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# Taft-Hartley Sections 301 and 303 Procedural Aspects

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# NOTES

## TAFT-HARTLEY SECTIONS 301 AND 303 — PROCEDURAL ASPECTS

The motives and purposes behind the binate Sections 301 and 303, no less than other sections of the Taft-Hartley Act,[1] are mixed and ambiguous.[2] Foremost, however, seems the notion that Congress intended to create new federal rights, contract and tort, enforceable nationally in a federal forum. In broad terms, where the required relationship to interstate commerce exists, Section 301 permits suits by either employers or unions for violation of collective bargaining agreements; Section 303 permits those injured by certain boycotts and unlawful combinations[3] to bring suit — in both cases, the forum provided is the district court of the United States. It is not the purpose of this Note to discuss the elements or validity of a collective bargaining agreement or a breach thereof, nor of concern is the problem of the existence of the prohibited boycotts and combinations. The procedural provisions of Section 301 are incorporated by specific reference in Section 303. Subject to the always inherent difficulties of distinguishing substance from procedure, this Note will be concerned with procedural aspects of suits under the binate sections.

### JURISDICTION

Section 301 grants to the district courts jurisdiction "without respect to the amount in controversy or without regard to citizenship of the parties," while Section 303 omits the latter phrase.[4] Whatever the reasons for the difference in phraseology, it is now settled that jurisdiction is vested in the district courts without regard to either citizenship or amount in controversy in suits under either section.[5] The necessary

1. 61 STAT. 136 (1947), 29 U.S.C.A. §§ 141 *et seq.* (Supp. 1953). Sections 301 and 303 are set out in the Appendix, *infra* p. 391.

2. See Judge Wyzanski's discussion in Textile Workers Union v. American Thread Co., 113 F. Supp. 137, 32 LRRM 2205 (D. Mass. 1953), 7 VAND. L. REV. 140.

3. Section 303 does not use the words "second boycott"; it deals with the exercise by a labor oranization of secondary pressure in a labor dispute. United Brick & Clay Workers v. Deena Artware, Inc., 198 F.2d 637, 30 LRRM 2485 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952).

4. See Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union, 193 F.2d 209, 29 LRRM 2223 (6th Cir. 1951), *cert. denied*, 343 U.S. 966 (1952) (action on contract arises under laws of United States); Pepper & Potter, Inc. v. Local 977, UAW, 103 F. Supp. 684, 29 LRRM 2580 (S.D.N.Y. 1952).

5. See Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d. 158, 26 LRRM 2136 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950).

Jurisdiction is limited also to "an industry or activity affecting commerce." Section 501 defines "industry affecting commerce" as "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce."

For purposes of removal jurisdiction, a federal court may look beyond the complaint to ascertain whether a union represents employees in an industry affecting commerce. Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278, 28 LRRM 2103 (S.D.N.Y. 1951).

foundation for federal jurisdiction in the binate sections, therefore, must be that the exercise or enforcement of the rights enumerated in those sections constitutes a case arising under the laws of the United States.[6] Creation of federal jurisdiction, without the concomitant creation of federal substantive rights,[7] would have been unconstitutional.[8]

The invocation of federal question jurisdiction here is dependent upon the appearance within the four corners of the complaint of a statement of a cause of action as narrowly defined by the language of Sections 301 and 303.[9] Thus, for example, not cognizable under these sections are actions involving intra-union squabbles concerning contract violation[10] and actions for inducing breach of contract.[11]

Jurisdiction may not be predicated merely upon Section 301(b) which allows suits by or against unions as entities. Procedural in

6. United Brick & Clay Workers v. Deena Artware, Inc., 198 F.2d 637, 30 LRRM 2485 (6th Cir.), *cert. denied,* 344 U.S. 897 (1952); Pepper & Potter, Inc. v. Local 977, UAW, 103 F. Supp. 684, 29 LRRM 2580 (S.D.N.Y. 1952); L. Fatato, Inc. v. Beer Drivers Local Union 24, 93 F. Supp. 481, 27 LRRM 2032 (E.D.N.Y. 1950); UAW v. Wilson Athletic Goods Mfg. Co., 26 LRRM 2383 (N.D. Ill. 1950); Banner Mfg. Co. v. United Furniture Workers, 90 F. Supp. 723, 25 LRRM 2498 (S.D.N.Y. 1950) (the first case to reach this result; a well-reasoned analysis that §303 merely eliminates the jurisdictional amount provision of §1331 of the Judicial Code); *see* International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 241-42, 72 Sup. Ct. 235, 96 L. Ed. 275 (1952). *Contra:* Lach v. Hoisting & Portable Power Shovel & Dredge Engineers Local 4, 86 F. Supp. 463, 24 LRRM 2528 (D. Mass. 1949).

7. United Electrical, Radio & Machine Workers v. Oliver Corp., 205 F. 2d 376, 32 LRRM 2270 (8th Cir. 1953); Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union, 193 F.2d 209, 29 LRRM 2223 (6th Cir. 1951), *cert. denied,* 343 U.S. 966 (1952); Waialua Agricultural Co., Ltd. v. United Sugar Workers, 114 F. Supp. 243, 32 LRRM 2440 (D. Hawaii 1953); Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162, 23 LRRM 2391 (S.D.N.Y. 1949); Colonial Hardwood Flooring Co. v. International Union United Furniture Workers, 76 F. Supp. 493, 21 LRRM 2340 (D. Md. 1948).

8. See Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45, 30 LRRM 2667 (D. Del. 1952).

9. Studio Carpenters Local Union No. 946 v. Loew's, Inc., 182 F.2d 168, 26 LRRM 2142 (9th Cir.) [mere threats insufficient under § 303(a)(4)], *cert. denied,* 340 U.S. 828 (1950); United Steel Workers v. Shakespeare Co., 84 F. Supp. 267, 23 LRRM 2341 (W.D. Mich. 1949); Mills v. United Ass'n of Journeymen, 8 F.R.D. 300, 22 LRRM 2539 (W.D. Mo. 1948). *But cf.* Bethlehem Steel Co. v. Industrial Union of Marine & Shipbuilding Workers, 115 F. Supp. 231, 32 LRRM 2767 (E.D.N.Y. 1953) (held language of § 303 shows an intention on part of Congress to give broad scope to the prohibitions in that section); International Union of Operating Engineers v. William D. Baker Co., 100 F. Supp. 773, 28 LRRM 2670 (E.D. Pa. 1951) (district court has jurisdiction under § 301 even though some parts of the relief requested may be beyond the court's jurisdiction). An oral contract entered into during the life of a written contract is valid and will support a § 301 action. United Shoe Workers v. Le Danne Footwear, Inc., 83 F. Supp. 714, 24 LRRM 2021 (D. Mass. 1949). Also *see* Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union, 193 F.2d 214, 29 LRRM 2223 (6th Cir. 1951).

Section 301 does not apply retroactively. Studio Carpenters Local Union No. 946 v. Loew's, Inc., 182 F.2d 168, 26 LRRM 2142 (9th Cir.), *cert. denied,* 340 U.S. 828 (1950); Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158, 26 LRRM 2136 (9th Cir.), *cert. denied,* 340 U.S. 827 (1950).

10. Kriss v. White, 87 F. Supp. 734, 25 LRRM 2130 (N.D.N.Y. 1949).

11. H. N. Thayer Co. v Binnall, 82 F. Supp. 566, 23 LRRM 2421 (D.Mass. 1949)

nature, the provision is not a broad grant of jurisdiction over all causes in which unions may be involved.[12]

Superimposed upon a background of jurisdictionally limited enforcement of related rights, the creation of federal rights by these sections raises the possibility of manifold and variegated conflicts of jurisdiction.

