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Vertical Conflicts: The Role of State Law in Suits under Section 301

Edward J. Hardin

Joseph C. Miller

NOTES

Vertical Conflicts: The Role of State Law in Suits under Section 301*

I. Introduction

A. *Purpose of the Note*

Section 301 of the Labor Management Relations Act[1] presents a case study in the interaction of state and federal courts in our federal system. *Textile Workers Union v. Lincoln Mills*[2] read section 301 as a mandate for the development of a federal common law of labor contracts, and *Charles Dowd Box Co. v. Courtney*[3] established concurrent jurisdiction in state courts for the development and enforcement of this common law. One of the most difficult practical problems posed by our federal system arises when the judicial institutions of one law-making authority are enlisted to enforce and protect rights created by another. While the United States Supreme Court through its appellate jurisdiction is the institution charged with the final responsibility for overseeing a satisfactory solution to this problem, and while the Court can indicate how competing interests are to be harmonized in specific controversies and provide some principles which may be useful in different contexts, it cannot review every state 301 suit. In the long run, success depends upon the earnest labors of state courts to identify the policies which are in conflict and bring their energies to bear in an effort to achieve a true resolution of the competing interests. For the most part, the Court has delineated the policy values under 301 law, and what remains is the application of these policies to specific issues which arise during the course of litigation. It is the purpose of this note to engage in the type of analytical processes state courts must undertake and to reach some conclusions concerning the role of state law in suits brought under section 301.

B. *General Considerations*

At the outset it is necessary to observe that the outcome of litigation

* This note was awarded the Edmund Morgan Prize, given for the best student writing submitted to the Vanderbilt Law Review during the 1967-68 academic year.

1. 29 U.S.C. § 185 (1964).
2. 353 U.S. 448 (1957).
3. 368 U.S. 502 (1962).

should not be affected by the forum in which it occurs. This result could be assured if state courts were required, without regard to traditional classifications of "substance" and "procedure," to decide every issue precisely as it would be decided in a federal court. This, however, would ignore not only the state's interest in having a voice in regulating the conduct of parties before its courts, but also the practical wisdom that courts perform much more satisfactorily when applying law with which they are familiar. In any event, such is not the solution envisioned under 301, nor the one traditionally chosen by courts employing foreign law. In establishing federal hegemony over 301, the *Lincoln Mills* Court said that "the substantive law to apply . . . is federal law, which the courts must fashion from the policy of our national labor laws."[4] By employing the expression "substantive" law, the Court apparently contemplated the existence of a "non-substantive" law which could vary with the tribunal entertaining the case. It would be a mistake to believe that by using such language the Court intended to be bound by the traditional substance-procedure bifurcation. The more sophisticated analysis now being employed in other areas of federal system conflicts makes clear that the terms "substance" and "procedure" take on different meanings in varying contexts, and that they are in fact descriptive rather than analytical.[5]

Two cases decided by the Supreme Court subsequent to *Lincoln Mills* supply the requisite analytical tools to begin a study of the role of state law under 301. In *Local 174, Teamsters v. Lucas Flour Co.*,[6] the Court stated that the subject matter of 301 "is peculiarly one that calls for uniform law" because the "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."[7] Building on this statement, in *International Union, UAW v. Hoosier Cardinal Corp.*,[8] the Court concluded that "[t]he need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it."[9] Of course, once it is decided that a specific issue requires uniformity, it follows from

4. 353 U.S. at 456.
5. *See* Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).
6. 369 U.S. 95 (1962).
7. *Id.* at 103.
8. 383 U.S. 696 (1966).
9. *Id.* at 702.

Lucas that the matter must be governed by federal law. On the other hand, if the need for uniformity is lacking, states are free to apply local law to the extent, at least, that the federal right under consideration is not subverted.[10]

With the relevant policy values now in mind, it is possible to begin a study of the role of state law under section 301. It should be noted that state law may become relevant under section 301 in three ways. As the Court noted in *Lincoln Mills*, ". . . state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy . . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."[11] Thus the collective body of state law may be relevant in the search for a rule of federal law. In addition, in at least two other ways state law is important. Occasionally, in areas affected with a federal interest but not requiring uniformity on a specific point, federal law will choose state law, that is, the differing rules of the fifty states will be chosen by federal law to fill a gap in the federal regulatory scheme and will be binding on both state and federal courts.[12] Finally, state law will apply *ex proprio vigore* in those "non-substantive" areas averted to in *Lincoln Mills*. It is with the latter two uses of state law that this note is concerned.

II. STATUTE OF LIMITATIONS

The jurisdictional grant in section 301 contains no statute of limitations, and there exists no general statute of limitations for the enforcement of federal rights. Traditionally, in situations where Congress has granted a right without placing a time limitation on enforcement suits, the federal courts have applied state statutes of limitations,[13] and indeed, there is considerable authority to the effect that the Rules of Decision Act[14]—which makes "the laws of the several states . . . rules of decision . . . in the Courts of the United States, in cases where they apply"—requires the application of state limitations.[15] However, the tradition has not been uniform. It is clear that even

10. *See* Central Vermont Ry. v. White, 238 U.S. 507 (1915).
11. 353 U.S. at 457.
12. *See* United States v. Yazell, 382 U.S. 341 (1966).
13. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906) (antitrust treble damage suit); Brady v. Daly, 175 U.S. 148 (1899) (copyright suit); Campbell v. Haverhill, 155 U.S. 610 (1895) (patent infringement suit); Gonzales v. Tuttman, 59 F. Supp. 858 (D.C.N.Y. 1945) (Fair Labor Standards Act suit).
14. 28 U.S.C. § 1652 (1964).
15. *See, e.g.*, Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906); Brady v. Daly, 175 U.S. 148 (1899); Campbell v. Haverhill, 155 U.S. 610 (1895).

under the Rules of Decision Act state statutes do not have to be applied if they discriminate against the enforcement of federal rights,[16] and on at least one occasion the Supreme Court has applied a limitations provision of an analogous federal right due to the similarity of the two causes of action.[17] It appears that courts enforcing federal rights have five alternatives in resolving the limitations question. They could: (1) apply state limitations; (2) judicially create a uniform federal limitation; (3) apply the limitation in an analogous federal statute; (4) apply an equitable doctrine of laches; or (5) simply place no limitation at all upon the bringing of suit.

With regard to 301 suits, the second alternative has been rejected as patent judicial legislation,[18] and the third alternative has had little use in 301 litigation because courts have failed to find an analogous cause of action.[19] The fourth and fifth alternatives were applied by at least one court,[20] but most of the lower courts facing the 301 limitations problem have applied state statutes, although apparently none did so on the basis of the Rules of Decision Act.[21] The Supreme Court resolved the issue for future 301 suits in *International Union, UAW v. Hoosier Cardinal Corp.*[22] by expressly holding that federal law chooses state law for the purpose of placing a time limitation on 301 actions. Although not mentioning the authoritative source of earlier decisions (Rules of Decision Act), the Court noted the long line of federal cases applying state limitations to the enforcement of federal rights, and viewed *Hoosier* as following respected precedent.[23] However, in a footnote the Court limited the reach of its decision by observing that the case before it closely resembled a common law

16. *See, e.g.*, Davis v. Rockton & Rion R.R., 65 F. Supp. 67 (W.D.S.C. 1946) (refusing to apply S.C. one year limitation on actions for wages under federal statutes).

17. McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (applied Jones Act limitation to action for unseaworthiness).

18. Fischbach & Moore, Inc. v. I.U.O.E., 198 F. Supp. 911 (S.D. Cal. 1961).

19. Harmon v. Martin Bros. Container & Timber Prods. Corp., 227 F. Supp. 9 (D.C. Ore. 1964) (rejecting 6 month's limitation on unfair labor practice charges in § 10(b) NLRA); Fischbach & Moore, Inc. v. I.U.O.E., 198 F. Supp. 911 (S.D. Cal. 1961) (rejecting antitrust statute of limitations); Tully v. Fred Olson Mfr. Service Co., 27 Wis. 2d 476, 134 N.W.2d 393 (1965).

20. Fischbach & Moore, Inc. v. I.U.O.E., 198 F. Supp. 911 (S.D. Cal. 1961) (applied a combination of laches and no limitation).

21. *See, e.g.*, United Mine Workers v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir. 1959), *cert. denied*, 359 U.S. 1013; Waters v. San Dimas Ready Mix Concrete, 222 Cal. App. 2d 980, 35 Cal. Rptr. 215 (1963); Breitman v. Brody, 113 Cal. App. 2d 642, 248 P.2d 932 (1952); Tully v. Fred Olson Mtr. Service Co., 27 Wis. 2d 476, 134 N.W.2d 393 (1965).

22. 383 U.S. 696 (1966).

23. The Court did not view McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), *supra* note 17 and accompanying text, as a departure from this tradition,' but rather as a function of the peculiarities of federal maritime jurisdiction. 383 U.S. at 704 n.6.

action for breach of contract and refused to take a position on whether the rule adopted would be applicable to other types of 301 suits.[24] The plaintiff urged the Court to devise a uniform limitation to close the gap left by Congress. Refusing to do so, the majority noted that the "range of judicial inventiveness [called for by *Lincoln Mills* and federal labor policy] . . . [must] be determined by the nature of the problem," and that federal labor policy did not call for a uniform limitation on 301 suits. Further, uniformity is needed only ". . . where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote. . . ."[25] When the question of limitation of actions arises these processes have already broken down, and, thus, there is no compelling need for uniformity.[26] With its careful definition of uniformity, *Hoosier* will influence the resolution of many conflicts between state and federal policies in state 301 suits. Nonetheless, with respect to the statutes of limitations problem itself, the decision leaves many questions unanswered.

In *Hoosier*, Indiana was both the forum state and the jurisdiction in which all the operative events occurred, and accordingly the Court expressed no opinion as to whether in a multi-state problem a choice of law should be made in accord with the principle of *Klaxon Co. v. Stentor Mfg. Co.*,[27] which holds that federal courts apply the choice of law rules of the state in which they sit.[28] If, instead of applying state law, the federal courts were to fashion their own choice of law rules for 301 suits, then the further question would arise as to whether those rules would govern 301 suits in state court. The Court could have obviated this problem, if, in following the long line of federal precedent, it had relied on the authoritative source at the heart of those previous decisions—the Rules of Decisions Act. In light of the construction placed upon that statute by *Erie R.R. v. Tompkins*,[29]

24. 383 U.S. at 705 n.7.

25. *Id.* at 702.

26. *Id.* Although it seems clear that statute of limitations questions do not affect the bargaining process as directly as other questions, such as arbitration or management rights clauses, it is also clear that *any* question in a 301 suit will arise only after the consensual processes have broken down. The dissent contended that the limitations provisions themselves would have an impact on the negotiation of collective agreements. 383 U.S. 711 n.2.

27. 313 U.S. 487 (1941).

