ENFORCEABILITY OF ARBITRATION AGREEMENTS UNDER
TAFT-HARTLEY SECTION 301

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The uncertainty already surrounding the enforceability of arbitration clauses in collective bargaining agreements has been compounded by the Supreme Court decision in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.¹ This now famous decision represents the initial effort by the Court to interpret and construe section 301 of the Taft-Hartley Act—that section which gives the federal district courts jurisdiction over suits for violations of collective bargaining contracts, and which provides that "any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents."² Tacitly admitting their own inability to clarify this ambiguous and inadequate legislative provision, six justices in three separate opinions concurred in holding that under section 301 a labor union cannot sue on behalf of its members for accrued wages. Whether this decision will have the effect of denying union standing to sue whenever the collectively bargained benefits flow directly to the employees rather than to the union, and, if so, what benefits flow so directly to the employees are questions which, although of vital importance, will probably have to await case-by-case development before any general rules can be formulated. It is clear now, however, that other problems emanating from Westinghouse will affect virtually every section 301 contract action. This Article will examine these problems principally in the light of their immediate and projected effects upon grievance arbitration in state and federal courts. Necessarily allied with this inquiry are questions bearing on the wisdom of the decision, the practicality of its application, and the benefits, if any, that may ensue.

Before the inquiry is begun, however, the four opinions in Westinghouse must be set forth in some detail. On the primary aspect of the decision—whether the union could sue on behalf of its members—the majority of the Court agreed only in result, there being sharp disagreement as to rationale. Justice Frankfurter, joined by Justices Burton and Minton, indicated uncertainty as to the grounds upon which the union had been denied standing

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by the court of appeals. He did, however, suggest two possibilities. First, as a matter of substantive right under the particular agreement, the benefits flowed to the employees only; the union therefore was not the proper party to bring suit. Second, under the so-called "eclectic theory" of *J. I. Case Co. v. NLRB*, the right to wages was an individual right arising not out of the collective agreement but out of the individual contract of employment, executed either contemporaneously with the collective agreement or at the time the employee began work; thus, the instant violation was not the type of violation—involving an employer and a labor organization—encompassed by section 301. With regard to the first possibility, Justice Frankfurter commented on the facility with which lawyers could include ingenious contractual provisions in the bargaining agreement and thus alter, for purposes of suit, the substantive rights of the parties. With regard to the second possibility, one that would establish a rule of law for all section 301 litigation, he stated the eclectic theory was not justified "either in terms of discoverable congressional intent or considerations relevant to the functions of the collective agreement."6

It should be realized that although Justice Frankfurter ostensibly rejected the eclectic theory, he nonetheless arrived at virtually identical results under his own solution. Rather than accepting such a substantive analysis of a collective agreement, he merely said that Congress, in section 301, did not intend to confer federal jurisdiction over suits of this nature. Thus, although for purposes of substantive law he indicated that the union did or should have standing, he nevertheless concluded that for purposes of federal jurisdiction the union did not have standing. This result was necessary, he felt, if the constitutional objections discussed below were to be avoided. Specifically mentioning suits for "accrued wages," the decision may possibly be restricted to this particular holding. On the other hand, the underlying hypothesis of the decision is that the union had standing to enforce only qua-union rights—rights going to the union rather than to the employees; and if this is so, the procedural approach will yield the same results as would the substantive eclectic approach.7

3. The court of appeals in *Westinghouse* was the first court to give serious consideration to the denial of union standing. Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 210 F.2d 623, 626 (3d Cir. 1954). In virtually all previous litigation, if counsel did present the argument, the courts apparently never gave it such serious thought as to include it or even allude to it in their decisions. But see Rock Drilling Union v. Mason & Hanger Co., 90 F. Supp. 539 (S.D.N.Y. 1950).

4. 321 U.S. 332 (1944). The words of Justice Jackson have been applied in situations completely different from those envisioned in the original decision.

5. 348 U.S. at 459.

6. Id. at 456-59.

7. Justice Frankfurter has apparently excluded all suits that deal with failure to pay individual compensation. Thus, in every action brought by a union, the federal courts will be required to see whether the dispute involves individual compensation or benefits flowing to the union. The lines of distinction in many instances will be tenuous; but they will be the same lines as would be drawn under an application of the eclectic theory.
The difference in the two approaches lies in the fact that the substantive approach would have established definable rules of standing under section 301. With Justice Frankfurter's jurisdictional approach, the right or standing to sue under the section is no more firmly established now than it was prior to the decision. And since the decision in no way cures the alleged constitutional difficulties, it seems likely that in an effort to avoid the same constitutional difficulties, federal jurisdiction may be further circumscribed as future litigation arises. Indeed, the Court, if it should so desire, can arrive ultimately at the conclusion that Congress intended section 301 as a device to be used only by employers against unions for breaches of no-strike provisions; and even this would not cure the constitutional objections. If this process is to continue, then section 301 will have no cure short of complete emasculation. And by predicing his decision on federal jurisdiction, Justice Frankfurter in future litigation can prescribe further procedural limitations, particularly in view of the fact that there is little or no legislative history as a guide in any direction.

In a separate concurrence, the Chief Justice, joined by Justice Clark, held simply that the legislative history of section 301 was insufficient to warrant a conclusion that Congress intended to authorize unions "to enforce in a federal court the uniquely personal right of an employee." How these five justices could have reached this result on the basis of legislative history or congressional intent is indeed strange when not one word was spoken or written in either the debates or committee hearings that would be even slightly suggestive of such a conclusion. That such a sweeping denial of rights should have been found in either the lack of legislative history or the silence of Congress betokens not a discovery of congressional intent but rather a somewhat unnecessary declaration of personal opinion. Indeed, Justice Reed, apparently preferring to base his conclusion on a conceptual analysis of the collective agreement, did not mention legislative history or intention—perhaps because he realized that they were nonexistent.

The second important aspect of the decision was the determination of whether section 301 was intended merely to confer jurisdiction in the federal courts or to confer such jurisdiction with the additional responsibility on the courts of

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8. 348 U.S. at 461.
9. Justice Frankfurter based his conclusions on the fact that there was no suggestion in Congress that such a result was intended. The Chief Justice and Justice Clark intimated that legislative history was not sufficiently clear nor explicit to authorize such suits. Hence, the conclusion was drawn on the silence of Congress. Such a silence could easily be attributed to the fact that the Taft-Hartley amendments were intended primarily for the benefit of management; and no one suspected that § 301 would become a tool for the unions. However, it was a declared purpose of the act to put labor and management on an equal plane. Silence of Congress, therefore, is a most misleading guide.
10. 348 U.S. at 461. Justice Reed based his decision on words bearing suspiciously close resemblance to the eclectic theory propounded by the court of appeals.
developing a body of federal common law for the enforcement of collective agreements. Although a majority of the courts previously considering the problem had decided upon the latter alternative, it appears as though their decisions were based not on legislative history or congressional intent, but rather on the questionable constitutionality of an act conferring jurisdiction but not creating an enforceable federal right. Because these courts had doubts concerning the allowable scope of "federal question" jurisdiction, they chose to avoid the issue by holding that Congress intended the development of a federal substantive law. The weight of precedent is therefore quite meaningless, since if the section could be constitutional despite state law being applicable, many of the opinions would be deprived of the only ground upon which they apparently rest.

Considering the problem in a quasi-de novo atmosphere, the Supreme Court arrived at no solution. Justice Frankfurter discussed the alternatives and arrived at the conclusion that Congress intended state law to be applicable. He indicated, however, that such a solution contained grave constitutional difficulties. And it was primarily and admittedly to avoid these difficulties that he arrived at his other conclusion, namely that Congress did not intend to open


12. In the cases cited in the first part of note 11 supra, the conclusions as to the applicability of federal law were based on either a short analysis that for purposes of constitutionality a federal substantive law must have been intended, or merely a reliance on such cases as Colonial Hardwood Floor Co. v. International Union, United Furniture Workers, supra note 11 and Wilson & Co. v. United Packinghouse Workers, supra note 11, the precursors of a long line of valueless precedent.

13. For more adequate discussion as to how the act can be constitutional despite application of state law, see text at pp. 190-94 infra.
federal courts for unions in cases of this nature. Here again the precedent which he established with regard to a union's standing to sue is quite meaningless, since if the section can be constitutional despite state law being applicable, his opinion would be deprived of the major ground upon which it apparently rests.

The Chief Justice and Justice Clark deemed it unnecessary to consider the constitutional question and based their concurrence wholly on the statutory interpretation mentioned earlier. For purposes of future litigation, one may speculate about their views on applicable law. Apparently, if they had deemed federal law controlling, they could easily have concurred with Justice Reed. That they chose to write an independent opinion indicates that they probably think state law is applicable but that such a conclusion, being consonant with the allowable scope of "federal question" jurisdiction, raises no constitutional objections. Justices Black and Douglas dissented on grounds that a federal substantive law was intended and that section 301 clearly contemplated suits by unions on behalf of their members.

In the light of the discordant views in the Westinghouse opinions, the difficulties inherent in section 301 can be appreciated, if not resolved. The enforcement of arbitration clauses in collective agreements, like many other issues in the area, will be materially affected by the problems exposed and generated in this decision. The first part of this Article will examine the effect of the problem of applicable law—explicitly avoided by the Court. The second part will consider the effect of the holding that the union could not sue on behalf of its members.

14. Justice Frankfurter's other ground for corroborating his conclusion was that since in the industrial areas the federal courts are already overburdened with litigation, Congress could not possibly have intended to aggravate the situation. Yet, one may speculate as to how crowded and overburdened are the state courts in the industrial areas of New York City and Chicago. In these latter areas it takes just as long if not longer to try a case in the state than in the federal courts. See, e.g., N.Y. Times, May 25, 1956, p. 1, col. 5. Certainly, if cooperation between the judicatures be an objective, the federal system should accept its obligations as readily as should the states. Indeed, engaging in the pastime of ascertaining congressional intention may lead easily to the conclusion that Congress intended to pre-empt the field to aid and relieve the state courts of their heavier burdens.

15. It is questionable whether Justice Frankfurter would have reached the same conclusion with regard to representative suits by unions, if a previous Supreme Court decision had faced the applicable law issue squarely and held state law applicable and the section constitutional.

16. With five members of the Court in apparent agreement on the applicability of state law, should another case arise before the Supreme Court (assuming that the section will not be held unconstitutional and assuming the accuracy of the conclusion drawn in text with regard to the opinion of the Chief Justice and Justice Clark), state law will probably be held controlling. Until that time, however, there seems to be no compelling reason why the district courts cannot continue to apply the same law they had been applying before the decision. See Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298 (2d Cir. 1956).
Which Law Is Applicable

Relevant Federal Statutes

The United States Arbitration Act

Unfortunately, even if section 301 is held to create a federal substantive right, specific enforcement of collective agreements to arbitrate has never been accorded full judicial or congressional recognition. The United States Arbitration Act in section 2 provides that any arbitration clause in "a contract evidencing a transaction involving commerce... shall be valid, irrevocable, and enforceable...." Section 4 provides affirmative relief for the enforcement of such agreements. Section 1, however, states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In the more than one generation of litigation under the Arbitration Act, there has never been a conclusive determination either as to whether section 1 is a limitation on the entire act, or, if it is—as has most recently been decided—what interpretation should be accorded to its peculiar terms. Although it has generally been deemed as a limitation on sections 2 and 4, this was not in itself a bar to the granting of relief. For if the particular court was inclined toward the idea that arbitration clauses should be enforceable contractual obligations, then ascribing appropriate definitions to the terms of section 1 could accomplish the objective. However, arriving at the objective through this backdoor approach has not been an easy task.