*Removal Jurisdiction*

Removal of an action from the state to federal forum is dependent upon the statement of a cause sufficient to bring it within the original jurisdiction of the district courts.[13] Therefore, where the relief sought cannot be granted in a federal court, as for example, injunctive relief precluded by the Norris-LaGuardia Act, most courts decline removal jurisdiction.[14]

There exist state counterparts of the rights created in these sections. The extent to which a plaintiff may rely upon these state rights, and disclaim federal rights, in moving to remand, is not clear.[15] One

(no jurisdiction under § 301 of action against one union for inducing a breach of contract between plaintiff employer and another union). See also Sterling v. Steam and Power Pipe Fitters' and Helpers' Local No. 438, 31 LRRM 2389 (D. Md. 1953) (no jurisdiction under § 301 over action by business manager against union employer for breach of employment contract); Wright & Morissey, Inc. v. Burlington Local No. 522, 106 F. Supp. 138, 30 LRRM 2649 (D. Vt. 1952) (action against union picketing to obtain a closed shop agreement held not within original jurisdiction of district court); Murphy v. Hotel & Restaurant Employees & Bartenders International Union, 102 F. Supp. 488, 28 LRRM 2370 (E.D. Mich. 1951). *But cf.* R. O. Stenzel & Co. v. Department Store Package Helpers Local Union No. 955, 11 F.R.D. 362, 28 LRRM 2607 (W.D. Mo. 1951); Fitzgerald v. Dictograph Products, Inc., 28 LRRM 2611 (N.Y. Sup. Ct. 1951) (federal court has jurisdiction over action against one union for conspiring to induce the employer to breach his contract with plaintiff union).

12. Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183, 21 LRRM 2605 (4th Cir. 1948); Kriss v. White, *supra* note 10.

13. The grounds for removal are to be determined at time of removal, not when later amended. Thus an action will not be remanded where a complaint originally praying for damages and an injunction was subsequently amended to ask only for injunctive relief. Direct Transit Lines, Inc. v. Local Union No. 406, 30 LRRM 2471 (W.D. Mich. 1952). See also Nash-Kelvinator Corp. v. Grand Rapids Bldg. and Const. Trades Council, 30 LRRM 2466 (W.D. Mich. 1952); *cf.* Isbrandtsen Co. v Schelero, 118 F. Supp. 579, 33 LRRM 2398 (E.D.N.Y. 1954); United Mineral & Chemical Corp. v. Katz, 118 F. Supp. 433, 33 LRRM 2453 (E.D.N.Y. 1954).

14. Castle & Cooke Terminals, Ltd. v. Local 137, 110 F. Supp. 247, 31 LRRM 2480 (D. Hawaii 1953); American Optical Co. v. Andert, 108 F. Supp. 252, 31 LRRM 2312 (W.D. Mo. 1952); Corrado Bros., Inc. v. Building and Const. Trades Council of Delaware, 29 LRRM 2141 (D. Del. 1951). *Contra*: Direct Transit Lines, Inc. v. Local Union No. 406, 29 LRRM 2492 (W.D. Mich.), *mandamus denied*, 199 F.2d 89, 31 LRRM 2004 (6th Cir. 1952). *Cf.* Isbrandtsen Co. v. Schelero, 118 F. Supp. 579, 33 LRRM 2398 (E.D.N.Y. 1954); United Mineral & Chemical Corp. v. Katz, 118 F. Supp. 433, 33 LRRM 2453 (E.D.N.Y. 1954). This inability of the federal courts to provide injunctive relief has been construed as an indication that Congress did not pre-empt the field. Associated Telephone Co., Ltd. v. Communication Workers, 114 F. Supp. 334, 32 LRRM 2485 (S.D. Cal. 1953).

15. Plaintiff may be directed by the Board to see state relief. Irving Subway Grating Co. v. Silverman, 117 F. Supp. 671, 33 LRRM 2293 (E.D.N.Y. 1953). "Plaintiff has elected to pursue a remedy available under state law." Associated

view suggests that the court may take judicial notice of the federal laws brought into play by allegations of the complaint, though no reference is made to them and though the plaintiff expressly disclaims any desire or intention to recover on other than a purely state cause of action.[16] Indeed, a federal court may look beyond the complaint to ascertain a jurisdictional fact, for example, to ascertain whether a union represents employees in an industry affecting commerce.[17] Another view suggests that, since the cause does not necessarily arise under a federal act, the plaintiff may rely upon state law and thus avoid removal.[18] Necessary to this view is the conclusion that federal jurisdiction is not exclusive and that Congress did not intend to pre-empt the field through enactment of these sections.[19]

*Federal v. State Jurisdiction*

Though Congress has power to provide for the exclusiveness of the federal remedy and jurisdiction,[20] most state courts have held that there is an absence of an intention on the part of Congress to pre-empt the field through enactment of these sections; they, therefore, retain jurisdiction.[21]

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Telephone Co., Ltd. v. Communication Workers, 114 F. Supp. 334, 337, 32 LRRM 2485 (S.D. Cal. 1953).

16. Direct Transit Lines, Inc., v. Local Union No. 406, 29 LRRM 2492 (W.D. Mich. 1952); New Broadcasting Co. v. Kehoe, 94 F. Supp. 113, 27 LRRM 2156 (S.D.N.Y. 1950).

17. Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278, 28 LRRM 2103 (S.D.N.Y. 1951).

18. Irving Subway Grating Co. v. Silverman, 117 F. Supp. 671, 33 LRRM 2293 (E.D.N.Y. 1953).

19. *Compare* Associated Telephone Co., Ltd. v. Communication Workers, 114 F. Supp. 334, 32 LRRM 2485 (S.D. Cal. 1953), *with* Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278, 28 LRRM 2103 (S.D.N.Y. 1951)

20. Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278, 28 LRRM 2103 (S.D.N.Y. 1951). Of course, the pre-emption can only be co-extensive with the source of power — the Interstate Commerce Clause of the Constitution. *Ibid.* See also General Electric Co. v. International Union, UAW, 93 Ohio App. 139, 108 N.E.2d 211, 30 LRRM 2607 (1952).

21. "[The] Federal Government has [not] legislated so comprehensively on the subject of contract violations as to preclude state action." Wisconsin Employment Relations Board v. Bookbinders and Bindery Women's Local No. 49, 28 LRRM 2515, 2517 (Wis. Cir. Ct. 1951) (state statute made contract violation an unfair labor practice). See also Winkelman Bros. Apparel, Inc. v. Local Union No. 299, 31 LRRM 2016 (Mich. Cir. Ct. 1952); Brotherhood of Painters, Decorators and Paperhangers v. Acorn Decorating Corp., 28 LRRM 2610 (N.Y. Sup. Ct. 1951) (contempt order granted for violation of injunction against breach of union contract); General Electric Co. v. International Union UAW, 93 Ohio App. 139, 108 N.E.2d 211, 30 LRRM 2607 (1952) (jurisdiction conferred on federal courts by § 301 is merely cumulative and not exclusive); Masetta v. National Bronze & Aluminum Foundry Co., 107 N.E.2d 243, 30 LRRM 2081 (Ohio App. 1952), *rev'd*, 159 Ohio St. 306, 112 N.E.2d 15 (1953); Weisfield's Inc. v. Haeckel, 28 LRRM 2055 (Ore. Cir. Ct. 1951); General Bldg. Contractors Ass'n v. Local Unions, 370 Pa. 73, 87 A.2d 250 (1952); Texas State Federation of Labor v. Brown & Root, Inc., 29 LRRM 2467 (Tex. Civ. App. 1952). *Contra:* Norris Grain Co. v. Nordaas, 27 LRRM 2323 (Minn. Sup. Ct. 1951); Fitzgerald v. Dictograph Products, Inc., 28 LRRM 2611 (N.Y. Sup. Ct. 1951). Federal courts have also recognized the presence of state jurisdiction. Associated Telephone Co., Ltd. v. Communication Workers, 114 F. Supp. 334,

Arguments against federal pre-emption through the binate sections are based upon the inadequacy or unavailability of a remedy in the federal forum[22] and the unlikelihood that Congress, without express words of exclusion, would have precluded state action in so broad a field.[23] In contrast to these arguments stands the broad implication of *Garner v. Teamsters, Chauffers and Helpers Local Union No. 776*,[24] beyond its particular holding, which is that activities cognizable under the Act, remediable or not remediable thereunder, are within the ex-

