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Herbert G. Keene Jr.

THE SUPREME COURT, SECTION 301 AND NO-STRIKE CLAUSES: FROM *LINCOLN MILLS* TO *AVCO* AND BEYOND

HERBERT G. KEENE, JR.†

INTRODUCTION

IN 1947 CONGRESS enacted section 301 of the Taft-Hartley Act, an innocuous-enough looking provision on its face, which opened the doors of the federal courts to suits for violations of collective bargaining agreements, between employers and labor organizations in industries affecting commerce, without regard to the amount in controversy or the citizenship of the parties.[1] Ten years later, in *Textile Workers Union v. Lincoln Mills,*[2] the United States Supreme Court held that section 301 was substantive as well as jurisdictional in nature and directed the federal courts to commence fashioning a body of federal common law to govern suits brought under section 301. This directive was intended to achieve two objectives: (1) the development of a uniform body of national labor law, and (2) the effective enforcement of collective bargaining agreements. These two objectives collided head-on five years thereafter in *Sinclair Refining Co. v. Atkinson.*[3] Therein, the Supreme Court, in a 5–3 decision, concluded that federal courts were barred by the Norris-LaGuardia Act[4] from enjoining strikes in breach of no-strike clauses even though such strikes were in violation of the very collective bargaining agreements for whose enforcement section 301 had been enacted. Recently, in April 1968, the Supreme Court held in *Avco Corp. v. Aero Lodge No. 735, I.A.M. & A.W.*[5] that all actions brought for violations of collective bargaining agreements, between employers and labor organizations in industries

† Member of the Pennsylvania and District of Columbia Bars. A.B., College of the Holy Cross, 1958; LL.B., Georgetown University, 1963.

1. The Labor-Management Relations Act (Taft-Hartley Act) § 301, 29 U.S.C. § 185 (1964), provides in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, 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.
>
> (b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . .

2. 353 U.S. 448 (1957).
3. 370 U.S. 195 (1962).
4. 47 Stat. 70 (1932), 29 U.S.C. §§ 101–15 (1964).
5. 390 U.S. 557 (1968).

affecting commerce, including those instituted in state courts, arise under section 301, are within the original jurisdiction of the federal district courts and are, therefore, removable to those courts.[6] But, the federal courts of course, are barred from issuing injunctions in labor disputes by section 4 of the Norris-LaGuardia Act.[7]

Whether, in the interests of uniform national labor law, state courts are now bound by the proscriptions contained in the Norris-LaGuardia Act with the result that they can no longer issue injunctions against strikes in breach of no-strike clauses has not yet been answered. However, if such be the case, the Supreme Court has achieved uniformity of national labor law at the sacrifice of the basic purpose of section 301 which was to increase — not decrease — the enforceability of collective bargaining agreements, including promises to arbitrate grievances, and their recognized *"quid pro quo"*[8] no-strike clauses. It is the purpose of this paper to trace the path taken by the Supreme Court which has led to this apparent impasse in national labor goals. Also explored is a possible solution still available to the Court which, if followed, would advance both the effective enforcement of collective bargaining agreements and the continuing development of a uniform national law of labor contracts. The underlying thesis is that Congress never contemplated, let alone intended, the situation existing today with respect to the enforcement, or more aptly, the non-enforcement, of the no-strike clause; and, further, that the time is long over-due for either the Court or Congress to rescue the no-strike clause from its judicially legislated limbo or to bury it and be done with it. Our national law of labor relations, in its day-to-day application, requires no less.

SECTION 301 AS SUBSTANTIVE LAW:

Textile Workers v. Lincoln Mills

Congress enacted the Labor Management Relations Act (Taft-Hartley Act) of 1947,[9] amending the National Labor Relations Act (Wagner Act),[10] for the purpose of redressing the imbalance of power existing in the law in favor of labor unions as against employers.

6. The federal removal statute, which provides that a civil action commenced in a state court may be removed to an appropriate federal district court when the claim arises under the Constitution, treaties or laws of the United States and is within the original jurisdiction of the federal district courts, may be found at 28 U.S.C. § 1441 (1964).

