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RUNAWAY SHOP — A PERENNIAL THREAT TO ORGANIZED LABOR

A. Introduction

On any given day, one can pick up the local newspaper and in scanning the headlines might well run across something like this: "Mr. Jones, Gold Dust's manager, threatens to move plant if its employees become organized"; or, "Local 246 seeks to prevent plant transfer"; or, "Soap Suds Inc. planning a transfer because of high cost of production." On reading the text, one sees a typical factual situation emerge. Soap Suds Inc. has been owned and operated by the same family for a good number of years. It employs a substantial number of people from the local community in which it is located, in addition to drawing a large number of workers from outlying districts. Its employees heretofore had never been represented by a union but after a few organizational meetings Soap Suds Inc. was presented with a demand for union recognition. Mr. Jones, a division superintendent of the corporation is quoted as having said: "We'll move down south before we recognize the union. Our employees are treated well, what else do they want?" Local 246 becomes certified and the employer makes concessions. About a year later the company declares that it is relocating because of the high cost of production. At the time the company's intention is made known half of its equipment has been moved to a new location. The story will end with an ambiguous statement like: "A spokesman for Local 246 states he will do all in his power to stop Soap Suds Inc. from moving. He will even take the case to the Supreme Court if he has to." This hypothetical sets the stage for one of the most controversial topics in labor law — the Runaway Shop.¹

The importance of solving the problem of plant relocation is eminently clear. Communities losing a large employer are often put in serious financial straits. On the other hand, if the employer can no longer manufacture his products at a reasonable profit because of union demands, it would be inequitable to force him to stay and operate at a loss. Further, the employees who were at least making a living wage before the union moved in are now faced with the possibility of no income at all. What can the employer do? What rights do the union and its members have? If Soap Suds Inc. were manufacturing products not only vital to the local community but important to the nation as a whole, would this make a difference? What court could the union go to in order to enforce its demands? Would it rely on federal law or state law? If it relies on federal law, then under which statute will its cause of action lie? Will it make any difference if there is an existing collective bargaining agreement when the owners of the company announce their intention to move? The answer to these questions will be analyzed.

B. Orientation.

In order to place the subject in proper perspective, organization of the materials will be as follows: (1) An examination of all forms of runaway shop, with particular emphasis on the various "schemes" that employers have used in effecting plant transfer, "key" facts which are strong indicia that the employer is trying to avoid the union or prevent his employees from organizing, and the defenses available to the charge of runaway shop; (2) The remedies available to the union and its members under § 8(a) of the National Labor Relations Act² (Wagner Act) and § 301 of the Labor Management Relations Act³ (Taft-Hartley Act); (3) An analysis of the important jurisdictional issues involved. The functions

1 2 CCH LAB. L. REP., ¶3795: "Removal of an existing business operation to another locality or a threat of removal may interfere with the free exercise of employees' rights. As a manifestation of the economic power of the employer over his employees, the threatened or actual moving of plant locations is a violation of the NLRA if motivated by a desire to hinder union or employee activity (Section 8(a)(1)). This anti-union tactic is known in labor parlance as the "runaway shop."

2 49 Stat. 452 (1935), 29 U.S.C. § 158 (1958).

3 61 Stat. 136 (1947), 29 U.S.C. § 185 (1958).

of the National Labor Relations Board, the federal courts, and the state courts will be analyzed in relation to the problem of plant relocation; (4) An examination of the "trends" and new developments in this field together with an attempted solution to some of the complex problems. The theme of this note will deal with the *practicality* of advising employers and labor unions of an appropriate line of action in a given factual situation.

C. Runawayism.

1. *Absence of Common Law.*

At present, when there is no collective agreement the union must bring its cause of action under an appropriate section of the NLRA.⁴ When there is an existing agreement, which the employer breaches by "running away," the union may or may not bring its claim under the LMRA.⁵ Neither of these two federal statutory remedies were available at common law. If there was no agreement binding the employer, there was no legal method to stop him from moving away.⁶ A more difficult problem, however, was presented when the employer breached a collective agreement. Here the courts were faced with the problem of whether or not this was a breach of contract. Resorting to an ultra-legalistic analysis of contract law, judges were extremely reluctant to give legal redress for any kind of breach of a collective agreement.⁷

The courts refused to look upon the collective agreement as a contract but did regard it as a "usage" that the individual parties to the employment relationship incorporated into their employment agreement. The collective agreement had legal significance only to the extent that the usage theory was deemed applicable.*** In a few cases the collective agreement is held to be a "moral obligation," not enforceable but influential in determining whether equitable relief shall be given.⁸

Other theories of collective bargaining agreements such as the agency theory,⁹ the third party beneficiary theory,¹⁰ and the contract theory,¹¹ were not utilized in the legal analysis of runaway shop. Thus because there was no statutory protection for employees when there was no existing agreement, and because when there was a collective bargaining agreement the courts looked at it with a rather jaundiced eye, no remedy of any consequence developed in connection with runaway shop before the NLRA was enacted.

2. *The Inchoate Form of Runaway Shop—Threats.*

The most rudimentary kind of runaway shop exists where an employer, faced with the threat of organized labor, makes a statement to the effect that, "If the union comes in, I go." This statement may or may not constitute an unfair labor practice depending on many extrinsic factors the most important of which is the history of troubled or cordial relations the employer has had with the union in the past.¹² If the threat is "effective," it may be a violation of Sections 7,¹³

⁴ See, e.g., *International Ass'n of Machinists v. Cameron Iron Works*, 257 F.2d 467 (5th Cir. 1958).

⁵ See, e.g., *United Steelworkers of America v. New Park Mining Co.*, 273 F.2d 352 (10th Cir. 1959).

⁶ See, e.g., GREGORY, *LABOR AND THE LAW, Collective Agreements and Arbitration* 443-96 (2d ed. 1958).

⁷ *Id.* at 445.

⁸ WOLLETT AND AARON, *LABOR RELATIONS AND THE LAW* 751 (2d ed. 1960).

⁹ The leading case is *Barnes & Co. v. Berry*, 169 Fed. 225 (6th Cir. 1909).

¹⁰ *In re Norwalk Tire & Rubber Co.*, 100 F. Supp. 706 (D. Conn. 1951).

¹¹ See, e.g., *Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benevolent Soc'y*, 265 Fed. 397 (E.D. La. 1920).

¹² See *NLRB v. Reynolds Int'l Pen Co.*, 162 F.2d 680 (7th Cir. 1947).

¹³ 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958). The section states that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . ."

8(a)(1),¹⁴ (2),¹⁵ (3),¹⁶ or (5)¹⁷ of the NLRA. If there is a violation, the National Labor Relations Board may issue a cease and desist order preventing the employer from further activity of this kind.¹⁸ It is important, therefore, to consider the ingredients of an "effective" as opposed to an "ineffective" threat.

In *Montgomery Ward & Co. v. NLRB*¹⁹ the employer operated a mail order house in Portland, Oregon. The union commenced an organization drive. Many speeches were made by union officials as to the benefits of unionization. The evidence showed that the manager of the plant hired detectives to determine which employees were interested in joining the union, and also made inquiries on his own. He threatened to close the plant if it became organized. The evidence, in addition, showed that after his activities, interest in unionization greatly decreased. The court recognized the right of an employer to express his views on unionization but held: "that the conduct and expression of the company in this case has [sic] really 'transgressed the permissible bounds.'"²⁰ The court never explicitly said what the "permissible bounds" were, and leads one to the conclusion that the case was largely an *ad hoc* determination. This is as it should be because of the confluence of factors that must be taken into account in determining whether the employer, in fact, has interfered with his employees' right to organize and be represented. In *Irving Air Chute Co.*,²¹ the employer was found guilty of an 8(a)(3) violation. The most important facts, as the court treated them, were: the employer threatened to remove his shop and told his employees that those who did not join the union would be preferred with respect to employment security; those who joined were threatened with discharge; he vilified and calumniated the union in addition to promising better working conditions if his employees wouldn't join.

All of these facts need not be present, however, before an employer can be restrained. In *NLRB v. Nina Dye Works Co.*,²² the court held that an unfair labor practice had been committed when the plant owner threatened to move because some of his employees refused to sign an anti-union petition. The court held that this threat coerced the employees in signing an agreement rejecting the union and that this was an unfair labor practice. It is interesting to note that the court, in enforcing the Board's determination, did not state that the *threat itself* was an unfair labor practice; rather, that the *results* flowing therefrom were in need of remedy. A menace *in vacuo* is completely harmless — the effect is what is important. If, because of the threat, interest in unionization decreases, employees are discriminately discharged or harassed, or the employee is not free to assert his preferences, then the employer is guilty of an unfair labor practice. Implicit in the *Irving* and *Nina* cases is the idea that the effectiveness of threats is to be determined by an objective standard. What the employer "thought" is not con-

14 49 Stat. 452 (1935), 29 U.S.C. § 158(1) (1958). This section provides it shall be an unfair labor practice for an employer: "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed . . ." in Section 7.

15 49 Stat. 452 (1935), 29 U.S.C. § 158(2) (1958). An employer may not "dominate or interfere with the formation or administration of any labor organization. . . ."

