

SECTIONS 8(b)(4) AND 303: INDEPENDENT REMEDIES AGAINST UNION PRACTICES UNDER THE TAFT-HARTLEY ACT*

WHEN Congress passed the Taft-Hartley Act,¹ a principal aim was to curb union practices considered injurious to employers and the public.² To achieve this end, two similarly worded sections forbid labor organizations to engage in or encourage certain types of secondary concerted activities and jurisdictional strikes, or to strike against an employer when the NLRB has certified another union as the bargaining agent for his employees.³ Section 303 gives

*International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp., 72 Sup. Ct. 235 (1952).

1. Labor-Management Relations Act of 1947, 61 STAT. 136 (1947), 29 U.S.C. § 141 *et seq.* (Supp. 1951). Section 1 amended the National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C. § 151 (1946). For legislative history of the Act, see NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT (1948).

2. SEN. REP. No. 105, 80th Cong., 1st Sess. 2 (1947).

3. Section 303(a) of the Act reads:

"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 . . . 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 other 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 organization has been certified as the representative of such employees under provisions of section 9 of the National Labor Relations Act;

"(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 provisions of section 9 of the National Labor Relations Act;

"(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 in 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. . . ." 61 STAT. 136, 158 (1947), 29 U.S.C. § 187(a) (Supp. 1951) (emphasis added).

Except as indicated by the words italicized, Section 8(b)(4) follows the wording in Section 303(a), 61 STAT. 141-2 (1947), 29 U.S.C. § 158(b)(4) (Supp. 1951).

Secondary boycotts and jurisdictional strikes were not prohibited by the Wagner Act; nor were there any defined union unfair labor practices, 49 STAT. 449 (1935), 29 U.S.C. § 151 (1946). Secondary boycotts and jurisdictional strikes were in fact immune from injunctions in the federal courts under the Norris-LaGuardia Act, 47 STAT. 70 (1932),

a private party injured by such conduct the right to sue the union for damages⁴ in federal or state courts,⁵ and to obtain a jury trial on the issue. Section 8 (b) (4), by classifying these activities as unfair labor practices,⁶ empowers the

29 U.S.C. § 101 (1946); *United States v. Hutcheson*, 312 U.S. 219 (1941) (no jurisdiction to enjoin a jurisdictional strike and picketing in support); *Taxi-cab Drivers Local v. Yellow Cab Operating Co.*, 123 F.2d 262 (10th Cir. 1941) (no jurisdiction to enjoin a secondary boycott). Previously, jurisdictional strikes, secondary boycotts, and secondary picketing were readily enjoinable under the common law as illegal conspiracies, and also in the federal courts, under the anti-trust laws. See MILLIS & BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 7-15, 460-61 (1950). Damage actions were likewise available, but rarely instituted. *Id.* at 496-7.

For the history and development of state statutes paralleling the federal law, see Killingsworth, *Restrictive State Labor Relations Acts*, [1947] WIS. L. REV. 546; Millis & Katz, *A Decade of State Labor Legislation 1937-47*, 15 U. OF CHI. L. REV. 282 (1948); Comment, *Current Legislative and Judicial Restrictions on State Labor Injunction Acts*, 53 YALE L. J. 553 (1944).

4. Section 303 was introduced specifically to give persons injured by the activity described in Section 8(b) (4) a right to sue for damages in the courts. See CONFERENCE COMMITTEE REPORT, LABOR-MANAGEMENT RELATIONS ACT 67 (1947), and explanation of Senator Taft, 93 CONG. REC. 4858 (1947). The court's jurisdiction under Section 303 is restricted to determination of damages. No incidental injunction can be granted. *Dixie Motor Coach Corp. v. Amalgamated Association*, 170 F.2d 902 (8th Cir. 1948); *Textile Workers v. Amazon Cotton Mills*, 167 F.2d 183 (8th Cir. 1948).

5. Section 303(b) gives a person injured in his "business or property" a right to sue in "any district court of the United States or any court having jurisdiction of the parties." 61 STAT. 159 (1947), 29 U.S.C. § 187(b) (Supp. 1951). The federal courts of the territories were held covered by the grant of jurisdiction. *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 72 Sup. Ct. 235, 239 (1952). State courts apparently may also hear the damage suit. See WOLLETT, *LABOR RELATIONS AND FEDERAL LAW* 121 (1949); TELLER, *COLLECTIVE BARGAINING AND LABOR DISPUTES* § 398.171 (Supp. 1950).

The jurisdiction conferred on the courts by Section 303(b) is further subject "to the limitations and provisions of § 301." Section 301 removes the usual \$3,000 minimum federal requirement to bring suits in the district courts and the need for diversity of citizenship in breach of contract suits by and against unions. In addition, Section 301 details the union's capacity to sue; it restricts money judgments against unions to their assets; and it defines the jurisdiction of the courts and the method of service of process. The requirement that the parties be involved in an industry affecting commerce is necessarily retained. 61 STAT. 156-7 (1947), 29 U.S.C. § 185 (Supp. 1951). All these jurisdictional provisions are apparently carried over to Section 303. *Schatte v. International Alliance*, 182 F.2d 158, 165 (9th Cir. 1950), *reversing* 84 F. Supp. 669, 673 (S.D. Cal. 1949), *cert. denied*, 340 U.S. 827 (1950) (diversity of citizenship not necessary in Section 303 suit); Note, 59 YALE L. J. 575 (1950). See *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 72 Sup. Ct. 235, 238 (1952).

