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George B. Yankwitt

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INJUNCTIVE RELIEF AGAINST A UNION'S VIOLATION OF A NO-STRIKE CLAUSE

One of the clauses most frequently found in collective bargaining agreements is a "no-strike" clause, whereby the union agrees to refrain from using work stoppages as a method of economic coercion.¹ The recent trend toward the use of such clauses has made it increasingly important to delineate the legal consequences of the union's breach of its promise not to strike. Among the possible consequences are: (1) justifiably imposed discipline or discharge of the employees participating in the breach, and cessation of the employer's obligations under the collective bargaining agreement; (2) an award of money damages either by an arbitrator or by a court before which suit is brought under Section 301 of the Taft-Hartley Act; and (3) an award of injunctive relief by either a court or arbitrator. Since the last possibility is most controversial, this Comment, after briefly discussing the problems raised by the first two possibilities, will focus upon the issue raised by the third—whether the courts or an independent arbitrator may award injunctive relief against the union's violation of a no-strike clause.

DISCHARGE, DISCIPLINE, AND MONEY DAMAGES

The union's agreement not to strike creates a condition of employment for the employees affected.² The Supreme Court has held that the activity of an individual violating such an agreement is not protected by the National Labor Relations Act,³ except where the strike was stimulated by an unfair labor practice of the employer.⁴ Once strikers are found to be unprotected by the provisions of the act, they may be discharged,⁵ and the employer may refuse to reemploy them upon termination of the strike.⁶ Discipline such as this is not an unfair labor practice.⁷

Under certain circumstances, a strike in violation of the collective bargaining agreement could also constitute an unfair labor practice under the Taft-Hartley Act, thereby giving rise to an unfair labor practice complaint.⁸ The National

¹ One survey indicated that such clauses were found in approximately 94% of the collective bargaining agreements in 1965. BNA Lab. Rel. Expediter 94 (1965).

² An employee's breach of the agreement would justify the imposition of discipline or even his discharge. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 246 (1962). In a suit based on the breach of a no-strike clause, the Supreme Court stated that the promise not to strike "at the very least establishes a rule of conduct . . ." *Ibid.*

³ *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939); see *International Union, UMW v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958) (dictum).

⁴ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

⁵ See *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944); cf. *NLRB v. Rockaway News Co.*, 345 U.S. 71, 80 (1953).

⁶ See *United Biscuit Co. v. NLRB*, 128 F.2d 771 (7th Cir. 1942). The breach of the no-strike clause may relieve the employer of his obligation to bargain with the union on behalf of those violating the agreement. *Ibid.* For example, a walkout without due notice to the union or to the employer, in breach of a no-strike clause, has been found to be a material breach of the contract which justified a subsequent "recission" of the collective bargaining agreement by the employer. *United Electrical Workers v. NLRB*, 223 F.2d 338, 341 (D.C. Cir. 1955), cert. denied, 350 U.S. 981 (1956).

⁷ *NLRB v. Rockaway News Co.*, supra note 5; *NLRB v. Sands Mfg. Co.*, supra note 3.

⁸ Cf. *Gilmour v. Local 74, Wood Lathers Union*, 223 F. Supp. 236, 241-42 (N.D. Ill.

Labor Relations Board's jurisdiction is not divested simply because the conduct constituting the unfair labor practice also violated the collective agreement.⁹ On the other hand, jurisdiction of the courts in a suit under section 301 is not displaced simply because the conduct complained of would also constitute an unfair practice,¹⁰ and the same conduct can result in both an unfair labor practice complaint and an action for breach of contract.¹¹

Money damages, of course, is a likely remedy in a breach of contract action in either state or federal courts.¹² It is also generally accepted that an arbitrator has the power to award damages for the breach of a promise not to strike.¹³

In fact, the Supreme Court has to a significant extent shown a preference for the forum of arbitration for the adjudication of claims for damages flowing from the breach of a no-strike clause.¹⁴ Such an attitude has led to use of the defense of arbitrability in damage suits brought by the employer. Hence, where a broad arbitration clause exists, the union may request that the employer's suit for violation of a no-strike clause either be stayed or dismissed on the theory that the damage claim is arbitrable under the collective bargaining agreement.¹⁵

1963). However, an unfair labor practice cannot be made out simply by showing a breach of the contract. *Association of Westinghouse Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 443 (1955); *A. I. Gage Plumbing Co. v. Local 300, International Hod Carriers Union*, 202 Cal. App. 2d 197, 20 Cal. Rptr. 860 (1962). "A strike in violation of the contract is not per se an unfair labor practice . . ." *Drake Bakeries, Inc. v. Local 50, Bakery Workers*, 370 U.S. 254, 265 (1962); see *Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467, 473 (5th Cir.), cert. denied, 358 U.S. 880 (1958). The Senate version of section 301 made the breach of a collective agreement a violation of the NLRA. But in the conference committee, this provision of the Senate Bill was discarded. See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 207 (1962).

⁹ *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

¹⁰ *Smith v. Evening News Ass'n*, supra note 9, at 197; see *United Steelworkers v. New Park Mining Co.*, 273 F.2d 352, 358 (10th Cir. 1959).

¹¹ *Gilmour v. Local 74, Wood Lathers Union*, supra note 8. Further, in light of *Old Dutch Farms, Inc. v. Milk Drivers Union*, 359 F.2d 598 (2d Cir. 1966), the employer, where there is an 8(b)(4) violation, may be able to collect money damages under section 303, even if there is an arbitration clause.

¹² See Spelfogel, "Enforcement of No-Strike Clause by Injunction, Damage Actions and Discipline," 7 B.C. Ind. & Com. L. Rev. 239, 240 (1966); Note, 39 Ind. L.J. 387 (1964).

¹³ Cf. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 988-89 (2d Cir. 1942); *Hiller v. Liquor Salesmen's Union*, 226 F. Supp. 161 (S.D.N.Y. 1964); *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929). For example, in staying proceedings against a union and two employers pending arbitration, a district court recognized that the question of the amount of damages involved was for the arbitrator. *Hiller v. Liquor Salesmen's Union*, supra at 165. While the agreement providing for arbitration did not expressly provide for the awarding of damages, the court grounded the arbitrator's authority in the general arbitration clause. "In the absence of clear language . . . to the contrary [the arbitration provisions] must be construed to authorize the award of damages . . ." *Id.* at 166.

¹⁴ See Schubert, "Arbitration and Damage Claims for Violation of the No-Strike Clause," 16 Lab. L.J. 751, 755 (1965).

