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Some Recent Developments in the Evolution of the Federal Common Law of Collective Bargaining Agreements: Arbitration

STUDENT COMMENTS

SOME RECENT DEVELOPMENTS IN THE EVOLUTION OF THE FEDERAL COMMON LAW OF COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION

The Supreme Court in three recent labor arbitration cases[1] had an opportunity to exercise its "role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements . . . ."[2] The results reached by the Supreme Court in these arbitration cases were foreshadowed in the famous *Textile Workers v. Lincoln Mills*[3] decision in which Justice Douglas, writing for the majority, interpreted Section 301 of the Labor Management Relations Act[4] as conferring jurisdiction on federal courts to enforce collective bargaining agreements and as a mandate to fashion a body of federal substantive common law to interpret them. One source of this substantive law of collective bargaining agreements was the Labor Management Relations Act,[5] but the choice and source of common law to supplement it was left open, subject only to the condition that it conform to the policies of the national labor law.[6] Justice Douglas found in Section 301 of the Act[7] a Congressional policy favoring and authorizing the specific enforcement of the arbitration provisions of collective bargaining contracts.[8] The view was expressed that a collective bargaining agreement which contained a broad arbitration clause and a blanket no-strike clause was the ideal method for labor and management to fulfill their statutory duty to bargain collectively.[9]

To some it appeared that this decision would flood the federal courts with litigation and that the development of a body of law to interpret and enforce collective bargaining contracts would be a slow case by case process of assimilating existing contract law and resolving its conflicting interpretations.[10] It also appeared to some that the courts would be placed in the midst of the day to day problems of labor management relations, tangled in complexities they are ill equipped to handle, crippled with method of stare decisis (and its connotations of universality) in situations of infinitely

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[1] United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[2] United Steelworkers v. American Manufacturing Co., supra note 1, at 567.

[3] Textile Workers v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

[4] Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. 185 (1958).

[5] Textile Workers v. Lincoln Mills, supra note 3, at 457.

[6] Ibid.

[7] Labor Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

[8] Textile Workers v. Lincoln Mills, supra note 3, at 455.

[9] Textile Workers v. Lincoln Mills, supra note 3, at 455; United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 n.4 (1960).

[10] Textile Workers v. Lincoln Mills, supra note 3, at 465 (dissenting opinion of Frankfurter, J.).

varying complexity and diversity.[11] Court involvement in the resolution of industrial disputes has the added disadvantage of the delay, in reaching decisions with finality, inherent in judicial trial and appeal.[12]

Justice Douglas, in the *Lincoln Mills* decision, cut through the complexities of constitutional law to arrive at a simple solution to the question of federal court jurisdiction to enforce collective bargaining agreements;[13] and the Justice, by these three recent decisions, has in like manner simplified the role of the federal courts in interpreting and enforcing arbitration agreements. The function of the courts, as we shall see, has been narrowed almost to the point of deciding the issues concerning arbitration on the basis of the pleadings.

1. Arbitrability

(a) *The broad clause:*

An employee of the American Manufacturing Co.[14] sought reinstatement after he had accepted a settlement of a Workmen's Compensation claim based upon a permanent partial disability. The seniority clause of the collective bargaining agreement provided that the employer would employ and promote on the basis of seniority "where ability and efficiency are equal."[15] The agreement also contained the "standard form" of arbitration clause (covering all disputes as to the meaning, interpretation, and application of this agreement) and a blanket no-strike clause. American denied reinstatement and after it refused to arbitrate the claim, the union brought suit under Section 301 to compel arbitration, alleging that American's refusal to reinstate was contrary to the seniority provision of their agreement.

The employer, American, defended its refusal to arbitrate on three grounds: 1., the employee was estopped by his acceptance of the workmen's compensation settlement; 2., he was physically unable to do the work; and 3., this type of dispute was not arbitrable.