6. Section 8(b) (4) conduct is made "an unfair labor practice for a labor organization or its agent." 61 STAT. 141 (1947), 29 U.S.C. § 158 (1951).

Sub-sections (1), (2), (3) and (4) of Section 303(a) correspond to (A), (B), (C) and (D) in Section 8(b) (4).

For informative material on the various sub-sections of 8(b) (4) see MILLIS & BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 455-581 (1950); WERNE, *LAW OF LABOR RE-*

NLRB to issue cease and desist orders against violators,⁷ to assign work in jurisdictional disputes,⁸ and to seek temporary injunctions against the proscribed practices in the federal courts.⁹ But in providing different forums and remedies for the same wrongs, Congress failed to indicate what relationship if any, actions under the two sections should have.

LATIONS 237-42 (1951); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 24-8 (1947); Dennis, *The Boycott Under The Taft-Hartley Act*, 3 N.Y.U. ANNUAL CONFERENCE ON LABOR 367 (1950); *Developments in the Law—The Taft-Hartley Act*, 64 HARV. L. REV. 781, 794-810 (1951); Comment, 50 MICH. L. REV. 315 (1951).

7. The NLRB is empowered under Section 10(c) of the Taft-Hartley Act to issue cease and desist orders when it finds an unfair labor practice in a hearing held pursuant to Section 10(b). The Board, further, has power to "take affirmative action . . . to effectuate the policies of the Act." 61 STAT. 147 (1947), 29 U.S.C. § 160(b) and (c) (Supp. 1951).

8. Whenever there are reasonable grounds to believe that a jurisdictional dispute exists within the meaning of Section 8(b)(4)(D), the NLRB is instructed by Section 10(k) to hear and determine the dispute unless within ten days the parties can arrive at a voluntary adjustment. The Board's Regional Director, however, may make a preliminary investigation to determine whether there is a prima facie case. *Herzog v. Parsons*, 181 F.2d 781 (D.C. Cir. 1949).

The Board will in all cases conduct a Section 10(k) hearing before a full dress 10(b) hearing will be held. Consequently an appeal cannot be taken to the courts unless the Section 10(k) award is violated and the 10(b) hearing is conducted. The award then is not a "final order" in the fullest sense. *Winslow Bros. & Smith Co.*, 90 N.L.R.B. 1379 (1950); *Juneau Spruce Corp.*, 82 N.L.R.B. 650 (1949) and 90 N.L.R.B. 1753 (1950); *Stroh Brewery Co.*, 88 N.L.R.B. 844 (1950); *Ship Sealing Contractors Ass'n.*, 87 N.L.R.B. 92 (1949); *Irwin-Lyons Lumber Co.*, 82 N.L.R.B. 916 (1949); *Moore Drydock Company*, 81 N.L.R.B. 1108 (1949). For a general treatment of the functions of Section 10(k) see MILLIS & BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 474 (1950); WERNE, *LAW OF LABOR RELATIONS* 241-2 (1951).

9. The Board's Regional Directors must petition the Federal Courts for a temporary injunction, whenever they have reasonable grounds to believe the acts violative of Sections 8(b)(4)(A), (B), (C), and in appropriate instances (D), have occurred. Sections 10(j) and (l), 61 STAT. 149 (1947), 29 U.S.C. §§ 160(j), (l) (Supp. 1951); *see, e.g.*, *Douds v. Wine, Liquor Distilling Workers' Union*, 75 F.Supp. 447, 449 (S.D. N.Y. 1948).

A private individual however, is still barred by the Norris-LaGuardia Act from going directly into the Federal Courts for relief against non-violent union activity in connection with labor disputes. *Bakery Sales Drivers' Local Union No. 33 v. Wagshal*, 333 U.S. 437, 442 (1948). He can act only through the Board.

The courts do not automatically grant the injunctions. They may require any of the traditional grounds for issuing injunctions: irreparable loss, harm to the public, strong necessity, etc. *See Le Baron v. Los Angeles Building and Constructing Trades Council*, 84 F. Supp. 629 (S.D. Cal. 1949), *aff'd*, 181 F.2d 449 (9th Cir. 1949); *Elliott v. Amalgamated Meat Cutters*, 91 F. Supp. 690 (W.D. Mo. 1950); *Brown v. Retail Shoe & Textile Salesmen's Union*, 89 F. Supp. 207 (N.D. Cal. 1950); and *Douds v. Wine, Liquor Distilling Workers' Union*, 75 F. Supp. 447 (S.D. N.Y. 1948). For a review of cases under Section 10(l) *see*, Blumenthal, *Mandatory Injunctions and the NLRB*, 2 LAB. L. J. 7 (1951).

In *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*¹⁰ the Supreme Court first considered the possible bearing of 8(b)(4) proceedings on suits under Section 303. The corporation had won a \$750,000 jury verdict in federal court against the union for damages resulting from a jurisdictional strike. The Ninth Circuit affirmed,¹¹ and certiorari was granted. The union argued, *inter alia*, that a jurisdictional strike does not violate 8(b)(4) until the NLRB has made a finding that the striking union is not entitled to the work. Reasoning that a strike cannot offend 303 unless it also violates 8(b)(4), the union insisted that damages, if any, should be computed only from the date of the NLRB determination.¹² The Supreme Court might have disposed of the Union's argument simply by ruling that violations of 8(b)(4), as well as 303, begin at the date of the strike rather than at the date of the NLRB decision. But the Court, in affirming the verdict, rested its decision on a broader ground. It held that Congress intended the remedies arising from 303 to be "independent" of those under

10. 72 Sup. Ct. 235 (1952).