28. *Klaxon*, of course, was a diversity suit and thus decided under different policy considerations than those with which a 301 court would be confronted. The case is used here, insofar as it stands, for the application of state choice of law rules by federal courts.

29. 304 U.S. 64 (1938). The construction referred to in the text is that the word "laws" in the Rules of Decision Act includes the decisional law as well as the statutory law of the state.

no question could arise over the applicability of state choice of law rules. However, it is submitted that the Court's approach did not remove the force from earlier interpretations of the Rules of Decision Act. *Hoosier* indicates that the limitations question is not affected by the need for uniformity mandated by *Lincoln Mills,* and presumably this applies equally to its choice of law aspect, thus removing the need to create a rule binding on state courts. Also, it seems clear that if the federal courts in a state were to apply a choice of law rule different from the state courts, forum shopping would result. This policy consideration and the authority of earlier cases[30] under the Rules of Decision Act point toward the application of the *Klaxon* principle.

It should be noted that if federal courts apply the choice of law rule of the state in which they sit, some forum shopping could still result, for the party may have a choice concerning the state in which suit is brought. This forum shopping could be eliminated either by fashioning a federal statute of limitations for 301 suits, or by creating a federal choice of law rule binding on the states. The first alternative is now up to Congress in light of *Hoosier.*

The second alternative has some attractive aspects. In addition to eliminating the forum shopping problem, a uniform choice of law rule would have the advantage of placing the federal courts in a position to influence the development of conflict of law rules generally. In the *Hoosier* decision there is sufficient basis to determine what that uniform choice of law rule might be. In choosing between two Indiana statutes of limitations, the Court indicated that the choice of the shorter limitation was consistent with the federal labor goal of encouraging rapid resolution of labor disputes.[31] This goal was inferred from the six-month limitation on the bringing of unfair labor practice charges.[32] Thus, it seems that the length of conflicting statute of limitations provisions would be a relevant consideration in the proper choice of law. A rule could be devised which simply pointed toward the shortest limitation available, or if the "contacts approach"[33]

30. *E.g.,* Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906). For a contrary reading of the cases referred to in the text, see Mr. Justice White's dissenting opinion in *Hoosier,* 383 U.S. at 709. *But see,* Gonzales v. Tuttman, 59 F. Supp. 858 (1945) (FLSA action applying state conflicts rule to find applicable statute of limitations.)

31. 383 U.S. at 707.

32. 29 U.S.C. § 160(b) (1964).

33. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960) for a presentation of the relevant considerations in applying the contacts approach to a contracts conflicts problem. The purpose of the contacts approach is to apply the law of the place having the most significant relationship with the matter under dispnte. Auten v. Anten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

were adopted, the federal goal of rapid disposition of labor disputes could come into play by influencing the choice of the shorter limitation when the qualitative and quantitative contacts were in equilibrium.

Nonetheless, it would appear that the fashioning of a uniform federal choice of law rule would be inconsistent with the mandate of the Rules of Decision Act unless attendant with strong justifications directed toward the protection of federal labor policy. In view of the formulation of that policy given by the Court in *Hoosier*, it appears that the required justifications are absent. It is submitted, then, that the Rules of Decision Act requires the application of state choice of law rules to statute of limitations questions in suits under section 301.

Although *Hoosier* provides the basis for ascertaining the applicable limitations period, at least in the absence of multi-state conflicts, it leaves open the question of what law applies to such matters as: when the cause of action accrued and under what conditions the running of the statute is tolled. The dissent assumed in a footnote that federal law would govern at least with respect to such matters as when the cause of action accrued and whether fraudulent concealment tolled the statute.[34] Certainly these particular assumptions are consistent with decisions in other areas where state statutes of limitations have been applied to federal rights.[35] However, the majority, in treating the tolling issue, may have laid the framework for an argument that state law should govern.[36] The plaintiff argued that the statute was tolled by a previous action brought in the state court involving the same controversy which had been dismissed as not cognizable under Indiana law. Distinguishing *Burnet v. New York Central R.R.*,[37] which had held that bringing a timely suit in state court served to toll the Federal Employers' Liability Act statute of limitations, the Court stated that the basis of that decision could be found in Congress' clear expression of the need for a uniform time bar in FELA cases and noted the absence of such an expression in section 301. In addition, the majority felt it necessary to observe

34. 383 U.S. 711 n.2.

35. *See, e.g.*, Cope v. Anderson, 331 U.S. 461 (1947) (accrual of action to assess shareholders of national banks); Holmberg v. Armbrecht, 327 U.S. 392 (1946) (fraudulent concealment as tolling statute of limitations in national bank assessment suit).

36. In a footnote the majority noted that neither party had disputed the accrual date of the cause of action and cited Cope v. Anderson, 331 U.S. 461 (1947), thus apparently recognizing that question as one governed by federal law.

37. 380 U.S. 424 (1965).

in a footnote that the union had failed to rely on the Indiana saving statute.[38]

There seems to be no justification for departing from federal precedent established in disposing of problems in other areas in which state statutes of limitation have been applied to federal rights. From these authorities it seems clear that questions such as when the cause of action accrues,[39] what constitutes commencement of the action,[40] and when tolling results from fraudulent concealment,[41] are to be governed by federal law, perhaps on the theory that they go to the definition of the right. Such questions as tolling for incapacity,[42] imprisonment,[43] or absence from the state,[44] may be governed by state law,[45] perhaps on the theory that these problems are not affected by a federal interest.

III. Trial Practice and Procedure

A. *Pleading*

Although the courts have not considered the extent to which state rules of pleading may be applied in actions under section 301,[46] there are a number of cases defining the role of state pleading requirements in actions to enforce other federally-created rights.[47] In *Davis v. Wechsler*,[48] the Supreme Court stated that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local

38. 383 U.S. at 708 n.11.

39. Cope v. Anderson, 331 U.S. 461 (1947); Rawlings v. Ray, 312 U.S. 96 (1941).

40. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

41. Holmberg v. Armbrecht, 327 U.S. 392 (1946).

42. Hoffman v. Keller, 193 F. Supp. 733 (D.C. Ore. 1961) (dicta); Kenny v. Killian, 133 F. Supp. 571 (D.C. Mich. 1955) (dicta).

43. Gordon v. Garrson, 77 F. Supp. 477 (D.C. Ill. 1948).

44. Barney v. Oelrichs, 138 U.S. 529 (1891).

45. For a thorough listing of tolling decisions in actions involving application of state statutes of limitations to federally-created rights, see Annot., 90 A.L.R.2d 265 (1963).

46. There have been a number of cases arising under § 301 in which the question of the sufficiency of the pleadings was involved. These cases did not, however, recognize the choice of law problem, although the results seem to be in agreement with the conclusions which will be reached herein. *E.g.*, Kennedy v. Local 659, UAW, 3 Mich. App. 629, 143 N.W.2d 133 (1966); Maddock v. Lewis, 386 S.W.2d 406, *cert. denied*, 381 U.S. 929 (Mo. 1965); Jones v. International Union of Operating Eng'rs, 72 N.M. 322, 383 P.2d 571 (1963).

47. *See, e.g.*, Allied Stores v. Bowers, 358 U.S. 522 (1959) (assertion of a constitutional claim in a state court action); Staub v. City of Baxley, 355 U.S. 313 (1958) (same); Brown v. Western Ry., 338 U.S. 294 (1949) (state FELA action); Davis v. Wechsler, 263 U.S. 22 (1923) (same); Solum v. Farmers & Merchants Nat'l Bank, 269 Minn. 431, 131 N.W.2d 231 (Minn. 1964).

48. 263 U.S. 22, 24 (1923).

practice." In a later case, *Brown v. Western Ry.*,[49] the Court clarified *Davis* by holding that federal law determines what gives rise to a right to enforce a federal right, that is, federal law establishes the elements which are necessary to accord an injured party a claim for relief, even though he asserts his claim in a state court.[50] Nevertheless, the Court indicated that the states may impose certain rules of particularity in pleading, provided that such rules are not applied so stringently as to impose unnecessary burdens upon rights of recovery authorized by federal laws.[51]

Thus, under the authority of *Brown* and *Davis*, it would appear that in state court actions under section 301, federal law would determine whether a cause of action had been stated, but that state courts may apply rules which, to some extent, control particularities such as the specificity with which allegations must be stated, the procedures for remedying irrelevant and redundant statements, and the way in which pleadings must be verified, so long as these rules do not impose unnecessary burdens on the right to recover.[52]

Such a result appears to be supported by sound reasoning. The

49. 338 U.S. 294 (1949). In the dissent, Mr. Justice Frankfurter analyzed the applicable law question as follows: "Federal law, though invoked in a State Court, delimits the Federal claim—defines what gives a right to recovery and what goes to prove it. But the form in which the claim must be stated need not be different from what the State exacts in enforcement of like obligations created by it, so long as such a requirement does not add to, or diminish, the right as defined by Federal law, nor burden the realization of this right in the actualities of litigation." *Id.* at 300.

50. In line with this thought, it would appear that federal law should also determine whether a state court has legislative jurisdiction under a federal statute. For example, there appears to be some dispute in the cases arising under § 301 as to whether a party bringing an action must plead only that the union involved represents employees engaged in commerce, or whether it must be pleaded that the employees in issue are employed in an industry affecting commerce. *Compare* Brewery Workers v. Adolph Coors Co., 59 L.R.R.M. 2947, 2949 (D.C. Col. 1964) ("[union] may not bring suit . . . unless it represents employees of the industry with which it has the contract and that *same* industry is one affecting commerce . . . ."), *with* Block Pontiac, Inc. v. Candando, 66 L.R.R.M. 2371 (D.C.E.D. Pa. 1967) (for purposes of jurisdiction, it is sufficient if only union involved in commerce). Since this matter is so intimately related to the operation and definition of the federal right, it would appear that uniformity requires that a federal rule be developed.