7. 29 U.S.C. § 104 (1964).

8. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957). Even in the absence of an express no-strike clause, an agreement to arbitrate grievances gives rise to an implied promise not to strike during the term of the contract. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

9. 29 U.S.C. §§ 141 *et seq.* (1964).

10. 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 151 *et seq.* (1964).

Section 301 of the Taft-Hartley Act was enacted to open the federal courts to suits for violations of collective bargaining agreements and, thereby, facilitate enforcement of such contracts by removing some of the procedural disabilities blocking suits against unions in state courts. The diverse common law rules of the various states had theretofore frequently frustrated all attempts to secure service of process upon and execution of judgment against unions. Employers, on the other hand, were easily sued. Congress designed section 301 to remedy this inequitable situation; but no attempt was made to remove or restrict state court jurisdiction. Acting under the Commerce Clause, Congress simply made the federal courts a proper forum for suits for violations of labor contracts between employers and labor unions in industries affecting interstate commerce and expedited the institution of such suits against labor unions. In doing so, Congress plainly meant to increase the enforceability of collective bargaining agreements and thereby further insure industrial peace and tranquility.[11]

During the ten year period, 1947-1957, a split of opinion developed among the circuit courts of appeals as to whether section 301 was merely jurisdictional in nature or whether it contained substantive content as well. This question was resolved by the Supreme Court in 1957 in the landmark case of *Textile Workers Union v. Lincoln Mills*[12] in which a labor union instituted an action under section 301 in a federal district court seeking specific performance of the arbitration provisions contained in a collective bargaining agreement. In affirming the district court's grant of the requested relief, and reversing the court of appeals,[13] the Supreme Court, speaking through Mr. Justice Douglas for a five man majority, held that section 301 carried substantive content and "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements and . . . specific performance of promises to arbitrate grievances. . . . "[14] The Court stated: "We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws."[15] Justices Burton and Harlan concurred in the conclusion that the federal district

11. The significant legislative history of section 301 is contained in an appendix to Mr. Justice Frankfurter's dissent in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 485–546 (1957).

12. 353 U.S. 448 (1957). The Supreme Court's holding in the earlier case of Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955), that section 301 was "a mere procedural provision" was later completely discredited as "no longer authoritative as precedent" in Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

13. 230 F.2d 81 (5th Cir. 1956).

14. 353 U.S. at 451.

15. *Id.* at 456.

court had jurisdiction to hear the suit but disagreed with the majority's conclusion that the substantive law to be applied was federal law. Mr. Justice Frankfurter, in a lengthy and sharp opinion, dissented on two principal grounds that: (1) section 301 was an unconstitutional attempt to grant jurisdiction to federal courts over contracts created by state substantive law in violation of the provisions respecting federal judicial power stated in Article 3 of the Constitution; and (2) section 301, in any event, was merely jurisdictional in nature, affording a federal forum to suits for violations of labor contracts. Justice Frankfurter attached a 62 page summary of the legislative history of section 301 to his dissenting opinion in support of his belief that section 301 did not call for the fashioning of a new body of federal substantive law and predicted that there would be vast problems created by the Court's decision since it brought into conflict state law and federal law, and state courts and federal courts.[16]

A fair reading of the legislative history of section 301 would seem to lend considerable support to Justice Frankfurter's view that section 301 was intended to be merely procedural in nature. The whole thrust of the section was to increase the enforceability of collective bargaining agreements by permitting suits for their violation to be brought not merely in state courts, as had formerly been the case, but also in federal courts regardless of diversity of citizenship or amount in controversy. Labor organizations, as unincorporated associations, had proven themselves procedurally immune to suit in several states whereas employers, as corporations, were easily sued. The jurisdiction of state courts was not to be supplanted, but supplemented. Section 301 suits were to be subject to "the usual processes of the law."[17] At the time of the adoption of section 301 these "processes," as administered by the state courts, included the several states' own brands of both legal and equitable relief. Nonetheless, the holding in *Lincoln Mills* was clear:

> Federal interpretation of the federal law will govern, not state law. . . . [S]tate law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.[18]

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16. *Id.* at 462. Mr. Justice Frankfurter had previously expressed his views on this subject in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

17. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42 (1947).