11. 189 F.2d 177 (9th Cir. 1951).

12. From April 10, 1948 to May 9, 1949, International Longshoremen's picketed Juneau's plant pursuant to a demand that Juneau bargain with it in regard to assigning barge loading work. This work Juneau had already assigned to its employees, members of a woodworkers' union, under an existing contract. The woodworkers agreed, at least temporarily, that Juneau should reassign the work to members of International. As a result International's picket line was honored and the plant was shut down. Extensive boycotting was also undertaken by International, and this effectively ended Juneau's operation.

On August 3, 1948, Juneau had filed a complaint alleging a violation of 8(b)(4)(D) with the NLRB. The Board held a 10(k) hearing on April 1, 1949. This resulted in a finding that International was not entitled to the work. But International continued its picketing until May 9—37 days beyond the date of the 10(k) award.

Juneau had, in the meantime, instituted a suit under 303 in the District Court of Alaska. Juneau demanded \$750,000 damages covering its losses over the entire period of the picket. International contended that the most Juneau could receive was an amount covering damages sustained during the thirty-seven days International had violated the Section 10(k) award. For it argued that the Board has not considered Section 8(b)(4)(D) violated until there has been a violation of the award in the Section 10(k) hearing; consequently, in view of the identity of the proscribing language in Sections 8(b)(4)(D) and 303(a)(4), there could not be a violation of Section 303(a)(4) until there had been a Section 10(k) hearing. Juneau refuted this argument on the basis of congressional intent to keep the two remedies independent.

The NLRB submitted an *amicus* brief to the Supreme Court. The Board disputed International's initial premise that no violation of Section 8(b)(4)(D) can occur until an award had been made under Section 10(k). It pointed out that it was only when reasonable grounds to believe that Section 8(b)(4)(D) has, in fact, been violated that a Section 10(k) hearing is conducted. Section 10(k) the Board views only as a procedural limitation designed to eliminate the delay involved in a full-dress Section 10(b) hearing of an 8(b)(4)(D) unfair labor practice. The Board expressed no opinion as to whether this procedural requirement carried over to the courts under Section 303. For a summary of the arguments before the Supreme Court, see 20 U.S.L. WEEK 3149 (Dec. 11, 1951).

8(b)(4)(D),¹³ and that administrative action by the NLRB is not a prerequisite to a damage suit.¹⁴ While only the jurisdictional dispute subsections were directly construed, this holding clearly covers 303 and 8(b)(4) in their entirety.

Complete independence of 8(b)(4) and 303 may well prove undesirable. Since the language in the two sections is notoriously confusing,¹⁵ an NLRB case and a private damage suit arising from the same or like events may easily have opposite outcomes. Thus, in one case a victorious union found itself liable for damages in a 303 suit for engaging in the same activities

13. "The fact that the two sections (§§ 8(b)(4)(D) and 303(a)(4)) have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be *independent*." *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 72 Sup. Ct. 235, 239 (1952) (emphasis added).

Senator Ball introduced what is now Section 303 before the Senate sitting as a Committee of the Whole. Section 8(b)(4) had already been reported out of Committee and discussed by the Senate. 93 CONG. REC. 4757 (1947). The Ball proposal contained in addition to the damage remedy a provision for injunctive relief which met with much opposition. Accordingly Senator Taft offered to substitute the present form of Section 303, which is, essentially, the Ball amendment without the injunction provision. 93 CONG. REC. 4770 (1947). The Ball and Taft versions were, then, discussed jointly. Reference to "direct access" to the courts cropped up frequently, but focused primarily on the injunction provision of the Ball version. See, e.g., 93 CONG. REC. 4836-7 (1947).

Senator Ball's version was defeated. 93 CONG. REC. 4849 (1947). The Taft amendment alone was then before the Senate; reference to "direct suit" was made only once in a vague way while the Taft version was discussed. 93 CONG. REC. 4858 (1947).

Primary emphasis in the whole debate on Section 303 was on the deterrent effect that the damage suit would have. *Ibid*.

See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 144 (1947) (suggestion that the Taft-Hartley Act was particularly plagued by the "manufacture of 'legislative history'" and "legislation not suggested by the bill" through the various reports and debates).

14. "Certainly there is nothing in the language of § 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true." *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 72 Sup. Ct. 235, 239 (1952).

15. Professors Millis and Brown describe the language as "extremely complex, technical and difficult." MILLIS & BROWN, *op. cit. supra* note 6, at 456. Consequently precedent under the two Sections has been difficult to manage. For example, the process of interpretation of the boycott language in Sections 8(b)(4)(A) and 303(a)(1) has been one of restricting the almost all-encompassing language of the Act by referring to congressional intent to proscribe only what at common law were "secondary" boycotts as distinguished from "primary." The characteristics of the outlawed activity now seem to be something between a literal reading of the Act and the common law, with considerable emphasis being placed on motive and situs of the dispute. See *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951); *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951); *International Brotherhood of Electrical Workers*, 341 U.S. 695 (1951); *Local 74, United Brotherhood of Carpenters and Joiners of America, AFL v. NLRB*, 341 U.S. 707 (1951). See also Johns, *Picketing and Secondary Boycotts Under the Taft-Hartley Act*, 2 LAB. L. J. 257, 263-9 (1951); Koretz, *Federal Regulation of Second-*

which were sanctioned by the Board.¹⁶ Similarly, an employer who has collected in a damage suit may be unable to secure a Board cease and desist order against continuance of conduct found illegal by a judge or jury. Resolution of these conflicting interpretations by reviewing courts would not necessarily occur.¹⁷ As a result, precedent is likely to become confused, and unions will be offered little guidance as to what constitutes permissible or prohibited conduct under the Act.

ary Strikes and Boycotts—A New Chapter, 37 CORN. L. Q. 235 (1952); Comment, 50 MICH. L. REV. 315 (1950).