51. Davis v. Wechsler, 263 U.S. 22, 24 (1923).

52. An example of an unnecessary burden on the right to recover was apparently involved in Chasis v. Progress Mfg. Co., 382 F.2d 773 (3d Cir. 1967). In that case the defendant alleged that the district court did not have jurisdiction under § 301 because the plaintiff had not alleged a breach of contract, nor had he alleged the specific provisions of the contract which had been violated. The court held that "[t]o require a plaintiff to set out each and every contractual fact and contention in detail before federal jurisdiction would attach under § 301 would be unreasonable and unwarranted in light of the purpose underlying § 301 and the function of the complaint in federal pleading." *Id.* at 777. While this case arose in the federal courts, which have long maintained a more liberal method of pleading, it would appear that the policies behind § 301 and the need for uniformity in this area would similarly prohibit a state from imposing over-exacting pleading requirements.

enforcement of collective bargaining agreements is a matter of national interest, and therefore, it is vital that the courts reach uniform results regarding matters affecting the collective bargaining and dispute settlement processes.[53] To assure uniformity, it is necessary, regardless of the forum, that the courts follow only one interpretation of the elements which must be pleaded to give rise to a right of recovery. On the other hand, with respect to the particularities of pleading there is no significant need for uniformity, since such requirements have little or no effect on the outcome of litigation, and consequently diverse rules would not lead to different results in different forums.[54] In addition to the absence of a need for uniformity in this regard, allowing the state courts to apply rules with which they are more familiar will promote efficient judicial administration.[55]

B. *Burden of Proof*

To date, it has not been specifically determined whether in suits arising under section 301 the question of burden of proof is to be governed by federal or state law.[56] In entering upon a discussion of this question, it is necessary to review the three burdens which the term "burden of proof" is used to describe—the burden to plead, the burden of producing evidence, and the burden of persuasion.[57] The first burden is normally placed upon the party seeking to establish a given fact. The second burden, the burden of producing evidence, is generally placed initially upon the party pleading the existence of a fact and requires for its satisfaction sufficient evidence to prevent the judge from sustaining an opponent's motion for directed verdict. Once a party has satisfied this burden, it generally shifts to his opponent who must, in turn, come forth with evidence sufficient to prevent an adverse ruling against him on the issue. The third burden, the burden of persuasion, becomes important only after both parties, having sustained their burdens of producing evidence, raise

53. International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).

54. Furthermore, if particularities are applied so stringently as to affect the outcome of litigation and, thereby, uniformity, the Supreme Court can remedy the situation since it retains the power to review state court decisions dealing with the sufficiency of pleading in actions involving federal rights. Brown v. Western Ry., 338 U.S. 294 (1949).

55. *See* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

56. There have been cases arising under § 301 concerning the question of burden of proof, but these cases have not indicated whether federal or state law applies. Vaca v. Sipes, 386 U.S. 171 (1967) (employee has burden of proving unfair representation by union); Williams v. Wheeling Steel Corp., 266 F. Supp. 651 (D.C. W. Va. 1967) (same).

57. For a general discussion of these burdens, *see* MCCORMICK, EVIDENCE 306 (1954).

a genuine issue of fact which can be submitted to the trier-of-fact. This burden, which is also generally placed upon the party pleading the existence of a fact, does not shift during the trial and requires the party charged with the burden to persuade the trier-of-fact that the fact which he alleges is true.

All of the burdens which the term "burden of proof" is used to describe have been held to be a matter of federal law in suits to enforce other federal rights with respect to which the federal and state courts have concurrent jurisdiction.[58] Thus, in suits under the Jones Act[59] and the Federal Employers' Liability Act,[60] state courts have been required to apply federal, rather than state, rules of burden of proof.[61] In the early cases dealing with this question, the reason given for the application of federal law was that burden of proof is more than a "mere matter of procedure," but instead goes to the "very substance" of the federally created right.[62] As often happens, the Court in those cases stated its reasoning in terms of conclusions, and consequently, they are not very helpful in determining the appropriate law to be applied to the matter of burden of proof in suits seeking to enforce federally-created rights.

However, in a later case, *Garrett v. Moore-McCormick Co.*,[63] which arose under the Jones Act and in admiralty, the Court appears to have used a method of analysis which may be helpful in determining whether state or federal rules of burden of proof are to be applied under section 301. In *Garrett*, there was a conflict between the federal rule and the Pennsylvania rule concerning which party had the burden of proving the validity of a release of liability. The federal rule placed the burden on the defendant shipowner to plead and prove a valid release, while the Pennsylvania rule placed the burden on the plaintiff seaman to prove the invalidity of a release. As in earlier cases decided under the FELA,[64] the Court resolved the conflict in favor of the application of the federal rule. However, instead of merely stating that the burden of proof was "substantive,"

58. *See, e.g.*, Garrett v. Moore-McCormack, 317 U.S. 239 (1942) (Jones Act—burden of producing evidence and burden of persuasion); Hill v. Smith, 260 U.S. 592 (1923) (Bankruptcy Act—burden of producing evidence); New Orleans & Northeastern R.R. v. Harris, 247 U.S. 367 (1918) (FELA—burden of producing evidence and burden of persuasion); Central Vermont Ry. v. White, 238 U.S. 507 (1915) (same).

59. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

60. 35 Stat. 65 (1908), *as amended*, 45 U.S.C. §§ 51-60 (1952).

61. *See* Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384-90 (1956); Note, *Procedural Protection for Federal Rights in State Courts*, 30 U. CIN. L. REV. 184 (1961).

62. *See, e.g.*, New Orleans & N.E. R.R. v. Harris, 247 U.S. 367 (1918); Central Vermont Ry. v. White, 238 U.S. 507 (1915).

63. 317 U.S. 239 (1942).

64. *See* McAllister v. Magnolia Petroleum Co., 357 U.S. 211 (1958).

the Court provided two basic reasons as to why this question should be governed by federal law.

The Court stated that there is a need for a uniform application of the Jones Act ". . . throughout the country, unaffected by 'local views of common law rules'."[65] Implicit in the Court's reasoning is that this policy of uniformity of result would be frustrated if the states were permitted to apply different rules of burden of proof. This reasoning appears to be valid, both in regard to the burden of producing evidence and the burden of persuasion. A case may turn on the issue of who has the burden of producing evidence, since probative evidence of the existence of a fact may be unavailable or too burdensome to acquire.[66] Thus, to permit different jurisdictions to place this burden on different parties would lead to diverse results regarding the same issue and would thereby defeat the policy of uniformity. Theoretically, this same reasoning can be applied to the burden of persuasion, although, practically speaking, the situation in which this burden affects the outcome of litigation—equilibrium of the evidence in the mind of the trier—probably has never arisen.[67] Nevertheless, diverse rules of burden of persuasion could possibly lead to different results on a particular issue and should, therefore, be governed by federal law to assure uniformity.

As a second reason, the *Garrett* Court stated that the policy behind the Jones Act required the application of federal law to the burden of proving a valid release. The Court noted that the seaman has traditionally been regarded as a "ward of admiralty" who is to be protected from shipowners seeking to take undue advantage of him. To place the burden upon the seaman to prove the invalidity of a release would contravene this policy and deny him part of the federal right which Congress created for his benefit. Since the matter of burden of proof is so intimately related to the federally-created right, the Court thought it mandatory that it apply a federal rule of burden of proof which would place the burden upon the defendant shipowner to prove a valid release.

While distinctions can be made, the approach taken by the Court in *Garrett* is similar to the approach in *Hoosier* regarding the question of statutes of limitations under section 301. In both cases the Court examined the specific issue before it with a view toward determining whether federal policy required uniformity and thus the application of federal, rather than state, law. Examining the issue of burden of proof in light of the Court's reasoning in *Hoosier* and its earlier

65. Garrett v. Moore-McCormack Co., 317 U.S. at 244.
66. *See* McCORMICK, EVIDENCE 685 (1954).
67. *Id.* at 686.

decision in *Garrett*, it is clear that the burden of producing evidence and the burden of persuasion are matters which require uniformity and should thus be governed by federal law.

Hoosier states that a matter requires uniformity when it affects the functioning of the collective bargaining process or the private settlement of disputes. Clearly, it is of concern to the parties at the bargaining table as to which of them will have the burdens of producing evidence and persuading a trier-of-fact of the interpretation of a contract term. Likewise, the imposition of the burden of proof will affect the private settlement of disputes, as in instances where an employee whose grievance has been compromised by his union brings suit against his employer alleging that his union unfairly represented him during the grievance procedure.[68] To permit diverse rules of burden of proof, and consequently diverse results, would lead to uncertainty at the bargaining table and would allow frustration of the contract procedure for settling disputes.

However, in *Hoosier* the Court held that since statutes of limitations do not "come into play" until the collective bargaining and settlement processes have broken down, there is no need for uniformity. This holding raises the question of exactly what the Court meant by the words "come into play." If these words mean "operative," then clearly there would be no need for uniform rules of burden of proof or any other matter of law that does not arise until trial. Such a meaning could not have been intended, for it would permit serious frustration of the federal scheme for bringing about industrial peace. It is far more likely that the words "come into play" were used by the Court to describe the situation in which the rule under consideration would not "affect" the pre-trial conduct of the collective bargaining and settlement processes. Viewed in this light, it appears that the rules of burden of proof do "come into play" before the breakdown of the collective bargaining and settlement processes, for they may "affect" both the end-product of collective bargaining and the manner in which disputes are settled. Furthermore, burden of proof rules may become very important in effectuating the policies of the federal labor laws. For instance, in *Vaca v. Sipes*,[69] the Supreme Court stated that an employee must come forward with clear and convincing evidence of unfair representation before he can sue his employer on a grievance which his union has compromised. By placing this burden on the plaintiff employee, the Court has accorded more stability to the decisions reached during the grievance procedure

68. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967); Williams v. Wheeling Steel Corp., 266 F. Supp. 651 (D.C. W. Va. 1967).

69. 386 U.S. 171 (1967).

and has placed unions in a better position to settle disputes short of arbitration when that step would not be advantageous. Thus, it appears that the courts must fashion uniform rules of burden of proof which will effectuate the purposes of the federal labor laws and which, because of their intimate relationship with the federal rights created under section 301, must be considered as a part of them and applied as a matter of federal law.

C. *Directed Verdicts*

Concern with the motion for directed verdict rests in two areas: (1) the quantum of probative evidence necessary to overcome such a motion; and (2) the standard utilized to weigh the evidence. The motion for directed verdict is invoked to test whether the opposing party has sustained his burden of producing evidence. When such a motion is made the judge must weigh the evidence and determine whether there is sufficient evidence to warrant the submission of the case to the trier-of-fact.

In determining the sufficiency of the evidence on a motion for directed verdict the courts have utilized two standards. The first standard is to examine only the evidence favorable to the party against whom the verdict is sought. If he has produced sufficient evidence to warrant the jury reasonably to infer that the ultimate proposition of fact which he is alleging is true, then the motion will fail, even in the face of overwhelming evidence to the contrary. In the event the jury renders a verdict for the party against whom the motion for directed verdict was made, the judge will examine the evidence on both sides on motion for judgment notwithstanding the verdict, and if the jury's verdict was unreasonable, it will be set aside. The second standard which the courts have used in weighing the evidence is to examine the evidence on both sides and issue a preemptory ruling if a verdict for the party opposing the motion would necessarily be set aside on a motion for judgment notwithstanding the verdict.

It is reasonably clear from prior authority that in state court actions to enforce federally-created rights the determination of whether a particular party has introduced sufficient evidence to overcome a directed verdict and to get his case before the trier-of-fact will ultimately be subject to review by the Supreme Court.[70] The Supreme Court appeared to give recognition to this doctrine in *Vaca v. Sipes*[71] when it stated in a state court suit arising under 301 that ". . . we cannot uphold the jury's award, for we conclude that as a matter of

70. Wilkerson v. McCarthy, 336 U.S. 53 (1949); Lavender v. Kurn, 327 U.S. 645 (1946); Bailey v. Central Vermont Ry., 319 U.S. 350 (1943).

