?

In Benz v. Compania Naviera Hidalgo, S.A., American unions peacefully picketed a foreign-flag ship docked in the U.S. to support foreign seamen in their dispute with the ship's master over wages and
working conditions. The ship's owner, a foreign corporation, brought a diversity suit against the American unions seeking damages and injunctive relief under Oregon law. In response, the unions contended that the application of state law was preempted by the federal Labor Act, but the Supreme Court disagreed. The Court held that the Labor Act was not applicable. Although Congress has the constitutionally-endowed authority to apply the Labor Act to foreign-flag ships with foreign crews docked in the United States, the Court concluded that Congress did not intend that the Act would apply.

Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill. . . . What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.

Strictly speaking, the Benz case does not hold that the Labor Act is not extraterritorial; it states that the Labor Act does not apply to a dispute between foreign workers and their foreign employer. However, Benz became the first in a line of Supreme Court opinions that are cited for the proposition that the Labor Act is not extraterritorial.

The Court's analysis in Benz was based on a long-standing canon of statutory construction that still prevails. Long before the Benz decision, the Court had adopted a presumption against extraterritoriality: Although Congress may enact laws that apply to the conduct of American citizens abroad, the Court will presume that a federal statute does not apply outside the territorial jurisdiction of the United States unless Congress, in either language or legislative history, expresses a contrary intention. This

250. Whether a state law claim or action is preempted by the federal Labor Act depends on whether the union's conduct arguably is protected by § 7, or arguably is prohibited by § 8 of the Labor Act. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

251. Benz, 353 U.S. at 143-44 (emphasis added).

252. See supra notes 237-38 and discussion infra pp. 100-01.


254. See Foley Bros., Inc. v Filardo, 336 U.S. 281, 285 (1949) (holding that federal Eight Hour Law was not applicable to a contract between the United States Government and an American private contractor for the performance of construction work by Americans in
canon of construction "is based on the assumption that Congress is primarily concerned with domestic conditions." The presumption against extraterritoriality is especially strong in the case of a labor statute. "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose."

In the Labor Act cases after Benz, the Court has continued to apply the presumption against extraterritoriality. But, this presumption should not condemn SAG's Global Rule One as undermining a policy imbedded in the Act. Certainly it is true that Congress' concern in enacting and amending the NLRA was to solve domestic problems and to secure the rights of Americans, not to apply the statute outside the United States. When Congress enacted the National Labor Relations Act (the "Wagner Act") in 1935, the United States was in the midst of the Great Depression. In an effort to end widespread discontent and industrial unrest, and to increase American workers' purchasing power and raise their standard of living, Congress passed that law. It guaranteed employees the right to form, join, and assist unions, and to bargain collectively with employers while it prohibited specified employer practices that interfered with employees' rights. In 1947, when Congress amended the Wagner Act by passing the Labor Management Relations Act (the "Taft-Hartley Act"), the United States was no longer in a depression, but the economy was wracked by post-World War II strikes in critical industries. Many members of Congress and the public believed that the Wagner Act had gone too far in empowering unions at the expense of American employers and American employees. In response, Congress passed the Taft-Hartley Act which,

Iran and Iraq); Blackmer v. U.S., 284 U.S. 421, 437 (1932) (holding that an American citizen was properly held in contempt of court for failing to respond to subpoenas issued while he was traveling abroad).


256. Professor Turley wrote that in the case of federal labor and employment statutes (as compared with antitrust statutes and securities regulations acts), courts apply the presumption against extraterritoriality very stringently. The court usually concludes that the ambiguous labor or employment federal statute is not extraterritorial. Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 NW. U. L. REV. 598, 618 (1990).


259. Id. at 27-28.


261. Id. at 32, 36-37. Many conditions in addition to post-World War II strikes fueled the perception that labor unions had become too powerful: illegal wartime strikes by the United Mine Workers; mass picketing during strikes; secondary boycotts; disruptions caused by jurisdictional disputes among unions, closed-shop provisions, some unions'
inter alia, prohibited specified union conduct and guaranteed employees the rights to refrain from joining or assisting unions, and to refrain from collective bargaining.\textsuperscript{262}

When Congress enacted and amended the Labor Act in the 1930s and 1940s, the world was a very different place than it is today. The economies of the world's nations were not as closely interrelated. Multinational corporations, doing business and employing persons throughout the world, were not as dominant as they are now.\textsuperscript{263} Thus, the question of the extraterritorial scope of either the Wagner Act or the Taft-Hartley Act would not have been of paramount significance to Congress, as it would be today if that same legislation were under consideration. Perhaps it can be said that Congress did not reject extraterritorial application of the Labor Act so much as it did not seriously focus on the question. If that is true, Global Rule One does not undermine a policy of the Act merely because the union rule seeks to protect American employees working outside the United States.

