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LABOR LAW—RES JUDICATA—The Applicability of Res Judicata and Collateral Estoppel to Actions Brought Under Section 8(b)(4) of the National Labor Relations Act

The question of whether courts can give preclusive effect to prior administrative determinations is a difficult problem that may arise in many factual contexts.[1] One aspect of this problem has recently received a considerable amount of judicial attention in cases involving allegedly illegal secondary boycott activity by a labor union; in this situation, an employer may seek relief from both the National Labor Relations Board[2] and the federal district courts.[3] The fact situation underlying the most recent of these cases, *Old Dutch Farms, Inc. v. Milk Drivers' Local 584*,[4] illustrates the difficulty of adapting traditional principles of res judicata and collateral estoppel to administrative adjudications.

In the *Old Dutch* case, plaintiff employer had filed unfair labor charges with the NLRB, alleging that defendant union had violated section 8(b)(4) of the National Labor Relations Act (NLRA)[5] by conducting an illegal secondary boycott of plaintiff's supplier.[6] The NLRB's regional director petitioned the district court for an injunction pursuant to section 10(*l*) of the NLRA,[7] but the petition

1. *See* notes 22-26 *supra* and accompanying text.

2. Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (1964), provides that any union engaging in a secondary boycott is guilty of an unfair labor practice. Thus, under § 10 of the National Labor Relations Act, 29 U.S.C. § 160 (1964), the NLRB has the power to order the union to cease and desist from such activity.

3. Under § 303 of the Labor Management Relations Act, 29 U.S.C. § 157 (1964), an employer may sue for damages caused by union activity in violation of the National Labor Relations Act secondary boycott provision (*see* note 2 *supra*). *See* note 13 *infra*.

4. 281 F. Supp. 971 (E.D.N.Y. 1968).

5. 29 U.S.C. § 158(b)(4) (1964) which states:

> (b) It shall be an unfair labor practice for a labor organization or its agents—(4)(i) to engage in, or to induce or encourage any individual employer by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> ....
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person ....

6. Section 8(b)(4) is intended to outlaw certain types of secondary pressure, although by its terms it does not state this purpose. *See* 93 CONG. REC. 4198 (1947) (remarks of Senator Taft); Berlinger, *Section 8(b)(4) of the National Labor Relations Act*, 7 S. TEX. L.J. 274 (1964); *Developments in the Law—The Taft Hartley Act*, 64 HARV. L. REV. 781, 799-804 (1951).

7. 29 U.S.C. § 160(*l*) (1964). This section provides that whenever a section 8(b)(4) violation is alleged, the regional attorney assigned to the case shall conduct a preliminary investigation to determine whether the Board should issue a complaint. If the regional attorney finds "reasonable cause to believe" that the charges are true, he must petition a federal district court for appropriate injunctive relief. Upon filing of the

was denied after an extensive hearing.[8] At the subsequent hearing before the Board's trial examiner, both parties had full opportunity to present oral argument and cross-examine witnesses; but they stipulated that the testimony and exhibits from the section 10(*l*) hearing, together with additional testimony, were to be presented as evidence.[9] The trial examiner found that the union had conducted a secondary boycott in violation of section 8(b)(4) and recommended that a cease and desist order be issued.[10] The Board adopted the findings and recommendations of the trial examiner,[11] and subsequently the court of appeals granted enforcement of the Board's order.[12]

After this had taken place, the employer brought suit in the United States District Court for the Eastern District of New York seeking damages under section 303 of the Labor-Management Relations Act (LMRA)[13] for the union's violation of section 8(b)(4) of the NLRA. Plaintiff claimed that the Board's prior finding of unlawful secondary activity by defendant[14] should be conclusive on the

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petition, the district court has jurisdiction and must serve all parties involved with notice so they may appear and present testimony.

The purpose of the section 10(*l*) procedure is to prevent further injury to a boycotted party prior to final adjudication of the charges by the NLRB—adjudication which could result in the issuance of a cease and desist order. McLeod v. Teamsters Local 27, 212 F. Supp. 57, 62 (E.D.N.Y. 1962). In such a case, the only question under consideration by the district court is whether the regional attorney had "reasonable cause" to believe there had been a violation of section 8(b)(4); the ultimate truth or falsity of the charges is not in issue. A denial of injunctive relief by the district court does not prevent the Board from issuing a complaint and proceeding with the action. McLeod v. Teamsters Local 239, 179 F. Supp. 481, 484-88 (E.D.N.Y. 1960). Thus, any action taken by the district court cannot be described as a final judgment on the merits. McLeod v. Teamsters Local 27, *supra*, at 62. *See also* Greene v. Bangor Bldg. Trades Council, 165 F. Supp. 902, 905-09 (N.D. Me. 1958) for an example of the scope of inquiry in a section 10(*l*) hearing.

8. McLeod v. Milk Drivers Local 584, 54 L.R.R.M. 2287, 2290 (E.D.N.Y. 1963).

9. Milk Drivers Local 584, 146 N.L.R.B. 509, 510 (1964).

10. 146 N.L.R.B. at 516-17.

11. 146 N.L.R.B. at 509-10.

12. NLRB v. Milk Drivers Local 584, 341 F.2d 29, 33 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

13. 29 U.S.C. § 187 (1964), which reads in pertinent part:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> (b) Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 303 was amended in 1959 to incorporate section 8(b)(4) by direct reference instead of repeating the same language. This amendment has been held to have created no substantive changes in the interpretation of the law, being simply a "short-hand" method used by Congress to state the same proposition. Taube Elec. Contr., Inc. v. International Bhd. of Elec. Workers Local 349, 261 F. Supp. 664, 665 (S.D. Fla. 1966).

14. *See* text accompanying notes 10 and 11 *supra*.

issue of liability in the section 303 action.[15] The court denied plaintiff's motion for summary judgment on the issue of liability, holding that an NLRB determination that section 8(b)(4) has been violated has no res judicata or collateral estoppel[16] effect on a subsequent section 303 damage action arising out of the same labor dispute.[17]

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15. The section 10(*l*) proceeding was not a final decision on the merits and consequently could not provide a basis from which to apply res judicata or collateral estoppel. *See* note 7 *supra* and notes 16 and 17 *infra*.

16. In its broadest sense, "res judicata" refers to the effect of a prior judgment on a subsequent adjudication which involves the same issues or causes of action. RESTATEMENT OF JUDGMENTS § 45 (1942); 5 J. WEINSTEIN, H. KORN, & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.07 (1967); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952). When res judicata is used in conjunction with the term "collateral estoppel," as in the text, it stands for the doctrine of "merger and bar." This doctrine prevents the parties to an action that has already reached judgment, and their privies, from later relitigating the same cause of action. RESTATEMENT, *supra*, at §§ 47-48; 5 J. WEINSTEIN, H. KORN, & A. MILLER, *supra*, at ¶¶ 5011.08-.18; *Developments in the Law*, *supra*, at 824-40. "Collateral estoppel" prevents relitigation of issues of fact or law in a subsequent suit based on a different cause of action, if the issues were essential to the previous judgment, and have been conclusively determined between the parties or their privies in the previous litigation. The issues must have been actually litigated and determined in a final judgment on the merits. RESTATEMENT, *supra*, at §§ 68-78; 5 J. WEINSTEIN, H. KORN, & A. MILLER, *supra*, at ¶¶ 5011.23-.34; *Developments in the Law*, *supra*, at 840-50.