16 49 Stat. 452 (1935), 29 U.S.C. § 158(3) (1958). An employer may not "encourage or discourage membership in any labor organization. . . ."

17 49 Stat. 452 (1935), 29 U.S.C. § 158(5) (1958). An employer may not "refuse to bargain collectively with the representatives of his employees. . . ."

18 See *Irving Air Chute Co.*, 52 N.L.R.B. 201 (1943).

19 107 F.2d 555 (7th Cir. 1939).

20 *Id.* at 559. Other cases that have examined what the "permissible bounds" are: *N.L.R.B. v. Winona Textile Mills Inc.*, 160 F.2d 201 (8th Cir. 1947); *The Federbush Co. Inc.*, 24 N.L.R.B. 829 (1940). See also *N.L.R.B. v. Fishman*, 278 F.2d 792 (3d Cir. 1960) for the distinction between threats and predictions. The latter form of activity is protected by § 8 (c) of the NLRA.

21 52 N.L.R.B. 201 (1943). Cf. *Sango Piece Dye Works Inc.*, 38 N.L.R.B. 690 (1942).

22 203 F.2d 849 (3d Cir. 1953). See *Jasper Blackburn Products Corp.*, 21 N.L.R.B. 1240 (1940) (Employer stated he would hire girls or move out of the state if his plant were unionized.)

trolling: the effect that the threat has on his employees right to organization and representation is.

Generally the NLRB determines the effectiveness of threats.²³ However, in *NLRB v. Reynolds Int'l Pen Co.*,²⁴ the Seventh Circuit reversed the Board's finding that the statements involved constituted an unfair labor practice. The court recognized that the nature of effective threats is a question of fact but held that this employer's acts did not transgress "reasonable bounds."

[H]e [employer] had heard that there was trouble in the factory, and that he had come back to straighten it out. He went on to say that he had received an offer to locate the factory "down south" where he could obtain cheaper labor and be free of labor troubles, and where he himself would prefer to live because of the year-round warm climate; that if he decided to move his plant, he could pack whatever equipment was necessary in 48 hours; but that he did not want to move if the employees wished him to remain.²⁵

In this case, there was no appreciable effect on the employees because the threat to move "down south" was made. The court apparently recognized this and thought it unjust to maintain an unfair labor practice charge against the employer. In the other cases cited, however, there was real and substantial damage suffered. In the *Irving Air Chute* case and also the *Nina Dye Works* case, people lost their jobs in addition to being subjected to a great deal of harassment. The evidence clearly showed that interest in unionization decreased. Therefore, the distinction of a threat *in vacuo* and a threat having serious effects is manifestly important. The former is "ineffective," the latter "effective."

3. Threats Coupled With an "Effective" Removal.

In the last section the inquiry was what constituted an "effective" threat. This section will be concerned with what constitutes an "effective" plant removal.

In *Oughton v. NLRB*,²⁶ defendant was engaged in a business in Philadelphia. He and his partner were faced with the threat of unionization and defendant stated that he would move his plant out of the area if it was organized. His partner subsequently opened a plant in Athens, Georgia and took part of the equipment from the main operation. Then the defendant renewed his threat stating that he would move the *whole* plant if the union didn't cease its activities. The Third Circuit enforced the Board's decision that this activity was in violation of Section 7 of the NLRA. It is not clear from the court's opinion whether the unfair labor practice was committed because part of the plant was removed, or whether it was committed because of the threats. One thing is clear however: the effect of the defendant's action in this case is that coercion by threatening to close the plant down or removing part of it is a violation of the employees' rights to organize and bargain collectively through representatives of their own choosing. This was simply a "tactic" to extract bargaining concessions.

In a similar factual situation, the Second Circuit enforced the Board's determination that Winchester Electronics Inc. had committed an unfair labor practice by closing one of its plants and moving the equipment to another location after various statements were made by the company's supervisor that if the union won the certification election the plant would cease operations.²⁷

Another problem in this area exists where there is a threat to close the plant and move away and after the threat is made, the plant closes up but doesn't go anywhere. Here there is no removal of even part of the equipment — just a shut-down. May a plant owner do this with impunity? In *Jac Feinberg Hosiery Mills, Inc.*,²⁸ the employer made four anti-union speeches after which he closed shop

23 See *NLRB v. Locomotive Finished Material Co.*, 133 F.2d 233 (8th Cir. 1943).

24 162 F.2d 680 (7th Cir. 1947).

25 *Id.* at 684.

26 118 F.2d 486 (3d Cir. 1940).

27 *NLRB v. Winchester Electronics Inc.*, 4 CCH LAB. L. REP., ¶ 17, 234 (2d Cir. 1961).

28 19 N.L.R.B. 667 (1940).

and gave impetus to the rumor that he was moving away by removing the entire surplus stock of stocking legs with the silk necessary to foot them. His reason: "[It was done] in order to find some solution to my problem, get the inventory down, and start with a clean slate after that."²⁹ His "problem" involved an impending organizational movement.³⁰ Subsequent to the closing, many of the community's leading citizens approached the plant owner and asked him to reopen so that the "pay-roll" could be kept up in town. They also asked the plant employees to abandon their cause. It was later shown that many of those requesting the resumption of operations were bond holders in the company and were worried about their financial interest. The Board found a violation of Section 7 of the NLRA. In explaining its finding, the Board stated:

[W]e believe that it [plant owner] shut its mill in order to intimidate its employees, both directly, through fear of job loss, and indirectly, through pressure from townspeople who believed their financial interest to be at stake, to abandon the Federation. [Federation was the union which tried to organize the plant]³¹

This case raises an interesting question: would there have been a violation of Section 7 if pressure from the citizens of the community had not been brought to bear upon the employees to abandon their organizational drive? Would fear of job loss alone be enough to intimidate an employee and quash his desire to be represented? It is manifest that the effect of *every* pressure must be examined before an adequate determination can be made as to whether the employees' right to self-organization has been violated—whether the pressure comes from the employer or not. So long as the employer's activities, directly or indirectly, vitiate the right of organization he will be held accountable.

Another variation of the theme is where an employer closes his plant, states that he will not reopen until the union cedes to his demands, and then moves some years later to a new location. In *Siddele Fashions, Inc.*,³² the employer manufactured women's blouses. He had been in business at the same location for twenty years and all the stock in the company was owned by him. In 1952, he closed his plant because the union wouldn't agree to a wage cut. Some seven years later he opened a new plant down south under a different name. At all times he denied any intention of moving. The Board found a violation of 8(a)(1), (3), and (5). An employer cannot move his shop just because he cannot reach a satisfactory agreement with the union. He has a duty to stay at his old location and negotiate a contract that contains better terms for him. To shut down a plant in such a manner is a "tactic" to force acquiescence to bargaining proposals.

It seems clear that an employer can in no way jeopardize the union or its members when both sides sit at the bargaining table. The employer's activities must be above reproach so that neither party is bargaining out of fear. If substantial pressure is brought to bear upon the union members, whether directly or indirectly, the employer stands liable even though no removal has taken place.

4. Plant Relocation Without a Presently Existing Agreement.

When a plant owner removes his business in the absence of any kind of a threat, and there is no collective agreement to stay at the present location for a given period, one of the most difficult aspects of the runaway shop problem is presented. The problem for the union, of course, is to ask the Board to lodge an unfair labor practice charge against the employer for a violation of his duty to bargain collectively as stated in Sections 7, 8(a)(1) and (5) of the NLRA. (The as-

29 *Id.* at 676.

30 *Ibid.*

31 *Ibid.* See *Regal Shirt Co.*, 4 N.L.R.B. 567, 570-71 (1937): "We built our factory here, and we intend to run it without any outside interference." Cf. *Triplett Electrical Instrument Co.*, 5 N.L.R.B. 835 (1938).

32 4 CCH LAB. L. REP., ¶ 10,436 (1961).

sumption is that there have been no discriminatory discharges preceding the move.)

Two important points are to be noted at the outset: (1) The NLRB is the only forum that can originally determine whether or not an unfair labor practice has been committed so long as the litigation is arguably within its jurisdiction.³³ A state court or board may hear the case if the NLRB refuses to, but the Board, must be the first to make the determination one way or the other.³⁴ (2) Therefore, when the union is faced with a runaway shop, and there is no existing collective agreement, a designated spokesman must bring the claim before the NLRB and it must be under an appropriate section of the NLRA. This is not to say, however, that if there is an agreement the union must seek some other forum. Shortly it will be shown that in this situation the union has a choice.³⁵ For the present, discussion will be confined to those situations where an agreement of one kind or another is absent.

NLRB v. Rapid Bindery, Inc.,³⁶ is the most recently decided case in this area. The employer closed his plant, reorganized and formed a new entity — "Frontier," and then moved to another location. The Second Circuit sustained the Board's finding that the new corporation was merely the *alter ego* of the old corporation and that the defendant was guilty of a violation of Sections 8(a)(1) and (5) of the NLRA. The court went on to hold that when a plant owner decides to move, he must give notice to the union to that effect so that the union's officials could consider the treatment due their employees "whose conditions of employment would be radically changed by the move."³⁷ In another case involving similar facts, the employer moved his shop and refused to reopen negotiations. The Board held that where there is an appropriate bargaining unit, and the plant owner refuses to bargain with it, he commits an unfair labor practice, and restored the *status quo*.³⁸ Other actions by the employer, such as lockouts followed by removal,³⁹ "roll-call" of all union members before a move is made and a contract negotiated,⁴⁰ or actions which generally dissuade an employee from union membership⁴¹ have been held to violate the right to freely organize and bargain collectively.

