THE SCOPE OF THE NATIONAL EMERGENCY LABOR INJUNCTION LAW

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The issue of whether individual members are bound by injunction orders issued under the emergency injunction provision of the Labor-Management Relations Act remains unresolved and, for the most part, the focus of little attention. In this article Mr. Shipman examines the enforceability and desirability of emergency injunction orders which are aimed at individual members of labor organizations. The author contends that there is no precedent for such orders and demonstrates that the traditional limitations upon federal equity power, the legislative history of the emergency law, and public policy with respect to industrial labor strife all militate against member liability.

I. INTRODUCTION

The legal community and the public at large have once again focused attention on the national labor injunction provisions of the Labor-Management Relations Act,[1] a source of perennial debate. The issue was recently spotlighted when the United Mine Workers of America, representing the bulk of the bituminous coal miners in the eastern United States, refused to work without the benefit of a collective bargaining agreement. When on March 6, 1978, the bargaining process failed to produce a settlement sometime after the walkout, the President of the United States invoked the emergency law contained in the Labor-Management Relations Act. On March 9, the Attorney General subsequently sought and obtained a temporary restraining order in the District Court for the District of Columbia.[2]

For the most part, the miners did not respond to the court's order, although a small number returned to work over a period of time as a result of economic hardship.[3] On March 17, the same court denied an extension of the order on the ground that the Government had not made a showing of good cause as required by Rule

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[1] Labor-Management Relations (Taft-Hartley) Act § 1, 29 U.S.C. §§ 141-188 (1976).

[2] N.Y. Times, Mar. 10, 1978, § A, at 1, col. 2.

[3] N.Y. Times, Mar. 15, 1978, § D, at 16, col. 2.

65 of the Federal Rules of Civil Procedure.[4] No contempt order was requested against either the union or its members, despite widespread violation of the original order by the members.[5]

Since 1947, a significant amount of commentary has arisen, analyzing, applauding, and for the most part, criticizing almost every aspect of the emergency provisions.[6] As one observer has aptly stated: "Concocting panaceas for emergency disputes is a popular indoor sport in this country and it is obvious from some of the proposals that one need not be an expert to play."[7] Yet one aspect of the emergency provisions has received little attention. This aspect concerns the reach of the emergency injunction power, namely, whether injunctions under the Act reach union members, and if so, whether they should.[8] With the emergency injunction provision having been employed in approximately thirty cases since the passage of the Act in 1947,[9] the instances of harsh action taken by the federal judiciary

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[4] United States v. United Mine Workers, 97 L.R.R.M. 3176, 3176–77 (D.D.C. 1978).

[5] N.Y. Times, Mar. 15, 1978, § D, at 16, col. 2.

[6] *See, e.g.*, Aaron, *Emergency Dispute Settlements*, in the Southwestern Legal Foundation's Thirteenth Annual Institute on Labor Law 199 (1967); Givens, *Professor Rothenberg's Proposed Solution for National Emergency Dispute: A Reply*, 65 DICK. L. REV. 201 (1961); Givens, *Dealing with National Emergency Labor Disputes*, 34 TEMPLE L.Q. 17 (1960); Jones, *The National Emergency Disputes Provisions of the Taft-Hartley Act: A View From a Legislative Draftman's Desk*, 17 CASE W. RES. L. REV 133 (1965); Syme, *The Public Emergency Dispute: Its Various Aspects and Some Possible Solutions*, 26 TEMPLE L.Q. 383 (1953).

[7] Aaron, *supra* note 6, at 199.

[8] Although few commentators have specially argued for injunctions which reach individual members in emergency disputes, there appears to be a pervasive assumption that such is indeed the case. The unspoken rationale apparently is that this rule is necessary in order to make the emergency injunctions effective in light of the labor movement's hostility to the Act's emergency provisions. *See* notes 149–53 *infra* and accompanying text.

[9] United States v. United Mine Workers, 97 L.R.R.M. 3176 (D.D.C. 1978); United States v. International Longshoremen's Ass'n, 78 L.R.R.M. 2955 (E.D. La. 1971); United States v. International Longshoremen's Ass'n, 337 F. Supp. 381 (S.D.N.Y. 1971); United States v. Portland Longshoremen's Ben. Soc'y Local 861, 336 F. Supp. 504 (D. Me. 1971); United States v. International Longshoremen's Ass'n, 335 F. Supp. 501 (N.D. Ill. 1971); United States v. International Longshoremen's Ass'n, 334 F. Supp. 1134 (S.D. Ga. 1971); United States v. Avco Corp., 270 F. Supp. 665 (D. Conn. 1967); United Steelworkers v. United States, 265 F. Supp. 756 (D.D.C.), *aff'd*, 372 F.2d 92 (D.C. Cir. 1966); United States v. International Longshoremen's Ass'n, 57 L.R.R.M. 2599 (S.D.N.Y. 1964); United States v. International Longshoremen's Ass'n, 246 F. Supp. 849 (S.D.N.Y. 1964); United States v. Boeing Co., 215 F. Supp. 821 (W.D. Wash.), *rev'd and remanded*, 315 F.2d 359 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); Seafarers Int. Union of No. Am., Pac. Dist. v. United States, 204 F. Supp. 686 (N.D. Cal.), *aff'd in part, rev'd in part*, 304 F.2d 437 (9th Cir.), *cert. denied*, 370 U.S. 924 (1962); United States v. National Maritime Union, 196 F. Supp. 374 (S.D.N.Y.), *aff'd*, 48 L.R.R.M. 2937 (2d Cir. 1961); United States v. United Steelworkers, 45 L.R.R.M. 2515 (W.D. Pa. 1960); United States v. United Steelworkers, 271 F.2d 676 (3d Cir.), *aff'd*, 361 U.S. 39 (1959); United States v. International Longshoremen's Ass'n, 177 F. Supp. 621 (S.D.N.Y. 1959); United States v. International Longshoremen's Ass'n, 147 F. Supp. 425 (S.D.N.Y. 1956); United States v. American Locomotive Co., Inc., 109 F. Supp. 78

against labor organizations, at the behest of plaintiffs such as employers and government, has been well documented.[10] The actions of the other branches of government directly against labor have also been quite drastic, if not at times violent. Presidents have threatened military force against labor,[11] and the legislature has moved directly against strikes in 1963,[12] 1966,[13] and 1967.[14] It is not surprising, therefore, to find that the judiciary has been in general agreement with the other branches of government concerning much of the emergency provisions and their application to specific factual circumstances.[15]

The theme of this Article is that assumptions and politically induced laxity have replaced fidelity to the plain statutory language of the emergency law, as well as to the traditional rules of federal equity jurisdiction and the statutes which modify them.

The presentation of this Article will conform to a two part scheme. The first part will examine case law on the issue of individual member liability under section 301 of the Labor-Management Relations Act and the Railway Labor Act. This will be followed by a look at the use of federal injunctive power against members under the Sherman and Clayton Acts and the limitations placed on that power by the Norris-LaGuardia Act and the federal rules of civil procedure. The second part of this article will focus upon the legislative history

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(W.D.N.Y. 1952), *aff'd*, 202 F.2d 132 (2d Cir. 1953), *cert. denied*, 344 U.S. 915 (1953); United States v. International Longshoremen's Ass'n, 116 F. Supp. 262 (S.D.N.Y. 1953); United States v. United Mine Workers, 25 L.R.R.M. 2381 (D.D.C. 1950), *aff'd*, 190 F.2d 865 (D.C. Cir. 1951); United States v. United Mine Workers, 89 F. Supp. 187 (D.D.C. 1950); United States v. International L. & W. Union, 78 F. Supp. 710 (N.D. Cal. 1948); United States v. Carbide & Carbon Chemicals Corp., 21 L.R.R.M. 2525 (E.D. Tenn. 1948); United States v. International Longshoremen's Ass'n, 22 L.R.R.M. 2421 (S.D.N.Y. 1948); United States v. Maritime Union, 22 L.R.R.M. 2306 (N.D. Ohio 1948); United States v. United Mine Workers, 77 F. Supp. 562 (D.D.C. 1948); United States v. United Mine Workers, 21 L.R.R.M. 2721 (D.D.C. 1948).

[10] For instances where injunctions were issued, see note 9 *supra*.

[11] Givens, *supra* note 6, at 202.

[12] Act of August 28, 1963, Pub. L. No. 88-108, 77 Stat. 129.

[13] S.J. RES. 186, 89th Cong., 2d Sess. (1966).

[14] Act of July 17, 1967, Pub. L. No. 90-54, 81 Stat. 122.

[15] The emergency law has withstood several constitutional challenges. The Second Circuit for example rejected the contention that in seeking an injunction in a private labor dispute the government was not presenting a case or controversy within the meaning of article III, section 2 of the Constitution. United States v. United Steelworkers, 202 F.2d 132, 138–39 (2d Cir.), *cert. denied*, 344 U.S. 915 (1953). The court reasoned that the existence of an employer-employee relational dispute did not preclude finding the government a party in interest with enforceable rights. *Id.* at 139. In another case, a district court held that the thirteenth amendment was not violated by the emergency injunction law. United States v. United Mine Workers, 21 L.R.R.M. 2721, 2724 (D.D.C. 1948). The court advanced the idea that while individuals could not be prevented from quitting, concerted quitting could be prohibited. *Id.*

of the emergency injunction provision of the Labor-Management Relations Act. The scope of this emergency injunction law with respect to member liability will then be considered in light of the policy and precedent discussed in previous sections.

II. INDIVIDUAL MEMBER LIABILITY

A. *Under Section 301 of the Labor-Management Relations Act*

When evaluating the scope of the emergency injunction, one must bear in mind that member liability and policy justifications may arise under other sections of the same Act. Section 301 of the Act provides for the recognition of any labor organization to "sue or be sued as an entity and in behalf"[16] of the employers whom it represents in the federal courts. The principle purpose behind section 301 is to provide a practical method of suing unions for violation of collective bargaining agreements.[17] The most recent decision in this area occurred in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,[18] where the Supreme Court addressed itself to the question of whether federal courts, under section 301, could enjoin union strikes occurring contrary to contractual no-strike clauses in collective agreements, at least where the strike had been initiated over a controversy which was properly submittable to arbitration.[19] Limiting itself to this issue

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[16] Labor-Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1976). This section in part states:

> § 185. Suits by and against labor organizations
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> (a) Venue, amount, and citizenship
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> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

[17] Section 301 was designed to overcome the common law treatment of labor unions as unincorporated associations. Under common law, actions against unions required individual service upon all members, for few state courts recognized unions as entities for litigation purposes. *See* Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 HARV. L. REV. 274, 303–04 (1948). For a discussion of the suability of labor unions prior to section 301, see Note, 32 VA. L. REV. 394 (1946). For an explanation of the development of and the distinctions between the entity and aggregate theories, see generally Dodd, *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977 (1929).

