Damages for Unfair Labor Practices

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an interest of the United States, it is highly improbable that a different rule would obtain with respect to a state's marketable title act.

V. CONCLUSION

The Indiana Marketable Title Act does not guarantee a commercially marketable title to a prospective grantor who has complied with the act, nor was it intended to do so. The purpose of the act is simply to extinguish unreserved pre-root of title interests which may cloud a title, and its policy is to permit the settlement of opposing post-root of title interests outside its scope.

The enactment of effective marketable title legislation is of great significance for Indiana. "No other remedial legislation which has been enacted or proposed in recent years for the improvement of conveyancing offers as much as the [M]arketable [T]itle [A]ct. It may be regarded as the keystone in the arch which constitutes the structure of a modernized system of conveyancing." Depending primarily on two factors, marketable title legislation may become as important in property law as recording acts. The first of these is its success in facilitating land title transactions through less expensive abstracting, more efficient title examination, and increased title security resulting from more uniform title practices. If the Marketable Title Act achieves these objectives, it will become an indispensable part of our property law. The second and most important factor in determining the role of marketable title legislation in Indiana is the extent to which it is accepted and used by practicing attorneys. Although problems necessitating changes in the act may arise, they will be of no serious consequence if the bar continues to realize the value of marketable title legislation while making the necessary changes. However, if the bar reacts to these problems by throwing out the baby with the bath water before the legislation has had a chance to prove itself, inefficient conveyancing practices will continue.

DAMAGES FOR UNFAIR LABOR PRACTICES

The National Labor Relations Board cannot award damages for unfair labor practices, and the state and federal courts are severely limited

73. SIMES & TAYLOR, supra note 1, at 3.

in encroaching on labor policy by awarding damages for actions which are within the domain of the NLRB. Traditional tort remedies, such as interference with the contractual relation, now generally are pre-empted by the Taft-Hartley Act if the interference involves an unfair labor practice. Consequently, an employer may recoup losses resulting from what Congress has determined to be unfair labor practices only through (1) exceptions to the pre-emption doctrine or (2) specific congressional provision, such as section 303 of the Labor Management Relations Act. Section 303 provides:

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 303 clearly was meant to deter engaging in 8(b)(4) violations. Section 8(b)(4) proscribes activities involving secondary boycotts, work assignment disputes, or hot cargo agreements. Also proscribed is the encouragement of employees or the coercion of an employer in an effort to force an employer to recognize a union when another is presently certified or to force an employer or self-employed person to join any labor or employer organization. These are the only unfair labor practices for which Congress has specifically given the courts jurisdiction to grant damages.

I. Rights and Liabilities Under 303

**Damages Necessary for a Right of Action**

By its language section 303(b) creates a right of action in "(w)hoever shall be injured in his business or property." The term "(w)hoever"
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is construed broadly by the courts to include anyone directly involved in the labor dispute. This construction is consistent with the section's legislative history and recognizes Congress' awareness of the broad coverage of that phrase. In accord with this construction, the Supreme Court rejected the argument that the statutory phrase should be construed so narrowly as to protect only the neutral employer in secondary boycott cases and gave a right of action to the primary employer.

However, when an employer not directly involved in the labor controversy seeks damages for loss of profits, the courts have given the phrase a narrow construction. For example, in Osborne Mining Co. v. United Mine Workers, a sales agent of Osborne, the employer who was the primary object of the union activities, sought to collect damages for loss of commissions it would have earned had Osborne filled its orders. The court ruled these damages to be incidental and too remote for recovery, even though some of the union’s activities were directed at the sales agent and a breach of the contractual relationship between the agency and Osborne was forced by the union.

Courts in Osborne and at least one other case have suggested that section 303 is analogous to the damage provisions of the Sherman Anti-Trust Act. Under the Sherman Act only those persons who are injured directly may recover. This narrow construction of "injury" in anti-trust cases results from a policy of limiting those entitled to recover the treble damages penalty. This policy is consistent with the doctrine that penal statutes are to be interpreted strictly, but section 303 is not a penal statute. It is remedial and the policy considerations of the anti-trust statutes are not applicable.

6. Id. at 643-44. See, e.g., United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940).
8. Id. at 729.
12. The courts feel that only those who are the direct object of the anti-trust violation should be entitled to the recovery of this penalty. Snow Crest Beverage v. Recipe Foods, 147 F. Supp. 907 (D. Mass. 1956); Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1952). They have been "reluctant to allow those who were not in direct competition with the defendant to have a private action even though, as a matter of logic, their losses were foreseeable." Snow Crest Beverage v. Recipe Foods at 909.
13. Prussian v. United States, 282 U.S. 675 (1931). "The term 'penal' has been given wide and varying meaning. It may apply to 'fines and imprisonments' only, it may extend to certain 'civil' recoveries." 2 SUTHERLAND, STATUTORY CONSTRUCTION § 3303 (3rd ed. Horack 1943).
More analogous to actions under section 303 than the actions under anti-trust statutes are suits for intentional interference with a contractual relationship. Under the standards applied to determine who has a right of action for intentional interference with a contract, a plaintiff not directly involved in a labor dispute, such as a sales agent of the employer, could recover if knowledge by the union of the plaintiff's interest is established and the union acts with the desire and purpose of interfering with the contract.\textsuperscript{14} If this standard had been applied in \textit{Osborne} the sales agency likely would have recovered, since the union had knowledge of the sales agent's contract and intentionally prevented its fulfillment. It seems that the courts, in determining whether damage is sufficiently direct to permit recovery, should look to the union's knowledge of the damage it will cause by engaging in an unfair labor practice prohibited by 8(b)(4).

