the owner of the shipment can establish that damage occurred in the United States.[32]

DIVERSITY JURISDICTION UNDER SECTION 303 (b) OF THE TAFT-HARTLEY ACT*

DURING the fifteen-odd years prior to the Taft-Hartley Act,[1] secondary boycotts and jurisdictional strikes were virtually unrestrained by federal[2] or state law.[3] The new act has changed the picture. Section 8(b) classifies

32. Section 6-204 of the New Commercial Code (May, 1949 Draft) makes the following provision:

"The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by connecting carriers or other persons is liable to anyone entitled to recover on the document for any breach by a connecting carrier or other person of its obligation under the document."

The scope of this section is in doubt. However, even if limited to bills issued in the United States, it would seem to cover the *Reider* situation (new bill issued at port of entry) and all exports originating in the United States. It should be noted that in outlining the applicability of the Code, Section 1-105 provides that if used as a federal statute "This Act shall apply whenever any contract or transaction within its terms . . . (a) Is in or affects interstate or foreign commerce; . . ."

* Schatte v. International Alliance, 84 F. Supp. 669 (S.D. Cal. 1949).

1. 61 STAT. 136 (1947), 29 U.S.C. § 141 (Supp. 1948). For general treatments of the Act, see COX, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 274 (1947-8); Daykin, *Collective Bargaining and the Taft-Hartley Act*, 33 IOWA L. REV. 623 (1948); Perkins, *Basic Labor Law Issues Under the Taft-Hartley Act*, 27 B.U.L. REV. 370 (1947).

2. Under the Wagner Act, secondary boycotts and jurisdictional strikes were not prohibited; the only defined unfair labor practices were those of employers. 49 STAT. 449 (1935), 29 U.S.C. § 151 (1946). The Norris-LaGuardia Act gave positive protection to these particular union activities by divesting the federal courts of jurisdiction to enjoin them. 47 STAT. 70 (1932), 29 U.S.C. § 101 (1946); United States v. Hutcheson, 312 U.S. 219 (1941) (jurisdictional strike, picketing and "don't purchase" letters); Taxi-Cab Drivers Local v. Yellow Cab Operating Co., 123 F.2d 262 (10th Cir. 1941) (secondary boycotts). See Note, 21 TEMP. L.Q. 258 (1948).

3. State labor laws have generally paralleled the federal law. Thus, anti-injunction acts similar to the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U.S.C. § 101 (1946), have been adopted in 18 of the principle industrial states. See Comment, *Current Legislative and Judicial Restrictions on State Labor Injunction Acts*, 53 YALE L.J. 553 (1944). See also, Crothers, *The Anti-Injunction Acts and Our State Constitutions*, 21 ORE. L. REV. 63 (1941). And in 10 states, "Little Wagner Acts" specifically include these activities within the concept of a labor dispute. See Dodd, *Some State Legislators Go to War—on Labor Unions*, 29 IOWA L. REV. 148 (1944); Killingsworth, *Restrictive State Labor Relations Acts*, [1947] WIS. L. REV. 546.

Although 12 states now have laws prohibiting secondary boycotts and 10 states now bar jurisdictional strikes, most of these restrictions have been passed since 1947. For a complete compilation of these statutes see Millis & Katz, *A Decade of State Labor Legislation 1937-47*, 15 U. OF CHI. L. REV. 282, 300-1, 304-5 (1948).

A few states do permit limited common law actions against boycotts and jurisdic-

secondary boycotts and jurisdictional strikes as unfair labor practices,[4] and Section 303(b) gives injured parties a private right of action for damages, enforceable in federal or state courts.[5] But the availability of the federal forum for 303(b) actions has recently been severely limited by *Schatte v. International Alliance*,[6] which requires diversity of citizenship for federal court jurisdiction.

A protracted jurisdictional dispute had culminated in an arbitration awarding the disputed work to one of the two contending unions. After some effort to secure a reversal of the award, the losing union brought the issue to a federal court in an action for damages under Section 303(b).[7] Unlike Sec-

tional strikes. See, Gershon, *Free Speech and the Secondary Boycott—A Reconsideration*, 21 So. CALIF. L. REV. 76 (1947); Gromfine, *Labor's Use of Secondary Boycotts*, 15 GEO. WASH. L. REV. 327 (1947).