First there was the difficulty of whether "contracts of employment" was to be construed to mean the individual contracts of employment or the contract of employment resulting from the negotiation of a collective agreement. If the latter construction were preferred, it appeared, until recently, as though

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19. The Arbitration Act, its possible interpretations and optimum applications, has been given exhaustive treatment in Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591 (1954); for a collection and short analysis of leading cases under the act, see 6 Lab. L.J. 58 (1955).
20. Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944), is the leading case relied upon for the proposition that a collective bargaining agreement is a "contract of employment." See also cases cited note 29 infra. However, in Hoover Motor Express Co. v. Teamsters Union, APL, 217 F.2d 49 (6th Cir. 1954), the court said that when there was an issue regarding individual rates of pay, it was the type of contract which fell within the terms "contract of employment"; but when there was a dispute relative to the bargaining agreement, such as breach of a no-strike clause, it was not a "contract of employment," and arbitration could be enforced if the agreement so provided. (This distinction may be suggestive of possible considerations in section 301 litigation after Westinghouse.) The court specifically mentioned and cast doubt upon the broad effect formerly attributed to Gatliff Coal Co. v. Cox, supra—that all collective agreements are "contracts of employment." In a later decision, Retail, Wholesale & Dept Store Union, CIO v. Buckeye Cotton Oil Co., 31 CCH Lab. Cas. ¶ 70179 (6th Cir. Aug. 22, 1956), the court
all collective agreements would be excluded from operation of the act.21 Second, there was the difficulty of defining the latitude of "any other class of workers engaged in foreign or interstate commerce." If *ejusdem generis* were to be used as a canon of statutory construction—and this is the most likely solution—only seamen, railroad employees or other workers engaged in transportation would be excluded. But this problem actually resolved itself into defining the terms "engaged . . . in interstate commerce." If these are words of art, they should be construed narrowly to mean only workers engaged in the actual transportation activities. If they are construed broadly and equated to the current concept of "affecting commerce," then, once again, all collective bargaining agreements would be excluded from the scope of the act. It should be noted that if the narrow construction is accepted, as has been done in recent litigation, then irrespective of the court's definition of "contract of employment," the arbitration agreement could still be enforced.22

Not to go unmentioned, of course, was the ambiguous phrase in section 2, which rendered enforceable an arbitration provision only when it appeared in "a contract evidencing a transaction involving commerce." The question here was whether a collective agreement was to be considered as such a contract on the argument that "involving commerce" was synonymous with "affecting commerce."23 Also problematical was the possible effect of section 2 on other sections of the act.

In view of these perplexing problems, very little could have been accomplished in fostering the enforcement of arbitration agreements were it not for the provisions of section 3. This section provides that in any federal court action, a stay of proceedings to allow arbitration can be granted "upon any issue referable to arbitration under an agreement in writing for such arbitration." Since it appeared to be wholly procedural, it was thought by many made a further exception to the *Gatliff* doctrine and held that an arbitration agreement may be enforced to settle a dispute concerning overtime compensation. In view of these two decisions, one might safely say that in the Sixth Circuit the exception has become the general rule.

21. Legislative history indicates that the clause was originally designed to exempt a seamen's union from the scope of the act. Since their rights and duties were under collective agreements, it would appear as though the broader definition was intended. *But see* United Office Workers, CIO v. Monumental Life Ins. Co., 88 F. Supp. 602 (E.D. Pa. 1950), where the court favored the narrow definition on grounds that congressional intention was only to provide against specific performance of contracts for personal services.

22. Signal-Stat Corp. v. United Elec. Workers, 235 F.2d 298 (2d Cir. 1956); Tenney Engineering, Inc. v. United Elec. Workers, 207 F.2d 450 (3d Cir. 1953) (narrow construction accepted); Harris Hub Bed & Spring Co. v. United Elec. Workers, 121 F. Supp. 40 (M.D. Pa. 1954) (although collective agreements are contracts of employment, "engaged in interstate commerce" is to be narrowly construed).

23. Tenney Engineering, Inc. v. United Elec. Workers, *supra* note 22, at 453, suggests that the terms may be synonymous. Signal-Stat Corp. v. United Elec. Workers, *supra* note 22, at 301, holds that a collective agreement *is* to be considered as such a contract.
Until only recently section 3 had been employed by defendants in section 301 actions as a defensive maneuver to secure a stay of proceedings pending arbitration as provided for in the collective agreement. Thus, in actions brought under section 301, the defendant, whether company or union, would petition for a stay. The court, if it first held that federal law was applicable and if it then wished to enforce the arbitration agreement, had two alternatives. One, it could simply hold that section 3 was purely procedural and therefore not limited by the exclusion in section 1 or the ambiguous phrase in section 2. Or two, even though section 1 was held to limit the entire act, the court could hold that either a collective agreement was not a “contract of employment,” or “any other class of workers engaged in interstate commerce” was to be narrowly construed; and it could then hold that either section 2 was not a limitation, or if it was, then a collective agreement was in fact “a contract evidencing a transaction involving commerce.” If in this second alternative the court failed to reach at least two of the four suggested conclusions, the stay could not be granted and the arbitration clause in the contract would be unenforceable.

24. Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945); Agostini Bros. Bldg. Corp. v. United States, 142 F.2d 854 (4th Cir. 1944); Donahue v. Susquehanna Collieries Co., 138 F.2d 3 (3d Cir. 1943); Cox, supra note 19, at 593, 594.


26. There are also instances where the union has sued initially to enforce an arbitration clause. Enforcement through such affirmative action was granted in International Union, United Automobile Workers, CIO v. Buffalo-Springfield Roller Co., 131 F. Supp. 667 (S.D. Ohio 1954); Mountain States Div. No. 17 Communications Workers v. Mountain States Tel. & Tel. Co., 81 F. Supp. 397 (D. Colo. 1948).

27. A stay has often been refused on grounds that the arbitration clause in the collective agreement did not extend to the type of dispute in issue. See United Elec. Workers v. Miller Metal Products, 215 F.2d 221 (4th Cir. 1954); Markel Elec. Products v. United Elec. Workers, 202 F.2d 435 (2d Cir. 1953); International Union, United Furniture-Workers v. Colonial Hardwood Floor Co., 168 F.2d 33 (4th Cir. 1948); Harris Hub Bed & Spring Co. v. United Elec. Workers, 121 F. Supp. 40 (M.D. Pa. 1954). This problem is not relevant here, since whether a dispute may be subject to arbitration necessarily depends upon the peculiar wording of the collective agreement. However, the courts have generally said that disputes arising out of a union’s breach of a no-strike clause are not arbitrable disputes within the terms of the narrow arbitration clause.


30. For decisions holding that a collective agreement is a “contract of employment,” see Lincoln Mills v. Textile Workers Union, CIO, 230 F.2d 81 (5th Cir. 1956), cert. granted, 25 U.S.L. Week 3094 (U.S. Oct. 9, 1956) (No. 211); Pennsylvania Greyhound Lines v. Amalgamated Ass’n of Street Employees, 193 F.2d 327 (3d Cir. 1952); Inter-
As long as the federal courts retained the option of considering section 3 as procedural and therefore not limited by sections 1 and 2, there was a simple avenue along which to proceed. However, in the recent decision of *Bernhardt v. Polygraphic Co. of America*, Justice Douglas, speaking for the majority, held that "since § 3 is a part of the regulatory scheme, we can only assume that the 'agreement in writing' for arbitration referred to in § 3 is the kind of agreement which §§ 1 and 2 had brought under federal regulation." With this construction of the Arbitration Act the federal courts, when entertaining a petition for a stay, will now be limited only to the second alternative; and failure to accept the not-easily-acceptable conclusions will vitiate the enforceability of arbitration clauses in the federal courts.

national Union, United Furniture Workers v. Colonial Hardwood Floor Co., 168 F.2d 33 (4th Cir. 1948); Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944); Ludlow Mfg. & Sales Co. v. Textile Workers Union, CIO, 108 F. Supp. 45 (D. Del. 1952), 65 HARV. L. REV. 1239. Thus, it would seem as though arbitration clauses are unenforceable in the Fourth, Fifth and Sixth Circuits. However, since the decisions in Hoover Motor Express Co. v. Teamsters Union, AFL, 217 F.2d 49 (6th Cir. 1954), and Retail, Wholesale & Dep't Store Union, CIO v. Buckeye Cotton Oil Co., 31 CCH Lab. Cas. ¶ 70179 (6th Cir. Aug. 22, 1956), see note 20 supra, it is probable that the Sixth Circuit has joined the trend toward enforceability. Furthermore, these latter decisions expressly limited the *Gatliff* doctrine, see note 20 supra, which doctrine had been employed in virtually every case construing the Arbitration Act. And since the *Gatliff* doctrine played a prominent part in the *Colonial Hardwood Floor Co.* decision, supra, it is difficult to see how the Fourth Circuit can continue its policy without completely ignoring the now limited basis upon which its policy was originally formulated. In view of Temney Engineering Inc. v. United Elec. Workers, 207 F.2d 450 (3d Cir. 1953), one cannot predict the result in the Third Circuit, although the atmosphere appears optimistic. In the First and Second Circuits, under the recent decisions in Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85 (1st Cir. 1956), *cert. granted*, 25 U.S.L. WEEK 3094 (U.S. Oct. 9, 1956) (No. 276), and Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298 (2d Cir. 1956), arbitration agreements are enforceable. Subject to a few exceptions, it appears as though a distinct trend favoring enforceability of arbitration agreements has been reflected in the more recent federal court decisions.

31. 350 U.S. 198 (1956). The case involved an individual contract of employment with no evidence of any collective agreement. Justice Douglas held that the individual contract was not "a transaction involving commerce." Since he deemed it such, he did not have to reach any conclusion with regard to the meaning of the exceptions in § 1. Thus, questions still outstanding are whether a collective agreement—as contrasted to an individual contract of employment—is "a transaction involving commerce," and, if so, whether such contracts are outside the § 1 exceptions.