The district court found for American on the basis of estoppel; the circuit court affirmed but for different reasons: "the grievance is a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement."[16] It relied on a line of decisions which looked to the Federal Arbitration Act[17] as a "guiding analogy"[18] in determining the relative roles of the arbitrator and the courts. Under this view the courts should look to the facts upon which the demand for arbitration is based, not for

[11] See, Wellington, Judge Magruder and the Labor Contract, 72 Harv. L. Rev. 1268, 1285-1300 (1959).

[12] Textile Workers v. Lincoln Mills, supra note 3, at 463, 464 (dissenting opinion of Frankfurter, J.).

[13] See Wellington, supra note 11, at 1269-74.

[14] United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960).

[15] Id. at 566.

[16] United Steelworkers v. American Manufacturing Co., 264 F.2d 624, 628 (6th Cir. 1959).

[17] 9 U.S.C. §§ 1-14 (1958).

[18] Engineers Ass'n v. Sperry Gyroscope Co., 251 F.2d 133, 136 (2d Cir. 1957), cert. denied, 356 U.S. 932 (1958).

the purpose of determining the merits of the controversy but to establish arbitrability.

> "The difference between the two proceedings is in the quantum of proof necessary for the moving party to obtain relief. In the arbitration hearing, the party seeking relief must fully establish his claim that the opposing party has violated the contract. Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim."[19]

This theory appears to have developed from an analogy to the court's function in determining its own jurisdiction.[20] Thus, if the subject matter of a claim is within the arbitrator's jurisdiction, the arbitrator does not lose his jurisdiction because of the fact that the proper disposition of the claim may be crystal clear to the court, unless the claim is a frivolous one. The Supreme Court, in reversing, specifically rejected the limitation on frivolous claims recognizing that " the processing of even frivolous claims may have therapeutic value . . . ."[21] The Court also rejected the error of the "Cutler Hammer" doctrine,[22] the preoccupation with ordinary contract law and failure to recognize the distinct nature of collective bargaining agreements.[23] Where the agreement is to arbitrate *all* grievances upon which the parties cannot agree, the court's sole function is to determine whether the claim asserted is *"on its face governed by the contract."*[24] Here, the union alleged that it had a grievance concerning the interpretation of the seniority clause and that is sufficient.

In thus restricting the judicial function, the court is requiring the judiciary to refrain from examining the dispute or grievance sought to be arbitrated beyond the point of determining that it is allegedly governed by a provision of the contract. A district court, subsequent to this decision, has granted summary judgment ordering arbitration, where the grievance was worded in terms of a violation of a specific provision of the collective bargaining agreement, notwithstanding the contention that there were still unresolved questions of fact on the issue of arbitrability.[25] In truth, there

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[19] Id. at 137.

[20] New Bedford Defense Products Div. of the Firestone Tire & Rubber Co. v. Local 113 UAW, 258 F.2d 522, 526 (1st Cir. 1958); Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482 at 1516 (1959).

[21] American Manufacturing Co., supra note 14, at 568 (Mr. Justice Whittaker concurred in the result on the grounds that the lower court should not look to the merits of the claim).

[22] Int'l Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, aff'd, 297 N.Y. 519, 74 N.E.2d 464 (1947).

[23] American Manufacturing Co., supra note 14, at 566-7: "It [Cutler-Hammer] held that 'If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.' 271 App. Div. at 918, 67 N.Y.S. 2d at 318." See, Hays, The Supreme Court and Labor Law October Term 1959, 60 Colum. L. Rev. 901, 921 (1960).

[24] American Manufacturing Co., supra note 14, at 568.

[25] UAW v. Waltham Screw Co., 47 L.R.R.M. 2196 (D. Mass. Nov. 21, 1960).

can be no such unresolved questions where the grievance is worded in the terms of violation of the collective bargaining agreement. All such unresolved matters can then go only to the merits of the controversy.