4. The prohibited activities are defined in Section 8(b)(4), which makes it an unfair labor practice for a union to engage in or encourage a strike or a boycott where its object is any one of the following:

(1) forcing any employer, *other than its own* to recognize or bargain with a non-certified union;

(2) forcing *its own or any other employer* to (a) join an employer organization or a union, (b) cease dealing with the products of, or doing business with, any person, (c) recognize or bargain with a labor organization in disregard of the previous certification of another union, (d) assign particular work to a particular union unless a Board order or certification is being violated.

Section 10(l) makes it mandatory that the Board seek an injunction where Section 8(b)(4) is violated. Major reliance, however, seems to have been placed on the deterrent effect of the new private remedy. 93 CONG. REC. 4858 (1947).

See, generally, Gromfine, *Labor's Use of Secondary Boycotts*, 15 GEO. WASH. L. REV. 327 (1947); Janes, *Secondary Boycotts and the Taft-Hartley Law*, 8 LAW. GUILD REV. 371 (1948).

5. "Whoever shall be injured in his business or property by reason of any violation of [Section 303(a)] may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 hereof 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. 159 (1947), 29 U.S.C. § 187 (Supp. 1948). Section 303(a) defines the prohibited practices in the same terms as Section 8(b)(4).

6. 84 F. Supp. 669 (S.D. Cal. 1949).

7. The pleadings presented a confused picture. A series of controversies over the erection of sets for Hollywood stages resulted in certain work being alternately allocated between Carpenters (plaintiffs' union) and International Alliance (the defendant union). In October 1945, the Carpenters struck, ostensibly against the defendant-employer, but actually against Alliance. Pursuant to a subsequent agreement, the Executive Council of the A. F. of L. investigated the dispute and allotted the major portion of the work to Alliance. Carpenters then got the president of the A. F. of L. to interpret the allocation decision so as to reallocate the disputed work to them. The Studios and Alliance refused to recognize this "interpretation" and Carpenters went out on strike. The Carpenters then instituted a suit in a district court alleging these facts as a violation of Section 303. They claimed injury to their "business and property" and "great distress to body and mind" shown by the fact that they had been out of work for 39 weeks. Brief for Defendant on Motion to Dismiss, pp. 12–19, Schatte v. International Alliance, 84 F. Supp. 669 (S.D. Cal. 1949); Opening Brief for Appellants, pp. 46–51 (on appeal).

tion 301, which creates a similar damage action for breach of collective bargaining agreements, Section 303 does not expressly exclude diversity as a jurisdictional requirement.[8] Contrasting the two sections, the court concluded that the lack of a disclaimer in 303(b) signified congressional intent to require diversity, despite a clause subjecting 303 to the limitations and provisions of 301.[9] Since the parties were not diverse, the case was dismissed for want of jurisdiction.[10]

While Congress may require diversity for enforcement of an action in the federal courts if it so chooses,[11] the requirement is not necessary to federal jurisdiction whenever an action presents a "federal question."[12] A party automatically invokes "federal question" jurisdiction by asserting a federally created right in his complaint.[13] Since the *Schatte* plaintiff relied on a federal

8. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court in the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 STAT. 156 (1947), 29 U.S.C. § 185 (Supp. 1948).

9. Schatte v. International Alliance, 84 F. Supp. 669, 674 (S.D. Cal. 1949).

10. 84 F. Supp. 669, 674 (S.D. Cal. 1949). Plaintiffs relied also on the theory that defendants' activity constituted a conspiracy to deprive plaintiffs of the right to work in violation of the Civil Rights Act, 14 STAT. 27 (1866), 8 U.S.C. § 41 (1946), and the Constitution, U.S. CONST. AMEND. V, XIX. These claims had been rejected in a prior case involving the same parties, and the *Schatte* court applied the customary rule of res judicata. 84 F. Supp. 669, 671. A further claim that plaintiffs' collective bargaining agreement had been breached within the damage provision of Section 301, see note 8 *infra*, was dismissed for lack of jurisdiction because suit was not brought in the Union's name. 84 F. Supp. 669, 672.

11. U.S. CONST. Art. III, § 2. Under this power, Congress has given general diversity jurisdiction to the federal courts. 28 U.S.C. § 1332 (Supp. 1949). See, generally, 1 MOORE'S FEDERAL PRACTICE 470-2, 480-99 (1938).