32. Id. at 201.

33. Some light may have been thrown on the definition of "involving commerce" when Justice Douglas stated that petitioner's conduct did not fall within § 2 because there was no showing that he "was working 'in' commerce, was producing goods for commerce, or was engaging in activity which affected commerce...." Ibid. This may mean that "involving commerce" can be equated to activity that either produces goods for commerce or affects commerce, both of which would probably encompass the majority of collective bargaining agreements. It may further indicate that the Court still abides by its peculiar words of art and that "engaging in commerce" under § 1 may be given its most narrow meaning.
There is a further holding in the *Bernhardt* decision that is equally important. In the past whenever a federal court entertained an action under section 301 and the defendant petitioned for a stay pending arbitration, the courts reached various conclusions as to which law was applicable. The most desirable conclusion, as noted earlier, was that federal substantive law was controlling and that under section 3 of the Arbitration Act a stay could be granted. However, even among those courts holding that section 301 created federal substantive rights, some of them, as already pointed out, deemed section 1 as limiting the entire act; and the granting of a stay was thus made dependent on their views concerning the definition of the exception clause. Those courts holding state law applicable generally said that enforceability of arbitration clauses was dependent on state law and not the Arbitration Act. A growing number of courts, led by Judge Wyzanski's decision in *Textile Workers, CIO v. American Thread Co.*, held that section 301 generated of its own force the remedy of specific performance of arbitration clauses. This was predicated either on the construction that Congress created a federal substantive law intended to operate outside the scope of the Arbitration Act, or on the alternative construction that even though matters of right were to be determined by the law of the state, matters of remedy, as is the case with specific performance of arbitration agreements, were to be governed by the law of the forum. Since the *Bernhardt* decision, this alternative construction is quite dubious.

34. See notes 29 and 30 supra.


38. Judge Wyzanski did not have to choose between or indeed even pose the alternatives, since under the law of Massachusetts arbitration clauses are enforceable. However, his theories as to the purposes of § 301, and as to its independence from the Arbitration and Norris-LaGuardia Acts were relied upon in the subsequent litigation. See note 37 supra.

39. This theory finds corroboration in Red Cross Line v. Atlantic Fruit Co., 204 U.S. 109 (1924), and Murray Oil Products v. Mitsui & Co., 146 F.2d 381 (2d Cir. 1944). Justice Minton, dissenting in *Bernhardt* v. Polygraphic Co. of America, 350 U.S. at 212-13, intimates that the *Murray Oil Products* decision is no longer being followed.

40. It is interesting to note that to this point at least the *Bernhardt* decision has not had any great effect upon lower court decisions. Although discussed at length in virtually
Justice Douglas appears to have negated Judge Wyzanski's theory by holding that the federal court could not "substantially affect the enforcement of the right as given by the state" and that "if the federal court allows arbitration where the state court would disallow it, the outcome of the litigation might depend on the courthouse where suit is brought. For the remedy by arbitration ... substantially affects the cause of action created by the state." Although superficially this would appear as precedent for actions brought under section 301, there are certain differentiating factors that should be mentioned. Since the Bernhardt litigation was based on diversity, it was an action to enforce a right quite plainly created by the state. In this there can be no denial. But with section 301, even if state law be held applicable, actions brought in the federal courts may still not be equivalent to enforcement of a right created by the state. There is a distinct possibility—or at least a very tenable argument—that although state law is applicable, the section still creates a federal right, i.e., the right to sue and be sued, and that the Bernhardt decision is therefore inapplicable. Indeed, Justice Frankfurter gave implied recognition to this fact when he stated in his concurring opinion that "furthermore, because the [Arbitration] Act is not here applicable, I abstain from any consideration of the scope of its provisions in cases which are in federal courts on a jurisdictional basis other than diversity of citizenship."

But if these hypertechnical distinctions are to be of any utility, they must be worked out in an atmosphere most conducive to the enforcement of arbitration agreements in collective contracts. Furthermore, the task must be accomplished in compliance with the expressions of Justice Douglas as to uniformity. If the Supreme Court should arrive at a definitive interpretation of the Arbitration Act by which all agreements will be enforceable, and if both state and federal courts can entertain suits on breaches of collective agreements, then there is the likelihood that the result of the litigation will depend upon the forum chosen.


41. 350 U.S. at 203. (Emphasis added.)
42. See note 104 infra.
43. Allied with this argument is that presented by Judge Magruder in Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85 (1st Cir. 1956), cert. granted, 25 U.S.L. Week 3094 (U.S. Oct. 9, 1956) (No. 276). He states that decisions since Guarantee Trust Co. v. York, 326 U.S. 99 (1945), give some indication that references to state law should be limited only to diversity situations. From this he concluded that in actions under § 301 references to state arbitration remedies are not required and the procedures employed by Judge Wyzanski in Textile Workers, CIO v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953), are still available. Judge Magruder's decision was followed in Retail, Wholesale & Dep't Store Union, CIO v. Buckeye Cotton Oil Co., 31 CCH Lab. Cas. ¶70179 (6th Cir. Aug. 22, 1956). It is interesting to note that in neither case was there an express statement as to whether state or federal law was to be generally controlling under § 301.
44. 350 U.S. at 208.
To achieve results that would not vary with the forum, three possible alternatives are available. The first is to hold that section 301 does not create a federal substantive right, that state law is applicable on all matters, and that the enforceability of arbitration agreements is dependent upon the law of the state. In consequence of such holding, arbitration clauses would be specifically enforced only in those few states which so provide. If this result were reached, it would almost certainly follow that state courts could entertain all actions on breaches of collective agreements. The second alternative is to hold that section 301 created a federal right, that arbitration agreements are enforceable under either section 301 or the Arbitration Act effectively construed, and that all actions for breach of collective bargaining contracts must be entertained exclusively by the federal courts. Without exclusive jurisdiction in the federal courts, there will always be the possibility that the outcome of litigation might depend on the courthouse where suit is brought—the exact situation condemned by Justice Douglas. The third alternative is to hold that although a suit may be maintained in the state court, any federal procedure which might affect the outcome of litigation would be controlling. This alternative would entail giving extensive effect to federal rules; and although exercising concurrent jurisdiction the states would be bound to follow federal procedures. Such a situation exists in actions brought under the Federal Employers Liability Act, and under the savings clause in admiralty jurisdiction. It has given rise to very fuzzy lines of distinction, lines which are ultimately resolvable only by the Supreme Court. And even under this solution, there

45. In virtually all states an agreement to arbitrate an existing dispute is specifically enforceable. However, the common law rule that agreements to arbitrate future disputes are unenforceable and entitle the injured party to recover only out-of-pocket damages has been abrogated in only fifteen states. And of these fifteen, only seven—California, Colorado, Connecticut, Louisiana, Massachusetts, New Jersey, and New York—permit enforcement when the breach occurs in a collective bargaining agreement. (Pennsylvania is probably included in this latter group, see Insurance Agents’ Union, AFL v. Prudential Ins. Co., 122 F. Supp. 859 (E.D. Pa. 1954).) Braden, Problems in Labor Arbitration, 13 Mo. L. Rev. 143 (1948). But see Flock, Methods Adopted by States for Settlement of Labor Disputes, Without Original Recourse to Courts, 34 Iowa L. Rev. 430 (1949) (an exhaustive analysis of state procedures suggesting that arbitration in one form or another is probably available in forty-six of the forty-eight states). A majority of states will enforce an arbitration award once it has been entered.

46. If state law is to control in all aspects, there is no possible reason why state courts cannot handle litigation concerning breaches of collective agreements. Only if federal procedures and/or substance is to be applied would there be cause and reason for federal pre-emption.

49. For FELA problems, compare Dice v. Akron, C. & Y.R.R., 342 U.S. 359 (1952), with Minneapolis & St. L.R.R. v. Bombolis, 241 U.S. 211 (1916). For problems under the savings clause, see Stevens, Erie R.R. v. Tompkins and the Uniform General Maritime Law, 64 Harv. L. Rev. 226 (1950); Note, 66 Harv. L. Rev. 315 (1952). Another area of application of state law under federal guidance may be found in Bindzycv v. Finucane, 342 U.S. 76 (1951), where it was held that even though a state court could issue
must first be a guiding federal rule on enforceability of arbitration agreements as well as on other procedural and substantive matters that might arise under the section.\(^5\) In the absence of such clearly defined rules, the state courts would always be in doubt should they be faced with a question that had not yet arisen in the federal courts.

If enforcement of arbitration agreements be the goal and if uniformity is to be achieved in arriving at this goal, the second alternative poses the simplest and most effective avenue. The first alternative would result in uniformity, but a type of uniformity predicated on forty-eight sovereign views—a uniformity of nonuniformity. The third alternative would raise countless problems; and one may justly speculate whether Congress in drafting section 301 could possibly have had such a solution, or group of potential solutions, in mind.

**The Norris-LaGuardia Act**

Yet, even if the Court should accept the second alternative and by judicial fiat hold that a federal substantive law had been created, there is still another obstacle in the path of uniform enforcement of arbitration clauses. This is the Norris-LaGuardia Act,\(^5\) which in sections 4 and 7 provides that no court of the United States shall have jurisdiction to issue a temporary restraining order or injunction “in any case involving or growing out of a labor dispute” unless extremely stringent requirements are fulfilled. So far, litigation involving application of the act to enforcement of arbitration clauses has shown a decided lack of unanimity. Thus, when equitable relief is sought by a union to enforce a contractual provision such as an arbitration clause, some courts have been inclined to grant relief on the theory that an injunction under these circumstances does not conflict with the purposes of the Norris-LaGuardia Act.\(^5\) On the other hand, courts have not granted such relief when an em-
ployer petitions to enforce an arbitration clause, basically because the necessary effect of such relief would, in many instances, be the enjoining of a strike. No court has granted equitable relief merely on an employer's petition alleging that the union is violating a no-strike clause; and a good many courts deny equitable relief in all circumstances irrespective of who petitions.

In many instances, those courts granting equitable relief justify their action on the broad ground that the Norris-LaGuardia Act was not intended, under any circumstances, to bar the enforcement of a voluntary agreement to arbitrate. Although this language would necessarily encompass an employer petition the effect of which would be the enjoining of a strike, no case has been decided on such facts. Other courts granting equitable relief do so on the theory that the Norris-LaGuardia Act was intended to bar injunctions against employees but not against employers. In these courts, equitable relief is avail-


54. But see Farrand Optical Co. v. Local 475, Int'l Union of Elec. Workers, AFL-CIO, 143 F. Supp. 527 (S.D.N.Y. 1956), where an injunction was issued against union picketing which was in violation of a strike settlement agreement. The rationale employed was that the circumstances did not set out a "labor dispute" within the meaning of the Norris-LaGuardia Act.


