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Settling South Prairie: Section 301 Jurisdiction over Representational Issues

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Settling *South Prairie*: Section 301 Jurisdiction Over Representational Issues

The labor strife of the early twentieth century necessitated congressional intervention if the benefits of an industrialized society were to be fully realized. Congress sought to exert federal control over labor relations[1] with the enactment of the National Labor Relations Act[2] (hereinafter the Wagner Act) in 1935. The Wagner Act legitimized collective bargaining and recognized the validity of collective bargaining agreements.[3] The National Labor Relations Board (NLRB) was created to administer the Wagner Act provisions.[4]

The NLRB processes, however, were viewed as inadequate by Congress.[5] Twelve years after initial passage, Congress amended the Wagner Act by enacting the Labor Management Relations Act,[6] (hereinafter the Taft-Hartley Act). Section 301[7] of the Taft-Hartley Act gives federal courts original jurisdiction over violations of collective bargaining agreements.[8] The provision for NLRB jurisdiction over representational issues[9] by the Wagner Act and the original jurisdiction given the courts under section 301 of the Taft-Hartley Act[10] created situations of conflicting jurisdiction. This author will explore the situations in which a breach of contract suit pursuant to section 301 presents the court with representational issues. In particular, section 301 suits alleging the single employer doctrine,[11] a unit accretion[12] or a stipulated unit[13] require the court initially to decide representational issues.[14]

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1. C. BUFFORD, BUFFORD ON THE WAGNER ACT §11, at 31 (1941).
2. Pub. L. No. 74-198, 49 Stat. 449, codified in 29 U.S.C. §§151-190 (as amended) (1982).
3. C. Bufford, *supra* note 1, §3, at 5-7.
4. *Id.* §§217-19, at 590-91.
5. *See* S. REP. No. 105, 80th Cong., 1st Sess. 15, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 421 (1948).
6. Pub. L. No. 80-101, 61 Stat. 136, codified in 29 U.S.C. §§151-191 (as amended) (1982).
7. 29 U.S.C. §185(a) (1982).
8. *Id.* Contract actions between private parties otherwise would have to meet the requirements of $10,000 in controversy and diversity of citizenship. *See* 28 U.S.C. §1332.
9. Representational issues include the determination of the group of employees that will comprise the bargaining unit. 29 U.S.C. §159(b). Moreover, when an established bargaining unit seeks to include additional job classifications within the bargaining unit, the accretion to the bargaining unit must be appropriate. Boire v. Int'l Bhd. of Teamsters, 479 F.2d 778, 796-97 (5th Cir. 1973).
10. *See infra* notes 66-101 and accompanying text.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

The United States Supreme Court has denied the federal courts jurisdiction to make initial determinations of representation issues if these issues are presented on appeal from an NLRB determination.[15] The Supreme Court, however, has not directly addressed the power of federal courts to make these determinations pursuant to section 301 jurisdiction.[16] The circuit courts of appeal have addressed the issue and are in conflict.[17]

The purpose of this comment is to establish that federal courts may determine representational issues when these issues arise pursuant to section 301 jurisdiction. Therefore, the conflicting decisions of the circuit courts of appeal will be analyzed. This analysis will reveal that the source of disagreement is focused upon whether section 9 of the Wagner Act, which allocates the determination of representational issues to the NLRB, makes the jurisdiction of the NLRB exclusive.[18] This author concludes the jurisdiction of the NLRB is not exclusive and federal courts may make initial determinations of representational issues pursuant to section 301 jurisdiction.

To support this result, this author will explore the rationale that presently allows arbitrators to make bargaining unit determinations. Courts and arbitrators will be compared in order to determine if the distinctions drawn between the jurisdiction of the two is justified. The application of the doctrine of traditional primary jurisdiction to the initial determination of representation also will be explored. Particularly, section 301 jurisdiction will be analyzed in light of the objectives of primary jurisdiction: uniformity of result and expertise.[19] Finally, this author will examine the practical result of bifurcating a section 301 suit between the NLRB and the courts. A bifurcated process causes delays without a demonstrable effect on expertise or uniformity of result. To understand more fully the existing conflict, one must first understand the legislative history of section 301 jursidiction.

Legislative History of Section 301

Pursuant to the power to regulate commerce, Congress passed the Wagner Act in 1935.[20] The fundamental purpose of the Wagner Act was to remove obstructions to the free flow of commerce by pro-

15. South Prairie Constr. Co. v. Local 627 Int'l Union of Operating Eng'rs, 425 U.S. 800, 803-04 (1976).
16. *See infra* notes 102-11 and accompanying text.
17. *See infra* notes 112-53 and accompanying text.
18. *See infra* notes 209-12 and accompanying text.
19. *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).
20. *See* R. Cortner, The Wagner Act Cases 82 (1964).

moting industrial peace.[21] Principally, the Wagner Act gave legal recognition to collective bargaining agreements[22] and created the NLRB to enforce the provisions of the Wagner Act.[23]

Congress intended the NLRB to be the primary tribunal to interpret and administer the Wagner Act.[24] This broad grant of authority gave the NLRB jurisdiction over two aspects of the collective bargaining process: unfair labor practices[25] and representation issues.[26] The grant of jurisdiction over unfair labor practices is contained in sections 7 and 8 of the Wagner Act.[27] Representation issues are reserved to the NLRB in section 9 of the Wagner Act.[28] Jurisdiction over representational issues includes the power to determine the unit of employees appropriate for bargaining purposes.[29] The NLRB also supervises the elections by which the members of an appropriate unit choose their bargaining representative.[30]