32 LRRM 2485 (S.D. Cal. 1953); Irving Subway Grating Co. v. Silverman, 117 F. Supp. 671, 33 LRRM 2293 (E.D.N.Y. 1953); Patton v. United Mine Workers, 114 F. Supp. 596, 32 LRRM 2642 (W.D. Va. 1953); Louisville & Nashville R.R. v. Local Union No. 432, 104 F. Supp. 748, 30 LRRM 2090 (S.D. Ala. 1952). *Contra*: Direct Transit Lines, Inc. v. Local Union 406, 29 LRRM 2492, 30 LRRM 2471 (W.D. Mich.), *mandamus denied*, 199 F.2d 89 (6th Cir. 1952); Nash-Kelvinator Corp. v. Grand Rapids Bldg. and Const. Trades Council, 30 LRRM 2466 (W.D. Mich. 1952); Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278, 28 LRRM 2103 (S.D.N.Y. 1951). In some instances special circumstances such as fraud or violence must be shown. Montgomery Bldg. and Const. Trades Council v. Ledbetter Erection Co., 256 Ala. 678, 57 So.2d 112, *cert. dismissed*, 344 U.S. 178 (1952). New York in particular has circumvented the exclusive federal jurisdiction problem by meticulous characterization of the issues. Isbrandtsen Co. v. Schelero, 118 F. Supp. 579, 33 LRRM 2398 (E.D.N.Y. 1954) (no labor dispute); United Mineral & Chemical Corp. v. Katz, 118 F. Supp. 433, 33 LRRM 2453 (E.D.N.Y. 1954) (picketing accompanied by violence tortious); S-M News Co. v. Simons, 279 App. Div. 364, 30 LRRM 2163 (1st Dep't 1952); G., H. & E. Freyberg, Inc. v. International Ladies' Garment Workers' Union, 33 LRRM 2402 (N.Y. Sup. Ct. 1954) (ortious picketing); Cortlandt Co. Department Store v. Cohen, 33 LRRM 2303 (N.Y. Sup. Ct. 1953) (no interstate commerce).

22. Of particular concern to the state employer is the lack of injunctive relief because of the prohibitions of the Norris-LaGuardia Act. The state courts feel that some protection of business and property must be afforded, especially after consideration is made of the NLRB's discretionary jurisdiction policy. Montgomery Bldg. and Const. Trades Council v. Ledbetter Erection Co., 256 Ala. 678, 57 So.2d 112 (1952); General Bldg. Contractors Ass'n v. Local Unions, 370 Pa. 73, 87 A.2d 250 (1952); Texas State Federation of Labor v. Brown & Root, Inc., 29 LRRM 2467 (Tex. Civ. App. 1952). The argument based on the unavailability of injunctive relief to private parties is somewhat reduced in light of the fact that § 10 makes injunction available to the NLRB in certain unfair labor practice situations. Since both the activity and relief are cognizable *somewhere* in the act, express exclusions within each section would seem unnecessary to pre-emption. But *query*, if Congress conferred jurisdiction on the district courts for the sole purpose of actions for damages, whether the states retain the residue of their traditionally exercised jurisdiction, including power to issue injunctions. "Since we hold that the statute does not confer jurisdiction on a District court to entertain or grant an injunction under Sec. 301(a) of the Labor Management Act, a fortiori, we hold that by the enactment of Sec. 301(a) Congress has not pre-empted the field to the exclusion of state action." Associated Telephone Co., Ltd. v. Communication Workers, 114 F. Supp. 334, 341, 32 LRRM 2485 (S.D. Cal. 1953). But, a district court may have jurisdiction under § 301 even though some parts of the relief requested may be beyond the court's jurisdiction. International Union of Operating Engineers v. William D. Baker Co., 100 F. Supp. 773, 28 LRRM 2670 (E.D. Pa. 1951).

23. General Electric Co. v. International Union UAW, 93 Ohio App. 139, 108 N.E.2d 211, 30 LRRM 2607 (1952) (language of § 301 is permissive not mandatory; Congress has right to exclude state jurisdiction over traditionally state matter but express words of exclusion should be required).

24. 74 Sup. Ct. 161 (1953). As to the scope of the reservation to the states of police power over essentially local matters, see 7 VAND. L. REV. 422 (1954). For cases distinguishing the *Garner* case, see United Mineral & Chemical Corp. v. Katz, 118 F. Supp. 433, 33 LRRM 2453 (E.D.N.Y. 1954); Irving Subway Grating

clusive federal domain. If this implication is extended to Sections 301 and 303 it leads to the conclusion that the jurisdiction and remedies provided thereunder are exclusively federal.[25]

Not necessarily inconsistent with the concept of pre-emption, the argument has been advanced that the grant in Section 303(b) to "any other court having jurisdiction of the parties" confers jurisdiction on state courts[26] similar in effect to the Federal Employers Liability Act. While this language on its face may permit of such an interpretation, reference to the over-all policy of uniformity patent throughout the Act suggests that a much more explicit conferral should be requisite to such a conclusion.[27]

*District Court v. NLRB Jurisdiction*

Within the federal sphere itself, there arise conflicts of jurisdiction. The Board, vested with jurisdiction over unfair labor practices, to enforce its determinations is permitted and in some cases required to seek injunctive relief.[28] Activity which constitutes a breach of contract under Section 301 may also be an unfair labor practice;[29] the activity giving rise to a Section 303 action must necessarily be an unfair labor practice.[30] Congress must have been cognizant of the overlapping of the binate sections with the unfair labor practice pro-

Co. v. Katz, 117 F. Supp. 671, 33 LRRM 2293 (E.D.N.Y. 1953); G., H. & E. Freyberg, Inc. v. International Ladies' Garment Workers' Union, 33 LRRM 2402 (N.Y. Sup. Ct. 1954); Cortlandt Co. Department Store v. Cohen, 33 LRRM 2303 (N.Y. Sup. Ct. 1953).

25. "[I]n the light of the determination that the section [301] creates a new, federal, substantive right . . . it seems clear that Congress preempted the field in this area." Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278, 28 LRRM 2103 (S.D.N.Y. 1951).

26. A California court was persuaded by the argument. Ensher v. Fresh Fruit and Vegetable Workers Union, 20 LRRM 2614 (Cal. Super. Ct. 1947). *Contra:* Bunch v. Launius, 33 LRRM 2263 (Ark. Sup. Ct. 1953); Gerry of California v. International Ladies' Garment Workers' Union, 21 LRRM 2209 (Cal. Super Ct. 1948).

27. In International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 72 Sup. Ct. 235, 96 L. Ed. 275 (1952), the Court indicated that "any other court" may refer to a court having the jurisdiction of a district court as, for example, a territorial court. The Court held, however, the District Court for the Territory of Alaska to be a "district court" for the purposes of § 303.

28. Section 8 defines certain activities by employers and unions as unfair labor practices; Section 10(a) empowers the Board to prevent commission of unfair labor practices; Section 10(e) provides for court enforcement of Board orders relative to unfair labor practices; Section 10(j) allows the Board to seek a temporary injunction against any unfair labor practice; Section 10(l) requires the Board to seek court injunction against certain types of secondary pressure by labor organizations.

29. Brady Transfer & Storage Co. v. Local No. 710, 30 LRRM 2535 (N.D. Ill. 1952) (objection to jurisdiction of action for violation of contract on ground court was without jurisdiction to remedy an unfair labor practice held untenable); Reinauer Transp. Cos. v. United Marine Division, ILA, 112 F. Supp. 940, 32 LRRM 2054 (S.D.N.Y. 1953) (court is not without jurisdiction of action for damages under § 301 on theory that union's conduct is an unfair labor practice under § 8(b)(2) over which NLRB has jurisdiction).

30. In the drafting of the Taft-Hartley Act there was some consideration given to making breach of contract an unfair labor practice. The idea was later abandoned.

visions in terms of activities; completely concurrent jurisdiction of the Board and the district courts could not have been intended. The necessary distinction in their respective jurisdictions must be in terms of remedies available before each forum.

Generally where injunctive relief is sought, the district courts decline jurisdiction in favor of the Board.[31] Collaterally, the Board, in the consideration of a petition for representation, has refused to act upon the allegation of the existence of a secondary boycott, noting that a remedy therefor may be an action under 303 for damages.[32]

Parties may not be including a provision against unfair labor practices in the collective bargaining agreement vest the courts with jurisdiction generally where exclusive jurisdiction is reposed in the Board.[33] Where, however, substantive rights with respect to such matters as positions or pay are created by contract, district courts may enforce the agreements though the breach is also an unfair labor practice.[34] In a suit for damages, the fact that other redress is possible in another tribunal such as the NLRB does not deny a plaintiff his rights under Sections 301 or 305.[35] Nor is a Board determination of the existence of a secondary boycott a prerequisite to the court's jurisdiction in a 303 action.[36]

*Venue*

Venue in actions against labor organizations may be laid in the district of the union's principal office or in any district where the union is engaged in representing or acting for employee members.[37] These provisions are not broad grants superseding existing venue provi-

31. Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees v. Dixie Motor Coach Corp., 170 F.2d 902, 23 LRRM 2092 (8th Cir. 1948); Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183, 21 LRRM 2605 (4th Cir. 1948); Direct Transit Lines, Inc. v. Local Union No. 406, 30 LRRM 2471 (W.D. Mich. 1952) (district court retained jurisdiction pending proof of fraud or violence; in absence of such proof, NLRB has jurisdiction); United Packinghouse Workers v. Wilson & Co., 80 F. Supp. 563, 22 LRRM 2297 (N.D. Ill. 1948). *But. cf.* Associated. Telephone Co., Ltd. v. Communication Workers, 114 F. Supp. 334, 32 LRRM 2485 (S.D. Cal. 1953); Louisville & Nashville R.R. v. Local Union No. 432, 104 F. Supp. 748, 30 LRRM 2090 (S.D. Ala. 1952) (no labor dispute).