57. Although Judge Magruder in Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85 (1st Cir. 1956), cert. granted, 25 U.S.L. Week 3094 (U.S. Oct. 9, 1956) (No. 276), suggests that arbitration can be ordered without also enjoining a strike, he poses but leaves unanswered the problem of what effect such an order would have. Many arbitrators will decline to hear disputes while a strike is in progress. And the pressure upon an arbitrator who does act under strike circumstances is sufficient to raise grave doubts about the fairness of the proceeding itself.

able only if the union petitions, notwithstanding that the arbitration agreement
is and should be binding upon both parties. It should be pointed out that
equitable relief granted on this latter theory has little justification and smacks
of being quite inequitable, especially when viewed against section 13(b), which
suggests almost explicitly that an employer can be "a person or association . . .
participating in a labor dispute." 60

If a union strikes in breach of an express no-strike clause, the fact that
a union was the offending party does not make the controversy any less a
"labor dispute." 60 And conversely, if the employer should breach the contract
and refuse to pay wages or refuse to arbitrate, the labor dispute is equally ap-
parent. 61 The problem in this area turns not on whether there is a labor dispute
within the meaning of the act, but rather on whether the Congress of 1947,
as well as the Congress of 1932, intended the act to apply in all circumstances.
Taft-Hartley legislative history would seem to support the view that the
mandates of Norris-LaGuardia were to stand; 62 but it is questionable whether
this decision was made with a view to its effect upon the enforcement of
arbitration clauses. Further, the district courts are given jurisdiction over
"suits" in section 301, the scope of which could easily include both legal as
well as equitable relief. 63 And section 8 of the Norris-LaGuardia Act specific-
ally encourages arbitration by requiring that no relief may be granted until
"every reasonable effort to settle such dispute either by negotiation . . . or
voluntary arbitration" has been made.

59. See discussion of Norris-LaGuardia Act in Comment, 21 U. Chi. L. Rev. 251
(1954).

60. W. L. Mead, Inc. v. International Brotherhood of Teamsters, 217 F.2d 6 (1st Cir.
1954); Alcoa S.S. Co. v. McMahon, 81 F. Supp. 541 (S.D.N.Y. 1948), aff'd per curiam,
173 F.2d 567 (2d Cir. 1949); Sound Lumber Co. v. Lumber & Sawmill Workers, 122 F.
Supp. 925 (N.D. Cal. 1954). But see Farrand Optical Co. v. Local 475, Int'l Union of

1955); Duris v. Phelps Dodge Copper Products Corp., 87 F. Supp. 229 (D.N.J. 1949);

62. Legislative history, although not conclusive, is highly persuasive that the Norris-
LaGuardia Act was not to be removed. In the original House Bill, H.R. 3020, 80th Cong.,
1st Sess. § 302(e) (1947), the act was specifically made inapplicable. The Conference
Committee in its report, H.R. REP. No. 510, 80th Cong., 1st Sess. 66 (1947), revised the
bill and stated that Norris-LaGuardia was made inapplicable only in its provisions with
regard to rules of agency, superseded by § 301(e) of Taft-Hartley.

63. See Milk and Ice Cream Drivers' Union v. Gillespie Milk Products Corp., 203
F.2d 650 (6th Cir. 1953), where the word "suits" was construed broadly to encompass all
forms of relief. Legislative history on this point indicates very little. The original lan-
guage as passed by the House was: "Any action for or proceeding involving . . ." H.R.
3020, 80th Cong., 1st Sess. § 302(e) (1947). This was altered by the Senate in S. 1126,
80th Cong., 1st Sess. § 301(a) (1947) to read "suits." Apparently little emphasis was
placed on the strict definition of the terms, the drafters probably considering an express
reference to the Norris-LaGuardia Act as the decisive factor. See note 62 supra. But see
statement by Senator Smith, 93 Cong. Rec. 4282 (1947), to the effect that it is difficult to
take issue with a provision that "simply" provides that "whichever side is guilty of violat-
ing a contract . . . shall be responsible for damages."
It should be remembered that both the Norris-LaGuardia Act and the Arbitration Act were drafted and enacted when the economic conditions and the development of legal institutions were nowhere near their present status. The Norris-LaGuardia Act was intended to discourage labor injunctions, as the term was then understood. Whether it was also intended to interfere with the contractual obligations freely and voluntarily agreed upon by the parties is another question. The Arbitration Act was drafted in a period when federal common law was still flourishing and *Erie R.R. v. Tompkins* had not yet been decided. The interstate commerce clause was still being employed as a device to void state regulation of commerce. Section 3 was intended to apply in every federal action, and there were no problems, first because there were no conflicts concerning state substantive law, and second, because the commerce power had not been extended to its present limits. Thus, the histories behind the acts and their purposes at the time of enactment are clearly inapposite to the economic and industrial development of the present era. Either they should be amended by Congress, or the Court should interpret them in light of current conditions. To interpret them according to the purposes of a past generation is to retard if not resist the necessary and natural growth of our legal system.

Admittedly, lifting of the Norris-LaGuardia ban presents a difficult question when one realizes that an employer's suit to enforce a no-strike clause or even an arbitration clause will necessarily entail the issuance of a labor injunction. Furthermore, such a labor injunction, to have any degree of effect, must necessarily enjoin all strike activities regardless of whether the collective agreement contains a no-strike clause or merely an arbitration clause alone.

64. Section 3 of the act provides that "yellow dog" contracts and contracts against the public policy of the act shall be unenforceable. Thus, the act rendered unenforceable only those contracts which up until that time had prevented labor from negotiating with management on an equal footing. No other contracts were mentioned, which may mean that all other contracts were to remain enforceable.

However, one year later in the NIRA, c. 90, 48 Stat. 195 (1933), § 3 provided for the equitable enforcement of Codes of Fair Competition, which may indicate that had the previous Congress so intended, they could have made collective agreements enforceable as well. To this it may be answered that the acts were designed for completely dissimilar purposes. The Norris-LaGuardia Act, like the Wagner Act, was intended to foster organization rather than administer the collective agreement. More than likely the Congress of 1932, rather than meditating rationally about post-contract remedies, was concerned only with placing labor in a position where it could just execute the contract.

65. 304 U.S. 64 (1938).

66. At the time of the Arbitration Act, Congress originally provided in § 2 for the enforceability of arbitration agreements in "any contract or ... transaction involving commerce." The word "contract" was stricken because Congress undoubtedly felt that its power over commerce was not quite as broad as the words could possibly be interpreted to suggest. However, it is interesting to note that the Sixty-eighth Congress exercised to the fullest extent the power which it had at that time. This may be implied legislative authority for a similar extended exercise today. See S. Rep. No. 536, 68th Cong., 2d Sess. (1925); Zip Mfg. Co. v. Pep Mfg. Co., 44 F.2d 184 (D. Del. 1930).

67. See note 57 supra.
And even if this proposal be viewed as a return to the era of labor injunctions, this anathema of a generation past must be viewed from a present day perspective. Labor organization has now reached a stage of development where it should be as bound by its contractual obligations as is any ordinary individual. If in return for collective benefits the union agrees not to strike, it should be held to both the benefits and the burdens of the contract. If the parties agree to arbitrate, the agreement should be enforceable—and effectively—regardless upon whom the onus may fall. Should the employer breach the contract, the union has a two-fold remedy—either an unfair labor practice charge before the NLRB or a suit in the district court for breach of contract. A strike should not be among its remedies. The zealous protection and humanitarian immunization formerly accorded to organized labor were necessary and desirable in a period when labor-management equality was not a reality but an ever sought after goal. If the goal has been achieved and a contract has been freely and voluntarily made, the protection and immunization become anachronisms—unsuitable for current conditions and indeed hindrances to the development of responsible unionism.

**Federal v. State Substantive Law**

With the relevant federal statutes thus set forth, we may now examine the problem as to whether state or federal substantive law is or should be applied under section 301. The little legislative history there is seems to lend some small credence to the opinion of Justice Frankfurter that state law was intended to control. However, there is such a dearth of legislative history that one may arrive at either conclusion without doing violence to any expressed intentions of Congress. That Justice Frankfurter chose to accept the state law conclusion, although in many respects unfortunate, is surprising only in that he attempted to substantiate his conclusion on congressional intent. The congressional mandate from the Eightieth Congress, which in his words makes the statute "wholly jurisdictional" and not "something other than what it clearly appears to be," takes two forms: one, a statement by Senator Taft which never mentioned state law and from which only an inference suggestive of state law could be drawn; and two, statements by Senator

68. Discussions of legislative history may be found in Justice Frankfurter's decisions in *Westinghouse*. See also Wollett & Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445 (1955). There are many isolated statements and remarks which indicate that § 301 was intended to be jurisdictional, from which the conclusion can be drawn that Congress contemplated state law as governing. However, there is no affirmative statement—except in the minority reports and opposition statements—that state substantive law was intended to govern. See note 71 infra.

69. 348 U.S. at 453.

70. Id. at 454.

71. Id. at 449. In all these instances congressional statements indicate only that the primary purpose of § 301 was to render unions suable. From this it is inferred that Congress intended state law to govern. Yet, one wonders whether the majority even thought of which law was to govern. That they spoke in terms suggestive of a purpose
Pepper and Secretary of Labor Schwellenbach, men who were violently opposed to the provision and whose statements must be taken in conjunction with their outspoken desire to paint the particular provision in as poor a light as possible. Indeed, a Supreme Court Justice has on one occasion expressed a policy that rejects use of minority reports and statements in the interpretation of legislation.

This subject, as to what Congress intended under section 301, has been argued ad infinitum. In all instances, disagreement, doubt and speculation are the only apparent results. If no one is justifiably able to ascertain legislative intention, then the field is open to make an unfettered choice of law—always considering such choice with a view to effectuating the over-all design of Congress in enacting the particular act as well as similarly allied legislation. If the Supreme Court is required to exercise its choice, one alternative would not reshape or transform "the obvious design of Congress" any more than another. As a matter of fact, if federal law were to be the choice, the problems would be far less complex than in any hybrid system employing state law in a federally created cause of action. A hybrid interpretation would pose the virtually insoluble problems inherent in any system whereby state law is applied under a federal right. For a few examples, there would arise questions of whether under particular circumstances, state or federal law would be applicable; questions of whether and how much jurisdiction can be exercised by state courts; questions of whether a national collective agreement might not be subjected to the random and varied constructions of numerous state courts or state laws; questions of whether state courts might not be construing and applying federal legislation without according to the litigants a right of federal review; and questions concerning the probability of a difference in outcome depending upon the choice of forum.

Certainly the framers of section 301 realized that some federal law was to be applicable. They specifically discussed the applicability of the Norris-LaGuardia Act and decided that they would not exclude its curtailments as they had done in section 303. In an action by an employer for breach of a no-strike clause, the question now arises: will the equity rules of the state pre-primarily jurisdictional does not necessarily mean that they intended state law to govern. It merely means that they wanted unions suable irrespective of what law was to govern.

72. Id. at 448.

73. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (concurring opinion). "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."


75. 348 U.S. at 454.

76. Note 62 supra.
vail over those of the Norris-LaGuardia Act, or will the latter, with its mandate that "no Court of the United States will issue . . . ," control? The fallacy in holding that state law is controlling appears particularly manifest in an example of this nature. Its ultimate settlement will rest not upon what state law provides nor on constructions of little Norris-LaGuardia Acts, but rather on whether the federal act is interpreted or amended to permit such equitable enforcement.