¹⁵ *Ibid.* See Spelfogel, supra note 12, at 254-55. *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, 370 U.S. 254 (1962), involved a suit by an employer against the union for damages flowing from the union's alleged violation of a no-strike clause. The limited question before the Supreme Court was the correctness of the district court's holding that the employer's claim was an arbitrable subject under the collective bargaining agreement and, therefore, the propriety of staying the action pending arbitration. *Id.* at 255. The Court found that the alleged breach of the no-strike clause, and the damages flowing therefrom were arbitrable under the contract. The company argued that the no-strike clause was so fundamental to the contract that the breach thereof must be deemed to estop the union from demanding arbitration. But the Court held that the arbitration provisions of a collective bargaining agreement "are meant to survive breaches of contract . . ." *Id.* at 262. The Court was not denying the possible right to damages but was simply "remit[ting]

A court or arbitrator's award of money damages and disciplinary action by the employer, however, may be little recompense to the employer whose enterprise is being destroyed by breach of the no-strike clause. Hence, injunctive relief is often sought in both court litigation and arbitration proceedings.

SUIT FOR SPECIFIC PERFORMANCE OF A PROMISE NOT TO STRIKE

A. *Suit in the Federal Courts*

In the landmark decision of *Textile Workers Union v. Lincoln Mills*,¹⁶ the Supreme Court held that Section 301(a) of the Taft-Hartley Act, in addition to affording the federal courts jurisdiction over breach-of-contract actions involving labor organizations in industries affecting commerce, authorized the federal tribunals "to fashion a body of federal law for the enforcement of . . . collective bargaining agreements . . ." ¹⁷ Though the federal substantive law to be formed included the availability of a directive for specific performance of a promise to arbitrate,¹⁸ the question of whether the federal courts could enjoin a strike in violation of a no-strike clause remained unanswered.

Subsequent to *Lincoln Mills*, the Second and Seventh Circuits held that such a strike fell within the phrase "labor dispute"¹⁹ in Section 4(a) of the Norris-LaGuardia Act,²⁰ which provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment

the company to the forum it agreed to use for processing its strike damage claims." *Id.* at 266. The Court further limited its holding:

We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union.

Id. at 265. See *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), where the Supreme Court affirmed the district court's refusal to dismiss an action for damages under section 301. The Supreme Court rejected the contention that the company was obligated to arbitrate and, therefore, that the action should have been dismissed or stayed pending arbitration. Here, the collective bargaining agreement provided only for arbitration of "employee grievances" when the arbitration machinery was invoked by the union. Since the company could neither submit grievances nor invoke arbitration on its own option, the contract could not possibly be construed to bind the company to arbitrate a claim for damages flowing from a violation of the no-strike clause. *Id.* at 241.

¹⁶ 353 U.S. 448 (1957).

¹⁷ *Id.* at 451, construing 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964), which provides: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

¹⁸ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

¹⁹ *Atkinson v. Sinclair Refining Co.*, 290 F.2d 312 (7th Cir. 1961), *aff'd*, 370 U.S. 195 (1962); *A. H. Bull S.S. Co. v. Seafarers' Union*, 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958). See also *Third Ave. Transit Corp. v. Quill*, 192 F.2d 971 (2d Cir. 1951) (Norris-LaGuardia Act applicable to a labor dispute although the action amounted to a violation of the collective agreement).

²⁰ 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964).

Thus both courts concluded that an injunction would be unavailable to the complaining party. However, the Tenth Circuit reached the opposite conclusion in *Local 795, Teamsters Union v. Yellow Transit Freight Lines*,²¹ and subsequently, the Supreme Court was squarely presented, in *Sinclair Ref. Co. v. Atkinson*,²² with the question of whether Section 301 of the Taft-Hartley Act in effect repealed Section 4(a) of the Norris-LaGuardia Act. *Sinclair Refining* held that specific performance of the promise not to strike, *i.e.*, an injunction against the strike which violates the no-strike clause, was not available in the federal courts.²³

The Court found, as had the Second and Seventh Circuits, that such strikes arose from "labor disputes" as defined in Norris-LaGuardia and that the injunction prayed for was therefore proscribed by section 4(a). Rejecting the argument that the Court had the power to judicially "accommodate" the Norris-LaGuardia Act with Section 301 of Taft-Hartley, the Court looked to the legislative history of the latter statute and found that the House bill had specifically provided for repealing the prohibitions of Norris-LaGuardia with respect to suits under section 301. But this bill was dropped by the conference committee and was never enacted into law.

B. *Suit in the State Courts*

In a suit for breach of a collective agreement, a Massachusetts court in *Courtney v. Charles Dowd Box Co.*²⁴ awarded a money judgment. The Supreme Court granted certiorari and affirmed, holding that section 301(a) did not divest the state tribunal of jurisdiction over a breach-of-contract action between an employer and a labor organization.²⁵ The Court found that Congress did not intend "to encroach upon the existing jurisdiction of the state courts."²⁶ But while *Dowd Box* held that state courts have concurrent jurisdiction under section 301, and indicated that they could enforce rights created by federal law,²⁷ *Teamsters Union v. Lucas Flour Co.*²⁸ left no doubt that it was federal substantive law that was to be applied by the state tribunals in suits under section 301.²⁹ In light of these two cases, then, the issue which *Sinclair* clearly left unanswered was whether the Norris-LaGuardia mandate that federal courts could not enjoin strikes under section 301 would become part of the federal substantive law obligatory upon the state courts.³⁰

Prior to *Sinclair* many jurisdictions sanctioned the issuance of an injunction

²¹ 282 F.2d 345 (10th Cir. 1960), rev'd, 370 U.S. 711 (1962).

²² 370 U.S. 195 (1962).

²³ *Id.* at 203. The *Sinclair* Court distinguished an earlier case, *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957), where it had upheld the issuance of an injunction prohibiting a strike. The *Railway Labor Act*, 48 Stat. 1185 (1934), 45 U.S.C. §§ 152-53 (1964), which controlled in *Chicago River*, called for compulsory arbitration of a "minor dispute." That strike therefore violated an "affirmative duty," imposed by statute.

²⁴ 341 Mass. 337, 169 N.E.2d 885 (1960).

²⁵ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

²⁶ *Id.* at 509.

²⁷ *Id.* at 507.

²⁸ *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

²⁹ *Id.* at 102-04.