The canon of statutory construction on which the Court relied in the Benz line of cases is of questionable utility in today's era of globalization. Professor Jonathan Turley has persuasively written that the presumption against extraterritoriality reflects an outmoded view of the world.\textsuperscript{264} He contends that in cases involving market statutes (e.g. antitrust laws and securities regulations statutes) federal courts implicitly acknowledge that there is a world-wide financial market and economy that will adversely affect the United States if actors outside the U.S. are not constrained by federal law. Therefore judges have given the presumption against extraterritoriality less weight than the Labor Act cases would suggest, and have held that ambiguous market statutes have extraterritorial effect in some circumstances.\textsuperscript{265} Professor Turley convincingly argues that it is time for federal courts to recognize that there is a world-wide labor market and therefore, the presumption against extraterritoriality ought to be treated the same way in labor statute cases as it is in market statute cases—which is to say, the ambiguous statute may have extraterritorial application. Professor

\textsuperscript{262} See id. at 39-40 (describing the LMRA).

\textsuperscript{263} For a discussion of the development and growing influence of multinational business enterprises, see generally \textit{Transnational Cooperation Among Labor Unions} supra note 4. "By the mid-1980s, multinational conglomerates had been created in the media sector." Jim Wilson, \textit{From "Solidarity" to Convergence: International Trade Union Cooperation in the Media Sector}, in \textit{Transnational Cooperation Among Labor Unions} 153, 160 supra note 4.

\textsuperscript{264} Turley, supra note 256, at 642-45.

\textsuperscript{265} See, e.g., U.S. v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945) (deciding that agreements made outside the United States may violate the Sherman Act, depending on their purpose and effect.)
Turley’s arguments suggest that Global Rule One should not fail merely because it applies outside the United States. After all, a union rule is not a federal statute and globalization, as he describes it, demonstrates the necessity for an extraterritorial membership union rule.

As stated above, the question of Global Rule One’s legality depends not just on the fact that it is extraterritorial, but on an analysis of why the Supreme Court has held that the Labor Act is not extraterritorial. What do those reasons say about the legality of Global Rule One? In the Benz line of cases, there is a second significant rationale—the avoidance of international discord or controversy—that has implications for the legality of Global Rule One. This second rationale has become increasingly important as the Benz line has evolved.

In Benz, the Court could have rested its decision on the first rationale—the presumption against extraterritoriality plus the absence of clear legislative history and statutory language.\(^{266}\) Instead, the Court went further to explain why the Labor Act has no "foreign applicability."\(^{267}\)

For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts.\(^{268}\)

If we consider this second rationale in opposition to extraterritoriality, the legality of Global Rule One may depend on the reaction of the international community and foreign government to it.

In the next decision following Benz, McCulloch v. Sociedad Nacional de Marineros de Honduras,\(^{269}\) the Court emphasized its refusal to interpret the Labor Act in a way that might cause international discord, absent a clear direction by Congress. While a Honduran-flag ship was docked in the United States, an American union sought certification by the National Labor Relations Board as the exclusive bargaining representative of the seamen (none of whom were North American) working aboard the ship.

\(^{266}\) In Windward Shipping, the Court observed:

Recognition of the clear congressional purpose to apply the LMRA only to American workers and employers was doubtless a sufficient reason to place the picketing in Benz outside the Act. But the Court in that case made clear its reluctance to intrude domestic labor law willy-nilly into the complex of considerations affecting foreign trade, absent a clear congressional mandate to do so . . . .

415 U.S. at 110.

\(^{267}\) Benz, 353 U.S. at 146.

\(^{268}\) Id. at 147.

