SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 18 | Issue 4

1967

Removal of Cases--Power to Remove--Conflicting Jurisdiction of State and Federal Courts

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REMOVAL OF CASES—POWER TO REMOVE—CONFLICTING JURISDICTION OF STATE AND FEDERAL COURTS

Carter v. Hill & Hill Truck Line, Inc., 259 F. Supp. 429 (S.D. Tex. 1966).

Section 16(b) of the Fair Labor Standards Act[1] provides that an employee subject to the act[2] may maintain an action against his employer for the recovery of unpaid minimum wages or overtime compensation "in any court of competent jurisdiction."[3] Repeatedly this provision has been construed to give state and federal courts concurrent original jurisdiction of such actions.[4]

Whether such an action may be removed from a state court to a federal district court has been the subject of considerable controversy since the passage of the Fair Labor Standards Act.[5] The fed-

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[1] Fair Labor Standards Act § 16(b), 52 Stat. 1069 (1938), as amended, 29 U.S.C. § 216(b) (1964) [hereinafter cited as FLSA].

[2] FLSA § 3(b), 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 203(b) (1964). Employees of employers conducting commerce which is defined as trade "among the several States or between any State or from any State and any place outside thereof" are subject to the FLSA.

[3] FLSA § 16(b), 52 Stat. 1069 (1938), as amended, 29 U.S.C. § 216(b) (1964).

[4] *E.g.*, Johnson v. Butler Bros., 162 F.2d 87 (8th Cir. 1947). See also IA MOORE, FEDERAL PRACTICE ¶ 0.167[5], at 962 (2d ed. 1965), where Professor Moore points out that the cases have consistently held § 16(b) actions to have arisen under an act of Congress regulating interstate commerce, so that the federal district courts might properly exercise original jurisdiction even though the ten thousand dollar minimum amount in controversy required for ordinary "federal question" jurisdiction is not present. See 28 U.S.C. §§ 1331, 1337 (1964).

[5] Since 1938 forty-seven cases have passed on the issue of removability of a § 16(b) cause.

Cases prior to 1948 denying removal: Johnson v. Butler Bros., 162 F.2d 87 (8th Cir. 1947); Maloy v. Friedman, 80 F. Supp. 290 (N.D. Ohio 1948); McGuire v. North Am. Aviation, Inc., 69 F. Supp. 917 (W.D. Mo. 1946); Crouse v. North Am. Aviation, 68 F. Supp. 934 (W.D. Mo. 1946); Young v. Arbyrd Compress Co., 66 F. Supp. 241 (E.D. Mo. 1946); Smith v. Day & Zimmerman, Inc., 65 F. Supp. 209 (S.D. Iowa 1946); Tobin v. Hercules Powder Co., 63 F. Supp. 434 (D. Del. 1945); Sheridan v. Leitner, 59 F. Supp. 1011 (S.D.N.Y. 1944); Wright v. Long, 65 F. Supp. 279 (W.D. Mo. 1944); Steiner v. Pleasantville Constructors, Inc., 59 F. Supp. 1011 (S.D.N.Y. 1944); Brockway v. Long, 55 F. Supp. 79 (W.D. Mo. 1944); Apple v. Shulman, 65 F. Supp. 677 (D.N.J. 1943); Adams v. Long, 65 F. Supp. 310 (W.D. Mo. 1943); Brantley v. Augusta Ice & Coal, Co., 52 F. Supp. 158 (S.D. Ga. 1943); Garner v. Mengel Co., 50 F. Supp. 794 (W.D. Ky. 1943); Fredman v. Foley Bros., 50 F. Supp. 161 (W.D. Mo. 1943); Duval v. Protes, 51 F. Supp. 967 (E.D.N.Y. 1942); Booth v. Montgomery Ward & Co., 44 F. Supp. 451 (D. Neb. 1942); Phillips v. Pucci, 43 F. Supp. 253 (W.D. Mo. 1942); Kuligowski v. Hart, 43 F. Supp. 207 (N.D. Ohio 1941); Stewart v. Hickman, 36 F. Supp. 861 (W.D. Mo. 1941); Wingate v. General Auto Parts Co., 40 F. Supp. 364 (W.D. Mo. 1941); Bell Aircraft Corp. v. Anderson, 73 Ga. App. 633, 38 S.E.2d 66 (1946).

