ment as to the validity of its lease with the defendant city prior to its making extensive improvements then contemplated. Similarly declaratory relief has been granted to determine the construction to be placed on a long term lease,[24] to ascertain the rights of a party under a contract which had been cancelled as between other parties to it,[25] to establish the validity of a contract of sale,[26] and to determine in a suit by the insured whether an insurance policy was still in effect.[27] A like remedy should be available in the instant case, where a party is bound by obligations imposed by an equitable decree rather than by a contract, deed, or will.

Certain objections may conceivably be made to the practice suggested. To a charge that unfair competition would be encouraged, the reply is that the Federal Declaratory Judgment Act authorizes the application of a new remedy but in no way alters the substantive law.[28] Nor would a suit for a declaration of rights unduly burden the defending party with litigation. The broad powers of the federal courts to impose costs will serve to obviate this objection.[29] Furthermore, the granting of declaratory relief rests upon the sound discretion of the court.[30] There seems, therefore, to be no valid objection to the use of a declaratory judgment as a device for interpreting equitable decrees,[31] at least when such action is brought in the court which issued such decree.

Labor Law—Jurisdiction of National Labor Relations Board—Scope of Interstate Commerce—[Federal].—The respondent, prior to the establishment of his present business, was employed as general supervisor of the L company, a partnership composed of his sons. Subsequent to a labor dispute in the partnership plant, he left his employment and moved to another state to establish his present business, the necessary capital having been advanced to him as a loan by the L company. The respondent operated under a standard agreement whereby he performed finishing operations exclusively for the L company, which in return supplied raw materials to no other finisher. As soon as the processing was completed, the finished goods were turned over to a representative of the L company, who assumed responsibility for their out-of-state shipment. The National Labor Relations Board found that the respondent was engaged in unfair labor practices,[1] and on petition to the circuit court of appeals to enforce the Board's cease and desist order, *held* (one judge dissenting), that the Board

[24] Washinton-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N.W. 618 (1930). See also Sarner v. Kantor, 123 Misc. 469, 205 N.Y. Supp. 760 (1924).

[25] Gotham Amusement Corp. v. Glover, 1 N.Y.S. (2d) 712 (1937).

[26] Petroleum Exploration, Inc. v. Superior Oil Corp., 232 Ky. 625, 24 S.W. (2d) 259 (1930).

[27] Stephenson v. Equitable Life Assurance Soc., 92 F. (2d) 406 (C.C.A. 4th 1937). See Anderson v. Aetna Life Ins. Co., 89 F. (2d) 345 (C.C.A. 4th 1937).

[28] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937); Davis v. American Foundry Equipment Co., 94 F. (2d) 441, 442 (C.C.A. 7th 1938).

[29] Federal Rules of Civil Procedure, rule 54(d).

[30] Aetna Casualty and Surety Co. v. Quarles, 92 F. (2d) 321 (C.C.A. 4th 1937); New York Life Ins. Co. v. Roe, 22 F. Supp. 1000 (Ark. 1938).

[31] See Beach v. Beach, 57 Ohio App. 274, 13 N.E. (2d) 581 (1937).

[1] 1 N. L. R. B. 864 (1936); 4 N. L. R. B. 596 (1937).

lacked jurisdiction because the respondent was not engaged in interstate commerce. *National Labor Relations Board v. Fainblatt.*[2]

Labor decisions under the National Labor Relations Act, the constitutional operation of which is based on the commerce clause, manifest an extension of federal power to regulate transactions "in" interstate commerce.[3] The courts have discarded the long-established notion that production for subsequent out-of-state shipment was not within the power of federal supervision because not within the "flow" of interstate commerce.[4] In upholding the constitutionality of the Wagner Act in *National Labor Relations Board v. Jones and Laughlin Steel Corp.* the United States Supreme Court ruled that since even purely intrastate activities such as manufacturing may have such a substantial relation to interstate commerce that their control is essential to protect such commerce from burdens and obstructions, and since the effect upon commerce, not the source of the injury, is the true criterion, jurisdiction should attach whether the relation of the employer to interstate commerce be "primary or secondary."[5] Accordingly, the jurisdiction of the National Labor Relations Board has been held to have attached in labor disputes arising out of the more obvious interstate activities such as the transportation of goods or passengers[6] or the collection and redistribution of news.[7] Moreover, the doctrine of the *Jones and Laughlin* case was applied in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board* to uphold the jurisdiction of the Board where the goods were made from local raw materials, and only thirty-seven per cent of the output was shipped out of state;[8] and also in a case where the greater part of an employer's interstate operations involved receipt of goods rather than their distribution.[9] Likewise, the sale of goods f. o. b. the place of production,[10] and sales involving the passage of title prior to delivery[11] have been ruled to have no effect upon the status of the company's operations in so far as interstate commerce is concerned. Finally, in the recent *Consolidated Edison Company* case the United States Supreme Court upheld the jurisdiction of the Board even though the utility company supplied a purely local market, on the ground that interruption of the supply of electric power because of a

[2] 98 F. (2d) 615 (C.C.A. 3d 1938), petition for *certiorari* filed before the United States Supreme Court, Dec. 8, 1938.