71. 386 U.S. 171 (1967).

federal law the evidence does not support a verdict that the Union breached its duty of fair representation."[72] While the Court was speaking of overturning a jury verdict, it can be implied that the sufficiency of the evidence supporting the allowance of a directed verdict in a state court 301 action would be subject to the same review. It is obvious that this power of review is necessary to insure that state courts apply proper standards of burden of proof and do not frustrate the policy of uniformity.

Although it is clear from *Vaca* and other cases involving federal rights that the sufficiency of the evidence supporting a directed verdict is a matter of federal law, there is, at most, only sparse authority concerning the question of whether state or federal standards of weighing the evidence on a motion for directed verdict are to be applied. In cases arising under the FELA,[73] the Supreme Court has not made a specific statement on this matter, and it appears to permit state courts to utilize their own standards of weighing the evidence.[74] There are reasonable grounds for permitting state courts to follow their own standards. Theoretically, there should be no difference in the outcome of litigation regardless of whether the court uses the judgment n.o.v. standard or the standard which looks to the evidence most favorable to the opponent of the motion, since at one point or another the judgment n.o.v. standard is applied and the court examines the evidence on both sides of the issue.[75] In any event, even if the application of different standards would lead to diverse results, this does not appear to be the type of problem which requires uniformity as defined by *Hoosier*. The standards used on a motion for directed verdict are almost wholly unrelated to the substantive issues of law involved in labor relations, and consequently, they would not be considered by the parties at the bargaining table or during the dispute settlement process. These standards do not "come into play" until the latter processes have broken down and

72. *Id.* at 193.

73. *See* cases cited note 39 *supra*.

74. However, in Wilkerson v. McCarthy, 336 U.S. 53 (1949), Mr. Justice Black, speaking for the majority, indicated that there might be a federal rule concerning the standard to be applied when weighing the evidence on a motion for directed verdict. He stated that "[i]t is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a preemptory instruction has been given." *Id.* at 57. There has been no clarification of this statement to date, and it appears that the states are still free to apply either of the traditional directed verdict standards.

75. Furthermore, in those jurisdictions employing the standard which looks only to the evidence most favorable to the opponent of the motion, the judge probably cannot in reality refrain from weighing the evidence on both sides.

should, therefore, for the purpose of convenience and promoting efficient judicial administration be governed by state law.[76]

D. *Appeals*

Consistent with the policies discussed regarding pleading,[77] it is clear as a general proposition that states may apply local ideas of appellate practice to appeals in suits based upon federal law. On the other hand, it seems equally clear that "the assertion of federal rights . . . is not to be defeated under the name of local practice."[78] Taken together, these two propositions are so widely accepted that few problems concerning what law governs the appeal of an order in a 301 suit seem to have arisen. For the most part, state courts apply local rules of appealability without facing the question of whether their action is permissible under federal law.[79] Such a question was raised in *Laufman v. Hall-Mack Co.*[80] and was resolved in favor of local rule application. In that case the District Court of Appeals in California held that no appeal lay from an order directing arbitration even though it appeared to the court that such an order would be appealable in a federal court under the same facts. *Central Vermont R.R. v. White*[81] was cited for the proposition that local practice governed unless it so subverted the federal right as to make it meaningless. Relying on the *Steelworkers* trilogy,[82] the court found that federal policy encourages arbitration and that California procedure was better adapted to further this policy than federal procedure itself. In addition, the court noted that the defendant lost no rights by proceeding to arbitration, for the question of arbitrability could be asserted before the arbitrator.

Although apparently not raised in the case, it should be observed that finding the local rule consonant with federal policy avoided a very difficult constitutional question. That question could be presented in the following case. A plaintiff comes into state court seeking an order compelling arbitration, or, in the alternative, damages. The

76. *See* Cheatham & Reese, *supra* note 55.

77. *See* text accompanying notes 53-55 *supra.*

78. Davis v. Wechsler, 263 U.S. 22, 24 (1923).

79. *See, e.g.,* Blue Diamond Coal Co. v. Baker, 375 S.W.2d 699 (Ky. 1964) (applied state standards of review); Shaw Electric Co. v. IBEW, 422 Pa. 211, 220 A.2d 889 (1966) (appeal from denial of judgment on the pleading); Hines v. Globe Solvents Co., 421 Pa. 367, 219 A.2d 695 (1966) (appeal from order refusing arbitration untimely under state law).

80. 215 Cal. App. 2d 87, 29 Cal. Rptr. 829 (1963).

81. 238 U.S. 507 (1915).

82. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

trial court finds that the issue is not arbitrable and proceeds to consider the damage claim. On appeal from the denial of arbitration the plaintiff is met by the argument that the state appellate courts lack jurisdiction to hear appeals from interlocutory orders. Assuming that federal policy encourages the private settlement of disputes and prefers an appellate review of the arbitrability question before entering upon a costly trial; and assuming further that as a matter of state law it is clear that the appellate court is without jurisdiction to hear the appeal, the federal constitutional problem is squarely confronted: does the federal constitution permit Congress or the federal courts to compel a state court to hear an appeal which, under state law, it is powerless to entertain? The same constitutional problem would be presented if a state failed to provide a trial court with jurisdiction to entertain a suit to enforce a federally-created right. The *Second Employers' Liability Cases*[83] indicate that state courts must adjudicate federal claims when their jurisdiction is "appropriate to the occasion." But there was also further indication that no attempt by Congress to enlarge or regulate the jurisdiction of state courts was there involved. *McKnett v. St. Louis & S.F. Ry.*[84] states that a court's jurisdiction is "appropriate to the occasion" when its ordinary jurisdiction encompasses actions similar to the federal right sought to be enforced. In addition, *McKnett* points out in dicta that "[t]he power of a State to determine the limits of jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution."[85] However, in spite of such language, *McKnett* also notes that Congress did not attempt to compel states to enable courts to hear FELA cases.[86] Other Supreme Court cases are equally as inconclusive.[87]

In spite of the unsettled authority on the issue above, there seems to be little ground for a state trial court of general jurisdiction to refuse to hear a 301 suit. It is clear that if within the boundaries of its "ordinary jurisdiction" a court hears similar cases, it cannot discriminate against a federally-created right. Since state courts do hear contract actions generally and have historically entertained suits on labor contracts, they are compelled to hear 301 suits. However, the

83. 223 U.S. 1, 57 (1911).
84. 292 U.S. 230, 232-33 (1934).
85. *Id.* at 233.
86. *Id.*
87. *See, e.g.*, Broderick v. Rosner, 294 U.S. 629 (1935); Kenney v. Supreme Lodge, Loyal Order of Moose, 252 U.S. 411 (1920). These two cases were actions on state statutes and involved full faith and credit; however, they employ the reasoning of the federal rights cases. In *Kenney*, the Court stated "that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction . . . to courts *otherwise competent.*" (Emphasis supplied). 252 U.S. at 415.

appellate issue is not as easily resolved. On the one hand, it may be argued that since the state undertook to enforce the federal right at the trial level, it cannot refuse to provide appellate procedure consistent with federal policy. On the other hand, it can be argued that, in fact, the state was compelled to hear the suit at the trial level; that parties claiming federal rights are accorded the same appellate relief as parties suing on state claims; and that federal power is lacking to thrust unauthorized jurisdiction upon state appellate courts. The constitutional question posed in the hypothetical case can be avoided by a characterization of the order under appeal as a final order within the framework of the federal right, and it seems clear that the Supreme Court has competence to make this characterization. In the event the problem is raised in a different context and cannot be solved as suggested, it would appear that state courts must accept appeals under the authority of federal law in order to avoid prejudicing a federal right. After all, appellate machinery exists in all states, and no greater intrusion upon state sovereignty is caused by requiring state courts to hear federal appeals than that which occurs when statutorily incompetent state trial courts are required to hear federal claims analogous to state claims which they are competent to entertain.

Notwithstanding the preceding, for the most part no problem will be presented by the application of state procedures and rules to appeals in 301 suits. However, following the example of *Laufman*, state tribunals must be alert to possible conflict. There is a presumption that state courts may apply their own rules to such appeals, but once the local rule is ascertained, its affect upon the substance of the federal right must be measured, and if substantial prejudice is found, the local rule must give way to federal policy.

IV. Arbitration Statutes

A. *Generally*

A large number of 301 suits seek either specific enforcement of an agreement to arbitrate or enforcement of an arbitrator's award. Congress has enacted a general arbitration statute,[88] but some question exists concerning its applicability to collective bargaining contracts.[89] In addition, most states have arbitration statutes, many of which purport to cover collective bargaining agreements.[90] These statutes delineate the procedure for specifically enforcing agreements

88. 9 U.S.C. §§ 1-14 (1964).
89. *See* text accompanying notes 111-27 *infra*.
90. *See* note 128 *infra* for a listing of these statutes.

to arbitrate, and the question arises to what extent, if any, they may be employed by state tribunals entertaining 301 suits. At least three alternative solutions appear. First, if the federal act is deemed inapplicable to labor contracts, the approach taken in *Hoosier* with regard to statutes of limitations could be adopted. Under this federal-law-chooses-state-law approach both the state and federal courts in a given state would apply the same arbitration procedure. Second, it could be held that the federal arbitration statute governs in state as well as federal courts, which, of course, would require a finding that a uniform procedure is needed. Finally, it could be determined that although the federal statute covers labor contracts, arbitration procedure is not a subject requiring uniformity, and thus the state would be free to employ local procedures, while the federal courts follow the congressional enactment. In order to consider which is the likely alternative, some attention must be directed to the nature of the arbitral process as well as to the statutes.

It is not clear from the cases precisely how arbitration procedures should be characterized for these purposes. For the most part, the parties to state proceedings, at least, appear to have assumed the applicability of state statutes, and consequently, there is little discussion to be found on this matter in section 301 cases.[91] On the other hand, arbitration statutes have been characterized in other types of litigation, and perhaps an examination of these cases will be fruitful.

Two Supreme Court cases appear to have reached contradictory results. *Red Cross Line v. Atlantic Fruit Co.*[92] considered whether the New York Arbitration Act could be applied in the New York courts to enforce an arbitration clause in a charter party, or whether application of the statute to maritime contracts would constitute state interference with federal jurisdiction under article III. Holding that New York could apply its statute, Mr. Justice Brandeis stated that "the [s]tate, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. New York, therefore, had the power . . . to compel parties . . . to specifically perform an agreement for arbitration, which is valid by the general maritime law. . . ."[93] In reaching this result, the majority recognized that under existing admiralty law an executory arbitration agreement, though valid, could not be specifically enforced because admiralty courts lacked equity powers.[94] The Court followed the characteriza-

91. *See, e.g.*, Brewery Workers v. Maier Brewing Co., 63 L.R.R.M. 2295 (Cal. Super. Ct. 1966); O'Brien v. Curran, 106 N.H. 252, 209 A.2d 723 (1965).