The seamen were represented by a Honduran union as their exclusive bargaining agent in conformity with Honduran law, which prohibited American unions from qualification.\footnote{270}

To determine if it had jurisdiction to conduct a certification election, the National Labor Relations Board weighed the ship’s American contacts against its foreign contacts. Based on this balancing process, the Board concluded that the ship had sufficient American ties so that it was engaged in “commerce,” and that its maritime operations “affected commerce” within the meaning of Section 2(6) and (7) of the Labor Act. Therefore, the Board ordered an election. Ultimately, the Supreme Court disagreed, deciding that the Act does not apply to foreign-flag ships with foreign crews.\footnote{271}

Significantly, the Court rejected the Board’s “balancing of contacts” approach to determining if the Labor Act applies to such a case.\footnote{272} The Court’s opinion followed the Benz reasoning,\footnote{273} but in McCulloch the Court was particularly concerned about the international and diplomatic ramifications of a decision to apply the Act under the circumstances. Application of the Labor Act would be contrary to both international law and U.S. Government principles recognizing that the law of the flag state governs the internal affairs of a ship, the Court decided.\footnote{274} The Court stated, “The possibility of international discord cannot be therefore gainsaid.”\footnote{275} The concurrent application of Honduran and American labor laws, plus the competing claims of the Honduran and American unions

\footnote{270. Id. at 14. The Honduran-flag ship was owned by a Honduran corporation that was a subsidiary of an American corporation. Nevertheless, the Court treated the employer as a foreign entity and did not consider the American connection to be significant. Id.}

\footnote{271. Id. at 13. The Court held that the National Labor Relations Board could be enjoined from holding the certification election. Id. at 16.}

\footnote{272. The Court feared that the Board’s “balancing of contacts” approach might: [Lead the Board to] inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely \textit{ad hoc} weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice. Id. at 19.}

\footnote{273. Id. at 20. The Court ruled that the Act’s jurisdictional provisions relating to certification elections do not apply to relations between foreign-flag ships and their foreign crew members; the maritime operations of foreign-flag ships employing foreign seamen are not in “commerce” and do not affect commerce within the meaning of \textsection 2(6) and \textsection 2(7) of the Labor Act. As in Benz, the Court stated that Congress had not affirmatively stated its intention that the Act apply to foreign-flag ships with foreign crews; Congress was concerned with American workers and their employers. Id.}

\footnote{274. Id. at 21.}

\footnote{275. Id.}
have "international import" that could "invite retaliatory action from other nations as well as Honduras." The Court concluded that if the Act were to apply under "such highly charged international circumstances," Congress must make that decision.

In a companion to the McCulloch decision, Inre Steamship Co., Ltd., v. International Maritime Workers Union, the Court reached the same result for the same reasons in a different procedural setting. In Inre, a labor organization formed by American unions to represent foreign seamen picketed foreign-flag ships while they were in American ports. The purpose of the picketing was to organize the foreign seamen on the ships. In response to the picketing, the ship owner sued the labor organization under New York state law for damages and injunctive relief. The New York Court of Appeals held that the state courts do not have jurisdiction because the matter is preempted by the federal Labor Act. The Supreme Court overruled the New York Court of Appeals and held, as in McCulloch, that the Labor Act does not apply to foreign-flag ships employing foreign seamen.

The next decision in the Benz line of cases is the only one in which the Court found that the Labor Act applies to a case with foreign facts. In International Longshoremen's Ass'n Local 1416 v. Ariadne Shipping Co., an American union picketed a foreign-flag vessel docked in an American port to protest the substandard wages paid by the foreign ship owner to American longshoremen working on the dock. The ship owner successfully petitioned the Florida state courts to enjoin the picketing. The Supreme Court reversed and held that the Florida courts had no jurisdiction because the state suit was preempted by the federal Labor Act. Although the union was picketing a foreign-flag ship with a foreign crew, the Labor Act applied because the "dispute centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew, but rather to do casual longshore work." Therefore, there was no risk that the Labor Act would involve the Board in the internal order of a foreign-flag ship or in the relationship between a foreign ship owner and a foreign crew. Thus, there was little likelihood of