³⁰ *Charles Dowd Box Co. v. Courtney*, *supra* note 25, at 514 n.8; see Note, 19 Rutgers L. Rev. 507 (1965).

against a strike in violation of a collective bargaining agreement.³¹ Decisions awarding injunctions were normally grounded either in simple contract law and the equity jurisdiction of the state court, or upon the premise that Taft-Hartley was intended to effectuate the enforcement of collective bargaining agreements.³² Perhaps the best known of the pre-*Sinclair* state court cases is *McCarroll v. Los Angeles County Dist. Council of Carpenters*.³³ Justice Traynor, anticipating the holdings in *Dowd Box* and *Lucas Flour*, declared that state courts have concurrent jurisdiction with federal tribunals under section 301 and must apply federal substantive law.³⁴ Recognizing that federal courts could not issue injunctions, Traynor confronted the question of whether state courts could do so. He concluded that Norris-LaGuardia was drawn as a limitation on only federal equity power and did not restrict the "remedial power of the state courts."³⁵ Section 301, therefore, did not require a state court to withhold the issuance of an injunction. "Uniformity in the determination of the substantive federal right itself is no doubt a necessity, but such uniformity is not threatened because a state court can give a more complete and effective remedy."³⁶

Although *McCarroll* was but one of the many state court decisions holding that the states were not divested of jurisdiction over suits seeking injunctions for the breach of a collective agreement,³⁷ it was not without a strong dissent. Justice Carter argued that a state tribunal could not afford a "more stringent or different relief" than could be afforded by a federal tribunal.³⁸ Looking back to *Lincoln Mills*, which determined the availability of the remedy of specific performance, he concluded that the availability of particular remedies is part of the federal substantive law applicable to a state court action brought under 301. The difference between injunctive relief being available or unavailable to

³¹ See Spelfogel, "Enforcement of No-Strike Clause by Injunction, Damage Actions and Discipline," 7 B.C. Ind. & Com. L. Rev. 239 (1966). Aaron, "Labor Injunctions in the State Courts—Part I," 50 Va. L. Rev. 951, 953 n.7 (1964) lists 33 states which have not adopted any comprehensive statutory controls over the issuance of labor injunctions. These states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and West Virginia.

³² See Spelfogel, *supra* note 31, at 242.

³³ 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958).

³⁴ *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 60, 315 P.2d 322, 330 (1957).

³⁵ *Id.* at 63, 315 P.2d at 332.

³⁶ *Id.* at 64, 315 P.2d at 332-33.

³⁷ See *Connecticut Co. v. Division 425, Street & Electric R.R. Employees*, 147 Conn. 608, 164 A.2d 413 (1960); *Harbison-Walker Refractories Co. v. Local 702, United Brick Workers*, 339 S.W.2d 933 (Ky. 1960); *Miller v. Kansas City Power & Light Co.*, 332 S.W.2d 18 (Mo. App. 1960); *Anchor Motor Freight N.Y. Corp. v. Local 445, Teamsters Union*, 12 Misc. 2d 757, 171 N.Y.S.2d 506 (Sup. Ct. Westchester County) *aff'd*, 5 App. Div. 2d 869, 171 N.Y.S.2d 511 (2d Dep't 1958); *General Electric Co. v. International Union, UAW*, 93 Ohio App. 139, 108 N.E.2d 211 (1952), appeal dismissed, 158 Ohio St. 555, 110 N.E.2d 424 (1953); *International Longshoremen's Union v. Harvey Aluminum*, 226 Ore. 94, 359 P.2d 112 (1961); *Springer v. Powder Power Tool Corp.*, 220 Ore. 102, 348 P.2d 1112 (1960); *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n*, 382 Pa. 326, 115 A.2d 733, cert. denied, 350 U.S. 843 (1955); *Associated General Contractors of America, Inc. v. Trout*, 59 Wash. 2d 90, 366 P.2d 16 (1961); *Clark v. Hein-Werner Corp.*, 8 Wisc. 2d 264, 99 N.W.2d 132 (1959).

³⁸ *McCarroll v. Los Angeles*, *supra* note 34, at 70, 315 P.2d at 336 (dissenting opinion).

the complaining party is not a mere difference in procedure but "goes to the very essence of the right itself."³⁹

This reasoning, however, was not typical of state court decisions prior to *Sinclair*. Most agreed with the majority in *McCarroll*. The following statement of the Pennsylvania Supreme Court is representative.

There does not exist any repugnance or conflict, direct or indirect, between the exercise of jurisdiction by a court of equity as in the instant case and the Labor Management Relations Act and the Norris-LaGuardia Act. . . . Prevention of violation of obligations contained in a contract by injunctive relief is a power traditionally exercised by courts of this Commonwealth.⁴⁰

What, then, is the federal substantive law which the state court is obliged to apply in suits under 301? Can a breach of a no-strike clause be enjoined under that law? The dissent in *McCarroll* and Professor Aaron⁴¹ answer that federal substantive law includes the restrictions embraced in the Norris-LaGuardia Act. Aaron argues that injunctive relief is of such a different nature from other forms of relief that it must be considered a distinct right; therefore, to allow the complainant in the state tribunal to obtain injunctive relief, while denying that relief in the federal courts, would create a distinction in the substantive rights of the parties depending on the forum in which the action was commenced. Under this view *Sinclair*, in holding that section 301 did not repeal Section 4 of Norris-LaGuardia, amounted to a determination that section 4 "must be read into the federal policy enunciated in Section 301."⁴² Professor Aaron admits, however, that some doubt is cast upon this conclusion by the *Sinclair* reference⁴³ to the *federal* courts' lack of power to enjoin strikes.⁴⁴ But Professor Gregory, in commenting upon Justice Traynor's conclusion that the existence or nonexistence of the restrictions of Norris-LaGuardia was a difference of remedial and not of substantive law, found it to be immaterial whether the limitations of Norris-LaGuardia were considered substantive or remedial.⁴⁵ He points out that the paramount concern "is . . . that only one law and one scheme govern in the enforcement of collective agreements made in the federal arena."⁴⁶ Uniformity in the law is intended to preclude "forum shopping."⁴⁷ If injunctive relief from the violation of a no-strike agreement were available in the state courts, complainants would rush to the state tribunals.⁴⁸ The law ap-

³⁹ Id. at 72, 315 P.2d at 338 (dissenting opinion).

⁴⁰ General Bldg. & Contractors Ass'n v. Local Union 542, 370 Pa. 73, 82, 87 A.2d 250, 255 (1952).

⁴¹ Aaron, "Strikes in Breach of Collective Agreements: Some Unanswered Questions," 63 Colum. L. Rev. 1027 (1963).

⁴² Id. at 1035.

⁴³ *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214 (1962).

⁴⁴ Aaron, *supra* note 41, at 1035-37.

⁴⁵ Gregory, "The Law of the Collective Agreement," 57 Mich. L. Rev. 635, 652-53 (1959) (an address delivered to an institute on collective bargaining and the law).

⁴⁶ Id. at 652.