When the courts and the Board deal with the kind of cases presently under consideration, they are looking for fair treatment of employees and their designated representatives whether or not there is an existing agreement. If a worker is faced with the loss of income and economic insecurity because his employer decides to move his plant, and it can be proven that the sole motivation for such a move is to deprive the individual of the right of self-organization and the freedom to bargain collectively, it is nothing more than basic fairness to require the employer to notify the individual or his designated representative of his intention.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encour-

33 See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

34 See, e.g., 73 Stat. 541 (1959), 29 U.S.C. §164 (1959) (Section 14 (c) of the LMRDA), *Guss v. Utah*, 353 U.S. 1 (1957).

35 See *United Shoe Workers of America, AFL-CIO v. Brooks Shoe Mfg. Co.*, 183 F. Supp. 568 (E.D. Pa. 1960).

36 293 F.2d 170 (2d Cir. 1961). The court exonerated the defendant of an alleged 8(a)(3) violation because it found that he had moved for a valid economic reason. *But see N.L.R.B. v. Brown-Dunkin Co.*, 287 F.2d 17 (10th Cir. 1961) and *N.L.R.B. v. Brown Co.*, 184 F.2d 829 (2d Cir. 1950) wherein defendants were found guilty of 8(a)(3) violations for moving their plants.

37 *NLRB v. Rapid Bindery Inc.*, 293 F.2d 170, 176 (2d Cir. 1961).

38 *Schieber Millinery Co.*, 26 N.L.R.B. 937 (1940). See generally, *Tennessee-Carolina Transp. Inc.*, 108 N.L.R.B. 1369 (1953); *Omaha Hat Corp.*, 4 N.L.R.B. 878 (1938).

39 *Hopwood Retinning Co.*, 4 N.L.R.B. 922 (1938).

40 *S & K Knee Pants Co.*, 2 N.L.R.B. 940 (1937).

41 See, e.g., *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1953).

aging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.⁴²

In conclusion, unless an employer contemplating removal gives his employees or their designated union representatives a chance to discuss the planned move and an opportunity to arrive at a satisfactory conclusion for all parties concerned, the employer might well be found guilty of an unfair labor practice and liable for the resulting losses incurred because of his action.⁴³

5. *Plant Relocation With a Presently Existing Agreement.*

If a plant owner removes his business to a new location without proper motive, and in violation of an existing contract, the union's scope of action is considerably broader. It may file an unfair labor practice charge with the Board,⁴⁴ or it may sue in federal court for a breach of contract.⁴⁵ If the former procedure is adopted, the Board may or may not declare that an unfair labor practice has been committed in addition to declaring a breach of the agreement.⁴⁶ If the latter course of action is chosen, the federal court may declare whether the contract has or has not been broken⁴⁷ even though the declaration would be tantamount to declaring an unfair labor practice.⁴⁸ However, in itself, a "breach of contract is not an unfair labor practice. . . ."⁴⁹

[I]f an otherwise arbitrable controversy happens also to be an unfair labor practice, the parties should not be forced to abandon their contract right and be relegated "to the slow and creaking procedure which, like a wounded snake, has dragged its slow length along, sans bargaining, sans labor peace, sans everything but pride of opinion, ill tempered and frustration."⁵⁰

The short of the matter is that when there is both a breach of contract and an unfair labor practice committed in the same act, the federal courts can enforce the contract even if its effect would be to adjudicate an unfair labor practice. "This will prevent the nebulous determination of *what part* is contract and *what part* is unfair labor practice when the *one part* constitutes both."⁵¹ As this note will subsequently show, the choice of forums when there is both a breach of contract and an unfair labor practice can be used to advantage by organized labor.

The leading case wherein suit was brought in a federal court for breach of a collective agreement not to "run away" is *United Shoe Workers of America v. Brooks Shoe Mfg. Co.*⁵² The court found that the defendant, Brooks Company, discontinued operations in Philadelphia and moved to Hanover, Pennsylvania in a deliberate scheme to avoid employing unionized labor — and in doing so violated its existing contract with the plaintiff union. Realizing that heretofore questions of this kind were usually decided by the NLRB under the label of unfair labor practices, the district judge held that the union had a valid cause of action for breach of contract. Thus, in this specific instance, the union did not have to look to the Board for an appropriate remedy. So conceived, Brooks' move was "a vio-

42 Third paragraph of the policy statement of the NLRA, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958).

43 See *Bermuda Knitwear Corp.*, 120 N.L.R.B. 332 (1958).

44 *In re J. Klotz & Co.*, 13 N.L.R.B. 746 (1939).

45 *United Shoe Workers of America, AFL-CIO v. Brooks Shoe Mfg. Co.*, 183 F. Supp. 568 (E.D. Pa. 1960).

46 *In re J. Klotz & Co.*, 13 N.L.R.B. 746 (1939).

47 *United Shoe Workers of America, AFL-CIO v. Brooks Shoe Mfg. Co.*, 183 F. Supp. 568 (E.D. Pa. 1960).

48 See *Int'l. Brotherhood of Electrical Workers v. Nat'l Elec. Contractors Ass'n Inc.*, 194 F. Supp. 491 (D. Md. 1961).

49 *Int'l Ass'n of Machinists v. Cameron Iron Works*, 257 F.2d 467, 473 (5th Cir. 1958).

50 *Id.* at 474.

51 *Ibid.*

52 187 F. Supp. 509 (E.D. Pa. 1960). *Accord*, *United Steelworkers of America v. New Park Mining Co.*, 273 F.2d 352 (10th Cir. 1959).

lation of the national labor policy fashioned by Congress and applied by the National Labor Relations Board."⁵³ Here, then, is an appropriate illustration of the proposition that even though a shop removal would constitute an unfair labor practice because of the owner's avowed purpose to avoid bargaining with the union, if a collective agreement specifically embodies terms in which the employer agrees not to move for a stated period of time, but does so, then the union may go into a district court under Section 301(a) of the LMRA,⁵⁴ and either enforce the terms of the agreement or receive an adequate money judgment for breach thereof.

In *S & K Knee Pants Co.*,⁵⁵ the union, without the benefit of Section 301, filed an unfair labor practice charge with the Board because of a plant relocation in violation of a collective agreement. *S & K*, a Virginia corporation, had its principal place of business at Lynchburg. Ninety-five per cent of its raw materials were brought into Virginia and seventy-five per cent of its finished product was sold outside the state. The record indicated that the owners moved to Virginia originally to acquire cheaper labor. When faced with an organizational movement they reacted violently. The union, however, persisted and was finally able to negotiate a contract. Shortly thereafter an announcement was made that the plant was to move to Culpeper, Virginia, a "good labor town." The Board held that the defendants had committed an unfair labor practice — not only because they refused to bargain collectively with the union — but because they breached their collective bargaining agreement. In another case,⁵⁶ the Board found that the transfer of the shop was, of itself, an unfair labor practice and the presence of a collective agreement added emphasis to the clearly wrongful conduct of the defendant employer.

6. Devices Used to Effect Plant Transfer.

(a) Corporate Reorganization — Piercing the Veil.

One of the favorite devices used by plant owners to avoid the efforts of organized labor is to transfer the plant and in the process reorganize the corporation owning it. The claim that is then made is that the owner's duty to bargain has been vitiated because he is no longer in business.⁵⁷ The Board and the courts have long recognized this for exactly what it is — a subterfuge — and have not permitted the shop owner to avoid his obligations this way.

Court supervision of corporate reorganization affords the operating possessor no freedom from its statutory duty to its employees. And, where managerial control and economic interest of the debtor in possession and the reorganized company are the same, it could be only the blindness of formalism that would suggest separately instituted proceedings against the predecessor and the successor for the redress of their respective but continuous unfair labor practices.⁵⁸

A few factual situations will illustrate this device. In *NLRB v. Auto Ventshade, Inc.*,⁵⁹ the president of the original corporation owned ninety-nine per cent of the stock. When he sold the business to his son all of the managerial staff remained the same. There was no visible change in any of the practices, customers, or policies of the business. Only seventeen days elapsed between the time the first corporation ceased to do business and the second took over. The first corporation was bound by a certification from the NLRB and the question was whether this certification bound the successor corporation or not. The Fifth Circuit held that because the employing industry remained essentially the same after the change

⁵³ *Id.* at 512.

⁵⁴ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

⁵⁵ 2 N.L.R.B. 940 (1937).

⁵⁶ See *In re J. Klotz & Co.*, 13 N.L.R.B. 746 (1939).

⁵⁷ See, e.g., *N.L.R.B. v. Hoppes Mfg Co.*, 170 F.2d 962 (6th Cir. 1948).

⁵⁸ *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 43 (3d Cir. 1942).