This grant of jurisdiction reflected the intent of Congress that the NLRB was best suited to administer the complex Wagner Act.[31] Through the Wagner Act, Congress sought to establish a national labor law paramount in the area of labor relations.[32] The purpose of having a single agency administer the law was to prevent the confusion likely to result if authority under the Wagner Act were diffused.[33] Centralized administration of a national labor law would result in uniform application of the policies of the Wagner Act.[34] For this reason, Congress confided development and application of this law in an expert administrative body.[35] The NLRB, however, was viewed less favorably by employers.[36]

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21. C. BUFFORD, *supra* note 1, §3, at 5.
22. *See id.*
23. *See id.* §215, at 589.
24. *See* Garner v. Teamsters Local No. 776, 346 U.S. 485, 489-90 (1953).
25. National Labor Relations Act §8, codified in 29 U.S.C. §158.
26. National Labor Relations Act §9, codified in 29 U.S.C. §159.
27. Section 7 of the Wagner Act specifies the rights of employees, such as the right to organize, choose representatives, and bargain collectively. 29 U.S.C. §157. Section 8 of the Wagner Act provides that infringement of the rights contained in section 7 constitutes an unfair labor practice. 29 U.S.C. §158(a)(1). Other activities constituting an unfair labor practice include: interfering with the operation of a labor organization, coercive membership practices, refusing to bargain, and hot cargo agreements. 29 U.S.C. §158(a)-(e).
28. 29 U.S.C. §159.
29. *Id.* §159(b).
30. *Id.* §159(c).
31. *See* Garner v. Teamsters Local No. 776, 346 U.S. 485, 489-90.
32. *See* Amalgamated Util. Workers v. Consol. Edison Co. of New York, Inc., 309 U.S. 261, 267-70 (1939).
33. *Id.*
34. *See* Garner v. Teamsters Local No. 776, 346 U.S. 485, 490 (1953).
35. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §22:5, at 100 (2d ed. 1983).
36. *See* C. BUFFORD, *supra* note 1, at 10.

Industrial employers viewed the NLRB as prejudiced in favor of labor interests.[37] Additionally, employers experienced dissatisfaction with having to resort to the prolonged process of obtaining relief through the NLRB.[38] Employers, however, had little recourse in dealing with unions other than through the NLRB because of procedural and practical limitations on the use of state court proceedings.[39]

The concerns of employers were persuasive and in 1947 Congress responded by enacting the Taft-Hartley Act.[40] This Act amended the Wagner Act[41] giving federal courts original jurisdiction over violations of collective bargaining agreements.[42] Section 301 of the Taft-Hartley Act provides for the enforcement of labor contracts in any federal court having jurisdiction over the parties, regardless of diversity of citizenship or amount in controversy.[43] Parties to a collective bargaining agreement, therefore, could sue for breach of contract in federal court. Section 301 of the Taft- Hartley Act reflected the Congressional belief that the processes of the NLRB were inadequate to deal with union misconduct.[44] Thus, the enforcement of collective bargaining agreements was intended to be left to the usual processes of law, not to the NLRB.[45]

The statutory grant of federal court jurisdiction under section 301 has been held constitutional.[46] Furthermore, the substantive law to be applied in section 301 suits is federal law.[47] This substantive law is to be fashioned from the policy of national labor laws,[48] leading

37. *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 6, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 297 (1948). The NLRB, as constituted under the Wagner Act, allegedly condoned unfair labor practices and coercive membership methods on the part of unions. *Id.*

38. *See* S. REP. No. 105, 80th Cong., 1st Sess. 15, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 421-24 (1948).

39. Many states do not permit unincorporated associations to be sued as an entity. *See* S. REP. No. 105, 80th Cong., 1st Sess. 15, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 421-24 (1948).

40. *See* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 507-08 (1948).

41. 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1 (1948).

42. Labor Management Relations Act 301, codified in 29 U.S.C. §185(a).

43. *Id.*

44. *See* S. REP. No. 105, 80th Cong., 1st Sess. 15, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 421-24 (1948).

45. *See* H. CONF. REPORT No. 510, 80th Cong., 1st Sess. 42, *reprinted in* 1947 U.S. CODE CONG. & AD. NEWS 1147, *and in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 546 (1948).

46. *See* Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 452-53 (1957).

47. *Id.*

48. *Id.*

to the development of a body of substantive federal law based upon the policies of the national labor laws.[49]

The federal common law is the Taft-Hartley Act as interpreted and applied by the courts in section 301 suits.[50] The Taft-Hartley Act retained section 9 of the Wagner Act relating to employee representation.[51] Thus, in a section 301 suit the federal courts can be called upon to apply and interpret the law relating to representational issues.[52]

Representational Issues

The appropriate bargaining unit determination is delegated to the NLRB.[53] Although the determination is a factual finding,[54] an element of agency discretion exists.[55] The NLRB need only designate an appropriate unit, not necessarily the most appropriate unit.[56]

In determining an appropriate bargaining unit, the NLRB designates a group of employees sharing a community of interest.[57] The group thus constituted will select a bargaining representative.[58] Large bargaining units are difficult for unions to organize and increase the degree of discord.[59] Small units, however, are disfavored by employers because of their cohesiveness.[60] In addition, the fragmentation of the employees into small bargaining units creates difficulties for the employer in dealing with his work force as a whole.[61] Therefore, this determination of the scope of the bargaining unit has great impact upon the collective bargaining process.[62]

If the bargaining unit composition is challenged, the NLRB will undertake a unit clarification.[63] This decision is conclusive on the