⁴⁷ *Ibid.*

⁴⁸ Summers, "Labor Law Decisions of Supreme Court 1961 Term," A.B.A. Section of Labor Relations Law Proceedings 51, 63 (1962) (quoted in part in Aaron, *supra* note 41).

plied under section 301 might then be fashioned initially by the state courts, with but occasional review by the Supreme Court.⁴⁹

Despite the above arguments, and absent clear statutory prohibition,⁵⁰ many state courts have continued since *Sinclair* to enjoin strikes which violate no-strike agreements.⁵¹ New York, although having a "baby Norris-LaGuardia Act," has found that a strike in breach of a no-strike clause does not fall within the meaning of a "labor dispute" as defined in its act.⁵² New York courts have held that their jurisdiction has not been removed by any federal authority⁵³ and have expressed the opinion that to allow the union to strike, notwithstanding the contract clause, would amount to making the agreement binding upon the company but not upon the union.⁵⁴ New York courts have, therefore, continued to enforce the collective agreement and to enjoin the breach of it.⁵⁵

Having previously held that the Taft-Hartley Act did not relieve the state courts of jurisdiction to issue an injunction against a violation of a collective agreement,⁵⁶ the Supreme Court of Pennsylvania has recently declared that *Lucas Flour* did not impose the anti-injunction limitations of Norris-LaGuardia on state proceedings.⁵⁷ The court recognized that Norris-LaGuardia expressed a congressional policy against injunctions,⁵⁸ but concluded that the anti-injunction policy was limited to injunctions granted by federal courts.⁵⁹ Enactment of section 301, without either totally or partially repealing Norris-LaGuardia, firmly indicated approval of the "existing federal labor policies which limit the injunctive jurisdiction of federal courts, but which do not attempt to limit that of state courts."⁶⁰ This reasoning has been found in the majority of state court decisions.⁶¹ There is, however, some opinion to the contrary. A lower New Jersey

⁴⁹ *Ibid.* Professor Summers, however, seems to feel that section 301 was intended as a supplement to state court remedies.

⁵⁰ Although interpretations may differ, for anti-injunction statutes, see Ill. Ann. Stat. ch. 48, § 2a (Smith-Hurd 1950); Mass. Ann. Laws ch. 214, § 9A (1955); N.Y. Lab. Law § 807 (formerly N.Y. Civ. Prac. Act § 876-a); Pa. Stat. Ann. tit. 43, § 206f (1964). One writer lists Arizona, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Hampshire, North Dakota, New York, Oregon, Pennsylvania, Rhode Island, Utah, Washington, Wisconsin, and Wyoming as having some sort of anti-injunction statute. Comment, 1963 U. Ill. L.F. 495, 497 n.13.

⁵¹ See Comment, 1963 U. Ill. L.F. 495.

⁵² *Employers Ass'n v. Operating Engineers*, 60 L.R.R.M. 2006 (N.Y. Sup. Ct. Westchester County 1965); see *Dairymen's League Co-op. Ass'n v. Conrad*, 33 Misc. 2d 914, 228 N.Y.S.2d 420 (Sup. Ct. Oneida County), *aff'd mem.*, 16 App. Div. 2d 869, 229 N.Y.S.2d 736 (4th Dep't 1962).

⁵³ *C. D. Perry & Sons, Inc. v. Robilotto*, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. Rensselaer County 1963), *aff'd per curiam*, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (3d Dep't 1965).

⁵⁴ *Strecher-Traung Lithograph Corp. v. Lithographers' Union*, 46 Misc. 2d 925, 260 N.Y.S.2d 1011 (Sup. Ct. Monroe County 1965).

⁵⁵ *C. D. Perry & Sons, Inc. v. Robilotto*, *supra* note 53.

⁵⁶ *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n*, 382 Pa. 326, 115 A.2d 733, cert. denied, 350 U.S. 843 (1955).

⁵⁷ *Shaw Elec. Co. v. International Bhd. of Electrical Workers*, 418 Pa. 1, 208 A.2d 769 (1965).

⁵⁸ *Id.* at 12, 208 A.2d at 775.

⁵⁹ *Id.* at 6-14, 208 A.2d at 772-76.

⁶⁰ *Id.* at 13, 208 A.2d at 776.

⁶¹ In *A. I. Gage Plumbing Supply Co. v. Local 300, Int'l Hod Carriers Union*, 202 Cal. App. 2d 197, 20 Cal. Rptr. 860 (1962), a contractor's action for an injunction against a strike in breach of the no-strike clause, the court concluded, citing *Dowd Box and McCarroll*, that a cause of action could be premised upon an existing collective bargaining agreement for an injunction, damages, or arbitration, in the state tribunal. In *Radio Corp. of America*

court, finding that the Norris-LaGuardia Act was an integral part of federal labor policy, concluded that section 4 must be considered under section 301:

[T]his court believes that it must either apply the Norris-LaGuardia Act . . . directly in the instant case or at least interpret our own Anti-Injunction Act in light of the Norris-LaGuardia Act so that it is not incompatible with it.⁶²

C. Removal of Injunction Suit From State to Federal Court

Assuming that the holdings of *Lincoln Mills* (application of federal substantive law under section 301), *Sinclair* (federal courts precluded from enjoining a strike in breach of a collective agreement), and *Lucas Flour* (state courts must apply federal substantive law) do not require state courts to apply the restrictions of Norris-LaGuardia, which by its terms applies to federal courts, the question then arises whether an action seeking only injunctive relief, commenced in a state court, may be removed to a federal district court. Since federal courts cannot award this type of injunctive relief, this question is of unique importance. If the defendant union can obtain removal, the state court would then be denied the power it otherwise might have to enjoin the strike.

Section 301 of the Taft-Hartley Act vests the federal district courts with original jurisdiction to entertain a cause of action based upon the breach of a collective bargaining contract.⁶³ *Dowd Box* affirmed the concurrent jurisdiction of the state tribunals. Thus, in a suit for only specific performance of a no-strike clause, whether removal from the state to the federal court should be allowed is dependent upon the meaning of "jurisdiction" as used in Section 4 of the Norris-LaGuardia Act.⁶⁴ As Section 1441(a) of the Judicial Code provides that a defendant may remove an action from the state court in which it was commenced to a federal court *if* the district court has "original jurisdiction" over the action,⁶⁵ the crucial question becomes whether the district court has jurisdiction

v. Local 780, Int'l Alliance of Theatrical Employees, 160 So. 2d 150 (Fla. App.), cert. denied, 169 So. 2d 390 (Fla. 1964), cert. denied, 380 U.S. 973 (1965), the Florida District Court of Appeal held that the lower state court had jurisdiction over an action, brought by an employer, for the enforcement of a no-picketing and no-strike clause of the agreement, and therefore, allowed the enjoining (with modification) of the striking and picketing. For state court issuances of injunctions for violations of the collective bargaining agreement, see *McLean Distrib. Co. v. Brewery Drivers Union*, 254 Minn. 204, 94 N.W.2d 514, cert. denied, 360 U.S. 917 (1959); *McLean Trucking Co. v. Doyle*, 17 Misc. 2d 478, 184 N.Y.S.2d 114 (Sup. Ct. N.Y. County), aff'd mem., 8 App. Div. 2d 789, 188 N.Y.S.2d 943, motion for leave to appeal denied, 9 App. Div. 2d 677, 193 N.Y.S.2d 223 (1st Dep't 1959); *Republic Aviation Corp. v. Republic Lodge 1987, Int'l Ass'n of Machinists*, 10 Misc. 2d 783, 169 N.Y.S.2d 651 (Sup. Ct. Queens County 1957); *Bee Lime, Inc. v. Long Island Local 252, TWU*, 157 N.Y.S.2d 232 (Sup. Ct. Nassau County 1956); *Masetta v. National Bronze & Aluminum Foundry Co.*, 107 N.E.2d 243 (Ohio App. 1952), rev'd on other grounds, 159 Ohio St. 306, 112 N.E.2d 15 (1953); *Alabama Cartage Co. v. International Bhd. of Teamsters*, 250 Ala. 372, 34 So. 2d 576 (1948).