⁵⁹ 276 F.2d 303 (5th Cir. 1960). *Accord*, *Rome Products Co.*, 77 N.L.R.B. 1217 (1948).

in ownership, the successor corporation was the *alter ego* of the former, and therefore had to recognize the certification. A short time before this decision was rendered, the Supreme Court declared that the NLRB's orders, when so drawn, bind not only the employer but all his agents, officers, successors, and assigns.⁶⁰

Other devices that have not been recognized as valid reorganizations, thereby not relieving an employer of his duty under an existing contract or of his duty to bargain collectively have been: (1) moving a shop twelve miles and then merging it into a new corporation because of the owner's poor health and a doctor's advice to "take it easy";⁶¹ (2) forming a new corporation and issuing all the stock to the owner's wife as a "gift";⁶² (3) removing part of a corporation's equipment to the successor corporation and then reorganizing.⁶³

In short, the principle to be observed is: "Where the [employment] enterprise remains essentially the same, the obligation to bargain of a prior employer devolves upon his successor in title."⁶⁴ The primary rationale the courts use is:

It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act [NLRA] in the interest of industrial peace. . . . It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency.⁶⁵

(b.) *Leasing Arrangements.*

One of the more important cases involving the effectiveness of devices utilized by a corporation to avoid its obligations under a collective bargaining contract is *United Steelworkers of America, AFL-CIO v. New Park Mining Co.*⁶⁶ The defendant mining company was under a collective agreement with the union. Before the contract ran out, the company set up a leasing agreement in which it agreed to cease operations and turn over all of the assets to another corporation. After this agreement became effective, the union brought suit in the district court for breach of a collective agreement under Section 301 of the LMRA. The Tenth Circuit held the controlling principle to be that "No one can doubt the inherent right of the employer to quit business without prejudice to the bargaining contract,"⁶⁷ and that an employer can sub-contract work usually done by his employees thereby bringing a premature end to the collective agreement; but, that the determining factor is *good faith*. This element must be present when an employer decides to cease operations by closing down or leasing his property. If the leasing arrangement was not made in good faith and with honest intention, but was a mere subterfuge to avoid the obligations of a collective bargaining agreement, the employer would be liable for its breach.

Several factors are brought up in the line of cases dealing with reorganization. The *New Park Mining* case clearly places the emphasis on an objective approach in deciding the effectiveness of a leasing agreement on an employer's obligations. If, from all of the observable factors, it *seems* as though the employer is acting in good faith, then he is relieved of whatever duties he had under the collective contract. The court speaks of this as an "inherent right." What is the *right*? This concept seems to be contrary to the traditional theory of contract law. May a promisor vitiate a contract because he, in good faith, decides to do so? It seems that the law of collective bargaining contracts should at least bear

60 *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942).

61 *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957).

62 *Leybro Mfg. Co.*, 24 N.L.R.B. 786 (1940).

63 *Hopwood Retinning Co.*, 4 N.L.R.B. 922 (1938).

64 *Cruse Motors, Inc.*, 105 N.L.R.B. 242, 247 (1953). Cf. *NLRB v. Hoppes Mfg. Co.*, 170 F.2d 962 (6th Cir. 1948); *NLRB v. Blair Quarries Inc.*, 152 F.2d 25 (4th Cir. 1945).

65 *NLRB v. Colten*, 105 F.2d 179, 183 (6th Cir. 1939) (Emphasis added).

66 273 F.2d 352 (10th Cir. 1959).

67 *Id.* at 356.

a reasonable facsimile to our traditional notions of contract law. Courts have gone so far as to hold that the status of a bargaining representative is a special one not governed by the common law principles of agency, and that as far as representation in a collective agreement is concerned, "traditional notions" do not obtain;⁶⁸ however, the wisdom of casting off all guide-lines in determining questions that involve liability in collective contracts is seriously questioned.

Another important point to be noted, somewhat analogous to the departure of "traditional notions" in dealing with collective contracts, is that in all of these cases, stress is put on the idea of a "clean break" or "cessation of operations" before the plant owner can successfully avoid his obligations. This, also, is determined by an objective standard in relation to the facts of the case.⁶⁹ The practical effect of this insistence on a clean break is that after an employer enters into a collective agreement all he needs to do is sell or lease his business to another company, make a clean break, and his liabilities vanish! Where does this leave the worker or his designated representative? At least one court has justified its decision by holding that if an existing agreement were binding on a subsequent purchaser after there had been a clean break he would be receiving "unbargained-for servitude."⁷⁰ It seems that the better view would be to recognize the sale or lease of a business to include the existing contract as part of the sale and to hold that the union and its designated members have the same rights after the business has been sold as they had before the transfer. If the new owner asserts that the collective contract was not a part of the bargained for consideration, then the union ought to be able to sue the previous owner for a breach of contract.

When there is no existing agreement, it seems to be more difficult to find an employer guilty of an unfair labor practice for refusal to bargain within the meaning of Section 8(a)(5) of the NLRA. *Hopwood Retinning Co.*⁷¹ and *Leybo Mfg. Co.*⁷² both involved reorganizing and transferring plants when there was no existing agreement. Here it seems that the evidence must clearly indicate the employer's desire to avoid the union by reorganizing.

7. Employer's Defenses.

A plant owner who has ostensibly committed an unfair labor practice for removing his business may be able to successfully defend against the charge for a number of reasons. In the last section, this was dealt with briefly in terms of an employer's making a clean break with the old business after he sells or leases it. The problem of motive was also briefly discussed in connection with the concept of a good faith breach of contract. The discussion now will concentrate on defenses, not tangentially, but in the main.

The NLRB has apparently deemed it expedient to allow an employer to move his shop when certain factors are present, and, as previously discussed it is of no moment whether or not a union contract exists. The chief defense the employer may avail himself of is that he has moved for economic reasons.⁷³ Specifically, this defense has been urged when the plant owner wants to move closer to his source of supply,⁷⁴ when there is an opportunity to lease another building at a reduced rate,⁷⁵ more room for expansion is needed,⁷⁶ an opportunity

68 See, e.g., *American Seating Co.*, 106 N.L.R.B. 250 (1953).

69 See, e.g., *United Steelworkers of America AFL-CIO v. New Park Mining Co.*, 273 F.2d 352 (10th Cir. 1959); *NLRB v. Blair Quarries Inc.*, 152 F.2d 25 (4th Cir. 1945).

70 *NLRB v. Alamo Truck Service*, 273 F.2d 238 (5th Cir. 1959). See *NLRB v. Armato*, 199 F.2d 800 (7th Cir. 1952); *Juneau Spruce Corp.*, 82 N.L.R.B. 650 (1949).

71 4 N.L.R.B. 922 (1938).

72 24 N.L.R.B. 786 (1940).

73 See *Mount Hope Finishing Co. v. NLRB*, 211 F.2d 365 (4th Cir. 1954); *Rome Products Co.*, 77 N.L.R.B. 1217 (1948).

74 *Mount Hope Finishing Co.*, *supra* note 73.

75 *Fiss Corp.*, 43 N.L.R.B. 125 (1942).

76 *Ibid.*

to purchase equipment at reduced cost is presented,⁷⁷ there is a desire to reduce operating costs,⁷⁸ or he is faced with a demand for increased wages and decides to discontinue business in the particular department wherein the increase is sought.⁷⁹ Even though a plant owner may have a complete defense to a charge of "run-away shop," under one of the recognized "excuses," he is under a duty to *notify* the union of his contemplated move so as to give the union an opportunity to bargain with respect to the employment of the old workers at the new plant.⁸⁰ Also, the move does not discharge the employer's duty to bargain at the new plant within the meaning of Sections 8(a)(1) and (5) of the NLRA.⁸¹

A great deal of emphasis is placed on the employer's motive as it relates to the objective circumstances that prompt the move.⁸²

A company may suspend its operations or change its business methods so long as its change in operations is *not motivated* by the illegal intention to avoid its obligations under the Act [The NLRA].⁸³

Also, the Sixth Circuit has ruled that the Board must consider the effect of an employer being presented with a uniform union contract that he has not had a chance to negotiate for and hasn't been given any alternative but to sign.⁸⁴ If an employer is presented such a contract, and instead of signing it moves away in breach of a present agreement, this might not be an unfair labor practice. In short, another possible defense to the charge of runaway shop is that when the plant owner does not have a chance to negotiate a new contract, he can breach the old one with impunity. To exclude evidence of this kind, states the court, would deprive the employer of due process of law.⁸⁵

As a general rule, the Board has not regarded an employer's personal feelings as being sufficient reason to justify a plant transfer.⁸⁶ Clearly, an excuse for moving because the owner didn't "like" the union is insufficient — if anything it is additional evidence of an employer's refusal to guarantee his employees rights enunciated in Section 7 of the NLRA.⁸⁷ Also, an owner cannot claim that the reason for his move was that his son was "allergic" to New York City.⁸⁸ Here, as in previous sections, the court is faced with the problem of determining "what was the *true reason*"⁸⁹ for the transfer. This, it seems, must be determined by taking all of the relevant factors into consideration and making a determination when "the big picture" unfolds.

When this picture is seen in its entirety, it is the sole province of the NLRB to weigh the evidence, pass on the credibility of witnesses, and select between conflicting and contradictory testimony. Unless the Board's findings are clearly not supported by the manifest weight of the evidence, the appellate court may not challenge its findings.⁹⁰

One important "excuse" remains. Neither the Board nor the federal courts will force an employer to return to his old location if the move would create

⁷⁷ *Ibid.*

⁷⁸ NLRB v. Adkins Transfer Co., Inc., 226 F.2d 324 (6th Cir. 1955).