Even now an exception to the narrow construction rule of no damages for parties not directly involved in the labor dispute is made for an employer whose physical property is damaged, and such an employer need not be a party to the labor dispute. For example, in \textit{Gilchrest v. United Mine Workers}\textsuperscript{15} the plaintiff merely had leased coal mines and mining equipment to the party who was the direct object of the union's illegal activities. Plaintiff's facilities were damaged by dynamiting, and the coal business, from which it received a percentage, was disrupted and destroyed. It recovered both for the damage to physical property and for the loss of business resulting from equipment damage.

It is difficult to see why contract losses should not be treated in the same way as physical property damage. In \textit{Osborne}, the selling agent's right to commissions on a contract it had secured was just as much the object of union attack as was the physical property in \textit{Gilchrest}. The union did everything it could to prevent the selling agent from collecting on his contract right, and that right was just as valuable to him as the physical property was to Gilchrest. Neither party had a dispute with the union, and both the contract right and the mining equipment were destroyed because the union had committed unfair labor practices against third persons. A distinction between destruction of physical property and destruction of intangible property as a grounds for granting recovery under 303 seems false, and it seems that a right of recovery should be permitted to all who suffer damage that proximately results from the union's illegal activities. The legislative history of the act, which indicates that

\textsuperscript{14} See, \textit{e.g.}, \textsc{Prosser}, \textsc{Torts}, § 106 (2d ed. 1955).
\textsuperscript{15} 290 F.2d 36 (6th Cir. 1961), \textit{cert. denied}, 368 U.S. 875 (1961). See also, \textsc{Local 978, United Bhd. of Carpenters v. Markwell}, 305 F.2d 38, 47 (8th Cir. 1962).
section 303 is to be a further deterrent to the proscribed illegal activity, is consistent with and supports the adoption of the proposition that no limitation other than that provided by common law should be imposed.

Employees seeking to recover damages under section 303 for contract interference are met with arguments fundamentally different from those invoked against the employer. The right of an employee to recover contract interference damages was recognized in *Wells v. International Union of Operating Engineers* in which the court was asked whether it had jurisdiction to hear the claims of individual plaintiffs, who were employees of the employer principally involved in the secondary boycott. After finding that one of the purposes of the illegal activity was to secure a breach of contract by the employer with the plaintiff employees, the court held that employees were within the language of the act permitting "(w)hoever" is injured to sue. However, cases where an employee's job was terminated because his employer was forced by an unfair labor practice to shut down must be distinguished from cases where an employee was discharged by the employer because of the insistence of his union. In *Seely v. Brotherhood of Painters* the court held that a union which forced an employer to discharge an employee did not violate that part of the secondary boycott proscription which makes it an unfair labor practice for a labor organization to force any person to cease doing business with another person. Although there appeared to be an 8(b)(2) violation, the employee was not permitted to recover because there was no secondary boycott. *Seely* was misinterpreted in the recent case of *Gibbs v. United Mine Workers*. *Gibbs* was an employee of both a mine operator and an independent contractor which hauled coal from the mine. The court awarded damages to Gibbs under 303 for the loss of his trucking contract because the facts constituted a secondary boycott, but an award of damages for the loss of his employment contract was set aside on the ground that forcing the discharge of Gibbs was not a secondary boycott. *Seely* cannot serve as authority for the *Gibbs* decision, however. In *Gibbs* there definitely was a secondary boycott without regard to the termination of Gibbs's employment, but in *Seely* there was no secondary boycott whatever and consequently no basis for a cause of action under 303. The *Seely* case is authority only for the proposition that the discharge of an

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17. 303 F.2d 73 (6th Cir. 1962).
18. 308 F.2d 52, 60 (5th Cir. 1962).
20. Damages were sustained for the loss of the employment contract as a result of the common-law conspiracy, though denied under § 303. *Id.* at 878. It seems that such an award should have been prevented by the pre-emption doctrine laid down in *Garmon*. See text accompanying note 61 infra.
employee does not constitute a secondary boycott and clearly is not authority for precluding recovery by an employee where there was in fact a secondary boycott. Gibbs should have been allowed to recover under section 303 for the loss of both the trucking contract and the employment.

Once it is established that the plaintiff, be he employer or employee, has a right of recovery the general rules for determining the amount of damages apply. When the legal and illegal activities are so interrelated as to be inseparable, the plaintiff may total the union's efforts and recover for the full damage. Lost profits are recoverable where there is an established and stable business and they can be proved with reasonable certainty, even though they are approximate; but they may not be determined by mere speculation or guess. It therefore has been held that if the employer-plaintiff has established a profitable business with his customers or lessor, his future profits are not speculative and may be recovered if there is a desire on the part of both parties to continue the business relationship.
Liability of Possible Defendants

Liability for section 303 violations must be considered from three principal viewpoints: (1) member and officer responsibility, (2) local union responsibility, and (3) international union responsibility. Though the three overlap, each involves problems different from the others.