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49. *See* Dowd Box Co. v. Courtney, 368 U.S. 502, 506-08 (1962); Teamsters Union Local No. 174 v. Lucas Flour Co., 369 U.S. 95, 103 (1962).
50. *See* Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).
51. 29 U.S.C. §159.
52. *See infra* notes 66-102 and accompanying text.
53. *See* West Point-Pepperell, Inc. v. Textile Workers Union of Am., 559 F.2d 304, 307 (5th Cir. 1977).
54. *Id.*
55. *See Boire*, 479 F.2d at 797.
56. R. Gorman, Basic Text on Labor Law 66 (1976).
57. *Id.* at 69. The relevant factors considered by the NLRB are similarity in earnings, hours, kind of work performed, and qualifications. *Id.* Also considered are degree of interchange among employees, geographic proximity, common supervision and determination of labor relations policy, history of collective bargaining, desires of affected employees, and the extent of union organization. *Id.*
58. 29 U.S.C. §159(a).
59. *See* R. Gorman, Basic Text on Labor Law 67-68 (1976).
60. *Id.*
61. *Id.*
62. *Id.* at 68.
63. *See* 18 T. Kheel, Business Organizations §14.01, at 14-15 (1984).

parties.[64] Pursuant to section 301 jurisdiction, however, bargaining unit determinations have been presented to the federal courts as well.[65]

Conflicting Jurisdiction

Issues of representation may be the subject of section 301 breach of contract actions in two different settings: (1) suits based on the single employer doctrine;[66] or (2) labor contracts in which the bargaining unit is defined as a term of the contract, such as stipulated units or contracts containing an accretion clause.[67] The single employer doctrine is an NLRB construct by which two or more related enterprises are recognized as a single entity.[68] The single employer doctrine is employed to meet the jurisdictional minimum of the NLRB[69] or to treat two or more enterprises the same for the purposes of an unfair labor practice or representational proceeding before the NLRB.[70] In determining whether the companies should be treated as a single employer, the NLRB considers the interrelation of operations as well as common management and control.[71] Once a finding of single employer is reached, the NLRB must inquire whether the two or more groups of employees constitute an appropriate bargaining unit based upon a community of interest among the employees.[72] If the NLRB concludes that two or more companies are in fact a single employer and the groups of employees constitute an appropriate bargaining unit, the NLRB then will treat the companies as one for the purposes of the NLRB.[73]

Section 301 suits based upon the single employer doctrine are supported by the Supreme Court[74] and the legislative intent of section 301 of Taft-Hartley.[75] The doctrine is employed to bind nonsignatory companies to the labor agreement.[76] Like the NLRB, the federal court must determine whether the two enterprises are a single employer.[77] Unlike the bargaining unit determination, the single employer deter-

64. *Id.*
65. *See infra* notes 66-102 and accompanying text.
66. *See infra* notes 68-83 and accompanying text.
67. *See infra* notes 84-91 and accompanying text.
68. *See* Carpenters Local No. 1846 v. Pratt-Farnsworth, 690 F.2d 489, 504 (5th Cir. 1982).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 505.
73. *Id.*
74. *See id.* at 511.
75. *Id.*
76. *Id.* at 503.
77. *Id.* at 510.

mination is not reserved to the NLRB by the Wagner Act.[78] If the court concludes the two or more related enterprises are in fact a single employer for bargaining purposes, the court then proceeds to the second prong of the single employer doctrine.[79] Similar to the NLRB, the court must determine that the employees of the related employers constitute an appropriate bargaining unit.[80] Only then are all parties, including the nonsignatory employer, bound by the collective bargaining agreement.[81] A section 301 suit based upon the single employer doctrine, therefore, requires the federal court to determine the appropriateness of the bargaining unit, a representational issue reserved to the NLRB.[82]

Representational issues also arise in cases in which the parties included the scope of the bargaining unit as a term of the contract.[83] The first type of contractual unit designation is a labor contract that contains an accretion clause.[84] An accretion clause provides that the labor contract will be extended to include employees not currently part of the bargaining unit if certain agreed events occur.[85] The contract may provide that employees at subsequently acquired worksites will accrete to the existing unit.[86] Moreover, a change in the duties of employees also may call for a similar accretion.[87]

If the union alleges that an accretion to the bargaining unit has occurred either by reason of acquired worksites or a change in employee duties, the NLRB determines whether the employees sought to be included are a proper accretion to the bargaining unit.[88] Bargaining unit accretions, however, have been approached with hesitance by the NLRB.[89] The rationale offered for the reluctance of the NLRB to enforce accretion clauses is that the accretion of employees to a bargaining unit, which is not chosen by the employee, violates the right of the accreted employees under section 7 of the Wagner Act to bargain collectively through a representative of their own choosing.[90]

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78. *See* Bhd. of Teamsters Local No. 70 v. California Consolidators, Inc., 693 F.2d 81, 83 (9th Cir. 1982).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 83-84.
83. *See Pratt-Farnsworth*, 690 F.2d at 524 n.17.
84. *See, e.g., Boire*, 479 F.2d at 782; Local No. 3-193 Int'l Woodworkers of Am. v. Ketchikan Pulp Co., 611 F.2d 1295, 1296-97 (9th Cir. 1982).
85. *See Pratt-Farnsworth*, 690 F.2d at 524 n.17.
86. *See, e.g., Boire*, 479 F.2d at 782; *Ketchikan*, 611 F.2d at 1296-97.
87. *See, e.g.*, Local No. 204 Int'l Bhd. of Elec. Workers v. Iowa Electric, 668 F.2d 413, 414-15 (8th Cir. 1982); Carey v. Westinghouse Corp., 375 U.S. 261, 262-63 (1964).
88. *See Boire*, 479 F.2d at 796-97.
89. *Id.* at 795-96.
90. *Id.* at 796-97.