276. Id.
277. Id. at 21-22.
279. Id. at 26-27. In McCulloch, the case arose because the National Labor Relations Board proposed to exercise its jurisdiction to conduct a certification election under § 9 of the Act. 372 U.S. at 13. In Inre, the case involved the Board's jurisdiction under § 10 of the Act to prevent unfair labor practices prohibited by § 8 of the Act.
282. Id. at 200.
283. Id. at 199.
a disturbance in international relations or of a conflict with international or foreign law.\textsuperscript{284}

If \textit{Ariadne} was the last decision in the \textit{Benz} line of cases, we might conclude that Global Rule One does not undermine a principle imbedded in the Labor Act. \textit{Ariadne} suggests that it is not inconsistent with the Act for an American union like SAG to target a foreign employer if the union’s goal is to protect American workers’ pay and benefits, and if there is little likelihood of ensuing international discord. But there is an important distinction between \textit{Ariadne}’s facts and the Global Rule One campaign: SAG’s conduct is directed at benefits and compensation paid to American workers \textit{outside the United States}. Perhaps SAG’s conduct is more likely to cause international discord. Whatever \textit{Ariadne} suggests about the legality of Global Rule One, \textit{Ariadne} is not the last word.

The last two decisions in the \textit{Benz} line are \textit{Windward Shipping Ltd. v. American Radio Ass'n}\textsuperscript{285} and \textit{American Radio Ass’n v. Mobile Steamship Ass’n}.\textsuperscript{286} They emphasize that the Labor Act is limited to United States territory to avoid the international consequences of an American union pressuring foreign employers to raise wages paid to foreign workers outside the United States.

\textit{Windward Shipping} and \textit{Mobile Steamship} both arose from a picketing campaign organized by the American Radio Association.\textsuperscript{287} The American Radio Association consisted of several American maritime unions representing a substantial number of American merchant seamen.\textsuperscript{288} These unions attributed the declining job opportunities for American seamen to competition from foreign shipping lines paying much lower wages to foreign seamen than American seamen received on American ships.\textsuperscript{289} The American Radio Association began a campaign to picket foreign-flag ships at several ports in the United States. The purpose of the picketing was to advise the public of the competitive advantages enjoyed by foreign ships that pay substandard wages and benefits and to ask the public to patronize American ships to protect American jobs and standards.\textsuperscript{290} Although the picketing was “neither obstructive nor violent,”\textsuperscript{291} American longshoremen

\textsuperscript{284} \textit{Id.} at 200.
\textsuperscript{286} 419 U.S. 215 (1974).
\textsuperscript{287} \textit{Id.} at 219 (stating that “[i]t is apparent from the facts already stated that the Houston picketing in \textit{Windward} and the Mobile picketing here were for all practical purposes identical”).
\textsuperscript{288} \textit{Windward Shipping}, 415 U.S. at 106.
\textsuperscript{289} \textit{Id.} at 107. It was undisputed that the wages paid to foreign crews on foreign ships were substantially less than those paid to American seamen on American ships. \textit{Id.} at 107 n.4.
\textsuperscript{290} \textit{Id.} at 106-07.
\textsuperscript{291} \textit{Id.} at 108.
and other port workers refused to cross the picket lines to load and unload the ships. In response, in *Windward Shipping*, foreign ship owners and their agents petitioned the Texas courts for an injunction against the picketing under Texas law. The Texas courts dismissed the suit, holding that state court jurisdiction was preempted by the Labor Act. 292 In *Mobile Steamship*, an American shipper and an association of American stevedoring companies petitioned the Alabama state courts for an injunction against the American Radio Association’s picketing under that state’s law. The Alabama courts granted injunctive relief, rejecting the unions’ preemption argument. 293

The issue before the Supreme Court in both cases was the same: is the state court action preempted by the federal Labor Act? 294 In each case, the Court held that the Labor Act is inapplicable; 295 the state courts have jurisdiction to enjoin union picketing if it violates state law.

In *Windward Shipping*, the Court stressed that the Labor Act is inapplicable because of the probable consequences of an American union pressuring a foreign employer to raise wages paid to foreign workers outside the United States:

The picket signs utilized at the docks where [the foreign-flag ships] were tied up protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States. At the very least, the pickets must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen’s refusal to load or unload the vessels, or because of wage increases awarded as a virtual

292. *Id.* at 105.