Generally speaking, judgments are not enforceable against individual union members or officers or their assets but only against a labor organization. However, state jurisdiction to enforce criminal penalties and common-law tort liabilities against individuals has not been abolished by the federal labor acts but only limited to instances where there was violence or criminal conduct. In Curto v. International Longshoremen's Union, the jury awarded damages against the international and local unions but absolved the individual defendants from liability even though their activity involved violence. Since a union is liable for the unlawful acts of its officers and agents when they have committed some tortious act under a state law which has not been pre-empted, it appears that there was an inconsistency in the verdict, especially in light of the fact that the agents appeared to be conspiring with the union to tortiously destroy their employer's goods. It seems the officers should have been held liable under state common law, but since the union's liability is determined under federal statute, it was the prerogative of the jury to be inconsistent.

Liability of the local union, whether it be for a 303 violation or an unfair labor practice charge, must be based on something other than mis-

27. Section 301, which is applicable to § 303 suits, provides that a labor organization may be sued as an entity "in the courts of the United States." Suit therefore should be brought under the union's name and not the name of its president. Schinella v. Iron Workers, 149 F. Supp. 5 (E.D.N.Y. 1957). Most plaintiffs, however, join several members of the local, sometimes using fictitious names, as representatives of the organization as a whole. This has the effect of bringing all members of the union into court. When an action involves both state and federal charges, the joinder of members may be required. Bunch v. Launius, 222 Ark. 760, 262 S.W.2d 461 (1953). Joinder of members is permissible in 303 cases even though the union is not considered by the state a jural entity subject to suit. Flame Coal Co. v. UMW, 303 F.2d 39 (6th Cir. 1962), cert. denied, 371 U.S. 891 (1963). See also Labor Management Relations Act § 301(b), 61 Stat. 156 (1947), 29 U.S.C. § 185(b) (1958).


31. Id. at 881.
conduct by the rank and file. The union will be held responsible only for the unlawful acts of its agents acting in the course and scope of their employment; and consequently, the problems common to agency law will arise here. If a union puts or lets an officer or other representative get into a position where he can and does cause conduct proscribed by the act, the union is liable. The union agent or representative who is responsible for the unlawful activity may be either a union officer named as an individual defendant or officials or agents who are not made parties to the suit. The liability of labor organizations for unlawful acts of officers or members is covered by section 6 of the Norris-LaGuardia Act, which requires clear proof of responsibility to establish liability. Although there once was case law requiring actual instigation, participation, or ratification to establish responsibility, which gov-


Even though such unlawful acts were not actually authorized or were forbidden, union responsibility may be found if the acts were done by the agent in the scope of his employment and in furtherance of the union's business. Curto v. International Longshoremen's Union, 107 F. Supp. 805 (D.Ore. 1952), aff'd 226 F.2d 875 (9th Cir. 1955) (jury instruction). Custom or traditional practice of a particular union may be considered in determining scope of employment. United Bhd. of Carpenters v. United States, 330 U.S. 395, 410 (1947). Actual authorization is not necessary. Lewis v. Benedict Coal Corp., 259 F.2d 346, 352 (6th Cir. 1958), cert. granted, 359 U.S. 905 (1959), modified, 361 U.S. 459 (1960).


36. Section 6 of the Norris-LaGuardia Act provides:

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.


38. Section 301(e) provides:

For purposes of this section in determining whether any person is acting as the "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually author-
erns recovery under section 303(b), has been construed to restore the general rules of agency, including the doctrine of apparent authority, to 303(b) actions.

While union constitutions usually give the international sufficient control over a local to establish a principal-agent relationship, this power of control is not by itself sufficient to make the international liable. The courts normally discuss the liability of the international in agency terms; but it appears that liability really is not determined by a strict application of common-law agency doctrines but rather by application of a standard specially suited to the equities of labor cases. In the opinions considered, contrary to agency doctrine, courts apparently would not make an international union liable for what it might have done but only for what it did. It appears that the international must itself be involved in the illegal activity. In one type of case the international’s involvement takes the form of direction, encouragement, or assistance of illegal activity. In another more common type of case representatives of the international actually participate in the illegal activity.


39. Section 303(b) provides: “whoever is injured . . . may sue . . . subject to the limitations and provisions of section 301. . . .”

40. International Longshoremen’s Union v. Hawaiian Pineapple Co., 226 F.2d 875 (9th Cir. 1955). In his analysis of the bill Senator Taft had the following to say: “It is true that this definition [in § 301(e)] was written to avoid the construction which the Supreme Court in the recent case of United States v. United Bhd. of Carpenters placed upon section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. . . . The conferees agreed that the ordinary law of agency should apply to union representatives. . . . Union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair labor practice . . . even though no formal action has been taken by the union to authorize or approve such conduct.” 93 Cong. Rec. 7001 (1947).