Even where the court has so simplified and narrowed the judicial function, difficult questions can still arise. In *Portland Web Pressmen's Union v. Oregonian Publishing Co.*[26] the union sought summary judgment ordering arbitration of a grievance arising out of the company's firing of employees who refused to cross a picket line of another union. The discharged employees, all members of the plaintiff union, refused to cross the picket line for a period of two months, but the firing did not occur until two days before the collective bargaining agreement between their union and the employer expired. The arbitration clause covered "all questions . . . concerning the construction [of] any clause of this contract or alleged violation thereof."[27] The union did not seek arbitration until after the agreement had expired and after it had called a strike. The district court denied summary judgment, holding that the union's demand for arbitration presented no "justiciable controversy." The Court of Appeals affirmed, reasoning that since the arbitrator could award neither back pay nor reinstatement because of the employees' continued refusal to cross the picket line, the alleged violation of the contract was an abstract and hypothetical question. Whether the dischargees were or were not technically employees during the two day period between the date of discharge and the expiration of the contract was held to be of no substantial importance under the agreement. Having found no actionable contract violation the court declared that the only dispute was whether the union had the right to bargain collectively with the company even though, absent the dischargees, the union did not represent a majority of the employees in the unit involved.[28] This question was considered to be within the exclusive jurisdiction of the National Labor Relations Board.[29]

Contra, Harbinson-Walker Refractories Co. v. United Brick Workers, 47 L.R.R.M. 2077 (Ky. Ct. App. Nov. 4, 1960) where enforcement of an award was denied. The agreement provided that either party could submit the grievance to arbitration. The Company had resisted arbitration and notified the arbitrator that he was without authority. The court's grounds for denial of enforcement was that the issue of arbitrability had not been tried by the lower court. It was clear that the union was contending that the company had violated the seniority provisions of the contract. An important and interesting side issue was the jurisdiction of the state court to hear the case and apply federal law. The Supreme Court has granted certiorari on this question in Charles Dowd Box Co. v. Courtney, 81 S. Ct. 699 (1961).

[26] 47 L.R.R.M. 2432 (9th Cir. Dec. 19, 1960).

[27] Id. at 2434.

[28] The Company had informed the union that it would bargain on a new contract only when the union could demonstrate that it represented a majority of its employees.

[29] This holding, however, is predicated upon the absence of a substantial contract violation. If this is the case then the union is really complaining of an unfair labor practice. However the fact that a contract violation is also an unfair labor practice should not bar the court from exercising jurisdiction. See, United Steelworkers v. New Park Mining Co., 273 F.2d 352 (10th Cir. 1959); Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 257 F.2d 467 (5th Cir. 1958), cert. denied, 358 U.S. 880 (1958); Independent Petroleum Workers v. Esso Standard Oil Co., 235 F.2d 401 (3d Cir. 1956); Textile Workers v. Arista Mills Co., 193 F.2d 529 (4th

It is submitted that the court carried its inquiry too far when it looked at the remedies available to the arbitrator as relevant to the issue of arbitrability.

The controversy in the *Oregonian Publishing* case in essence is no different than that of the *American* case itself, or for that matter of any case where "the proper disposition of the claim may be crystal clear under the law."[30] The proper result or the importance of the grievance are not determinative of the promise to arbitrate. Properly the court should look only to whether the grievance is *phrased* in terms of contract violation or interpretation.