18. 353 U.S. at 457.

Undoubtedly, the majority of the Court believed that the development of a body of uniform federal law governing suits for violations of collective bargaining agreements would materially advance the purpose of section 301 and increase the enforceability of such agreements.[19]

The question of whether the Norris-LaGuardia Act's proscriptions against the issuance of injunctions in labor disputes prevented the Court from decreeing specific performance of the employer's promise to arbitrate grievances received short-shrift from the Court. Failure to arbitrate was not viewed "as part and parcel of the abuses against which the act was aimed."[20] Furthermore, the Court noted, section 8 of the Norris-LaGuardia Act[21] encourages arbitration of labor disputes, for it denies injunctive relief to anyone who has failed to make "every reasonable effort" to settle the dispute by negotiation, mediation, or "voluntary arbitration." Thus, concluded the Court, "we see no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act."[22] Whether a majority of the Court informally considered or discussed what disposition it would make of a suit by an employer, rather than by a labor union, to specifically enforce a union's no-strike promise, the *quid pro quo* for the employer's arbitration promise, is, of course, unknown. However, for a fleeting moment, at least, following the Court's *Lincoln Mills* decision, the hope of employers that enforcement would be granted in such a case found reasonably firm support in Mr. Justice Douglas' majority opinion that violations of arbiration clauses were without the "kinds of acts" against which Norris-LaGuardia was aimed.

ARBITRATION — THE FAVORED MEANS: THE *Steelworkers Trilogy*

In 1960, the Supreme Court set to work in developing the body of federal labor contract law called for by *Lincoln Mills*. In the now-famous *Steelworkers' Trilogy* of cases,[23] the Court firmly established

19. *See* Note, *The Federal Common Law,* 82 HARV. L. REV. 1512, 1531–35 (1969).
20. 353 U.S. at 458.
21. 29 U.S.C. § 108 (1964).
22. 353 U.S. at 458. In support of this conclusion, Mr. Justice Douglas referred to the accommodation effected between the Norris–LaGuardia Act and the Railway Labor Act in Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949) and Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937). These cases would next be cited by Mr. Justice Brennan, joined by Mr. Justice Douglas, in the dissent in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).
23. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

arbitration as the favored means for resolving industrial disputes and later denominated it "a kingpin of federal labor policy."[24] In *United Steelworkers of America v. American Mfg. Co.*,[25] an action by a union to compel arbitration of a grievance had been dismissed by the lower federal courts as frivolous and accordingly not subject to arbitration. In reversing and remanding for arbitration, the Supreme Court held that the function of the judiciary "is very limited when the parties have agreed to submit all questions of contract and interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . . The courts, therefore, have no business weighing the merits of the grievance. . . ."[26] In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[27] also an action by a union to compel arbitration of a grievance, the lower federal courts had dismissed the union's complaint on the ground that the asserted grievance fell outside the parties' arbitration agreement. In reversing and remanding for arbitration, the Court stated: "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement. . . ."[28] In the last of the three cases, *United Steelworkers of America v. Enterprise Wheel and Car Corp.*,[29] the union instituted an action to enforce an arbitration award. In reversing the Court of Appeals' refusal to do so, the Court declared that "the question of interpretation of the collective bargaining agreement is a question for the arbitrator. 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. . . ."[30] so long as the arbitrator stays within the jurisdiction conferred upon him by the contract. The *Trilogy* thus instructs the courts not to investigate the merits of either grievances or arbitration awards, but to confine themselves to a consideration

24. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 226 (1962).
25. 363 U.S. 564 (1960).
26. *Id.* at 567–68.
27. *Id.* at 574.
28. *Id.* at 581.
29. *Id.* at 593.
30. *Id.* at 599.

of the pure contract questions — did the parties agree to arbitration of the dispute at hand and did the arbitrator, in issuing his award, stay within the jurisdiction granted him by the parties' agreement? If the answer to both of these questions is in the affirmative, then the court, whether state or federal, is to enforce the arbitration award as a matter of federal labor policy. In such a manner, the purpose of section 301 to enhance the enforceability of collective bargaining agreements is promoted and the directive of *Lincoln Mills* that there be a federal common law of labor contracts is complied with.[31] In addition, the mandate of Norris-LaGuardia that federal courts not interfere in industrial disputes, a task for which they are concededly ill-equipped, is preserved inviolate and extended to the arbitration process.