92. 264 U.S. 109 (1924).

93. *Id.* at 124.

94. *Id.* at 123. *See* The Eclipse, 135 U.S. 599 (1890).

tion of the New York courts[95] that limitations and procedures in the enforcement of valid agreements to arbitrate were part of the law of remedies.[96] Thus, the question having been characterized as procedural for purposes of concurrent state jurisdiction in admiralty, it was thought that the United States Arbitration Act[97] would be available for the specific enforcement of a promise to arbitrate in a diversity suit. However, *Bernhardt v. Polygraphic Co.*[98] reached a contrary result. The case involved a breach of contract action removed from a Vermont court to federal court. The contract had an arbitration clause, but there was no showing that the agreement involved a maritime transaction or one affecting interstate commerce,[99] thus, jurisdiction was based solely upon diversity. On the basis of the New York Arbitration Statute, the defendant sought a stay of the action pending arbitration. The district court denied the stay following Vermont law, which adhered to the common law rule of denying enforcement to executory agreements to arbitrate. The federal act also has a provision which would have allowed a stay pending arbitration,[100] and the court of appeals characterized the question of enforcing the arbitration agreement as procedural and applied the federal statute. Reversing the court of appeals, the Supreme Court held the federal act inapplicable to this diversity action, indicating that to do otherwise would raise a serious constitutional question.[101] Mr. Justice Douglas stated that "[i]f the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State."[102] *Bernhardt* does not refer to the *Red Cross Line* decision, although the characterization of arbitration in the two cases conflicts. An attempt to distinguish *Bernhardt* from *Red Cross Line* has been made on the basis that in the former the controlling substantive law, in practical effect, denied the validity of executory arbitration agree-

95. *See* Meacham v. Jamestown, F. & C. R.R., 211 N.Y. 346, 105 N.E. 653 (1914) (concurring opinion).

96. 264 U.S. at 118.

97. 9 U.S.C. §§ 1-14 (1964).

98. 350 U.S. 198 (1956).

99. The applicability of the United States Arbitration Act is specifically limited to maritime contracts, or those in transactions affecting commerce excluding such "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1964).

100. 9 U.S.C. § 3 (1964).

101. 350 U.S. at 202.

102. 350 U.S. at 203.

ments.[103] This distinction appears to be unfounded, for in fact the state of the controlling substantive law in both cases was identical. Mr. Justice Frankfurter pointed out in the concurring decision that the district court denied the stay, not because Vermont law invalidated such clauses, but because, although recognizing their binding force, local law refused to compel specific performance.[104] That was the state of maritime law as Mr. Justice Brandeis understood it at the time of the *Red Cross Line* decision.[105] So it appears that the procedural characterization used in the latter case has been deprived of its vitality by the *Bernhardt* decision. However, it does not follow, as some writers have apparently assumed,[106] that if *Bernhardt* devitalizes the *Red Cross Line* rationale, state arbitration statutes are inapplicable to 301 suits. Furthermore, distinguishing *Bernhardt* cannot revive the *Red Cross Line* procedural characterization, at least with respect to specifically enforcing arbitration agreements in collective bargaining contracts. *Lincoln Mills* is clear on the point that the question of *whether* the agreement to arbitrate will be enforced is a federal law matter.[107] What *Lincoln Mills* leaves open, and on what *Bernhardt* gives less guidance than might at first be assumed, is *how* the arbitration promise is to be enforced. In remanding the case to the district court for further proceedings, the *Bernhardt* Court took specific note of the respondent's argument that New York law, not Vermont law, was governing.[108] In recommending this argument for the district court's consideration, the Court appears to have assumed that its validity would result in specific enforcement of the promise to arbitrate under the New York Arbitration Act. This assumption could be read to indicate that the governing substantive law carries with it the arbitration procedures to be applied were it not for the fact that earlier in the opinion the Court had held that the federal act was inapplicable by its own terms.[109] Accordingly, there is nothing in the *Bernhardt* rationale indicating that it would be improper to apply the federal statute in a diversity suit involving an arbitration agreement of the type the statute reaches.[110] On the basis of the preceeding

103. *See*, Pirsig, *The Minnesota Uniform Arbitration Act and the Lincoln Mills Case*, 42 MINN. L. REV. 333, 365 (1958).

104. 350 U.S. at 206.

105. 264 U.S. at 123.

106. Pirsig, *supra* note 103 at 362-65, 374. The author proceeds at great length to distinguish *Red Cross Line* from *Bernhardt*, and relies upon *Red Cross Line* when stating under what conditions he feels the state arbitration statute would be applicable.

107. 353 U.S. at 456. The Court's language makes clear that the correctness of the *Red Cross Line* characterization has been rendered moot by § 301.

108. 350 U.S. at 205.

109. 350 U.S. at 200.

110. It should be noted that Mr. Justice Frankfurter, in the concurring opinion, took the position that since the act did not obviously apply to diversity cases, he

authority, then, the question is still open as to whether state arbitration statutes can be applied in 301 suits brought in state courts.

B. *United States Arbitration Act*

At the instigation of the American Bar Association, the United States Arbitration Act was enacted in 1925 to overcome judicial hostility toward executory agreements to arbitrate. Due to vigorous lobbying by the Seaman's Union,[111] the bill contains exceptions which have led to conflicting results concerning its application to arbitration clauses in collective bargaining contracts. Section 1 makes the act applicable to maritime transactions and to arbitration clauses contained in contracts "evidencing a transaction involving commerce," but excepts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[112] Three arguments have been put forward to support the proposition that collective bargaining agreements are not excluded by this exception.

One argument which had enjoyed vitality for a time was rejected by the *Bernhardt* case. The contention was that, since the various sections of the act were self-contained and need not be read together, the exclusionary clause was applicable only to the definition of commerce. Therefore, for example, section 3 of the act, which authorizes a stay of court proceedings pending arbitration, could be applied to a collective bargaining contract, since that section omitted any reference to commerce.[113] However, in *Bernhardt*, the Supreme Court held that sections 1 and 2 define the field in which Congress was legislating, and that section 3, as part of the complete regulatory scheme, was subject to the same limitations as sections 1 and 2.

A second argument makes a distinction between contracts of employment which give rise to individual jobs and collective bargaining contracts which merely establish the terms and conditions of employment.[114] The position taken is that the exception was de-

would hold it inapplicable to all diversity cases in an effort to avoid the "serious constitutional question" that would otherwise arise. 350 U.S. at 208. For an excellent opinion which rejects this view, see Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (1959). Judge Medina, in that case, takes the view that not only does the statute apply in diversity cases, but it declares a rule of national law to be applied to arbitration agreements affecting commerce or maritime affairs and enforceable in state or federal courts.

111. Note, *Lincoln Mills: Labor Arbitration and Federal-State Relations*, 57 COLUM. L. REV. 1123, 1124 (1957).

112. 9 U.S.C. § 1 (1964).

113. Watkins v. Hudson Coal Co., 151 F.2d 311, (3d Cir. 1945).

114. Local 205, UEW v. General Elec. Co., 233 F.2d 85 (1st Cir. 1956) *aff'd*, 353 U.S. 547 (1957); Hoover Motor Express Co. v. Teamsters Local 327, 217 F.2d 49 (6th Cir. 1954).

signed to prevent specific performance of individual contracts, and was not intended to apply to collective bargaining contracts which should, instead, be viewed as trade agreements.

The final argument made relies upon the principle of *ejusdem generis* and maintains that the exception is limited to a narrow class of workers actually working in commerce, as distinguished from those whose work merely affects commerce.[115]

On the other hand, several circuits have taken the position that from legislative history, it is clear that collective bargaining contracts were intended to be covered and that the exception is as broad as the coverage of the act.[116] The Fifth Circuit took this view in *Lincoln Mills*,[117] while the First Circuit, in two cases[118] which were reviewed along with that decision, had held that collective bargaining agreements could be enforced under the arbitration statute. However, the majority of the Supreme Court did not discuss the statute in any of the opinions, and this led Mr. Justice Frankfurter to observe in dissent that the Court's silence could be taken as implicitly ruling the arbitration statute inapplicable.[119] Subsequent decisions have not unanimously accepted this view of the *Lincoln Mills* result, and the conflict continues.[120]

It may be that the dispute regarding the applicability of the United States Arbitration Act is largely academic. Decisions under 301 are setting standards for enforcing arbitration independently of the 1925 statute.[121] Language in *General Electric Co. v. Local 205, UEW*[122] may indicate that the Supreme Court views the statute as inapplicable under 301. In affirming enforcement of an arbitration clause in a labor contract on the authority of the arbitration act, the Court stated: "We follow in part a different path than the Court of

115. Tenney Eng'r, Inc. v. Local 437, UEW, 207 F.2d 450 (3d Cir. 1953). This view is apparently limited to the Third Circuit and was expressly rejected by the Fourth Circuit in UEW v. Miller Metal Prods., Inc., 215 F.2d 221 (1954).

116. *See, e.g.*, United Steelworkers v. Galland-Henning Mfg. Co., 241 F.2d 323 (7th Cir. 1957); Lincoln Mills v. Textile Workers Union, 230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957).

117. Lincoln Mills v. Textile Workers Union, 230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957).

118. Goodall-Sanford, Inc. v. Local 1802, Textile Workers, 233 F.2d 104 (1st Cir. 1956), *aff'd*, 353 U.S. 550 (1957); Local 205, UEW v. General Elec. Co., 233 F.2d 85 (1st Cir. 1956), *aff'd* 353 U.S. 547 (1957).

119. 353 U.S. at 466-67.

120. *See, e.g.*, Pietro Scalzitti Co. v. Operating Eng'rs, Local 150, 351 F.2d 576 (7th Cir. 1965).

121. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

122. 353 U.S. 547 (1957).

Appeals, though we reach the same result."[123] The same language, however, has been read as confirmation that the federal statute should be employed by federal courts as the "guiding analogy" under 301.[124] If the federal act is not applicable per se, it is certainly part of the body of federal law to which courts may look when devising standards to apply under 301.[125] Both the arbitration act and national labor policy[126] attempt to encourage the private resolution of disputes. The procedures specified by the statute are designed to facilitate enforcement of arbitration agreements and to limit judicial review of awards.[127] This harmony between the federal arbitration act and national labor policy, together with the silence of the majority in *Lincoln Mills,* indicates that the act, or at least its "non-substantive" aspects, has not been absorbed under 301. This view would allow the federal courts to apply the statute as a "guiding analogy" in 301 suits without attempting to determine whether they were applying "substantive" or "non-substantive" law, while, at the same time, leaving the state courts free to look to their own sources of rules when confronted with questions not affected with the need for uniformity. Several reasons commend this interpretation of the somewhat confusing debate concerning the applicability of the federal arbitration statute. While in toto adoption of the congressional enactment as national law to be applied by state and federal courts would assure protection of the basic policies announced in *Lincoln Mills,* it would demand uniformity in areas not required by labor policy at the sacrifice of the state courts' interest in applying their own familiar procedures whenever possible. Ruling the federal statute completely inapplicable to collective bargaining contracts and employing a federal-law-chooses-state-law approach would be unsatisfactory, because some states have no arbitration statute. The suggested approach allows for selective absorption as national law of those aspects of the federal statute requiring uniformity, while still permitting state and federal courts to go their respective ways on issues not requiring uniform resolution.