Courts also are reluctant to enforce contract accretion clauses.[91] The courts share the concern of the NLRB regarding the right of employees to choose their bargaining representative.[92] This right of self-determination comes into focus in the unit accretion situation because a determination of both unit composition and unit representation is required.[93] In these situations, courts readily defer to the procedures of the NLRB for determining unit accretions.[94]

Stipulated units, on the other hand, require a more limited analysis by the NLRB or courts. Stipulated units may result from an agreement between the employer and the union regarding the scope of a bargaining unit prior to the actual collective bargaining.[95] Alternatively, the unit may be stipulated by a term of the contract.[96] The sole inquiry is whether the unit, as comprised, is repugnant to the Wagner Act or its policies.[97] Stipulated units, therefore, do not require either the NLRB or the courts to determine the appropriateness of the bargaining unit.[98]

Thus, section 301 actions alleging the single employer doctrine or seeking to enforce an accretion clause require the court to make a bargaining unit determination.[99] Bargaining unit determinations, however, are reserved to the NLRB by section 9 of the Wagner Act.[100] Whether courts may make these determinations has not been addressed definitively by the Supreme Court.

Federal Court Jurisdiction

The Supreme Court has addressed the jurisdiction of representational issues only in the context of judicial review of agency action.[101] In *South Prairie Construction Company v. Local No. 627 International Union of Operating Engineers*,[102] the union filed an unfair labor practices complaint with the NLRB alleging two construction companies were in fact a single employer.[103] The NLRB rejected the contention

91. *See id.* at 796-97; *see also Ketchikan*, 611 F.2d at 1301; *Pratt-Farnsworth*, 690 F.2d at 519-20.
92. *See Pratt-Farnsworth*, 690 F.2d at 521.
93. *See Boire*, 479 F.2d at 796-97 (quoting Pix Maintenance Co., 181 N.L.R.B. 88 (1970)).
94. *See Pratt-Farnsworth*, 690 F.2d at 524 n.17.
95. R. Gorman, Basic Text on Labor Law 66 (1976).
96. *See Pratt-Farnsworth*, 690 F.2d at 503 n.6.
97. *See* SCM Corp. v. Local No. 527 Printing & Graphic Communications Union, 116 L.R.R.M. (BNA) 1158 (1984).
98. *See Pratt-Farnsworth*, 690 F.2d at 524 n.17.
99. *See supra* notes 74-82 and accompanying text.
100. *See* 29 U.S.C. §159(b).
101. *See Pratt-Farnsworth*, 690 F.2d at 515-17.
102. 425 U.S. 800 (1976).
103. *See South Prairie*, 425 U.S. at 801.

of the union without reaching the appropriate bargaining unit issue.[104] When the union appealed the decision of the NLRB, the Court of Appeals for the District of Columbia reversed the finding of the NLRB.[105] The District of Columbia Circuit found the two companies were a single employer, satisfying the first prong of the single employer doctrine.[106] The court proceeded to determine the second prong of the single employer doctrine, the existence of an appropriate bargaining unit comprised of the two groups of employees.[107] Although the single employer issue was reviewable, the Supreme Court reversed, holding the NLRB had never reached the issue of the appropriateness of the bargaining unit.[108] The Court reasoned that the initial determination by the court of appeals of the bargaining unit question was "incompatible with the orderly function of the process of judicial review" and remanded to the NLRB for further findings.[109] Whether the "incompatible test" addresses section 301 jurisdiction as well as appellate review is a source of conflict.[110] Subsequent decisions of the courts of appeal have adopted different approaches to this question.

In 1980, the Ninth Circuit concluded that both the reach of *South Prairie* and the Congressional intent of section 9 of the Wagner Act precluded section 301 jurisdiction over representational issues.[111] In *Local No. 3-193 International Woodworkers of America v. Ketchikan Pulp Co.*,[112] the union and the employer entered into a collective bargaining contract providing that employees at future worksites would accrete to the existing bargaining unit.[113] The employer acquired additional worksites and refused to recognize an accretion to the existing bargaining unit.[114] The union brought suit seeking interpretation and enforcement of the contract and the action was removed to federal court pursuant to section 301.[115] The Ninth Circuit denied the demand for accretion, recognizing that the two areas reserved to the NLRB, unfair labor practices and representational issues, represented different policy considerations.[116] Although the court could take jurisdiction

104. *Id.* at 801-02.
105. *Id.* at 802.
106. *Id.*
107. *Id.* at 803.
108. *Id.* at 803-04.
109. *Id.* at 805 (quoting N.L.R.B. v. Metropolitan Ins. Co., 380 U.S. 438, 444 (1965)).
110. *See infra* notes 110-47 and accompanying text.
111. *Ketchikan*, 611 F.2d at 1298-99.
112. 611 F.2d 1295 (9th Cir. 1980).
113. *Id.* at 1296-97.
114. *Id.* at 1297.
115. *Id.* at 1296-97.
116. *Id.* at 1298.

of a contract violation action concerning an unfair labor practice, representational issues embodied a special concern for employee self-determination of bargaining representatives.[117] This strong policy of self-determination could not be circumvented under the guise of contract interpretation.[118]

The result in *Ketchikan* can be attributed to the unfavorable attitude the courts and the NLRB have shown toward unit accretions.[119] The accretion determination reaches beyond the appropriateness of the bargaining unit to the actual designation of a bargaining representative.[120] The Ninth Circuit, however, also has refused to permit section 301 jurisdiction if only the unit appropriateness issue is presented.[121] In a single employer case, for example, the court relied heavily upon the reasoning in *Ketchikan* to conclude that the Congressional intent in section 9 and the holding in *South Prairie* reserved the unit appropriateness issue exclusively to the NLRB.[122] Thus, the Ninth Circuit does not recognize federal court jurisdiction in section 301 suits involving representational issues.