Cases prior to 1948 allowing removal: Aaker v. Kaiser Co., 74 F. Supp. 55 (D. Ore. 1947); Koskala v. Butler Bros., 65 F. Supp. 276 (D. Minn. 1946); Swettman v. Remington Rand, Inc., 65 F. Supp. 940 (S.D. Ill. 1946); Ellems v. Nick F. Helmers, Inc.,

eral court for the Southern District of Texas, in *Carter v. Hill & Hill Truck Line, Inc.*,[6] opposed the modern weight of authority[7] by disallowing removal and remanding a section 16(b) cause to the Texas state court in which it was initially brought. The *Carter* decision, along with *Wilkins v. Renault Southwest, Inc.*,[8] has at least rekindled conflict over an issue that Professor Moore had considered to be "apparently settled in favor of removal."[9] The propriety of the *Carter* decision's denial of removal cannot be fully assessed unless reference is made to the historical context of forty-six earlier cases ruling on the issue.[10]

Prior to the 1948 revision of the federal removal statute[11] as part of the revamping of the entire Judicial Code, a strong majority of cases held against removal.[12] There was, however, no unanimity of theory in the cases comprising this majority. A large percentage of cases[13] espousing the early majority view turned upon the construction of section 16(b) of the act. These cases construed "maintain," as used in section 16(b), to mean "to prosecute to final

65 F. Supp. 566 (E.D.N.Y. 1944); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Cox v. Gatliff Coal Co., 52 F. Supp. 482 (E.D. Ky. 1943); Harris v. Reno Oil Co., 48 F. Supp. 908 (N.D. Tex. 1943); Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (W.D.S.C. 1942); McGarrigle v. 11 West Forty-Second St. Corp., 48 F. Supp. 710 (S.D.N.Y. 1942); Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (D.N.J. 1940); Mengel Co. v. Ishee, 192 Miss. 366, 4 So. 2d 878 (1941).

Cases since 1948 denying removal: Carter v. Hill & Hill Truck Line, Inc., 259 F. Supp. 429 (S.D. Tex. 1966); Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647 (N.D. Tex. 1964); Zorilla v. Puerto Rican Cement Co., 227 F. Supp. 159 (D.P.R. 1964); Rolon v. Flexicore Co., 216 F. Supp. 954 (D.P.R. 1963); Dando v. Stonhard Co., 93 F. Supp. 270 (W.D. Mo. 1950).

Cases since 1948 allowing removal: Goettel v. Glen Barry Mfrs., Inc., 236 F. Supp. 884 (N.D. Okla. 1964); Niswander v. Paul Hardeman, Inc., 223 F. Supp. 74 (E.D. Ark. 1963); Carrero v. M. S. Kaplan Co., 161 F. Supp. 754 (D.P.R. 1958); Buckles v. Morristown Kayo Co., 132 F. Supp. 555 (E.D. Tenn. 1955); Rossi v. Singer Sewing Mach. Co., 127 F. Supp. 53 (D. Conn. 1954); Green v. Fluor Corp., 122 F. Supp. 224 (S.D.N.Y. 1954); Asher v. William L. Crow Constr. Co., 118 F. Supp. 495 (S.D.N.Y. 1953); Korrell v. Bymart, Inc., 101 F. Supp. 185 (E.D.N.Y. 1951).

[6] 259 F. Supp. 429 (S.D. Tex. 1966).

[7] Since 1948 eight cases have permitted removal, while five cases have disallowed it. Cases since 1948 allowing and denying removal are cited note 5 *supra*.

[8] 227 F. Supp. 647 (N.D. Tex. 1964).

[9] 1A MOORE, *op. cit. supra* note 4, at 962; see WRIGHT, FEDERAL COURTS § 38, at 113 (1963).

[10] Cases cited note 5 *supra*.

[11] 28 U.S.C. § 1441(a) (1964). Section 1441(a) is quoted in text accompanying note 29 *infra*.

[12] Prior to 1948 twenty-three cases denied removal, while eleven permitted it. Cases prior to 1948 permitting and denying removal are cited note 5 *supra*.