(b) *Exclusions from broad arbitration clauses*

Warrior & Gulf Navigation Company operates a shop for the normal maintenance of its barges. It is not equipped to make major repairs and accordingly it has, from the beginning of its operations more than 19 years ago, contracted out its major work. In the two year period prior to this dispute it laid off employees, reducing the bargaining unit from 42 to 23 men. This reduction was due in part to contracting out of normal maintenance work previously done by its employees. A number of employees signed a grievance charging Warrior with inducing a partial lockout and thereby violating the contract by arbitrarily and unreasonably contracting out work. The collective agreement had both a "no-strike" and a "no lockout" provision. It also had a grievance procedure which provided for the arbitration of disputes as to the meaning and application of "the provisions of this agreement." This provision however excluded from arbitration "matters which are strictly a function of management." Warrior refused to arbitrate the grievance and the union brought suit under Section 301. The district court found that " 'throughout the successive labor agreements between these parties . . . [the union] has unsuccessfully sought to negotiate changes in the labor contract . . . which would have limited the right of the [employer] to continue the practice of contracting out such work,' "[31] and that therefore contracting out work was always understood as a function of management and that it was specifically excluded from the arbitration provision. The Court of Appeals affirmed; the Supreme Court reversed, the majority holding that in regard to collective bargaining agreements, all doubts should be resolved in favor of arbitration[32] and in the absence of an express provision excluding the particular grievance from the arbitration machinery, arbitration should be ordered.[33] The phrase "matters which are strictly a function of management" is broad and vague. To determine its

Cir. 1951); United Elec. Workers v. Worthington Corp., 236 F.2d 364 (1st Cir. 1956) (dictum); Note: Jurisdiction of Arbitrators and State Courts over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725 (1956).

[30] New Bedford Defense Products Div. of the Firestone Tire & Rubber Co. v. Local 113, UAW, 258 F.2d 522, 526 (1st Cir. 1958).

[31] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 588.

[32] Id. at 583.

[33] Id. at 585.

contents is to examine the merits of the grievance or construe the contract; and it is the arbitrator's decision on these questions that the parties bargained for, not that of the courts.[34]

The Court reasoned that collective bargaining agreements are so different in their nature and purposes from conventional commercial arbitration contracts that the precedents for interpreting the latter are not applicable to the former.[35] The policy of the Labor Management Relations Act is to enforce agreements to arbitrate in order to stabilize collective bargaining.[36] The agreement to arbitrate grievances arising under the contract and matters not settled by the contract is the "quid pro quo" for an agreement not to strike.[37] The court must avoid any consideration of the merits of the controversy even through the medium of interpreting the arbitration clause in the contract; this precludes an examination of the bargaining history in construing the clause.[38] To hold otherwise would be to substitute the judgment of the courts for that of the arbitrator, and it is the judgment and "expertise" of the arbitrator that the parties have bargained for.[39] For this reason the courts cannot infer or imply an exclusion from the arbitration clause; it must be express; to infer an exclusion is to construe the substantive provisions of the contract.[40]

The dissent applied the traditional judicial approach to arbitration contracts: those matters which are not expressly included in the jurisdiction of the arbitrator may not be included by implication. Arbitration divests the courts of jurisdiction and is founded upon the agreement of the parties which may never be implied as it is in derogation of the rights of the parties to have a court determination of the controversy.[41] The dissent examined the prior history of collective bargaining not with a view to determining the merits of the agreement but rather to determine the "jurisdiction" of the arbitrator.[42] Viewed in this light, the dissent was of the opinion that the union was attempting to obtain under the guise of arbitration that which it could not obtain in collective bargaining.[43]

In considering this case, however, it should be kept in mind that the court was faced with a very broad arbitration clause and a vague exclusionary clause. This caveat is expressed by the concurring opinion:

> "The very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction. The case

34 Id. at 584-5 (by implication).
35 Id. at 578.
36 Ibid.
37 Id. at 578 n.4; Textile Workers v. Lincoln Mills, supra note 3, at 455.
38 Warrior & Gulf Navigation, supra note 31, at 585.
39 Id. (by implication).
40 Id. at 581-2.
41 Id. at 585-92 (dissenting opinion of Whittaker, J.).
42 Id. at 592.
43 Id. at 588 (by implication).