[18] 398 U.S. 235 (1970).

[19] *Id.* at 237–38.

alone, the Court ruled that an injunction could run against the labor organization.[20] But the Court pronounced no law with respect to the injunction's force upon individual members. In *Atkinson v. Sinclair Refining Co.*,[21] a decision which occurred prior to *Boys Markets*, the Court refused to reach the question of whether equitable remedies could bind individual members under section 301.[22] The inference in *Atkinson*, though it has generally gone unnoticed, is that section 301(a)'s jurisdictional reference to "parties" means only those parties to the collective bargaining agreement, namely, the labor organization and the employer.[23] In the absence of specific authorization on this matter, then, it appears that lower federal courts cannot now asssume that the *Boys Markets* holding warrants injunctive relief against members.[24]

The issue of whether individual members, bound by a no-strike clause, may be liable at law under section 301 also appears to be unsettled. In a leading 1971 case,[25] the Seventh Circuit ruled that both the union and the employer can be reached under section 301 but that members are not liable for damages resulting from a "wildcat" or unauthorized strike.[26] Although the language of section 301 does not expressly prohibit damage actions by employers against employee-union members who undertake an unauthorized strike, the court noted that nothing in the legislative history of the Act indicated that a damage action would be against members for a strike in breach

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[20] *Id.* at 253. In so holding the Court overturned that part of Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), which held that the anti-injunction provision of the Norris-LaGuardia Act denied the federal court's jurisdiction to grant injunctions. *See* 398 U.S. at 249.

For instances in which the Court granted injunctions under section 301 of the Labor-Management Relations Act, see United States Steel Corp. v. United Mine Workers, 534 F.2d 1063, 1077 (3d Cir. 1976); Island Creek Coal Co. v. United Mine Workers, 507 F.2d 650, 653 (3d Cir.), *cert. denied*, 423 U.S. 877, *rehearing denied*, 423 U.S. 1008 (1975); Peabody Coal Mine v. Local Union No. 7869, UMW, 360 F. Supp. 615, 620 (W.D. Ark. 1973). On the topic of labor injunctions under section 301, see generally Wimberly, *The Labor Injunction—Past, Present and Future*, 22 S.C. L. REV. 689, 727–37 (1970).

[21] 370 U.S. 238 (1962).

[22] 370 U.S. at 249 n.7.

[23] *See* 370 U.S. at 247.

[24] Indeed, there are no reported decisions enjoining members alone for striking.

[25] Sinclair Oil Corp. v. Oil, Chem. & Atomic Workers Int'l Union, 452 F.2d 49 (7th Cir. 1971).

[26] Sinclair Oil Corp. v. Oil, Chem. & Atomic Workers Int'l Union, 452 F.2d 49, 50 (7th Cir. 1971). The court noted that this issue was one of first impression. *Id.* In *Atkinson*, the Court had expressly reserved the question of member liability in situations where the labor union was not responsible, *e.g.*, a wildcat strike. 370 U.S. at 249 n.1.

of a no-strike clause.[27] At least one district court,[28] on the other hand, has reluctantly, and it would appear erroneously,[29] held that where the plaintiff employer could not prove a union to be responsible for a walkout, the plaintiff would have a cause of action against members and would have the opportunity to prove them liable.[30]

The policy considerations underlying the section 301 controversy are relatively simple. On the one hand, the efficacy of the *Boys Markets* injunction may depend to some extent upon the liability of more militant memberships. On the other hand, the anti-labor history of the federal judiciary prior to the Norris-LaGuardia Act[31] and the National Labor Relations Act,[32] and the present possibility of seriously exacerbating industrial tension, are factors weighing in favor of member immunity.

Some observers have commented that in passing section 301, Congress was acting to prevent a possible recurrence of the *Danbury Hatters*[33] case which imposed liability for damages upon individual members.[34] The same reasons that led Congress to act to prevent individual damage liability apply equally as well to the imposition of an equitable remedy which would reach members.

Several harmful effects of such member liability have been suggested. For instance, it would summon up past labor history and

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[27] Sinclair Oil Corp. v. Oil, Chem. & Atomic Workers Int'l Union, 452 F.2d 49, 52 (7th Cir. 1971). *But see* Note, 18 WAYNE L. REV. 1657, 1664–74 (1972) (asserting that *Sinclair Oil* court erred by arguing that section 301 of Labor-Management Relations Act was only meant to preclude union members from liability in situations where the union was found liable). *See also* Note, 86 HARV. L. REV. 447, 457–58 (1972) (suggesting that answer to wildcat strikes lies in "imposing an affirmative duty on the union to combat wildcat strikes," thereby making union liable if it fails to take reasonable measures to prevent such actions).

[28] *See* Alloy Cast Steel Co. v. United Steelworkers, 429 F. Supp. 445 (N.D. Ohio 1977).

[29] The opinion would appear erroneous because it relied upon Smith v. Evening News Ass'n, 371 U.S. 195, 199–200 (1962), as authority for holding that union members may be held liable for damages arising out of a strike. Alloy Cast Steel Co. v. United Steelworkers, 429 F. Supp. 445, 451 (N.D. Ohio 1977). However, *Smith* only holds that members may have standing to sue an employer for damages under section 301 of the Labor-Management Relations Act. 371 U.S. at 199–200.

[30] Alloy Cast Steel Co. v. United Steelworkers, 429 F. Supp. 445, 451 (N.D. Ohio 1977). *But see* Givens, *Responsibility of Individual Employees for Breaches of No-Strike Clauses*, 14 IND. & LAB. REL. REV. 595, 597 (1961) (contending that imposition of damages on individual striking employees is violative of thirteenth amendment anti-slavery provision).

[31] Norris-LaGuardia Act §§ 1-15, 29 U.S.C. §§ 101-15 (1976). For a description of the early treatment of labor unions by the courts, see Note, 86 HARV. L. REV. 447, 455 (1972).

[32] *See* Note, *supra* note 31, at 455.

[33] *Danbury Hatters* is a reference to the decisions in Loewe v. Lawlor, 208 U.S. 274 (1908), and Loewe v. Savings Bank, 236 F. 444 (2d Cir. 1916).

[34] *See* Note, *supra* note 31, at 458. For the congressional debates on this issue, see 93 CONG. REC. 4839–40 (1947) and 92 CONG. REC. 5705 (1946).

its bitterness; it would possibly wipe out life savings in one coup, and it would create movement martyrs.[35] Moreover, it is unlikely that the employees would be able to compensate employers for any substantial losses and therefore labor would conclude that the real reason for the rule is to impose penalties upon militants and to discourage defiance.[36]

Until the Supreme Court has ruled dispositively on member liability, assumptions of power in this area by lower federal courts may violate the principle of judicial self-restraint. The argument that the expansion of the court powers in those cases is simply a plenary effectuation of a wronged plaintiff's remedies is without merit. Once new parties become liable, namely, members who have not previously been liable for a period of perhaps forty years, a new cause of action has in fact been created, one which runs from the government to the members.[37] While the judicial creation of new forms of action is necessary and desirable in many areas, courts should not be as active in an area as heavily legislated as labor relations law, especially where there is no signal of authorization from the high Court or the legislature.

B. *Under the Railway Labor Act*

Several instances of member liability have also arisen under the Railway Labor Act,[38] which was passed in 1926 to prohibit strikes in the railroad industry[39] and later amended in 1936 to include air carriers.[40] The Act established a scheme for the prompt resolution of disputes between railway carriers and their employees, and succeeded for the most part during its early history in preventing or

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[35] Givens, *supra* note 30, at 596.

[36] Note, *supra* note 31, at 451.

[37] Witness the recent controversy over remedies in Title VII of the Civil Rights Act of 1964. Some courts appear to have violated statutes and possibly the Constitution in shaping remedies which are too far reaching. *See, e.g.*, Watkins v. United Steelworkers, 516 F.2d 41 (5th Cir. 1975); Waters v. Wisconsin Steel Works of Int'l Harvester, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

[38] Prior to the passage of the Railway Labor Act, there were instances of individual member liability for railroad strikes. *See In re* Lennon, 166 U.S. 548, 555–57 (1897) (contempt conviction of union member who refused to comply with injunction against strike); Williams v. United States, 295 F. 302, 305 (5th Cir. 1923) (criminal conviction of union members under Sherman Act); United States v. Railway Employees' Dept. of A.F.L., 283 F. 479, 494 (N.D. Ill. 1922) (injunction against strike leaders granted); Toledo, A.A. & N.M. Ry. Co. v. Pennsylvania Co., 54 F. 730, 740 (N.D. Ohio 1893) (individual union members may be found liable for damages under Interstate Commerce Act).

[39] Railway Labor Act of 1926, ch. 347, 44 Stat. 577.

[40] An Act of April 10, 1936 to Amend the Railway Labor, ch. 166, § 201, 49 Stat. 1189.

minimizing strikes in the railroad and airline industries.[41] By the 1950's, however, mounting labor grievances among railway employees led to an increased number of union strikes.[42] Amid this period of unrest, the Railway Act was invoked against union members to restrain such strikes.

In the case of *Louisville & Nashville R.R. Co. v. Brown*,[43] the Fifth Circuit held members liable for damages when they undertook a wildcat, or unauthorized, strike in contravention to the terms of the Railway Labor Act.[44] The *Brown* case, however, provides weak precedent for the proposition that union members are generally liable under the Act, for the decision was based primarily on state tort law and was limited to the facts of the particular situation with which it dealt.[45] The determining factor in the court's opinion was the union's purpose behind the strike. The members had engaged in a strike which had not been authorized by the railroad union, and therefore, the court noted, were not enforcing their own railway employment interest.[46] Notwithstanding this narrow importation of the opinion, the decision has still been criticized because of the court's imposition of member liability.[47]

Stronger reliance was placed on the Railway Labor Act for the purpose of imposing member liability in *United States v. Brotherhood of R.R. Trainmen*,[48] when union members were held subject to the court's equitable power under the Act.[49] However, when the injunction was widely ignored, the Government only charged the union

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[41] On the topic of the Act's early success in preventing strikes, see Syme, *supra* note 6, at 386.