The Arbitration Act presents a similar problem. One may speculate whether it or state law was intended to apply under section 301. There is no practical reason why the Arbitration Act should not occupy the same status as the Norris-LaGuardia Act; and if state law be held applicable, both acts should necessarily be deemed inapplicable, since to hold otherwise would result in a judgment that might vary with the choice of the forum. But to hold that the Norris-LaGuardia Act is inapplicable seems to fly in the face of legislative history; and yet, if forum shopping is to be avoided, the act must be so held. From this, it should be apparent that if state law be held applicable under section 301, the Supreme Court will either be required to lift the curtailments of the Norris-LaGuardia Act by rationalizing or ignoring the contrary indications of legislative history or else it will have to content itself with a forum shopping result. The latter alternative is clearly undesirable; and to embrace the former is to illustrate graphically the worthlessness of legislative history—the existence or nonexistence of which loomed so persuasive in the Westinghouse decision.

There are other relevant aspects of federal law in section 301 actions. Even though the state law of Pennsylvania allowed unions to sue on behalf of their members, under Westinghouse, the federal rules were apparently controlling. And in the case of a union suing after it has lost its representative capacity, the

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77. Apparently, if § 301 were intended to operate without regard to the Norris-LaGuardia Act, then assuming that state law is controlling, equitable remedies might be dependent on state law. Since no mention of the Arbitration Act appeared in 1947 legislative history, it is probable that enforceability of arbitration clauses will be dependent on state law with the additional problem of having to fall outside the curtailments of the federal Norris-LaGuardia Act, if such act is in fact applicable.

78. It is of interest to note that the Norris-LaGuardia Act, considered in light of the Erie doctrine, may be unconstitutional, since in a diversity case injunctive relief available in state courts may not be available in federal courts. Furthermore, if state law is applicable under § 301, the Norris-LaGuardia Act would have the same restrictive effect as it would in a diversity case, notwithstanding contrary provisions of state law. In this regard, see Comment, 20 U. Cnns. L. Rev. 304 (1953).

79. This of course assumes that if state law is held to govern in toto, there will be no federal pre-emption. If state law governs only in minor aspects, there can still be federal pre-emption.

80. A typical example would be in a state which permits injunctive relief against unions. If the Norris-LaGuardia Act continues as a bar, the employer can sue in the state court as was done in General Bldg. Contractors' Ass'n v. Local 542, Int'l Union of Operating Engineers, 370 Pa. 73, 87 A.2d 250 (1952).

subsequent NLRB determination or employee vote will control over the express words of the former collective agreement. The NLRB has established numerous rules concerning agreements which, of themselves, would not preclude an employee election and the negotiation of a new contract. Certainly, if one of these nonprecluding agreements were entered, a determination of its validity and whether it created an enforceable contract would most assuredly be dependent on the policies established by the Board rather than on state contract law.

Additionally, it has already been decided that a breach of contract is not per se an unfair labor practice, but if a breach does constitute such a practice, the federal courts should decline jurisdiction in favor of the exclusive jurisdiction of the NLRB. Thus, in virtually every breach of contract action, there is a jurisdictional fact which must be determined—whether the breach is also an unfair labor practice. If such a determination does not entail the application of federal law and if Congress could not have envisioned such application, then it is difficult to understand what, if anything, Congress could have envisioned.

On the basis of these conclusions, one point should be crystal clear—some federal law will be applicable in virtually every action brought under section 301. When the question of applicable law directly confronts the Su-

82. This problem is suggested but not discussed in Modine Mfg. Co. v. Grand Lodge Int'l Ass'n of Machinists, 216 F.2d 326 (6th Cir. 1954); John Hancock Mut. Life Ins. Co. v. United Office & Professional Workers, 93 F. Supp. 296 (D.N.J. 1950); Duris v. Phelps Dodge Copper Products Corp., 87 F. Supp. 229 (D.N.J. 1949). In this regard, see also Local 420, United Ass'n of Journeymen v. Carrier Corp., 130 F. Supp. 26 (E.D. Pa. 1955) (a post-Westinghouse decision where the judge, depending on NLRB decisions, ruled that the contract on which the union brought action was illegal. Could legality of the contract possibly be dependent upon state law?).

83. Such agreements may be found in General Elec. X-Ray Corp., 67 N.L.R.B. 997 (1946) (an agreement executed with notice of another union’s conflicting claim to bargaining rights); Ball Bros. Co., 54 N.L.R.B. 1512 (1944) (one covering only members of the union); Corn Products Refining Co., 52 N.L.R.B. 1324 (1943) (one not providing substantive terms of employment); Eicor, Inc., 46 N.L.R.B. 1035 (1943) (an agreement not reduced to writing).


85. United Elec. Workers v. General Elec. Co., 231 F.2d 259 (D.C. Cir. 1956); Anson v. Hiram Walker & Sons, Inc., 222 F.2d 100 (7th Cir. 1955); Born v. Laube, 213 F.2d 407 (9th Cir. 1954); Amazon Cotton Mill v. Textile Workers Union, 167 F.2d 183 (4th Cir. 1948); United Elec. Workers v. Worthington Corp., 136 F. Supp. 31 (D. Mass. 1955). But see Textile Workers Union v. Arista Mills Co., 193 F.2d 529, 534 (4th Cir. 1951), quoting from Reed v. Fawick Airflex Co., 86 F. Supp. 822, 823-24 (N.D. Ohio 1949), and suggesting that if a particular act is a breach of contract, “the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted... also an unfair labor practice.” Perhaps the fact that these cases are pre-Garner may be important. See note 92 infra and accompanying text. For if the district courts can determine contract breach actions which are also unfair labor practices, then we have almost the same possibility of two inconsistent results as exists under § 303.
Yet, even if the Supreme Court should accept the federal substantive law approach, a further obstacle obstructs the uniform enforcement of collective agreements. This obstacle takes the form of two courts enforcing the same rights. If state courts are permitted to entertain breach of contract actions, there is the probability that in a given case two different results can be reached depending on the forum that is chosen. Thus, irrespective of what will be the interpretation of the Norris-LaGuardia Act, the same procedural remedy may not be available in the state court. This difference in result will not be restricted to procedural remedies alone, since substantive principles of contract law also may vary from forum to forum. For example, the federal court might take the view that a strike in violation of a no-strike clause would not relieve an employer of his duties under the contract. With the same litigation, the state court might say that the union’s strike presented the employer with an option either to rescind the contract completely or to continue the contract and sue for damages.

And since there are two potential forums, either of the parties might be encouraged to initiate proceedings in the forum where from a personal viewpoint more desirable relief is available. In many instances there would be a race to the court by the parties in an attempt to preclude each other from action in the court where more, or less, effective relief could be had. A typical example might be where an employer institutes a policy of subcontracting, thereby precipitating a union strike in violation of a no-strike clause. The union might then maintain a breach of contract action in either a federal or state court on grounds that the employer’s subcontracting policy constituted not only a breach of contract, but a sufficient breach to relieve the union of its contractual duties. The employer, on the other hand, might sue merely on the no-strike-clause breach, setting up a defense on the subcontracting issue. Both the union and the employer would be able to bring suit, the first to file determining the forum. The variety of possible results leading to the ultimate choice of forum would depend on the laws of the particular state as well as the interpretations of federal legislation. And, if state courts are deemed to have jurisdiction, it is probable that no right of removal to the federal courts would exist.

86. Different remedies would be available unless the unlikely situation exists where the law that might affect the outcome of the litigation, whether state or federal, supersedes the other completely. See text at pp. 178-79.

87. This involves a collateral issue of what breaches by either side are sufficient to relieve the other side of its duties under the contract. It is necessarily outside the scope of this study.

88. Castle & Cooke Terminals, Ltd. v. Local 137, Int’l Longshoremen’s Union, 110
and there would be no federal grounds upon which to rest an appeal. Another possibility of difference in result could develop if enforcement of arbitration agreements were an available remedy under section 301. Under these circumstances, a stay pending arbitration would be granted in the federal courts even though similar relief is clearly unavailable in a majority of state courts.

Although these are problems of procedure, there are problems of constructions under the NLRA as well. Should an employer bring action against a union for breach of a no-strike clause, the district court may decline jurisdiction, relying on the questionable authority that a strike anytime before expiration of the contract is an unfair labor practice and therefore within the exclusive jurisdiction of the NLRB. On the other hand, a state court possibly without knowledge of the current controversy in this area might accept jurisdiction and, looking at its own laws, award injunctive relief. Such an award would be in direct conflict with the theory of Garner v. Local 776, Teamsters Union, AFL, that unfair labor practices are within the exclusive jurisdiction of the NLRB. Indeed, there seems to be no reason why an employer cannot include all the 8(b) provisions in a collective contract, thereby giving himself the right to petition any state court for damages and/or injunctive relief.


Another aspect of this problem is a union strike in breach of contract but resulting directly from an employer's unfair labor practice. If the litigation fell outside NLRB jurisdictional yardsticks, either federal or state courts would probably be available to both parties. But if the case fell within NLRB jurisdiction, the question would arise whether a state court would be required to decline jurisdiction when the unfair labor practice is presented by way of defense. Or might this not be similar to the rule in removal jurisdiction that the federal claim must be on the complaint and not by way of defense?

89. In this regard, see also text at notes 82 and 83 supra, on the question of elections superseding "voidable" collective agreements.

90. United Packinghouse Workers, CIO v. NLRB, 210 F.2d 325 (8th Cir. 1954), denying enforcement of 89 N.L.R.B. 310 (1950); Lion Oil Co. v. NLRB, 221 F.2d 231 (8th Cir. 1955), denying enforcement of 109 N.L.R.B. 680 (1954).

91. Even if the attorneys in the state court show that the industry is within NLRB jurisdictional requirements, it would be of more than passing interest to note how a judge in a local state circuit court would wrestle with the cases under § 8(d). Not only would there be a conflict between federal circuit courts and the NLRB, but the conflict would extend itself into an innumerable mass of local state tribunals exercising general jurisdiction.

For some of the problems that arise in the exclusive jurisdiction context, see Note, 65 Yale L.J. 1196 (1956).

92. 346 U.S. 485 (1953). Although an illegal strike should be enjoinable, it must be done consistently with the provisions of the Taft-Hartley Act, particularly the provisions of 8(d), which suggest that the strike could and would probably also be an unfair labor practice. It is submitted that § 8(d) must be modified so as to permit district courts to enjoin strikes in breach of no-strike clauses. See text at pp. 181-83 supra. Problems under 8(d), however, comprise a comprehensive study in their own right.

93. Even if federal courts were to have jurisdiction concurrent with the NLRB over these unfair labor practice-contract breach actions, at least under the suggested preemption solution there would be fewer courts interpreting federal legislation; and those courts that did would have the benefit of many years of experience with litigation under Taft-Hartley.
Notwithstanding the choice of law—unless either the state or federal courts accept *in toto* the substance and procedure of the other—the instant criticism is directed against any system where there are two possible forums in which to bring the same cause of action. To avoid the inherent disadvantages of such a system, there should be not only a federal substantive law, but also federal pre-emption of such causes of action. Federal jurisdiction would be dependent on whether the collective agreement was in an industry which affected commerce. Although this would produce a small degree of nonuniformity, it would appear only among those comparatively few and insignificant groups which fall outside the extensive scope of "industry affecting commerce."