32. Parks-Belk Co. of Elizabethton, 77 N.L.R.B. 429, 22 LRRM 1036 (1948).

33. *See* Textile Workers Union v. Arista Mills Co., 193 F.2d 529, 533, 29 LRRM 2264 (4th Cir. 1951).

34. Textile Workers Union v. Arista Mills Co., *supra* note 33; Reed v. Fawick Airflex Co., 24 LRRM 2568 (N.D. Ohio 1949). No claim may be based solely on an unfair labor practice. Reed v. Fawick Airflex Co., *supra;* International Longshoremen's & Warehousemen's Union v. Sunset Line & Twine Co., 77 F. Supp. 119, 21 LRRM 2635 (N.D. Cal. 1948) (refusal to bargain).

35. Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45, 30 LRRM 2667 (D. Del. 1952).

36. International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 72 Sup. Ct. 235, 96 L. Ed. 275 (1952) (§ 8(b)(4)(D) and § 303(a)(4) provide separate remedies).

37. See Section 301(c), Appendix. See also Colonial Hardwood Flooring Co. v. International Union, United Furniture Workers, 76 F. Supp. 493, 21 LRRM 2340 (D. Md. 1948) (Union argument that venue properly laid only in district in which union an inhabitant was not tenable).

sions.[38] They do not, for example, deprive another party of his personal venue privileges.[39] Nor do they serve to broaden the jurisdiction of the federal courts.[40]

The *forum non conveniens* provisions of Section 1404(a) of the Judicial Code are applicable. In accordance therewith actions have been transferred to other districts where the company has its principal place of business, the union has its principal office, the parties have executed the collective bargaining agreement, the employees live and most witnesses are to be found.[41]

*Service of Process*

Section 301(d) provides that service on an officer or agent of a labor organization, in his capacity as such, constitutes service on the labor organization.[42] Due process requirements — service reasonably calculated to give notice and opportunity to be heard — are superimposed on this provision.[43] Thus service on a nondescript union employee, hired for minor duties, does not constitute service on the union.[44] Correlative is the problem of whether service on a local or international union is sufficient to bring in the other.[45] An answer depends upon a consideration of such factors as unity in relations, dominant control by the international,[46] the utilization of the local by the international as its agency and the autonomy of the unions with some reference to their constitutions.[47] Possible also is an implied ratification of service through delay in making an objection.[48]

38. 28 U.S.C.A. § 1391 (1950).

39. International Ass'n of Machinists v. Smiley, 76 F. Supp. 800, 21 LRRM 2574 (E.D. Pa. 1948).

40. Brooks v. Hunkin-Conkey Const. Co., 95 F. Supp. 608, 27 LRRM 2315 (W.D. Pa. 1951); Rock Drilling and Common Laborers' Local Union No. 17 v. Mason & Hangar Co., 90 F. Supp. 539, 26 LRRM 2218 (S.D.N.Y. 1950).

41. Flight Engineers Ass'n v. United Air Lines, Inc., 23 LRRM 2283 (S.D.N.Y. 1949); *see* International Union of Electrical Workers v. United Electrical Workers, 192 F.2d 847, 29 LRRM 2170 (6th Cir. 1951); see also Fitzgerald v. Niles Bement Pond Co., 274 App. Div. 499, 84 N.Y.S.2d 779, 23 LRRM 2222 (1st Dep't 1948) (N.Y. state court refused jurisdiction because action affected labor relations and police power of another state).

42. See Claycraft Co. v. United Mine Workers, 204 F.2d 600, 32 LRRM 2124 (6th Cir. 1953).

43. Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162, 23 LRRM 2391 (S.D.N.Y. 1949).

44. National Organization, Masters, Mates and Pilots v. Banks, 196 F.2d 428, 30 LRRM 2074 (5th Cir. 1952).

45. Claycraft Co. v. United Mine Workers, 204 F.2d 600, 32 LRRM 2124 (6th Cir. 1953); Isbrandtsen Co. v. National Marine Engineers' Ben. Ass'n, 9 F.R.D. 541, 25 LRRM 2068 (S.D.N.Y. 1949) (service on assistant business manager of local insufficient as to international; local an autonomous entity, not an agent); Daily Review Corp. v. International Typographical Union, 9 F.R.D. 295, 24 LRRM 2043, *motion to set aside service denied*, 24 LRRM 2179 (1949), *rev'd*, 26 LRRM 2503 (E.D.N.Y. 1950).

46. International Union of Operating Engineers v. Jones Const. Co., 240 S.W.2d 49, 28 LRRM 2422 (Ky. Ct. App. 1951).

47. Claycraft Co. v. United Mine Workers, 204 F.2d 600, 32 LRRM 2124 (6th Cir. 1953).

48. See Daily Review Corp. v. International Typographical Union, 24 LRRM 2179 (E.D.N.Y. 1949).

While Federal Rule 4(f) provides for extra-territorial service where granted by statute, no such grant is found in the Taft-Hartley Act.[49]

PRACTICE

Routine application of the federal rules has minimized problems of practice and procedure under the binate sections. However, some twilight procedure-substance questions, not completely covered thereby, have arisen.

*Parties*

Section 301(b), applicable to actions under both sections, provides that a labor organization may sue or be sued as an entity.[50] Beyond this, however, no specific direction is given as to the parties, in whose favor or against whom run the rights created by these sections. Section 301(a) is merely a grant of jurisdiction, without mention of parties;[51] Section 303(b), again granting jurisdiction, notwithstanding the broad indication that anyone injured in his business may sue, is equally uninformative. In large measure, differences in the inherent nature of actions in tort or contract dictate the propriety of party procedure.

The courts, perhaps limited by traditional notions, have been more strict in the 301 contract actions[52] than in the 303 tort actions. One

49. Daily Review Corp. v. International Typographical Union, 9 F.R.D. 295, 24 LRRM 2043, *motion to set aside service denied,* 24 LRRM 2179 (E.D.N.Y. 1949), *rev'd,* 26 LRRM 2503 (E.D.N.Y. 1950).

50. Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162, 23 LRRM 2391 (S.D.N.Y. 1949); Kaye and Allen, *The Suability of Unions,* 1 LAB. LAW. J. 705 (1950). It has been suggested that the application of § 301(b) is not limited to suits for violation of collective bargaining contracts. Rock Drilling and Common Laborers' Local Union No. 17 v. Mason & Hangar Co., 90 F. Supp. 539, 26 LRRM 2218 (S.D.N.Y. 1950). Early doubts whether Congress contemplated suits by unions for breach of contract have been dispelled. See International Longshoremen's and Warehousemen's Union v. Libby, McNeill & Libby, 114 F. Supp. 249, 32 LRRM 2588 (D. Hawaii 1953). Almost half the actions brought under § 301 have been by labor organizations.

51. "All the statute talks about is a suit for violation of the contract; it does not say who may or who may not sue." Isbrandtsen Co. v. Local 1291, 204 F.2d 495, 496, 32 LRRM 2091 (3d Cir. 1953). Section 301(b) does not enlarge the jurisdiction of federal courts. Rock Drilling and Common Laborers' Local Union No. 17 v. Mason & Hangar Co., 90 F. Supp. 539, 26 LRRM 2218 (S.D.N.Y. 1950). In large measure, the problem is the substantive one of the nature of a collective bargaining agreement, a matter long in dispute. See MATHEWS, LABOR RELATIONS AND THE LAW 306 (1953); Livengood, *Labor Contracts and the Taft-Hartley Act,* 26 N.C.L. REV. 1 (1947).