[42] *See* Syme, *supra* note 6, at 386.

[43] 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 946 (1958).

[44] *Id.* at 156.

[45] *Id.* at 157–58. The defendant employees had claimed that they were not liable under state law, arguing that federal law had pre-empted the field of railway labor relations. *Id.* at 152. The court, however, allowed state law to govern upon finding that the purpose of the strike was the circumvention of the grievance procedure created by the Railway Labor Act. *Id.* at 156.

[46] *Id.* at 150, 157–58.

[47] *See* Comment, 59 COLUM. L. REV. 177, 189 (1959).

[48] 27 L.R.R.M. 2151 (1950).

[49] *Id.* at 2152. The court reasoned that a continuance of the strike by union members would

> deprive the Nation of essential transportation service, . . . greatly obstruct the flow of interstate commerce and the transmission of the mails, . . . interfere with and obstruct the effective performance and discharge of vital and necessary Governmental functions and . . . frustrate the powers . . . of Congress upon the Executive Branch of the Government, . . . imperil [its] National security, health and safety, . . . and cause the United States of America to suffer immediate and irreparable injury for which it has no adequate remedy at law.

Id. at 2151.

with contempt and did not pursue the members.[50] Although the opinions in the contempt actions did not suggest why the Justice Department failed to charge the members with contempt, it seems apparent that the government attorneys believed there was no legal basis for holding the members liable, or that there was a great need to avoid further aggravation of industrial tensions.

Perhaps the strongest authority for member liability under the Railway Labor Act can be found in *United States v. Robinson*,[51] where convictions of contempt against striking air traffic controllers for the violation of a Railway Labor Act injunction were upheld by the Ninth Circuit.[52] Yet even this case, and others like it, would seem to have limited application outside the railway and air carrier industry, for both these industries have historically been more closely regulated than the private sector.[53] This has been true of labor as well as management.[54] Thus while member liability might be justified in the railway and air carrier industry, legal precedent under the Railway Labor Act provides inadequate support for such liability in the private sector.

III. The Reach of Injunctive Relief Under the General Equity Powers of the Courts

A. *Under the Sherman and Clayton Antitrust Acts*

Before the adoption of the Taft-Hartley Act in 1947, the only significant legislation restricting labor union activity was the Sherman Antitrust Act.[55] The Sherman Act provided authority for the federal courts to declare certain strikes to be illegal.[56] Relying on section 1

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[50] *See* United States v. Brotherhood of R.R. Trainmen, 27 L.R.R.M. 2308, 2308 (N.D. Ill. 1951).

[51] 449 F.2d 925 (9th Cir. 1971).

[52] *Id.* at 926.

[53] *See* Harper, *Major Disputes Under the Railway Labor Act*, 35 J. Air Law & Com. 3, 3 (1969); Comment, *supra* note 47, at 182; Comments, 14 DePaul L. Rev. 115, 119 (1969).

[54] *See* Comment, *supra* note 53, at 119.

[55] Sherman Act § 1, 15 U.S.C. § 1 (1976).

[56] The activity which was held illegal under the Sherman Act constituted secondary boycotts, *i.e.*, boycotts of a neutral party by the union to force that party to put pressure on the actual party in dispute with the union, and transportation strikes. *See, e.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U.S. 37, 45, 54 (1927) (declaring employer's stone "unfair" and forbidding union members on construction sites outside state from working on such stone held to be an illegal restraint of trade); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 461–64, 478 (1921) (union's boycott of dealers, marketing employer's machinery, held combination and conspiracy to restrain interstate commerce); Vandell v. United States, 6 F.2d 188, 190 (2d Cir. 1925) (Sherman Act applied to boycott of interstate railway company).

of the Act, which declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,"[57] the federal courts reasoned that to restrain is to prohibit, limit, confine, or abridge,[58] and that "commerce," having a broader meaning than mere trade, means traffic between citizens of different states.[59] Consequently, the Sherman Act covered all union activity which was cognizable under federal commerce power.[60]

One of the earliest statements regarding the use of federal injunctive power against labor unions under the antitrust laws can be found in *United States v. Debs*.[61] In *Debs*, the United States sought to enjoin a boycott by the American Railway Union. The boycott prevented railroad companies, running out of Chicago, from operating their trains.[62] The circuit court based its opinion primarily upon the Sherman Antitrust Act and granted an injunction.[63] Although the Supreme Court, in affirming the lower court injunction, found authority for its decision on the broader premise of federal commerce power and federal authority to regulate the mails,[64] it was careful to state: "It must not be understood from this that we dissent from the conclusions of that [the circuit] court in reference to the scope of the [Sherman] act . . . ."[65] Rather, the Court explained, "we prefer to rest our judgment on the broader ground . . . believing it of impor-

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[57] Sherman Act § 1, 15 U.S.C. § 1 (1976).

[58] *See, e.g.*, *In re* Charge to Grand Jury, 62 F. 828, 831 (N.D. Ill. 1894).

[59] *See, e.g.*, United States v. Cassidy, 67 F. 698, 705 (N.D. Cal. 1895).

[60] *See* United States v. Gold, 115 F.2d 236, 237 (2d Cir. 1940). This view, however, was later repudiated by the Supreme Court in Apex Hosiery Co. v. Leader, 310 U.S. 469 (1913), where the Court remarked that the only restraints forbidden by the Sherman Act were those which "tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." *Id.* at 493.

[61] 64 F. 724 (N.D. Ill. 1894).

[62] *Id.* at 726–27, 730–34.

[63] *Id.* at 745–53.

[64] *In re* Debs, 158 U.S. 564, 579, 581–84 (1895). Resorting to even broader ground to justify the use of federal injunctive power, the Court at one point declared:

> Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other . . . . The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

Id. at 584. This statement, to the effect that all governments have always had the duty and power to protect the public interest, is startling in a system normally described as a government of limited powers and based upon the rule of law.

[65] *Id.* at 600.

tance that the principles underlying it should be fully stated and affirmed."[66]

In any event, it appears that *Debs* constructed a rule of federal law which invested the government with injunctive rights beyond any statutory authorization and beyond the rule of *stare decisis*.[67] Emphasizing that all governments have always had the duty and power to protect the public interests, the Court issued an injunctive order which appeared to reach even members of the union, at least according to the far-reaching rhetoric indulged in by the Court.[68] This was a startling statement to be made in a system normally described as a government of limited powers and based upon the rule of law. Nevertheless, the Sherman Act was invoked by federal courts to support injunctions against unions in a number of subsequent cases. In fact, post-*Debs* cases indicated that if proper jurisdiction were obtained, relief could be broad and effective.[69]

In response to labor's continued complaints about the use of the Sherman Act against union activity, and to excessive use of labor injunctions by federal courts, Congress adopted sections 6 and 20 of the Clayton Act.[70] Section 6 declares that the labor of a human being is not an article or commodity of commerce and that nothing in the Act will be construed to proscribe labor organizations or their members from carrying out their lawful objectives.[71] Section 20 limits federal injunctive power by providing that no injunction shall be granted by any federal court for certain specified acts growing out of a labor dispute between employers and employees concerning terms and conditions of employment.[72]

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[66] *Id.*

[67] *See* Note, *National Emergencies and the President's Inherent Powers*, 2 STAN. L. REV. 303, 310 (1950).

[68] 158 U.S. at 578–79.

[69] *See* E. OAKES, ORGANIZED LABOR & INDUSTRIAL CONFLICTS § 565 (1927); *see, e.g.*, American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 F. 598, 605–07 (N.D. Ohio 1898).

[70] *See* S. REP. NO. 698, 63d Cong., 2d Sess. 10–12 (1914).

[71] Section 6 provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Clayton Act § 6, 15 U.S.C. § 17 (1976).

[72] Section 20 reads:

> That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case beween an employer and employees, or between employers and employees, or between employees, or

The Supreme Court, however, ignored what appeared to be a manifest intention by Congress to wholly exempt labor from antitrust laws and federal injunctive power, and instead allowed only a partial exemption. In *Duplex Printing Press Co. v. Deering*[73] the language of sections 6 and 20 was held to constitute no bar to relief against members as well as the union under certain circumstances. In that case, the union had engaged in a secondary boycott, that is, they had boycotted the employer's dealers, who were not employing union members, because these dealers insisted on selling and operating machinery produced by the employer with whom the union had an existing labor dispute.[74] The Court upheld an injunction to restrain the union's conduct, holding that the Clayton Act exempted labor union activities only to the extent that those activities were directed against the employees' immediate employer, and that controversies over the sale of goods by others did not constitute labor disputes within the meaning of the Clayton Act.[75] In this regard the Court said: "there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects . . . ."[76] Two years later, in *United Mine Workers v. Coronado Coal Co.*,[77] the Supreme Court held that

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between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value: or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Clayton Act § 20, 29 U.S.C. § 52 (1976).

[73] 254 U.S. 443 (1921).

[74] *Id.* at 462–64.

[75] *Id.* at 466, 473–77.

[76] *Id.* at 469.

[77] 259 U.S. 344 (1922).

unions could be sued as quasi-corporations for damages and that a resulting judgment could even bind union members.[78]

The popular view of the labor organization itself has changed from that of an unincorporated association to one of a separate and distinct entity. At common law a labor union, which is an unincorporated association, was not a legal entity distinct from its members, and therefore could not sue or be sued in the association name.[79] An action had to be brought against the individual persons constituting the association, as a class suit, or against an agent or committee authorized to defend for the organization.[80] This common law rule has at least been modified by statute, permitting labor organizations to sue and be sued in their own name, that is, as a separate entity.[81] Notwithstanding this new identity under the entity theory, labor organizations have not, per se, been granted limited liability which would insulate members from orders binding the organization. In fact there have been instances of broad equitable relief granted against unions in one period or another.[82] Nevertheless, it must be remembered that the exercise of the court's inherent equitable power is circumscribed by statutory limitations in the context of labor relations and by the congressionally and constitutionally delineated rules of jurisdiction.[83] Moreover, sections 6 and 20 of the Clayton Act furnish a potentially powerful restriction upon injunctive orders, when their clear prohibition against injunctions running against members engaged in concerted work stoppages is given effect. Of course, the decision of whether these provisions will be given full effect will in part be determined by policy considerations and the prevailing judicial temperament toward labor. Finally, although the Act by its terms only applies to employers, it is well settled that it also includes the government when it is attempting to act in private sector labor relations.[84]

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[78] *Id.* at 391–92, 402–03.

