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A series of work stoppages by members of the defendant union resulted in a plantwide strike on plaintiff's plant in Nashville, Tennessee on October 15, 1965. Avco, alleging a violation of the existing collective bargaining agreement, brought an action in a Tennessee state court seeking to enjoin the strike, and asking for general relief. A temporary injunction was granted and the union filed a petition for removal of the action to United States district court. Upon removal, the union moved for dissolution of the temporary restraining order and dismissal of the action on the basis that the district court had no power to issue or maintain the injunction due to the restrictions of the Norris-La Guardia Act; and Avco moved to remand to the state court on the grounds that the complaint was founded on a breach of contract arising under state law and not on a "claim or right arising under the Constitu-

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1 The petition for removal in these cases is made pursuant to 28 U.S.C. § 1441 (1948). § 1441 provides:
(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

2 29 U.S.C. § 104 (1932):
No court of the United States 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 (as these terms are herein defined) 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....
Avco also contended that the district court did not have jurisdiction of the action by virtue of the anti-injunction provisions of the Norris-La Guardia Act. The district court denied Avco's motion to remand to the state court and Avco appealed. Held, affirmed. The district court does have original jurisdiction of the action under the provisions of section 301 of the Taft-Hartley Act.

This holding of the Court of Appeals for the Sixth Circuit is in direct conflict with the holding of the third circuit in American Dredging Co. v. Local 25, Marine Division Union of Operating Engineers, AFL-CIO, which is expressly repudiated by the court in Avco. The court in American Dredging held that the cause of action brought in a state court was based solely on a state created right, and thus it is not removable when the complaint does not disclose within its four corners that the action is based upon federal law.

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3 The employer's allegation was that the action was not based on federal law as is required by the Removal Statute. See n. 1 supra.

4 29 U.S.C. § 104 (1932). The employer argued that this section is a limitation on the subject matter jurisdiction of the court rather than on the equity jurisdiction of the court. If the section is a limitation on the subject matter jurisdiction of the courts then the removal is not allowed because the federal court does not have the original jurisdiction required by the Removal Statute. However, if the statute is a limitation merely on the equity jurisdiction of the federal courts, the action is removable and the federal court has jurisdiction of the suit but has no power to issue an injunction. The federal district courts are split on the issue. For cases in which remand was granted see California Packing Corp. v. Local 142, ILWU, 253 F. Supp. 597 (D. Hawaii 1966); Merchants Refrigerating Co. v. Local 6, ILWU, 213 F. Supp. 177 (N.D. Calif. 1963); Lock Joint Pipe Co. v. Anderson, 127 F. Supp. 692 (W.D. Mo. 1955); Castle & Cooke Terminals v. Local 137, ILWU, 110 F. Supp. 247 (D. Hawaii 1953); Home Building Corp. v. Carpenters Dist. Council, 53 F. Supp. 804 (W.D. Mo. 1943). For cases in which remand was denied see Oman Constr. Co. v. Local 327, Int'l. Brotherhood of Teamsters, 263 F. Supp. 181 (M.D. Tenn. 1966); Food Fair Stores v. Retail Clerks District Council 11, 229 F. Supp. 123 (E.D. Pa. 1964); Tri-Boro Bagle Co. v. Bakery Drivers Local 802, 228 F. Supp. 720 (E.D. N.Y. 1963); Crestwood Dairy v. Kelley, 222 F. Supp. 614 (E.D. N.Y. 1963); Pocahontas Terminal Corp. v. Portland Bldg. & Constr. Trade Council, 93 F. Supp. 217 (D. Maine 1950).

(a) 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.


7 Id. at 850.
a labor dispute can give rise to a state cause of action as well as a federal cause of action and the plaintiff is free to pursue whichever he chooses; section 301\(^8\) did not pre-empt the area of labor relations; and in order for a case to be removable, under the doctrine of *Gulley v. First National Bank,\(^9\) the federal jurisdiction must be found within the four corners of the complaint. The court also used the theory that the provisions of the Norris-La Guardia Act denying the district courts jurisdiction to issue injunctions in labor disputes,\(^10\) denied them jurisdiction to entertain the suit. The court refused to "give sanction to an exercise in futility" by saying that a district court "has subject matter jurisdiction of a cause of action ... when it does not in the first place have jurisdiction to entertain and decide it upon its merits ...."\(^11\)

Section 301 of the Taft-Hartley Act gives the federal courts jurisdiction in suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce.\(^12\) In the now famous case of *Textile Workers v. Lincoln Mills\(^3\) the Supreme Court held that section 301 was more than a procedural statute; it also creates substantive law so that the federal courts have the power to grant relief in actions brought under section 301. The courts were left to develop a body of federal labor law to be applied to cases brought under section 301. While section 301 did not pre-empt the area to the extent of divesting state courts of jurisdiction over such actions,\(^14\) the state courts are compelled to apply the federal labor law.\(^16\) In this process of developing a new body of federal labor law however, the anti-injunction provisions of the Norris-La Guardia Act stand intact. The Supreme Court held in *Sinclair Refining Co. v. Atkinson\(^8\) that section 301 does not impliedly repeal the Norris-La Guardia Act and the two must stand together. The dominant theme of this whole line of cases is the desire to create a substantive labor law to be applied in all cases and provide a consistency that is not otherwise available.