Traditionally, courts have held that only parties to an action or their privies could be affected by, or make use of, collateral estoppel. This requirement was grounded upon the doctrine of mutuality, which stated that only those persons who were bound by a prior judgment could obtain the benefit of that judgment. 5 J. WEINSTEIN, H. KORN, & A. MILLER, *supra*, at ¶ 5011.38; *Developments in the Law*, *supra*, at 861-62. However, strict adherence to mutuality has increasingly given way to a variety of exceptions that permit conclusive effect to be given to issues in actions involving persons who were not formally parties or privies to the prior litigation. 5 J. WEINSTEIN, H. KORN, & A. MILLER, *supra*, at ¶¶ 5011.38-.42; *Developments in the Law*, *supra*, at 862-65. Several courts have rejected mutuality entirely in favor of a policy that emphasizes adequate litigation of the issues involved, and fundamental fairness to the persons who would be subject to the preclusive effect of the prior judgment. This approach requires only that there is an identity of issues between the first and second actions; that the first judgment was final and on the merits; and that the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the prior adjudication. *See* Graves v. Associated Transp. Inc., 344 F.2d 894, 898-902 (4th Cir. 1965); Zdanok v. Glidden Co., 327 F.2d 944, 955-56 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Maryland v. Capital Airlines, Inc., 267 F. Supp. 298, 302-05 (D. Md. 1967); Bernhard v. Bank of America Natl. Trust & Sav. Assn., 19 Cal. 2d 807, 811-13, 122 P.2d 892, 894-95 (1942); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 144-48, 225 N.E.2d 195, 196-99, 278 N.Y.S.2d 596, 598-602 (1967); Currie, *The Contributions of Roger J. Traynor—Civil Procedure—The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

For a discussion of res judicata and collateral estoppel as applied in the context of administrative decisions, *see* notes 22-38 *infra* and accompanying text.

17. Old Dutch Farms, Inc. v. Milk Drivers Local 584, 281 F. Supp. 971, 974-75 (E.D.N.Y. 1968). In an alternative holding, the court decided that a substantial question of fact remained to be tried on the issue of liability. The court noted that defendant had consistently urged in all prior proceedings that the boycotted supplier was neither a neutral nor a disinterested party to the dispute, and that its operations were so involved with those of plaintiff milk dealer as to constitute a defense of common control to the secondary boycott charge. Upon examining the record, the court felt that this question had been considered fully only in the section 10(*l*) hearing. Since a hearing under that section is merely a preliminary investigation and not a plenary trial, the

In reaching this result, the court noted that the provision of section 303 allowing courts to grant damages for violations of section 8(b)(4) of the NLRA represented an exception to the Board's primary jurisdiction over unfair labor practice actions.[18] The court then interpreted several decisions as holding that section 303 damage actions must be considered entirely separate and independent from prior Board proceedings on the same matters.[19] The rationale of these prior decisions, adopted in *Old Dutch Farms*, was that Congress had created two separate and cumulative remedies which were to be administered by two different bodies, and that therefore the findings of either trier of fact could have no res judicata or collateral estoppel effect on the other.[20]

The unfortunate result of this holding is that the issue of liability must be relitigated completely whenever an injured party seeks to obtain damages as well as injunctive relief for an alleged violation of section 8(b)(4). Moreover, if the court in the section 303 action disagrees with the Board's findings, the parties will be faced with inconsistent results. For example, an employer losing a claim of illegal boycott before the Board may still be awarded damages by a court if the court disagrees with the Board's decision on the legality of the boycott.[21] It is submitted that this result is unnecessary in many instances, and that the decision in the *Old Dutch Farms* case is the result of a misreading of the case law and the legislative history associated with section 303.

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court concluded that the question of common control remained to be tried on the issue of liability. 281 F. Supp. at 975. *See also* note 7 *supra*.

18. 281 F. Supp. at 974. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959); Rothman, *The National Labor Relations Board and Administrative Law*, 29 GEO. WASH. L. REV. 301, 301-04 (1960); Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 549 (1963).

19. Old Dutch Farms, Inc. v. Milk Drivers Local 584, 281 F. Supp. 971, 974-75 (E.D.N.Y. 1968), citing: International Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952); NLRB v. Radio & Television Engrs. Union, 364 U.S. 573 (1964); Kipbea Baking Co. v. Strauss, 218 F. Supp. 696 (E.D.N.Y. 1963).

20. Old Dutch Farms, Inc. v. Milk Drivers Local 584, 281 F. Supp. 971, 975 (E.D.N.Y. 1968).

The facts in *Old Dutch Farms* did not present the court with the complementary question of whether a court judgment in a section 303 action could have any preclusive effect on a subsequent hearing on the same dispute before the Board. The problems posed by the two situations are not the same and consequently this Note will discuss only the effects of res judicata and collateral estoppel applied by the courts to prior administrative decisions. In any event, this complementary problem seems largely academic since the great majority of cases will involve a prior Board action in which the employer seeks the immediate relief of a cease and desist order, followed by the slower court action for damages. *Cf.* Note, *Sections 8(b)(4) and 303: Independent Remedies Against Union Practices Under the Taft-Hartley Act*, 61 YALE L.J. 745, 754-56 (1952).

21. *See* notes 69-70 *infra* and accompanying text. *But see* notes 63-64 *infra* and accompanying text for a discussion of those situations in which inconsistent results could still occur, even with acceptance of collateral estoppel, in situations such as that posed by *Old Dutch Farms*.

Because the concepts of res judicata and collateral estoppel were developed in the context of successive court actions,[22] some cases have held that administrative decisions can have no preclusive effect on subsequent court proceedings.[23] Such statements have, however, been criticized as being far too broad,[24] and the cases which conclude that the doctrines of res judicata and collateral estoppel can never be applied to the proceedings of an administrative agency now constitute a shrinking minority.[25] Rather, most courts are willing to give some res judicata or collateral estoppel effect to prior decisions of administrative tribunals if these bodies acted in a judicial capacity and manner in reaching their decisions.[26] Thus, a relevant question presented by cases similar to *Old Dutch Farms* is whether Board procedures in unfair labor practice disputes constitute the equivalent of a plenary court trial. Examination of these procedures indicates that the Board's hearing and review process is a "judicial" proceeding[27] affording an adequate adjudicatory basis for applying res judicata or collateral estoppel to a subsequent court action.[28]

22. In contrast, res judicata and collateral estoppel may occur in a variety of contexts when freely applied to both administrative and judicial adjudications. These doctrines may apply as between decisions of the same or different administrative tribunals; from a court decision to an agency proceeding; and, as was attempted in *Old Dutch Farms,* from an administrative decision to a court proceeding. Each situation involves different policies and problems; thus, the decision of whether or not to apply res judicata or collateral estoppel will vary according to the circumstances. Groner & Sternstein, *Res Judicata in Federal Administrative Law,* 39 IOWA L. REV. 300 (1954); *Developments in the Law, supra* note 16, at 865-74.

23. *See* Pearson v. Williams, 202 U.S. 281 (1906); Jason v. Summerfield, 214 F.2d 273 (D.C. Cir.), *cert. denied,* 348 U.S. 840 (1954); Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947).

24. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966). Many of these decisions have been criticized as being quite careless in their language, especially since their facts would render res judicata inapplicable in any event. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 18.02 (1958, Supp. 1965).

25. *See* decisions collected in 2 K. DAVIS, *supra* note 24, at § 18.02 (1958).

26. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421 (1966): "When an administrative agency is acting in a judicial capacity and resolves issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata.*" *See, e.g.,* International Union of Mine Workers Local 15 v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335 (1945); Fairmont Alum. Co. v. Commissioner, 222 F.2d 622, 625-27 (4th Cir.), *cert. denied,* 350 U.S. 838 (1955). *Cf.* Parker, *Administrative Res Judicata,* 40 ILL. L. REV. 56 (1945); Schopflocker, *The Doctrine of Res Judicata in Administrative Law,* 1942 WIS. L. REV. 5, 198 (1942).

27. This classification has been criticized as being imprecise and of little help in categorizing administrative procedures, but it is still used by the courts as a determining standard. *Developments in the Law, supra* note 16, at 866. However, it seems clear the Board's proceedings constitute the equivalent of a plenary court trial, despite the differences in procedure and rules. For contrast, it is important to note that there are Board procedures that would not be equivalent to a court trial on the merits. *See, e.g.,* NLRA § 10(k), 29 U.S.C. § 160(k) (1964); 29 C.F.R. §§ 101.31-.36, 102.89-.93 (1968).

28. All unfair labor practice proceedings under section 8 of the NLRA are initiated by the filing of charges alleging a particular violation of the act. NLRA § 10(b), 29 U.S.C. § 160(b) (1964); 29 C.F.R. § 101.2 (1968). This charge may be filed by any person, 29 C.F.R. § 102.9 (1968), and such charges are normally filed with the regional director for the region in which the acts complained of took place. 29 C.F.R. § 101.2

However, administrative procedures such as those involved in *Old Dutch Farms* do not completely correspond to those of the courts;[29] thus, it is often necessary, particularly in a situation in which the first decision was rendered by an administrative tribunal, to modify the strict, court-developed principles governing the use of

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(1968). A member of the field staff investigates the charges, 29 C.F.R. § 101.4 (1968), and after examining the evidence and the statements of the parties involved, the regional director may issue a formal complaint. NLRA § 10(b), 29 U.S.C. § 160(b) (1964); 29 C.F.R. §§ 101.8, 102.15 (1968). If the regional director feels the charges have no merit, he may recommend withdrawal to the charging party, 29 C.F.R. §§ 101.5, 102.9 (1968), or he may dismiss the charges on his own initiative, 29 C.F.R. §§ 101.6, 102.18 (1968). The charging party may appeal this dismissal to the NLRB's General Counsel, who may reinstate the charges or affirm the dismissal, 29 C.F.R. §§ 101.6, 102.19 (1968); the General Counsel's decision is final and not reviewable by the courts, Division 1267, Amalgamated Assn. of Street, Elec. Ry. & Motor Coach Employees v. Ordman, 320 F.2d 729 (D.C. Cir. 1963).

If a complaint is issued, an open hearing will be conducted by a trial examiner; the case will be formally prosecuted by an attorney from the General Counsel's office, but all parties are given formal recognition and may call witnesses, submit evidence, cross-examine, make motions, and present oral arguments. 29 C.F.R. §§ 101.10, 102.8, 102.34-.35, 102.38, 102.41-.42 (1968). The rules of evidence of the federal district courts control the proceeding so far as is practicable. NLRA § 10(b), 29 U.S.C. § 160(b) (1964); 29 C.F.R. § 102.39 (1968). After such a hearing, the NLRB trial examiner prepares a written opinion stating his findings of fact, conclusions, and recommendations for disposition of the case. This decision is forwarded to the NLRB itself and served on all parties. NLRA § 10(b), 29 U.S.C. § 160(b) (1964); 29 C.F.R. §§ 101.11, 102.45 (1968). All parties may file with the Board exceptions and supporting briefs directed at this initial decision. 29 C.F.R. §§ 101.11(b), 102.46 (1968). If no exceptions are filed, the trial examiner's decision will be adopted by the Board, 29 C.F.R. § 101.12(a) (1968); otherwise, the Board will decide the case on the record, or it may hear additional testimony and evidence and consider the parties' briefs or oral arguments. NLRA § 10(c), 29 U.S.C. § 160(c) (1964); 29 C.F.R. §§ 101.12(a), 102.48(b)-(d) (1968). The Board's order may affirm, modify, or set aside the trial examiner's decision [NLRA § 10(c), 29 U.S.C. § 160(c) (1964); 29 C.F.R. § 101.12, 102.48 (1968)]; the NLRB may also reopen any of its own orders any time before a record of the case is filed with a court of appeals. NLRA § 10(d), 29 U.S.C. § 160(d) (1964); 29 C.F.R. § 102.49 (1968). Such Board decisions usually culminate in a cease and desist order directed at the offending party, NLRA § 10(c), 29 U.S.C. § 160(c) (1964); 29 C.F.R. § 101.12(a) (1968). If the respondent complies with the order, the case is usually closed, although the Board's jurisdiction over the case continues. 29 C.F.R. § 101.13(b) (1968).

If respondent does not comply with the cease and desist order, or if the NLRB wants to implement its order with a court decree despite initial compliance, the Board may petition a federal court of appeals for enforcement by an injunction. NLRA § 10(e), 29 U.S.C. § 160(e) (1964); 29 C.F.R. § 101.14 (1968). Upon filing of a record of the case with a court of appeals, the Board decision becomes final and jurisdiction passes to the court; the court may then affirm, modify, or set aside the Board's decision. NLRA §§ 10(d)-(e), 29 U.S.C. §§ 160(d)-(e) (1964); 29 C.F.R. § 101.14 (1968). In addition, any party "aggrieved" by the Board's decision may appeal to a court of appeals to review and set aside the Board's order. NLRA § 10(f), 29 U.S.C. § 160(f) (1964); 29 C.F.R. § 101.14 (1968). Failure to comply with the Board's order after enforcement by a court of appeals may result in civil or criminal contempt charges. 29 C.F.R. § 101.15 (1968).

29. *See, e.g.*, 2 K. DAVIS, *supra* note 24, at § 18.01 (1958); *Developments in the Law*, *supra* note 16, at 865-74; *cf.* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-44 (1940).

res judicata and collateral estoppel.[30] Such adaptation does not mean, however, that any of the basic principles may be disregarded entirely. Thus, for collateral estoppel to apply in such situations, the prior decision by the Board must be final[31] and on the merits,[32] with all questions of fact essential to the judgment having been actually litigated,[33] and the administrative determination must involve the same issues[34] and some of the same parties or their privies[35] as does

30. *See* 2 K. DAVIS, *supra* note 24, at § 18.02-.03; Grover & Sternstein, *supra* note 22, at 316; Note, *Res Judicata and Intragovernmental Inconsistencies*, 49 COLUM. L. REV. 640 (1949).