It may well be doubted that a jury could understand fine distinctions made by charges conforming to the rules laid down in these cases. Furthermore, Section 8(b)(4)(A) involves refinements which will offer both judge and jury considerable trouble. *E.g.*, *Douds v. Metropolitan Association, etc.*, 75 F. Supp. 672 (S.D. N.Y. 1948) (privileging union activity against an "ally" of the primary employer). See also WERNE, *op. cit. supra* note 6, at 237-42; WOLLETT, *op. cit. supra* note 5, at 88-98; *Developments in the Law—The Taft-Hartley Act*, 64 HARV. L. REV. 781, 794-810 (1951) (difficulties of 8(b)(4) analyzed).

16. In the matter of Deana Artware, Inc., 86 N.L.R.B. 732 (1949), *reheard*, 28 LAB. REL. REF. MAN. 1271, 95 N.L.R.B. No. 6 (1951). The Board twice found that a picket by the union of a warehouse on the Corporation's property was not a violation of Section 8(b)(4). Nevertheless, a jury trial under Section 303 resulted in a verdict and judgment for \$29,000 damages. The Section 303 case is unreported, but is now before the Court of Appeals for the Sixth Circuit. Brief for Appellants, pp. 45-6, *United Brick & Clay Workers of America v. Deane Artware, Inc.*, Civil Action No. 11403 (5th Cir. 1952).

The possibility of such conflict and its bad effects were brought out in the Senate debates: "I cannot be convinced that it is sound legislation to disperse the authority over these problems, to draw into the orbit of their handling, a host . . . of Federal judges without competence in the field or, by splitting up authority among all the district judges of the land, to make impossible the development of a uniform body of precedent and decisions, harmoniously integrated with each other over the entire economy." Senator Morse, 93 CONG. REG. 5043 (1947).

The dispersion of authority in the Act has been severely criticized by leading experts in the field. See 2 TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* § 398.171 (Supp. 1950); Van Arkel, *Administrative Law and the Taft-Hartley Act*, 27 ORE. L. REV. 171, 180-2 (1948).

Of course conflict between the courts and the Board is most likely to arise in applying the Act to different facts. Conflict of statutory interpretation will be less dramatic but equally troublesome.

17. In theory, reviewing courts and one Supreme Court can harmonize interpretations of the law and reverse either the trial court or the NLRB for errors. But, in fact, insulation afforded lower tribunals' findings of facts and inferences allowable from controverted evidence may prevent resolution.

Findings of Federal trial judges sitting without juries are not to be reversed unless "clearly erroneous." FED. R. CIV. P. 52(a). And the findings of facts and inferences made by the NLRB are conclusive "if supported by substantial evidence on the record as a whole." SECTION 10(1), 61 STAT. 148 (1947), 29 U.S.C. § 160(1) (Supp. 1951). While this provision gives more scope to review than under the Wagner Act, the reviewing court has less power than it has under the "clearly erroneous" rule. See Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233, 1245-6 (1951). *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 484-5 (1950) (Justice Frankfurter detailing the legislative history of the "substantial evidence" test). The jury ver-

To ensure uniformity in analogous situations where Congress has set up an administrative agency to handle the special problems of industries the Supreme Court has frequently invoked a so-called "primary jurisdiction" rule.¹⁸ Under this doctrine the Court requires preliminary resort to the agency as a prerequisite to instituting a court suit, even where the court action would appear to be entirely independent of the administrative process.¹⁹ Typically,

dict, once evidence is introduced to support an inference, cannot be reversed except on questions of law, although some broader scope of review may now be indicated. See, *e.g.*, *Moore v. Chesapeake & Ohio R. R.*, 340 U.S. 573 (1951).

For an example of how presumptions allowed lower tribunals may foil resolution although the facts of two cases are indistinguishable, see *John Kelley Co. v. Commissioner of Internal Revenue*; *Talbot Mills v. Same*, 326 U.S. 521 (1946) (Tax Court Cases).

Supreme Court resolution of conflicting decisions may of course be prevented by denial of certiorari. See *Harper & Etherington, What the Supreme Court Did Not Do in the 1950 Term—*, 100 U. OF PA. L. REV. 354 (1951).

18. The primary jurisdiction rule has been variously termed "preliminary resort," "prior resort" and "exclusive administrative jurisdiction." See DAVIS, ADMINISTRATIVE LAW 664 (1951); Miller, *The Necessity for Preliminary Resort to the Interstate Commerce Commission*, 1 GEO. WASH. L. REV. 49 (1932); Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 MINN. L. REV. 560 (1941); Note, 51 HARV. L. REV. 1251 (1938).