From this background arises the issue involved in *Avco* and *American Dredging*, i.e., whether an action for breach of a no-strike clause in a collective bargaining agreement is removable from state to federal court. Under the Removal Statute, "any civil action brought in a State court of which the district courts of the United

\(^8\) 29 U.S.C. § 185 (1947) [hereinafter referred to as § 301].
\(^10\) See note 4 supra.
\(^11\) 338 F.2d 837, 842 (1964).
\(^12\) See note 5 supra.
\(^13\) 353 U.S. 448 (1957).
\(^14\) Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).
\(^16\) 370 U.S. 195 (1962).
States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States ...."17

When an employer brings an action to enjoin a strike as being in violation of a no-strike clause in the collective bargaining agreement, the union is desirous of immediately removing the action to federal court where there is no "jurisdiction" to issue an injunction against the strike due to the Norris-La Guardia Act.18 The union seeks to remove pursuant to the Removal Statute with jurisdiction of the federal court based on section 301. The opposition to removal is that the action is based solely on a state-created right and not upon section 301; and that the Norris La-Guardia Act denies the federal courts the jurisdiction to entertain these suits. In American Dredging both of these arguments were adopted; in Avco they were rejected.

The argument is based on the Gulley doctrine that the nature of the action (state or federal) must be determined from the four corners of the complaint. Under this doctrine the "plaintiff is the master of his own case" and is entitled to bring the cause of action on the law he desires and in the forum he desires.19 On this point Avco holds that a state created cause of action can no longer exist as the area is pre-empted by section 301. The court in Avco said that "all rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce arise under Federal law. State law does not exist as an independent source of private rights to enforce collective bargaining contracts.... The force of Federal preemption in this area cannot be avoided by failing to mention Section 301 in the complaint."20 Relying on Lincoln Mills, Lucas Flour and Dowd Box, the court in Avco concludes that although the state courts do have concurrent jurisdiction in section 301 cases they are bound to apply federal law;21 had the action remained in state court federal law would be controlling; thus the action is one arising under the laws of the United States. This is in contrast to the American Dredging holding that the state cause of action is an entity separate and distinct from an action under sec-

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18 Many states have "baby Norris-La Guardia Acts" which are patterned after the federal statute. Few are copied exactly after the federal statute with each state making its own adjustments. Also many states have no provisions similar to the Norris-La Guardia Act. For a survey of these state laws see Aaron, Labor Injunctions in The State Courts—Part I: A Survey, 50 Va. L. Rev. 951 (1964).
20 Avco Corp. v. Aero Lodge No. 735, International Ass'n of Mach. and Aerospace Workers, 376 F.2d 337, 340 (6th Cir. 1967).
tion 301. Under the *American Dredging* result a premium would be placed on artfully drawn pleadings and the result of a particular case would be highly dependent upon the situs of the activity. Allowing enforcement of a state cause of action by a state court, decided on the basis of state law in this area is clearly repugnant to the policy of establishing a single body of federal labor law intended to insure consistent results in labor cases. The body of law created under section 301 is clearly federal and the need for a single body of federal law is compelling.

The second step in the argument against removal is based on a literal interpretation of the wording of the Norris-La Guardia Act. The act provides that "[n]o court of the United States shall have jurisdiction...[to restrain certain acts one of which is refusing to perform any work]." The *American Dredging* decision is based on the premise that the word "jurisdiction" is used exactly the same in section 4 of the Norris-La Guardia Act as it is in section 301 of the Taft-Hartley Act. Under this interpretation the district courts are not only deprived of the power to issue an injunction, they do not

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22 The commentators have argued that the outcome of a removal case in these circumstances may to a large extent depend on the relief prayed for in the petition. The argument runs that if injunctive relief alone is asked for the federal court may not have jurisdiction due to the Norris-La Guardia Act; but if only damages are asked for or if the petition asks for damages and an injunction the case is more likely removable due to the provisions of the Removal Statute that if a separate claim which is removable is sued upon with a non-removable claim, the district court may either hear the suit in its entirety or remand it in its entirety. Professor Aaron concludes that the suit should be removable in either situation but submits that the federal courts are likely to deny removal if an injunction alone is sought and if both an injunction and damages are sought the federal court is likely to split the cause and remand the injunction prayer and hear the damages claim. Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 127 (1963). This extended discussion is a good example of the premium placed on drafting of pleadings and the uncertainty which remains regardless of how carefully the pleadings are drawn.