12. "Federal question" is itself but one of several alternative grounds for federal court jurisdiction. The judicial power, U.S. CONST., Art. III, § 2 extends to (1) all cases arising under the Constitution, laws and treaties of the United States ("federal question"), (2) all cases affecting Ambassadors, other public ministers and consuls, (3) all cases of admiralty and maritime jurisdiction, (4) controversies to which the United States is a party, (5) controversies between two or more states, (6) all cases between a state and citizens of another state, (7) all cases between citizens of different states, (8) all cases between citizens of the same state claiming lands under grants of different states and between a state or citizens thereof, and foreign states, citizens or subjects.

These are the limits beyond which Congress cannot go in vesting jurisdiction in the federal courts. Most of the constitutional grants have been carried over into statutes. 28 U.S.C., c. 85 (Supp. 1949). See 1 CYCLOPEDIA OF FEDERAL PROCEDURE 107 (2d ed. 1943).

13. *E.g.*, Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894). Congress may constitutionally confer federal question jurisdiction whenever it has the power to regulate the subject matter concerned. Osborn v. Bank of the United States, 9 Wheat. 738 (U.S. 1824). See MOORE'S JUDICIAL CODE COMMENTARY 135-52 (1949). Occasionally, Congress is vague and courts have to determine whether it actually intended to confer jurisdiction. See, *e.g.*, Gally v. First National Bank, 299 U.S. 109 (1936). See generally Forrester, *The Nature of a "Federal Question"*, 16 TULANE L. REV. 362 (1942).

right created by Section 303(b),[14] the court should have accepted jurisdiction unless there was a clear congressional intent to require the additional element of diversity.[15]

It is extremely doubtful that Congress exhibited, as the court found,[16] any such intent by omitting in Section 303(b) the express exclusion of diversity found in Section 301. The latter clause was designed to meet a specific problem not present in drafting Section 303(b). Federal courts had uniformly held that diversity was required for federal jurisdiction over a common law action to enforce a collective bargaining agreement.[17] This background presented two dangers. First, courts might tend to hold that Congress could not convert a common law action into a right involving a valid federal question, and that diversity would still be necessary. A minority of congressmen actually held this view.[18] But it seemed clear to the others that congressional power over employer-employee relations included the creation of federal remedies for injuries arising from the prohibited activities.[19] An express statement that diversity was unnecessary was calculated to make the majority's sentiment perfectly clear. The second danger was that courts would recognize a federal question but retain a diversity requirement on the ground that Congress, though "aware" of past judicial interpretations, had

14. The section does not raise a question of constitutional power, see note 13 *supra*, since it is clear that Congress may validly legislate concerning employer-employee relations in interstate commerce. National Labor Relation Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). And see note 19 *infra*. Congress itself has answered the question of whether the district court has jurisdiction by making a specific and definite grant. See note 5 *supra*. Therefore, if a plaintiff can bring himself within the terms of Section 303(b), the district court has jurisdiction whether his claim ultimately be held good or bad. *Cf.* Binderup v. Pathe Exchange, 263 U.S. 291 (1923).

15. See MOORE'S JUDICIAL CODE COMMENTARY 140–46 (1949). See notes 12 and 13 *supra*.

16. 84 F. Supp. 669, 673 (S.D. Cal. 1949).

17. *E.g.*, Blankenship v. Kurkman, 96 F.2d 450 (7th Cir. 1938). This case determined that Congress had not yet created any contractual rights under the Wagner Act for employees and their employers. An action relying on the Act did not therefore state a federal question and diversity was necessary in order for the case to be heard in a federal court. See notes 12 and 13 *supra*.

18. Minority reports in both the House and Senate attacked the constitutionality of Section 301 because of its express disclaimer of diversity, see note 8 *supra*. It was argued that the section was merely procedural—that it attempted to transfer ordinary breach of contract suits to the federal courts without creating a federal substantive right and therefore diversity was required. See H.R. REP. No. 245, 80th Cong., 1st Sess. 109 (1947) (Minority Report); SEN. REP. No. 105, 80th Cong., 1st Sess. 13 (1947) (Minority Report). See also *Hearings before Committee on Labor and Public Welfare on S.5 and S.J. Res. 22*, 80th Cong., 1st Sess. 57 (1947) (Senator Pepper and former Secretary of Labor Schwellenbach).

19. *Id.* at 58; Note, *Section 301(A) of the Taft-Hartley Act: A Constitutional Problem of Federal Jurisdiction*, 57 YALE L.J. 630 (1948). The constitutionality of the section was upheld in Colonial Hardwood Flooring Co. v. International Union, 76 F. Supp. 493 (D. Md. 1948).

refused to change them. The express disclaimer eliminated any possibility of such statutory misinterpretation.