Nevertheless, even if these suggestions are accepted, it is obvious, under *Westinghouse*, that federal pre-emption will only prevail when the employer sues or when the union sues to enforce qua-union rights. Those suits in which unions are suing to enforce rights flowing to individual employees must find their paths into state courts. Actually, there would be little utility in holding that Congress has pre-empted the field of contract breach actions, when the majority of cases, heretofore deemed litigable under section 301, are now excluded and in the exclusive jurisdiction of state courts. The power behind any argument of pre-emption lies in the advantages of complete uniformity.

It would be anamolous for the Court to hold that there is federal pre-emption, except for suits by unions on behalf of employees. There are as many federal questions involved in the latter suits as there are in a suit on a qua-union right; to hold pre-emption of one without the other poses an irreconcilable solution, if a solution it be at all. Hence, although the wisdom of *Westinghouse* as to representative suits will be discussed later, it is at this point presupposed that its command will be reversed by the Court or "amended" by Congress.

What is most important is that there would be a basis for Supreme Court review, whereas such a basis would probably not exist from a state court.


95. Uniformity may indeed not be a fact, considering the many conflicts between the various circuits. Nonetheless, sporadic conflict between ten circuits ultimately reconcilable by the Supreme Court still seems more desirable than forty-eight states adjudicating questions replete with federal ramifications and in virtually every instance possessing no characteristics warranting federal review.

96. Text at pp. 194-201 infra.
Without such remedial action, there is virtually no possibility of attaining the
objective of Justice Douglas in *Bernhardt*—that the outcome of litigation should
not be dependent upon a choice of forum.

**Constitutional Difficulties in Holding State Law Applicable**

Although creation and application of a federal substantive law would be the
most efficacious as well as the simplest solution, and although its acceptance
would involve no constitutional difficulties with the “arising under” clause,
nonetheless, since *Westinghouse*, it becomes necessary to consider constitu-
tional questions with a view to the application of state law. This considera-
tion is even more essential since Justice Frankfurter reached his conclusion con-
cerning union representative suits primarily and admittedly to avoid the con-
stitutional difficulties supposedly inherent in his earlier conclusion that state
substantive law was intended to govern.

Section 301 (b) confers capacity on labor unions “which represent em-
ployees in an industry affecting commerce” to sue or be sued in the district
courts of the United States. Section 301 (a) states that such suits may be
maintained in the district courts “without regard to the amount in controversy
and without regard to the citizenship of the parties.” It is this latter clause that
requires the creation of a federal right, since elimination of the diversity re-
quirement constitutionally demands that the suit be one “arising under the
laws . . . of the United States.”

Hence, the argument, that section 301 is of
dubious constitutional validity, for if Congress intended state law to govern,
the section would not embody a federal substantive right, and the contemplated
suit would not be one arising under the laws of the United States.

Since the decision in *Osborn v. Bank of the United States*, “arising under”
jurisdiction has been of uncertain dimensions. In *Osborn* such jurisdiction
involved a federally created right of action ostensibly controlled by the sub-
stantive law of the states. The problem then was not which law would apply,
but, granting the applicability of state law, whether the need for the federal
action was sufficient to justify constitutionally its creation. With Justice
Marshall it was not a semantic or theoretical determination of whether such
jurisdiction could be properly conferred. Rather, because of the pragmatic
considerations, he held that conferral of such jurisdiction was necessary to
protect a federally created instrumentality from diverse and possibly hostile

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97. Jurisdiction of the federal courts under the Constitution requires either diversity
of citizenship or a suit arising under the laws of the United States. U.S. Const. art. III,
§ 2.

98. 22 U.S. (9 Wheat.) 737 (1824).

99. Implicit in this problem is the recognized incongruity that there is a difference
between the scope given to the constitutional clause and that given to the statutory lan-
guage in the specialty clauses. *But see* Gully v. First Nat'l Bank, 299 U.S. 109 (1936), in
which Justice Cardozo seems to indicate that they both have only one meaning—a narrow
one. See Forrester, *supra* note 74.
state regulation. It was not primarily the federal creation that motivated Marshall, although this may have been employed as a rationale. He believed the design and intent of Congress in establishing the bank required that litigation concerning it be in courts sympathetic to the legislative intent and cognizant of the statutory purposes. Only with such a protecting judiciary could the congressional purpose be fully realized. This type of jurisdiction, in its many decades of development, has been termed "protective," for its importance does not lie necessarily in the enforcement of federal rights but in the protection of an area of regulation into which Congress has actively entered.

Certainly in section 301 Congress desired to make collective agreements enforceable. But it also desired to make them enforceable in those courts that were most familiar with and sympathetic to the prevailing legislative design, notwithstanding which law was to be applicable. That federal law in many instances had to be applicable, even if only indirectly, could not have escaped the eye of Congress. And, even if we assume that state courts would be equally as receptive to and familiar with the purposes of federal labor regulation, there is still no reason why Congress could not have insured against any possibility, no matter how remote. Perhaps Congress could have thought that state law might be properly employed to interpret matters of substance, but that state procedures were either inadequate or unsuitable to foster congressional purposes. Indeed, throughout this discussion there have been numerous examples suggestive of litigation wherein federal principles must be construed, interpreted and applied. Certainly the need to protect areas of federal labor regulation, now so extensive as to have in some cases been deemed exclusive, is just as sufficient a constitutional justification as was the justification of Justice Marshall in protecting the bank.

Yet, even if constitutionality cannot be predicated on this very real need for protection, there seems to be no reason why the provision cannot be considered to have incorporated state law into the federal statute. Thus, where a litigant seeks to enforce a collective agreement, he is enforcing a federal right which Congress has created by embodying state substantive law within its legislative direction. Indeed, there is no possible reason for any restriction on Congress' accepting the law of any one or a dozen states, incorporating

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100. Although the jurisdictional requirements for federally created instrumentalities have been severely restricted in recent years, 28 U.S.C. § 1349 (1952), it is not because the jurisdiction does not exist, but because there no longer is any critical need for protection.


102. Textile Workers Union, CIO v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953). See also Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216, 224 (1948). In the words of Justice Reed, concurring in Westinghouse, 348 U.S. at 463-64: "Whether the rules of substantive law applied by the federal courts are derived from federal or state sources is immaterial. The rules are truly federal, not state."
it into a federal statute and thereby creating a federal substantive right. That the law incorporated on this occasion was the law of each of the forty-eight states if and when a suit should be brought within its jurisdiction appears to be a distinction of form rather than substance. A uniform federal right was created, although its substantive vindication must rest ultimately on the laws of the particular state. There should be nothing to prevent the federal government, if it so wishes, from cooperating with the states instead of pre-empting the field entirely to itself; and such an effort at cooperation can and should be construed as the creation of a federal substantive right.

For all that can be derived from legislative history, section 301 may merely have been intended as a direction to district courts to treat unions as falling within the second clause of rule 17(b) of the Federal Rules of Civil Procedure. Congress seems to have so loosely employed the term "substantive right," that it may have intended section 301 to serve as the "substantive right existing under the . . . laws of the United States" described in rule 17(b). "Law" encompasses both substantive and procedural provisions; and "substantive right" may be considered merely as capacity to sue.

And if neither of these theories provides ample scope for upholding constitutionality, one may always resort to the rationale expounded by Justices Jackson, Black and Burton in National Mut. Ins. Co. v. Tidewater Transfer Co. It would not be at all strange to employ a wholly ambiguous precedent, if to do so would settle what is today a wholly ambiguous lack of precedent. Indeed, if legislation is to be interpreted with a view to upholding constitutionality, there is no reason why Congress, if it has substantial cause, cannot confer jurisdiction on the judiciary over any area in which the legislature may act.

103. If § 301 was intended to incorporate state substantive law as part of the federal substantive right, then, in many ways, one is able to understand why Congress added the words "without regard [etc.] . . . ." The provision expressly negating the amount in controversy would be explainable only if Congress had been contemplating 28 U.S.C. § 1331 (1952), which requires $3,000, rather than 28 U.S.C. § 1337 (1952) (actions arising under acts of Congress), which apparently does not require the jurisdictional amount. Furthermore, since state law applies primarily in diversity jurisdiction, a provision incorporating state law and attempting to ascribe to it characteristics of a federal substantive right would naturally seek to negate the very jurisdictional grounds upon which the application of state law is usually made to depend.

104. See TELLER, THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING § 398.11 (Supp. 1950). The federal government can adopt state substantive law in the enforcement of a federal right. That state law application will impair uniformity "seems to be a legislative problem rather than a question of constitutional law."

105. Cf. Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 1126, 80th Cong., 1st Sess. 16 (1947), reading in part: "There are no federal laws giving . . . an employer . . . any right of action against a union for any breach of contract. Thus, there is no 'substantive right' to enforce in order to make the union suable as such in federal courts." This statement indicates that either the committee did not understand what a substantive right was or that they were equating a substantive right to that same right existing in rule 17(b) "under the laws of the United States."


107. 337 U.S. 582 (1949).
whether or not it has ever entered the field.\textsuperscript{108} That it may soon enter the field or that it has already entered the field may lead Congress to the justifiable conclusion that creation of jurisdiction is a necessary and proper means to accomplish its purposes and ends. It is neither impractical nor contrary to precedent to hold that the jurisdiction of the judiciary is coextensive with the powers of Congress and that Congress can grant jurisdiction to the judiciary pursuant to any of its article I powers; and if upholding constitutionality be the objective, this is most assuredly a reasonable rationale.

Thus, various theories have been presented upon any one of which the constitutionality of section 301 could have been upheld. Yet, as mentioned earlier, any solution involving the application of state law necessarily leads to a complex of difficulties. That the court should look upon federal law as governing is clearly the most desirable solution. Possibly, however, there is one solution involving the nominal application of state law that does not interfere with the uniform evolution of federal law concerning collective bargaining.

This would entail a result comparable to that described by Justice Reed in his concurring opinion,\textsuperscript{109} to the effect that state law would govern except in cases of conflict, and then federal law would prevail. State law would be relied upon “because its application is not contrary to federal policy, but supplements and fulfills it.”\textsuperscript{110} Thus, in actions under section 301, federal procedures will always prevail. Federal substance will prevail except where the application of state substance will not interfere with the uniformity of federal decisions.\textsuperscript{111} Where there is a national five-state contract, for example, state substantive law may have to be disregarded in the interest of having the same contract construed similarly throughout the multistate plant system. But, where there is a single contract within one state and where application of state law will not interfere with national uniform objectives and interpretations, then the state law will govern.

It should be noted that even under this solution, although state law would be only nominally applicable, federal pre-emption would be desirable if not essential—first, because it would lend to uniformity in the construction of all federal labor regulation; and second, because it would devolve only on the

\textsuperscript{108} Although the bankruptcy power is explicit, Congress has still made state substantive law controlling in certain instances. And although the commerce power does not explicitly refer to labor relations, there is no possible justification for considering the bankruptcy power as any broader or any more of an integral part of our federal system than the power over labor relations. And, if the former jurisdiction, applying state law, is constitutional, it is impossible to understand why the latter should not be so also. Congressional power over commerce is more than sufficient to warrant and uphold the constitutionality of § 301.