⁷⁹ NLRB v. Mahon Co., 269 F.2d 44 (6th Cir. 1959); *Accord*, NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960); NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954).

⁸⁰ NLRB v. Rapid Bindery Inc., 293 F.2d 170 (2d Cir. 1961).

⁸¹ Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999 (1953) (one member dissenting).

⁸² See NLRB v. Adkins Transfer Co., *supra* note 78. (All evidence pointed to the fact that the employer had had a history of cordial relations with the Teamsters' Union). See, e.g., Radio Officers' Union of Commercial Telegraphers v. NLRB, 347 U.S. 17 (1953).

⁸³ NLRB v. Adkins Transfer Co., 226 F.2d 324, 327 (6th Cir. 1955) (Emphasis added).

⁸⁴ NLRB v. Tennessee-Carolina Transp. Inc., 226 F.2d 743 (6th Cir. 1955).

⁸⁵ *Ibid.*

⁸⁶ See, e.g., NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957).

⁸⁷ See, e.g., S & K Knee Pants Co., Inc., 2 N.L.R.B. 940 (1937).

⁸⁸ *In re J. Klotz & Co.*, 13 N.L.R.B. 746 (1939).

⁸⁹ NLRB v. Adkins Transfer Co., *supra* note 83, at 328.

⁹⁰ NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874 (1st Cir. 1941), *cert. denied*, 313 U.S. 595, 61 Sup. Ct. 1119, 85 L. Ed. 1549 (1941).

an economic hardship.⁹¹ It is hard to conceive of an instance where it would not create an economic hardship to move back. Although this defense would only be presented after the Board had found an unfair labor practice was committed, it remains a potent weapon in defeating the employees' right to fair treatment under the NLRA.

D. Remedies⁹²

1. Under the National Labor Relations Act.

The NLRA is remedial in scope.⁹³ The Board, in ordering affirmative action, cannot confer a punitive penalty on an employer because he has committed an unfair labor practice — even though the Board might be of the opinion that the policies of the Act would be effectuated by such an order.⁹⁴

In determining the proper remedy, most of the union's suits for plant relocation have been brought under section 8(a)(1).

Since the language of Section 8(a)(1) of the Act is general, many types of employer activity have been held to interfere with employee organization. Coercive acts or statements . . . "runaway shops," . . . Almost any type of activity which would tend to interfere with employee organization may be held to be violative of Section 8(a)(1).⁹⁵

The Board's choice is rather extensive. When there has been an "effective" threat made, the usual cease and desist order will issue. In addition, a statement must usually be posted in a conspicuous place to inform the employees that their employer is complying with the Board's determination.⁹⁶ When there has been an "effective" removal that cannot be justified, the NLRB may order reinstatement,⁹⁷ back pay,⁹⁸ transportation expenses,⁹⁹ reasonable commuter expenses,¹⁰⁰ or a retransfer of the plant to its old location.¹⁰¹ The order is almost always stated in terms of alternate remedies so that the employer must choose whether he will accept the reinstatement and back-pay provisions or move back to his old location and restore the *status quo*.¹⁰²

One of the reasons for alternate remedies is because of what was heretofore referred to as an "unwarranted hardship" by forcing an employer to move back. Another reason sometimes given is that by forcing a retransfer, the employees' rights at the new location would be prejudiced.¹⁰³

The first, and most important, remedy is reinstatement of employees at the new plant. This rule seems simple enough once the employer has been found to have committed an unfair labor practice; in application, however, it has not been free of complication. A few cases will illustrate this: in *Rome Products Co.*,¹⁰⁴ the Board found that defendant had reorganized his company in an effort to avoid collective bargaining. In order to restore, as nearly as possible, the *status quo* before the wrongful activities, an order was issued to reinstate the employees at

91 See *United Shoe Workers of America, AFL-CIO v. Brooks Shoe Mfg. Co.*, 187 F. Supp. 509 (E.D. Pa. 1960).

92 See 34 TEMP. L.Q. 136 (1961); 53 MICH. L. REV. 627 (1955).

93 *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). See *NLRB v. Grower-Shipper Vegetable Ass'n of Cal.*, 122 F.2d 368 (9th Cir. 1941) (Beyond the Board's authority to order back-pay to the Government).

94 *Republic Steel Corp. v. NLRB*, *supra* note 93.

95 CCH LABOR LAW COURSE, ¶ 1548 (12th ed. 1961).

96 See, e.g., *Irving Air Chute Co.*, 52 N.L.R.B. 201 (1943).

97 *Bermuda Knitwear Corp.*, 120 N.L.R.B. 332 (1958).

98 *Omaha Hat Corp.*, 4 N.L.R.B. 878 (1938).

99 *New Madrid Mfg. Co.*, 104 N.L.R.B. 117 (1953).

100 *In re J. Klotz & Co.*, 13 N.L.R.B. 746 (1939).

101 See, e.g., *Schieber Millinery Co.*, 26 N.L.R.B. 937 (1940).

102 *Ibid.*

103 See *In re J. Klotz & Co.*, *supra* note 100.

104 77 N.L.R.B. 1217 (1948).

the new plant and to pay their travel expenses there. In *New Madrid Mfg. Co.*,¹⁰⁵ the order of reinstatement was issued with one additional feature. If all the employees of the former plant could not be put to work immediately, they would have to be placed on a "preferential" list according to seniority (if the company had a seniority program) and hired as soon as possible. When the individual worker's name was placed on the "list" liability for back pay would stop. In another case,¹⁰⁶ the Board specifically reserved the right to modify its order of reinstatement if a change of conditions in the future warranted it. In *NLRB v. Midwest Transfer Co.*,¹⁰⁷ reinstatement was ordered for any employee who was at all affected by the relocation of a shop even though he was not named in the complaint. In *Tennessee-Carolina Transp. Inc.*,¹⁰⁸ the order requiring reinstatement was qualified to the extent that it would obtain so long as equivalent jobs with the company were not available in the area where the employees were working after the plant transfer.

To be vested with the power to retain or regain, as nearly as possible, the *status quo* is one thing; to emasculate a protective remedy is quite another. There is no good reason for placing an injured employee on a "preferred" list and make him wait without compensation for a job opening at the new plant when it has been found that the employer moved solely to avoid his obligations and coerce his workers. Although an employer should not be forced to hire people he does not need, if his wrongful conduct puts employees out of work because of the move, then the better view seems to be to hold the employer liable for all back pay until the employee can be put back on the job. It is suggested that this kind of qualification on a reinstatement order is an emasculation of the protection that should be given to union members who are organized for a common purpose and because of this organizational activity, are subsequently deprived of rights given them under Sections 7 and 8 of the NLRA.¹⁰⁹

Most of the orders requiring reinstatement also carry some provision for back pay, as the preceding discussion indicates. The general rule, subject to many qualifications, is that the wrongful employer will be liable for back pay from the time of the move until he offers, or is required, to reinstate his old employees.¹¹⁰ It is generally accepted that the amount of back pay due may be proportionately reduced by the amount of money an employee earns in the meantime,¹¹¹ but that the employee is under no duty to mitigate this amount.¹¹² If an offer of reinstatement is refused, the liability for back pay ceases.¹¹³ In one leading case,¹¹⁴ the Board ordered reinstatement but did not grant back pay for the period of unemployment.

Not quite as many different results emerge when the question of transportation and commuting expenses is dealt with. Here the general rule is that the employer will have to pay transportation costs to the new location for his former employees.¹¹⁵ If his family does not wish to go along, reasonable commuter's costs

105 104 N.L.R.B. 117 (1953).

106 Bermuda Knitwear Corp., *supra* note 97.

107 287 F.2d 443 (3d Cir. 1961). Cf. *Berkshire Knitting Mills v. NLRB*, 139 F.2d 134 (3d Cir. 1943); *Republic Steel Corp. v. NLRB*, 107 F.2d 472 (3d Cir. 1939).

108 108 N.L.R.B. 1369 (1953).

109 The claim is frequently made that seniority rights, in an order of reinstatement, are "vested." Quite recently, a plant moved from Bedford Heights, Ohio to Georgetown, Ky. Four hundred employees of the plant sued for \$1,250,000 claiming, *inter alia*, that they had a vested right to reinstatement at the new plant. *South Bend Tribune*, Nov. 10, 1961, p. 6, col. 4.

110 See, e.g., *Omaha Hat Corp.*, 4 N.L.R.B. 878 (1938).

111 *Ibid.*

112 *Ibid.*

113 *Tennessee-Carolina Transp. Inc.*, 108 N.L.R.B. 1369 (1953).

114 See, e.g., *S & K Knee Pants Co. Inc.*, 2 N.L.R.B. 940 (1937).

115 See *Schieber Millinery Co.*, 26 N.L.R.B. 937 (1940).

will be allowed.¹¹⁶ This latter award is reasonable so long as it is sparingly applied. It would seem unreasonable for example, to require an employer to go as far as paying commuting expenses, even though restricted to bi-weekly trips, in cases where the new plant has been moved many miles from the old location. It would smack of punitive damages to allow an employee to go home once every other week when home is two thousand miles away! The former award, however, seems to be entirely reasonable and consistent with the Board's desire to regain the *status quo* after an effective plant transfer.