52. State practice in breach of collective bargaining agreement actions is generally more liberal. See, *e.g.,* Smith v. Arkansas Motor Freight Lines, Inc., 214 Ark. 553, 217 S.W.2d 249, 23 LRRM 2414 (1949) (officials of union have capacity to bring representative action for specific performance; union members too numerous to be joined); Masetta v. National Bronze & Aluminum Foundry Co., 107 N.E.2d 243, 30 LRRM 2081 (Ohio App. 1952) (class action), *rev'd,* 159 Ohio St. 306, 112 N.E.2d 15 (1953); Weisfield's Inc. v. Haeckel, 28 LRRM 2055 (Ore. Cir. Ct. 1951) (rebellious union members). *But cf.* MacKay v. Loew's, Inc., 182 F.2d 170, 26 LRRM 2143 (9th Cir.) (closed shop contract is obligation created for benefit of union and not individual members), *cert. denicd,* 340 U.S. 828 (1950).

court has required that the action be limited to formal signatory parties.[53] Other courts, however, have permitted an action against rebellious union members[54] and an action against a union, not signatory to the contract, for conspiracy with the contracting union to breach the contract with the employer.[55] There is some indication that a third party beneficiary may sue;[56] plaintiffs attempting to bring themselves within this category, however, have to date been unsuccessful. A ship charterer, not referred to specifically in the contract between a shipping company and a longshoremen's union, was held not be a third party beneficiary;[57] similarly, an employer, a member of an employers' association which had negotiated a contract for the benefit of its members, had no rights as a beneficiary.[58]

Employees are not proper parties to bring 301 suits for violation of collective bargaining agreements, either individually[59] or collectively through use of the class action device.[60] They may, however, join in a suit by a union.[61] As a corollary, the union is an indispensable party

53. Ketcher v. Sheet Metal Workers' Internat. Ass'n, 115 F. Supp. 802 (E.D. Ark. 1953); *see* Colonial Hardwood Flooring Co. v. International Union United Furniture Workers, 76 F. Supp. 493, 495, 21 LRRM 2340 (D. Md.), *aff'd on other grounds*, 168 F.2d 33, 22 LRRM 2102 (4th Cir. 1948) (contract must have been executed by international for it to be proper party; question determined on evidence and not on motion to dismiss). *But cf.* Stenzel & Co. v. Department Store Package Helpers Local Union No. 955, 11 F.R.D. 362, 28 LRRM 2607 (W.D. Mo. 1951).

54. Stenzel & Co. v. Department Store Package Helpers Local Union No. 955, 11 F.R.D. 362, 28 LRRM 2607 (W.D. Mo. 1951). But a union which induced a breach of contract between plaintiff employer and another union may not be sued under § 301. H. N. Thayer Co. v. Binnall, 82 F. Supp. 566, 23 LRRM 2421 (D. Mass. 1949).

55. *See* Alcoa S.S. Co. v. McMahon, 173 F.2d 567, 568, 23 LRRM 2533 (2d Cir. 1949).

56. *See* Isbrandtsen Co. v. Local 1291, 107 F. Supp. 72, 74, 30 LRRM 2551 (E.D. Pa. 1952), *aff'd*, 204 F.2d 495, 32 LRRM 2091 (3d Cir. 1953) (court specifically did "not take up the thorny question of whether the courts under Section 301(a) have jurisdiction over a suit brought by a third-party beneficiary"). Collective bargaining agreements have sometimes been held to be third party beneficiary contracts for the benefit of employees. MATHEWS, LABOR RELATIONS AND THE LAW 307 (1953).

57. Isbrandtsen Co. v. Local 1291, 107 F. Supp. 72, 30 LRRM 2551 (E.D. Pa. 1952), *aff'd*, 204 F.2d 495, 32 LRRM 2091 (3d Cir. 1953) (plaintiff too far away from contract to be included either as a donee or a creditor beneficiary).

58. Ketcher v. Sheet Metal Workers' Internat. Ass'n, 115 F. Supp. 802, 33 LRRM 2352 (E.D. Ark. 1953).

59. "It would be improper for the employees to bring the action in their own name." UAW v. Wilson Athletic Goods Mfg. Co., 26 LRRM 2383 (N.D. Ill. 1950); *see* Schatte v. International Alliance of Theatrical Stage Employees, 84 F. Supp. 669, 672 (S.D. Cal. 1949). *But cf.* Slade v. Sun Shipbuilding and Dry Dock Co., 23 LRRM 2054 (E.D. Pa. 1948).

60. Schatte v. International Alliance of Theatrical Stage Employees, 84 F. Supp. 669 (S.D. Cal. 1949); see also UAW v. Wilson Athletic Goods Mfg. Co., 26 LRRM 2383 (N.D. Ill. 1950).

61. United Protective Workers v. Ford Motor Co., 194 F.2d 997, 29 LRRM 2596 (7th Cir. 1952). The employee, however, joining under Rule 20(a), FED. R. CIV. P., cannot rely on § 301 jurisdiction but must allege proper jurisdictional facts such as diversity and amount. *Ibid.*

to a suit by the individual employees.[62] It is not clear whether the union may be their litigating agent.[63] It would seem the better view to permit a union to sue for violation of rights running to the individual employees under the collective bargaining agreement, to avoid a multiplicity of suits and to guarantee a remedy to employees in a state which may not provide one. Indeed, the view may be taken that union rights exist in all situations where individual employees' rights exist.

Section 303 clearly contemplates actions by employers against unions.[64] This right of action has been construed to include the primary as well as the neutral employer.[65] A broad interpretation of the scope of the prohibitions in the section has resulted in holding two unions, conspiring to induce a secondary boycott, as proper parties defendant.[66]

Attempts by particular unions to evade the application of these sections, through contentions that they were not proper parties, have been largely rebuffed. For example, the union-filing requirements of Sections 9(f), (g) and (h) of the Act have been construed as requisites only to utilization by unions of Board processes;[67] they do not apply in suits by or against unions under Sections 301 and 303.[68] Moreover, a union which represents both employees subject to and employees exempt from the coverage of the Act is not immune to suit under

62. Slade v. Sun Shipbuilding and Dry Dock Co., 23 LRRM 2054 (E.D. Pa. 1948) (union must be joined as a party to action for reinstatement brought by individual employee against employer under § 301).

63. Rock Drilling and Common Laborers' Local Union No. 17 v. Mason & Hangar Co., 90 F. Supp. 539, 26 LRRM 2218 (S.D.N.Y. 1950) (§ 301(b) defines capacity only when union rights are involved; union not made the litigating agent for those it represents). See also Local 50 v. General Baking Co., 97 F. Supp. 73, 28 LRRM 2039 (S.D.N.Y. 1951).

64. Nash-Kelvinator Corp. v. Grand Rapids Bldg. & Const. Trades Council, 30 LRRM 2466 (W.D. Mich. 1952); see also Deena Products Co. v. United Brick & Clay Workers, 195 F.2d 612, 30 LRRM 2324 (6th Cir.), *cert. denied*, 344 U.S. 822 (1952). The language of § 303 seems sufficiently broad to permit actions by a union plaintiff.

65. United Brick & Clay Workers v. Deena Artware, Inc., 198 F.2d 637, 30 LRRM 2485 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952) (language "whoever shall be injured" has plain, unambiguous, meaning).

66. Pepper & Potter, Inc. v. Local 977, UAW, 103 F. Supp. 684, 29 LRRM 2580 (S.D.N.Y. 1952); Bethlehem Steel Co. v. Industrial Union of Marine & Shipbuilding Workers, 115 F. Supp. 231, 32 LRRM 2767 (E.D.N.Y. 1953) (language of section shows an intention on part of Congress to give broad scope to prohibitions in the section). In a § 303 action alleging a conspiracy by unions and individual employees, verdicts in favor of the employees and against the unions were not inconsistent; the employees may have committed the acts, yet not have acted in concert with the unions. Curto v. International Longshoremen's & Warehousemen's Union, 107 F. Supp. 805, 31 LRRM 2168 (D. Ore. 1952).

67. Gerry of California v. Superior Court, 32 Cal.2d 119, 194 P.2d 689, 22 LRRM 2279 (1948) (non-compliance with filing requirements does not vest jurisdiction in state court of action for injunction against secondary boycott).