In drafting Section 303(b), on the other hand, Congress had no problem of overcoming prior judicial interpretation. Since the Wagner and Norris-La-Guardia Acts in effect gave positive protection to secondary boycotts and jurisdictional strikes,[20] the federal courts had had no occasion to pass on jurisdictional requirements.

Moreover, the drafters of the act thought an express disclaimer of diversity unnecessary to Section 303(b).[21] Senator Taft, in defending the section, compared it to the treble damage clause of the Sherman Act[22] on which it had been patterned.[23] Since the courts had never required diversity there,[24] he seemed to assume that Section 303(b) would be similarly unrestricted.[25] Even those Senators who challenged the wisdom of Section 303(b) agreed with him that it conferred federal jurisdiction without regard to diversity.[26] Any remaining doubts as to congressional intent should have been dissipated by the incorporation into Section 303(b) of the limitations and provisions of Section 301.[27]

Section 303(b) of the Taft-Hartley Act was clearly intended to supply a federal remedy for injuries caused by secondary boycotts and jurisdictional

20. See note 2 *supra*.

21. "A federal statutory tort has been created. The Federal courts are given jurisdiction and it would be unnecessary to eliminate the usual [diversity] requirement." Communication to the YALE LAW JOURNAL from Thomas E. Shroyer, Professional Staff Member, Senate Committee on Labor and Public Welfare, and Chief Counsel to the Joint Committee on Labor Management Relations, Nov. 22, 1949 (replying for Senator Taft). See also notes 23 and 24 *infra*.

22. 38 STAT. 731 (1914), 15 U.S.C. § 15 (1946).

23. See 93 CONG. REC. 4872 (1947). The original Senate proposal removed labor unions from exemption under the antitrust laws if they conspired to fix prices, allocate customers, or impose restrictions on the purchase, sale or use of materials in restraint of trade. SEN. REP. No. 105, Supplemental Views, 80th Cong., 1st Sess. 55 (1947). As finally adopted, Section 303 stops short of declaring this activity a conspiracy, but the intent remains to subject unions to restrictions and liabilities similar to those applied against employers under the Sherman Act. *Ibid.*; 93 CONG. REC. 4872 (1947). And the jurisdictional requirements in Section 303(b) are parallel to those in the treble damage clause of the Sherman Act—neither contains a jurisdictional minimum nor an express disclaimer of diversity.

24. *E.g.*, Rambusch Decorating Co. v. Brotherhood of Painters & Decorators & Paperhangers of America, 105 F.2d 134 (2d Cir. 1939).

25. See notes 21 and 23 *supra*.

26. See, *e.g.*, 93 CONG. REC. 4868 (1947) (statement by Senator Pepper): "In the next place Mr. President [Section 303] confers jurisdiction on the Federal courts without regard to diversity of citizenship required in other Federal cases." See also *id.* at 4845. See *id.* at 4839, where Senator Morse stated: "In other words, the proposal of the Senator from Ohio would open wide the doors of the federal courts to damage suits. . . ."

27. See note 5 *supra*. The *Schatte* court interpreted the "limitations and provisions" clause as applicable only to non-conflicting provisions in Section 303(b). 84 F. Supp. 669, 674. Having already decided that Congress intended to require diversity, the court concluded that the clause did not apply here.

strikes,[28] and to open the federal courts to "whoever" should be injured by those activities. The decision in the *Schatte* case reads into it a diversity requirement which is not there. And since in most cases the parties to a Section 303(b) action will be residents of the same state,[29] the decision virtually eliminates the federal forum.

28. See note 2 *supra*. For discussion indicating congressional concern over the lack of federal remedies see, *e.g.*, 93 CONG. REC. 4838–9 (1947); SEN. REP. No. 105, 80th Cong., 1st Sess. 2 (1947).

29. The members of Congress were primarily concerned with providing remedies for small business men and farmers injured by the proscribed activities. See 93 CONG. REC. 4838 (1947); SEN. REP. No. 105, Supplemental Views, 80th Cong., 1st Sess. 54 (1947). In most of these instances, the parties will be residents and citizens of the same local area. This is particularly true of jurisdictional strikes which generally involve local unions. And the result is not changed if a national union is joined with the local since all adverse parties must be diverse before the federal courts may take diversity jurisdiction. Strawbridge v. Curtiss, 3 Cranch. 267 (U.S. 1806). Moreover, the scope of Section 303(b) is broad enough to include some disputes between employees and their own employer. See note 4 *supra*. Here there will frequently be no diversity.