19. The primary jurisdiction rule in the federal courts had its origin in the Supreme Court decision of *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The Oil Co. sued the Railroad to recover monies paid in excess of what it maintained was a reasonable rate. The Oil Co. had a recognized action under the common law. The Interstate Commerce Act provided: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." 24 STAT. 387 (1887), 49 U.S.C. § 22 (1946). Moreover, the Act provided specifically that a choice of forums was open to injured parties: "[A]ny person . . . claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission . . . or may bring suit in his . . . own behalf for the recovery of damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction. . . ." 24 STAT. 382 (1887), 49 U.S.C. § 9 (1946). But despite these clear provisions the Court required the Oil Company to resort to the Interstate Commerce Commission for its remedy. Justification for the decision was that a series of court determinations would defeat the primary purpose of the Act—consistent findings of reasonable rates.

The rule in the ICC cases is now fairly well crystallized: When special knowledge of relevant facts is required, or when the fact situation is so involved as to demand the agency's special techniques in reporting and hearing cases, then prior resort will be required. For an excellent digest of the I.C.C. and other cases on prior resort, see DAVIS, ADMINISTRATIVE LAW 666-9 (1951).

The primary jurisdiction rule has been widely applied in administrative law outside of the ICC rate-making cases. *E.g.*, *Slocum v. Delaware L. & W. Ry. Co.*, 339 U.S. 239 (1949); *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946) (both cases requiring prior resort to the National Railway Adjustment Board, distinguishing *Moore v. Ill. Central Ry. Co.*, 312 U.S. 630 (1941)); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932) (prior resort to Shipping Board); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Co.*, 173 F.2d 784 (6th Cir. 1949) (inter-

the doctrine is used when solution of a problem requires the agency's special knowledge of relevant facts or when the fact situation is considered to be so complex as to demand the agency's special techniques in hearing and reporting cases.²⁰ The doctrine usually results in dismissal of the court suit unless a specific issue can be saved for the court after the agency finding.²¹

The 8(b)(4)—303 situation would have seemed a particularly appropriate

state pipe line case referred to Federal Power Commission). Moreover, the Supreme Court has indicated the doctrine's applicability to pre-Taft-Hartley NLRB cases. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 139 n.22 (1939) (Justice Frankfurter, however, citing for the proposition *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), a case involving rather the doctrine of "exhaustion of administrative remedies.")

The primary jurisdiction rule, in fact, was argued by counsel for the Union in the *Juneau* case in the opening brief before the Circuit Court of Appeals for the Ninth Circuit. Brief for Appellants, pp. 53-7, *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.*, 189 F.2d 177 (9th Cir. 1951). But it was dropped. Reply Brief of Appellants, pp. 12-14, *ibid.* The doctrine seems irrelevant to the case since at the time of appeal there were two decisions by the NLRB declaring International's activity to be violative of Sections 8(b)(4)(D). *Juneau Spruce Corp.*, 82 N.L.R.B. 650 (1950) (10(k) procedure), and 90 N.L.R.B. 753 (1950) (review of Trial Examiner hearing of 8(b)(4)(D)).

The most important recent development in the primary resort rule is its growing use in anti-trust suits involving industries subject to the concurrent jurisdiction of administrative agencies. See, e.g., *Far East Conference, et al v. United States*, 72 Sup. Ct. 492 (1952) (Supreme Court requires prior resort to U.S. Shipping Board in anti-trust suit brought by the Attorney General); *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951) *cert. filed* 20 U.S.L. WEEK 3212 (Feb. 4, 1952) (private anti-trust suit referred to the C.A.B.); and Note, *Judicial Application of Anti-Trust Law to Regulated Industries*, 64 HARV. L. REV. 1154 (1951). Interestingly enough, Senator Taft analogized the Section 303 damage suit to the treble damage suit under the anti-trust law. 93 CONG. REC. 4872-3 (1947) ("The parallel is exactly the same.").

20. "Preliminary resort to the [Interstate Commerce] Commission is required . . . because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." Brandeis, J., *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

The rule is, however, beset with uncertainties. Compare, e.g., *Georgia v. Pennsylvania R. R. Co.*, 340 U.S. 889 (1950) (5 to 4 decision of the Supreme Court denying need for prior resort in injunction suit under the antitrust laws on the ground that the ICC may not be able to offer relief sought), with *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946) (injunction and damage award by state court reversed: primary jurisdiction of the ICC).

21. See *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940) (damage suit referred to the ICC but retention on the court's docket ordered because the court could possibly hear claims arising out of failure to comply with the Commission's order); *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951) (anti-trust suit referred to the CAB, but court retains suit on its docket because the right to damages, should the CAB find a violation of the CAA, may be saved for the courts).

one for application of the remedial primary jurisdiction rule. The complicated fact situations which arise in secondary boycott and jurisdictional dispute cases require the Board's expert knowledge of labor relations.²² Proper evaluation of the cases also demands that familiarity with the bargaining and business relationships in the plant and industry which only an expert agency can attain.²³ Moreover, the Board's hearing technique seems to ferret out relevant facts more easily than formalized procedures before a judge or jury.²⁴ And the detailed NLRB findings provide clearer guides to future

22. Senator Morse stated the case for keeping the most important remedies with the NLRB:

"It has been my consistent endeavor while this legislation has been under discussion to vest determination . . . in a single organization that is expert in labor problems . . . Labor problems are complex; as complex indeed as our entire social structure since the great mass of our people are workers . . . Close day-to-day contact with these problems is necessary if able persons are to keep themselves even reasonably informed." 93 CONG. REC. 4841 (1947).

See also Van Arkel, *Administrative Law and the Taft-Hartley Act*, 27 ORE. L. REV. 171, 180-2 (1948) (criticism of the jurisdictional handling of the two Sections); cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1950) (Justice Frankfurter's view of the Board's expertise).