[13] Cases denying removal prior to 1948, cited note 5 *supra*, except those decided by the Federal District Court for the Western District of Missouri, and Kuligowski v. Hart, 43 F. Supp. 207 (N.D. Ohio 1941).

judgment."[14] To have allowed removal would have been to deny the plaintiff-employee his right to "maintain" suit in the state court in which the action was originally brought. The word "maintain" was given such meaning that it, in effect, amended the broad language of the removal statute,[15] making it inapplicable to section 16(b) cases.[16]

The courts developed several distinct arguments to justify equating "maintain" with "prosecute to judgment."[17] The first, the "surplusage" argument, proceeded from the premise that an employee, in the absence of congressional enactment, possessed the right to commence an action for the recovery of unpaid wages in a state court. If "maintain" were held to mean merely "to commence," then the statutory grant of the right "to maintain" would be superfluous. The preferable approach, it was reasoned, was to hold that the term "maintain" conferred a right to prosecute section 16(b) actions to judgment in the court in which action was commenced, thus eliminating any right to removal.[18]

The next rationale, the "harassment" argument, concerned the substantive policy of the Fair Labor Standards Act. The courts urg-

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[14] *E.g.*, Johnson v. Butler Bros., 162 F.2d 87 (8th Cir. 1947). The *Johnson* court held that Congress intended, by its use of the word "maintain," that a § 16(b) action "could be prosecuted to final judgment in the court in which it was commenced." *Id.* at 89.

[15] The applicable provision of the removal statute prior to the 1948 amendment read as follows: "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States . . . of which the district courts of the United States are given original jurisdiction . . . may be removed by the defendant . . . [from any state court] to the district court of the United States . . . ." Judiciary Revision Act ch 3, § 28, 36 Stat. 1094 (1911).

[16] Wright v. Long, 65 F. Supp. 279 (W.D. Mo. 1944); *cf.* Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (W.D.S.C. 1942); Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (D.N.J. 1940).

The *Wright* court held that § 16(b) was intended by Congress to be an exception to the general removal statute. Wright v. Long, *supra* at 279. *Sonnesyn* stressed that holding "maintain" to be an equivalent for "prosecute to judgment" would constitute an implicit amendment of the removal statute. Sonnesyn v. Federal Cartridge Co., *supra* at 35.

[17] The first two arguments against removal will be referred to as the "surplusage" argument and the "harassment" argument in text accompanying notes 18-20 *infra.*

[18] Smith v. Day & Zimmerman, Inc., 65 F. Supp. 209 (S.D. Iowa 1946); Young v. Arbyrd Compress Co., 66 F. Supp. 241 (E.D. Mo. 1946); Steiner v. Pleasantville Constructors, Inc., 59 F. Supp. 1011 (S.D.N.Y. 1944); Apple v. Shulman Publications, Inc., 65 F. Supp. 677 (D.N.J. 1943); Fredman v. Foley Bros., 50 F. Supp. 161 (W.D. Mo. 1943); Brantley v. Augusta Ice & Coal Co., 52 F. Supp. 158 (S.D. Ga. 1943).

The *Fredman* court considered it dubious that Congress "would expressly give a right which already existed." Fredman v. Foley Bros., *supra* at 163. *Fredman* further suggested that Congress would not have authorized the commencement of suit without providing for its future course. *Ibid.*

ing this argument viewed the congressional intent as seeking to assure subsistence-level and lower-class workers an adequate standard of living.[19] A material aspect of the statute was the section 16(b) provision for the expeditious recovery of unpaid wages. To have permitted removal would have afforded defendant-employers a means by which they could "harass" laborers into dropping potentially successful suits due to the threat of travel and unforeseen litigation expenses incident to removal, severely undercutting the value of the Fair Labor Standards Act.[20]

A small percentage of pre-1948 cases denying removal reasoned that section 16(b) claims, in the absence of diversity of citizenship, did not constitute "cases or controversies" arising under laws of the United States[21] because of the lack of a substantial federal question.[22] Under this view, federal removal jurisdiction failed because the federal courts could not have decided section 16(b) cases originally.[23]

The primary argument of those pre-1948 cases permitting re-

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[19] *E.g.*, Tobin v. Hercules Powder Co., 63 F. Supp. 434 (D. Del. 1945).

The Senate Education and Labor Committee report concerning the Fair Labor Standards Act, S. REP. NO. 884, 75th Cong., 1st Sess. 3-4 (1937), furnishes strong evidence that Congress intended to benefit the laboring class. "It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." *Ibid.* However, neither the Senate Report nor the pertinent House Report, H.R. REP. NO. 1452, 75th Cong., 1st Sess. (1937), referred specifically to the intended meaning of "maintain" in § 16(b).

[20] Smith v. Day & Zimmerman, Inc., 65 F. Supp. 209 (S.D. Iowa 1946); Tobin v. Hercules Powder Co., 63 F. Supp. 434 (D. Del. 1945); Fredman v. Foley Bros., 50 F. Supp. 161 (W.D. Mo. 1943); Booth v. Montgomery Ward & Co., 44 F. Supp. 451 (D. Neb. 1942); Wingate v. General Auto Parts Co., 40 F. Supp. 364 (W.D. Mo. 1940); Bell Aircraft Corp. v. Anderson, 73 Ga. App. 633, 38 S.E.2d 66 (1946).