[3] See 47 Yale L.J. 1221 (1938).

[4] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[5] 301 U.S. 1, 32, 37 (1937). See also N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49 (1937); Jeffrey-De Witt Insulator Co. v. N.L.R.B., 91 F. (2d) 134 (C.C.A. 4th 1937); N.L.R.B. v. Eagle Mfg. Co., 99 F. (2d) 930 (C.C.A. 4th 1938).

[6] Washington, Virginia and Maryland Coach Co. v. N.L.R.B., 301 U.S. 142 (1937). See also Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937).

[7] Associated Press v. N.L.R.B., 301 U.S. 103 (1937).

[8] 303 U.S. 453 (1938).

[9] N.L.R.B. v. A. S. Abell Co., 97 F. (2d) 951 (C.C.A. 4th 1938); Clover Fork Coal Co. v. N.L.R.B., 97 F. (2d) 331 (C.C.A. 6th 1938).

[10] Mooreville Cotton Mills v. N.L.R.B., 94 F. (2d) 61 (C.C.A. 4th 1938).

[11] Botany Worsted Mills, 4 N.L.R.B., 292 (1937).

labor dispute in the plants would vitally affect enterprises engaged in interstate commerce.[12]

In reaching its conclusion the court in the instant case stressed employer participation in interstate commerce in the transportational sense instead of the effect upon commerce as determining jurisdiction.[13] This approach glosses over the criterion established by the United States Supreme Court[14] and ignores the Board's findings that the labor dispute had greatly diminished the amount of goods shipped in interstate commerce.[15] Neither precedent nor policy permit the conclusion that a scheme of manufacture involving a separation of the manufacturing unit from the supply, transportational and marketing units, and retention of title by the party supplying the raw materials and selling the finished goods, should place an employer beyond the pale of the Wagner Act.[16] It is submitted that only a court unfriendly to the objectives of the act, would reach the result of the instant case.[17]

As for the proper procedure necessary to raise the interstate commerce issue, it is well settled that the initial determination lies with the Board. Thus in *Myers v. Bethlehem Shipbuilding Corp.*,[18] the United States Supreme Court held that the Board cannot be enjoined[19] from conducting hearings concerning charges of unfair labor practices on the ground that the employer is not engaged in interstate commerce. The employer must first exhaust the administrative remedies under the act. Only after the issuance of a final order may the employer obtain a judicial review of all questions touching the jurisdiction of the Board and the regularity of its proceedings, provided that proper steps were taken during the hearings to preserve such questions for review.[20]

[12] Consolidated Edison Co. of New York v. N.L.R.B., 95 F. (2d) 390 (C.C.A. 2d 1938) aff'd on the jurisdictional question and rev'd on other grounds in 59 S. Ct. 206 (1938). See also Stafford v. Wallace, 258 U.S. 495 (1922).

[13] Compare statements of the issue in majority and dissenting opinions of instant case, p 615, 619.

[14] See notes 5, 8, 12 *supra*.

[15] The plant's output during the month *before* the strike amounted to 80 per cent of the level reached the same month of the previous year, while the output during the month *after* the strike was only 38 per cent of what it was the year before. See 1 N.L.R.B. 864, 876 (1936).

[16] See dissenting opinion of Judge Biggs in instant case, p. 619.

[17] The hostility of the court of appeals for the third circuit to the Wagner Act is evidenced by its decisions in N.L.R.B. v. Pennsylvania Greyhound Lines, 91 F. (2d) 178 (C.C.A. 3d 1937), rev'd in 303 U.S. 261 (1938); N.L.R.B. v. Pacific Greyhound Lines, 91 F. (2d) 458 (C.C.A. 9th 1937), rev'd in 303 U.S. 272 (1938); *In re* N.L.R.B., 304 U.S. 486 (1938) (writ of prohibition issued to prohibit the judges of the circuit court of appeals for the third circuit from exercising jurisdiction on the petition of the Republic Steel Corporation to set aside an order of the Board without affording the Board a reasonable opportunity to vacate the order). See also Anderson, Who's Court-Packing Now?, 147 Nation 583 (Dec. 3, 1938).

[18] 303 U.S. 41 (1938). *Accord:* Newport News Shipbuilding and Dry Dock Co. v. Schauffler, 303 U.S. 54 (1938). See also Anniston Manufacturing Co. v. Davis, 301 U.S. 337 (1937). See also note in 51 Harv. L. Rev. 1251 (1938).

[19] Nor will a declaratory judgment be granted. Bradley Lumber Co. of Arkansas v. N.L.R.B., 84 F. (2d) 97 (C.C.A. 5th 1936), *cert. denied*, 299 U.S. 559 (1936).