Statutory Provisions

State and federal courts are given concurrent jurisdiction to enforce, by way of damages, the rights created by section 303.46 In federal district courts, the jurisdictional requirements are relaxed to a great extent because one of the announced objectives of 303 was the elimination of obstacles to suits.47 The act specifically grants jurisdiction to federal courts to hear 303 suits "without respect to the amount in controversy."48 The only limitation to this is the de minimis doctrine,49 which goes also to the effect on interstate commerce. For example, in Groneman v. International Bhd. of Elec. Workers,50 the activities involved were primarily local, and out of state purchases caused an interruption of interstate commerce only to the extent of $6,000. The district court was held to be without jurisdiction because the impact was so "trifling and microscopic" that Congress did not intend to regulate such acts. The National Labor Relations Act seeks to prevent disturbances to interstate commerce resulting from strikes and labor disputes induced or likely to be induced resulting from strikes and labor disputes induced or likely to be induced


47. International Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237, 244 (1952). Assuming a violation of § 8(b) (4) is alleged, the one jurisdictional requirement, whether the suit be brought in a federal or state court, is that interstate commerce be affected. The courts have held that in enacting the National Labor Relations Act Congress meant to reach the full extent of its powers under the commerce clause. Guss v. Utah Labor Board, 353 U.S. 1, 3 (1957). The commerce power extends to the protection of interstate commerce from interference by activities which are wholly intra-state. NLRB v. Fainblatt, 306 U.S. 601, 605 (1938). Thus, businesses which, by themselves, would be purely local, might be considered to affect interstate commerce when all of their purchases or sales out of state are considered together. It is immaterial that the out of state purchase or sale does not relate to the labor dispute, because "the interstate commerce intended to be protected by the Act is not confined to the particular job but extends to all of the activities of the employer." Cone Bros. Contracting Co. v. Bricklayers Union, 263 F.2d 297, 299 (5th Cir. 1959), cert. denied, 360 U.S. 904 (1959).


50. 177 F.2d 995, 997 (10th Cir. 1949).
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by unfair labor practices. In light of this objective, activities which are primarily local and which involve the purchase of only a small percentage of out-of-state materials are not within the scope of section 303.

The consensus appears to be that diversity of citizenship is not necessary to the jurisdiction of the federal courts under section 303. However, one court has held to the contrary. In Lach v. Engineers Local, the contention was made and accepted that diversity is required, the ruling being based on a reading of 303 in conjunction with section 301(a) of the Labor Management Relations Act, which deals with suits for violation of contracts between unions and employers. Section 301 confers jurisdiction "without respect to the amount in controversy or without regard to the citizenship of the parties," while Section 303 provides that an action may be brought in district court "without regard to the amount in controversy." Thus by negative implication, section 303 requires the existence of diversity of citizenship. United Brick Workers v. Deena Artware points out, however, that section 303 "creates new substantive rights and liabilities together with an appropriate remedy for their enforcement, and that an action under it clearly arises under a law of the United States within the meaning of section 1331, Title 28 of U. S. Code, and under an Act of Congress regulating commerce within the meaning of section 1337, Title 28 U. S. Code, both of which sections grant jurisdiction to the district courts without requiring diversity of citizenship." Both section 301 and section 303 were enacted by the same Congress at the same time—1947—and there is no apparent reason why there should be different jurisdiction requirements for the two remedies.

State Court Jurisdiction of Tort Damage Claims

Generally, jurisdiction of the National Labor Relations Board supersedes that of state courts in cases in which the activity that is the subject matter of the litigation is arguably within section 7 or 8 of the National Labor Relations Act. Exceptions to this rule are made, however; and

54. 198 F.2d 637 (6th Cir. 1952).
55. See, e.g., La Cross Tel. Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949); Schatte v. International Alliance, 182 F.2d 158 (9th Cir. 1950); California Ass'n of Employers v. Building & Constr. Trades Council, 178 F.2d 175 (9th Cir. 1949); Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183 (4th Cir. 1948). These cases hold that the federal and state courts are generally pre-empted by the NLRB.
56. In addition to § 303, the Labor Management Relations Act (Taft-Hartley Act) § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), permits an employer or a labor organization to prosecute a breach of the collective bargaining contract, even though the
chief among them is the recognition of state court jurisdiction in matters involving the maintenance of domestic peace. The fact that a violation of domestic peace also constitutes an unfair labor practice does not prohibit the state courts from granting relief. Until recently, however, it was not clear that a threat to domestic peace was necessary to circumvent the pre-emption doctrine. It was thought that perhaps all state common law and statutory rights were enforceable without regard to the presence or absence of violence. Whether courts could act in non-violent tort cases was clarified somewhat in the Supreme Court case of San Diego Bldg. Trades Council v. Garmon. In that case, a California court had held that the union activities which constituted unfair labor practices were a tort under state law and the general tort provisions of the California Civil Code. The United States Supreme Court granted certiorari to determine whether the California court had jurisdiction to award damages arising out of peaceful union activity. The California decision was reversed, and state court jurisdiction was denied. To minimize areas of potential conflict, the jurisdiction of state courts was limited to cases in which the conduct constituting the unfair practices involved intimidation and threats of violence. States must have power to pre-

breach concededly involves an unfair labor practice. Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962). Because § 301 does not involve the collection of damages solely for the commission of an unfair labor practice, it does not come within the scope of this paper.