31. International Union of Mine Workers Local 15 v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 339-41 (1945); Ford Motor Co. v. NLRB, 305 U.S. 364 (1939); note 16 *supra*. For a discussion concerning the necessity for a Board decision to be filed with a court of appeals for enforcement or on appeal in order for it to become final, *see* note 28 *supra*. *See also* the discussion in note 64 *infra* concerning the ways that such filing and finalizing may or may not be achieved.

32. *See, e.g.*, Purvis v. Great Falls Bldg. & Constr. Trades Council, 266 F. Supp. 661 (D. Mont. 1967). *See also* note 16 *supra*. *Cf.* Aircraft & Engine Maint. Local 290 v. Oolite Concrete Co., 341 F.2d 210 (5th Cir. 1965), *cert. denied*, 382 U.S. 972 (1966) (dismissal of complaint not decision on merits); NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir.), *cert. denied*, 321 U.S. 795 (1944) (Board decision not to take action not decision on merits).

33. *See, e.g.*, Purvis v. Great Falls Bldg. & Constr. Trades Council, 266 F. Supp. 661 (D. Mont. 1967); Taube Elec. Contr., Inc. v. International Bhd. of Elec. Workers Local 349, 261 F. Supp. 664 (S.D. Fla. 1966). *See also* note 16 *supra*. *Cf.* Fibreboard Paper Prod. Corp. v. East Bay Union of Machinists Local 1304, 344 F.2d 300 (9th Cir.), *cert. denied*, 382 U.S. 826 (1965).

34. *See* note 16 *supra*. Since the statutory language defining the rights of an injured party is identical in sections 8(b)(4) and 303 (note 13 *supra*), the issue of liability is the same whether the action is brought before the Board or a court. Haughton v. International Woodworkers, 168 F. Supp. 273, 278 (D. Ore. 1958) (same facts and law control in both section 8(b)(4) and 303 actions); *cf.* 2 K. DAVIS, *supra* note 24, at § 18.04 (1958) (decisions collected); *Developments in the Law—Res Judicata*, *supra* note 16, at 824-31.

35. *See* note 16 *supra*. With the decline of mutuality, the formerly strict privity requirements of collateral estoppel have given way to a requirement that only the party against whom the collateral estoppel is asserted need have been a party or in privity with a party to the first action. Bernhard v. Bank of America Natl. Trust and Sav. Assn., 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942). This position has been adopted by the federal courts in Zdanok v. Glidden Co., 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964) and thus can be applied in the section 8(b)(4)-303 context. The defending union will generally be the same party in both actions, so no privity barriers to applying collateral estoppel against the union exist.

However, in attempting to apply collateral estoppel against an employer, some problems have arisen. Since the unfair labor practice charges are officially prosecuted by an attorney of the Board's General Counsel office, some cases have created a sharp distinction between the status of the "private" rights sought to be enforced by the charging party and the "public" rights enforced by the Board. NLRB v. Thompson Prods., Inc., 130 F.2d 363 (6th Cir. 1942); Jaffee, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946). Relying heavily on the distinction between "public" and "private" rights, the district court in Boeing Airplane Co. v. Aeronautical Indus. Dist. Lodge 751, 91 F. Supp. 596 (W.D. Wash. 1950), *aff'd*, 188 F.2d 356 (9th Cir. 1951), held that an employer suing a union in a district court under section 301 of the NLRA for breach of a collective bargaining agreement could not rely for collateral estoppel purposes on a court of appeals determination that a valid agreement existed between employer and union. This holding reversed a Board decision that no such agreement existed. Although the Board proceedings had been instituted by the same union charged in the section 301 action, the court felt that since the union could not

the later action before the court. Similarly, res judicata as merger and bar involves the same principles as collateral estoppel,[36] except that the same cause of action must be involved in both proceedings,[37] and matters may be precluded in the second action even though they were not actually litigated in the initial decision.[38]

This Note is concerned primarily with the possibility of granting preclusive effect to the Board's determination of the issue of union liability under the section 8(b)(4) charge.[39] Since traditional collateral estoppel principles must be adapted somewhat when applied to the Board's procedures,[40] the preclusive effect given to the

"control" the Board's prosecution in the "public interest," the union should not be bound by any Board determination of issues of fact.

However, the Supreme Court subsequently noted in Garner v. Teamsters Local 776, 346 U.S. 485 (1953) (dictum) that the distinction between "public" and "private" claims was meant to serve only as a convenient classification and not as a legally binding distinction. The Supreme Court indicated that the utility of this distinction depended largely on the circumstances and the nature of the interests involved. 346 U.S. at 494. Moreover, a recent decision by the Supreme Court indicates that a charging party *can* have a recognized interest in a Board proceeding. In UAW Local 283 v. Scofield, 382 U.S. 205 (1965), the Court held that a successful charging party in an NLRB unfair labor practice proceeding could intervene as an independent party in the court of appeals review proceedings on that same action. The Court stated that it was clear that a charging party has a vital interest in Board proceedings, and noted significant factors that indicated the possible involvement of a charging party in the Board action. 382 U.S. at 212-13. *See* the discussion of the rights of a charging party to cross-examine, file briefs, etc. before the Board in note 28 *supra*; *cf.* Comment, *The Charging Party Before the NLRB: A Private Right in the Public Interest*, 32 U. CHI. L. REV. 786 (1965).

Since there is no court procedure similar to that followed by the Board, the traditional formulations of "privity" do not strictly encompass the relationship between the charging party and the Board in unfair labor practice actions. *Developments in the Law —Res Judicata*, *supra* note 16, at 855-65. Nonetheless, the analogy to strict privity is quite evident, and it seems equally plain that a sufficient "nexus" exists between the General Counsel and the charging party to acknowledge that an employer may be bound by a determination of the issue of liability before the Board. The courts in the section 303 action of course should determine whether the interest of the charging party was adequately prosecuted and whether there has been actual litigation on the issue of liability, but this must be done whenever collateral estoppel is applied.

36. *See* note 16 *supra*.

37. *See* note 16 *supra*. In the section 8(b)(4)-303 context, since the facts constituting a violation of either section can be identical (*see* notes 13 and 34 *supra*), it might be held that the two sections involve not only the same issue of liability, but the same cause of action as well. However, only the section 303 suit requires an injured party to prove "the damages by him sustained." Thus, it is quite possible that the two sections actually involve different causes of action with a common issue of liability. In such a case, res judicata in the sense of merger and bar could not be applied in the section 8(b)(4)-303 context. However, the point is not entirely certain due to the vagaries of definition of "cause of action" as applied to a situation involving both administrative and court actions. *Cf.* 2 K. DAVIS, *supra* note 24, at § 18.04. *See also* the additional discussion on whether res judicata as merger and bar may apply in note 53 *infra* and accompanying text.

38. *See* note 16 *supra*. Since merger and bar apply to whole causes of action, matters not actually litigated may still be precluded. *See Developments in the Law—Res Judicata*, *supra* note 16, at 824.

39. *See* text accompanying notes 14, 15, 20, and 22 *supra*.

40. *See* notes 31-35 *supra* and accompanying text.

prior determination of liability will be referred to simply as "estoppel" in order to avoid confusion with the doctrine of collateral estoppel as it was developed in the courts.