\textsuperscript{109} 348 U.S. at 461.

\textsuperscript{110} Id. at 463.

\textsuperscript{111} Perhaps this may have been the method employed in Local 793, United Automobile Workers, CIO v. Auto Specialties Mfg. Co., 15 F.R.D. 261 (W.D. Mich. 1951), where questions concerning admissibility of evidence relating to circumstances surrounding execution of a contract were made dependent on state law.
federal courts to ascertain when there is or may be a conflict requiring the
application of federal law. In this way, only courts familiar with the general
legislation and receptive to its aims would determine when the objective of
uniformity required the application of federal law.

But if the Supreme Court should decide that section 301 has not pre-empted
the field, then somewhat desirable results could be attained only if there were
an appealable right to the Supreme Court. With such a right, state interpreta-
tions conflicting with acknowledged federal purposes and uniform federal appli-
cations could be modified or reversed. Although the processes of appeals and
possible reversals would generate endless litigation, it is a consequence which
is absolutely essential.

One might wonder why the issue of constitutionality and state substantive
law has been discussed at such length when the most desirable and least prob-
lematical solution would be the creation and application of federal substance.
Two reasons will be sufficient. First, when in future litigation the issue is
faced squarely, the problems should be discussed in the light of desirable solu-
tions rather than hypothetical constitutional difficulties; and second, Justice
Frankfurter reached his other conclusion—regarding suits by unions on be-
half of employees—because of his reluctance to discuss the constitutional diffi-
culties allegedly inherent in the section. Hence, if there are no constitutional
difficulties, his second conclusion is to a large extent unjustified.

Suits by Unions on Behalf of Their Members

Until the Westinghouse decision, no court entertaining section 301 litigation
had even suggested the possibility that suits by unions on behalf of their mem-
bers were excluded from the scope of the section. Indeed, there was some
thought that the section went so far as to permit individual suits by employees.

Although the vast majority of courts held that section 301 contemplated suits
only by employers and unions, the latter suits were never restricted along
the lines suggested in Westinghouse.

112. See note 3 supra and accompanying text.
113. Marranzano v. Riggs Nat'l Bank, 184 F.2d 349 (D.C. Cir. 1950), indicates that
an employee may sue individually for breach of a collective agreement. However, it appears
that this case arose under the general jurisdiction of the District of Columbia Court and
not under § 301. See analysis in Ketcher v. Sheet Metal Workers, 115 F. Supp. 802, 810
(E.D. Ark. 1953). The dictum in Isbrandtsen Co. v. Local 1291, Int'l Longshoremen's
Ass'n, 204 F.2d 495 (3d Cir. 1953), suggesting that individuals can sue under § 301 is
somewhat weakened because of its uncritical reliance on Marranzano v. Riggs Nat'l Bank,
supra.

A few courts have allowed joinder of individual plaintiffs without discussion. See Mer-
cury Oil Refining Co. v. Oil Workers Int'l Union, CIO, 187 F.2d 980 (10th Cir. 1951); Local 937, United Automobile Workers, CIO v. Royal Typewriter Co., 88 F. Supp. 669
(D. Conn. 1949).

114. United Protective Workers v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952);
Silverton v. Rich, 119 F. Supp. 434 (S.D. Cal. 1954), and cases collected therein. The
leading case on the proposition is Shatte v. International Alliance of Theatrical Stage
Seeking to avoid his self-imposed constitutional difficulties, Justice Frankfurter reached the conclusion that section 301 did not confer upon unions the right to sue in behalf of their members in the *Westinghouse* type of case. To avoid the constitutional questions and to lighten the load on an already overburdened judiciary, he read a procedural limitation into the statute that is even less justified in legislative history and certainly more unwarranted on the clear face of the statute than is his earlier conclusion that Congress did not intend to create a body of federal substantive law. A perfunctory perusal of section 301 will show that subsection (a) makes no distinction as to what provisions of a contract, if violated, may be enforced. It reads: "suits for violations of contract . . .," thereby implying that every and all violations were to be given recognition. Furthermore, subsection (b) specifically states that "any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents. . ." On the clear face of this provision, unions were given two rights: the right to sue as an entity, and the right to sue in behalf of its members. Clearly they were intended to be able to sue not only on their own behalf, but on behalf of their members as well.

Looking at the statute in its entirety, we note that section 8(d) speaks of bargaining about "wages, hours, and other terms and conditions of employment." Section 9(a) states that the union "shall be the exclusive representatives . . . for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." In section 2(5), Congress defined a union as "any organization . . . which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages . . . or other conditions of employment."

Employees, 84 F. Supp. 669 (S.D. Cal. 1949). The doctrine has been extended to the point that only formal signatory parties to the contract have been allowed standing under § 301. See Ketcher v. Sheet Metal Workers, 115 F. Supp. 802 (E.D. Ark. 1952), where individual employers in an employers' association could not sue because only the association, as a corporation, had signed the contract. See also Square D. Co. v. United Elec. Workers, 123 F. Supp. 776 (E.D. Mich. 1954).

115. Legislative history is obscure but interesting. Prior to *Westinghouse* the controversy was whether the words "between an employer and a labor organization" modified "suits" or "contracts." If the former, the right of action would be limited to employers and unions. If the latter, anyone affected by the breach could sue. The bill as passed by the Senate, H.R. 3020, 80th Cong., 1st Sess. § 301(a) (1947), read: "Suits for violations of contracts concluded as a result of collective bargaining between an employer . . ." The phrase beginning with "concluded" would seem to modify "contracts," which would suggest that any aggrieved individual could sue. The bill was put in its final form by the conference committee, H.R. REP. No. 510, 80th Cong., 1st Sess. § 301(a) (1947). There is some suggestion that no change was really effected by the change in words. 93 Cong. Rec. 6535 (1947).

Moreover, see the words of Senator Taft, 93 Cong. Rec. 4141 (1947): "The purpose of Title III is to give the employer and the employee the right to go to the federal court to bring a suit to enforce the terms of a collective agreement. . ." (Emphasis added.) It may be said with assurance that Senator Taft never envisioned that the employee—much less the union—was to be denied a cause of action such as was done in *Westinghouse*.
Thus the act provides not only that the labor organization will negotiate with the employer, but that it will be the exclusive representative for purposes of discussing grievances, disputes or conditions of employment generally. Indeed, the collective bargaining process requires that the union be the representative of the employees in all dealings whether with regard to negotiation of the contract or with regard to disputes arising during the contract's administration. To hold that the union can represent the employees during negotiations but cannot represent them—at least under section 301 116—in enforcing that which has been negotiated defies the very spirit of the collective bargaining function.117 It is a view which has no precedent in collective bargaining history and even less precedent in printed legislative history.

It is clear then that the Westinghouse decision denies unions and employees a right bestowed upon them by a simple and plain reading of the statute. A narrow reading of legislation may often be necessary to avoid constitutional difficulties. But if there is a choice between a narrow and a broad reading 118—both of which would be constitutional—the former should not prevail when it is less corroborated in legislative history, and less consonant with the over-all intention of Congress in enacting the particular legislation.119

What types of union activity has Westinghouse excluded from the operation of section 301? An arbitration clause may be among those benefits that run to the union rather than to the individual employees. The clause certainly is not something written into the individual contracts of hire. Yet, if the arbitration concerns an employer's failure to pay holiday wages, would not the union then be seeking to enforce a right on behalf of its members? That is, will the answer depend on the underlying issues in the arbitration petition, or will arbitration be enforced without piercing the union veil?120 Will there be a different

116. See text at p. 168 supra.
117. Hughes Tool Co., 104 N.L.R.B. 318 (1953). Justice Frankfurter, dissenting in Elgin J. & E. Ry. v. Burley, 327 U.S. 661, 676 (1946), said: "[T]he whole course and current of the railway trade union relationships imply that the interest of the individual member as to issues arising under the collective agreement is entrusted to his chosen representative." And although Justice Frankfurter suggests in Westinghouse that under substantive law unions should be able to sue, this does not lessen the effect of his decision that in view of limited federal jurisdiction unions cannot.
118. There seems little question that if the Supreme Court had decided that federal substantive law was created, it would not have reached its conclusion with regard to procedural standing.
119. One should recall the statements emanating from the Eightieth Congress that the Taft-Hartley Act was geared for equality and that at long last management and labor would be on an equal footing. Whatever may have been the sub rosa motives of the drafters, equality was written into the statute by Congress—only to be interpreted out of the statute by the Court.
interpretation when the union affirmatively seeks to enforce an arbitration clause than when it uses arbitration as a defense to obtain a stay of proceedings? What would be the result if the employer sued for breach of a no-strike clause, and the union interposed the defense that the employer refused to arbitrate the issue of the unjust discharge of five prominent union officials? If a union petition for a stay pending arbitration is granted, it is in effect the enforcement by the union of rights running to the individual employees. Indeed, this dilemma applies with equal force to a declaratory judgment action. Will the court be required to examine the purpose of the action before it can entertain jurisdiction?

An arbitrary decision by the employer to close its doors should be given the same treatment as if the company had violated its contractual obligation and refused to pay one day's holiday wages to its employees. And were the employer to lock his doors, basing his action on a construction of the contract, the union, possessed of an indisputable charge of lockout, could not sue for wages on behalf of its members because the lockout clause (under this very realistic although somewhat academic analysis) could have been intended for the exclusive benefit of the employees and not the union. If the union sought to sue on behalf of its members, it would then be restricted to the state courts, where its standing would be dependent on dubious and unsettled state rules of procedure. If section 301 has been construed so as to relegate unions to state rules of procedure, that spirit of equality supposedly underlying the Taft-Hartley amendments should relegate employers likewise. To subvert the union provisions and at the same time uphold the employer provisions manifests anything but a discovery of legislative intention—unless, of course, subconscious and unexpressed intentions were controlling considerations.

30 CCH Lab. Cas. ¶69952 (M.D. Tenn. May 2, 1956). Note the possible interpretations in Hoover Motor Express Co. v. Teamsters Union, AFL, 217 F.2d 49 (6th Cir. 1954), supra note 20.

121. See text at note 87, supra.

122. Litigation under § 301 where declaratory relief has been sought may be found in United Protective Workers v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952) (suit on behalf of one employee); AFL v. Western Union Tel. Co., 179 F.2d 535 (6th Cir. 1950) (suit on behalf of one employee); Durkin v. John Hancock Mut. Life Ins. Co., 11 F.R.D. 147 (S.D.N.Y. 1950) (dispute over check-off). It is doubtful that an action such as that in the first two cases could be maintained today.