A subsequent decision by the Eighth Circuit applied a different analysis. In *Local Union 204, International Brotherhood of Electrical Workers v. Iowa Electric Light and Power Co.*,[123] the union successfully petitioned the NLRB for the accretion of quality control inspectors to the bargaining unit.[124] The union proposed contract modifications based upon the accretion.[125] The employer rejected the modifications and the unit accretion.[126] The union then notified the employer that the contract modifications were deemed accepted and subsequently filed a section 301 suit.[127]

The Eighth Circuit recognized the conflict between section 301 jurisdiction of the courts over contract violations and the jurisdiction of the NLRB over representational issues.[128] Between these grants of authority, the court held the dividing line to be whether the issue was primarily contractual or primarily representational.[129] The court

117. *Id.* at 1298-99.
118. *Id.* at 1299-1300.
119. *See Pratt-Farnsworth*, 690 F.2d at 520.
120. *See supra* notes 113-16 and accompanying text.
121. *California Consolidators*, 693 F.2d at 83-84.
122. *Id.* at 82-83.
123. 668 F.2d 413 (8th Cir. 1982).
124. *Iowa Electric*, 668 F.2d at 415.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 416.
129. *Id.* at 419.

in *Iowa Electric* observed that the dispute centered upon the unit accretion issue and concluded the dispute primarily was representational.[130] Although the Eighth Circuit did not conclude whether the jurisdiction of the NLRB was exclusive or primary,[131] representational issues were held to be outside the scope of section 301 jurisdiction.[132]

The Fifth Circuit took a different approach from either the Eighth or Ninth Circuits and reached a result contrary to both. In *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*,[133] the court concluded that in certain circumstances a federal court could take jurisdiction of a representation issue.[134] *Pratt-Farnsworth* was a section 301 breach of contract case in which the plaintiff alleged that two related construction companies, one union and the other non-union, were in fact a single employer.[135] Neither the employer nor the union previously had invoked the jurisdiction of the NLRB by seeking a unit clarification.[136]

The *Pratt-Farnsworth* court refused to construe *South Prairie* as vesting the NLRB with exclusive jurisdiction over representational issues.[137] Rather, the court limited the application of *South Prairie* to situations concerning judicial review of NLRB determinations, not section 301 original jurisdiction.[138] The court concluded, therefore, that *South Prairie* was not a bar to initial determination of appropriate bargaining unit by a federal court in a section 301 action.[139]

This distinction between initial determinations and issues presented on appellate review was the focus of an alternative basis for the holding. *Pratt-Farnsworth* also held that the same absence of prior NLRB involvement made the Wagner Act inapplicable.[140] The court gave a restrictive reading to the language of section 9 which sets forth the jurisdiction of the NLRB over representation issues.[141] The portion of section 9 providing for NLRB determination of the appropriate bargaining unit "in each case"[142] was read to mean in each case in which the parties had invoked the processes of the NLRB.[143] In *Pratt-*

130. *Id.* at 419-20.
131. *Id.* at 420.
132. *Id.* at 420-21.
133. 690 F.2d 489 (5th Cir. 1982).
134. *Pratt-Farnsworth*, 690 F.2d at 515-17.
135. *Id.* at 498-99.
136. *Id.* at 515.
137. *Id.* at 514.
138. *Id.*
139. *Id.*
140. *Id.* at 514-15.
141. *Id.* at 515.
142. *Id.* at 514-15 (quoting 29 U.S.C. §159(b)).
143. *Id.*

Farnsworth, no party had resorted to the NLRB;[144] thus, neither section 9 of the Wagner Act nor *South Prairie* supported the proposition that the authority of the NLRB was exclusive.[145] The jurisdiction of the NLRB was not exclusive[146] and the enforcement of the contract necessarily required a determination of who is bound by the contract.[147] Therefore, the Fifth Circuit held that federal courts have jurisdiction of the representational issue when necessary to determine the underlying claim for breach of contract.[148]

Although the Supreme Court has not addressed the issue, the reasoning of the Fifth Circuit makes sense.[149] A reading of the exact language used in *South Prairie* supports the distinction made by the court in *Pratt-Farnsworth* between cases presenting initial determination issues and issues presented subsequent to NLRB involvement.[150] *South Prairie* focused on the role of federal courts in reviewing prior administrative determinations, holding that the judicial role in this setting is limited.[151] If confined to the issue of judicial review, the case has limited relevance to initial judicial determination of representational issues.[152] The Supreme Court, however, has allowed arbitrators to determine representational issues.[153] Since allowing arbitrators to make bargaining unit determinations is inconsistent with denying federal courts the same power,[154] this author next will explore the rationale behind arbitration of representational issues.

Arbitration of Representational Issues

The Supreme Court has addressed the role of arbitrators in representation disputes.[155] Since most labor contracts require disputes arising out of the contract to be submitted to an arbitrator,[156] the role of labor arbitration has been significant. Thus, the allocation of power between the NLRB and arbitrators is relevant.

An analysis of the allocation of power between the NLRB and arbi-

144. *Id.* at 515.
145. *Id.* at 514-15.
146. *Id.* at 514.
147. *Id.*
148. *Id.* at 517.
149. *See supra* notes 132-47 and accompanying text.
150. *See supra* notes 136-38 and accompanying text.
151. *South Prairie*, 425 U.S. at 805-06.
152. *Pratt-Farnsworth*, 690 F.2d at 514-15.
153. *See infra* note 191-203 and accompanying text.
154. *See infra* notes 225-31 and accompanying text.
155. *See infra* notes 168-86 and accompanying text.
156. *See* P. Hays, Labor Arbitration 20 (1966); Labor Relations Expediter (BNA) §5 (1983).

trators requires a discussion of what constitutes arbitration. Arbitration is a dispute resolution mechanism that the parties have provided for in their contract.[157] An arbitration clause provides for the submission of disputes to a third party for resolution.[158] The authority of the arbitrator is derived from the contract.[159] The decision of the arbitrator, therefore, is contractually binding upon the parties.[160] The significant difference between arbitrators and courts or the NLRB is that the arbitrator does not possess any power independent of that allocated by the parties in the terms of the contract.[161] The scope of the arbitrator's power is limited to issues arising under the contract and may be circumscribed further by terms limiting the type of disputes that may be arbitrated.[162]