[79] *See In re* New York Times Co., 2 App. Div.2d 31, 33, 152 N.Y.S.2d 884, 886 (1956); Stefenia v. McNiff, 49 Misc.2d 480, 482–83, 267 N.Y.S.2d 854, 857 (Sup. Ct. 1966).

[80] *See* Iron Molders' Union 125 v. Allis-Chalmers Co., 166 F. 45, 48 (7th Cir. 1908).

[81] Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1976). However, section 301 is more of a suability-empowerment statute in federal court than a federal declaration on the change of labor organizational status and of substantive rights and obligations.

[82] *See* E. OAKES, *supra* note 69, §§ 565, 569.

[83] *See* Clayton Act § 20, 29 U.S.C. § 52 (1976); Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1976); FED. R. CIV. P. 4(f), 65.

[84] *See* United States v. American Fed'n of Musicians, 47 F. Supp. 304, 308 (N.D. Ill. 1942), *aff'd*, 318 U.S. 741 (1943).

B. *The Reach of Injunctions After the Norris-LaGuardia Act*

The Norris-LaGuardia Act provides that no federal court shall issue an injunction to prohibit any person or persons participating in a labor dispute from "ceasing or refusing to perform any work."[85] But like other anti-injunction acts, the Norris-LaGuardia Act has been given narrow construction in order to permit the imposition of equitable relief.[86] For example, in *United States v. United Mine Workers*,[87] where union workers in a nationwide coal strike walked out of mines which had been seized and operated by the federal government pursuant to wartime emergency power,[88] the Supreme Court held that the Act did not apply to the sovereign government as an employer or to relations between the government and its employees.[89] Noting that the Act failed to mention the United States in its anti-injunction provision, the Court reasoned that as a matter of statutory construction whenever a new statute is enacted it is not to be read as denying the sovereign a previously held right or

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[85] Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1976). Section 4 reads in part as follows:

> No court of the U.S. shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

Id.

[86] *See, e.g.*, 398 U.S. at 240–55 (injunction may be issued against labor organization for breach of clause in collective bargaining agreement); National Ass'n of Letter Carriers v. Sombrotto, 449 F.2d 915, 918–19 (2d Cir. 1971) (Norris-LaGuardia does not bar injunctive imposition of trusteeship by an international over local to avoid strike in breach of contract); Louisville & Nashville R.R. Co. v. Brown, 252 F.2d 149, 157 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) (section 6 of Norris-LaGuardia does not bar liability of members under Railway Labor Act).

[87] 330 U.S. 258 (1947).

[88] *Id.* at 262–67. The federal government took possession of the mines pursuant to Executive Order No. 9728, 11 Fed. Reg. 5593 (1946), wherein the President directed the Secretary of the Interior to seize and operate the mines after finding that labor disturbances were interrupting the production of bituminous coal necessary for the operation of the national economy during the transition from war to peace. The Secretary was also empowered to negotiate with the miners' union over the terms and conditions of employment. The President's action was taken under his authority as Commander-in-Chief of the Armed Forces and by virtue of the War Labor Disputes Act of 1943, ch. 144, 57 Stat. 163. 330 U.S. at 262 n.1.

[89] 330 U.S. at 282, 289. The defendants maintained, however, that workers in government seized mines were not federal employees in the proper sense of the word and that the government in its operation of the mines was not functioning in a sovereign capacity. These arguments were rejected by the Court. *Id.* at 284–85. In a separate opinion, Justice Frankfurter borrowed Under Secretary Patterson's apt description to characterize "the role of the Government as that of 'a receiver that would be charged with the continuity of operation of the plant.' " *Id.* at 320 (Frankfurter, J., concurring in part, dissenting in part) (footnote omitted).

power unless it is specifically so provided therein.[90] Thus, the Court concluded, an injunction could issue consistent with the Norris-LaGuardia Act since it did not, *haec verba*, bar a governmentally-secured injunction.[91]

Any theory, however, which views the government to be generally exempt from this Act is questionable, for as Justice Frankfurter pointed out in his separate opinion in *United Mine Workers*, this legislation was largely a response to the harsh results in *Debs* and two subsequent cases,[92] where the injunction was governmentally-secured under the claim of a compelling public emergency.[93] Moreover, the legal grounds of this case appear to limit the Court's otherwise expansive holding to a situation in which the government is the actual employer in a labor dispute.[94]

It was not until some time shortly after this case arose, that Congress passed the Labor-Management Relations Act, which expressly provided that the Norris-LaGuardia Act would not apply to bar governmentally-secured injunctions in emergency labor disputes.[95]

Given the Supreme Court's ability then in *United Mine Workers* to avoid the express provisions of the Norris-LaGuardia Act, without the benefit of the Labor-Management Relations Act's express repeal of the former in cases of national emergency, one may suggest with some degree of confidence that the same political obsequiousness which dominated the Court on this matter in 1947 would have led it to the same decision even after the government relinquished its status as employer. More importantly, there is nothing to suggest that an injunction order under these circumstances could not be directed toward individual members. Such a derogation of the anti-injunction

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[90] *Id.* at 270, 272; *see* Lewis v. United States, 92 U.S. 618, 622 (1875); United States v. Herron, 87 U.S. (20 Wall.) 251, 263 (1873). *But see* United States v. California, 297 U.S. 175, 186 (1936) (presumption that sovereign not bound by Act unless specifically named "does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated"). For an elaboration of the implied exclusion of the sovereign, see Comment, 45 MICH. L. REV. 469, 487–91 (1947).

[91] 330 U.S. at 289.

[92] United States v. Railway Employees' Dept. of A.F.L., 290 F. 978 (N.D. Ill. 1923); United States v. Hayes, D. Ind. 1919, Equity No. 312 (unreported); *see* 75 CONG. REC. 5479 (1932) (Senator LaGuardia) (injunction issued in *United States v. Railway Employees' Dept. of A.F.L.* held up as an example of the abuses sought to be prevented by Norris-LaGuardia Act); *id.* at 5490 (Representative Cellar) (*United States v. Railway Employees' Dept. of A.F.L.* injunction "verily destroyed the bill of rights contained in our Constitution"). For a discussion of the legislative history and intent of the Norris-LaGuardia Act, see Comment, *supra* note 90, at 491–94.

[93] 330 U.S. at 315 (Frankfurter, J., concurring in part, dissenting in part).

[94] *See id.* at 275, 276, 278, 280, 282, 284–86, 289.

[95] Labor-Management Relations Act § 208(b), 29 U.S.C. § 178(b) (1976).

pronouncements by Congress is certainly in harmony at least with the more modern trend.[96]

C. *Jurisdictional Limitations Imposed by the Rules of Federal Jurisdiction*

The national emergency provisions of the Labor-Management Relations Act contained in section 208 do not create new modes of obtaining jurisdiction over a union and its members.[97] Had Congress intended otherwise, it could have expanded the judicial power of the federal courts in cases arising under the Act to limits in excess of those courts' existing jurisdiction.[98] Instead, the statute simply provides that a court "having jurisdiction of the parties" may issue the injunction.[99] Since the method of obtaining jurisdiction over the parties is undefined by the Act, it is clear that an injunction must be premised upon the usual in personam jurisdiction of the federal district courts.[100] One must then turn to the Federal Rules of Civil Procedure for illumination on this subject. These rules place two major limitations upon the jurisdiction of the federal courts to issue an injunction. First, the court's in personam jurisdiction must be exercised within the territorial bounds prescribed by statute;[101] second, the court's jurisdiction to issue an injunction extends only to those persons who have been made a party to the preliminary injunction by proper service of process or who are agents of such a party or acting in concert with them.[102]

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[96] *See* note 84 *supra*.

[97] *See* Labor-Management Relations Act § 208, 29 U.S.C. § 178 (1976).

[98] Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 442 (1946); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838); *see, e.g.*, 28 U.S.C. § 1692 (1976) (extending federal service of process where receiver is appointed for property situated in different districts); 28 U.S.C. § 1694 (1976) (creating methods for service of process in patent infringement actions); 28 U.S.C. § 1695 (1976) (providing for service of process in stockholder's derivative actions); C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 7, at 17 (3d ed. 1976) ("federal courts are courts of limited jurisdiction . . . . They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress.").

[99] Labor-Management Relations Act § 208(a), 29 U.S.C. § 178(a) (1976).

[100] Jones, *supra* note 6, at 203.

[101] FED. R. CIV. P. 4(f). Rule 4(f) provides that service of federal process normally is confined to the territorial limits of the state in which the federal district court is sitting, unless such process is extended by statute or by the federal rules of civil procedure. *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1124–29 (1969).

[102] FED. R. CIV. P. 65(d). Prior to the passage of Rule 65(d), the court could issue an injunction against the entire world, thus binding everyone who had notice of it. Chisolm v. Caines, 147 F. Supp. 188, 191 (E.D.S.C. 1954).

Absent special authorization by a federal statute,[103] the in personam jurisdiction of the federal district court is restricted by the territorial limits of the state in which the district court is held, as provided for in Rule 4(f) of the Federal Rules of Civil Procedure. As already noted, had Congress intended otherwise, it would have so provided.[104] Thus, this territorial restriction applies to injunctions under the Act. If any court attempts to issue an injunction against members based upon its jurisdiction over the union's office or its agent's offices, only those members within that district would actually be bound by the order, assuming for the moment that service of process was made and that jurisdiction was otherwise proper.[105] In one recent non-emergency case, where an international union did not have its office nor any agents within the district, the district court held that it had neither venue nor in personam jursidiction over the international union which allegedly violated both the National Labor Relations Act and the antitrust laws.[106] Again in another case, a district court declined to issue an injunction against four corporations because it would have been compelled to hear evidence related to work stoppages outside of its territory and beyond its jurisdiction.[107]

Almost by definition then, in a national emergency case, no single district court could exercise jurisdiction over the entire situa-

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[103] For specific instances in which federal statutes have extended the in personam jurisdiction of the federal district courts, see 4 C. WRIGHT & A. MILLER, *supra* note 101, §§ 1118–25.