[20] N.L.R.B. v. Anwelt Shoe Mfg. Co., 93 F. (2d) 367 (C.C.A. 1st 1937); United Employees Ass'n v. N.L.R.B., 96 F. (2d) 875 (C.C.A. 3d 1938).

Under the act[21] the court may, at the instance of the employer or the Board, remand the case to have further evidence submitted before the Board;[22] otherwise the Board's findings of fact on the commerce issue should be conclusive upon the court if supported by substantial evidence.[23] Conceivably, however, the commerce issue may be considered as calling for the determination of a "jurisdictional fact," requiring under the doctrine of *Crowell v. Benson*[24] independent judicial review. Without passing upon the question Justice Roberts seemed to suggest in the *Washington Coach* case a possible limitation upon the doctrine.[25] Furthermore, a recent decision in the circuit court of appeals for the ninth circuit held that with regard to the question of employment—one of the "jurisdictional facts" mentioned in the *Benson* case—a finding by the Board that individuals were employees at the time of its order, if supported by evidence, was conclusive upon the court.[26] And finally, in view of the recent trend toward upholding the finality of administrative findings if supported by substantial evidence[27] and against increasing the number of "jurisdictional facts,"[28] it is doubtful that the doctrine will be extended to the labor cases.

[21] 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (e) (Supp. 1938).

[22] Ford Motor Co. v. N.L.R.B., 59 S. Ct. 301 (1939); *In re* N.L.R.B., 304 U.S. 486 (1938); North Whittier Heights Citrus Ass'n v. N.L.R.B., 97 F. (2d) 1010 (C.C.A. 9th 1938), petition for *certiorari* filed before the United States Supreme Court, Sept. 12, 1938.

[23] 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (e) (Supp. 1938). Agwilines, Inc. v. N.L.R.B., 87 F. (2d) 146 (C.C.A. 5th 1936); Washington, Virginia and Maryland Coach Co. v. N.L.R.B., 301 U.S. 142, 147 (1937); N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937); N.L.R.B. v. Nat'l New York Packing and Shipping Co., 86 F. (2d) 98 (C.C.A. 2d 1936); Black Diamond S.S. Corp. v. N.L.R.B., 94 F. (2d) 875 (C.C.A. 2d 1938); N.L.R.B. v. Wallace Mfg. Co., 95 F. (2d) 818 (C.C.A. 4th 1938); N.L.R.B., v. Oregon Worsted Co., 96 F. (2d) 193 (C.C.A. 9th 1938). For similar holdings involving the Federal Trade Commission see Federal Trade Comm'n v. Standard Education Society, 302 U.S. 112, 117 (1937); and the Board of Tax Appeals in Marshall v. Comm'r of Internal Revenue, 57 F. (2d) 633 (C.C.A. 6th 1932); Atlas Plaster and Fuel Co. v. Comm'r of Internal Revenue, 55 F. (2d) 802 (C.C.A. 6th 1932). For cases in which the court held that evidence was not substantial enough to render Board's findings conclusive see Appalachian Electric Power Co. v. N.L.R.B., 93 F. (2d) 985 (C.C.A. 4th 1938); N.L.R.B. v. Thompson Products, 97 F. (2d) 13 (C.C.A. 6th 1938); N.L.R.B. v. Union Pacific Stages, 99 F. (2d) 153 (C.C.A. 9th 1938).

[24] 285 U.S. 22 (1932); see also St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936). See also Nathanson, The Wagner Act Decisions Studied in Retrospect, 32 Ill. L. Rev. 196, 201 (1937).

[25] See Washington, Virginia and Maryland Coach Co. v. N.L.R.B., 301 U.S. 142, 147 (1937) (Justice Roberts dissented in Crowell v. Benson).

[26] See N.L.R.B. v. Carlisle Lumber Co., 99 F. (2d) 533, 537, 538 (C.C.A. 9th 1938), petition for *certiorari* filed before the United States Supreme Court, Dec. 5, 1938.

[27] See note 23 *supra*.

[28] See Voehl v. Indemnity Insurance Co., 288 U.S. 162, 166 (1933); Employers Liability Assurance Corp. v. Hoage, 91 F. (2d) 318, 319 (App. D.C. 1937) (ruling that the scope of employment issue is non-jurisdictional); National Casualty Co. v. Hoage, 73 F. (2d) 850 (App. D.C. 1934); McNeelly v. Sheppeard, 89 F. (2d) 956 (C.C.A. 5th 1937) (causation of injury issue held non-jurisdictional). See also Swayne and Hoyt, Ltd. v. United States, 300 U.S. 297, 303, 304 (1937). See also Black, The "Jurisdictional Fact" Theory and Administrative Finality, 22 Corn. L. Q. 349, 363 (1937); notes in 25 Calif. L. Rev. 315, 325 (1937) and 24 Va. L. Rev. 653 (1938).