> might of course be otherwise were the arbitration clause very narrow, or the exclusion clause quite specific, for the inference might then be permissible that the parties had manifested a greater interest in confining the arbitrator; the presumption of arbitrability would then not have the same force and the Court would be somewhat freer to examine into the merits."[44]

In addition to the determination of subject matter arbitrability is the question of the necessity for procedural compliance. Does the agreement make its procedural steps conditions precedent to suit on the contract? To state the proposition is to suggest its answer. The problem here is one of construction of the grievance and arbitration provisions of the agreement and for this reason the compulsion of the American and Warrior cases as precedent has been doubted.[45] However, the courts which have been faced with the question subsequent to the Supreme Court Cases have held these decisions as governing and the question one for the arbitrator.[46] This result seems desirable. The procedural provisions can and often are as vague as the exclusionary clauses. If the arbitrator is in a superior position to determine the meaning of an exclusionary clause, because of his "knowledge of the common law of the shop"[47] and the effect of his judgments on "morale" and "tensions,"[48] his position is certainly just as superior for the determination of procedural compliance.

2. Arbitration Awards

The *Enterprise Wheel* case[49] raised the problem of the standards to be applied by a court in reviewing the arbitrator's award, the court being limited to the determination of whether the arbitrator "exceeded his jurisdiction" in making the award. The award involved workers who were wrongfully discharged during the term of the contract. The contract had expired and the employer's operations continued without a new contract. The arbitrator ordered re-instatement after the expiration of the contract with back pay to the date of re-instatement. All the members of the court agreed as to the propriety of the award of back-pay during the term of the contract.[50] The dissent however, was of the opinion that the arbitrator exceeded his jurisdiction in ordering re-instatement after the expiration of the contract and in ordering back pay for the period after the contract's ex-

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[44] Id. at 572-3 (concurring opinion of Brennan, J.).

[45] See, Note 70 Yale L.J. 611 (1961) where it is suggested that the considerations which require the function of the courts to be restricted in determining subject matter arbitrability (danger of interpreting the merits, embryonic nature of collective bargaining agreements, etc.) do not apply to the question of procedural compliance.

[46] Philadelphia Dress Union v. Sidele Fashions, Inc., 187 F. Supp. 97 (E.D. Pa. 1960); Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 46 L.R.R.M. 3084 (3d Cir. Oct. 7, 1960).

[47] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[48] Ibid.

[49] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[50] Id. at 600 (dissenting opinion of Whittaker, J.).

piration arguing that whatever rights the employees might have had under the contract, the employer was free to fire them at will after its expiration.[51]

The majority was of the opinion that for it to review the arbitrator's application of the principles of law relevant to the interpretation of labor agreements would completely emasculate the "arbitrator's decision is final" provision of the agreement and would in effect engage the courts in the construction of the contract.[52]

The arbitrator, although confined to interpreting and applying the collective bargaining agreement, may look to many sources for guidance in making an award. The customs and practices of the industry and the law developed from the national labor legislation are relevant to his inquiry;[53] the mere fact that the award resembles remedies developed under the Labor Management Relations Act does not mean that the arbitrator was not interpreting and applying the collective bargaining agreement. Mere ambiguity as to the basis of the award is not a sufficient reason to deny enforcement.[54]

> "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[55]

But quite obviously at some point the courts must interfere. The opinion does not indicate with any specificity at what point this will be, beyond indicating that judicial activity will be minimal. The opinion does not indicate that where by his own words the arbitrator expressly states that he is not interpreting or applying provisions of the collective bargaining agreement the courts should refuse enforcement.[56] It also states that where it is apparent that the arbitrator exceeded his submission or abused his trust the courts should likewise intervene. However, this statement must be evaluated in the light of the facts of the case before the court, for certainly in the eyes of the dissenter it was apparent that the arbitrator had exceeded the submission.[57] The opinion can probably best be understood when examined in the light of the collective bargaining process. If the parties have chosen to employ arbitration, then the arbitrator becomes an indispensable part of the collective bargaining process.[58] The arbitration process being primarily a system of private law, short of assuring good faith and due process, the courts should probably not interfere.[59]