The *Wingate* court asserted that, due to travel and litigation expenses, the Fair Labor Standards Act would be of "slight value to workingmen" if removal were allowed. Wingate v. General Auto Parts Co., *supra* at 365.

[21] See 28 U.S.C. § 1337 (1964).

[22] See cases cited note 13 *supra.*

In Stewart v. Hickman, 36 F. Supp. 861 (W.D. Mo. 1941), the court quoted from Western Union Tel. v. Ann Arbor R.R., 178 U.S. 239, 243-44 (1900), as follows: " 'When a suit does not really and substantially involve a *dispute or controversy* as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws.' " Stewart v. Hickman, *supra* at 864.

Based upon the *Ann Arbor* standard, the § 16(b) case before the *Stewart* court was held not to constitute a case or controversy because the outcome did not turn on the construction of the Fair Labor Standards Act.

Implicit in the *Stewart* argument is the well-founded concern of the federal judiciary for the over-crowding of trial dockets. A direct method for combatting this problem on the federal level is to eliminate cases that do not call for judicial interpretation. A related argument is raised in the *Carter* case. See text accompanying note 41 *infra.*

[23] See 28 U.S.C. § 1441(a) (1964).

moval also concerned the meaning of the word "maintain."[24] These decisions indicated that equating "maintain" with "prosecute to judgment" would be tantamount to an implicit amendment of the removal statute. After demonstrating that the meaning of "maintain" is uncertain, these cases concluded that it would be improper to hold the removal statute amended by implication.[25]

The court in *Aaker v. Kaiser Co.*[26] noted that Congress used affirmative language to bar removal of certain cases arising under the Federal Employer's Liability Act.[27] This decision permitted removal, reasoning that had Congress intended to block removal of section 16(b) actions, it would have so provided in a manner comparable to its express provision that no case arising under the Federal Employer's Liability Act "brought in any state court of competent jurisdiction shall be removed to any court of the United States."[28]

In 1948, however, the removal statute was amended to provide:

> *Except as otherwise expressly provided by Act of Congress,* any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United

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[24] Aaker v. Kaiser Co., 74 F. Supp. 55 (D. Ore. 1947); Swettman v. Remington Rand, Inc., 65 F. Supp. 940 (S.D. Ill. 1946); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (W.D.S.C. 1942); Ricciardi v. Lazzara Baking Co., 32 F. Supp. 956 (D.N.J. 1940); *cf.* Harris v. Reno Oil Co., 48 F. Supp. 908 (N.D. Tex. 1943).

[25] *E.g.*, Ricciardi v. Lazzara Baking Co., *supra* note 24, which held: "[S]o many different and conflicting constructions appear to have been given [to 'maintain'] . . . that its character for exactitude of meaning is badly damaged. It would be indeed dangerous to conclude that a word so weakened could be used to amend the removal act . . . ." *Id.* at 958.

[26] 74 F. Supp. 55 (D. Ore. 1947).

[27] Federal Employers' Liability Act § 1, 36 Stat. 291 (1910) [hereinafter cited as FELA].

[28] *Ibid.* The clause relating to removal was deleted by Congress in 1948. FELA § 1, 36 Stat. 291 (1910), as amended, 45 U.S.C. § 56 (1964).

Cox v. Gatliff Coal Co., 52 F. Supp. 482 (E.D. Ky. 1943), in addition to permitting removal on the ground that "maintain" had an uncertain meaning, met the "surplusage" argument squarely. For a discussion of the "surplusage" argument, see text accompanying note 18 *supra.* The *Cox* court asserted that § 16(b)'s authorization for the recovery by a plaintiff-employee of both minimum wages or overtime and an "additional equal amount as liquidated damages" might reasonably be construed to be authorization for the recovery of a penalty or forfeiture under the laws of the United States. Ordinarily, suits for the recovery of such a penalty or forfeiture have been maintainable only in the federal courts. 28 U.S.C. § 1355 (1964).

The court in *Cox* understood the purpose of Congress to be to "dissipate any doubt as to the right and duty of state courts to entertain jurisdiction" of § 16(b) cases even though "the extra recovery should be judicially determined to be in the nature of a penalty or forfeiture." Cox v. Gatliff, *supra* at 484.