23. See, e.g., *Winslow Bros. & Smith Co.*, 90 N.L.R.B. 1379 (1950) (the Board in a Section 10(k) hearing determined which of two unions was entitled to the work on the basis of the history of the plant); *Denver Building & Construction Trades Council*, 87 N.L.R.B. 755 (1949) (union black-list and "hot cargo" letters privileged under Section 8 (b) (4) (A) because they were traditional weapons used by labor organizations in direct support of a "primary" labor dispute). Compare *Wine, Liquor and Distilling Workers' Union*, 78 N.L.R.B. 504 (1948), *enforced*, 178 F.2d 584 (2d Cir. 1949) (wholesaler not an "ally" of manufacturer so that union dispute activity against him aimed at forcing him to boycott manufacturer's goods is an 8(b) (4) (A) unfair labor practice), with *Irwin-Lyons Lumber Co.*, 87 N.L.R.B. 54 (1949) (lumber company and transport company under such common stock ownership and managerial control that they were "allies"; hence union activity against one but aimed at the other is privileged).

For particular difficulties in enforcing 8(b) (4) in the construction industry, see Comment, *The Impact of the Taft-Hartley Act on the Building and Construction Industry*, 60 YALE L. J. 673, 681-9 (1951).

24. "Administrative agencies, in general, are just as painstaking and impartial in their finding as are courts. They have, in addition, the advantage of expert investigative staffs to assist in preparing and presenting cases before them. Knowing the characters and abilities of the men who compose those staffs, they can place in them a degree of reliance and confidence that a judge cannot place in the opposing advocates on whose presentation of the evidence he must largely rest his decision. The administrative agency . . . offers an affirmative and purposeful way of insuring that, to a considerable extent, the relevant facts will be brought out, the public's interest made clear and justice done." FRANK, *IF MEN WERE ANGELS* 146-7 (1942). Cf. COX, *Some Aspects of the Labor-Management Relations Act, 1947*, 61 HARV. L. REV. 1, 43 (1947).

The techniques of NLRB hearings are briefly examined in WERNE, *op. cit. supra* note 6, at 55-6; TELLER, *op. cit. supra* note 16, at §§ 203.9-51, and excellently reviewed in MILLIS & BROWN, *op. cit. supra* note 6, at 395-419.

For a statement of the multiple advantages of administrative adjudication in regulatory statutes in general see BLACHLY & OATMAN, *ADMINISTRATIVE LEGISLATION AND ADJUDICATION* 202-223 (1934).

conduct than do jury verdicts or many lower court decisions. In addition, more consistent interpretation of substantive law can be achieved by having a single body handle all cases.²⁵

Although the Supreme Court declined to apply primary jurisdiction in *Juneau*, judicial means to avoid conflict in some cases are still available. In Section 303 suits involving issues over which the Taft-Hartley Act gives the NLRB exclusive jurisdiction, such as employer unfair labor practices and union certification,²⁶ courts should hold prior determination by the Board on these issues to be conclusive. If no decision of the Board has been made, the court could refer those questions to the Board for settlement.²⁷ If such an issue amounts to a defense of the union's conduct,²⁸ the court should either

25. The Board is thoroughly conversant with the language of the Sections through handling a multitude of 8(b)(4) cases. See collection of cases in *Developments in the Law—The Taft-Hartley Act*, 64 HARV. L. REV. 781, 798-810 (1951). The lower Courts have had few cases under the damage Section. The Labor Management Relations Manual, for example, reports only four suits under Section 303 in the period from May 1948 to April 1950. LAB. REL. MAN. CUM. DIGEST AND INDEX § 82.841 (Supp. 1950). As a result, the Board certainly is better equipped to apply precedent to any one case than is any district court. See note 16 *supra*.

Conflicting interpretations of the law are less likely in NLRB cases simply because they all pass through the hands of a single body of experts. See *NLRB v. Hearst Publications*, 322 U.S. 111, 123 (1939).

26. It was not the understanding of the Congress that the Board's exclusive jurisdiction over employer unfair labor practices, union certification, the conduct of elections and choice or bargaining unit were in any way abridged by the Taft-Hartley Amendments. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 40, 90 (1947); SEN. REP. NO. 105, 80th Cong., 1st Sess. 499 (1947).

Extension of court jurisdiction beyond the claim for damages in 303 cases has been justified twice because of the deletion by the Taft-Hartley Amendments of the phrase "exclusive" in Section 10(a) of the Wagner Act which defines the Board's power over unfair labor practices. But on both occasions the lower courts were reversed. *Textile Workers v. Amazon Cotton Mills*, 76 F. Supp. 159 (M.D. N.C. 1947), *rev'd*, 167 F.2d 183 (4th Cir. 1948); *Dixie Motor Coach Corp. v. Amalgamated Ass'n, of Street, Elec. Ry. & Motor Coach Employees*, 74 F. Supp. 952 (W.D. Ark. 1947), *rev'd*, 170 F.2d 902 (8th Cir. 1948).

Elimination of "exclusive" from Section 10(a) by the Senate and House Conferees was solely for the sake of consistency with Senate adoption of the damage suit section and injunction procedures under Sections 10(j) and (l). H.R. REP. NO. 510, 80th Cong., 1st Sess. 52 (1947).

27. *Cf.* procedure adopted without legislation in *Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd.*, 78 F. Supp. 1, 9 (Hawaii 1948) (Court in anti-trust suit denies primary jurisdiction of CAB but reserves right to refer administrative questions to the agency).