293. *Mobile S.S.*, 419 U.S. at 218. The unions defended themselves against the state court action with Constitutional claims as well as the preemption argument. The United States Supreme Court discussed and rejected the unions’ contention that the picketing was expressive conduct protected from a state court injunction by the First and Fourteenth Amendments. *Id.* at 229. A state may enjoin peaceful picketing aimed at preventing effectuation of that state’s public policy. *Id.* (applying Int’l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284 (1957)).

294. See supra note 250, and accompanying text (enumerating the criteria for preemption of state action by the federal Labor Act). In *Windward Shipping*, the American unions unsuccessfully contended that the picketing arguably was protected by § 7 of the Labor Act and therefore, the Texas suit was preempted by the Labor Act. 415 U.S. at 105. In *Mobile Steamship*, the American unions unsuccessfully claimed that the picketing arguably was prohibited by § 8(b)(4) of the Labor Act (proscribing secondary boycotts by a union) and therefore, the Alabama suit was preempted by the federal statute. 419 U.S. at 219.

295. The Court held that Labor Act is inapplicable because the dispute did not involve activities in “commerce” or “affecting commerce” within the meaning of § 2(6) and (7) of the Labor Act. *Id.* at 224; *Windward Shipping*, 415 U.S. at 115.
self-imposed tariff to regain entry to American ports. Such a large-scale increase in operating costs would have more than a negligible impact on the "maritime operations" of these foreign ships, and the effect would be by no means limited to costs incurred while in American ports. Unlike Ariadne, the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country.

In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under Benz rather than under Ariadne.296

In Mobile Steamship, the Court relied on its decision in Windward Shipping.297 It held that the state court action by American shippers and American stevedoring companies was not preempted by the federal Labor Act—although all the parties in the Alabama action were American—because the union's conduct was the same as in Windward Shipping.298

In Windward Shipping and Mobile Steamship, the Court allowed the difficulties and probable responses of foreign employers to render peaceful picketing by American unions, in American ports to protect American jobs and workers, outside the scope of the Labor Act. Global Rule One seeks to

296. 415 U.S. at 114-15 (footnote omitted).
297. 419 U.S. at 222 (quoting Windward Shipping).
298. Id. at 225. The Court reasoned:

The effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-ship owners or by the persons seeking to service and deal with the ships. The fact that the jurisdiction of the state courts in this case is invoked by [American] stevedores and shippers does not convert into "commerce" activities which plainly were not such in Windward.

Id.
do what the unions' picketing attempted to do in *Windward Shipping* and *Mobile Steamship*: force employers outside the United States to raise wages and benefits to American levels in order to protect American workers, and indirectly, to protect American jobs.\(^9\)

There are some important distinctions, however, between Global Rule One and *Windward Shipping* and *Mobile Steamship*.\(^9\) Global Rule One affects the compensation and benefits of SAG members who are American residents—not all employees—of employers outside the United States.\(^9\) In *Windward Shipping* and *Mobile Steamship*, the Court envisioned that higher costs incurred by foreign shippers would harm U.S. citizens, who are dependent on foreign shippers to transport imported and exported goods.\(^9\) Even if Global Rule One were to raise the cost of films made outside the United States and these increased costs were passed on to American consumers, the American citizenry and economy are not as reliant on the existence of low-cost movies as they are dependent on the availability of low-cost maritime shipment of goods. Despite these differences, the Court's concerns with the international ramifications of American unions pressuring foreign employers to raise wages paid outside the United States makes it possible—perhaps probable—that the Board or a federal court will conclude that Global Rule One is likely to create the same kind of international difficulties that the Court envisioned in *Windward Shipping* and *Mobile Steamship*. Global Rule One's extraterritorial effect and its probable international consequences raise serious questions about whether the rule violates policies imbedded in the Labor Act.

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299. In *Windward Shipping* and *Mobile Steamship*, the unions' picketing could stop direct competition by foreign shipping lines with American ship owners if the ships could not dock in a U.S. port. In the case of Global Rule One, the union's prohibition can stop direct competition from film production companies working outside the United States if they cannot hire American performers, many of whom are movie stars crucial to a film's commercial success.