> States for the district and division embracing the place where such action is pending.[29]

Thereafter, the majority of courts began to permit removal of section 16(b) cases.[30] In contrast to the pre-1948 majority, the later decisions were similar in rationale; all permitted removal on the ground that "maintain" standing alone was not sufficiently "express" to meet the dictates of the revised statute,[31] and as a supplementary argument, several cases[32] recalled the reasoning of *Aaker v. Kaiser Co.*[33]

Until the *Wilkins v. Renault Southwest, Inc.*[34] case in 1964, the handful of cases disallowing removal disregarded the change in the removal statute.[35] Typically, the bases for these decisions was the assertion that "maintain" is equivalent to "prosecute to judgment," in addition to citing pre-1948 cases barring removal as authority.[36]

Wilkins was the first post-1948 case refusing removal which attempted to grapple with the change in language of section 1441(a). *Wilkins* disallowed removal on four grounds:[37] (1) a 1958 Senate Judiciary Committee Report which stated that section 16(b) cases were not removable;[38] (2) the word "maintain" was an express provision as required by the amended removal statute; (3) Congress intended to contract, not expand the scope of removal by its 1948 amendments; and (4) to allow removal would defeat the substantive policy of the Fair Labor Standards Act.[39]

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[29] 28 U.S.C. § 1441(a) (1964). (Emphasis added.)

[30] Since the 1948 amendments eight cases have permitted removal of § 16(b) actions, while five, including *Carter*, have denied removal. Cases since 1948 permitting and denying removal are cited note 5 *supra*.

[31] Cases since 1948 permitting removal cited note 5 *supra*.

[32] Niswander v. Paul Hardeman, Inc., 223 F. Supp. 74 (E.D. Ark. 1963); Asher v. William L. Crow Constr. Co., 118 F. Supp. 495 (S.D.N.Y. 1953).

Niswander cited the "express" provisions in 28 U.S.C. § 1445 (1964), while the *Asher* court noted the "express" provisions against removal in the Securities Act of 1933, § 22, 48 Stat. 86, as amended, 15 U.S.C. § 77(v) (1964).

[33] 74 F. Supp. 55 (D. Ore. 1947). For a discussion of the *Aaker* argument, see text accompanying notes 26-28 *supra*.

[34] 227 F. Supp. 647 (N.D. Tex. 1964).

[35] Cases since 1948 denying removal cited note 5 *supra*, except Carter v. Hill & Hill Truck Line, Inc., 259 F. Supp. 429 (S.D. Tex. 1966) and Wilkins v. Renault Southwest, Inc., *supra* note 34.

[36] *E.g.*, Rolon v. Flexicore Co., 216 F. Supp. 954 (D.P.R. 1963).

[37] 227 F. Supp. at 648.

[38] S. REP. NO. 1830, 85th Cong., 2d Sess. 9 (1958). "In . . . the Fair Labor Standards Act . . . the Congress has given the workingman the option of filing his case in either the State court or the Federal court. If filed in the State court the law prohibits removal to the Federal court." *Ibid.*

[39] 227 F. Supp. at 648.

Essentially, *Carter v. Hill & Hill Truck Line, Inc.*[40] has adopted the reasoning of the *Wilkins* decision, adding little to the latter's argument supporting the denial of removal. The *Carter* court did, however, stress that its result would ease the problems created by an overcrowded federal docket.[41] In addition, the court quoted, in the appendix to its opinion, a recent statement by the American Law Institute favoring the denial of removal.[42]

The merits of the second and third arguments asserted by *Wilkins* supporting the refusal of removal are questionable. First, the contention that the meaning of "maintain" is sufficiently certain so as to constitute an express provision against removal is categorical and unexplained.[43] The split in authority prior to and following 1948 attest to the uncertain meaning of "maintain."[44] Furthermore, neither *Wilkins* nor *Carter* resolve the difference between the unequivocally express provision against removal in acts such as the pre-1948 Federal Employer's Liability Act[45] and the more implicit provision in section 16(b).[46]

The argument that Congress intended to contract removal jurisdiction by its 1948 changes in the Judicial Code is not effectively supported. The case cited as authority, *American Fire & Cas. Co. v. Finn*,[47] did hold that the change in section 1441(c) of Title 28 was intended to diminish removal jurisdiction, but *Finn* is silent upon the intended effect of the change in section 1441(a), the only provision pertinent to the issue presented by *Carter*.[48]

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[40] 259 F. Supp. 429 (S.D. Tex. 1966).