In summing up the remedies available under the appropriate provisions of the NLRA, it is to be specifically noted that, in the main, the employer was held to commit an unfair labor practice by removing his shop when there was no collective agreement. The union's chief complaint is that the employer has violated his employees' right to bargain and organize freely, that the employer has practiced coercive acts by moving, and by so doing has refused to bargain collectively. The NLRB's primary objective is to regain the *status quo* before the commission of the wrongful acts.

2. Under the Labor Management Relations Act.¹¹⁷

When Congress passed the NLRA, it specifically refrained from any provision for the enforcement of collective agreements. It was felt that this was a matter for the state courts to take care of. The rules governing this important phase of labor relations were, therefore, left to the controls of the common law.¹¹⁸ "[T]he common-law rules governing the enforcement of collective agreements proved hopelessly inadequate."¹¹⁹ Because of this, Section 301 of the LMRA was passed. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations, and that industrial peace can be best obtained only in that way.¹²⁰

The classic case of *Textile Workers Union of America v. Lincoln Mills of Alabama*,¹²¹ which will be revisited in the discussion of jurisdiction, is the leading authority for (among other things) determining what law will be applied when the federal courts decide whether there has been a breach of a collective agreement. "[T]he 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."¹²² This statement has led to no little confusion when the courts apply the remedy available for breach of contract where an employer removes his plant after he has specifically agreed not to do so. The question that looms large in this area is the *type* of remedy available for the breach. Will actual damages alone be awarded, or may the court impose punitive damages? If the remedy at law is inadequate, may the court issue an injunction to specifically enforce the terms of the agreement? All possibilities but the equitable remedy of injunction will be discussed in this section. The latter remedy will be reserved for the important question of jurisdiction.

In *United Shoe Workers of America AFL-CIO v. Brooks Shoe Mfg. Co.*,¹²³ the District Court took notice of the fact that the union had had consecutive collective bargaining agreements with the employer for twenty years. All of these contracts specifically stated that the employer agreed not to move for any reason during the term of the contract. In violation thereof, the defendant moved from

116. *In re J. Klotz & Co.*, *supra* note 100. (Travel limited to bi-weekly trips.) In *New Madrid Mfg. Co.*, *supra* note 99, the Board held daily commuting to be an unreasonable burden for the employer to bear.

117. See 28 U. CHI. L. REV. 707 (1961) for an excellent summary of the development of federal law under section 301 of the LMRA.

118. GREGORY, LABOR AND THE LAW, 444 (2 ed. 1958).

119. *Ibid.*

120. See, e.g., *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

121. 353 U.S. 448 (1957).

122. *Id.* at 456 (Emphasis added).

123. 187 F. Supp. 509 (E.D. Pa. 1960). See 109 U. PA. L. REV. 762 (1961).

Philadelphia to Hanover, Pennsylvania. The court recognized its rights to "fashion" a remedy based on the policy of our national labor laws and did so to the tune of \$78,011. \$50,000 was punitive and the rest compensatory. It is interesting to examine how the court arrived at the figure for compensatory damages. The contract was due to expire; but, since there had been a history of collective bargaining agreements, it was fair to assume there would be future agreements to last as long as the past agreements had. Thus, the damages sustained by the breach did not cease when the contract did; rather, they were computed on a twenty year basis.¹²⁴ In justifying the punitive damage assessment, great emphasis was placed on the highly mobile character of the shoe industry, and how the union's reputation as an effective bargaining agent would be seriously impaired as the result of the transfer.

It seems that a contrary result would not have been unreasonable. As to actual damages, it is difficult to see how an employer can breach that which is not yet in existence, and, at best has only the chance of fruition. As to punitive damages, the result is even more objectionable. Section 301 has no specific provision for punitive damages. When this prevails, the better rule seems to be that the aggrieved party shall only "recover the damages by him sustained and the cost of the suit."¹²⁵ When Congress intends that punitive damages should obtain, it makes adequate provisions therefore.¹²⁶

In the innumerable cases arising from the breach of an ordinary commercial contract, it has seemed wise to adhere to the general rule excluding the punitive element and to avoid the frequently futile attempt to determine the degree of moral obloquy.¹²⁷

This criticism of punitive damages being allowed when a breach of a collective bargaining contract occurs is couched in the belief that the rules of law governing collective contracts should not be substantially different from the rules governing the breach of other types of contracts. To make euphonious distinctions between a collective agreement and other types of agreements seems neither wise nor realistic. Are we to have a separate body of law, either statutory or judge-made, just to cover all of the aspects of collective bargaining contract law? This proposition has not received wide endorsement in our state courts.¹²⁸

The time has at last arrived, however, when, under patriotic and intelligent leadership, their [the labor unions'] place has become secure in the confidence of the country, and their contracts are no longer construed with hesitancy or strictness, but are accorded the same liberality, and receive the same benefits of the application of the principles of the modern law, bestowed upon other agreements which appertain to the important affairs of life.¹²⁹

The unanimity of agreement on the state level has been received with something less than enthusiasm by the federal courts when a labor agreement is interpreted in light of federal labor legislation. In *J.I. Case Co. v. N.L.R.B.*,¹³⁰ the Supreme Court examined the functions of the union, employer, and employee, and the impact of the NLRA. The decision in that case has influenced other courts to hold that the labor agreement is *sui generis*.¹³¹ Justice Brennan, while still a member of the New Jersey Supreme Court, examined the nature of the collective agreement at length in *Kennedy v. Westinghouse Electric Corp.*,¹³² and seemed

124 See *Burlesque Artists Ass'n v. Hirst Enterprises Inc.*, 267 F.2d 414 (3d Cir. 1959) for another interesting way of computing damages under § 301.

125 *United Mine Workers of America v. Patton*, 211 F.2d 742, 749 (4th Cir. 1954).

126 *Ibid.*

127 5 CORBIN, CONTRACTS § 1077 at p. 367 (1951); see RESTATEMENT, CONTRACTS § 342 (1932): "Punitive damages are not recoverable for breach of contract."

128 See, e.g., *Yazoo & M.V.R.R. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931); But see *Swart v. Houston*, 154 Kan. 182, 117 P.2d 576 (1941).

129 *Yazoo & M.V.R.R. v. Sideboard*, *supra* note 128 at 671.

130 321 U.S. 332 (1944).

131 See WOLLET AND AARON, *LABOR RELATIONS AND THE LAW*, 753 (2d ed. 1960).

132 16 N.J. 280, 108 A.2d 409 (1954).

to indicate that a new legal category for this type of "special" agreement might be needed. However, in an incisive law review article, Professor Archibald Cox points out the lack of wisdom in disregarding all of the precepts of contract law when dealing with problems of collective agreements.¹³³

Regardless of what view is taken as to the nature of the collective agreement, the fact still remains that a union may go into a federal court and obtain relief for the breach of its contract in those matters that are of "peculiar concern" to the union.¹³⁴ This concern has been construed to cover the situations that are the subject of this note — "running away" — when the contract specifically proscribes this type of unilateral conduct. The *Brooks Shoe* and *New Park Mining* cases clearly indicate this. Whereas the union is restricted to the Board when there is no contract, the breach of a specific agreement will afford two forums for a proper determination.

Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may constitute also an unfair labor practice within the meaning of the act.¹³⁵

The possible kinds of relief that may be given by a federal court will be presently discussed.

E. Jurisdiction

1. The National Labor Relations Board.

Congress has placed the administration and interpretation of the labor policy of the United States in the hands of the NLRB.

[T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience. . . .¹³⁶

When a controversy is arguably within the purview of Section 7 or 8 of the NLRA, the state and federal courts must defer to the exclusive jurisdiction of the Board.¹³⁷ This jurisdiction has been granted by Congress to enforce *public* rights on behalf of public interests rather than private rights for private interests.¹³⁸ What all this means for the purposes of this discussion is that, generally, the NLRB is the sole arbiter of whether or not an employer is guilty of an unfair labor practice under the appropriate section of the NLRA for relocating his plant.

The first question to be examined in order to determine whether jurisdiction may be exercised is whether the plant owner is "substantially" engaged in interstate commerce. Just how small the effect on interstate commerce has to be cannot be stated with certainty. In no significant cases have the courts found the Board to have exceeded its jurisdiction.¹³⁹ In a leading case, the Supreme Court held that the power of the Board reaches small enterprises "which in isolation might be deemed to be merely local. . . ." ¹⁴⁰ The Court noted that:

[The question] is not to be determined by confining judgement to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of

133 See Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 14-15 (1958).

134 *United Steelworkers of America AFL-CIO v. New Park Mining Co.*, 273 F.2d 352, 355 (10th Cir. 1959).

135 *Textile Workers Union of America v. Arista Mills Co.*, 193 F.2d 529, 533 (4th Cir. 1951).