[104] *But see* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 203–05 (E.D. Pa. 1974) (establishing "fairness test" to which Congress' power to authorize extra-territorial process is subject); Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 537 (1963) (contending that there are constitutional limitations upon extensions of federal service of process by Congress).

[105] *Cf.* Sherman v. Kirshman, 369 F.2d 886, 889 (2d Cir. 1966) (judgment against an unincorporated association is enforceable only against association itself or against individual members who are subject to court's jurisdiction); Olsen v. Puntervold, 338 F.2d 21, 22 (5th Cir. 1964) (judgment against partnership is not recoverable from an individual partner unless service can be made upon him).

There have been several occasions in which the government attorneys have brought actions for injunctions in separate courts simultaneously, but this has been rare. *See, e.g.*, United States v. International Longshoremen's Assoc., 78 L.R.R.M. 2955 (E.D. La. 1971); United States v. International Longshoremen's Assoc., 337 F. Supp. 381 (S.D.N.Y. 1971); United States v. Portland Longshoremen's Benevolent Soc'y, Local No. 861, 336 F. Supp. 504 (S.D. Me. 1971); United States v. International Longshoremen's Assoc., 334 F. Supp. 1134 (S.D. Ga. 1971). The mere existence of such occasions, however, indicates that Justice Department attorneys have recognized the problem as a real one and sensed vulnerability to it should labor attack an order on this basis.

[106] Sherman v. American Fed'n of Musicians, 94 L.R.R.M. 2348, 2348 (W.D. Okla. 1976).

[107] Consolidation Coal Co. v. United Mine Workers, 95 L.R.R.M. 2539, 2544 (W.D. Pa. 1977).

tion.[108] Nevertheless, in well over thirty emergency dispute cases giving rise to an injunction,[109] the injunctive orders covered parties not subject to the jurisdiction of the issuing court. In none of these cases was a jurisdictional challenge made.[110] And yet in at least sixteen cases, there were multiple party defendants some of whom were not obliged to respond to extraterritorial service of process and over whom the court could not have exercised jurisdiction except by their consent.[111]

The second limitation on the court's power to issue a preliminary injunction arises from the requirement that a person against whom an injunction is sought, be served with notice. This requirement is embodied in Rule 65(a)(1) of the Federal Rules of Civil Procedure.[112] In connection with this requirement, section (d) of Rule 65 states in part that a preliminary injunction and temporary restraining order "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."[113] Thus, unless a person is acting in concert with a properly named defendant or is an agent of such a defendant, he may not be bound by an injunctive order, unless he has been made a party to the preliminary injunction hearing by service of process and given an opportunity to defend his interests.[114]

This rule, originally enacted in 1914 as part of the Clayton Act,[115] was the result of a congressional attempt to restrict the power of the federal courts to halt strikes by the use of injunctive orders, a common occurrence in the emergency situation.[116] This aspect of Rule 65, however, has not always been given proper effect by courts issuing an injunction. In the 1978 *United Mine Workers* case,[117] for

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[108] *Contra,* United States v. American Locomotive Co., 109 F. Supp. 78 (W.D.N.Y. 1952) (injunction granted against strike by employees at New York plant which manufactured materials essential to making of atomic weapons for national defense).

[109] *See* note 9 *supra.*

[110] Jones, *supra* note 6, at 210.

[111] *Id.* at 225; *see, e.g.,* United States v. United Steelworkers, 271 F.2d 676, 679 (3d Cir. 1959) (defendants waived service of process).

[112] FED. R. CIV. P. 65(a)(1).

[113] *Id.* 65(d).

[114] *See* Consolidation Coal Co. v. Local Union No. 1784, 89 L.R.R.M. 2131, 2132 (6th Cir. 1975).

[115] The Clayton Act of 1914, ch. 323 § 19, 38 Stat. 738.

[116] *See* FED. R. CIV. P. 65 (imposing requirements of notice and posting of bond, as well as restricting form and scope of injunctive orders).

[117] *See* note 2 *supra.*

instance, a temporary restraing order was addressed to the defendant union and its members, even though the members had not been individually served with notice or made parties to the original hearing on the request for a preliminary injunction.[118] The Justice Department there was attempting a *fait accompli*. Had there been a refusal to return to work, it is, at the very least, questionable whether members who had not been made parties to the original hearing could have been liable for contempt.[119]

It appears clear that members are not parties to a hearing on a preliminary injunction, and thus not bound by an injunction order, merely because their union is a party.[120] In *Chase National Bank v. Norwalk*,[121] which dealt with an order similar to the one issued by the court in *United Mine Workers*, the Supreme Court stated that established principles of equity required that the scope of an injunctive order be limited to properly named defendants, that is, parties to the underlying litigation and their confederates or associates and may not extend to others who merely acquire notice of it.[122] In that case the Court was faced with an order which directed the City of Norwalk, Ohio, to refrain from destroying or interferring with the continued use of poles, wires, and electrical equipment belonging to a power company operating within the city.[123] No person other than the city had been served with notice of the request for a preliminary injunction, or had participated in the injunction proceeding.[124] The issuing court nonetheless sought to hold state officials liable for contempt when they, acting independently and without inducement from the named defendant, undertook acts proscribed by the injunction order.[125] Finding that the injunction could not be the basis for liability of state officials, the Court ruled that the most the order could do was prevent the named defendant from inducing persons not bound

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[118] *Id.* The temporary restraining order in the 1978 *United Mine Workers* case stated:

> The defendants and their officers, agents, *members*, servants and employees and all persons acting with them are restrained from continuing . . . any strikes . . . in the bituminous coal industry of the United States and from interfering with or affecting the orderly continuance of work in the bituminous coal industry of the United States.

N.Y. Times, Mar. 10, 1978, § D, at 14 (emphasis added).

[119] *See* Consolidation Coal Co. v. Local Union No. 1784, UMW, 89 L.R.R.M. 2131, 2132 (6th Cir. 1975).

[120] *See id.*

[121] 291 U.S. 431 (1934).

[122] *Id.* at 436–37; *accord*, 7 MOORE'S FEDERAL PRACTICE ¶ 65.13 (2d ed. 1978).

[123] 291 U.S. at 434.

[124] *Id.* at 436.

[125] *Id.* at 437.

by the order to do the prohibited act.[126] Thus, it is clear that no court has the power to bind members of a union by an injunction, merely because they have done "what the decree has forbidden."[127]

IV. THE REACH OF THE INJUNCTION UNDER THE EMERGENCY DISPUTE PROVISIONS OF THE LABOR-MANAGEMENT RELATIONS ACT

A. *The Emergency Dispute Provisions*

Courts are sometimes heard to maintain that the only protection afforded members in carrying out their work stoppages in an emergency is the preservation of a single employee's right to end his employment relation altogether during the reign of the injunction.[128] This is a strange observation since there has been little debate on the issue and none on the court's remedial power in that context.[129]

Not only is there a lack of a consensus on the part of the legislators concerning this issue, but there is also a substantial amount of argument by Senator Pepper to the effect that an injunction against members would violate the thirteenth amendment where a nongovernmental employer is involved.[130] Noting a Florida Supreme Court decision[131] construing that state's constitution, which had adopted verbatim the thirteenth amendment of the United States Constitution, he remarked: "We are not advised of any rule of law

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[126] *See id.* at 436–37.

[127] *See* Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930).

[128] *See* United States v. United Steelworkers, 202 F.2d 132, 139 (2d Cir.), *cert. denied*, 344 U.S. 915 (1953).

[129] While Representative Case's comments on this issue support the position that the sole protection of union members striking in emergency situations is the right of the individual to terminate his employment, this has been the extent of the discussion on this point. Representative Case remarked that:

> The right to strike, the right to quit work in concert, is a normal accompaniment of the right to bargain collectively. But a distinction must be made . . . between the right to quit work individually and the right to quit work in concert. The right of an individual to work or not to work is a natural right and a right protected by the Constitution. The right to strike, however, is not a natural right. . . . [T]here is no right anywhere, anytime, for any group to act in concert against the public welfare, not even in the name of good intentions by a labor organization.

93 CONG. REC. 3652 (1947) (remarks of Representative Case).

[130] 2 NLRB; LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1111 (1948) [hereinafter cited as LEGISLATIVE HISTORY OF LMRA].

[131] Henderson v. Coleman, 7 So.2d 117 (1942) (injunction against union members to prevent them from striking when no contractual relationship is involved violates Florida Constitution, Declaration of Rights Section 19).

under which any man in this country will be forced to serve any other man whom he does not wish to serve."[132]

While in summarizing the legislative history, one must concede that many of Senator Pepper's arguments were not accepted by his colleagues, neither did the majority appear to subscribe to the view that there was a distinction between an individual and a collective right to cease working. Thus, the statutory interpretation which courts have employed with respect to the emergency law has been read into the legislative history of the emergency statute rather than derived from it.

The emergency provisions, in their final form and in pertinent part read as follows:

> Section 1.
>
> b) . . . *employers, employees and labor organizations . . . recognize under law that neither party has any right in its relations with any other* to engage in acts or practices which jeopardize the public health, safety or interest.[133]
>
> Section 208.
>
> . . . the President may direct the Attorney General to petition any district court . . . *having jurisdiction* of the parties to enjoin such strike . . . .[134]
>
> Section 209.
>
> . . . *Neither party* shall be under any duty to accept in whole or in part, any proposal made by the [Federal Mediation and Conciliation] Service.[135]
>
> Section 502.
>
> Nothing in this Chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in the Chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue process to compel the performances by an individual employee such labor or service . . . without his consent . . . .[136]

The underscored portions of the statute indicate that the legislature considered two propositions so fundamental that there was no need to forcefully articulate them. The first is that the court in the emergency case acts only upon parties to the suit, and does not bind

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[132] LEGISLATIVE HISTORY OF LMRA, *supra* note 130, at 1111.

[133] Labor-Management Relations Act § 1, 29 U.S.C. § 141 (1976) (emphasis added).

[134] Labor-Management Relations Act § 208, 29 U.S.C. § 178 (1976) (emphasis added).

[135] Labor-Management Relations Act § 209, 29 U.S.C. § 179 (1976) (emphasis added).

[136] Labor-Management Relations Act § 502, 29 U.S.C. § 143 (1976).

the entire world such as members who are properly describable only as persons, regardless of whether they have actual knowledge of the order.