58. See, e.g., White Oak Coal Co. v. UMW, 318 F.2d 591 (6th Cir. 1963), cert. denied, 375 U.S. 966 (1964); UMW v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir. 1959), cert. denied, 359 U.S. 1013 (1959).


60. In United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1953), the Supreme Court allowed a state court to award compensatory and punitive damages where the union had used violence and intimidated officers and employees of the plaintiff to achieve a prohibited objective. Such activity on the part of the union had required the abandonment of all the employer's projects in the area. This union conduct constituted a violation of section 8(b) (1) (A) of the Labor Management Relations Act and was a ground for state common-law tort action based on violence and intimidation. The Supreme Court allowed recovery on the common-law tort theory, reasoning that "the state remedy had no effective counterpart." The Court said, "For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse of compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct." Id. at 664. Though the facts of the Laburnum case show violent activity on the part of the union, the ruling of the case implied that all state common-law liabilities can be prosecuted by the employer without regard to the interest of the state in the "maintenance of domestic peace." See generally Wollett, State Power to Regulate Labor Relations, 33 WASH. L. REV. 364 (1958).


62. Id. at 239.


serve domestic tranquility when there is no clear congressional mandate to the contrary. The National Labor Relations Act does not take away this state power over violent conduct since the act does not provide an adequate substitute. The procedures outlined in the act are not designed to control violence or to provide effective sanctions such as punitive damages. On the other hand, when there is no violence, there is no compelling need for state action.

In addition, Congress provided a compensatory remedy in section 303 for unfair labor practices arising under section 8(b)(4) because it was felt that secondary boycotts and jurisdictional strikes were particularly indefensible forms of union activity. It is consistent with the national labor policy, which is designed to promote free collective bargaining, that damages should be allowed only for the unfair labor practices specified in section 303. Allowing the courts to go outside 303 and compensate for losses due to other unfair labor practices might hamper free collective bargaining and would therefore present at least a potential conflict with the national labor relations policy. This potential conflict is not present when there is violence, as Congress has not dealt with violence in a way adequate to protect the state's interest. In sum, a state or federal court may adjudicate activities involving an unfair labor practice and grant damages when the activities are so violent that the state must act to preserve its domestic peace. Otherwise, in labor matters covered by the National Labor Relations Act a court may only act where Congress specifically has permitted.

**Joinder of 303 and State Causes of Action**

Because only actual damages sustained may be recovered under 303 for an 8(b)(4) violation, the award of punitive damages or grant of an injunction must be based on violation of a joined state statutory or common law aimed at preserving the public order. The state action is separate from the federal right, but joinder of the two is allowed.

If jurisdiction is based on diversity of citizenship, there is no ques-
tion that the federal court could hear and determine the joined common-law liability, if not pre-empted, and possibly grant punitive damages. However, when there is no diversity of citizenship, a question arises as to the propriety of joining a federal and non-federal cause of action. Recently, in *United Mine Workers v. Meadow Creek Coal Co.*, it was held that when there is a section 303 question presented, the federal and non-federal questions are based on substantially the same facts, and the federal and non-federal claims are only different grounds for a single cause of action based on wrongful interference with the plaintiff's business, the district court has jurisdiction of the non-federal claim. In sum, when a federal question is substantially presented, the federal court may take jurisdiction and resolve all questions of law based on the facts which raise the federal question. This is an example of ancillary jurisdiction.

Under this rule, when the section 303 claim is dismissed on its merits, the district court may still retain jurisdiction of the joined state cause of action if the federal question is not plainly lacking in substance. However, when the plaintiff's asserted federal cause of action is frivolous or insubstantial the district court cannot retain the case and administer the cause of action under the common law of the state. Unless there is jurisdiction based on diversity of citizenship the plaintiff must institute a new suit in the state court.

In almost all instances where a state cause of action has been joined with the section 303 suit, there has been violence involved and joinder was for the purpose of obtaining punitive damages. But in the recent case of *Morton v. Local 20, Teamsters Union*, an award of punitive damages was based on a secondary boycott made unlawful by state law. The court of appeals ruled that such punitive damages were permissible even though there was no violence involved. It was contended that a distinction should be made between violent and non-violent activity, but the court refused to recognize the distinction. The Supreme Court reversed