68. UAW v. Wilson Athletic Goods Mfg. Co., 26 LRRM 2383 (N.D. Ill. 1950); United Steel Workers v. Shakespeare Co., 84 F. Supp. 267, 23 LRRM 2341 (W.D. Mich. 1949).

these sections.[69] A union, once certified, may not avoid the effects of Section 303(a)(3) except by following Board decertification procedures; disclaimer or transfer is here ineffectual.[70]

*Joinder of Actions*

Federal Rule 18(a) permits the joinder of Section 301 contract claims and Section 303 tort claims against an opposing party.[71]

*Prior Determination*

An NLRB determination of an unfair labor practice charge in a public proceeding by the Board may precede an action for damages by individuals in a private suit under either of the binate sections. While the issues before the Board in the one case and before the court in the other may be substantially identical, the parties in and the natures of each proceeding differ to the extent that the principles of collateral estoppel do not apply.[72]

Inconsistencies between a Board 8(b)(4) order and a 303 judgment may, therefore, result from the same fact situation. The doctrine of "primary jurisdiction" which might have served to obviate this anomaly and to produce uniformity through substantive integration has thus far been given no efficacy.[73]

REMEDIES

That Congress contemplated relief in the form of money damages is clear from the language of these sections.[74] Whether specific reference to this relief accompanied by silence as to other remedies evi-

69. Waialua Agricultural Co., Ltd. v. United Sugar Workers, 114 F. Supp. 243, 32 LRRM 2440 (D. Hawaii 1953) (union which represented both agricultural and nonagricultural workers not immune to suit under § 301).

70. Pepper & Potter, Inc. v. Local 977, UAW, 103 F. Supp. 684, 29 LRRM 2580 (S.D.N.Y. 1952). *Cf.* International Union of Operating Engineers v. Dahlem Const. Co., 193 F.2d 470, 29 LRRM 2271 (6th Cir. 1951) (union may not by use of "cooling-off" notice provisions of § 9(d) escape liability for later breach of no-strike provision in contract).

71. Colonial Hardwood Flooring Co. v. International Union United Furniture Workers, 76 F. Supp. 493, 21 LRRM 2340 (D. Md.), *aff'd*, 168 F.2d 33, 22 LRRM 2102 (4th Cir. 1948); *see* Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45, 48, 30 LRRM 2667 (D. Del. 1952).

72. Boeing Airplane Co. v. Aeronautical Industrial District Lodge No. 751, 91 F. Supp. 596, 26 LRRM 2324 (W.D. Wash. 1950), *aff'd*, 188 F.2d 356, 27 LRRM 2556 (9th Cir. 1951) (existence of contract in issue).

73. Employment of these doctrines appears precluded by the language of the Supreme Court in International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 72 Sup. Ct. 235, 96 L. Ed. 275 (1952). But see Comment, 61 YALE L.J. 745, 752 (1952).

74. See Alcoa S.S. Co. v. McMahon, 173 F.2d 567, 23 LRRM 2533 (2d Cir. 1949); International Union United Furniture Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33, 22 LRRM 2102 (4th Cir. 1948); International Longshoremen's and Warehousemen's Union v. Libby, McNeill & Libby, 114 F. Supp. 249, 32 LRRM 2588 (D. Hawaii 1953); Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45, 30 LRRM 2667 (D. Del. 1952); Nash-Kelvinator

dences an intention that that relief be exclusive is not clear.[75] Also not clear is the applicability and effect of the Norris-LaGuardia, Declaratory Judgment, Federal Interpleader and Federal Arbitration Acts on the power of the court to grant the specific relief sought.

*Damages*

Determination of actual damages is apparently consistent with rules traditional in tort and contract actions.[76] Actionable injuries under both sections essentially result in compensable typical business losses, such as standby expenses, product spoilage, demurrage and lost income.[77] The duty to mitigate damages appears to be stringent.[78]

The failure of Section 303 to provide for other than "the damages . . . sustained" presents the problem of the propriety of punitive damages. While the language suggests that compensation was intended to

Corp. v. Grand Rapids Bldg. and Const. Trades Council, 30 LRRM 2466 (W.D. Mich. 1952); Textile Workers Union v. Berryton Mills, 28 LRRM 2540 (N.D. Ga. 1951); United Steel Workers v. Shakespeare Co., 84 F. Supp. 267, 23 LRRM 2341 (W.D. Mich. 1949). Judgments are enforceable only against union assets. § 301(b). Actions thereon may be brought in state courts. Juneau Spruce Corp. v. International Longshoremen's and Warehousemen's Union, 32 LRRM 2592 (Cal. App. 1953). Supplemental proceedings to discover union assets also may be brought in state court. Arnold v. National Union of Marine Cooks, 257 P.2d 629, 32 LRRM 2324 (Wash. 1953).

75. "[§ 301] conferred jurisdiction for the sole purpose of actions for damages." International Longshoremen's and Warehousemen's Union v. Libby, McNeill & Libby, 114 F. Supp. 249, 251, 32 LRRM 2588 (D. Hawaii 1953); see Amalgamated Ass'n of Street and Motor Coach Employees v. Dixie Motor Coach Corp., 170 F.2d 902, 23 LRRM 2092 (8th Cir. 1948); Haspel v. Bonnaz, Singer & Hand Embroiderers, 112 F. Supp. 944, 32 LRRM 2244 (S.D.N.Y. 1953) (damages exclusive remedy). *Contra*: Milk and Ice Cream Drivers and Dairy Employees Union v. Gillespie Milk Products Corp., 203 F.2d 650, 31 LRRM 2586 (6th Cir. 1953).

76. See Deena Products Co. v. United Brick & Clay Workers, 195 F.2d 612, 30 LRRM 2324 (6th Cir.) (damages suffered through secondary boycott dependent on contractual relations of plaintiff with its subsidiary which relations did not exist), *cert. denied*, 344 U.S. 822 (1952); United Electrical, Radio & Machine Workers v. Oliver Corp., 205 F.2d 376, 32 LRRM 2270 (8th Cir. 1953) (jury instructed on "contemplation of the parties at the time the contract was made" rule).

77. See, *e.g.*, United Electrical, Radio & Machine Workers v. Oliver Corp., 205 F.2d 376, 32 LRRM 2270 (8th Cir. 1953) (jury correctly instructed to determine fair and reasonable necessary standby expenses although the plant was not completely closed during the strikes); Alcoa S.S. Co. v. Conerford, 25 LRRM 2199 (S.D.N.Y. 1949). In International Union of Operating Engineers v. Dahlem Const. Co., 193 F.2d 470, 29 LRRM 2271 (6th Cir. 1951), damages based on similar losses were asked, but were not considered excessive and were not contested. Section 303(b) provides for the recovery of "the cost of the suit." *Query*, whether this may include attorney's fees and other costs incident to preparation of the suit for court.

78. In the *Alcoa Steamship* case, *supra* note 77, in violation of the contract, the union refused to work more than eight men in the hold in unloading freight; work stopped on August 20 and was not resumed until August 25. The company sued for $16,000 damages. The court held that the employer was under a duty to mitigate damages by allowing unloading to continue with eight men in the hold, that two days instead of the six was a reasonable time to try to persuade the union to accede, that only 1/3 damages would be awarded on the basis of two days lost time; the court allowed, however, the company to recover for the nonproductivity of those men above eight who could have more economically unloaded the cargo. *Cf.* Schlenk v. Lehigh Valley R.R., 74 F. Supp. 569 (D.N.J. 1947).

be the standard of recovery, the tortious nature of secondary pressure gravitates in favor of punitive damages where customarily permitted.[79]

*Injunction*

Injunctive relief, sought in lieu of or in addition to monetary damages, has usually been refused.[80] The strongest argument against the granting of injunctive relief has been the applicability of the Norris-LaGuardia prohibitions.[81] The only express relaxation of those prohibitions in the Taft-Hartley Act has been to permit limited requests by the Board or the Attorney General.[82] Absent such express relaxation in regard to private litigants, it seems clear that the prohibitions

79. The recent precedent of the Fourth Circuit denying recovery of punitive damages may well be persuasive in other federal courts. See Patton v. United Mine Workers, 22 U.S.L. WEEK. 2464 (4th Cir. Mar. 15, 1954), *reversing* 114 F. Supp. 596, 32 LRRM 2642 (W.D. Va. 1953).

80. Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183, 21 LRRM 2605 (4th Cir. 1948); International Longshoremen's and Warehousemen's Union v. Libby, McNeill & Libby, 115 F. Supp. 123, 32 LRRM 2728 (D. Hawaii 1953) (legislative history discussed); Haspel v. Bonnaz, Singer & Hand Embroiderers, 112 F. Supp. 944, 32 LRRM 2244 (S.D.N.Y. 1953); Textile Workers Union v. Berryton Mills, 28 LRRM 2540 (N.D. Ga. 1951); Local 937 v. Royal Typewriter Co., 88 F. Supp. 669, 24 LRRM 2438 (D. Conn. 1949); Duris v. Phelps Dodge Copper Products Corp., 87 F. Supp. 229, 25 LRRM 2089 (D.N.J. 1949); United Packinghouse Workers v. Wilson & Co., 80 F. Supp. 563, 22 LRRM 2297 (N.D. Ill. 1948); Alcoa S.S. Co. v. McMahon, 81 F. Supp. 541, 23 LRRM 2051 (S.D.N.Y 1948), *aff'd*, 173 F.2d 567, 23 LRRM 2533 (2d Cir. 1949); *see* Bakery Sales Drivers Union v. Wagshal, 333 U.S. 437, 442, 68 Sup. Ct. 630, 92 L. Ed. 792 (1948); International Longshoremen's & Warehousemen's Union v. Sunset Line & Twine Co., 77 F. Supp. 119, 21 LRRM 2635 (N.D. Cal. 1948). The federal court may refuse removal jurisdiction on the ground that no original jurisdiction exists. Associated Tel. Co., Ltd. v. Communication Workers, 114 F. Supp. 334, 32 LRRM 2485 (S.D. Cal. 1953); Castle & Cooke Terminals, Ltd. v. Local 137, 110 F. Supp. 247, 31 LRRM 2480 (D. Hawaii 1953); American Optical Co. v. Andert, 108 F. Supp. 252, 31 LRRM 2312 (W.D. Mo. 1952); Corrado Bros., Inc. v. Building and Const. Trades Council of Delaware, 29 LRRM 2141 (D. Del. 1951). *Contra:* Direct Transit Lines, Inc. v. Local Union No. 406, 29 LRRM 2492, 30 LRRM 2471 (W.D. Mich.), *mandamus denied*, 199 F.2d 89, 31 LRRM 2004 (6th Cir. 1952); Nash-Kelvinator Corp. v. Grand Rapids Bldg. and Const. Trades Council, 30 LRRM 2466 (W.D. Mich. 1952). Injunctive relief is of course proper where plaintiff brings himself within the conditions of Norris-LaGuardia. Bakery Sales Drivers Union v. Wagshal, 333 U.S. 437, 68 Sup. Ct. 630, 92 L. Ed. 792 (1948); Milk and Ice Cream Drivers and Dairy Employees Union v. Gillespie Milk Products Corp., 203 F.2d 650, 31 LRRM 2586 (6th Cir. 1953); Dixie Motor Coach Corp. v. Amalgamated Ass'n of Street and Motor Coach Employees, 74 F. Supp. 952, 21 LRRM 2193 (W.D. Ark. 1947), *rev'd*, 170 F.2d 902, 23 LRRM 2092 (8th Cir. 1948); Mountain States Div. No. 17, Communications Workers v. Mountain States Tel. & Tel. Co., 81 F. Supp. 397, 22 LRRM 2495 (D. Colo. 1948). One district court has held Norris-LaGuardia inapplicable where there is sought a mandatory injunction requiring defendant to perform its contract. Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D.N.C. 1950). See also 6 VAND. L. REV. 405 (1953).

81. Cases cited note 80 *supra*.

82. Section 10(h) of the Act expressly exempts federal courts in granting appropriate injunctive relief from the limitations of the Norris-LaGuardia Act. 61 STAT. 146 (1947), 29 U.S.C.A. § 160(e) (Supp. 1953). Appropriate relief is that sought by the NLRB or the Attorney General in certain specified cases. *Id.* §§ 160(e), (j), (l), 178. See Amalgamated Ass'n of Street and

were intended to apply.[83] The failure of these sections to specify the availability of injunctive relief,[84] and the limited grant solely to public officers to secure such relief, are further indications that injunction is not a proper remedy under these sections.[85]

*Specific Performance and Arbitration*

Specific performance of an arbitration clause has in one case been granted.[86] On the basis of this holding specific enforcement of other aspects of these agreements may be made available. The application of the Norris-LaGuardia Act to suits for specific performance as a form of negative injunction[87] and to injunctive enforcement of arbitration awards has not been determined.[88]

The Federal Arbitration Act excepts from its operation "contracts of employment of . . . workers engaged in foreign or interstate commerce."[89] There is some doubt as to whether collective bargaining agreements are within the ambit of this exclusion.[90] Most courts have refused to grant the stay of proceedings order provided for in the Arbitration Act on one or more of several grounds: (1) the statute

Motor Coach Employees v. Dixie Motor Coach Corp., 170 F.2d 902, 23 LRRM 2092 (8th Cir. 1948); Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183, 21 LRRM 2605 (4th Cir. 1948); Direct Transit Lines, Inc. v. Local Union No. 406, 30 LRRM 2471 (W.D. Mich. 1952); United Packinghouse Workers v. Wilson & Co., 80 F. Supp. 563, 22 LRRM 2297 (N.D. Ill. 1948).

83. *Contra:* Milk and Ice Cream Drivers and Dairy Employees Union v. Gillespie Milk Products Corp., 203 F.2d 650, 651, 31 LRRM 2586 (6th Cir. 1953) ("we think the unqualified use of the word 'suits' . . . authorizes injunctive process for the full enforcement of the substantive rights created by section 301(a)....").

84. "[T]he language of section 303(b) is explicit in providing for the recovery of damages but makes no mention of injunctive relief." Haspel v. Bonnaz, Singer & Hand Embroiderers, 112 F. Supp. 944, 946, 32 LRRM 2244 (S.D.N.Y. 1953).

85. "In no other cases does the act confer jurisdiction upon the District Courts to deal with unfair labor practices; and it is hardly reasonable to suppose that Congress intended the District Courts to have general power to grant injunctive relief . . . while limiting with such meticulous care the cases in which those courts might grant injunctive relief upon petition of the Labor Board or the Attorney General acting under the direction of the President. Expressio unius est exclusio alterius". Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183, 187, 21 LRRM 2605 (4th Cir. 1948) (legislative history considered in detail). See also Associated Tel. Co. Ltd. v. Communication Workers 114 F. Supp. 334, 32 LRRM 2485 (S.D. Cal. 1953).

86. "§ 301 provides, as a nationally available remedy, specific performance of arbitration clauses in labor contracts in industries affecting commerce." Textile Workers Union v. American Thread Co., 113 F. Supp. 137, 141, 32 LRRM 2205 (D. Mass. 1953), 7 VAND. L. REV. 140 (the decision may be based on either state or federal law).

87. See Textile Workers v. Aleo Mfg. Co., 94 F. Supp. 626, 27 LRRM 2164 (M.D.N.C. 1950) (mandatory injunction allowed).

88. See Alcoa S.S. Co. v. McMahon, 81 F. Supp. 541, 23 LRRM 2051 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 567, 23 LRRM 2533 (2d Cir. 1949).

89. 9 U.S.C.A. § 1 (Supp. 1953).

90. The court in Lewittes & Sons v. United Furniture Workers, 95 F. Supp. 851, 27 LRRM 2490 (S.D.N.Y. 1951), after reviewing the cases, came to the conclusion that the language of exception referred to personal contracts of employment, not collective bargaining agreements; a stay order was, therefore, granted as to an action for breach under § 301.

excludes from its operation collective bargaining agreements,[91] (2) the likelihood that the existence and validity of the contract itself will be put in issue precludes arbitration,[92] and (3) the narrow language of the contract arbitration clause is thought to evidence an intent that a dispute under rather than breach of contract should be arbitrable.[93]

*Declaratory Judgment*

Exclusiveness of the monetary damage remedy militates against the entertainment of suits for declaratory judgments. It would seem, however, that the remedy is conducive to the stability of labor contracts in particular, and should be freely allowed.[94] Where declaratory judgments are permitted,[95] there is doubt as to the applicability of the Norris-LaGuardia Act to injunctions sought pursuant thereto.[96]

*Interpleader*

Interpleader may prove a very valuable remedial device particularly where each of two rival unions asserts a claim to check-off dues under a collective bargaining contract.[97] A realistic interpretation of Section 301(a), recognizing potential as well as actual violation as a basis

91. International Furniture Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33, 22 LRRM 2102 (4th Cir. 1948); Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45, 30 LRRM 2667 (D. Del. 1952); Matson Nav. Co. v. National Union of Marine Cooks, 22 LRRM 2138 (N.D. Cal. 1948).