Such vague limitations can be expected to produce varying results and

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51 Id. at 601-2 (dissenting opinion of Whittaker, J.).
52 Id. at 598-9.
53 Id. at 597.
54 Id. at 598.
55 Id. at 599.
56 Id. at 597.
57 Id. at 599-602 (dissenting opinion of Whittaker, J.) (by implication).
58 Id. at 596.
59 Cf., Federal Arbitration Act, 9 U.S.C. § 10 (1958).

considerable litigation. Illustrative of this is a Sixth Circuit opinion decided subsequent to the *Enterprise* case.[60] In the arbitration proceeding the union claimed that the employer had violated their agreement by speeding up the assembly line on one of the articles used in the finished product. The arbitrator found that the union had failed to carry the burden of proving the "unreasonableness" of the quota and dismissed the grievance. However, he directed the parties to enter into negotiations with a view towards determining, through engineering surveys, a proper rate. During the negotiations the old rate was to be maintained. The collective bargaining agreement provided as follows:

> "The function of the arbitrator shall be of a judicial rather than a legislative nature. He shall not have the power to add to, ignore, or modify any of the terms and conditions of the contract. His decision shall not go beyond what is necessary for the interpretation and application of this contract. . . ."[61]

The employer refused to comply with so much of the award as dealt with negotiations concerning the engineering surveys. The union brought suit under Section 301 for enforcement. The district court granted summary judgment for the defendant.

On appeal the Court of Appeals affirmed, holding that the arbitrator exceeded his authority.[62] On rehearing[63] the court distinguished the *Enterprise* case. It held that the arbitrator's power was strictly limited by the "judicial function" clause and that once the arbitrator had decided that the grievance was without merit his authority was exhausted.

The Court in the *Enterprise* case was not faced with the problem of construing a clause limiting the arbitrator's jurisdiction, but the three cases considered together do indicate the probable approach. If the court refuses to construe exclusionary clauses governing arbitrability for fear of influencing a decision on the merits then it does not appear that it will be any more willing to construe clauses limiting the remedial power of the arbitrator. A clause stating that the arbitrator's function is judicial is not unambiguous; e.g., does "judicial functions" encompass merely the limited power of a court of law or the broad remedial powers of a court of equity? For the judiciary to decide whether a particular arbitrator in a particular instance acted in a non-judicial manner would appear to involve a greater danger of deciding the merits of a controversy than would a consideration of bargaining history in order to determine whether a particular activity is a "management prerogative." The latter, of course, the court has refused to do.

If the "judicial functions" clause is not specific enough to be applied by the courts, but is to be construed only by the arbitrator, then the award

[60] Local 791, IUE v. Magnavox Co., 47 L.R.R.M. 2296 (6th Cir. Dec. 21, 1960).
[61] Id. at 2297.
[62] Ibid.
[63] Local 791, IUE v. Magnavox Co. 47 L.R.R.M. 2571 (6th Cir. Feb. 13, 1961).

must be enforced unless it is "apparent that the arbitrator went beyond his submission"[64] or in his own words manifested an infidelity to his obligation and interpretation of the collective bargaining agreement. It would appear that the arbitrator's opinion in this case contains the same type of ambiguity present in *Enterprise*. His holding that the union had failed to meet its burden of proof and his ordering of the surveys are, to a degree, at least inconsistent. The ordering of the surveys might be considered a device for adducing further evidence before reaching a final result on the merits; in this state of doubt the court should not interfere.

3. Conclusion

Some may object that the majority of the Court has exceeded the bounds of judicial self restraint and read its approval of arbitration as a means of settling labor disputes into the Labor Management Relations Act.[65] Section 301 of the Act was, in the view of some, merely designed to give unions and employers a federal forum for enforcing rights arising under state substantive law in those states which did not allow suits by or against unincorporated associations.[66] In the words of Senator Taft, ". . . All we provide in the amendment is that voluntary associations shall in effect be suable as if they were corporations, and suable in the Federal courts if the contract involves interstate commerce . . . ."[67]

Breach of contract was not made an unfair labor practice in and of itself,[68] and the National Labor Relations Board has traditionally rejected the role of policing collective bargaining contracts.[69] The clause in Section 203, upon which Justice Douglas bases his contention that the Congress intended to indorse the policy of enforcing arbitration contracts, is on its face merely a limitation on the authority of the Mediation Service.