123. 353 U.S. at 548.

124. Comment, *The Applicability of State Arbitration Statutes to Proceedings Subject to LMRA Section 301,* 27 OHIO ST. L.J. 692, 704-05 (1966).

125. *See,* Local 1416, IAM v. Jostens, Inc., 250 F. Supp. 496 (1966).

126. 29 U.S.C. § 173(d) (1964).

127. 9 U.S.C. §§ 1-14 (1964). Section 2 makes arbitration agreements valid, irrevoeable and enforceable; § 3 permits stay of action pending arbitration; § 4 authorizes applications for specific enforcement and provides for summary disposition of such preliminary issues as contract *vel non;* § 5 allows for court appointment of an arbitrator in the event the parties fail to appoint one; § 6 provides that applications under the act shall receive motion treatment; § 7 authorizes subpoenas; § 10 limits the grounds for vacation; and § 11 specifies grounds for modification.

C. *The State Acts*

The tenacity of judicial hostility toward arbitration led many states as well as Congress to enact enabling statutes.[128] The details and coverage of these laws vary, but for the most part, they contain similar legislative objectives. The basic purpose is, of course, to allow parties to adopt private dispute-settling mechanisms that will not be defeated by courts jealous of their jurisdiction. To achieve this object the statutes employ some or all of the following provisions: (1) a declaration that agreements to arbitrate present or future disputes are valid, irrevocable, and enforceable; (2) a definition of the scope of the arbitrator's authority; (3) an authorization detailing the grounds and procedure for obtaining a stay of action pending arbitration; (4) a provision for the appointment of arbitrators in the event the parties fail to do so; (5) a grant of subpoena power to the arbitrator; (6) a specification of the methods of enforcing the agreements; and (7) a detailing of the grounds and procedures for modifying, vacating or confirming awards. It can be seen that some of the stated provisions, such as those validating arbitration clauses, are calculated to achieve the same ends sought by national labor policy, while the harmony of others, such as those listing grounds for vacating awards, with 301 will depend on their details. Having concluded that under existing law state courts are free to apply whatever

128. ALA. CODE ANN. tit. 7, § 829-44 (1960); ARIZ. REV. STAT. ANN. §§ 12-501 to 1517 (Supp. 1967); ARK. STAT. ANN. §§ 34-501 to 510 (1962); CAL. CIV. PROC. §§ 1280-94.2 (Supp. 1967); COLO. RULES CIV. PROC. 109; CONN. GEN. STAT. ANN. §§ 52-408 to -424 (1959); FLA. STAT. ANN. §§ 682.01-.22 (Supp. 1968); GA. CODE ANN. §§ 7-201 to -224 (1936); HAWAII REV. LAWS §§ 188-1 to -15 (1955); IDAHO CODE ANN. §§ 7-901 to -910 (1948); ILL. ANN. STAT. ch. 10, §§ 1-30, 101-23 (Smith-Hurd 1966); IND. STAT. ANN. §§ 3-201 to -226 (1968); IOWA CODE ANN. §§ 679.1-.18 (1950), *as amended*, (Supp. 1968); KAN. GEN. STAT. ANN. §§ 5-201 to -213, 301 to -310 (1964); KY. REV. STAT. ANN. §§ 417.010-.040 (1963); LA. REV. STAT. §§ 9.4201-.4217 (1951); ME. REV. STAT. ANN. tit. 26, §§ 951-60 (1964), *as amended*, (Supp. 1967); MD. ANN. CODE art. 7, §§ 1-23 (1968); MASS. ANN. LAWS ch. 251, §§ 1-19 (1968); MICH. STAT. ANN. §§ 27A.5001-5035 (1962); MINN. STAT. ANN. §§ 572.08-.30 (Supp. 1967); MISS. CODE ANN. §§ 279-97 (1956); MO. ANN. STAT. §§ 435.010-280 (1952); MONT. REV. CODES ANN. §§ 93-201--1 to -10 (1964); NEB. REV. STAT. §§ 25-2103 to -2120 (1965); NEV. REV. STAT. §§ 38.010-.240 (1959); N.H. REV. STAT. ANN. §§ 542.1-10 (1955); N.J. STAT. ANN. §§ 2A:24-1 to -11 (1952); N.M. STAT. ANN. §§ 22-3-1 to -8 (1954); N.Y. CIV. PRAC. LAW 7501-14 (McKinney 1963), *as amended*, (Supp. 1967); N.C. GEN. STAT. §§ 1-544 to -567 (1953); N.D. CENT. CODE §§ 32-29-01 to -21 (1960); OHIO REV. CODE §§ 2711.01-.15 (1964); ORE. REV. STAT. 33.210-.340 (1967); PA. STAT. ANN. tit. 5, §§ 1-209 (1963), *as amended*, (Supp. 1967); R.I. GEN. LAWS ANN. §§ 10-3-1 to -20 (1957), *as amended*, (Supp. 1967); S.C. CODE ANN. §§ 10-1901 to -1905 (1962); TENN. CODE ANN. §§ 23-501 to -519 (1955); TEX. REV. CIV. STAT. arts. 224-49 (1959), *as amended*, (Supp. 1967); UTAH CODE ANN. §§ 78-31-1 to -22 (1953); VA. CODE ANN. §§ 8-503 to -507 (1957), *as amended*, (Supp. 1968); WASH. REV. CODE §§ 7.04.010 to -.220 (1961); W. VA. CODE ANN. §§ 55-10-1 to -8 (1966); WIS. STAT. ANN. §§ 298.01-.18 (1958); WYO. STAT. ANN. §§ 1-1048.1-.21 (Supp. 1967).

arbitration procedures they wish, so long as they are consistent with 301, the next step is to measure the effect various provisions would have on labor policy if applied in state court 301 suits.

1. *Statutes that exclude labor agreements from coverage.*—Several statutes specifically exclude labor arbitration clauses from their coverage,[129] while at least one is, by its own terms, inapplicable to agreements covered by the provisions of the federal arbitration act.[130] By exempting contracts subject to the federal act, it is not clear whether this statute becomes inapplicable to collective bargaining contracts, for, as previously noted, considerable doubt exists as to the scope of the federal statute. It is clear, however, that neither such a clause nor a general exclusion of labor contracts from the arbitration statute can prohibit state courts from enforcing 301 arbitration clauses.[131] Whether state courts in suits under section 301 must apply their arbitration statute to the extent permitted by federal law is a matter of local law; it does not follow that such a statute has to be applicable by its own terms in order to serve as a useful guide to settling 301 disputes. Courts in states whose statutes exclude collective bargaining contracts will be called upon to enforce arbitration agreements under 301, and reference to the state arbitration statute as a source of procedure would be consistent with the role accorded the federal act by some courts.[132]

2. *Stay of Action; Stay of Arbitration.*—Most state arbitration statutes provide a procedure for staying the trial of an action pending arbitration.[133] Such a provision is certainly consistent with labor policy, and under *Lincoln Mills* state courts have the power to stay actions even if such a provision is not found in the local arbitration statute. Failure to do so would, in effect, deny specific performance of the arbitration agreement.

129. The following states exclude labor: Arizona, Maryland (unless parties expressly select statute), Michigan, New Hampshire, Oregon, Rhode Island, Washington, and Wisconsin. For full citations *see* note 128 *supra*. In addition, the following states have no arbitration statute: Alaska, Delaware, District of Columbia, Oklahoma, South Dakota and Vermont. Colorado has no statute, but provides for arbitration in its rules of civil procedure. *See* COLO. RULES CIV. PROC. 109.

130. LA. REV. STAT. ANN. § 9:4216 (1951). The statute is inapplicable to "contracts of employment of labor or to contracts for arbitration which are controlled by valid legislation of the United States . . . ." The "coutracts of employment of labor" language may make the issue of the United States Arbitration Act's applicability moot, but it is susceptible to the same type of limiting construction which some courts have put on the federal act.

131. *See* text accompanying note 11 *supra*.

132. *See*, Local 1416, IAM v. Jostens, Inc., 250 F. Supp. 496 (1966).

133. These states are: Alabama, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, Wisconsin, aud Wyoming. For complete citations, *see* note 128 *supra*.

In addition to a stay of action, some state statutes allow for a stay of arbitration on certain limited grounds. It is not clear what the effect of such a provision is, but if it is to block arbitration where the party has not agreed to arbitrate,[134] then certainly it is unnecessary, for a party cannot be compelled to arbitrate an issue which he has not agreed to submit to arbitration.[135] It should be noted that state courts may only grant stays sparingly, for with regard to labor contracts, all doubts are to be resolved in favor of arbitration.[136]

3. *Subpoena Power.*—The United States Arbitration Act[137] and the majority of the states[138] grant arbitrators the power, with enforcement in the courts, to compel the attendance of witnesses and the production of books and records. It would seem that such provisions are calculated to increase the effectiveness of the arbitration proceeding, and the view has been taken that the power should be inferred from 301 itself.[139] Regardless of whether 301 demands the grant of the subpoena power, courts should not hesitate to allow subpoenas in states whose statutes grant the power. It is true that if some states grant subpoena power while others do not, arbitration will be more effective in the former states than in the latter. However, it seems that this argument really addresses itself to the question of whether the power should be implied under 301 as a matter of federal law rather than to the question of whether provisions in state statutes granting subpoena power may be validly applied under 301. Assuming applicability, a court enforcing a subpoena in a 301 suit must consider the effect of the enforcement in the light of labor policy. There may be some matters of privilege and permissible scope of materials subject to the power which would have to be viewed with labor policy in mind.

4. *Vacation or Modification of the Award.*—The provisions in most

134. *See, e.g.*, N.Y. CIV. PRAC. LAW § 7503 (McKinney Supp. 1967), "A party . . . may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with . . . ."

135. *See,* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

136. *Id.* at 582-83.

137. 9 U.S.C. § 7 (1964).