⁶² *Independent Oil Workers v. Socony Mobil Oil Co.*, 85 N.J. Super. 453, 459-60, A.2d 78, 82 (1964). See *Commercial Can Corp. v. Local 810, Steel Fabricators*, 61 N.J. Super. 369, 160 A.2d 855 (1960) (strike in violation of collective bargaining agreement is labor dispute, not enjoined under the New Jersey anti-injunction statute). Maryland has followed New Jersey and has held that its state statute makes the issuance of an injunction against a strike violating the contract unavailable. *Tidewater Express Lines v. Freight Drivers Union*, 230 Md. 450, 187 A.2d 685 (1963).

⁶³ Quoted, in part, *supra* note 17.

⁶⁴ See text accompanying note 20 *supra*.

⁶⁵ 28 U.S.C. § 1441(a) (1964) provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought

to permit the action to commence before it, Norris-LaGuardia simply divesting it of authority to issue an injunction, or whether the district court lacks the "original jurisdiction" necessary for the action to be removed.⁶⁶

As Professor Aaron has recognized,⁶⁷ it would appear at first that a suit by an employer for injunctive relief would not be removable under section 1441(a), since Section 4 of Norris-LaGuardia appears to relieve the district courts of "original jurisdiction." The weight of judicial authority supports this view.⁶⁸

In a suit prior to the *Sinclair* decision⁶⁹ for injunctive relief from the breach of a no-strike clause, the defendant removed the action to the district court. The court granted the petition for remand, stating that it would be absurd to have a case brought before it "in which there is no power to give the relief demanded, due to surviving prior limitations."⁷⁰ In another injunction action, removed from the California courts, the district court granted plaintiff's motion to remand for lack of jurisdiction in the federal tribunal.⁷¹ Finding that the strike arose from a labor dispute, the court held that Norris-LaGuardia removed the jurisdiction of the federal court. But, of special significance, the court rejected the defendant's contention that the action should not be remanded for lack of jurisdiction in the state tribunal. Even if the application of federal substantive law were held to relieve the state court of authority to enjoin the strike, this could not be a basis for refusing to remand. Section 1447 of the Judicial Code was said to require the remand of any case, removed from a state court, in which the federal tribunal was without original jurisdiction.⁷² Lack of jurisdiction in the state court was immaterial.

In *American Dredging Co. v. Local 25, Operating Engineers*,⁷³ the only court of appeals decision on this question, the Third Circuit rejected the view that Norris-LaGuardia did not strip federal courts of subject-matter jurisdiction but only relieved the courts of the "power to grant injunctive relief."⁷⁴ In holding that section 301 did not give the district court the subject-matter jurisdiction necessary to comply with the "original jurisdiction" requirement of section 1441(a) of the Judicial Code, the court expressly relied upon the *Sinclair*⁷⁵ holding which had affirmed the district court's dismissal "for lack of jurisdiction."⁷⁶ This language was thought to embrace subject-matter jurisdiction.

The Third Circuit proceeded to pinpoint some of the consequences flowing from a district court's denial of the motion to remand. The first of the injustices" enunciated by the court was the deprivation of the plaintiff's right to be

in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

⁶⁶ See Note, 39 Ind. L.J. 387, 391 (1964).

⁶⁷ Aaron, *supra* note 41, at 1041.

⁶⁸ See Comment, 1963 U. Ill. L.F. 495, 499; Note, 44 N.C.L. Rev. 188, 190 (1965).

⁶⁹ *Castle & Cooke Terminals, Ltd. v. Local 137, Int'l Longshoremen's Union*, 110 F. Supp. 247 (D. Hawaii 1953).

⁷⁰ *Id.* at 251.

⁷¹ *Merchants Refrigerating Co. v. Warehouse Local 6, Int'l Longshoremen's Union*, 213 F. Supp. 177 (N.D. Cal. 1963).

⁷² *Id.* at 178.

⁷³ 338 F.2d 837 (3d Cir. 1964).

⁷⁴ *Id.* at 839-40.

⁷⁵ *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962).

⁷⁶ *American Dredging Co. v. Local 25, Operating Engineers*, *supra* note 73, at 840.

"master of its own case," that is, "to cast its action on state-created rights rather than on rights available under federal law . . ."⁷⁷ It is here that the Third Circuit seemed to err. The court, in effect, admitted that the difference in the availability of injunctive relief goes to the complainant's "right," that is, that the difference is one of substance. The Supreme Court has clearly held that it is federal substantive law which applies to suits for the breach of a collective bargaining agreement. The right to proceed in a state court is not to be denied the complainant, but his action is to be governed by "rights" created under federal law. Therefore, if the Third Circuit is to be taken literally, the state court must also dismiss the action. As this does not appear to be the intended result of the Third Circuit's decision, one can only conclude that the court recognizes and accepts the existence of a substantive disparity between the rights of litigants in federal and state courts. This was essentially the position espoused in the dissenting opinion.⁷⁸ The dissenting judge argued that the sole determinant of the rights asserted in the action was federal law. The suit being identical to *Sinclair*, except that it was brought in a state court, *Lucas Flour* compelled the application of federal law. Succinctly put, "any state law authorizing the enforcement of a no-strike clause by injunction is incompatible with and, therefore, cannot be absorbed in federal labor law."⁷⁹

The dissent in *American Dredging* was not without judicial support. In *Crestwood Diary, Inc. v. Kelley*⁸⁰ a federal district court stated that although the prohibitions of the Norris-LaGuardia Act specifically denied "'jurisdiction' to issue an injunctive order . . . each inhibition necessarily assumes the existence of a 'case' of which the court has jurisdiction and which it must, and has the power to, adjudicate in accordance with the standards the Act imposes."⁸¹ The court held that an action resting upon an alleged breach of contract is governed by federal law, thus necessitating adjudication in the federal court when that court's jurisdiction was invoked upon removal, even if the injunctive relief sought plainly could not be awarded. The court considered Norris-LaGuardia a part of substantive law, but reasoned that even if the act be considered as a limitation only on the equity jurisdiction of federal courts so that the state courts' power to grant the labor injunction would not be impaired, this distinction between the equity jurisdiction of the federal and state judiciary would not be a basis for denying the right to remove.⁸²

In an earlier case dealing with a prayer for injunctive relief against union picketing, a district court held that Norris-LaGuardia did not prevent it from hearing the case nor awarding other than injunctive relief.⁸³ The court determined that the criterion of whether a case may be removed is not the ultimate disposition of the case, but rather the applicability of federal law and whether it governs the suit as set forth in the complaint.⁸⁴ Finally, in *Publishers' Ass'n*

⁷⁷ Id. at 846.