In the *Old Dutch Farms* case, the court's refusal to apply estoppel to the Board's determination was based in large part on the United States Supreme Court's decision in *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corporation.*[41] In *Juneau Spruce,* the plaintiff-employer had filed charges with the Board alleging that the defendant-union had violated section 8(b)(4)(D) of the NLRA.[42] The Board then initiated a hearing under section 10(k) of the NLRA[43] and determined that such a violation had occurred.[44] Shortly thereafter, the employer commenced a section 303 action in a federal district court,[45] seeking damages that had accrued both before and after the Board's decision in the section 10(k) proceeding.[46] The employer obtained a money judgment for all such damages in its section 303 action, and this decision was subsequently affirmed by the Ninth Circuit.[47] After certiorari had been granted by the Supreme Court,[48] the union argued that only picketing which took place after a Board decision declaring the picketing illegal could constitute a violation of section 303.[49]

Responding to this argument, the Supreme Court noted that union secondary activity could give rise to both the administrative remedy of an injunction and the judicial remedy of money damages:

> The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each

41. 342 U.S. 237 (1952). For a discussion of this case, *see* Recent Decision, *Labor Law—Labor Management Relations Act—Relationship of Remedies Under Title I and Title III,* 51 MICH. L. REV. 307 (1952); 61 YALE L.J. 745 (1952).

42. 29 U.S.C. § 158(b)(4)(D) (1964), which deals with jurisdictional or work assignment disputes.

43. 29 U.S.C. § 160(k) (1964), 29 C.F.R. §§ 101.31-.36, 102.89-.93 (1968). This section provides that whenever a section 8(b)(4)(D) violation is filed, the Board is "empowered and directed to hear and determine the dispute" unless the parties themselves adjust the dispute within ten days after filing of the charges. This hearing is not an adversary proceeding, and the hearing officer prepares a report that is filed with the Board in Washington for determination of the matter. If the parties do not comply with the section 10(k) decision, the Board may then commence regular unfair labor practice charges under sections 10(b)-(e) of the NLRA. *See* note 28 *supra.* Section 10(k) proceedings are not reviewable in the courts of appeal as independent actions. 29 C.F.R. § 102.92 (1968). Thus, a section 10(k) action technically cannot be a final Board decision and thus cannot serve as the basis for estoppel. *See* notes 16, 28, & 31 *supra.*

44. Juneau Spruce Corp., 82 N.L.R.B. 650 (1949).

45. Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union, 83 F. Supp. 224 (D. Alaska 1949) (motion to dismiss complaint denied).

46. International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 239-40 (1952).

47. International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 189 F.2d 177 (9th Cir. 1951).

48. 342 U.S. 857 (1951).

49. 342 U.S. at 243.

> other. Certainly there is nothing in the language of §303(a)(4) which makes its remedy dependent on any prior administrative determination. . . . Rather, the opposite seems true.[50]

The Court made it clear that since the remedies could be cumulative[51] there was no "primary jurisdiction" in the Board in section 303 cases.[52] Therefore, claims based on alleged violations of section 8(b)(4) would not *have* to be determined initially by the Board before a section 303 action could be commenced.

The holding in *Juneau Spruce* that the judicial and administrative remedies are cumulative does indicate that res judicata as merger and bar may not be applied to prevent an employer who has already brought a section 8(b)(4) action before the Board from subsequently initiating a section 303 suit.[53] However, it must be noted that *Juneau Spruce* simply held that a successful Board action is not a prerequisite to a section 303 suit. The Court was not called upon to consider whether the existence in fact of a prior Board determination of liability could have an estoppel effect in a subsequent damage action.[54] Therefore, those decisions which have interpreted the "independent remedies" language of *Juneau Spruce* to mean that no estoppel effect of the Board's proceeding can be asserted in a subsequent section 303 suit[55] seem to represent an unwarranted

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50. 342 U.S. at 244.

51. 342 U.S. at 244.

52. "Primary jurisdiction" is a doctrine often applied by the courts to situations in which remedies for the same violation exist in both the courts and an administrative agency. The doctrine requires preliminary resort to the administrative tribunal as a prerequisite to the court action, although the statutes generally do not seem to require this. The argument for the doctrine is largely based on taking advantage of administrative expertise and procedures in highly technical areas of the law. *See* Note, *Sections 8(b)(4) and 303: Independent Remedies Against Union Practices Under the Taft-Hartley Act*, 61 YALE L.J. 745, 751-53 (1952).

53. In addition in the argument that merger and bar are inapplicable to the section 8(b)(4)-303 context because there are two different causes of action present, note 37 *supra*, the fact that the bifurcated statutory schemes prevents an injured party from obtaining both injunctive relief and damages from the same tribunal indicates that merger and bar could simply not apply even if the two proceedings did involve the same cause of action. The Board order enforced by a court of appeals is the only source of injunctive relief, and only the courts are authorized to grant damages, so any attempt to apply merger and bar principles (*see* note 16 *supra*) would operate to deny an injured party a remedy to which he was still rightfully entitled. *See* Taube Elec. Contr., Inc. v. International Bhd. of Elec. Workers Local 349, 261 F. Supp. 664 (S.D. Fla. 1966); Haughton v. International Woodworkers, 168 F. Supp. 273, 278 (D. Ore. 1958), *aff'd*, 294 F.2d 766 (9th Cir. 1961).

54. On the facts of the case, it is doubtful that such a situation could have been present since the section 10(k) Board decision could not serve as the basis for an estoppel argument. *See* note 43 *supra*.

55. NLRB v. Radio & Television Engrs. Local 1212, 364 U.S. 573 (1961) (dictum), stated that "substantive symmetry" was not required between procedures of the Board and suits in the courts under section 303. 364 U.S. at 585. However, there is no indication what this vague language refers to, especially in light of the fact that it has been

extension of the actual decision; nothing in the language of *Juneau Spruce* is inconsistent with the application of estoppel on the issue of liability.[56] It is significant that the majority of courts faced with this question in the context of 8(b)(4) and 303 actions have been unwilling to say estoppel may *never* apply, but rather have refused to give estoppel effect to the Board's determination because the particular facts of the cases did not warrant application of the doctrine.[57] Consequently, it is submitted that *Juneau Spruce* and its progeny do not support the *Old Dutch Farms* court's conclusion that application of estoppel in the section 8(b)(4)-303 context is never possible.

The legislative history of section 303 also indicates that Congress did not intend the administrative and court actions to be independent in all respects. In enacting section 303, Congress was primarily concerned with providing a damage remedy to compensate persons injured by illegal secondary boycotts.[58] In addition, Congress

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held that substantive law under section 8(b)(4) Board actions applies equally to section 303 suits. Local 978 Carpenters & Joiners v. Markwell, 305 F.2d 38 (8th Cir. 1962). *See also* Kipbea Baking Co. v. Strauss, 218 F. Supp. 696 (E.D.N.Y. 1963); Lewis Food Co. v. Los Angeles Meat Drivers Local 626, 159 F. Supp. 763 (S.D. Cal. 1958).

56. In a decision connected with the *Old Dutch Farms* litigation, the court of appeals, while reversing a stay order, cited *Juneau* to the effect that a decision by the Board in an 8(b)(4) proceeding may not bind a court in a section 303 action. Old Dutch Farms, Inc. v. Milk Drivers Local 583, 359 F.2d 598, 602 n.7 (2d Cir.), *cert. denied*, 385 U.S. 832 (1966). This seems to typify a rather uncritical acceptance of one interpretation of the *Juneau Spruce* holding.

57. NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir.), *cert. denied*, 321 U.S. 795 (1944) (NLRB decision not to take action on a complaint held not to have any effect on a subsequent suit under section 303, since this was a reversible decision by the NLRB and was merely an administrative rather than a judicial function); Aircraft & Engine Maint. Local 290 v. Oolite Concrete Co., 341 F.2d 210 (5th Cir. 1965), *cert. denied*, 382 U.S. 972 (1966) and Aircraft & Engine Maint. Local 290 v. I.E. Schilling Co., 340 F.2d 286 (5th Cir. 1965), *cert. denied*, 382 U.S. 972 (1966) (refusal of NLRB General Counsel to issue a complaint does not constitute a final decision on the merits); Taube Elec. Contr., v. International Bhd. of Elec. Workers, Local 349, 261 F. Supp. 664 (S.D. Fla. 1966) (Board's dismissal of a complaint for lack of evidence is not final or on the merits and cannot be given estoppel effect); Purvis v. Great Falls Bldg. & Constr. Council, 266 F. Supp. 661 (D. Mont. 1967) (consent decree before the Board was not an actual litigation and did not constitute a finding of facts that could operate as estoppel in a subsequent section 303 action). *Cf.* Fibreboard Paper Prods. Corp. v. East Bay Union of Machinists Local 1304, 344 F.2d 300 (9th Cir.), *cert. denied*, 382 U.S. 826 (1965).

There may have been similar grounds for rejecting application of estoppel in *Old Dutch Farms*. As the court pointed out in its alternative holding, *see* note 17 *supra*, the fact issue of "common control" was actually tried only in the section 10(*l*) hearing; since such a hearing is not a plenary trial but merely a preliminary investigation, the court held that this issue remained to be tried. However, since the majority of the evidence presented in the subsequent trial examiner's hearing was similarly stipulated from the section 10(*l*) hearing, *see* text accompanying note 9 *supra*, there may well have been grounds to hold that the entire issue of liability was not actually litigated between the parties in a sufficiently adversarial setting. Such a finding would of course eliminate one of the essential prerequisites for applying estoppel. *See* note 33 *supra* and accompanying text.

58. 93 CONG. REC. 4198, 4843, 4858, 4872-73 (1947) (remarks of Senator Taft).

apparently felt that the presence of such a remedy, together with the existence of a Board cease and desist order, would serve to deter unions from engaging in unlawful secondary activity.[59] The choice of the courts as the forum for the damage action may have resulted from Congress' belief that courts are more experienced than the Board in handling damage remedies.[60] There is little, if any, indication in the legislative history as to what relationship Congress intended to create between section 303 actions and Board proceedings to enforce section 8(b)(4).[61] Finally, there is nothing in the legislative history to suggest that the adoption of two different remedies meant that there should be two completely independent actions.

The doubtful validity of both the precedent invoked and the arguments made in opposition to the application of estoppel in *Old Dutch Farms* indicate that estoppel may well provide an alternative to the "completely independent" doctrine. However, it must be recognized that consistent application of estoppel will not constitute a panacea for the problems created by the bifurcated remedial pattern set out in the statutes. Since the basic principles discussed above must be present before estoppel is applied,[62] situations will inevitably arise in which estoppel cannot be invoked from a section 8(b)(4) decision by the NLRB to a section 303 action in the district court. In particular, the requirement that the Board's decision must be a final one indicates that their determination will not be granted estoppel effect unless the NLRB order is filed with a court of appeals for review or enforcement.[63] Thus, in some situa-

59. *Id.* at 4843, 4858.

60. *Id.* at 4858. Senator Taft stated that the Board was rejected as not being "an effective tribunal for the purpose of trying to assess damages in such a case."

At the present time there is considerable interest in the NLRB's remedial powers, particularly in the area of the controversial "make-whole" order awarded against an employer who has violated section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1964). *See* Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967). One of the arguments which employers advance against the proposed remedy is that the make-whole order—designed to restore the "lost benefits" of collective bargaining to employees if their employer has refused to bargain in violation of section 8(a)(5)—amounts to nothing more than having the NLRB award general damages, something which it is not generally empowered to do. *See generally* McGuinness, *Is the Award of Damages for Refusals To Bargain Consistent with National Labor Policy Cases?*, 14 WAYNE L. REV. 1086, 1088-96 (1968); Note, *An Assessment of the Proposed "Make-Whole" Remedy in Refusal-To-Bargain Cases*, 67 MICH. L. REV. 374 (1968). Interestingly, Mr. McGuinness (counsel for Ex-Cell-O Corp.) argues that "[s]ection 303 of the Act shows that Congress specifically provided for a damage remedy in the courts when it felt damages were necessary to effectuate the purposes of the Act." McGuinness, *supra*, at 1093 (emphasis deleted).

61. 93 CONG. REC. 4840-41, 4863 (1948) (remarks of Senator Morse). Senator Morse criticized the enactment of section 303 because it made the creation of a uniform body of precedent virtually impossible and because it bypassed an existing administrative structure. However, his criticisms do not appear to have been answered in the debate.

62. *See* notes 16 and 31-35 *supra*.

63. *See* notes 28 and 31 *supra* and accompanying text.

tions the parties themselves may be able to preclude use of estoppel simply by submitting to or not objecting to a Board order.[64] Likewise, because of *Juneau Spruce*'s holding that the remedies are cumulative, there is nothing to prevent an injured party from initiating a section 303 action before filing with the Board, or from commencing both actions simultaneously.[65] Nevertheless, these situations are likely to be the exception rather than the rule; they should be considered as limitations upon the application of estoppel rather than a reason for abandoning all use of the principle.[66]

Since there appears to be no insuperable doctrinal barrier to applying estoppel from Board proceedings, it is appropriate to consider the beneficial effects that would result from consistent use of estoppel in the section 8(b)(4)-303 context. The first major advantage would be a reduction of the possibility of inconsistent results. Such inconsistency can easily arise because the language of section

64. Under section 10(d) of the NLRA, 29 U.S.C. § 160(d) (1964), until a transcript of the record of an unfair labor practice case is filed with a court of appeals for enforcement of review, the Board may at any time set aside or modify any of its decisions. Therefore, a Board order must come before a court of appeals if sufficient finality to permit application of estoppel is to be achieved. There are a variety of ways in which this can or cannot occur. A respondent may simply comply with a Board cease and desist order, and the case may then be closed with enforcement proceedings being instituted. 29 C.F.R. § 101.13 (1968). In such a case, the charging party cannot seek review as an "aggrieved" party, NLRA § 10(f), 29 U.S.C. § 160(f) (1964), since he really has nothing to object to aside from the fact that he cannot apply estoppel to the nonfinal order. However, the Board may still apply for enforcement despite initial compliance on the part of the respondent, 29 C.F.R. § 101.14 (1968); thus, there is still a possibility that estoppel could apply in such situations. Of course, if the respondent does not comply, enforcement proceedings will be instituted by the NLRB; if not, the charging party would then have grounds to ask for enforcement and review. Finally, if the respondent seeks to overturn an unfavorable decision by the NLRB, it can appeal under section 10(f) of the NLRA, 29 U.S.C. § 160(f) (1964); of course, he risks application of estoppel on the chance of gaining reversal on appeal—in which case the respondent could probably use the victory on appeal to estop the charging party if he subsequently institutes a section 303 action. If the Board (and thus the charging party, *see* note 35 *supra*) loses the section 8(b)(4) action, the respondent (union) can obtain estoppel against the charging party (employer) in two ways. The General Counsel's office, as the prosecuting arm of the NLRB, might appeal a contrary decision of the trial examiner which had been accepted by the Board in Washington. However, this situation seems unlikely to occur very often. The other possible situation is one in which a charging party "loses" before the Board and appeals as an "aggrieved" party under section 10(f) of the NLRA, 29 U.S.C. § 160(f) (1964). Such a situation would also involve running the risk of being estopped in the hopes of obtaining reversal on appeal.