> "203(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. *The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.*"[70] (Emphasis supplied.)

However, the statutory language was not explicit and it lends itself to the construction adopted by the Supreme Court in the *Lincoln Mills* case. Further, the Act has been amended since the *Lincoln Mills* decision, so that Congress

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[64] Enterprise Wheel & Car Corp., supra note 49, at 598.

[65] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 589 (dissenting opinion of Whittaker, J.).

[66] See, Wollett and Wellington, Federalism and Breach of the Labor Agreement, 7 Stan. L. Rev. 445 (1955).

[67] 92 Cong. Rec. 5705 (1947).

[68] See, Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947).

[69] Consolidated Aircraft Corp., 47 N.L.R.B. 694 (1943).

[70] Labor Management Relations Act, 61 Stat. 153 (1947), 29 U.S.C. § 173(d) (1958).

must be deemed to have impliedly accepted the Court's construction of the Act.[71]

The declaration of policy contained in the Labor Management Relations Act states that one of its purposes is "to promote the full flow of commerce"[72] and the rationale upon which the Court upheld its constitutionality was that Congress was exercising the Commerce power in order to remove obstructions to the flow of commerce such as those caused by strikes.[73]

The series of decisions under discussion may foreshadow the development of a means for obtaining the objective upon which the constitutionality of the Act was based. Thus, after twenty five years, the combination in a collective bargaining agreement of a blanket no-strike clause and a broad arbitration clause may provide a voluntary means of avoiding the work stoppages and the public injury which result from the inevitable frictions of an industrial society. The optimism expressed is dampened by several possibilities, one of which is that the effect of the decisions may be, at least in some instances, merely an incentive for more carefully drafted exclusionary clauses or express limitations upon the remedies an arbitrator may award.[74] Some may abandon arbitration provisions entirely. The other and more serious possibility, is that the Court will not give equal effect to the obligations of both of the parties to the arbitration contract.[75]

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71 Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin), 73 Stat. 519, 29 U.S.C.A. §§ 401-531 (1960 Supp.).

72 Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. 141(b) (1958).

73 N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); American Communications Ass'n v. Douds, 339 U.S. 382, 387 (1950).

74 Hays, The Supreme Court and Labor Law, October Term 1959, 60 Colum. L. Rev. 901, 925 (1960). Cf., Note 70 Yale L.J. 611, 620-22 (1961).

75 See generally, Labor Injunctions and Judge Made Labor Law: The Contemporary Role of Norris-Laguardia, 70 Yale L.J. 70, 94-100 (1961).

A circuit court has denied specific enforcement of a no-strike clause, holding that despite Section 301 of the Labor Management Relations Act, that restrictions imposed on the court's jurisdiction by the Norris-LaGuardia Act were still applicable [A. H. Bull Steamship Co. v. Seafarer's Int'l Union, 250 F.2d 326 (2d Cir. 1957)]. The court noted that where the drafters of Taft-Hartley wished to make the provisions of the Norris Act inapplicable, they did so expressly and for this reason the court would not imply a partial repeal of the latter statute. The court gave effect to Section 301 to the extent of allowing damages for breach of contract.

Another circuit in a recent decision has enjoined a strike in violation of an arbitration clause [Chauffers Union v. Yellow Transit Freight Lines, 282 F.2d 345 (10th Cir. 1960), cert. granted, 29 U.S.L. Week 3203 (U.S. Jan. 9, 1961)]. The results reached by the two cases may be reconciled, although the court in the latter decision did not attempt to do so (at 349), because the issues presented by the two cases are quite different. The employer is under a statutory duty to bargain continuously during the life of the contract in regard to those matters which were left unresolved by the contract or were not contemplated at the time of its execution [The Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), enforcement granted 196 F.2d 680 (2d Cir. 1952); Cf. Local 9735, United Mine Workers v. N.L.R.B., 258 F.2d 146 (D.C. Cir. 1958)]. The exercise of organized economic power may be vital to obtain the employer's prompt compliance with his duty to bargain collectively [Cf. N.L.R.B. v. Insurance Agents Union, 361 U.S. 488, 495 (1960)] and it was the purpose of the Norris Act to protect this power [Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co., 353 U.S.