STATE COURT JURISDICTION:

Dowd Box AND *Lucas Flour*

The question of the state courts' continuing jurisdiction over suits for violations of collective bargaining agreements between employers and unions engaged in commerce, following the sweeping pronouncements of *Lincoln Mills,* was brought before the Court in 1962 in the case of *Dowd Box v. Courtney.*[32] Relying upon the legislative history of section 301 the Court unequivocally held that "the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. [Moreover,] there is explicit evidence that Congress expressly intended *not* to encroach upon the existing jurisdiction of the state courts."[33] Jurisdiction over suits for the enforcement of labor contracts between employers and unions engaged in commerce, accordingly, is not vested exclusively in the federal courts. The state courts enjoy concurrent jurisdiction with the federal courts over such actions. But, in keeping with the dictates of *Lincoln Mills,* federal substantive law must be applied, whether the forum be state or federal. The questions of whether the Norris-LaGuardia Act might be applicable to a suit brought in a state court for a union's violation of a labor agreement, and whether such a suit could be removed to a federal court, were expressly reserved for future disposition.[34]

31. *See* Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law,* 63 MICH. L. REV. 751 (1965); Givens, *Section 301, Arbitration and the No-Strike Clause,* 11 LAB. L.J. 1005 (1960).

32. 368 U.S. 502 (1962).

33. *Id.* at 508–09 (emphasis added).

34. *Id.* at 514.

During the same term, the case of *Teamsters Local 174 v. Lucas Flour Co.*,[35] was decided by the Court. In an 8–1 decision, affirming a state court's award of damages to an employer for a union's breach of its no-strike clause, the Court expanded upon its *Lincoln Mills'* directive that principles of federal substantive labor law be applied to state-instituted section 301 actions. Emphasizing the problems that might arise from a lack of uniformity between federal and state courts in the interpretation and enforcement of labor contracts the Court held that

> incompatible doctrines of local law must give way to principles of federal labor law. . . . The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills,* requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy. . . . [T]he subject matter of § 301(a) "is peculiarly one that calls for uniform law."[36]

Accordingly, concluded the Court, "we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."[37] However, because the employer in this case did not seek specific performance of the no-strike clause, but only money damages for its breach, the Court's opinion was totally silent on the applicability of Norris-LaGuardia to state court section 301 actions.

SECTION 301 AND NORRIS-LAGUARDIA:

Sinclair v. Atkinson

Born of another age when the union movement was in need of protection against the federal courts' overzealous issuance of injunctions in labor disputes, the Norris-LaGuardia Act absolutely prohibits federal court injunctions against, *inter alia,* peaceful picketing and strikes in any case involving or growing out of a labor dispute.[38]

35. 369 U.S. 95 (1962).
36. *Id.* at 102–03.
37. *Id.* at 104.
38. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1964), provides in pertinent part:

> 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 . . . 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 Act also establishes severe procedural limitations on federal courts' issuance of injunctions against any activity undertaken in connection with a labor dispute even if such activity includes threats of violence or other unlawful conduct.[39] In addition, however, as noted by Mr. Justice Douglas in *Lincoln Mills,* the Act encourages resort to arbitration in labor disputes by prohibiting the federal courts from issuing restraining orders or injunctions in favor of anyone who has failed to make "every reasonable effort" to settle a dispute by negotiation, mediation, or "voluntary arbitration."[40]