The second important inference which may be drawn from the language is that the legislature, when considering the scope of the injunction, contemplated only two parties to the suit. Members of an organization are not mentioned anyplace in the relevant provisions and "employees" only once, and that is found in the preamble to section 1 which was intended to modify the original National Labor Relations Act and to preface the entirely new law of the Labor-Management Relations Act. Even the preambular section proceeds to discuss the rights of "neither party." Indeed, Representative Fisher remarked that he saw the purpose of the emergency law as a method of stopping John L. Lewis,[137] longtime president of the United Mine Workers who was often identified with the union itself.[138]

It is true that the rules of statutory construction hold that where a statute has been interpreted in a particular manner for some considerable time, and such interpretation has been left undisturbed by the legislature, the courts will be satisfied that they have effectuated congressional intent.[139] However, the Supreme Court has warned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."[140] In any event, there have been few direct holdings upon the issue of the scope of the injunction. Those that do exist are from lower courts and reveal a pattern of inconsistency. They should be given weight accordingly.

The development of the national emergency injunction case law has indeed been inconsistent and contradictory. In the early cases members had never been named or served, nor had they participated in the litigation. None of these cases culminated in an order purporting to bind the members as such. Yet the later cases have purported to bind individual members under injunction orders. An examination of this curious development is in order.

In the 1946 coal miner's strike, prior to the Labor-Management Relations Act, the temporary restraining order named only "the union and all persons in active concert,"[141] and in the contempt proceedings which followed a refusal to return to work, none of the members were charged with contempt.[142] Only the union and its president

[137] 93 CONG. REC. 3516 (1947) (remarks of Representative Fisher).

[138] United States v. United Mine Workers, 70 F. Supp. 42, 48 (D.D.C. 1946).

[139] *See* Girouard v. United States, 328 U.S. 61, 69 (1946).

[140] *Id.*

[141] United States v. United Mine Workers, 19 L.R.R.M. 2059, 2060 (D.D.C. 1946).

[142] *See* United States v. United Mine Workers, 70 F. Supp. 42, 52 (D.D.C. 1946).

were held accountable.[143] While inveighing at great length against the members,[144] the Supreme Court never discussed possible member liability of any type. In the 1948 coal miner's strike a similar temporary restraining order was issued which barred the union and all persons in active concert with it from violating its terms.[145] Again members ignored the injunction and no action was taken against them, giving rise to an inference that perhaps the government attorneys did not believe the order was enforceable against members. A similar injunctive order was issued in *United States v. Carbide & Carbon Chemicals Corp.*,[146] and the coal miner strikes of 1949[147] and 1950[148] with the same result.

In 1952 a change began to occur. There was either a broadening of the meaning "persons in active concert" or merely a clarification. The Court in *United States v. United Steelworkers of America*[149] rejected a general challenge to the order's validity by stating: "Nor was the injunction too broad. No individual employee was required to do or to refrain from doing anything except not to act in concert with the union. *Otherwise, each was free from all restraints.*"[150]

It therefore appears that the members were free to engage in wildcat or unauthorized activity, or any strike which did not involve the labor organization without fear of potential liability. Thus, a wildcat strike, even if concerted, though free from union influence, would not have violated the order under this construction of the Act.

The trial court in the *United Steelworkers* case had introduced novel language representing a considerable broadening of the tradi-

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[143] *Id.*

[144] United States v. United Mine Workers, 330 U.S. 258, 306 (1947). The Court stated: "Loyalty in responding to the orders of their leaders may, in some minds, minimize the gravity of the miners' conduct; but we cannot ignore the effect of their action upon the rights of other citizens." *Id.*

[145] United States v. United Mine Workers, 21 L.R.R.M. 2570, 2571 (D.D.C. 1948).

[146] United States v. Carbide & Carbon Chemicals Corp., 21 L.R.R.M. 2525, 2525–26 (E.D. Tenn. 1948). The order barred the defendants (no members listed as such) and all those in concert with them from engaging in stoppages. *See also* United States v. International Longshoremen's Ass'n, 22 L.R.R.M. 2421, 2422 (S.D.N.Y. 1948); United States v. Longshoremen's Union, 78 F. Supp. 710, 714 (N.D. Cal. 1948); United States v. National Maritime Union, 22 L.R.R.M. 2306, 2307 (N.D. Ohio 1948).

[147] United Mine Workers v. United States, 177 F.2d 29, 33 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949) (temporary restraining order directed against union and all those in active concert).

[148] United States v. United Mine Workers, 25 L.R.R.M. 2381 (D.D.C. 1950), *aff'd*, United States v. United Mine Workers, 190 F.2d 865 (D.C. Cir. 1951).

[149] United States v. United Steelworkers, 202 F.2d 132 (2d Cir.), *cert. denied*, 344 U.S. 915 (1953).

[150] *Id.* at 139 (emphasis added).

tional order's scope. This Steelworker's order required that there be a bar against all "*members* of the defendant Union, and those of Local 2286 and Local 4498, acting in concert, from in any manner continuing . . . or taking part in the strike."[151]

The case is an important watershed in the emergency injunction law, for the trial court order imposed a bar on member stoppages which were independent of union activity as well as those which were in concert with it, while the appellate interpretation of the Act on this point relieved those same members from the reach of the order unless they acted in concert with the union.

The appellate decision however, seems to have little or no effect on subsequent trial courts engaged in the rather matter-of-fact issuance of emergency dispute injunctions. All later emergency cases, where the government has prevailed, have involved a standard injunction order form directed expressly against "members of the defendant union."[152] This form has varied little over the years. Yet continuity of form is by itself unconvincing authority for its correctness, since in none of these cases has the scope of the order undergone appellate review.

The form of the order as it stands in most cases only acknowledges individual walkouts as a permissible work stoppage. This renders a very limited interpretation of section 502, one which is restricted only to the proscription against forced labor contained in the thirteenth amendment. Assuming the judicial attitude that all strikes and stoppages are not exercises of the individual employee's right to quit work, the courts may even circumvent this limited right by factually finding that "the strike by the defendant [union] has been a concerted stoppage of work and not the exercise of the right of individual employees to quit their labor as set forth in section 502 of the Act."[153] Perhaps section 502 was most graphically ignored in one

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[151] *Id.* at 135 (emphasis added).

[152] *See* United States v. International Longshoremen's Ass'n, 78 L.R.R.M. 2955 (E.D. La. 1971); United States v. International Longshoremen's Ass'n, 344 F. Supp. 1134, 1137 (S.D. Ga. 1971); United States v. Boeing Co., 215 F. Supp. 821, 826 (W.D. Wash. 1963); United States v. International Longshoremen's Ass'n, 177 F. Supp. 621, 625 (S.D.N.Y. 1959); United States v. United Steelworkers, 178 F. Supp. 297, 297 (W.D. Pa. 1959); United States v. International Longshoremen's Ass'n, 147 F. Supp. 425, 428 (S.D.N.Y. 1956).

[153] United States v. International Longshoremen's Ass'n, 337 F. Supp. 381, 384 (S.D.N.Y. 1971); *see, e.g.*, United States v. International Longshoremen's Ass'n, 246 F. Supp. 849, 856 (S.D.N.Y. 1964) (ruling that members stand in no different relation to union than to officers, agents and employees than to their employers); United States v. United Steelworkers, 45 L.R.R.M. 2515, 2516 (W.D. Pa. 1960) ("no member of the United Steelworkers of America subject to this Court's injunction could have been unemployed . . . unless he were in contempt of this Court").

case where the court issued an injunction stating: "All parties involved in the dispute, *all employees* . . . and all employers and management are made subject to and brought within the reach of the preliminary injunction. . . ."[154] The treatment accorded section 502, though, would seem to reflect the general position of the courts with regard to the use of injunctive power in labor disputes. This section has placed little or no restriction on the court's power to reach individual members.

B. *Emergency Orders Under the Act*

The question then raised is by what exotic mechanism do federal courts purport to bind members who are not individually named, served or participating, or otherwise significantly made parties to the injunction suit. As was noted earlier, under common law an unincorporated labor organization was not a legal entity and could not be sued as such. Thus any injunction issued against it could only bind its constituent members who were sued in their own capacity.[155] Section 301 of the Act, however, changed the rule of union capacity to be sued and to sue in actions arising under that section by allowing actions to be brought directly against unions.[156] It may be then that when courts claim power to bind members and find them in contempt where they have never been individually made parties they are relying *sub silentio* upon a presumed application of section 301 to the national emergency provisions[157] which not only allow for jurisdiction over the union as an entity but for jurisdiction over all members as well whether or not they have been made parties to the suit. This seems to be the only explanation for the court's expansion of its jurisdictional and injunctive reach. The language of the Act, however, aside from not providing any express support for permitting the government the use of section 301 under emergency proceedings excludes the government from its use. Section 301 provides:

> 301(a) Suits for violations of contracts between *an employer and a labor organization* . . . may be brought in any district court . . . .
>
> (b). . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents . . . .
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> . . . .

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[154] United States v. National Maritime Union, 196 F. Supp. 374, 379 (S.D.N.Y. 1961) (emphasis added), *aff'd*, 48 L.R.R.M. 2937 (2d Cir. 1961).

[155] *See, e.g.*, Charleston Dry Dock & Machine Co. v. O'Rourke, 274 F. 811, 814 (E.D.S.C. 1921).

[156] Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1976).

[157] 29 U.S.C. § 178 (1976).

> (d) the service of a summons . . . upon an . . . agent of a labor organization, in his capacity as such, shall constitute service upon the labor *organization*.[158]

The section does not provide that service upon the union shall constitute service upon the members. And subsection (b) mandates that all judgments in law against the union through the use of this statutorily-created entity theory excludes any liability of members for damages in that same suit.[159]

Senator Taft in explaining the purpose of section 301 noted that it provides that unions can be sued as though they were corporations.[160] If this was the intent of Congress, then union members, analogous to corporate shareholders, cannot be liable for contempt in equity either, at least not upon a judgment against only the organization.