136 *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

137 *Ibid.*

138 *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

139 See, e.g., *Polish National Alliance v. N.L.R.B.*, 322 U.S. 643 (1944).

140 *Id.* at 648.

which if left unchecked may well become far-reaching in its harm to commerce.¹⁴¹

It is not hard to imagine, therefore, the almost unlimited discretion the Board has in determining whether or not it will hear a case involving a runaway shop. This power to exercise jurisdiction has been interpreted by the Supreme Court to be coextensive with congressional power to legislate under the Commerce Clause.¹⁴² When the Board refuses to handle a "small" case, the federal and state courts were formerly also precluded from hearing it.¹⁴³ This result was appropriately characterized as creating a "no-man's land," a proper discussion of which is beyond the scope of this note. Suffice to say, however, that the Board's power to restrict its own jurisdiction has rendered much of the litigation concerning no-man's land moot when Congress voted in 1959 to broaden the area wherein the courts could act.¹⁴⁴

The next question to determine is whether or not an employer can arguably be found guilty of a violation of Sections 7 or 8 of the NLRA, in addition to committing a violation of Section 301 of the LMRA. The Board *always* has jurisdiction to hear and adjudicate the status of a plant owner's actions regardless of which section of the NLRA or the LMRA the cause of action is brought under.¹⁴⁵ The Board, however, has been extremely reluctant to find a breach of a collective agreement apparently on the theory that it does not want the chore of policing labor agreements.¹⁴⁶

[I]t will not effectuate the statutory policy of "encouraging the practice and procedure of collective bargaining" for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We therefore do *not deem it wise* to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen.¹⁴⁷

Obviously, the objection of the NLRB to policing collective contracts is well stated. Although they have jurisdiction to declare a breach, just as they have jurisdiction to declare an unfair labor practice, it would place an unreasonable burden on an already overburdened administrative tribunal. The Board already has all the business it can handle.¹⁴⁸ In due deference to the Board's workload, however, where does this leave the union when an employer suddenly picks his plant up and moves away in violation of an agreement not to do so? Even if there is an arbitration provision in the contract there is no one to arbitrate with. Consideration of this will presently follow.

2. The Federal Courts.

Section 301 of the LMRA provides for suits by or against labor organizations when a collective bargaining contract has been breached. Regardless of whether the union is sued or is bringing suit, or whether the federal jurisdictional requirements are met, or whether the state in which the particular federal court

141 *Ibid.*

142 See, e.g., *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

143 See *Guss v. Utah*, 353 U.S. 1 (1957).

144 See 73 Stat. 541 (1959), 29 U.S.C. § 164 (1959) (Section 14(c) of the LMRDA), WOLLET AND AARON, *supra* note 131 at 112-15.

145 See, e.g., *NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262 (3d Cir. 1941).

146 *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694 (1943).

147 *Id.* at 706 (Emphasis added).

148 See, e.g., *Siemons Mailing Service*, 122 N.L.R.B. 81 (1958).

is located permits suits against unions as such, the action may be brought.¹⁴⁹ The suit may be prosecuted by a private litigant,¹⁵⁰ but not in lieu of a labor organization when it represents a majority of employees as a bargaining unit.¹⁵¹ Section 301 applies only to union claims under a collective agreement and not individual claims that are "uniquely personal."¹⁵² In addition, district courts will not be deprived of jurisdiction even though the breach constitutes an unfair labor practice.¹⁵³ With this general introduction of the scope of Section 301, an examination of the section as it applies to runaway shops is required.

The only case that has been found wherein a federal court, under Section 301, awarded damages for breach of a runaway shop clause in the collective contract is *United Shoe Workers of America AFL-CIO v. Brooks Shoe Mfg. Co.*¹⁵⁴ This case was discussed at length previously and will not be considered here. What must be determined now is whether an award of money damages is the *only* remedy available under Section 301 when a plant owner moves in violation of his contract. Since there is no case law on this point, the question must be approached by way of illustration in other areas of labor law, and how the courts have applied Section 301 in these areas.

Prior to the *Textile Workers Union v. Lincoln Mills* case,¹⁵⁵ the courts interpreting Section 301 limited the scope of relief to money damages.¹⁵⁶ The reason for this reluctance seems to be grounded in the belief that if other types of remedies were available under Section 301 — specifically injunctive relief — the Norris-LaGuardia Act¹⁵⁷ would be repealed by implication.¹⁵⁸ After *Lincoln Mills*, a premium was placed on "judicial inventiveness" to fashion a remedy in line with national labor laws and policies. Apparently the Tenth Circuit took *Lincoln Mills* at its word. In *Teamsters Union v. Yellow Transit Freight Lines, Inc.*,¹⁵⁹ the court affirmed an order of the district court in Kansas granting an injunction enjoining a labor union from violating a no-strike clause in a collective bargaining agreement. The court was satisfied that there had been a showing of irreparable harm, and that there was no labor dispute within the meaning of Norris-LaGuardia. So conceived, the purpose and policy of the Act would not be served by denying an injunction.

149 CCH LABOR LAW COURSE, ¶ 2403 (12th ed. 1961).

150 *Swift & Co. v. United Packinghouse Workers of America*, 177 F.Supp. 511 (D. Colo.).

151 See *Disanti v. Local 54, Federation of Glass, Ceramic and Silica Works of America*, 126 F. Supp. 747 (W.D. Pa. 1954). The court intimates that it will not entertain, in any circumstance, a suit by a private litigant. See also, *NLRB v. Wheland Co.*, 271 F.2d 122, 124 (6th Cir. 1959): "The right to representation exists prior to the holding of an election and must be recognized whenever it is found that an organization represents a majority of the employees."

152 *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 (1955). The following claims have been held "uniquely personal" and therefore not under Section 301: *Textile Workers Union v. Bates Mfg. Co.*, 158 F. Supp. 410 (D. Me. 1958) (Failure to pay a cost-of-living increase as provided in contract); *Silverton v. Valley Transit Cement Co.*, 249 F.2d 409 (9th Cir. 1957) (Failure to pay wages at rate specified in collective bargaining agreement); *Chicago Newspaper Guild v. Chicago Daily News*, 40 L.R.R.M. 2038 (N.D. Ill. 1957) (severance pay); *United Shoe Workers v. Milson Shoe Corp.*, 36 L.R.R.M. 2302 (D. Mass. 1955) (vacation and holiday pay).

153 See *Int'l Brotherhood of Elec. Workers v. Nat'l Elec. Contractors Ass'n Inc.*, 194 F. Supp. 491 (D. Md. 1961). See also, *Independent Petroleum Workers of New Jersey v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir. 1956).

154 187 F. Supp. 509 (E.D. Pa. 1960).

155 353 U.S. 448 (1957).

156 See, e.g., *Aetna Freight Lines, Inc. v. Clayton*, 228 F.2d 384 (2d Cir. 1955), *cert. denied*, 351 U.S. 950 (1956). But see *Milk & Ice Cream Drivers v. Gillespie Milk Products Corp.*, 203 F.2d 650 (6th Cir. 1953).

157 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1958).

158 See, e.g., *Mead v. Teamsters Union*, 217 F.2d 6 (1st Cir. 1954).

159 282 F.2d 345 (10th Cir. 1960), *cert. granted*, 364 U.S. 931 (1960).

In *Lincoln Mills*, the Supreme Court held that an agreement to arbitrate was specifically enforceable under Section 301.

[T]he agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation [301] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.¹⁶⁰

The *Yellow Freight Lines* case involved the other side of the *quid pro quo* — the no-strike provision — and held that it, too, was specifically enforceable. This has been categorically rejected; in *Bull S.S. Co. v. Seafarers' Int'l Union*,¹⁶¹ the Second Circuit held that to issue an injunction to specifically enforce a no-strike provision in a collective agreement would be to emasculate the Norris-LaGuardia Act. *Lincoln Mills* had involved an arbitration clause. In *Bull Steamship*, however, the conduct sought to be enjoined was a strike. This said the court, was specifically included within Section 4(a) of the Norris-LaGuardia Act as a valid labor dispute and therefore would not be enjoined. The issue will soon be decided by the Supreme Court, but some speculation, especially as the problem related to runaway shop, might be fruitful.

It seems that *Yellow Transit* follows the direction of *Lincoln Mills* in fashioning a remedy appropriate to the circumstance and in accord with the national labor policy.

It is one thing to utilize an injunctive decree for the negative purpose of interfering with full freedom of association, self-organization and designation of representatives to negotiate the terms and conditions of employment. It is quite another to utilize the judicial processes to preserve and vouchsafe the fruits of a bargain which the parties have freely arrived at through the exercise of collective bargaining rights.¹⁶²

Thus, if the Supreme Court rules that an agreement not to strike during the term of the collective contract may be specifically enforced, it seems fair to predict that a very effective weapon may be used by the union in runaway shop cases — an injunction to compel the employer to remain at his present location if the contract negotiated contains a "no-runawayism" clause.

Even if the court decides not to expand Section 301 to cover no-strike provisions, injunctive relief might still be granted under the holding in *Lincoln Mills*. Section 4(a) of the Norris-LaGuardia Act specifically states that a federal court will be without jurisdiction to issue an injunction when an employee engages in: "ceasing or refusing to perform any work or to remain in any relation of employment."¹⁶³ Norris-LaGuardia protects strikes. We are called upon to decide an issue involving strikes. Therefore, we may not enjoin the strike because of the specific provisions of the Anti-Injunction Act. This seems to be the mainstay of the reasoning in *Bull*. If the Supreme Court reverses *Yellow Transit* on the superficial reasoning of *Bull* — an unhappy result — still we have the ruling in *Lincoln Mills* involving an arbitration clause. The Court held that this could be specifically enforceable. There are no provisions in the Norris-LaGuardia Act for runaway shop as there are for strikes. Why, therefore, cannot a provision in a contract that prevents a plant owner from relocating be specifically enforced?