123. In the Supreme Court argument of Westinghouse, appellants in their brief found 65 cases arising under § 301. Of these, 25 were brought by the employer, 2 by individuals, and 37 by unions. Of these 37, 30 involved what would today probably be considered as compensation flowing to the individual and therefore excluded from the act. Since Westinghouse, to the best of my knowledge, 20 cases have been litigated, 17 of which were initiated by unions. Of these 17, 7 were excluded because involving interests of individual employees: United Elec. Workers v. General Elec. Co., 231 F.2d 259 (D.C. Cir. 1956); International Ladies Garment Workers, AFL v. Jay-Ann Co., 228 F.2d 632 (5th Cir. 1956); United Steelworkers v. Pullman-Standard Car Mfg. Co., 37 L.R.R.M. 2696 (W.D. Pa. 1956); United Shoe Workers, CIO v. Milson Shoe Corp., 36 L.R.R.M. 2302 (D. Mass. 1955); Textile Workers Union, CIO v. Williamsport Textile Corp., 136 F. Supp.
Admittedly, vexatious problems arise if unions are to be permitted to sue on behalf of their members. For example, if a judgment be rendered against the employer in the federal court, what protection would he have against a subsequent action by an individual employee in the state court? It might be held that in this situation the issue would be res judicata. But what of the situation where the individual sues alone in the state court, and after judgment is rendered the union sues on behalf of all employees in either the state or federal court? Is the employer protected by paying the individual judgment if he may later be subjected to a representative suit by the union on the same cause of action?

Yet, under the Supreme Court's present solution and on the assumption that additional jurisdictional limitations will not be imposed, there are equally vexatious problems. If the union conducts its own health and welfare plan to which the employer makes periodic contributions, a breach of the employer's duty could give rise to a union suit in the federal court as well as an employee suit in the state court—each tribunal ascribing a different purpose to the plan. Again, if the union sues to enforce an arbitration clause in the federal court and an employee sues in a state court, inconsistent judgments can arise depending on whether the courts hold that the clause was intended for the union or for the individual members. Will a federal decision be given controlling effect, or will there be a possibility of inconsistent results should

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124. International Ladies Garment Workers v. Jay-Ann Corp., supra note 123, in which payments pursuant to a health and welfare plan were deemed to be individual compensation and not within the jurisdiction of the federal courts.
the federal decision postdate that in the state? Or will this matter also depend on state law, so that the benefits of arbitration clauses will flow to different parties depending on the state court rule?\[122\] Further, in those states which do not require exhaustion of grievance and arbitration machinery as a condition precedent to suit,\[126\] can an individual bring suit while the union is still pursuing its contractual remedies? Will the decision of the arbitrator in favor of the employees have any effect if and when an opposite decision has already been handed down by the court? If the union should choose for tactical reasons not to arbitrate and should a state court say that an arbitration clause is intended for the benefit of employees, one individual might sue to enforce the clause notwithstanding that his union for ample reason thinks the case wholly unsuitable for arbitration.

Again, if state court actions by individuals are permitted,\[127\] the union not being a requisite party as it is under section 9(a), there is every possibility that a judgment can be rendered which is inconsistent with the terms of the collective agreement and thereby in violation of the spirit if not the letter of the J. I. Case Co. decision.\[128\] And what effect will a suit by one individual, who may not have pursued his rights with sufficient vigor, have on subsequent suits by other individuals or by the union?

Indeed, in those states that do not permit unincorporated associations to sue or be sued in their own names—and this includes a good many states\[129\]—the employees may be more desirous of enforcing their individual rights through the courts rather than through machinery set up in an arbitration clause, especially when the clause is probably unenforceable. And when the clause is unenforceable,\[130\] both management and the union might be more desirous of going to court rather than setting up and following the time-consuming steps of grievance and arbitration machinery. Even when there has been arbitration

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125. If state law is controlling and should the suit arise first in the federal courts, the problem will present itself as to what law should be applied, or what in fact is the law, if the state has not already handled similar litigation. This is a familiar but perplexing problem under Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

126. See Dufour v. Continental So. Lines, Inc., 219 Miss. 296, 68 So. 2d 489 (1953); Latter v. Holsum Bread Co., 108 Utah 354, 160 P.2d 421 (1945). These cases, however, appear to be in the minority.

127. One court, and there may be many more, did not permit a class suit for breach of contract on grounds that each employee had his own seniority rights and was therefore entitled to a different amount of damages. See Masetta v. National Bronze & Aluminum Foundry Co., 159 Ohio St. 306, 112 N.E.2d 15 (1953). Since in Westinghouse 4000 employees were suing for daily wages, which in many cases would be slightly different, each individual would probably be required to maintain an individual suit. Considering the expense and time necessary for litigation, there would be, in effect, a wrong without a remedy.


130. See note 45 supra.
and the award is enforceable, will the union be able to sue or will each individual be required to sue on his own behalf? In states where exhaustion of arbitration machinery is not required, the union, if it has standing, or the employees individually may elect to dispense with the grievance machinery and go directly to court. Indeed, where there is the possibility of an individual suit that may be inconsistent with the arbitrator's decision, incentive might be given both parties to litigate rather than arbitrate the disputed issue. Such a state of affairs obviously does not foster the interests of collective responsibility or the individual settlement of internal disputes.

Thus the problem does not lie wholly in whether unions can sue on behalf of their members. Rather, as long as union members retain their common law rights to sue as individuals, and as long as state courts are available to vindicate such rights, there will be numerous insoluble problems irrespective of what view is taken as to the federal right of unions to sue on behalf of their members. For uniformity of judicial decisions dealing with federal labor regulations, for the protection of union and employee rights under the collective agreement, and for the elimination of forty-eight different procedural requirements now prevailing under state law, the issue should be resolved by requiring all employees when covered under a collective agreement to pursue their rights exclusively through the union—the union being permitted and required to maintain a federal suit under section 301. The employee should not be permitted to bring an individual suit for breach of the collective agreement, notwithstanding that the union does not act as rapidly or with as much enthusiasm as would the employee suing as an individual.

To protect against egregious discrimination by the union against an individual or groups of individuals, there is always section 9(a) (permitting individual grievances),

131. Ibid.

132. This problem was suggested but not discussed in United Elec. Workers v. Worthington Corp., 136 F. Supp. 31 (D. Mass. 1955). The union sued for enforcement of an arbitration award. The court dismissed the action because the complaint alleged an unfair labor practice. However, even though the award was for the benefit of only two employees, the court did not discuss Westinghouse and seemed to indicate that the award would have been enforced if the union had framed its complaint only in contract breach terminology.

133. Note 126 supra.

134. The possibility of two different suits by the employer also exists. See International Plainfield Motor Co. v. Local 343, Int'l Union, United Automobile Workers, CIO, 123 F. Supp. 683 (D.N.J. 1954), where it was held that an employer suit against individual members in the state court did not constitute a waiver of his suit against the union in the federal court.

135. For a complete discussion of this problem, see Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956).

136. Perhaps suits involving discrimination where both the union and the employer manifest opposition to the employee can be entertained in the state courts on a breach of trust basis. Although this would often entail interpretation of union duties under federal law and hence result in a sacrifice of uniformity, it is probably a small and justified sacrifice when considered along with expediency, limited jurisdiction of the NLRB, and proxi-
section 8(b)(2), or a federal action such as that maintained in *Steele v. Louis-
ville & N.R.R.*

One of the major purposes underlying the collective bargaining process is
the establishment of democratic and responsible unions. A means to this end
is the annual election of union officers provided for in virtually every union
constitution. If the employees feel aggrieved by their union's choice not to sue
or even arbitrate, it is always within their power to elect new officers and to
enact new policies.*

Intelligent self-responsibility in any democratic organization rests not upon each individual pursuing his own interests to the exclusion
of all others, but rather on the balance between individual desires and the collective welfare. The individual should have some protection against arbitrary
and discriminatory oppression. On the other hand, collective welfare will be
most adequately fostered by preventing the individual from activity which of
its very nature will interfere with and possibly even subvert the aims and
decisions of his elected representatives. Placing discretion of arbitration and
suit wholly in the union would promote a sense of responsibility in the union
officers as well as active and mature interests on the part of the employees in
their union organization. This, it is suggested, would be a proper, effective and
equitable solution to a most perplexing problem.

**Conclusion**

Whether arbitration clauses will be enforced with greater or lesser frequency
under *Westinghouse* is something which cannot be predicted and which will
only be answered by decisions in the Supreme Court or acts of Congress. As
the situation appears today, the enforceability of arbitration clauses might well
be dependent upon the inadequate and diverse laws of the several states. And,
even if the Supreme Court should decide that a federal substantive law has been
created, arbitration clauses will still be subjected to the speculative interpreta-
tions and rigorous requirements of the Arbitration and Norris-LaGuardia Acts.
Should the bar or obstacles posed by these statutes be lifted by the Supreme
Court or Congress, a prayer for affirmative relief or a petition for a stay pend-
ing arbitration may still be limited by the ambiguous and wholly unnecessary
decision that section 301 does not permit suits by unions on behalf of their
members.

This study can offer little advice to an attorney contemplating action under
section 301. The only reasonable alternative therefore is to offer advice as to

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137. 323 U.S. 192 (1944).

138. For a discussion of an alternative means for effecting the wishes of the majority,
see Comment, 66 *Yale L.J.* 223 (1956).
how the shambles of section 301 may still be salvaged so as to accomplish effectively its original design. To this end, five suggestions are presented:

(1) Either by decision of the Supreme Court or by act of Congress a federal substantive law should be explicitly created in the application and administration of section 301.

(2) An act of Congress should provide for the affirmative enforcement of all arbitration clauses in collective agreements and for the granting of a stay pending arbitration whenever the dispute is arbitrable under the contract. Such an act should specifically amend by reference the Norris-LaGuardia Act, so that in any case involving breach of a collective agreement, injunctive relief may be obtained by the injured party. Such an act should also provide that when the particular breach complained of constitutes evidence of an unfair labor practice within the exclusive jurisdiction of the NLRB, the court must then either decline jurisdiction or grant a stay pending an immediate determination of jurisdiction by the Board. In addition, the act should either repeal the Arbitration Act or render it inapplicable to any case involving a collective bargaining agreement.

(3) If Congress does not enact legislation of this nature, then the Supreme Court should accept the doctrine that section 301 generates of its own force the remedy of specific performance of arbitration agreements and collective bargaining contracts. Such remedy should be available without regard either to the Arbitration Act or Norris-LaGuardia Act.

(4) The Supreme Court should reverse its holding in Westinghouse or Congress should enact legislation in order to allow unions to sue on behalf of their members for any breaches of the collective bargaining agreement. In a smaller and more modest manner, if such result is not obtained, the Supreme Court should decide that arbitration agreements, irrespective of the subject matter of the dispute, are qua-union rights and may be enforced by the bargaining representative. Further, the employee should be denied his common law right to sue individually for breach of the collective agreement; and such cause of action should inure wholly to the union organization.

(5) For the purpose of effectuating national policy and to accomplish uniformity in the area of labor management relations, the federal courts should be the exclusive tribunals for all litigation involving breaches of collective bargaining contracts. Only in this way can an effective system be established to provide available relief that will be adequate, uniform and not dependent upon a calculated choice of forums.
CONTRIBUTOR TO THIS ISSUE