[41] *Id.* at 430.

[42] ALI JURISDICTION STUDY § 1312(d), comment at 79-80 (Tent. Draft No. 4, 1966). The American Law Institute draft condemned the allowing of removal on the ground that employers misuse it as a device for delay and harassment. *Ibid.*

[43] 227 F. Supp. at 648. The *Wilkins* court stated only that "maintain" is "an *express provision* against removal within the meaning of . . . the removal statute." *Ibid.*

[44] See cases cited note 5 *supra.*

[45] FELA § 1, 36 Stat. 291 (1910). For examples of other statutes containing "unequivocally express" provisions against removal, see statutes cited note 32 *supra.*

[46] FLSA § 16(b), 52 Stat. 1069 (1938), as amended, 29 U.S.C. § 216(b) (1964). For a discussion of the implicit "bar" to removal in § 16(b), see text accompanying notes 30-34 *supra.*

[47] 341 U.S. 6 (1951).

[48] *Id.* at 9-10. The *Finn* case was concerned with the construction of 28 U.S.C. § 1441(c) (1964), which bears upon the removability of "separate" and "independent questions." See generally WRIGHT, *op. cit. supra* note 4, § 39.

The *Finn* court cited the House Judiciary Committee Report dealing with the 1948 amendments to the Judicial Code, which stated that the change in § 1441(c) would reduce the number of removable cases. The report *did not* state that the change in the general removal provision, § 1441(a), was intended to reduce the number of removable cases. H.R. REP. NO. 3214, 80th Cong., 1st Sess. A134 (1947).

The fairest conclusion is that *Wilkins* and *Carter* have been unable to demonstrate either that an undeniably express provision against removal is contained within section 16(b), as required by the 1948 amendment, or that the 1948 change in section 1441(a) was intended to decrease removability, so that "express" could be given an expansive construction.

The strength of the *Carter-Wilkins* rationale lies in its amplification of the "harassment" argument:[49]

> [S]mall [section 16(b)] cases should not be removable for a very practical reason: removal was an obvious tactic by which the defendant could delay, increase the costs of litigation and harass the plaintiff: Where the employee commences such a suit in a state court far removed from the nearest federal court the cost of travel and subsistence of the claimant, his witnesses and attorneys, would amount to a denial of the very cause of action conferred by Congress in § 216(b).[50]

Because the dollar amounts in suit under section 16(b) have typically been small,[51] there is compelling merit to the argument that the statutory right is jeopardized by the travel and litigation expense resulting from removal. The significance of the *Wilkins* court's failure to interrelate the "maintain" provision of the Fair Labor Standards Act and the removal statute is diminished upon consideration of the policy of section 16(b). By adhering to the abstract and formalistic niceties of statutory construction, the contemporary majority of courts neglect, if not totally disregard, the substance of an act intended to benefit the laboring class. The justice of the *Carter* result makes it the preferable view.[52]

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[49] For a discussion of the "harassment" argument, see text accompanying notes 19-20 *supra.*

[50] Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647, 648 (N.D. Tex. 1964).

[51] *E.g.*, Carter v. Hill & Hill Truck Line, Inc., 259 F. Supp. 429 (S.D. Tex. 1966) ($4,810.26); Buckles v. Morristown Kayo Co., 132 F. Supp. 555 (E.D. Tenn. 1955) (less than $3,000); Wright v. Long, 65 F. Supp. 279 (W.D. Mo. 1944) (less than $3,000); McGarrigle v. 11 West Forty-Second St. Corp., 48 F. Supp. 710 (S.D.N.Y. 1942) ($1,700).

[52] An argument based upon the rules of statutory construction that might have been utilized by the *Carter* court is the "surplusage" argument. Although this argument does not meet the contemporary majority's argument squarely, it firmly supports the *Carter* result. For a discussion of the strengths and infirmities of the "surplusage" argument, see note 28 and text accompanying note 18 *supra.*

It should be pointed out that several post-1948 cases which upheld removal suggested that a more equitable result could be attained by remanding § 16(b) actions to state courts. These cases held, however, that the broad language of the removal statute compelled the respective courts to retain jurisdiction of the removed cases. Niswander v. Paul Hardeman, Inc., 223 F. Supp. 74 (E.D. Ark. 1963); Asher v. William L. Crow Constr. Co., 118 F. Supp. 495 (S.D.N.Y. 1953); Korell v. Bymart, Inc., 101 F. Supp. 185 (E.D.N.Y. 1951).