Arbitrators also lack the authority to enforce their awards.[163] If an arbitrator has exceeded the contractual authority, the courts will refuse to enforce the award.[164] Furthermore, although arbitrators usually do not determine their own jurisdiction,[165] they have not considered the jurisdiction of the NLRB to be a bar to their jurisdiction.[166]

In *Carey v. Westinghouse Corporation*,[167] the Supreme Court held that the jurisdiction of the NLRB over representational issues was not a bar to the arbitration of representation issues.[168] *Carey* presented a dispute arising out of a collective bargaining agreement.[169] The union and the employer agreed to the use of arbitration in the event of unresolved disputes involving the "interpretation, application or claimed violation"[170] of the agreement. The union was the exclusive bargaining representative for all production and maintenance employees,[171] but salaried and technical employees were represented by a different

157. *See* P. HAYS, *supra* note 156, at 13.
158. *Id.*
159. TROTTA, ARBITRATION OF LABOR-MANAGEMENT DISPUTES 78 (1974).
160. F. ELKOURI, HOW ARBITRATION WORKS 3 (1952). Arbitration is to be distinguished from mediation which is not binding on the parties. *Id.* A mediator, rather, seeks to persuade parties to reach agreement, but cannot compel them to do so. *Id.*
161. *See* TROTTA, *supra* note 159 at 23-24.
162. *See id.* at 81.
163. *See* United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960).
164. *See* United Steelworkers of Am. v. Enter. Wheel and Car Corp., 363 U.S. 593, 597 (1960).
165. O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 213-15 (1983).
166. *Id.* at 129.
167. Carey v. Westinghouse Corp., 375 U.S. 261 (1964).
168. *Id.*
169. *Id.* at 262.
170. *Id.*
171. *Id.*

bargaining unit.[172] The union alleged that the employer was using technical employees to perform production and maintenance duties[173] and characterized the dispute as a work assignment, not a representational, issue.[174] When the union filed a grievance, the employer refused to arbitrate, alleging that the dispute concerned a representational issue, within the exclusive jurisdiction of the NLRB.[175]

The conflicting characterizations of the dispute were not determinative of the issue.[176] The Supreme Court, instead of deciding whether the dispute was a representational or work assignment issue, took a broader stance and held, regardless of the nature of the dispute, that the pervasive, curative effect of arbitration[177] was likely to serve the interests of industrial peace.[178] The Court, however, did provide limitations on the power of arbitrators to decide representational issues. The decision of the arbitrator must be fair and not repugnant to the purposes of the Wagner Act.[179] Additionally, a subsequent determination by the NLRB takes precedence over the arbitrator's decision.[180] The possibility of conflict between the earlier decision of the arbitrator and a later NLRB determination was held to be outweighed by the benefits of arbitration at an early stage of the conflict.[181]

In addition, the Court included some controversial dicta. The power of arbitrators, regardless of the nature of the dispute, was justified by analogizing to the jurisdiction of the courts.[182] The Court in *Carey* noted that state and federal courts could determine unfair labor practices under section 301 jurisdiction.[183] In considering section 301 jurisdiction, the Court did not distinguish between unfair labor practices and representational issues.[184] The Court concluded, therefore, that state and federal courts had jurisdiction over representational issues.[185]

The dicta has not been persuasive on the issue.[186] Courts have noted a difference between unfair labor practices and representational issues.[187] A stronger case for deferral to the NLRB has been recognized

172. *Id.*
173. *Id.*
174. *Id.* at 269.
175. *Id.* at 262-63.
176. *See id.* at 269-70.
177. *Id.* at 272.
178. *Id.*
179. *See id.* at 270-71.
180. *Id.* at 272.
181. *Id.*
182. *Id.* at 268.
183. *Id.*
184. *Id.*
185. *Id.*
186. *See supra* notes 112-23 and accompanying text.
187. *Id.*

in the latter instance.[188] Additionally, *South Prairie* was decided after *Carey* and the holding in *South Prairie* was perceived as a rejection by the Supreme Court of the earlier dicta.[189] Notwithstanding the decision in *South Prairie*, however, the power of arbitrators to make bargaining unit determinations has been upheld.[190]

If the dispute is between the NLRB and arbitrators over representational issues, courts have upheld the power of arbitrators.[191] Jurisdictional disputes between the NLRB and section 301 court jurisdiction over representational issues, however, result in a preference for NLRB jurisdiction.[192] Two rationales have been cited in support of the preference for arbritration over NLRB processes. First, the disputes concern a contract providing arbitration as a mechanism for the resolution of these disputes; therefore, later action by the NLRB may be unnecessary because of the "pervasive curative effect"[193] of arbitration. Second, section 203(d)[194] of the Taft-Hartley Act provides that a method agreed upon by the parties will be the desirable method of resolving grievances.[195]

Although the Ninth Circuit has noted the apparent inconsistent treatment by the courts of arbitrators and section 301 jurisdiction,[196] the Supreme Court has never directly addressed the issue. Circuit courts, however, have held the inroads of arbitration into the allegedly exclusive jurisdiction of the NLRB over representational issues do not expand the section 301 jurisdiction of the courts.[197] Courts have distinguished between issues concerning unfair labor practices and representational issues[198] as well as between adjudication of these issues by arbitrators and federal courts.[199]

Some analogies, however, may be drawn between section 301 suits and arbitration. First, in the absence of an arbitration clause, section 301 jurisdiction is an available alternative for bargaining unit issues arising out of a collective bargaining agreement. Taft-Hartley expressly