⁷⁸ Id. at 857-58 (dissenting opinion).

⁷⁹ Id. at 857.

⁸⁰ 222 F. Supp. 614 (E.D.N.Y. 1963).

⁸¹ Id. at 615.

⁸² Id. at 617.

⁸³ *Pocahontas Terminal Corp. v. Portland Bldg. Trade Council*, 93 F. Supp. 217 (D. Me. 1950).

⁸⁴ Id. at 225. But cf. *Monmouth Canning Co. v. Local 340, Truckdrivers Union*, 140 F. Supp. 304 (D. Me. 1956).

v. New York Newspaper Printing Pressmen's Union,⁸⁵ a district court addressed itself to the question of removal and, citing *American Dredging* as authority to the contrary, held that a suit for breach of a no-strike clause "arises" under federal law. "To hold otherwise would be to disregard the Supreme Court's holding in . . . *Lincoln Mills* . . ."⁸⁶ Finding that the "jurisdiction" removed from the federal courts by virtue of Norris-LaGuardia referred only to the court's authority to award injunctive relief after taking cognizance of the suit, the court noted that any other finding would be "unreasonable" in light of the district court's authority to hold a hearing and make determinations of fact under section 7 of the act.⁸⁷

Professor Chafee supported the view that Norris-LaGuardia did not divest the federal courts of subject-matter jurisdiction.⁸⁸ Summarizing Chafee's thesis that "inability to grant the specific relief requested is not the same as lack of jurisdiction over the substance of the litigation,"⁸⁹ Aaron also concludes that federal tribunals retain original jurisdiction over a suit for specific enforcement of a no-strike clause and, therefore, removal should be sanctioned under section 1441(a).⁹⁰ He maintains that the federal tribunals retain the ability to effectively adjudicate the substance of the controversy.⁹¹ As indicated in *Tri-Boro Bagel Co. v. Bakery Drivers Union*,⁹² a prayer for "such other relief as the court may deem just and proper" would authorize the court, under Rule 54(c) of the Rules of Civil Procedure,⁹³ to award money damages if it found the action to be a proper one. That case, moreover, sanctioned removal even if the action be immediately dismissed on the ground that Norris-LaGuardia prohibited issuance of the injunction sought.⁹⁴ The Southern District of New York has also taken cognizance of Rule 54(c) and has stated that it would enable a federal court, in an action for an injunction alone, to assume jurisdiction of the suit and to award appropriate relief.⁹⁵ This argument was rejected in *American Dredging*,⁹⁶ however, with the court citing Rule 82 of the Federal Rules.⁹⁷

D. *Suit for Specific Performance Joined to a Claim for Damages*

It is clear that an employer may bring an action for damages for the union's breach of its agreement not to strike. Such an action may be brought in either a state or federal tribunal, but if commenced in a state court, it may be removed

⁸⁵ 246 F. Supp. 293, 294 (S.D.N.Y. 1965).

⁸⁶ *Ibid.*

⁸⁷ *Id.* at 295.

⁸⁸ Chafee, *Some Problems of Equity* 367-74 (1950).

⁸⁹ Aaron, *supra* note 41, at 1045.

⁹⁰ *Id.* at 1046.

⁹¹ *Ibid.*

⁹² 228 F. Supp. 720 (E.D.N.Y. 1963).

⁹³ Rule 54(c) of the Federal Rules of Civil Procedure provides in pertinent part: Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

⁹⁴ *Tri-Boro Bagel Co. v. Bakery Drivers Union*, *supra* note 92, at 724.

⁹⁵ *Publishers Ass'n v. New York Newspaper Printing Pressmen's Union*, 246 F. Supp. 293, 296 (S.D.N.Y. 1965).

⁹⁶ *American Dredging Co. v. Local 25, Operating Engineers*, 338 F.2d 837, 848-49 (3d Cir. 1964).

⁹⁷ Rule 82 of the Federal Rules of Civil Procedure provides: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

to a federal court. No impediment such as the Norris-LaGuardia Act raises any doubt as to this.

Under Section 1441(c) of the Judicial Code, when an action which alone would be removable is joined with one not removable, the entire matter may be removed although the district court retains the discretion to remand that which otherwise would not be within its original jurisdiction.⁹⁸ Assuming that an action for specific performance alone is not within the original jurisdiction of the district court, and is therefore not removable under section 1441(a), what are the consequences when a prayer for money damages is added to the complaint? Although in *American Dredging* the circuit court concerned itself with a prayer for "such other relief" and not with one specifically for money damages, the court did state that the prayer did not create a separate cause of action so as to base jurisdiction, upon removal, on 1441(c).⁹⁹ There is, however, a judicial basis for the distinction suggested. The district court in *Kroger Co. v. Retail Clerks*,¹⁰⁰ in remanding a suit to enjoin a strike to the state court, distinguished those cases in which a prayer for money damages was included.¹⁰¹ In an earlier district court case, where the complaint prayed for money damages and injunctive relief, the court held the prayer for money damages to be properly removable but remanded the prayer for an injunction to the state court.¹⁰² And in *National Dairy Prods. Corp. v. Heffernan*,¹⁰³ the district court, defining "jurisdiction" as used in the Norris-LaGuardia Act to mean the ability to entertain the suit, stated that while an action for injunctive relief alone could not be "originally instituted" in a federal court, a federal tribunal "would have original jurisdiction of a suit seeking both an injunction and damages."¹⁰⁴ The court held that two separate claims as stated were premised upon independent wrongs: the action for damages was based upon the past conduct of the union, while injunctive relief was sought for protection from anticipated future conduct. Under 1441(c), therefore, the entire case was removed. Then, finding that it lacked jurisdiction over the claim for injunctive relief, the court immediately dismissed that claim, but not upon the merits.¹⁰⁵

In *H. A. Lott, Inc. v. Hoisting Engineers*,¹⁰⁶ the District Court for the Southern District of Texas assumed, without deciding, that the *Heffernan* reading of "jurisdiction" was correct. The court stated that if the prayers for damages and injunctive relief were considered as presenting but a single claim, removal would be upheld.¹⁰⁷ If, however, the complaint was considered to have alleged two distinct causes of action, the result would still be the same, for then injunctive

⁹⁸ 28 U.S.C. § 1441(c) (1964) provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

⁹⁹ *American Dredging Co. v. Local 25, Operating Engineers*, supra note 96, at 849.

¹⁰⁰ 56 L.R.R.M. 2893 (S.D. Ohio 1964).