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71. *Id.* at 59.
72. *Id.* at 60. In *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191 (1909), where the trial court acquired jurisdiction by reason of the federal questions involved, the court “had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.”
75. *Ibid.* The lower court's decision also was based on the case of *Hurn v. Oursler*, 289 U.S. 238 (1933), where the Supreme Court ruled that a federal court may dispose of all issues arising from the facts constituting the federal action. But in that case there was no conflict with federal law as is presented by the state statute in *Morton* and
because the court of appeals overlooked the point that a joinder of a state cause of action based on violence is permitted because the state could have acted when there was violence and not otherwise. There is no reason to prohibit joinder of such a cause of action. However, when the state cause of action does not involve the maintenance of domestic peace but is based solely on a state secondary boycott statute, there is ample reason for disallowing the joinder and precluding the recovery of punitive damages. By allowing such a joinder and, consequently, punitive damages, a conflict with national labor relations policy is presented. The national labor policy, as interpreted by the Supreme Court, is to grant exclusive jurisdiction of labor matters to the National Labor Relations Board with the courts acting only in such instances and manner as the act specifically states. Section 8(b)(4) violations present one instance where courts may act, but the courts are limited to awarding actual damages sustained. Congress could have made provisions for treble damages, as in anti-trust violations, but it was not so inclined. To have allowed joinder of the state cause of action in Morton, with no overpowering reason such as the exercise of the state’s power to maintain peace, would have circumvented the national labor policy of allowing only actual damages. The state secondary boycott statute is not necessary to the protection of citizens or maintenance of domestic peace and is merely a disruption of national labor policy.

To sum up, a state common-law or statutory cause of action may be joined with the section 303 suit in order to obtain the advantage of punitive damages or an injunction. Such a joinder should, however, be limited to only those instances where the state common law or statutory cause of action could have been brought in the state court. Otherwise, states will be able to circumvent the national labor policy by allowing punitive damages where none were intended.

**Removal to Federal Courts**

Theoretically there should be no advantage to removing a 303 case. Except when domestic peace is involved, both state and federal courts are precluded from awarding punitive damages by the wording of section 303

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76. But see Blair v. UMW, 211 F. Supp. 786 (E.D. Ky. 1962), where punitive damages were recovered when the complaint alleged a *purposeful invasion* of the plaintiff’s rights based upon a § 303 violation and an interference with contractual rights under the common law of the state.

which expressly limits damages to those actually sustained. With the same exception, federal courts also are precluded by the Norris-LaGuardia Act from granting an injunction; and a state court injunction is preempted by the National Labor Relations Act. State courts, however, are inclined to be more liberal in allowing injunctions and injunctions pendente lite, because they seem either less likely to find interstate commerce affected or more likely to overlook or rule against pre-emption. State courts also will permit a state cause of action to be joined for the purpose of punitive damages more readily than will federal courts. Because of this state court liberality, removal to a federal court takes on some importance.

When a case is removed because damages and an injunction are sought, and the damage claim is later deleted by amendment, thereby removing any basis for jurisdiction, a question arises as to whether a motion for remand should be granted. If the amount recoverable is reduced below the jurisdictional minimum after institution of a suit in a federal court, the court's jurisdiction is not ousted. However, one court which

78. Section 303(a) expressly provides that the aggrieved party "shall recover the damages by him sustained and the cost of the suit." Punitive damages are awarded upon the theory of punishment rather than compensation. See, e.g., Washington Gas Light Co. v. Lansden, 172 U.S. 534 (1899). The clear intention of Congress is only to compensate the plaintiff for the amount of actual damages and no more. UMW v. Patton, 211 F.2d 742 (4th Cir. 1954). The act does not contemplate injunctive relief. "It is clear that Congress did not intend, either by expression or by necessary implication, that private parties should have a right to injunctive relief even as an ancillary remedy in the permitted suit for damages." Longshoreman's Union v. Sunset Line & Twine Co., 77 F. Supp. 119 (N.D. Calif. 1948).


80. State and federal courts may enjoin activity which also constitutes an unfair labor practice only when such activity is of a violent nature. UAW v. Wisconsin Employment Relations Board, 351 U.S. 266 (1956).

81. See e.g., Lion Oil Co. v. Marsh, 229 Ark. 678, 249 S.W.2d 509 (1952).


83. The language of 303(b) reasonably lends itself to the interpretation that Congress intended that a party be permitted to prosecute his suit to its final adjudication in a state court if he so chooses. The act expressly gives the plaintiff a choice of where he may sue. An interpretation which would permit removal solely because a federal question was involved would make the words "or in any other court of competent jurisdiction" meaningless. In such a case, the real choice of forum would be left to the defendant, a result which, arguably, Congress did not intend. Considering these factors, and the fact that district courts, in general, interpret jurisdictional requirements strictly, removal of 303 cases in the future might be denied except in diversity cases. When damages or damages and an injunction are sought in state court there is no question as to the appropriateness of removal, assuming a 303 case can be removed. Douglas v. Electric Workers, 136 F. Supp. 68 (W.D. Mich. 1955). When only an injunction is sought in the state court, however, problems arise as to the propriety of removal to a federal court. See Note, Employer Remedies for Breach of No-Strike Clauses, 39 Ind. L.J. 387, 391 (1964), for a discussion of removal of 301 suits.

had held that jurisdiction was not ousted later seemed to doubt this holding in a similar situation, saying, "the action is not one of which the federal district courts have original jurisdiction, (and) . . . the cause should accordingly have been remanded to the (state court)."

The case, however, involved only an injunction, and remand has been denied where damages and an injunction were joined. It would seem that denial of remand is the logical course. Since federal law pre-empts state court injunctions, a remand would be meaningless, for the state court would have to dismiss under the Garmon doctrine. However, it is submitted that if a case is brought in the state court and only an injunction is sought, it should not be removed but be left to the state court to dismiss if dismissal is required.