300. The fact that the employers targeted by Global Rule One may be controlled by, or closely affiliated with, American companies (unlike the ship owners in *Windward Shipping* and *Mobile Steamship*) would not be a significant distinction. The Court has refused to treat the fact that a foreign-flag ship was owned by a subsidiary of an American corporation as determinative. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963). For a criticism of this aspect of the Court's decision, see Currie, *supra* note 249 (stating that the Court erred in not balancing the foreign and domestic contacts of the ship owners).

301. *See Interview with A. Robert Pisano, supra* note 43.

302. *See supra* discussion pp. 111-13 (discussing disparities in pay rates between American and foreign shipworkers); *see also Mobile S.S. 419 U.S. at 223* (quoting *Windward Shipping*) (stating that the unions had hoped to compel foreign ships to raise pay to American levels).
VIII. A Framework for Deciding Whether Global Rule One Violates Policies Imbedded in the Domestic Scope of the Labor Act

It is too simple to say that Global Rule One violates policies imbedded in the Labor Act because it applies outside United States territory and the Labor Act does not. In his comprehensive analysis of the Court's decisions in *McCulloch* and *Incres*, Professor David P. Currie wrote that the analysis of whether the Labor Act should apply to a case with foreign facts should depend on the following: (1) an analysis of whether the policies of the Labor Act will be advanced or undermined by application of the Act to that case and (2) a consideration of the relative interests of the United States and the foreign nation involved in having its law apply to the case. A variation of Professor Currie's nuanced analysis (based on conflict of laws jurisprudence) offers a framework to evaluate whether Global Rule One violates policies imbedded in the Labor Act.

A. Global Rule One and the Fundamental Purposes of the Labor Act

Does SAG's implementation of Global Rule One undermine or further Labor Act policies? The central purpose of the Labor Act is to foster the collective bargaining process. As Professor Clyde W. Summers has written:

Enacted in 1935, the *Wagner Act* declared the public policy of the United States to be one of "encouraging the practice and procedure of collective bargaining." The premises and purposes of collective bargaining were threefold. First, in Section 1 of the statute, the drafters recognized the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of [collective] ownership."... The inequalities of individual bargaining led to unacceptable social and economic results. Consequently, it was to be replaced with collective bargaining which would provide more bargaining power and produce more acceptable social and economic results. Second, individual bargaining inevitably led to demands for government intervention to protect employees from...
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oppressive terms. Establishing a collective labor market would reduce the need for government regulation. In Senator Robert F. Wagner’s words, it was “the only key to the problem of economic stability if we intend to rely upon democratic self-help by industry and labor, instead of courting the pitfalls of an arbitrary or totalitarian state.” Terms and conditions of employment would be determined by market forces in the collective labor market, not by government. . . . Third, collective bargaining would serve the social purpose of enriching democracy by giving workers a voice in decisions of industry affecting their working lives. Again, in the words of Senator Wagner, “we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood.”

When Congress amended the National Labor Relations Act in 1947 (and subsequently), the original congressional purpose of encouraging collective bargaining remained a central goal of the statute. In fact, several of the Taft-Hartley Act provisions and subsequent amendments to the Labor Act strengthened the collective bargaining process.

In today’s time of globalization, there is an even greater imbalance of power between individual employees, their unions, and employers than there was in 1935 or in 1947. American unions, whose bargaining power is limited by national borders and the domestic scope of the Labor Act, cannot hope to match the negotiating strength of multinational employers in many instances. With technological advances, these employers can move work outside the United States to avoid American labor laws, collective bargaining agreements, labor standards, and unions. An American employer that is part of a multinational company may be able to avoid its obligations by utilizing a foreign affiliate to employ persons

306. Section 201 of the Labor Management Relations (Taft-Hartley) Act of 1947 states:

It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees[.]