To circumvent this argument, in situations where the employer has asked only for an injunction, several defendant unions have attempted to invoke rule 54 (c) of the Federal Rules of Civil Procedure to assist removal. Rule 54 (c) provides that federal courts may "grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings." This argument states that even if the plaintiff does not ask for damages the federal courts have the power to award damages and the petition asking for only an injunction should be treated the same as one asking for damages also. For a discussion of this argument see *Comment, The Norris-LaGuardia Act and Section 301 of the Taft-Hartley Act—Problems of Jurisdiction and Removal in the Enforceability of Collectively Bargained No-Strike Agreements*, 60 NW. U. L. REV. 489, 506 (1965).
have the power to entertain a suit asking for an injunction. Thus since the district court does not have jurisdiction of the suit, so the argument goes, removal is not possible.

The court in Avco holds that jurisdiction does not have the same meaning in section 4 as it does in section 301.29 Under this holding "[t]he Norris-La Guardia Act does not deny to Federal Courts jurisdiction over the parties or the subject matter. The Federal Courts are denied the power to grant injunctive relief under the provision of Section 4 of the Act, and permitted to grant injunctive relief under the provision of Section 7 of the Act. The Norris-La Guardia Act does not limit the power of the Court to entertain the suit."30 This theory adopts an argument by Professor Chaffee31 that the Norris-La Guardia Act limits only the equity jurisdiction of the Federal Court and is not a limitation on the power of the court.32

The question of removal, as Judge Hastie points out in his dissent in American Dredging, is a technical question which must be decided because a more vital question hasn’t been answered. This more vital question is whether the Norris-La Guardia anti-injunction provisions are applicable to the states.33 The Supreme Court has (in the past) expressly avoided the question;34 Judge Hastie is convinced that the provisions are applicable to the states;35 and a

24 The question then is, what is the substantive law to be applied in suits under § 301 (a)? We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws.” Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 456 (1957).
27 The phrase "court of the United States" means solely courts created by Congress under Article III of the Constitution and does not refer to state or territorial courts. ILWU v. Wirtz, 170 F.2d 183 (9th Cir. 1948).
29 Avco Corp. v. Aero Lodge No. 735, Int. Ass’n of Mach. and Aerospace Workers, 376 F.2d 337, 341 (8th Cir. 1967).
30 Id.
31 Z. Chaffee, SOME PROBLEMS OF EQurTY 368 (1950).
32 Profesor Aaron agrees with this conclusion and himself concludes that “removal of the case from state court should be allowed under Section 1441 (a) of the Judicial Code.” Aaron, Strikes in Breach of Collective Agreements: Some Unanswered Questions, 63 Colum. L. Rev. 1027, 1046 (1963).
33 See Id.
34 Dowd Box Co. v. Courtney, 368 U.S. 502, 514 n.8 (1962).
leading California case has held that the provisions are not applicable to the states.

The Sinclair case held that section 4 is an integral part of the federal labor policy, and section 301 must be used in conjunction with section 4, not in place of section 4. To be consistent with the policy of establishing a body of federal labor law as commanded by the Supreme Court in Lincoln Mills, the Norris-La Guardia Act must be applied to the states. The role of the injunction in a labor dispute cannot be over-emphasized. It is the most controversial and the most lethal weapon in the arsenal of the employer and its proper role has been extensively debated. But the question here is not whether the injunction should be available or not. The point is that it is not available in federal courts, while it is available in state courts in various different forms and often with little or no restrictions. As long as this situation exists it will be impossible to develop a consistent labor law.

The holding of Avco is a step in the right direction toward developing a uniform labor law. Avco will in effect apply the Norris-La Guardia Act anti-injunction provisions to state courts in the sixth circuit for the union will be free to remove an action from any state court with the power to enjoin their strike. Thus the employer will be deprived of a remedy available to him before the enactment of section 301 and the "fears" of the dissent in Sinclair will be realized. In order to insure a consistent body of federal labor law this issue must be resolved and hopefully will be resolved by the Supreme Court in its October 1967 term.

William E. Marsh, '68

38 See generally F. Frankfurter and N. Green, The Labor Injunction (1930).
39 For an opinion that the American Dredging decision is based on a basic policy disagreement with Sinclair and a desire to make the injunction available to the employers see Note, 51 VA. L. REV. 973, 982 (1965).
41 See note 20, supra.
42 For a discussion on Congressional resolution of the issues presented in this area see Wellington and Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 YALE L. J. 1547 (1963).
45 Cert. has been granted in Avco. 88 S. Ct. 103 (1967).