28. A union may set up an employer unfair labor practice as a defense to a charge of activity proscribed by Section 303 or 8(b)(4). For example, the NLRB assumed, although it did not decide, that an assignment of work by an employer in violation of the non-discrimination provisions of Section 8(a)(3) privileges union activity which would otherwise violate Section 8(b)(4). In the matter of *William Fargo*, 91 N.L.R.B. 1003, 1007 (1950).

Similarly, Board certification of a union is a valid defense to charges of violations of Sections 303(a)(2) and (3), and in certain instances 303(a)(4).

stay its proceedings pending the Board decision or make its judgment or jury verdict contingent on the outcome of the referred defense.

Furthermore, decisions from reviewing courts under one of the similarly worded sections are applicable as a matter of *stare decisis* to interpretations of the other.²⁹ Hence parties or intervenors in suits under Section 303 might call the attention of the trial court to the same case, or cases involving similar facts, pending before the Board or reviewing courts.³⁰ Then, pursuant to its power to control its own docket,³¹ the court could stay the 303 suit until the Board case has been fully adjudicated.³² While the employer might be

29. See, e.g., *Illinois ex rel. Gorden v. Campbell*, 329 U.S. 362, 366-7 (1946) (decisions under original section of the Social Security Act applicable under substantially the same section in amended act); *Kelleher v. United States*, 88 F. Supp. 139 (S.D. N.Y. 1950) (Admiralty Rule 32 being an exact copy of Rule 34 of the Federal Rules of Civil Procedure, precedent under the latter must be followed in Admiralty cases); *but cf. Bulcke v. Graham*, 91 F. Supp. 615, 618 (N.D. Wash. 1949) (A decision as to the right to assume jurisdiction under Section 303(b) is not *stare decisis* as to the jurisdiction of the court to issue an injunction under Section 10(l) of the Taft-Hartley since the wording of those two Sections is different.).

30. The Court itself may have some difficulty taking notice of judicial proceedings not immediately before it. 9 WIGMORE, EVIDENCE § 2579 (3d ed. 1940). But any party to the suit, an *amicus curiae*, or an intervenor can call the court's attention to the suit concurrently being heard. *Landis v. North American Company*, 299 U.S. 248 (1936) (party moves for stay); *Helmbright v. Hertin*, 125 Neb. 210, 249 N.W. 552 (1933) (*amicus* brings attention of court to other proceedings); *Grand Rapids v. Consumers' Power Co.*, 216 Mich. 409, 414, 185 N.W. 852, 854 (1921) (intervenor has same rights as a party).

31. See *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Crancer v. Lawden*, 315 U.S. 631, 636 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 382 (1935).

32. Only a final order of the Board on the merits should bind the courts in 303 cases. The order of the NLRB in a Section 10(b) hearing of an 8(b)(4)(D) complaint is final and directly appealable to the Court of Appeals. 61 STAT. 147 (1947), 29 U.S.C. 159 (e) (Supp. 1951). Once appealed the courts in the 303 suit should not be bound until the case has been decided by the last reviewing court. Such practices would run counter to the generally accepted rule that a decision is final for the purposes of binding the courts and administrative bodies as a matter of *res judicata* or collateral estoppel although it is still appealable. See RESTATEMENT, JUDGMENTS § 41(d) (1942); *Reed v. Allen*, 236 U.S. 191, 199-200 (1932). But in view of the possibility of reversal on review a delay until the last appeal is taken seems the wiser practice.

A Section 10(k) hearing award is not technically a final order of the Board, since it is unreviewable by the courts. Review is only obtainable if the award is violated and a full-dress 10(b) hearing is held. Consequently it seems undesirable to make the 10(k) findings binding on the courts.

For examples of court proceedings stayed to await administrative determinations although jurisdiction of the court and agency are recognized as concurrent and separate, see *Leventritt v. Securities & Exchange Commission*, 178 F.2d 336 (2d Cir. 1949) (SEC); *United States v. Railway Express Agency, Inc.*, 89 F. Supp. 931 (D. 1950) (ICC); *Woods v. Gates*, 88 F. Supp. 867 (D. La. 1950) (Housing Expeditor); *Illinois-Iowa Power Co. v. North American Light and Power Co.*, 49 F. Supp. 277 (D. Del. 1943) (SEC); *cf. Crancer v. Lawden*, 315 U.S. 631, 636 (1942) (power acknowledged, but stay denied).

harmful by this delay, the uniformity of interpretation achieved by the stay order device should be an overriding consideration.³³

To ensure effective and certain integration in all cases, however, congressional action is necessary. Congress should amend the Taft-Hartley Act to require prior resort to the Board in all Section 303 suits, or, at least, make such resort a discretionary matter for the trial court when the facts appear to require the expert opinion of the Board. As to what weight the courts should give NLRB decisions in referred cases or in cases originating with the Board, Congress has several alternatives. The most extreme would make all such decisions absolutely binding on the courts. Thus, a final order by the Board finding no violation of 8(b)(4) would result in dismissal of the 303 action; a finding of an 8(b)(4) violation would leave only the question of damages in the 303 suit. While this proposal would ensure complete uniformity, it might encourage an employer initially seeking only a Board cease and desist order to take his NLRB verdict to the court to collect damages, or to use the possibility of such action as a bargaining weapon. But in view of the unpopularity of damage litigation against unions, it is unlikely that an employer not already bent on suing the union will embark on a course which will further strain his labor relations and may cause local public censure.³⁴

33. The stay order is an equitable remedy. See *McCLINTOCK*, *EQUITY* §28 (2d ed. 1948). In regard to the problem of integration of the NLRB orders and Section 303 damage suits, the problem for the court is to balance the public interest in obtaining uniformity against any inconvenience or expenses caused by the delay to the parties.