308. Summers, supra note 10, at 822-23.
outside the United States.

Unions throughout the United States—not just in Hollywood—have been unable to obtain collective bargaining agreements that guarantee an employer will not move work outside the country. Additionally, they have been unable to obtain the next best option: employers' commitments that the collective bargaining agreements will apply to workplaces outside the U.S. From the union perspective, an internal membership rule like Global Rule One is the third best alternative: it insures that if an employer hires an American SAG member outside the U.S., the employer will apply the provisions of the American collective bargaining agreement to that employee. The rule thereby protects American workers who work outside the U.S. and indirectly preserves American jobs by lessening the advantages offered to a filmmaker who works abroad. In this way, Global Rule One somewhat preserves the balance of power between the employer and the union, but at a considerable cost to individual SAG members.³⁰⁹

Global Rule One is in the tradition of strategies that unions have long applied in the domestic economy:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.... "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."³¹⁰

By making it more difficult for an American employer to avoid the obligations of SAG's Basic Agreement, Global Rule One strengthens the institution of collective bargaining and furthers the policies of the Labor Act. This, in turn, means that the economic, social, and political goals of the Labor Act are more likely to be achieved than if unions cannot address the problems of runaway production with an internal membership rule.

³⁰⁹. If an employer refuses to grant a SAG member the protections of the Producers-Screen Actors Guild Codified Basic Agreement of 2001, the SAG member cannot accept the work.

B. Balancing the Interests of the United States and a Foreign Nation in a Dispute Arising from SAG’s Enforcement of Global Rule One

Is the possibility—or probability—that Global Rule One will cause international discord and retaliation serious enough to say that Global Rule One violates policies imbedded in the Labor Act? Whether the rule undermines principles implicit in the domestic scope of the Act should depend on an assessment of the relative interests of the United States and the foreign nation where the filming occurs (the “host nation”). What is the strength of the U.S. interest in having Global Rule One affect filmmakers outside the U.S. compared with the host nation’s interest in having filmmakers within its borders free from the rule? The outcome of this balancing process may turn on the resolution of several significant factual issues.

What is the relation of the filmmaker working abroad to the host nation and to the United States? Certainly a foreign nation has a great interest in protecting an employer from imposition by an American union if the employer is a resident of that foreign nation and an integrated part of its economy (for example, it is incorporated in that foreign nation and it is owned and controlled by persons or entities in that nation). The foreign nation might justifiably and vociferously object to the burdens placed on such a resident employer by an American union’s rule like Global Rule One. However, if the employer filming abroad is simply an entity with a short lifespan (the duration of the film production) that derives its capital from American sources and is otherwise controlled by, or closely tied to, American entities, then the United States has a greater interest in seeing that an American union’s rule to protect American workers and their jobs is enforceable abroad. This is particularly true if the American workers’ ties to the union are more permanent than those to the employer or the host nation. In the case of Global Rule One, after filming, SAG members will return to the U.S. and presumably will obtain the American union’s benefits (e.g., health and pension benefits). Although the host nation may still object to a union rule like Global Rule One, its objections should carry little weight with a court or the National Labor Relations Board, if the relationship between the employer and the foreign nation is attenuated. A filmmaker should not be permitted to run away from the burdens imposed by American unions to protect American workers and their jobs by creating a short-lived foreign business entity and filming abroad to shoot what is really an American film.

There is another significant factual issue that may have to be resolved before a court or the National Labor Relations Board can determine if Global Rule One violates policies imbedded in the Labor Act. What is SAG’s role in the negotiations with a filmmaker working outside the
United States who hires a SAG member? Is SAG acting merely as an advisor to an individual SAG member who is negotiating a supplemental agreement that provides the benefits of SAG’s Basic Agreement? Or, is SAG really acting as a collective bargaining agent for SAG members who fall under the jurisdiction of a foreign union and, under the host nation’s labor laws, have a collective bargaining relationship with the filmmaker? If the former is the case, the foreign nation probably has no real interest in protecting employers within its borders. If the collective bargaining agreement between a filmmaker and the foreign union contemplates that there may be a supplemental agreement with an individual performer, there is no real conflict between SAG’s role as adviser and the foreign union’s status as the collective bargaining representative for the film project. The host nation would have no more interest in objecting to SAG’s acting as an advisor than it would have to an American attorney, relative, or friend advising the individual performer negotiating a supplemental agreement.

However, if SAG is acting as the collective bargaining agent for SAG members who are American residents, the employer could be caught in a conflict between its obligations to the foreign union and to SAG. Whether there is such a conflict would depend, in part, on the contents of foreign labor law. It may also depend on the relationship between SAG and the foreign union, and whether they have agreed to accommodate each other’s activities. Depending on the circumstances, the employer in the host nation may be caught between the conflicting demands made by a foreign union that, under the laws of the host nation, has the right to represent the performer and SAG. Given these facts, a host nation is likely to vigorously protest that SAG is intruding into a relationship sanctioned by its labor laws. In this instance, SAG's enforcement of Global Rule One would seem to be an affront to the foreign nation's sovereignty, and a court or the National Labor Relations Board may conclude that Global Rule One is inconsistent with policies inherent in the domestic scope of the Labor Act.