188. *Id.*
189. *Id.*
190. *See* Retail Clerks Local No. 588, Retail Clerks Int'l Ass'n v. NLRB, 565 F.2d 769, 778 (D.C. Cir. 1977).
191. *See, e.g., Retail Clerks*, 565 F.2d at 778; *Carey*, 375 U.S. at 272.
192. *See, e.g., California Consolidators*, 693 F.2d at 83-84; *Ketchikan*, 611 F.2d at 1299-1300; *West Point Pepperell*, 559 F.2d at 306-07.
193. *See Retail Clerks*, 565 F.2d at 777; *see also Carey*, 375 U.S. at 272.
194. 29 U.S.C. §173(d).
195. *Carey*, 375 U.S. at 264-65.
196. *See* Carpenters Local No. 1478 v. Stevens, *reported in* 117 L.R.R.M. (BNA) 2023, 2027 (9th Cir. 1984).
197. *Id.* at 2027.
198. *See supra* note 117 and accompanying text.
199. *See Ketchikan*, 611 F.2d at 1298.

provides that the enforcement of contracts is to be left to the usual processes of law, not to the NLRB.[200] Moreover, the NLRB does not have the power to interpret a contract.[201] Thus, in the absence of an arbitration clause section 301 jurisdiction would be appropriate.[202]

Second, the dicta in *Carey* indicated that unfair labor practices and representational issues are analogous when considering the jurisdiction of the federal courts.[203] The courts can determine issues concerning unfair labor practices even though a remedy is available before the NLRB.[204] Similarly, the courts should be able to determine representational issues notwithstanding the ability of either party to petition the NLRB for a unit clarification.[205]

Section 301 jurisdiction, however, has not been shown the same deference as arbitration.[206] One explanation offered is that arbitration is an exception to the exclusive jurisdiction of the NLRB.[207] The courts, however, have not agreed on whether the jurisdiction of the NLRB is exclusive. Courts have used vague terms that avoid the hard question. These terms include the responsibility of the NLRB,[208] the preeminence of the NLRB,[209] the primary competence of the NLRB,[210] and primary, if not exclusive, jurisdiction.[211] Characterizing the jurisdiction of the NLRB as exclusive or primary produces different results when considering the jurisdiction of the courts.

An assertion that the jurisdiction of the NLRB over representational issues is exclusive is difficult to support. *Retail Clerks Local 588, Retail Clerks International Association v. NLRB*,[212] decided subsequent to *South Prairie*, upheld the authority of arbitrators to make bargaining unit determinations.[213] If both arbitrators and the NLRB may decide representational issues, the jurisdiction of the NLRB must

200. *See* H. CONF. REPORT No. 510, 1st Sess. 42, *reprinted in* 1947 U.S. CODE CONG. AND AD. NEWS 1147, *and in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 546 (1948).
201. *See* Sinclair Refining Co. v. NLRB, 306 F.2d 569, 576 (5th Cir. 1962).
202. *See supra* notes 197-98 and accompanying text.
203. *Carey*, 375 U.S. at 268.
204. *Id.*
205. *See Pratt-Farnsworth*, 690 F.2d at 519.
206. *See supra* notes 192-93 and accompanying text.
207. *See* Comment, *Arbitration of Representation Issues: A Critique of Carey*, 1983 B.Y.U. L. REV. 349, 367.
208. *See Pratt-Farnsworth*, 690 F.2d at 514.
209. *See Iowa Electric*, 668 F.2d at 420.
210. Bhd. of Teamsters Local No. 70 v. California Consolidators, Inc., 693 F.2d 81, 82 (9th Cir. 1982).
211. *See Ketchikan*, 611 F.2d at 1298.
212. 565 F.2d 769 (D.C. Cir. 1977).
213. *See Retail Clerks*, 565 F.2d at 778.

not be exclusive.[214] Additionally, in denying federal court jurisdiction over representational issues, *Ketchikan* balked at describing the jurisdiction of the NLRB as exclusive.[215]

The jurisdiction of the NLRB, therefore, cannot be described as exclusive and remain consistent with the holding in *Carey*.[216] The Fifth and Ninth Circuits hinted that the NLRB may have primary jurisdiction over representational issues.[217] Since the Fifth and Ninth Circuits prefer to characterize the jurisdiction of the NLRB as primary, the doctrine of traditional primary jurisdiction must be considered.[218]

Application of the Primary Jurisdiction Doctrine

The doctrine of primary jurisdiction is a judicial creation[219] under which the court abstains from exercising jurisdiction until the administrative agency having special competence to deal with the subject matter has acted.[220] No fixed formula for the application of primary jurisdiction exists.[221] Rather, the doctrine requires the court to defer to the particular adminstrative agency whenever the objectives of the doctrine, expertise and uniformity of result, are implicated.[222] The doctrine particularly is relevant to the initial determination of appropriate bargaining unit because the doctrine does not alter the authority of either courts or administrative agencies;[223] rather, the doctrine guides a court in determining "whether [a] court or agency will *initially* decide a particular issue, not the question whether [a] court or agency will *finally* decide the issue."[224]

An initial examination would indicate that perhaps courts should defer to the NLRB when a bargaining unit issue is presented. First, the expertise of the NLRB regarding representation is presumed.[225] Second, the federal courts may misconstrue and misapply the Wagner Act.[226] Conflicting decisions between the federal courts and the NLRB

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214. *Id.*
215. *See Ketchikan*, 611 F.2d at 1298.
216. *See supra* note 165 and accompanying text.
217. *See Pratt-Farnsworth*, 690 F.2d at 515 n.11.
218. *See Ketchikan*, 611 F.2d at 1298.
219. *See Pratt-Farnsworth*, 690 F.2d at 515 n.11.
220. *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).
221. *Id.*
222. *Id.*
223. *See* Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 199 n.29 (1978) (quoting 3 K. Davis, Administrative Law Treatise §19.01 at 3 (1958) (emphasis in original)).
224. *Id.*
225. R. Gorman, Basic Text on Labor Law 67 (1976).
226. *See* Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 546 (1962).

will be destructive to a comprehensive federal scheme;[227] therefore, representational issues should be deferred to the NLRB.