138. The states making provision for subpoena power on the part of the arbitrator include: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, Mississippi, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Islaud, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. For full citations, *see* note 128 *supra.*

139. Comment, *The Applicability of State Arbitration Statutes to Proceedings Subject to LMRA Section 301,* 27 OHIO ST. L.J. 692, 707 (1966).

statutes[140] specifying grounds for vacating or modifying awards are designed to limit the scope of review.[141] Limited review is consistent with the federal policy of according finality to the arbitrator's award, but certainly the specific limitations must be measured against the standard of 301. For example, a state provision not permitting the vacation of awards obtained by fraud could not be consistent with federal labor policy. It has been suggested that rules governing review be deemed substantive for the purposes of 301.[142] Such rules do go to the heart of the policy favoring arbitration, and a lack of uniformity in this area could affect bargaining table views of arbitration clauses from state to state. Surely, states should not feel as free to apply local rules in reviewing awards as they would in more "procedural" areas such as pleading. However, given the embryonic state of the substantive law under 301, it is submitted that state courts in search of a source from which to devise a federal rule governing review of arbitrators' awards can find a helpful reference in state arbitration statutes.

5. *Other Provisions.*—As noted above, most state statutes have sections declaring that arbitration agreements are valid, irrevocable, and enforceable; sections defining the scope of the arbitrator's authority; and sections providing for the court appointment of arbitrators. With regard to 301 suits, these provisions seem to be superfluous. *Lincoln Mills* makes arbitration clauses specifically enforceable; and the scope of the arbitrator's authority has been limited by federal law to the interpretation and application of the collective bargaining agreement.[143] Finally, court appointment of arbitrators would seem a necessary corollary to specific enforcement of arbitration clauses. If the parties entered into an arbitration agreement, they obviously anticipated that an arbitrator would be chosen. If his selection by the parties has failed for some reason, unwillingness on the part of the court to appoint one would frustrate the agreement of the parties. At

140. These states have such provisions: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

141. CAL. CIV. PROC. CODE § 1286.2 (Supp. 1967), for example, lists the following grounds for vacating awards: (1) fraud; (2) corruption; (3) prejudice; (4) abuse of power; (5) refusal to postpone upon good cause shown; or (6) refusal to hear material evidence.

142. Note, *Lincoln Mills: Labor Arbitration and Federal-State Relations*, 57 COLUM. L. REV. 1123, 1135 (1957).

143. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

least one court has taken the view that the policy of encouraging arbitration dictates that the court effectuate the basic intent of the parties by supplying an arbitrator.[144]

V. SOME REMEDIAL PROBLEMS

A. *Enjoining Strikes in Breach of Collective Bargaining Agreements*

This section considers whether state courts entertaining suits under section 301 may enjoin strikes in breach of collective bargaining agreements.[145] With respect to the federal courts, this question was resolved in *Sinclair Refining Co. v. Atkinson*,[146] where the Supreme Court held that section 4 of the Norris-LaGuardia Act[147] prohibits the issuance of injunctions to enforce no-strike agreements. The issue at this juncture is whether the prohibitions of the Norris-LaGuardia Act are now applicable to state courts under 301 or whether the operation of that act is to be confined to the federal courts. The courts considering this issue have reached conflicting results and there appears to be reason and authority in support of a number of views.[148]

In *McCarroll v. Los Angeles County District Council of Carpenters*,[149] Justice Traynor, speaking for the majority of the California

144. *See*, Deaton Truck Line, Inc. v. Teamsters Local 612, 314 F.2d 418 (5th Cir. 1962), which accepted this view.

145. For general discussions of this question see Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027 (1963); Janofsky & Vaughn, *Affirmative Role of State Courts to Enjoin Strikes in Breach of Collective Bargaining Agreements*, 7 B.C. IND. & COM. L. REV. 869 (1966); Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia*, 79 HARV. L. REV. 757 (1966); Stern, *The Norris-LaGuardia Act and State Court Injunctions Against Strikes in Breach of a Collective Bargaining Agreement Under Section 301: Accommodation vs. Incompatibility*, 39 TEMPLE L.Q. 65 (1965).

146. 370 U.S. 195 (1962).

147. 47 Stat. 70 (1932), *as amended*, 29 U.S.C. §§ 101-15 (1964). Section 4 of the act provides that: "No court of the United States shall have jurisdiction to issue any temporary restraining order or permanent injunction in any case involving or growing out of a labor dispute to prohibit any person or persons participating or interested in such dispute [as these terms are herein defined] from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment. . . ."

148. *See, e.g.*, Avco Corp. v. Lodge 735, IAM, 376 F.2d 337 (6th Cir.), *cert. granted*, 389 U.S. 819 (1967) (states cannot issue injunction under 301); American Dredging Co. v. Local 25, Operating Eng'rs, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965) (states can issue injunctions under 301); McCarroll v. Los Angeles Co. Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Dugdale Constr. Co. v. Operative Plasterers Ass'n, Local 538, 257 Iowa 997, 135 N.W.2d 656 (1965); Shaw Elec. Co. v. IBEW, 418 Pa. 1, 208 A.2d 769 (1965).

149. Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 335 U.S. 932 (1958).

Supreme Court, concluded that the restrictions of the Norris-LaGuardia Act are not applicable to state courts entertaining suits under section 301. Questioning the power of Congress to restrain state courts in exercising their remedial powers, he found no congressional intention to limit the power of state courts to grant injunctions. It "would give . . . an ironic twist [to the purpose of section 301 to hold] that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301."[150] This reasoning is supported by the decision of the Pennsylvania Supreme Court in *Shaw Electric Co. v. IBEW*.[151] The court stated:

> It is true that the (Norris-LaGuardia) Act expresses a congressional policy against injunctions, but only injunctions granted by federal courts. Congressional enactment of Section 301, without amendment of the Norris-LaGuardia Act, with Congress fully aware of state court remedies, strongly indicates reaffirmance of existing federal labor policies which limit the injunctive jurisdiction of federal courts, but which do not attempt to limit that of state courts.[152]

While the views expressed in *Shaw* and *McCarroll* are appealing, there is equally persuasive authority which indicates that the prohibitions of the Norris-LaGuardia Act are a matter of federal law to which the states must adhere.[153] In *Avco Corp. v. Lodge 735, IAM*,[154] the Sixth Circuit held that "the remedies available in State Courts are limited to the remedies available under Federal law."[155] Reasoning that *Sinclair* reinforced the status of the Norris-LaGuardia Act as part of the nation's labor legislation, the court found that "[t]hough Section 4 specifically applies only to Federal Courts, [it] was nevertheless, a clear declaration of congressional policy against enjoining peaceful picketing which we must now follow and apply as part of Federal labor law."[156] The court also indicated that this is an area requiring uniform development of the law lest the "State Courts . . . become the preferred forum for adjusting breaches of no-strike clauses in collective bargaining agreements. . . ."[157]

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150. 49 Cal. 2d at 63-64, 315 P.2d at 332.

151. 418 Pa. 1, 208 A.2d 769 (1965).

152. *Id.* at 12-13, 208 A.2d at 775-76.

153. *See* Avco Corp. v. Lodge 735, IAM, 376 F.2d 337 (6th Cir.), *cert. granted*, 389 U.S. 819 (1967). *See also* Aaron, *supra* note 145 at 1035.

154. 376 F.2d 337 (6th Cir.), *cert. granted*, 389 U.S. 819 (1967).

155. *Id.* at 343.

156. *Id.* at 342.

157. *Id.* at 343.

On appeal the Supreme Court considered only the narrow question of whether the Norris-LaGuardia Act's restriction on the jurisdiction of the federal courts to issue labor injunctions prevented the removal of 301 suits from state courts when only injunctive relief was requested.[158] In holding that the action was properly removed to the federal court under the Removal Act,[159] the Court stated that the "nature of the relief available after jurisdiction attaches is . . . different from the question whether there is jurisdiction to adjudicate the controversy."[160] Although noting that the court of appeals had stated in dictum that "the remedies available in State Courts are limited to the remedies available under Federal law," the Supreme Court expressly reserved decision on this question. Thus, state court judges are still confronted with the question of whether they have the power to issue injunctive relief in suits under section 301.

The various positions taken on this issue result from the conflict between, on the one hand, the congressional intent in enacting section 301 to increase the effectiveness of enforcing labor agreements, and, on the other hand, the *Hoosier* policy of maintaining uniformity in the resolution of issues which affect the smooth functioning of the collective bargaining and dispute settlement processes. Under the present decisional framework this conflict cannot be resolved. If the policy of uniformity is sought to be effectuated, then state courts must be deprived of the power to issue labor injunctions, thereby frustrating the effective enforcement of collective bargaining agreements. On the other hand, if state courts are permitted to issue no-strike injunctions, there would be a sacrifice of uniformity. Furthermore, even if uniformity is sacrificed, it is doubtful whether, in light of *Avco*, the effective enforcement of collective bargaining agreements can be enhanced. Conceding the power of state courts to issue no-strike injunctions, the decision in *Avco* clearly establishes the defendant's right to remove the action to federal court where he may seek dissolution of the injunction. While noting that there was no question of the district court's power to dissolve a state court injunction after removal,[161] the Supreme Court in *Avco* expressly reserved decision on whether the district court is required to dissolve the injunction under the authority of *Sinclair*.[162] If it must do so, permitting state courts to issue injunctive relief under section 301 will merely add an additional procedural step to such 301 actions. Even if the

158. Avco Corp. v. Lodge 735, IAM, 390 U.S. 557 (1968).
159. 28 U.S.C. § 1441 (1964).
160. 390 U.S. at 561.
161. *See* 28 U.S.C. § 1450 (1964).
162. 390 U.S. at 561 n.4.

district court, under certain circumstances, is permitted to allow state court no-strike injunctions to continue in effect, plaintiffs will still institute their suits in state courts where injunctive relief is available and defendants will remove them to federal court in the hope that the injunction will be dissolved—again creating an additional procedural step.

It can be seen that favoring effective enforcement over the policy of uniformity will lead to an unsatisfactory result. This would tend to militate toward the preference for the policy of uniformity. However, such a preference fails to meet the *McCarroll* objection that in enacting section 301 Congress sought to enhance the enforcement of collective bargaining agreements. It is submitted that *McCarroll's* interpretatiton of congressional intent was correct.[163] Consequently the proper method of bringing about uniformity is through a change in the applicable federal law. There are two courses which could be taken: Congress could repeal the Norris-LaGuardia Act in so far as it prohibits injunctive enforcement of no-strike agreements[164] or, in the absence of such congressional action, the Supreme Court could reconsider and overrule its decision in *Sinclair* and permit federal courts to issue no-strike injunctions in limited situations.[165] The latter approach could be justified along the lines of the Court's decision in *Lincoln Mills* regarding the specific enforcement of agreements to arbitrate.[166] It could be said that while the issuance of no-strike injunctions would appear to fall within the literal terms of the Norris-LaGuardia Act, the granting of such injunctions is necessary to achieve section 301's purpose of enhancing the integrity

163. Remarks of Senator Ferguson, 92 CONG. REC. 5708 (1946), cited in Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962): "MR. FERGUSON. Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts all the present rights of the State courts to adjudicate the rights between parties in relation to labor agreements. The amendment merely says that the Federal courts shall have jurisdiction. It does not attempt to take away the jurisdiction of the State courts, and the mere fact that the Senator and I disagree does not change the effect of the amendment. MR. MURRAY. But it authorizes the employers to bring suit in the Federal courts, if they so desire. MR. FERGUSON. That is correct. That is all it does. It takes away no jurisdiction of the State courts."