IX. CONCLUSION

The legality of Global Rule One cannot be determined in the abstract, in an article. It depends partly on the resolution of significant factual issues
about which there will be considerable dispute. Moreover, there are so many complex and refractory questions raised by SAG's adoption of Global Rule One, that a single article cannot do justice to all the possible considerations.

Nevertheless, this article examined one especially intriguing issue: whether SAG's promulgation or enforcement of Global Rule One violates Section 8(b)(1)(A) of the Labor Management Relations Act? More specifically, does Global Rule One's extraterritorial scope mean that it undermines policies imbedded in the Act, a statute that applies only to United States territory? This article proposed an analytical framework for determining this issue and described some of the factors that could be considered by the National Labor Relations Board or a court. Regrettably, this is not an issue that can be determined without the resolution of difficult, disputed factual questions. But it is an issue worth writing about—even of there is no clear answer—because Global Rule One is an innovative, but problematic, solution to a problem that faces unions and workers throughout the United States.

Regardless of whether the National Labor Relations Board or a court determines that Global Rule One is lawful or unlawful, the flight of film production from the United States and the efforts of Hollywood unions to address the difficulties of lost work and foreign competition, illustrate a broader problem that threatens American workers in all industries.

Congress passed and amended the Labor Act at times when the labor market was domestic in scope. The purpose of the Act was to promote collective bargaining: (1) as a method of equalizing bargaining power between employers and employees, thereby improving the economic and social conditions of employees and increasing their purchasing power; (2) as a way of insuring that the parties in the employment relationship would determine compensation and the terms and conditions of employment without government legislation or dictate; and (3) as a means of protecting workplace or industrial democracy. Today, the institution of collective bargaining is threatened by the ability of American employers to use technological advances and foreign affiliates to move work outside the United States. It is relatively easy for employers to avoid American labor laws, unions, collective bargaining agreements, and labor standards. American unions lack the bargaining power to protect American workers from competing with foreign labor in a race to the bottom that eventually will harm the entire global labor market and the American economy.

The Labor Act could be amended to address the challenges of globalization. For instance, Congress could amend the Labor Act to provide that if an employer signs a collective bargaining agreement, its parent and affiliated companies are also bound by the agreement (at least if they are closely related to the employer and/or if they are American
entities). The Labor Act could be given extraterritorial effect, perhaps requiring transnational bargaining between American unions and American employers who have workplaces and American employees abroad. These suggestions are offered merely to stimulate thought as to possible solutions to the problems facing American workers in an era of globalization. They may be impossible in the current political climate.

In this time of globalization, if the collective bargaining process that is central to our labor laws is to be preserved, unions must find a way to strengthen their bargaining power vis-à-vis mobile, multinational employers. If that does not happen, collective bargaining will become increasingly ineffectual and irrelevant in the twenty-first century. What will take its place?

312. See, e.g., Section 2000e-1 of Title VII of the Civil Rights Act of 1964, as amended, provides in part:

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title engaged in such corporation shall be presumed to be engaged in such employer. (2) Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer. (3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—(A) the interrelation of operations; (B) the common management; (C) the centralized control of labor relations; and[,] (D) the common ownership or financial control, of the employer and the corporation.

Id.; see also Age Discrimination in Employment Act, 29 U.S.C. § 623(h)(3) (extending coverage to foreign corporations controlled by an American employer) and § 630(f) (defining “employee” to include American citizens employed by a covered employer in a workplace in a foreign country).

313. Some employment statutes have extraterritorial effects. See Outten & Raisner, supra note 2, at 628.

314. For many years, Congress has not had the political will to amend the Labor Act in any way that would impose greater obligations on management or strengthen unions. In 1998, Professor Summers wrote, “the present Congress is not likely to enact anything that will increase effective collective representation by workers.” Summers, supra note 10, at 795. The same could be said today.