III. MISCELLANEOUS PROBLEMS

Service of Process

Service of summons or other legal process upon an officer or agent of a labor organization, in his official capacity, constitutes service upon the labor organization. When the international and local are separate, autonomous entities, service of summons upon a local officer is not service upon the international unless the international grants the officer the authority to hold himself out as an official organizer, representative, or agent of the international. Local unions or state and area conferences are autonomous if they have "constitutional authority to govern themselves and to transact business through their own duly elected agents and representatives." This is true even though the international may exercise very strong control over its locals. However, courts have held that service of process on a regional director is valid service on an "agent" of the union "in his capacity as such," within the meaning of section 301(d). Service may also be made upon the secretary of state in the state in

85. Direct Transit Lines v. Local 406, Teamsters Union, 199 F.2d 89 (6th Cir. 1952).
89. Such was implied in Direct Transit Lines v. Local 406, Teamsters Union, 219 F.2d 699, 700 (6th Cir. 1955).
90. UMW v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir. 1959), cert. denied, 359 U.S. 1013 (1959); Claycraft Co. v. UMW, 204 F.2d 600 (6th Cir. 1953).
91. Morgan Drive Away, Inc. v. Teamsters Union, 268 F.2d 871, 875 (7th Cir. 1959); Farnsworth & Chambers Co. v. Sheet Metal Workers, 125 F. Supp. 830 (D. N.M. 1954). Cf. Claycraft Co. v. UMW, 204 F.2d 600 (6th Cir. 1953), which was distinguished because the district union was found to have no constitution and was wholly dependent on the international.
which the dispute took place, if the state statute so provides.92

Statutes of Limitations

Assuming the union is found liable under 303, a question may arise concerning what, if any, statute of limitations to apply. The court in *Fischbach & Moore, Inc. v. International Union of Operating Engineers*,93 a 301 case, denied the union's motion to dismiss under a three-year California statute of limitations.94 This reasoning is based on the logic of *Textile Workers v. Lincoln Mills*,95 which construes section 301 to allow a uniform federal interpretation of contract terms to be applied rather than the numerous meanings that would be applied in different jurisdictions. The *Fischbach* court concluded that only the equitable doctrine of laches would be applicable.

By so holding, the California district court did not follow the line of cases which have applied state statutes of limitations to other federal statutes, including the Fair Labor Standards Act,96 the Civil Rights Act,97 and anti-trust statutes.98 "The adoption of state statutes seems so well established that the failure to designate a limitation period has been said to indicate a congressional intention that state law be applied."99 The federal court's decision to apply federal substantive law in *Lincoln Mills* for the interpretation of contract terms in a 301 case was necessary to foster a uniform national labor policy. But such is not the case when only a procedural question such as the applicable statute of limitations is involved. An instance could be conceived where a state statute of limitation "unreasonably interferes with federal regulation of interstate commerce,"100 but such does not seem to be the case in *Fischbach*. The only relevant question the district court should consider is which state statute

94. Id. at 913. Cf. Kipheas Baking Co. v. Strauss, 218 F. Supp. 696 (E.D. N.Y. 1963) where the court stated: "and it is well settled that state statutes cannot limit the jurisdiction or restrict the procedure of the federal courts. . . ."
97. See, e.g., Smith v. Cremins, 308 F.2d 187, 189 (9th Cir. 1962).
98. See, e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); Englander Motors, Inc. v. Ford Motor Co., 293 F.2d 802 (6th Cir. 1961).
of limitation provision to apply and not whether such provision applies.\textsuperscript{101} In labor disputes, where officers are elected or changed frequently and union members involved are likely to shift to new jobs, it is imperative that some statute of limitations apply rather than the equitable doctrine of laches.\textsuperscript{102}

\textit{Relation Between Court and Board}

Although the conduct which gives rise to a section 303 action is, by definition, an unfair labor practice, the Supreme Court ruled in \textit{International Longshoremen's Union v. Juneau Spruce Corp.}\textsuperscript{103} that a Board determination of an unfair labor practice is not a condition precedent to relief under section 303. The two actions are entirely independent, with the court and the NLRB each entitled to make its own decision upon the evidence before it. Such was the case in \textit{Juneau Spruce}, where the court affirmed a ruling by the NLRB that no unfair labor practice existed and, at the same time and on facts arising out of the same labor dispute, affirmed a contrary ruling by a district court in a 303 suit. Both the NLRB and the district court decisions were supported by substantial evidence on the whole record of their respective hearings.\textsuperscript{104} It seems

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\begin{quote}
Since the Congress embodied in § 301 . . . no statute of limitations, under the established federal rule the appropriate state statute would in any event be applied. The District Court's error was not in applying the Kentucky statute but, in our opinion, . . . in applying the one year limitation covering injuries to the person rather than the 15 year limitation applicable to contracts."
\end{quote}

See also Smith v. Cremins, 308 F.2d 187, 189 (9th Cir. 1962), where the court in interpreting the federal Civil Rights Act, which had no statute of limitations, stated:
\begin{quote}
In determining which period of limitations to apply to an action under a particular federal statute the court accepts the state's interpretation of its own statute of limitation, but determines for itself the nature of the right conferred by the federal statute.
\end{quote}

\textsuperscript{102} See generally, \textit{Note}, 76 HARV. L. REV. 1306 (1963), for a discussion criticizing the Fischbach decision.