92. Metal Polishers v. Rubin, 85 F. Supp. 363, 24 LRRM 2430 (E.D. Pa. 1949). If the entire contract is void, no provision for arbitration remains; arbitration proceedings taken thereunder would be without effect.

93. Colonial Hardwood Flooring Co. v. International Union United Furniture Workers, 76 F. Supp. 493, 21 LRRM 2340 (D. Md.), *aff'd*, 168 F.2d 33, 22 LRRM 2102 (4th Cir. 1948); Metal Polishers v. Rubin, 85 F. Supp. 363, 24 LRRM 2430 (E.D. Pa. 1949). Where broad language is employed ("all grievances, complaints, differences or disputes arising out of or relating to this agreement, or the breach thereof"), the court may find an intent to arbitrate breach of the contract itself. Lewittes & Sons v. United Furniture Workers, 95 F. Supp. 851, 27 LRRM 2490 (S.D.N.Y. 1951).

94. The Federal Declaratory Judgment Act, however, does not confer jurisdiction; the jurisdictional requirements of § 301 must be met. International Longshoremen's and Warehousemen's Union v. Libby, McNeill & Libby, 114 F. Supp. 249, 32 LRRM 2588 (D. Hawaii 1953).

95. Milk and Ice Cream Drivers and Dairy Employees Union v. Gillespie Milk Products Corp., 203 F.2d 650, 31 LRRM 2586 (6th Cir. 1953); United Protective Workers v. Ford Motor Co., 194 F.2d 997, 29 LRRM 2596 (7th Cir. 1952), *on remand*, 31 LRRM 2597 (N.D. Ill. 1953); AFL v. Western Union Tel. Co., 179 F.2d 535, 25 LRRM 2327 (6th Cir. 1950); Lima-Hamilton Corp. v. Local No. 106, UAW, 27 LRRM 2260 (N.D. Ohio 1950) *semble*; Studio Carpenters Local Union No. 946 v. Loew's, Inc., 84 F. Supp. 675, 24 LRRM 2493 (S.D. Cal. 1949). *Contra:* International Longshoremen's and Warehousemen's Union v. Libby, McNeill & Libby, 115 F. Supp. 123, 32 LRRM 2728 (D. Hawaii 1953).

96. See United Protective Workers v. Ford Motor Co., 194 F.2d 997, 29 LRRM 2596 (7th Cir. 1952); AFL v. Western Union Tel. Co., 179 F.2d 535, 25 LRRM 2327 (6th Cir. 1950); Alcoa S.S. Co. v. McMahon, 81 F. Supp. 541, 23 LRRM 2051 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 567, 23 LRRM 2533 (2d Cir. 1949); *see* Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626, 629, 27 LRRM 2164 (M.D.N.C. 1950).

97. In Sun Shipbuilding & Dry-Dock Co. v. Industrial Union of Marine & Shipbuilding Workers, 95 F. Supp. 50, 27 LRRM 2250 (E.D. Pa. 1950), interpleader brought under 28 U.S.C.A. § 1335 (1950) was dismissed because

therefor, properly supplies the jurisdictional grounds requisite to utilization of the interpleader device under Rule 22.[98]

*Election of Remedies*

The parties to a collective bargaining agreement, as in any other contract, will be held to their election of remedy. Thus an election to rescind will preclude an action for damages.[99]

## CHOICE OF LAW

Whether the creation of federal substantive rights presupposes the application of a federal common law is a question implicit in all cases based on federal-question jurisdiction. Most persuasive is the argument that federal rights require national uniformity of treatment, in contradistinction to the policy favoring intra-state uniformity in state-created rights. The conclusion developing in other areas is that a federal common law is applicable in the adjudication of federal rights. This resultant national uniformity is particularly desirable in the field of labor relations problems national in scope. Notwithstanding the failure of Congress in these two sections to particularize substantive rights, or to dictate the development of a federal common law,[100] most courts have considered that state law is inapplicable in the determination of the rights created by these sections.[101]

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the requisite diversity was not present. Two dicta points are worthy of note: (1) the international and the two rival unions were considered indispensable parties to a proper action of interpleader; (2) the dispute did not involve a violation of a contract, but an intra-union squabble. The position as to (2) would unnecessarily limit the scope of § 301 jurisdiction. See also International Union of Electrical Radio & Machine Workers v. United Electrical, Radio & Machine Workers, 192 F.2d 847, 29 LRRM 2170 (6th Cir. 1951) (no appeal from order of interpleader).

98. FED. R. CIV. P. 22. "The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C. §§ 1335, 1397, and 2361." *Id.* 22(2).

99. Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge No. 751, 26 LRRM 2324 (W.D. Wash. 1950), *aff'd*, 188 F.2d 356, 27 LRRM 2556 (9th Cir. 1951). See also Gladding, McBean & Co. v. Warehouse Union, 27 LRRM 2263 (Cal. Super. Ct. 1951) (notice of modification is not equivalent to notice of termination and does not terminate contract); cf. International Union of Operating Engineers v. Dahlem Const. Co., 193 F.2d 470, 29 LRRM 2271 (6th Cir. 1951). See also Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45, 30 LRRM 2667 (D. Del. 1952) (suggests prior breach may absolve of liability if material and not severable from second breach).

100. "[Congress] did not indicate whether it intended the federal courts to apply the contract law of the states wherein they sit, or to develop a separate and distinct federal common law of collective bargaining contracts where interstate commerce is affected." International Longshoremen's and Warehousemen's Union v. Libby, McNeill & Libby, 114 F. Supp. 249, 250, 32 LRRM 2588 (D. Hawaii 1953); see also Textile Workers Union v. American Thread Co., 113 F. Supp. 137, 32 LRRM 2205 (D. Mass. 1953), 7 VAND. L. REV. 140.

101. International Union of Operating Engineers v. Dahlem Const. Co., 193 F.2d 470, 29 LRRM 2271 (6th Cir. 1951); Shirley-Herman Co. v. International Hod Carriers, 182 F.2d 806, 26 LRRM 2258 (2d Cir. 1950); Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626, 27 LRRM 2164 (M.D.N.C. 1950).

Imbued with *Erie* dogma, some courts have deemed state law controlling in Statute of Frauds and Statute of Limitations problems, through argument that the enforcement of the federal rights must conform to the remedy prescribed by the law of the state where the action is brought.[102] Whatever the problem is labeled — substantive, procedural or remedial — the right is federal, the forum is federal; federal law, statutory or common law, should apply.[103] The federal courts should fend for themselves in these matters without reference to state law except as it may be used in determining the federal common law.[104] Where practicable, however, the establishment of statutory guides is most desirable.

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102. "Although the contract and federal jurisdiction to enforce it arise out of a federal statute, the enforcement of the right must conform to the remedy prescribed by the law of the state where the action is brought." Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union, 193 F.2d 209, 215, 29 LRRM 2223 (6th Cir. 1951) (Ohio Statute of Frauds held applicable); *cf.* Albrecht v. Indiana Harbor Belt R.R., 178 F.2d 577, 25 LRRM 2205 (7th Cir. 1949), *cert. denied,* 339 U.S. 949 (1950) (action barred by Indiana Statute of Limitations).

103. The Supreme Court, in Clearfield Trust Co. v. United States, 318 U.S. 363, 63 Sup. Ct. 573, 87 L. Ed. 838 (1943), recognized that essentially federal rights were to be governed by federal law exclusively. But see Austrian v. Williams, 198 F.2d 697 (2d Cir. 1952), 6 VAND. L. REV. 401 (1953).

104. Adoption of the six months limitations period applicable to unfair labor practices would be inconsistent with the divorced treatment heretofore accorded § 8 and §§ 301, 303. See Comment, 61 YALE L.J. 745, 752 (1952). It would appear that the general equity doctrine of laches may apply, however.

## APPENDIX

SECTION 301:

*Suits by and against labor organizations—venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

*Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments*

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

*Jurisdiction*

(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such

organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

*Service of process*

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

*Determination of question of agency*

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or susbsequently ratified shall not be controlling. 61 STAT. 156 (1947), 29 U.S.C.A. § 185 (Supp. 1953).

SECTION 303:

*Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages*

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is —

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees or another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. 61 STAT. 158 (1947), 29 U.S.C.A. § 187 (Supp. 1953).