The clear intent of the drafters is that this section was to prevent any recurrence of the *Danbury Hatters* case where the members were liable for damages upon a judgment against the union. Since the drafters of section 301 were not expressly concerned with the equity liability problem in 1947, the omission of any reference to the problem does not give rise to an inference of *expressio unius est exclusio alterius*. There is also some legislative history which suggests that the incarceration sanction was not considered acceptable under the emergency injunction provision of the Act.[161] Because civil or criminal contempt fines levied against members based upon a judgment against a union would violate the policy behind section 301's reversal of the *Danbury Hatters* rule, there is little in the way of serious sanctions remaining against members and hence no purpose or effect in securing a judgment which binds them.

In view of the conclusion that section 301 cannot apply to provide jurisdiction over members, and the futility of securing such if it were possible, one might ask what other devices might remain available to a district court for carrying out such a task. One alternative is the class action device.

In *Duplex Printing Co.*, the Supreme Court stated that the injunction should run against members even though they had not been served or made a part of the injunction proceeding because "averments and proof [existed] to show that it was impracticable to

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[158] Labor-Management Relations Act § 301(a), 29 U.S.C. § 185 (1976) (emphasis added).
[159] *Id.* § 301(b).
[160] 93 CONG. REC. 3839 (1947) (remarks of Senator Taft).
[161] 93 CONG. REC. 4190 (1947) (remarks of Senator Taft).

bring all the members before the court and that the named defendants properly represented the, and those named were called upon to defend for all, pursuant to Equity Rule 38."[162]

The modern Federal Rules of Civil Procedure also provide for class actions.[163] A non-emergency suit was held maintainable as such against union members where the president was named as the representative of the class under Rules 17(b) and 23.[164] However, these rules have received increasingly restrictive interpretations not only in the well-known securities and consumer protection cases, but also in labor litigation.

In *Carroll v. American Federation of Musicians*, for instance, it was held that the decision of a court in a suit between a union and an orchestra is binding only upon the orchestra leaders who sue and the unions being sued, despite the claim that Rule 23 allows the leaders to represent all in the union's jurisdiction.[165] Among other problems of the class action, Rule 23(c) allows plaintiffs and defendants the absolute right to remove themselves from the class.[166] This has serious implications for emergency dispute cases, since defendant members can remove themselves en masse, and thereby defeat facile jurisdiction, just as though no class had been petitioned.

A second example of the limitations on the use of this device is the rule of the Supreme Court that individual notice must be given to the parties who are in the class and who are reasonably ascertainable.[167] In order to circumvent the notice problem to masses of members under this rule, the plaintiff could attempt to borrow a technique currently utilized in mass injunctive proceedings in the public sector of labor-management relations. There plaintiffs have often used television, radio and newspapers to publicize the suit and thereby to gain jurisdiction over members. But as of yet, the courts reviewing these methods have considered them to be of dubious validity when challenged on the basis of due process.[168] There is additionally no precedent for their use in federal labor law.

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[162] 254 U.S. at 461.

[163] *See* FED. R. CIV. P. 17(b), 23.

[164] Gilmour v. Wood, Wire & Metal Lather's Local 74, 223 F. Supp. 236, 246–47 (N.D. Ill. 1963).

[165] Carroll v. American Fed'n of Musicians, 372 F.2d 155, 162 (2d Cir. 1967), *rev'd on other grounds*, 391 U.S. 99 (1968).

[166] FED. R. CIV. P. 23(c)(2).

[167] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974).

[168] *E.g.*, Joint School District No. 1 v. Wisconsin Rapids Educational Ass'n, 70 Wis.2d 292, 315–16, 234 N.W.2d 289, 302–03 (1976); *accord*, Utica Teacher's Ass'n v. Board of Educ. of Utica, 67 Misc.2d 770, 771, 325 N.Y.S.2d 587, 588–89 (1971). In *Wisconsin Rapids* where the plaintiff government attempted to base jurisdiction on the fact that the order had been printed

One final example of the difficulty of attempting to use the class action device is the fact that the technique of naming a leader of the union as a representative of the class of members would not be available in the "wildcat" situation. There, he would not be representative of the rank and file. Ironically, however, this is precisely the situation where the court is in greatest need of the device since the membership's actions are not "in concert with" the union—the cases where the members as a group can be reached in their capacity as confederates of the union defendant.[169]

With respect to overbroad injunction orders, the independent enjoining of members regardless of whether they meet the "in concert" with the union test is an attempt by courts to exceed their jurisdiction and therefore is a legal nullity insofar as its operative effect upon members not meeting the test is concerned.[170] Accordingly, district courts and the reviewing courts should inquire as to the situation before issuing broadly worded orders sought by government counsel and before affirming them on appeal.

In particular, before contempt can be found against members under the present procedure for obtaining jurisdiction, a court must determine: (1) whether the organization complied with the order by taking steps to secure a return to work; and (2) whether there is any rebuttal evidence to show that the union has been clandestinely ordering members to disregard its public return to work request. If the union has complied in good faith, then the work stoppage is unauthorized. Members are therefore beyond the reach of the standard order and procedure, and the government must look to other remedies.

Whatever developments follow in the emergency injunction field, hopefully the courts will avoid the political expediency typified by one district court when it claimed that "the jurisdiction of this Court based on the fact that a strike is threatened which would imperil the national health or safety, permits the Court to issue a decree addressed to all involved in th[is] labor dispute."[171] Such reasoning

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on the front page of the city newspaper, but the court found the contempt charge unsupportable due to lack of notice. 70 Wis.2d at 316, 234 N.W.2d at 302–03. Mere presence of counsel at the hearing was of no moment since whatever he did there bound only those with notice *ab initio*. *Id.*

[169] *See* FED. R. CIV. P. 65(d).

[170] *See* O. FISS, INJUNCTIONS 625–29 (1972). According to one commentator, these courts are employing the erroneous and dated "in rem" theory. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.9 (1973).

[171] United States v. International Longshoremen's Ass'n, 57 L.R.R.M. 2599, 2605 (S.D.N.Y. 1964).

is detrimental to the intent of the emergency statute and the principles of federal equity.

The Constitution raises one last possible limitation upon the reach of the emergency injunction. The American Civil Liberties Union has advanced the position that the temporary restraining order issued in the 1978 *United Mine Workers* case violated the associational rights of the striking miners.[172]

When the Labor-Management Relations Act was enacted in 1947 the right of freedom of association had not yet been accorded constitutional status. This right was established in 1958 in *NAACP v. Alabama*.[173] In *Thomas v. Collins*,[174] first amendment protection was extended to beliefs concerning economic matters including those relating to labor disputes advanced by union members and their leaders.[175]

Presumably, the order in the 1978 case, not untypical of those of the last twenty-five years, bars the sending of pro-strike communications to the press or the public representatives, the preparation of militant leaflets, and the exercise of a wide spectrum of other basic first amendment protected speech.[176] The taking of a strike vote that could conceivably result in the affirmative might be barred by such an order, yet the district court for the District of Columbia recently refused on first amendment grounds to issue an order barring such activity during Postal Service negotiations, a non-emergency case.[177] In short, the broadly drafted orders in emergency cases appear to impose a massive prior restraint upon the speech and associational rights of 160,000 American citizens.[178]

Even if the jurisdictional problems of the typical emergency injunction could be resolved to the government's satisfaction through the use, for example, of the class action device, there is still reason to believe that section 20 of the Clayton Act applies to bar relief against members engaging in non-union stoppages. It has been repeatedly held that the passage of the National Labor Relations Act and subsequent labor legislation does not effect a repeal of the previously enacted labor-related statutes such as the antitrust laws, unless there

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[172] Amicus Brief of the American Civil Liberties Union at 10–11, United States v. United Mine Workers, 97 L.R.R.M. 3176 (D.D.C. 1978) [hereinafter cited as Amicus Brief].

[173] 357 U.S. 449, 460 (1958).

[174] 323 U.S. 516 (1945).

[175] *Id.* at 530.

[176] Amicus Brief, *supra* note 172, at 13.

[177] United States v. Postal Service Workers, 771 GOV'T EMPL. REL. REP. (BNA) 6, 7 (1978).

[178] Amicus Brief, *supra* note 172, at 14.

is express language or necessary implications present.[179] The language of the Labor-Management Relations Act does not expressly repeal the section 20 limitation in the Clayton Act. It merely provides that the Norris-LaGuardia Act is inapplicable in national emergency cases.[180] In view of this express repealer in the Labor-Management Relations Act of an earlier inconsistent provision, the lack of any express repeal of section 20 of the Clayton Act, or for that matter any discussion of the issue in the Act's legislative history, it is difficult if not impossible to find an implied revocation of section 20. Section 20 does not interfere with a Labor-Management Relations Act order against an organization, but only with an order against strikers.[181]

Lastly, the argument that the Clayton Act's protection extends only to situations where the strikers are not departing from their normal and legitimate objectives and therefore does not apply to an emergency order since the Labor-Management Relations Act makes such a strike illegal is weak. This exception of "normal and legitimate objects" was used traditionally in antitrust and secondary boycott cases representing clear abuses of power.[182] Where a union or its members strikes, after the expiration of a collective agreement it is pursuing its normal objects.[183] The only difference between the emergency and non-emergency strikes, *certirus paribus*, is that the emergency case strikers happen to be in a large and successfully organized union in an important industry. This is what all "legitimate" unions aspire to become. It may be illogical to penalize some for actually attaining this status. Since we are striving to evaluate the lawfulness and legitimacy of the typical emergency order, it is likely to be a question-begging exercise for us to include as part of our test the word "legitimate" as used in *Duplex* and other Clayton Act cases.

V. CONCLUSION

A. *The Efficacy of the Judiciary in Enforcement of Orders Against Members*

One of the most important arguments against the emergency injunction reaching union members originates from pragmatists who insist that it is virtually impossible to devise effective and

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[179] Bodine Produce, Inc. v. United Farmworkers Organizing Comm., 494 F.2d 541, 544–56 (9th Cir. 1974).

[180] 29 U.S.C. § 178(b) (1976).

[181] Clayton Act § 6, 15 U.S.C. § 17 (1976).

[182] *See, e.g.*, 254 U.S. at 469.

[183] *See id.* at 470–72.

economically-imposable sanctions upon members. Thus, although much humor is directed towards the futility of the task in the form of such statements as "You cannot dig coal with bayonnets [*sic*],"[184] little meaningful analysis of the enforcement of court emergency orders has been done.

The most significant study of the problem was written more than a quarter of a century ago by Mr. Rosen.[185] It divides national emergency strikes into three types for the purpose of evaluating the feasibility of remedial sanctions.