One final argument may be made in defense of the claim that injunctive relief under Section 301 may be granted in runaway shop cases. Courts have found no difficulty in granting injunctions, even though the controversy comes within the literal language of Norris-LaGuardia, if they are convinced that such con-

160 *Textile Workers Union of America v. Lincoln Mills*, *supra* note 155 at 455.

161 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958).

162 *Teamsters Union v. Yellow Transit Freight Lines, Inc.*, 282 F.2d 345, 349-50 (10th Cir. 1960), *cert. granted*, 364 U.S. 931 (1960).

163 49 Stat. 70 (1932), 29 U.S.C. § 104(a) (1958).

troveries are not included within the *policy* of the Act.¹⁶⁴ What the Act was designed to foster is patent in its policy:

[T]he individual unorganized worker is commonly helpless . . . to protect his freedom of labor, . . . wherefore, . . . it is necessary that he have full freedom of association, self-organization . . . and that he be free from the interference, restraint, or coercion of employers of labor, or their agents. . . .¹⁶⁵

It would take some stretch of the imagination to hold that an employer couldn't be specifically enjoined, because of Norris-LaGuardia, from moving his shop in violation of a contract that has been entered into freely as the result of both the union and employer's efforts.

3. *The State Courts.*

In *Elisco v. Rockwell Mfg. Co.*,¹⁶⁶ the plaintiff filed a charge with the Board alleging that the defendant was intending to move his plant in violation of an existing agreement. While this charge was pending, plaintiff brought suit in a Pennsylvania state court for an injunction *pendente lite*. It was apparent from the facts of the case that the defendant employer would have been able to move his shop before the Board could make its determination. The Supreme Court of Pennsylvania flatly stated that because the claim involved was arguably within the jurisdiction of the Board, the federal government had preempted the field and state jurisdiction did not lie.

Although admittedly the majority rule in state courts, this principle has been subject to effective erosion.¹⁶⁷ Prior to *Guss v. Utah*¹⁶⁸ and *San Diego Building Trades Council v. Garmon*,¹⁶⁹ the general rule that prevailed was that a state might exercise its powers to enjoin the breach of a collective bargaining agreement either through the traditional powers of its courts of equity or through administrative agencies created by statute.¹⁷⁰ Further, the defendant had the burden of proving the interstate character of the business involved.¹⁷¹

The question of federal jurisdiction in labor disputes arises only when the employer is engaged in interstate commerce or when his business substantially affects interstate commerce. The record in this case, as compiled in the court below, does not clearly disclose the extent or even the existence of interstate commerce engaged in or affected by the operation of Vulcan Iron Works.¹⁷²

After *Garmon* and *Guss*, the state courts experienced difficulty in swallowing the elephant.

[W]e are not unmindful of two recent United States Supreme Court decisions which could conceivably prohibit this court and the court below from exercising any jurisdiction in the instant proceedings. The impetus of these decisions is felt, however, only where the effect on interstate commerce is sufficient to confer jurisdiction on the National Labor Relations Board.¹⁷³

It was noted earlier in the discussion that practically any amount of interstate commerce is sufficient to confer jurisdiction on the Board. If the court's statement is literally true, then it would have little business to contend with in this area.

164 See *Brotherhood of Railroad Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30 (1957); *Syres v. Oil Workers' Int'l Union*, 223 F.2d 739 (5th Cir. 1955).

165 47 Stat. 70 (1932), 29 U.S.C. § 102 (1958).

166 387 Pa. 274, 128 A.2d 32 (1956).

167 Compare *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511 (1955).

168 353 U.S. 1 (1957).

169 359 U.S. 236 (1959).

170 See, e.g., *Masetta v. National Bronze & Aluminum Foundry Co.*, 62 Ohio L. Abs. 374, 107 N.E.2d 243 (1952), *rev'd on other grounds*, 159 Ohio St. 306, 112 N.E.2d 15 (1953); *Lion Oil Co. v. Marsh* 220 Ark. 678, 249 S.W.2d 569 (1952).

171 *Haefele v. Davis*, 373 Pa. 34, 95 A.2d 195 (1953).

172 *Id.* at 198.

173 *Northampton Area Joint School Authority v. Building & Construction Trades Council*, 396 Pa. 565, 152 A.2d 688, 691-92 (1959).

Other cases, though not expressly showing disfavor, have held that even in the face of a clear federal policy on handling industry that is involved in interstate commerce, the Board's jurisdiction must "be either readily ascertainable from the complaint itself or affirmatively proven by the defendant."¹⁷⁴ Another court has held that when no unfair labor practice is involved, a state court is not deprived of exercising its traditional powers of equity to compel specific performance of an employer's contractual duties.¹⁷⁵ Still another court has held that there is concurrent jurisdiction in federal and state courts over suits for the enforcement of a collective bargaining agreement.¹⁷⁶

In an excellent case arising in the State of Washington,¹⁷⁷ the state Supreme Court recognized the test set out in *Garmon* but held that the dispute was not arguably within Section 7 or 8 of the NLRA. It characterized the action as a simple one for breach of a bargaining agreement. Since Congress, under Section 301 of the LMRA, authorizes suit by and against a labor organization for breach of a collective agreement,¹⁷⁸ and since this case involves a breach of contract, the dispute isn't *solely* within Sections 7 and 8 of the NLRA. It is also within the confines of Section 301. Therefore, the state courts, reasoned the Washington court, are not preempted from applying common law in suits which involve the enforcement of rights under a union contract.

The collective bargaining agreement is the cornerstone of successful labor management relations. To hold that either party to such an agreement can disregard its express terms without incurring liability for the consequences would annihilate all progress in this area with a single stroke of the pen. Collective bargaining agreements would be unenforceable by either side, and would create rights without remedies to protect these rights.¹⁷⁸

These cases on the state level indicate another possibility when a union is faced with the threat of shop removal in violation of a collective agreement. The precedents seem strong enough to convince a courageous state court that a temporary injunction should issue when there has been a breach of contract using reasoning similar to the last case discussed.¹⁷⁹

F. Conclusion.

The forms of runaway shop are many and varied. The remedies available are, in some cases, grossly inadequate. The jurisdictional issues are complex. It is felt that the most pressing demand in this whole area is to examine the status of the collective bargaining agreement and to determine whether labor law is at that stage in its development where the courts and the Board can treat the agreement with the same level of sophistication that ordinary contract law requires. If this level can be maintained, then, at least for organized labor, most of its problems with regard to runaway shop in breach of a collective contract may be solved. When there has been a breach and attempted removal, the union could either go into state court or federal court and immediately get an injunction preventing the transfer after which the Board could make the proper determination of whether the employer has a valid reason for moving or not. This is a bold remedy but so is moving away. Once the plant owner has moved the damage has been done. To be sure, there are the remedies of reinstatement and back-pay

174 See, e.g., *Fountain Hill Underwear Mills v. Amalgamated Clothing Workers Union of America*, 393 Pa. 385, 143 A.2d 354, 359 (1958).

175 *Westinghouse Electric Corp. v. Unemployment Compensation Board of Review*, 187 Pa. Super. 391, 144 A.2d 673 (1958).

176 *Courtney v. Dowd Box Co.*, 169 N.E.2d 885 (Mass. 1960).

177 *Lucas Flour Co. v. Local 174, Teamsters, Chauffeurs & Helpers of America*, 356 P.2d 1 (Wash. 1960).

178 *Id.* at 6.

179 *Lucas Flour Co. v. Local 174, Teamsters, Chauffeurs & Helpers of America*, *supra* note 177.

plus travel expenses. However, seldom will a worker want to move 1,000 miles, sever all family ties, go into a new plant under strained conditions, and expect things to be as they were before the plant moved. On the other hand, it is not unreasonable to ask an owner of a business to restrain his desires until the Board makes a determination. There is no law that says an employer must remain where he is if he has good cause to leave.

As far as plant removal is concerned when there is no contract providing against such a move, the union is not without a remedy. However, the time necessary to get a proper adjudication might prevent an equitable and just remedy. Also, the advantage of a choice of forums is not present — the Board is the only solution unless it declines jurisdiction.

In conclusion, one might speculate as to the future problems in this area that have not, as yet, been raised. If the status of the collective agreement could be more clearly defined, an employer might be liable for an anticipatory breach for moving his shop before the termination of the contract. There might be a full faith and credit problem if a determination is made by a state court as to an employer's liabilities once he has moved away. Would the state court to which an employer has moved be willing to give full faith and credit to an order compelling reinstatement if this would deprive its citizens of work? Finally, one might contemplate the liability of a private industry or firm making an offer so attractive to another plant owner that, because of the offer, the plant owner moves in violation of an agreement not to do so. It is to be expected that judicial rule-making in this area will increase rapidly in the coming years.

— Robert G. Berry