\textsuperscript{103} 342 U.S. 237 (1952).


By determining that the Board and court are completely independent, special problems arise with regard to § 8(b)(4)(D) violations:

Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4) to a judgment for damages. The fact that the two sections have an identity of language and yet two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of § 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. . . . The fact that the Board must first attempt to resolve the dispute by means of a § 10(k) determination before it can move under § 10(b) and (c) for a cease and desist order is only a limitation on administrative power, as is the provision in § 10(k)
reasonable that the *Juneau Spruce* interpretation should prevail over an interpretation requiring a Board determination first because a union is more likely to refrain from unlawful activity if it is faced with the possibility of having to win both in the courts and before the NLRB rather than just before the Board. This reasoning is consistent with the purpose behind the enactment of section 303: to provide a further deterrent to the proscribed activity. Proponents of a uniform national labor policy will advocate that the Board always should decide the labor dispute initially. The fear that a union will be caught in conflicting interpretations of what constitutes a section 303 violation is, however, unfounded. Decisional law developed under section 8(b)(4) has been held to be controlling in a private suit under section 303 since the violation of one is theoretically a violation of the other. Also, a court in a section 303 case may, if it so chooses, adopt by reference findings made by the NLRB in the parallel unfair labor practice "cease and desist" case. No objection can be made to this adoption so long as the findings are not treated as res judicata. In any event, the examiner's findings are some evidence of fact, and weight should be given to them. Besides being tied together by decisional authority and prior findings in a pending case, the courts will dismiss a complaint in which the defendant union had taken a position diametrically opposed to the one which they persistently urged before the Board.

There is one instance where the court must rely upon a prior Board determination. A violation of section 8(b)(4)(c) speaks in terms of forcing recognition of a union where another has already been certified. Recovery under 303 in the courts therefore depends entirely upon the Board's determination of certification. The issuance and revocation of

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105. *Local 978, United Bhd. of Carpenters v. Markwell*, 305 F.2d 38, 40 (8th Cir. 1962).
109. Section 8(b)(4)(C) provides that it is unlawful to induce or encourage employees or to threaten or coerce employers where the object thereof is "forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of § 9." 61 Stat. 140 (1947), 29 U.S.C. § 158(b) (1958).
certifications of labor unions is entrusted expressly and solely to the NLRB\textsuperscript{111} and rightly so with the uncertainty in future dealings that would result when an employer had to deal with a union which was both certified and uncertified.\textsuperscript{112}

The Supreme Court, in considering whether courts should be permitted to determine a union's certification, ruled that certification was for the Board.\textsuperscript{113} Reference was made to the Board's administrative prudence in furthering industrial stability in such matters and the fact that decertifying a defunct\textsuperscript{114} or employer-dominated\textsuperscript{115} union is highly discretionary. In any event, the language of 8(b)(4)(c) clearly requires that any changes in certification must first comply with the provisions of section 9,\textsuperscript{116} which sets forth Board procedure for determining whether a union should be certified or not.

\textbf{OBSERVATIONS ON CONDOMINIUMS IN INDIANA: THE HORIZONTAL PROPERTY ACT OF 1963}

As residential land-use in urban areas becomes more intensive to house an expanding population, fewer families will be able to enjoy advantages of home ownership. The ownership in fee of individual apartments in larger structures, as made possible in condominiums,\textsuperscript{1} offers a potential solution to that problem. The condominium is a new concept

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  \item \textsuperscript{111} Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 404 (1940). It was stated by the court in Pepper & Polter, Inc. v. Local 977, Automobile Workers Union, 103 F. Supp. 684, 688 (S.D. N.Y. 1952), that: "It must be presumed that the orderly procedure contemplated by § 9 was intended as the sole and exclusive method of decertification." So a union cannot even voluntarily self-decertify itself. See Allis-Chalmers Mfg. Co., 62 N.L.R.B. 995, 996 (1945).
  \item \textsuperscript{112} E.g., a certified union does not have to endure an election for a period of time whereas an uncertified union is always subject to a management petition for an election. 61 Stat. 143 (1947), 29 U.S.C. § 159(c) (1958).
  \item \textsuperscript{113} Brooks v. NLRB, 348 U.S. 96, 103-04 (1954).
  \item \textsuperscript{114} Even though a certified union no longer functions nor represents a majority of the employees, the certification still retains "vitality to protect an employer against a raiding rival whose objective is forcing or requiring such employer to recognize or bargain with it as the representative of his employees." Such remains the case until certification is effectively extinguished by Board action. Parks v. Atlanta Printing Pressmen Union, 243 F.2d 284 (5th Cir. 1957).
  \item \textsuperscript{115} Lewis Food Co. v. Los Angeles Meat Drivers, 159 F. Supp. 763 (S.D. Calif. 1958).
\end{itemize}