¹⁰¹ *Ibid.*

¹⁰² *Swift & Co. v. United Packinghouse Workers*, 177 F. Supp. 511 (D. Colo. 1959).

¹⁰³ 195 F. Supp. 153 (E.D.N.Y. 1961).

¹⁰⁴ *Id.* at 156.

¹⁰⁵ *Ibid.*

¹⁰⁶ 222 F. Supp. 993 (S.D. Tex. 1963).

¹⁰⁷ *Id.* at 994.

relief would be removable under 1441(c) when joined with the claim for damages.¹⁰⁸

E. *A Recommended Approach to Suits for Injunctive Relief*

It is submitted that *Lincoln Mills*, *Sinclair*, and *Lucas Flour* compel the conclusion that the federal labor policy, fashioned under Section 301(a) of the Taft-Hartley Act, does not permit the issuance of an injunction to enjoin the breach of a no-strike clause. The states therefore are divested of the authority to issue a labor injunction in the very same circumstances. Appropriate enough are Professor Hanslowe's words:

These jurisdictional-procedural-remedial difficulties are quite unavoidable consequences of the section 301 imbroglio, of which the *Sinclair* decision is merely a crowning touch. Given *Sinclair*, it is difficult to see how blatant forum shopping can be avoided and uniformity preserved (and uniformity is surely an aim of the Supreme Court's pre-*Sinclair* decisions), except by (at least) allowing removal, and (possibly) by following the dissent in the *McCarroll* case, treating the problem as one of substance, and limiting the state courts' equity powers in section 301 cases, to conform to *Sinclair*.¹⁰⁹

If this view is accepted, then, as the dissent in *American Dredging* pointed out,¹¹⁰ a complainant would not be deprived of injunctive relief simply because his action was removed to the federal tribunal; the injunctive relief would be precluded in any forum by operation of federal law.

If the *Sinclair* decision is not deemed to have incorporated the restrictions of Norris-LaGuardia into federal substantive law, then the jurisdiction of the federal district court (upon removal) should not depend "upon the ingenuity of the form of a complaint in equity."¹¹¹ While the power of the court to issue an injunction is believed to go to the substance of the complainant's rights, a court's inability to issue an injunction need not divest it of "jurisdiction" over the suit. If a suit for injunctive relief is to be remanded to a state court, a complaining party would derive the benefit *Sinclair* denied him.

Professor Aaron has suggested, however, that federal courts are likely to remand a claim for injunctive relief to the state court, whether or not joined by a claim for damages.¹¹² Further, to deny the availability of injunctive relief in state tribunals would be to eliminate a remedy available before the enactment of section 301.¹¹³ Nonetheless, regardless of whether a claim for damages is linked to a claim for injunctive relief, removal of the latter to the federal courts should be sustained. Without relegating legal niceties to a status of lesser importance, the primary consideration is that there be uniformity in the law governing the enforcement of collective bargaining agreements under section 301.

¹⁰⁸ Id. at 995. Rule 54(c) is set out, in part, at note 83 supra.

¹⁰⁹ Hanslowe, "Labor Relations Law," 16 Syracuse L. Rev. 244, 256 (1965).

¹¹⁰ *American Dredging Co. v. Local 25, Operating Engineers*, 338 F.2d 837, 858 (dissenting opinion).

¹¹¹ *Food Fair Stores, Inc. v. Retail Clerks Council*, 229 F. Supp. 123, 127 (E.D. Pa. 1964) (effectively overruled by *American Dredging*).

¹¹² Aaron, "Strikes in Breach of Collective Agreements: Some Unanswered Questions," 63 Colum. L. Rev. 1027, 1051-52 (1963).

¹¹³ *Ibid.*

ARBITRATION

A promise not to strike, within a collective agreement, becomes a *term* of that agreement. The standard grievance procedure, culminating in arbitration, covers the "meaning, interpretation and application" of the collective bargaining agreement.¹¹⁴ An alleged breach of the promise not to strike may be considered as involving an "application" of the collective bargaining agreement, and, therefore, arbitration is a possible consequence of that breach.

The arbitration trilogy of 1960¹¹⁵ provides necessary background for discussion of this topic. *United Steelworkers v. American Mfg. Co.*¹¹⁶ and *United Steelworkers v. Warrior & Gulf Nav. Co.*¹¹⁷ involved suits under 301(a) to compel arbitration. In these two cases the Supreme Court limited the function of the judiciary to ascertaining whether the claim for arbitration is "on its face . . . governed by the contract" and ruled out any consideration of the merits of the claim.¹¹⁸ The question for the judiciary is limited to whether there was an agreement to arbitrate the grievance.¹¹⁹ "Doubts should be resolved in favor of coverage."¹²⁰ In *United Steelworkers v. Enterprise Wheel & Car Corp.*¹²¹ the Court created a strong presumption in favor of the enforceability of an arbitrator's award. Again, doubt should be resolved in favor of the award being within the scope of the arbitrator's authority.¹²²

A. Arbitrator's Power To Enjoin a Strike in Violation of the Agreement

An arbitrator is "commissioned to interpret and apply the collective bargaining agreement . . ." ¹²³ He brings an "informed judgment to bear in order to reach a fair solution of a problem. This is especially true [of] . . . remedies."¹²⁴ Where a breach of a no-strike clause has been alleged, employers have often sought arbitration for an interpretation of the "terms" or "application" of the agreement. In many instances, striking and picketing in violation of the agreement have been enjoined by order of the arbitrator.¹²⁵

But rarely can the express intention of the parties be found to bestow upon the arbitrator the power to enjoin a strike. Rather, finding their intention is often a process of assuming an implied intention in light of the presumptions created by the law.¹²⁶ The Court is willing to allow great leeway in upholding an arbitrator's finding that he has been given the authority to afford a remedy.¹²⁷

¹¹⁴ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 565 (1960).

¹¹⁵ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

¹¹⁶ *Supra* note 115.

¹¹⁷ *Supra* note 115.

¹¹⁸ *United Steelworkers v. American Mfg. Co.*, *supra* note 115, at 568.

¹¹⁹ *United Steelworkers v. Warrior & Gulf Nav. Co.*, *supra* note 115, at 582.

¹²⁰ *Id.* at 583.

¹²¹ 363 U.S. 593 (1960).

¹²² *Id.* at 597.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *General American Transp. Corp.*, 41 Lab. Arb. 214 (1963) (enjoined striking and picketing in violation of the agreement); *Liebman Breweries, Inc.*, 35 Lab. Arb. 384 (1960) (clearer agreement involved); see *United Parcel Service, Inc.*, 41 Lab. Arb. 560 (1963) (enjoining strike).

¹²⁶ See text accompanying notes 118-21 *supra*.

¹²⁷ See discussion of *Enterprise Wheel* accompanying note 121 *supra*.