A conclusion that the NLRB possesses expertise superior to the courts, however, does not seem clearly established. The federal courts are concerned intimately with the administration of the Wagner Act, both statutorily through section 301[228] jurisdiction and through judicial review of NLRB decisions.[229] While NLRB bargaining unit determinations are not directly reviewable,[230] representational issues do reach the courts of appeal by procedures established for the review of unfair labor practices.[231] The foregoing analysis indicates that the alleged disparity of expertise between the courts and the NLRB is exaggerated.[232]

The concern for lack of uniformity also is no bar to initial determination of representational issues by federal courts. Under section 301 jurisdiction, issues may reach the court only if the issues arise from the rights of the parties under the labor contract.[233] Since the issues arise out of a contract peculiar to the parties, the determination of the court is not likely to have broader implications for the regulatory function of the NLRB.[234] Moreover, primary jurisdiction does not allocate the ultimate authority to determine the issue.[235] Rather, primary jurisdiction is a tool for allocating the workload between courts and administrative agencies.[236] Finally, the law applied in section 301 actions is fashioned from the policies of national labor law.[237] Therefore, because both the NLRB and the courts will be applying the same law,[238] the disparity in result will be minimized.

The concerns pertaining to uniformity and expertise aside, the parties need not resort to the administrative agency if the remedy available will be inadequate.[239] Although the NLRB can determine the bargaining

227. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).
228. *See supra* notes 40-45 and accompanying text.
229. *See Iowa Electric*, 668 F.2d at 416 n.6.
230. *Id.* at 420. Judicial review is limited because of the presumed expertise of the NLRB and the discretionary nature of an appropriate bargaining unit determination. R. GORMAN, BASIC TEXT ON LABOR LAW 67 (1976).
231. *See Ketchikan*, 611 F.2d at 1299. Appeals from NLRB decisions constitute 15% of the appellate workload and 30% of agency appeals. *See* L. MODJESKA, NLRB PRACTICE 89 n.5 (1983).
232. *See supra* notes 221-24 and accompanying text.
233. *See supra* notes 40-45 and accompanying text.
234. *See* World Airways, Inc., v. Northeast Airlines, Inc., 349 F.2d 1007, 1010-11 (1st Cir. 1965).
235. *See supra* notes 223-24 and accompanying text.
236. *Id.*
237. *See* Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).
238. *Id.*
239. *See* McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667, 670 (4th Cir. 1960); United States v. Zweifel, 508 F.2d 1150, 1156 n.6 (10th Cir. 1975).

unit issue,[240] the NLRB cannot enforce the contract.[241] Therefore, the parties would have to institute a section 301 suit.[242]

The delays inherent in a bifurcated action do not serve the purposes of the Wagner Act.[243] The initial NLRB action is slow.[244] As one court noted, "[t]he notoriously glacial immobility of the NLRB could easily drag the unit clarification out for a year or more . . . ."[245] When judicial process must follow the NLRB action, the delays are extended.[246]

During this prolonged process, the representation dispute will remain unresolved. The issue of representation goes to the heart of the collective bargaining process[247] and the protection afforded by the Wagner Act will be enhanced if the representational question receives prompt determination.[248] If the parties have not provided for arbitration, prompt court action seems appropriate. Although the possibility of conflict with the NLRB exists, the court is no more likely than the NLRB to err.[249] Furthermore, a judicial determination of representational issues, even if erroneous, is still subject to appellate review.

Thus, the policies of primary jurisdiction, uniformity of result and agency expertise, are no bar to judicial determination of representational issues pursuant to section 301 jursidiction.[250] Moreover, a bifurcation of the action between the NLRB and federal courts is inimical to the purposes of the Wagner Act.[251] Therefore, since the jurisdiction of the NLRB is primary, primary jurisdiction is no bar to section 301 jurisdiction of representational issues.[252]

CONCLUSION

In enacting the Taft-Hartley Act, Congress allocated power to the courts and the NLRB. The intent of Congress was that the NLRB

240. *See* 29 U.S.C. §159(b).
241. *See* NLRB v. George E. Light Boat Storage, Inc., 373 F.2d 762, 768 (5th Cir. 1967).
242. *See supra* notes 230-32 and accompanying text.
243. *See* Sovern, *supra* notes 226, at 556-67.
244. Typically, elections to determine bargaining unit representatives require 286 days; one-fourth require more than one year. W. GOULD, A PRIMER ON AMERICAN LABOR LAW 126-27 (1982).
245. *See Boire*, 479 F.2d at 788.
246. In unfair labor practice cases, for example, between 317 and 350 days elapse between the petition filed with the court of appeals for enforcement and a court decision. W. GOULD, *supra* note 244 at 126-27.
247. *See* R. Gorman, *supra* note 225, at 67.
248. Sovern, *supra* note 226, at 566-67.
249. *See supra* notes 228-32 and accompanying text.
250. *See supra* notes 225-35 and accompanying text.
251. *See supra* notes 242-47 and accompanying text.
252. *See supra* notes 219-51 and accompanying text.

have jurisdiction of disputes regarding unfair labor practices and representational issues, while the court was to enforce labor contracts. Situations arose in which the jurisdiction of the courts conflicted with those areas delegated to the NLRB. The allocation of jurisdiction over representational issues has been troublesome. Particularly, arbitrators have been allowed to make bargaining unit determinations while the courts have not been allowed to do so.

The courts addressing the different treatment of section 301 jurisdiction and arbitration have not agreed on the nature of the jurisdiction of the NLRB over representational issues. The jurisdiction of the NLRB, however, is most appropriately described as primary. Through the application of the doctrine of primary jurisdiction to representational issues, section 301 court jurisdiction over these issues serves the purposes of the doctrine, uniformity and expertise, as well as the objective of the Wagner Act, industrial peace. Therefore, when acting pursuant to section 301 jursidiction, federal courts should be able to determine representational issues.

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