Justice Douglas, speaking for the majority, expressed the view that a collective bargaining agreement which contained a broad arbitration clause and a blanket no-strike clause was the ideal method for labor and management to fulfill their statutory duty to bargain collectively.[76] The concurring opinion stated that the presence of a no-strike clause was not necessary to the result reached,[77] and if this is an accurate expression of the opinion of the majority, of what significance is Justice Douglas' emphasis upon the fact that arbitration is the "quid pro quo" for a no-strike clause?

It would seem to point in the direction of carrying the Court's policy to its logical conclusion: that is, if the Norris-LaGuardia Act does not prohibit an injunction ordering an employer to arbitrate or enforcing an arbitrator's award, then it should follow that a strike in regard to a matter subject to arbitration should be enjoined and the union ordered to proceed to arbitration, and a strike aimed at nullifying an award unfavorable to the

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30, 40-41 (1957)]. Section 301 of the Taft-Hartley Act has the effect of subjecting the union to liability for damages when it violates a no-strike clause, but the Norris Act protects the union from an injunction in doing so [A. H. Bull Steamship Co. supra; Cf. Labor Management Relations Act § 13, 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958), N.L.R.B. v. Drivers Union, 362 U.S. 274, 282 (1960)]. Thus the union is free to weigh the alternatives and exercise a choice.

The case of a contract with a no-strike clause and no provision for arbitration must be contrasted with a contract in which the union has relinquished its right to strike in return for arbitration: the latter contract makes provision for the continuous obligation to bargain. A literal reading of the Norris Act would bar a federal court from specifically enforcing a no-strike clause coupled with provisions for arbitration [Chauffers Union v. Yellow Transit Freight Lines, supra, at 350; See, Note, 72 Harv. L. Rev. 354 (1958)]; however, an examination of the legislative history of the Norris Act and the purposes it was designed to achieve would point to an opposite result. The Norris Act was aimed at restricting the federal equity power in order to curb the injunctive abuses then prevalent (Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co., supra) and with these exceptions the federal courts retain their common law equity jurisdiction [United States v. Mine Workers, 330 U.S. 258, 270 (1946)]. There is evidence from the legislative history that Congress contemplated that the Norris Act would not be applicable to situations where the parties have channeled their obligation to bargain (Cf. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co., supra). Surely it cannot be argued that the union must retain the economic power of the strike in order to coerce the arbitrator. The provision in the collective bargaining agreement that the arbitrator's decision is final would be rendered meaningless if a strike aimed at nullifying the award could not be enjoined [Cf. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)].

By arbitration the union has obtained a means of resolving disputes without resort to the use of economic weapons (Cf. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co., supra); the union should not be permitted to disrupt the channels of collective bargaining which it has voluntarily chosen. Further, the court can grant an injunction operating on both parties, ordering arbitration and thus insuring the employment of the channel the parties have chosen [Cf. Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R., 363 U.S. 528 (1960)].

[76] United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 567 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 n.4 (1960).

[77] American Manufacturing, supra note 76, at 573 (concurring opinion of Brennan, J.).

union should also be enjoined.[78] Thus the policy would have full symmetry being equally binding on both parties. It was this latter aspect which worried Justice Frankfurter in his dissent in the *Lincoln Mills* case[79] and whether the majority is willing to accept the full implications of the doctrine remains to be seen.

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[78] See supra note 75.

[79] Textile Workers v. Lincoln Mills of Alabama, 353 U.S. 448, 462-63 (1957) (dissenting opinion of Frankfurter, J.).