Thus, it is evident that there will be a tactical element involved with the acceptance of estoppel. Also, the requirement of finality seems to favor the employer over the union insofar as the opportunities for applying estoppel are concerned. Nonetheless, it is most likely that most cases will be filed with a court of appeals, and any "bias" toward the employer is in keeping with the adoption of section 303 in the first place. *See* 93 CONG. REC. 4845 (1947).

65. *See* note 20 *supra*.

66. The doctrine of estoppel in these circumstances constitutes something of a midpoint or compromise between the "completely independent" position and the possibility of applying a rule of "primary jurisdiction."

8(b)(4) is technical and difficult to work with;[67] the distinctions between primary and secondary activity have caused the courts considerable trouble in the past.[68] Thus, under the holding of a case like *Old Dutch Farms*, a court might well find a union liable for activities that had been previously adjudged proper by the NLRB. Under existing standards for reviewing both lower tribunals' findings, it is unlikely that such inconsistent results would be resolved on appeal.[69] Therefore, inconsistent findings are obviously quite possible under the "completely independent" doctrine and, indeed, have already occurred.[70] Allowing different tribunals to find that the same activities are both legal and illegal not only is irrational, but also promotes confusion in a very sensitive and complex area of labor relations. [71] Total uniformity could not be achieved,[72] but estoppel could be applied in the majority of cases, and this would markedly decrease the opportunities for conflicts to arise.[73]

Application of estoppel to a prior Board decision could also be supported on the ground that this procedure would actually further Congress' intent in enacting section 303. If the *Old Dutch Farms* result is accepted, an employer must litigate the issue of liability in both the section 8(b)(4) proceeding[74] and the section 303 action, ex-

67. Truck Drivers Local 728 v. Empire State Express, Inc., 293 F.2d 414 (5th Cir.), *cert. denied*, 368 U.S. 931 (1961); Retail Clerks Local 1017 v. NLRB, 249 F.2d 591 (9th Cir. 1957); Bulcke v. Graham, 91 F. Supp. 615 (W.D. Wash. 1949).

68. *See* Koretz, *Federal Regulation of Secondary Strikes and Boycotts—A New Chapter*, 37 CORNELL L.Q. 235 (1952); Sovern, *supra* note 18, at 549; Note, *Independent Remedies*, *supra* note 20, at 749.

69. Findings of fact by the Board are conclusive if supported by "substantial evidence on the record as a whole." NLRA § 10(e), 29 U.S.C. § 160(e) (1964). *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950). Findings of federal district judges may be reversed only if "clearly erroneous," FED. R. CIV. P. 52(a), and findings of fact by a jury are even more insulated. Thus, an appellate court on review would be unlikely to resolve possible conflicts of interpretation as to what constitutes secondary activity. *See* note 70 *infra*.

70. *See* United Brick & Clay Workers v. Deena Artware, 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952); NLRB v. Deena Artware, Inc., 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953). These decisions were rendered by the same court on the same day. In the first decision, a section 303 action, the court affirmed a jury verdict that defendant union had engaged in a secondary boycott; the second decision affirmed a finding by the NLRB that no such boycott had been conducted. However, the secondary boycott had been the main issue in the section 303 suit, while the Board decided that issue only collaterally in its proceeding. The sixth circuit also pointed out that the evidence presented with regard to the secondary boycott issue was considerably different in the two actions. 198 F.2d at 653. Finally, no question of estoppel was raised in either one of the lower tribunals or on appeal.

71. *Cf. Developments in the Law—The Taft Hartley Act*, 64 HARV. L. REV. 781, 798-805 (1951); Comment, *Labor Law—Boycotts and Coercion of Neutral Employers Under the Taft-Hartley Act*, 50 MICH. L. REV. 315 (1951).

72. *See* notes 63-64 *supra* and accompanying text.

73. *See* Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953); 93 CONG. REC. 4840-41 (1947) (remarks of Senator Morse); Van Arkel, *Administrative Law and the Taft-Hartley Act*, 27 ORE. L. REV. 171, 180-82 (1948).

74. Although the employer does not "prosecute" the section 8(b)(4) action, he will

pending considerable time and money in the second action to prove facts that have already been determined.[75] The result may well be to discourage employers from bringing many suits under section 303[76] —a result that Congress obviously did not intend. Application of estoppel to the Board's determination of liability would generally leave only the issue of damages to be tried in the courts.[77] This

still be involved in it to a significant extent, *see* notes 28 and 35 *supra*, all the more so if there is a possibility that the doctrine of estoppel will apply.

75. All facts essential to the judgment must have been actually litigated. *See* notes 16 and 33 *supra*.

76. There have been considerably more actions brought on section 8(b)(4) violations before the NLRB than under section 303 in the courts. H. MILLER & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 497 (1950); LAB. REL. CUM. DIGEST & INDEX II, § 58 (1966); CCH 1968 LAB. L. REP. ¶ 5255. Since a violation of section 8(b)(4) may give rise to both the administrative remedy and the damage relief, it seems that an employer would be likely to prosecute both actions whenever he could demonstrate actual loss. *Cf.* note 37 *supra*.

77. The union could argue that granting preclusive effect to the administrative determination of liability would deprive it of a right to trial by jury. Apparently this question has not yet arisen in the cases, but it seems that this contention is not persuasive. The seventh amendment preserves the right to jury trial as it existed at common law, and rule 38(a) of the Federal Rules of Civil Procedure guarantees a right to jury trial as preserved by the seventh amendment or as given by a statute. *See* Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961). In section 303 Congress created a statutory cause of action having no historical counterpart at common law. Although jury trials have been granted in section 303 actions, neither section 301 nor 303 of the LMRA, 29 U.S.C. §§ 185, 187 (1964), makes any mention of a specific right to jury trial. Consequently, since the status of the jury trial in section 303 suits never seems to have been litigated, the extent to which there exists a "right" to a jury trial in section 303 actions is rather unclear. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (right to jury trial exists in proceedings containing both legal and equitable issues); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1936) (no constitutional right to jury trial in statutorily created actions not existing at common law). *Cf.* Simmons v. Avisco, Local 713 Textile Workers, 350 F.2d 1012, 1018 (4th Cir. 1965) [right to jury trial in suits under § 102 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 412 (1964)]; McGraw v. United Assn. of Journeymen Plumbers, 341 F.2d 705, 709-10 (6th Cir. 1965) [no right to jury trial in § 102 of the LMRDA, 29 U.S.C. § 412 (1964)].