The first type is that presented by the recalcitrant union. This is the simplest situation since the union has, presumably, control over its membership and is perhaps even proud of its contumacy. Such strikes occurred in the early coal miner's strikes. The second archetype is to be found in a union leadership which controls its membership and operates the strike execution clandestinely through the use of prearranged strike signals, even while it publicly denounces the work stoppage as an unauthorized "wildcat." The third and increasingly frequent stoppage is the genuine wildcat strike in which the leadership has lost control of a large amount of its members, or even all of them.[186]

The first two situations are not ones presenting profound enforcement problems. The court in the first two cases may be able to employ the persuasive and coercive faculties of the union to successfully obtain a return to work. Courts have often employed the union in a hired gun capacity in many section 301 (no-strike clause violation) actions. Courts can require unions to cooperate to a great degree to obtain a return to work. Mere urging of a return is not enough to satisfy the standard test for civil liability, at least where further means are available.[187] In one case, the international organization was held to be under a duty to (1) fine, expel, and suspend members after having threatened the same without result; (2) send representatives to urge dissidents to return; (3) call meetings of strike leaders; (4) direct strikers to vote by secret ballot. The Locals should have removed all

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[184] Ching, *Collective Bargaining and the Emergency Dispute*, 26 TEMPLE L.Q. 363, 363 (1953).

[185] Rosen, *The Effectiveness of the Judiciary in National Emergency Labor Disputes*, 6 RUTGERS L. REV. 402 (1952).

[186] *See* LEVINSON, THE NEW WORKING CLASS MAJORITY 226–28 (1974).

[187] Eazor Express, Inc. v. International Bhd. of Teamsters, 357 F. Supp. 158, 166–67 (W.D. Pa. 1973); *accord*, Vulcan Materials Co. v. United Steelworkers, 430 F.2d 446, 457 (5th Cir. 1970).

stewards and committeepersons, and insured that no striker was employed anywhere else during the strike.[188]

In the emergency cases courts have largely tended to avoid the issue of union liability for unauthorized strikes by inferring as a regular practice, that the union is responsible for the stoppage even though there is no direct evidence to support the inference. Therefore situation three is treated as situation two. In the 1949 United Mine Workers contempt conviction, the court went so far as to deny the traditional definition of wildcat. It held that a strike can be unauthorized only when there is a small number of strikers, since reason demands that no such large scale strike could occur without union involvement.[189]

At least one court, however, has objected to this inference where it is not based upon any evidence. In this court's opinion, if a union had done all that it could to induce a return, the government's case for contempt must fail:

> It may well be that the strike by union members has been ordered, encouraged, recommended, instructed, induced or in somewise permitted by means not appearing in the record; but this court may not convict on conjecture, being bound to act only on evidence brought before it, which is insufficient to support a finding of either criminal or civil contempt.[190]

Assuming the wildcat situation becomes more acute, it seems there will be an increased temptation, both in section 301 and emergency actions, to hold individual members liable regardless of the legal limitations which might have been recognized in more serene and contemplative times. Courts unable or unwilling to employ the organization may grasp at any arguably permissible remedial sanction for the purpose of vindicating the power of the court and the federal executive if not also to obtain a return to work. In addition to judicial assumptions concerning the power to bind striking members, the idea is not totally without support in scholarly circles.[191]

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[188] Eazor Express, Inc. v. International Bhd. of Teamsters, 357 F. Supp. 158, 166–67 (W.D. Pa. 1973). *But cf.* United Constr. Workers v. Haislip Baking Co., 223 F.2d 872, 876 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955) (union not liable to employer for damages resulting from strike unless its agents " 'participated in, ratified or encouraged the continuance of the strike.' ").

[189] United Mine Workers v. United States, 177 F.2d 29, 35–36 (D.C. Cir.), *cert. denied*, 338 U.S. 871 (1949).

[190] United States v. United Mine Workers, 89 F. Supp. 187, 189 (D.D.C. 1950); *accord*, Peabody Coal Co. v. Local Unions 1734, 1508, 1548, 543 F.2d 10, 12 (6th Cir. 1976).

[191] Rosen, *supra* note 185, at 416.

Mr. Rosen discusses several proposed remedial sanctions which would reach union members. One of these is the mass round-up and imprisonment. He notes that such has often been a farcical failure in other lands as exemplified by the New Zealand strike results in 1942. There, prison facilities were woefully inadequate for the truly mass strike such as most emergency stoppages here would be. Examples of the failure of this sanction in the United States are well-known also. The Dayton, Ohio, firemen's strike of the early 1970's is often cited, and Rosen discourages the use of mass fines for much the same pragmatic reasons.[192]

He does recommend sanctions for member contempt, such as raising the retirement age for pension eligibility, lowering seniority credits, striking contract clauses such as those for vacations and even cancelling National Labor Relations Board certification, so as to deprive contemnors of the protections afforded employees who remain within the bounds of national labor policy.[193] He views sanctions which can be executed without individual operation against members, the most practicable solution to contempt enforcement problems. Rosen concedes that some or all of these struck benefits may be nullified by subsequent bargaining between the parties, and such has surely resulted often in the public employment sector.[194] Where rights are restored upon the employees' relinquishment of their demands for higher wages or more employment safety, the contempt power would appear to have been diverted from its proper use as an enforcement mechanism to that of a lever in the collective bargaining process. The section 301 actions would involve these problems but their likelihood of developing in the emergency cases is remote.

However, Mr. Rosen's suggestions do involve a substantial risk of illegality. Today, it is doubtful whether universal sanctions against members, regardless of participation in a strike (such as occurred in *Danbury Hatters*), would pass constitutional due process scrutiny. Individual adjudications of culpability would destroy any practicality to be gained by the original idea. The removal of Board certification might increase employer reprisals, and consequently result in more rank and file militancy and disruption of commerce, than had been previously experienced.

The absence of lawful and expedient remedy sanctions against mass union membership is simply one more argument for rejecting any attempt to hold members liable. The awareness of this reality

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[192] *Id.* at 417.
[193] *Id.* at 418 & n.91.
[194] *Id.* at 418.

should inspire those responsible for national labor policy formulation to investigate alternative solutions to the emergency strike dilemma.

B. *The Desirability of Emergency Orders Against Members*

It has been many years since the *Debs* and *Danbury Hatters* cases have given the federal judiciary an unfavorable reputation in labor circles. In all of this time, few of even the most conservative of commentators have recommended the use of remedial sanctions against members for violation of emergency injunctions.[195] Individual damage liability has been roundly criticized as being repugnant to national labor policy in the post-*Danbury Hatters* era.[196] Member liability in the past has produced more persistent efforts to organize to secure protection against strike penalties.[197] It has been further urged that damages against members would constitute cruel and unusual punishment as well as violate the thirteenth amendment. Because Mr. Rosen's suggestions as well as the more traditional sanctions are so similar to civil damages in their operative effect, the same criticisms of damages must apply to them.

The suggestion of member liability is irresponsibly made. Under the present and historical practice, the union membership is not liable because it is not subject to in personam jurisdiction and therefore any order similar to the present standard is a legal nullity unless members act in concert with the union. Courts have, in purporting to bind members, overruled the intent of Congress as well as some earlier courts' initial interpretation of the Labor-Management Relations Act. Department of Justice policy has been such as to ensure that courts would not be required to rule on member liability in an actual contempt case. Member liability of any type has serious first and thirteenth amendment implications which the courts have not squarely

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[195] For example, Rothenberg, a leading commentator of the topic in earlier years, suggested that neither members nor unions be liable for violating emergency orders. He believes that since the leadership alone is responsible, only they should be liable. This neglects two important considerations: (1) since most unions will not call a strike without a strike vote, the members are responsible in the political sense; (2) if there was crippling liability imposed upon only one union's leadership, such would have substantial deterrent effect upon all but the most conservative personalities from running for union office. The national policy of encouraging collective action and bargaining would possibly be impaired even in non-emergency labor-management interaction. Rothenberg, *What Should Be Done About Emergency Strikes?*, 54 DICK. L. REV. 361, 393 (1950).

[196] Marshall, *New Perspectives on the National Emergency Disputes*, 18 LAB. L.J. 451, 457 (1967); Givens, *supra* note 6, at 41.

[197] Givens, *Responsibility of Individual Employees for Breaches of No-Strike Clauses*, 14 IND. & LAB. REL. REV. 595, 596 (1961).

met as of this time. The Clayton Act probably bars member liability under an injunction at least where there is no union concert. If member liability was attempted to be enforced, it would start anew the labor tension and animosity which *Debs* and *Danbury Hatters* raised and would create more problems in the long term than it would solve in the short.

The rejoinder to these conclusions is to ask, what can a court do when confronted with an emergency dispute and the union organization has complied with the order, or there is at least no evidence of lack of compliance?

A much simpler solution than amending the Federal Constitution, amending the Clayton Act, or joining all individual members through the use of a class action device, is to use judicial scrutiny. If courts exercise their plenary power to examine whether there is a national emergency, for the most part, only those disputes which are actually national emergencies will be adjudicated to be such. When this recommendation becomes practiced, the labor movement will recognize the legitimacy of the courts because of the good-faith evenhandedness employed in these cases. The labor movement will be in substantial agreement with the courts in subsequent rulings, either in accepting the President's evaluation of the seriousness of the strike's effects, or in rejecting it.

Labor is neither un-American nor intent upon serving only its parochial interests. It simply is aware that the label of national emergency, and hence the emergency injunction, has been vastly overused, as proven by several major research studies.[198] And as such, labor feels, perhaps justifiably, that the injunction is primarily an anti-labor, rather than a pro-national interest weapon.

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[198] IV National Labor Dispute, U.S. Dept. of Labor, Impact of Longshore Strikes on the National Economy, 92d Cong., 2d Sess. 1513–95 (1972); Bernstein & Lovell, *Are Coal Strikes National Emergencies?*, 6 IND. & LAB. REL. REV. 352, 366 (1953); *see* Moskow, *National Emergency Strikes: The Final Offer, Selection Procedure and Other Options*, in Twenty-fourth Annual N.Y.U. Conf. Lab. 1, 5 (1972). Secretary of the Interior Kreps, in an affidavit to the court, in paragraph 11, stated that throughout the coal strike of 1978, which the President's cabinet officers were testifying to be a "National Emergency," the exportation of coal continued. Amicus Brief, *supra* note 172, at 25.