164. *See, e.g.*, Stern, *supra* note 145.

165. Some commentators seem to think that the Supreme Court correctly decided *Sinclair*. *See, e.g.*, Lesnick, *supra* note 145. Others disagree. *See, e.g.*, Aaron, *supra* note 145.

166. In regard to specifically enforcing agreements to arbitrate, the Court employed the following rationale. It stated that the failure to arbitrate was not one of the abuses toward which the Norris-LaGuardia Act was directed. Furthermore, the Court found a congressional policy favoring the settlement of disputes by arbitration in § 8 of the Norris-LaGuardia Act which denies injunctive relief to those who have failed to make "every reasonable effort" to settle their disputes without court action, including by way of "voluntary arbitration." Textile Workers v. Lincoln Mills, 353 U.S. 448, 458 (1957).

of the collective bargaining agreement and bringing about industrial peace. Furthermore, it is arguable that to the extent that section 301's policy of promoting effective enforcement of labor agreements conflicts with the policy of the Norris-LaGuardia Act, the former policy must be given effect under normal rules of statutory construction.

Absent the selection of one of the above alternatives, the question of whether state courts have the power to issue injunctive relief under section 301 remains unresolved. In terms of the *Hoosier* analysis, the policy of uniformity requires the application of federal law to this problem. The question now becomes: is that federal law the Norris-LaGuardia Act and the anti-injunction policy which it evinces? If so, state courts lack the power to issue injunctive relief in suits under section 301. However, the same reasons which bring into question the continuing validity of *Sinclair* suggest that neither the Norris-LaGuardia Act nor its anti-injunction policy should be applied so as to deny the issuance of no-strike injunctions by state courts. Furthermore, the application of Norris-LaGuardia to the states was not envisioned at the time of its enactment, nor apparently was this envisioned at the time of the enactment of section 301.[167] Consequently, in the absence of congressional guidance, the policy evidenced by the Norris-LaGuardia Act could be regarded as a matter of federal common law which the judiciary is free to modify and accommodate to the purposes of section 301. By viewing Norris-LaGuardia's relationship to state courts in this manner, the Supreme Court could hold that in light of the purposes of section 301, state courts can issue no-strike injunctions, but because of the policy evidenced by the Norris-LaGuardia Act to control the issuance of labor injunctions and due to the demand for at least some degree of uniformity, no-strike injunctions can only be issued under certain federally-prescribed standards and as a matter of federal law.[168]

B. *Specific Enforcement of Arbitrator's Awards*

In an effort to avoid the restrictions of *Sinclair*, parties faced with a work stoppage in violation of a labor agreement have first obtained

167. *See* remarks of Senator Ferguson, 92 CONG. REC. 5708 (1946), *cited in*, note 163 *supra*.

168. Of course, the selection of such an approach would suggest that district courts be permitted under proper circumstances to allow state court no-strike injunctions to continue in effect upon removal. In determining whether 301 injunctions should be permitted to continue in effect, the federal courts would be given the opportunity to fashion federal standards to which state courts must adhere in issuing injunctions. Thus, the federal courts would not be deprived of their role in this important area under § 301 and the state courts' power to issue no-strike injunctions would remain

an arbitrator's back-to-work award, and have initiated an action under 301 for specific enforcement. Since the decision in *Sinclair* the courts in at least two circuits have been presented with the question of whether the Norris-LaGuardia Act precludes such relief.[169] In *Marine Transport Lines v. Curran*,[170] a district judge answered this question in the affirmative. He stated that "whatever the form of the proceeding," the "court [was] being asked to enjoin a work stoppage."[171] Having made this determination he concluded:

> In *Sinclair* the employer sought to enjoin a work stoppage before the arbitration took place in order to make arbitration effective. Here the employer seeks to enjoin a work stoppage after the arbitration has taken place and after the arbitrator has directed that the work stoppage cease. In my opinion, there is no significant difference between the two situations, as far as the power of this court is concerned. It inevitably follows from *Sinclair* that this court lacks jurisdiction to grant the relief requested here.[172]

The judge admitted that his conclusion "impairs the efficacy of no-strike and arbitration clauses in collective bargaining agreements,"[173] but he stated that the only remedy for this situation rests with Congress.

The Third Circuit Court of Appeals reached a contrary result in *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, Local 1291*.[174] The court held that the district court's order of specific enforcement "was not in conflict with the Norris-LaGuardia Act but completely within the *Lincoln Mills* and *Steelworkers* opinions . . . and [was] a vital part of the all important enforcement of the specific performance of the admittedly agreed to arbitration clause in the labor contract . . . ."[175] The court's decision was appealed to the Supreme Court, where, instead of meeting the issue, the Court reversed the district court's order for vagueness on the basis of

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meaningful. Of greatest importance, however, is the fact that the enforcement of collective bargaining agreements would remain at least as effective as it was prior to the enactment of § 301.

169. Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, Local 1291, 365 F.2d 295 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967); Marine Transport Lines v. Curran, 65 L.R.R.M. 2095 (D.C.N.Y. 1967). This question was also involved in Gulf & South American Steamship Co. v. National Maritime Union, 360 F.2d 63 (5th Cir. 1966), but the court disposed of the matter by stating that the issue in dispute was not arbitrable and that the no-strike issue alone could not serve as a basis for the arbitrator's jurisdiction to grant a back-to-work award.

170. 65 L.R.R.M. 2095 (D.C.N.Y. 1967).

171. 65 L.R.R.M. at 2097.

172. *Id.*

173. *Id.*

174. 365 F.2d 295 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967).

175. *Id.* at 299-300.

FEDERAL RULE OF CIVIL PROCEDURE 65(d), which provides specific standards that must be met by "[e]very order granting an injunction and every restraining order . . . ." Reserving the question whether the order was an "injunction" within the meaning of the Norris-LaGuardia Act, the Court held that "it was an equitable decree compelling obedience under the threat of contempt and was therefore an 'order granting an injunction' within the meaning of Rule 65 (d)."[176]

In a separate opinion, Mr. Justice Douglas stated that "[i]f the order of the District Court is an 'injunction' within the meaning of Rule 65(d), then [he failed] to see why it [was] not an 'injunction' within the meaning of the Norris-LaGuardia Act."[177] He reasoned that once the order is held to be an injunction, "the District Court on remand would likely consider *Sinclair*, which is not overruled, controlling and apply it to preclude the issuance of another order."[178] His wish was apparently to reconsider the wisdom of the decision in *Sinclair*, for he stated that the Court "should not set . . . on a path that may well lead to the eventual reaffirmation of the principles of that case."[179]

Considering the issue in the abstract, it would appear that under the rationale of *Hoosier* the specific enforcement of back-to-work awards is a matter demanding uniformity and should consequently be governed by federal law. Whether an arbitrator's back-to-work award can be specifically enforced would definitely concern the parties at the bargaining table and affect the settlement of disputes under collective bargaining agreements.[180] Unfortunately, this question cannot be considered in the abstract, for the possible applicability of *Sinclair* may once again bring about a situation in which the doctrine of uniformity gives rise to a conflict with the intent of Congress in enacting section 301 to promote the effective enforcement of labor agreements. This is similar to the problem which has arisen in regard to the issuance of no-strike injunctions,[181] except in this instance, the Supreme Court has not specifically held that federal courts are precluded by the Norris-LaGuardia Act from issuing specific enforcement of awards.

There are several courses of action which could be taken in regard to the question under discussion. The Supreme Court could limit its holding in *Sinclair* to the issuance of no-strike injunctions prior

176. 389 U.S. at 75.
177. *Id.* at 77, (1966) (Mr. Justice Douglas, dissenting).
178. *Id.*
179. *Id.*
180. *See* Kirkwood, *The Enforcement of Collective Bargaining Contracts—A Summary*, 15 LAB. L.J. 111 (1964).
181. See notes 163-66 *supra* and accompanying text.

to arbitration on the ground that the employer can at that time seek specific enforcement of the arbitration agreement, under which the dispute may be resolved without using a weapon as potent as an injunction. It could then be reasoned that when, on the other hand, suit is brought to enforce an arbitrator's award, the union has in fact submitted to the arbitration procedure and by disobeying the arbitrator's award is endangering the effectiveness of arbitration as a peaceful means of settling disputes.[182] Although there is some merit to this distinction, it would appear that both in the case of no-strike injunctions and the specific enforcement of back-to-work awards, the court's power is being used to enjoin a work stoppage,[183] and that consequently the same view should be taken toward both types of relief.

The other alternatives which the courts have with respect to this problem are identical to those discussed in the previous section.[184] These choices are to hold the decision in *Sinclair* applicable to federal court orders enforcing back-to-work awards and either: (1) require in addition that, as a matter of uniformity, the state courts refrain from issuing such relief; or (2) sacrifice a degree of uniformity in an attempt to accommodate Norris-LaGuardia and 301 by confining the operation of the latter to federal courts and permitting state courts to issue orders enforcing arbitrators' back-to-work awards as a matter of federal law and under federally-prescribed standards. However, the former alternatives should be considered only in the absence of a reversal of *Sinclair*, which is, in the final analysis, the most effective method of promoting the enforcement of labor agreements and achieving the intent of Congress in enacting section 301.

VI. Conclusion

This Note has not made an exhaustive study of possible federal system problems arising under section 301. It has attempted to suggest the proper analytical format in which some of the more important federal-state conflicts should be viewed, and to indicate solutions to specific issues where appropriate. The embryonic state of the federal "substantive" law in this area has enabled the courts to decide cases without identifying the source of the law applied, and thus to avoid difficult federal-state conflicts. It is suggested that neither the fashioning of federal labor law nor the development of

182. *See* International Longshoremen's Ass'n v. Philadelphia Marine Ass'n, 389 U.S. 64 (1967) (Mr. Justice Douglas, dissenting).

183. *See* Marine Transport Lines v. Curran, 65 L.R.R.M. 2095 (D.C.N.Y. 1967), and note 4 *supra* and accompanying text.

184. See notes 167-75 *supra* and accompanying text.

standards to determine the role of state law is fostered in this manner. Accordingly, a state court must examine each issue with which it is confronted with reference to its effect upon the negotiation and administration of collective bargaining agreements. If conflicting results on the issue from jurisdiction to jurisdiction are likely to have a disruptive effect upon these processes, then the state tribunal is bound to apply federal law and identify its source as such. On the other hand, if uniformity is not required, the state court may resort to local rules. Even here, the discretion over local rules must be exercised in such a fashion as not to unduly hinder the assertion of federal rights.

EDWARD J. HARDIN

JOSEPH C. MILLER