The stay may certainly be granted if the point of law decided by the NLRB case will result in dismissal of the 303 suit. *Landis v. North American Company*, 299 U.S. 248 (1936), noted, 46 *YALE L. J.* 897 (1937).

Clarification of the law for the judge to apply, or for his charge to the jury could be a sufficient reason. See *Landis v. North American Co.*, *supra*, at 254; *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949); *Coyne & Delaney Co. v. G. W. Orthank*, 90 F. Supp. 505, 506-8 (S.D. Iowa 1950); *Dederrick v. North American Co.*, 48 F. Supp. 410, 412 (D.D.C. 1945); *Brendle v. Smith*, 46 F. Supp. 522, 524 (S.D. N.Y. 1942). The Federal Courts have regularly stayed proceedings to permit state courts to clarify the state laws applicable to the federal cases. *Shipman v. DuPre*, 339 U.S. 321 (1949); *Meredith v. Winter Haven*, 320 U.S. 228 (1943).

Identity of parties is a relevant consideration, because a party may conceivably be prejudiced by a proceeding before the Board at which it could not examine witnesses or argue on appeal. See *Landis v. North American Co.*, *supra*; Note, 47 *YALE L. J.* 799, 802-3 (1938).

The timing of the suits is a further consideration, which may however, always be outweighed by others. *E.g.*, *Yale & Towne Mfg. Co. v. Manning, Maxwell & Moore*, 91 F. Supp. 106, 108 (S.D. N.Y. 1950); *P. Buersdorf & Co. v. Duke Laboratories*, 92 F. Supp. 287, 288 (S.D. N.Y. 1950).

34. The paucity of litigation under 303 has been generally attributed to the unwillingness of employers to strain union relationships. The cease and desist order is of course a less inflammatory proceeding than the attack on the union treasury. Furthermore, since the employer would still be required to show causal connection between the violation and the jury, a brake on litigation would remain. See *Developments in the Law—The Taft-Hartley Act*, 64 *HARV. L. REV.* 781, 847 (1951).

Methods of integration short of giving NLRB determinations a full binding effect are also available. The court could be given discretion to request an advisory opinion of the NLRB as to whether the union conduct is illegal.³⁵ Or the NLRB decision could be introduced in the 303 suit as *prima facie* evidence of all matters determined and essential to the prior adjudication—a technique similar to that available for treble damage plaintiffs under Section 5 of the Clayton Act after a successful government antitrust suit.³⁶ Another possibility is to have the Board's decision conclusive on the district courts as to the issues of fact decided if supported by "substantial evidence on the record considered as a whole."³⁷ The issue of damages would remain solely for judge or jury determination if the union were found to have violated the prohibited activities.

Congress should start examination of these alternatives immediately. In view of the desirability of furthering harmonious employer-union relationships, it is questionable whether the Act should permit the heavy damage suits possible under 303 at all.³⁸ But it is clear that revision of the sections procedurally—whatever their merit substantively—is definitely in order to eliminate the difficulties which have been and will continue to be caused by keeping them independent.

35. See *In re Chicago Rys. Co.*, 160 F.2d 59, 68-9 (7th Cir. 1947), *cert. denied*, 331 U.S. 808 (1947) (court at its discretion accepts SEC advice under Ch. X of the Bankruptcy Act, 52 STAT. 890-1 (1938), 11 U.S.C. § 572 (1946)).

See also 38 STAT. 722 (1914), 15 U.S.C. § 47 (1946) (Attorney General may refer cases brought by him under the anti-trust laws to the FTC: FTC findings are admitted as a master's report in equity except that the court may reject the whole or a part of the report as the nature of the case requires.).

36. 38 STAT. 731 (1914), 15 U.S.C. § 16(5) (1946) (decree in government anti-trust suit admissible in evidence and constitutes a *prima facie* case in private anti-trust suit). See Note, *Clayton Act, Section 5: Aid to Treble Damage Suits?*, 61 YALE L. J. 417 (1952).

Unless there is direct legislative sanction, an administrative order which would not have *res judicata* or collateral estoppel effects would be inadmissible in evidence. *Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.*, 150 F.2d 69, 74 (2d Cir. 1945) (FTC order not admissible in anti-trust litigation); *accord*, *International Tag and Salesbook Co. v. American Salesbook Co.*, 6 F.R.D. 45 (S.D.N.Y. 1943); and *Proper v. John Bene and Sons*, 295 F. 729 (E.D.N.Y. 1923).

37. See scope of review under Section 10(1) of the Taft-Hartley Act, 61 STAT. 148 (1947), 29 U.S.C. § 160(e) (Supp. 1951). In view of the Board's special qualifications giving its opinion such force in 303 suits seems warranted. *Cf.* *Securities and Exchange Commission v. Central-III. Securities Corp.*, 338 U.S. 96 (1949) (SEC approval of re-organization binding on District Courts when supported by substantial evidence); *Eckers v. Western Pacific R.R.*, 318 U.S. 448, 467 *et seq.* (1943) (ICC approval of rates binding on courts if plan approved conforms to provisions of the Interstate Commerce Act and is fair and equitable).

38. See discussion, 93 CONG. REC. 4839-40 (1947).