In any event, a recent decision of the Supreme Court suggests that estoppel could be applied whatever the status of the jury in section 303 proceedings. Katchen v. Landy, 382 U.S. 323 (1966), arose out of a claim by a creditor on sums allegedly owed to him by a bankrupt corporation. The trustee in bankruptcy claimed that certain of these sums were "voidable preferences" and could be recouped by the trustee in a summary proceeding under the Bankruptcy Act. The creditor argued that by asserting an adverse claim to the preferences, the trustee would have to seek to recover such preferences in a plenary court proceeding under section 60 of the Bankruptcy Act, 11 U.S.C. § 96 (1964), in which the creditor could assert a clear right to a jury trial on the preference issue. The Supreme Court held that under section 57(g) of the Bankruptcy Act, 11 U.S.C. § 93(g) (1964), the trustee could proceed under the summary jurisdiction of the bankruptcy court. The creditor then argued that permitting the trustee to act first in the bankruptcy court would be a denial of the creditor's clear right to a jury trial in the plenary court suit under section 60 of the Bankruptcy Act, since the decision of the bankruptcy court would be res judicata on the preference issue. In reply, the Supreme Court recognized the existence of a right to jury trial in the plenary court action, but stated that the strong policies behind the Bankruptcy Act would permit the trustees to proceed first in the essentially equitable summary proceeding even though this would be dispositive of the preference issue involved

reduced burden should encourage employers to bring more section 303 suits, thereby fulfilling Congress' goal of providing an additional compensatory remedy to persons injured by illegal secondary activity.[78] Similarly, the deterrence provided by section 303 would be strengthened since the unions would know that one adjudication of illegal secondary activity would be likely to result in the application of two penalties.[79]

Adoption of estoppel in this context might also benefit the union in some cases.[80] If, after a full adjudication on the merits, the Board found that the union was engaging in a proper primary strike, application of estoppel principles would for all intents and purposes prevent the employer from bringing a subsequent section 303 action.[81] This is a more desirable result than that reached in *Old Dutch Farms,* which seems to dictate that the employer not only could bring a suit to harass the union after failing before the NLRB *and* losing on an appeal, but also could conceivably *win* the subsequent action and receive damages.[82]

The application of estoppel would not prevent an employer who was unsuccessful before the Board and on appeal from commencing an action under section 303,[83] but it would permit the courts to dismiss such suits early in the proceedings. A complainant whose section 303 action is properly dismissed on grounds of estoppel can hardly contend that he has been unfairly denied a "right" to a dam-

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in the legal claim under section 60. Thus, the Court permitted preclusion of the preference issue despite the admitted presence of a constitutional jury trial right.

By analogy to *Katchen,* application of estoppel should be permitted in the section 8(b)(4)-303 context although it would preclude jury consideration of the issue of union liability in section 303 suits. The same policy considerations that applied in *Katchen* suggest that the NLRB should be given primary responsibility for deciding unfair labor practice questions since the Board has had more experience in dealing with the complexities of section 8(b)(4) secondary activities than the courts. In addition, it is not clear that there is a constitutional right to a jury trial present in section 303 actions; that was clear under section 60 of the Bankruptcy Act in *Katchen.* Finally, it should be emphasized that use of estoppel would not affect the use of a jury to try the issue of damages in the section 303 action, which arguably is the proper role for the jury under the bifurcated statutory scheme. *See* notes 58-61 *supra* and accompanying text, and notes 88-89 *infra* and accompanying text.

78. 93 CONG. REC. 4858 (1947) (remarks of Senator Taft).

79. *Id.* The threat of financial loss is probably a much greater deterrent than a mere order to cease picketing, and unions might be less likely to engage in questionable secondary activities if damage actions were easier to bring.

80. *See* note 64 *supra.* Employers seeking injunctive relief might be quite willing to run the risk of appealing a contrary decision, particularly in difficult cases. If a decision were to be reversed in favor of the employer, he would not only probably get an injunction, but would be able to use the court of appeals decision to estop the union in the subsequent section 303 action.

81. *See* note 83 *infra* and accompanying text.

82. *See* note 70 *supra.*

83. An action could be commenced, but it would be useless to the plaintiff-employer. Estoppel does not bar the action entirely, but it disposes of the central issue of liability.

age remedy, and it would seem that the courts are quite capable of distinguishing previous Board actions that do not provide adequate adjudicatory grounds for applying estoppel.[84] Also, since the trial examiner's findings of fact must have been previously reviewed both by the NLRB and by a court of appeals,[85] there seems to be little danger that an inadequate adjudication of the liability issue in the Board stage of the proceedings will be granted estoppel effect. The union will in all probability offer a strong defense before the Board in anticipation that estoppel might apply. Consequently, the fear that unfairness to either an employer or a union would result from applying estoppel in the subsequent section 303 suit seems largely unfounded.

Application of the doctrine of estoppel to Board proceedings would also seem to encourage a better allocation of decision-making functions than that which presently exists. In the majority of cases,[86] the substantive issue of liability would be settled by the NLRB, the body possessing the greatest expertise in dealing with labor matters.[87] Allowing the NLRB to be the sole trier of the liability issue in the majority of cases would permit development of a more uniform body of precedent than could be achieved under the present bifurcated statutory arrangement.[88] Moreover, litigation of the damage issue, where appropriate, would be left to the courts; this is a task for which they are traditionally suited. This division of functions would seem to be in accord with the little evidence that exists concerning the legislative purpose in entrusting section 303 actions to the federal courts.[89]

In summary, giving estoppel effect to Board determinations of liability in subsequent section 303 damage actions involving the same facts would not only serve the goals of minimizing unnecessary litigation and saving time and expense, but also would constitute a

84. *See* cases cited in note 57 *supra.*

85. *See* notes 28 and 64 *supra.* Contrast this situation with that in which collateral estoppel is applied as between two court actions; a decision of a trial court alone may become res judicata or carry a collateral estoppel effect without ever being subjected to any appellate scrutiny.

86. *See* notes 20 and 64 *supra.*

87. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1950); NLRB v. Pacific Inter-Mountain Express Co., 228 F.2d 170, 171 (8th Cir. 1955), *cert. denied,* 351 U.S. 952 (1956). *Cf.* Feldesman, *Unfair Labor Practice Procedures and Proceedings—Jurisdictional Disputes, and Organizational and Recognitional Picketing,* 13 SYRACUSE L. REV. 205, 208-09 (1961).

88. *See* note 64 *supra. Cf.* Note, *Sections 8(b)(4) and 303: Independent Remedies Against Union Practices Under the Taft-Hartley Act,* 61 YALE L.J. 745, 754-57 (1952), for some additional proposals to avoid the problems posed by the "completely independent" doctrine. Few (if any) of these solutions seem to have been actually tried, however. Although legislative action by Congress would certainly be the most complete solution, nothing has been done since 1952 when *Juneau* first spotlighted the problems, and little action seems forthcoming from Congress in the future.

89. 93 CONG. REC. 4840-41, 4858 (1947).

reasonable conceptual alternative to the present position that the two remedies are "completely independent." The existing doctrines of estoppel contain built-in restraints, such as the requirement of a final judgment on the merits, which would prevent—in this context as in others—possible abuses of the rights of the parties involved.