It must be recognized that in creating a collective bargaining agreement, the parties have looked towards the preservation of a harmonious relationship. While strife at the outset of their relationship may be caused by attempting to come to explicit terms on every aspect of their agreement, it may be argued that the very purpose of agreeing to arbitrate violations of the agreement is to allow the arbitrator to preserve, uphold, and effectively enforce their agreement. Enjoining the breach of the agreement would certainly come within these bounds.¹²⁸ In *Macy's New York*,¹²⁹ for example, employees of the retail department were enjoined from picketing and demonstrating in connection with a dispute between the employer and the warehouse employees. And in *Ford Motor Co.*,¹³⁰ local officers and members of the union were involved in an unauthorized strike in violation of a no-strike clause. The arbitrator awarded a cease and desist order against the striking and the inducing of others to strike.

B. *Enforceability of the Arbitrator's Award*

The arbitrator's power to enjoin labor activities has seldom been judicially reviewed. Upon a motion to confirm the award of the arbitrator, the Supreme Court of New York upheld an injunction enjoining the union "from causing members to refuse to handle or move certain cargo intact in 'containers' to named consignees."¹³¹ Previously, in *Ruppert v. Egelhofer*,¹³² the New York Court of Appeals had explicitly approved the power of the arbitrator to enjoin labor activities. In the arbitration proceeding, prior to that case, the arbitrator enjoined a labor organization from continuing a slowdown. Though the court admitted that the agreement did not "directly affirm or deny such a power,"¹³³ it argued that only the injunction would effectuate the intent of the parties—the elimination of work stoppages. Believing that the existing anti-injunction statute would prohibit the issuance of the injunction by the court without an additional finding of fact, the court frankly admitted that the judicial confirmation of the injunction amounted to a court-ordered injunction. "But, once we have held that this particular employer-union agreement not only did not forbid but contemplated the inclusion of an injunction in such an award no ground remains for invalidating this injunction."¹³⁴ This conclusion fits nicely into the reasoning of the trilogy: first there is a presumption of arbitrability and then a resolution of ambiguity in favor of finding the authority for the arbitrator's award. Resolving both presumptions in favor of enforceability, the court can conclude that the arbitrator has the authority to enjoin the dispute.

In a suit brought in a federal court for the enforcement of an arbitration award ordering the union to cease and desist work stoppages in violation of the agreement, the district court distinguished those cases holding that a court could not enjoin a strike violating a no-strike clause by finding that "the parties . . . agreed to be bound by the decision of the arbitrator, and the

¹²⁸ See discussion of *Ruppert v. Egelhofer* at text accompanying notes 132-34 *infra*.

¹²⁹ 40 Lab. Arb. 954 (1962).

¹³⁰ 41 Lab. Arb. 619 (1963).

¹³¹ *Matter of N.Y. Shipping Ass'n*, 54 L.R.R.M. 2680, 2681 (Sup. Ct. New York County 1963), enforcing 41 Lab. Arb. 809 (1963).

¹³² 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

¹³³ *Id.* at 581, 148 N.E.2d at 130, 170 N.Y.S.2d at 787.

¹³⁴ *Id.* at 581-82, 148 N.E.2d at 131, 170 N.Y.S.2d at 788.

plaintiff is entitled to have the award of the arbitrator enforced."¹³⁵ Since both this district court decision and *Ruppert* predate *Sinclair*, one cannot predict with certainty how these cases would now be decided. It is suggested, however, that the outcome would not be changed by the latter decision.

Regardless of whether one thinks that *Sinclair* is part of the federal law the states are obliged to apply under 301, there is a distinction between the order of the arbitrator, chosen by the parties and vested with authority by them, and the judicially issued injunction. Where the collective bargaining agreement has given the arbitrator the power to determine the remedy for a violation of contract, under the rationale of *Enterprise Wheel* the court may find a basis upon which to rest the arbitrator's power to enjoin the violation of a no-strike clause.¹³⁶ This reasoning would appear to apply to federal and state courts alike.¹³⁷ Moreover, where the arbitrator's power to enjoin is not expressly conferred, the court may find that the parties had implicitly agreed to bestow such a power upon him.¹³⁸

CONCLUSION

Injunctive relief would appear to be of such an entirely different nature from either an order to arbitrate or an award of damages that its unavailability in federal courts must be said to be part of the federal labor policy. Without negating the intent of Congress in passing the Norris-LaGuardia Act, and with due deference to the legalistic arguments over the meaning of the term "jurisdiction" as used within that act, it is submitted that given the holdings of *Lincoln Mills*, *Sinclair*, and *Lucas Flour*, and given the over-all intent of Congress in the passage of our labor laws, the authority of the state tribunals to enjoin a strike in violation of a labor agreement (in the federal arena) has been removed. If, however, this approach is not accepted, then uniformity in our labor law would seem to demand approval of those judicial precedents upholding the jurisdiction of the federal courts upon removal of a suit for specific performance of a no-strike clause.

But there are other considerations:

Breach or violation of the no-strike provision of the agreement cannot be tolerated nor condoned. Indeed, it is difficult to envision any action or activity more likely to reduce a labor agreement to a worthless scrap of paper, to irreparably impair the parties' relationship and more inimical to the best economic interests of Company, Union and workers alike, than the indulgence in its violation.¹³⁹

Where management and labor alike recognize these considerations and vest authority in an arbitrator to adjudicate controversies arising between them, then the arbitrator's use of the full scope of power allotted to him should be judicially approved and enforced. Indulgence should be given to the arbi-

¹³⁵ *New Orleans S.S. Ass'n v. General Longshore Workers*, 49 L.R.R.M. 2941, 2942 (E.D. La. 1962).

¹³⁶ Spelfogel, "Enforcement of No-Strike Clause by Injunction, Damage Actions and Discipline," 7 B.C. Ind. & Com. L. Rev. 239, 252 (1966).

¹³⁷ See Comment, 1963 U. Ill. L.F. 495, 500 (1963).

¹³⁸ See *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 581, 148 N.E.2d 129, 131, 170 N.Y.S.2d 785, 787 (1958).

¹³⁹ *United Parcel Service, Inc.*, 41 Lab. Arb. 560 (1963).

trator's discretion. "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal."¹⁴⁰

If the arbitrator, then, is deemed capable of wielding the power to enjoin a strike in breach of the agreement, the remaining question concerns when should he be deemed to have that authority? The Supreme Court affords the answer in *Enterprise Wheel*.¹⁴¹ The widest latitude is to be allowed the arbitrator in interpreting the provisions of the collective bargaining agreement, for "it is [his] . . . construction which was bargained for."¹⁴² If uniformity is then diminished somewhat, the resulting diversity will be based upon the parties' own choosing within the favored framework of arbitration.

George B. Yankwitz

¹⁴⁰ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 569 (1960).

¹⁴¹ See text accompanying notes 121-22 *supra*.

¹⁴² *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).