The clash between the Norris-LaGuardia Act's proscriptions against the grant of injunctive relief in labor disputes and the developing federal law of section 301 favoring full and ready enforcement of labor contracts occurred in the now-famous case of *Sinclair Refining Co. v. Atkinson.*[41] Therein, the employer instituted an action against a union with which it had a collective bargaining agreement, complaining that, in violation of the arbitration and no-strike provisions of the contract, the union had over a period of some 19 months engaged in work stoppages and strikes on 9 separate occasions, each of which plainly grew out of a grievance which was subject to arbitration under the contract, and, therefore, fell squarely within the union's promise not to strike. The employer claimed that it had no adequate remedy at law to protect its contractual rights and accordingly requested the federal district court, in which it commenced the action, to enjoin the union "preliminarily at first, and thereafter permanently, from aiding, abetting, fomenting, advising, participating in, ratifying, or condoning any strike, stoppage of work, slowdown or any other disruption of, or interference with normal employment . . . in support of, or because of, any matter or thing which is, or could be, the subject of a grievance under the grievance procedure of the said contract. . . ."[42]

The district court dismissed the complaint on the ground that section 4 of Norris-LaGuardia prohibited the Court from granting the injunctive relief requested.[43] The dismissal was sustained by the court of appeals[44] and, in a decision of enormous impact, affirmed by the Supreme Court by a 5–3 vote, with Mr. Justice Black delivering the opinion of the Court.

39. 29 U.S.C. § 107 (1964).

40. 29 U.S.C. § 108 (1964).

41. 370 U.S. 195 (1962). *See also* Boys Markets, Inc. v. Retail Clerks, Local 770, ___ F.2d ___ (9th Cir. 1969), where the Ninth Circuit recently found *Sinclair* to be controlling in similar circumstances.

42. *Id.* at 197–98.

43. 187 F. Supp. 225 (N.D. Ind. 1960).

44. 290 F.2d 312 (7th Cir. 1961).

The Court held that (1) a dispute over a violation of a collective bargaining agreement was a "labor dispute" within the meaning of the Norris-LaGuardia Act; (2) section 4 of the Norris-LaGuardia Act therefore prohibited the issuance of the requested injunctive relief; and (3) section 301 of the Taft-Hartley Act did not repeal, or otherwise compromise or narrow, the proscriptions against injunctions contained in Norris-LaGuardia.

In support of its conclusion that section 301 neither explicitly nor impliedly repealed section 4 of Norris-LaGuardia so as to permit federal courts to enforce arbitration agreements by enjoining strikes in breach of them, the Court extensively reviewed and relied upon section 301's legislative history. Although Congress' principal purpose in enacting section 301 was to increase the enforceability of labor contracts, the Court correctly observed that all attempts in Congress to include a provision in section 301 repealing the anti-injunction provisions of Norris-LaGuardia had been unsuccessful. While Congress had specifically withdrawn certain sections of the National Labor Relations Act (Wagner Act), as amended by the Taft-Hartley Act, from the proscriptions of Norris-LaGuardia,[45] it did not do so with respect to section 301. In addition, subsection (e) of section 302 specifically repealed the anti-injunction provisions of Norris-LaGuardia in certain cases involving payments made by employers to unions or union representatives.[46]

> Thus the failure of Congress to include a provision in § 301 expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act [was] evaluated in the context of a statutory pattern that indicate[d] not only that Congress was completely familiar with these provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them in situations where such repeal seemed desirable.[47]

The bill passed by the House of Representatives had expressly provided that Norris-LaGuardia's anti-injunction provisions would not apply to section 301 suits. The Senate bill had provided that the National Labor Relations Board, not private persons, could enjoin breaches of collective bargaining agreements as unfair labor practices.

45. 61 Stat. 146, 155 (1947), *as amended* 29 U.S.C. §§ 160(h), 178(b) (1964). Congress amended § 10(h) of the National Labor Relations Act, and § 208(b) of the Taft-Hartley Act, by permitting injunctions to be obtained in certain kinds of cases by the National Labor Relations Board or the Attorney General. *See also* §§ 10(j) and 10(l), 29 U.S.C. §§ 160(j) and 160(l) (1964), of the Taft-Hartley Act empowering and, in some instances, requiring the N.L.R.B. to obtain injunctions in labor cases.

46. 61 Stat. 157, 29 U.S.C. § 186(e) (1964).

47. 370 U.S. at 205.

Following joint conference, however, neither of these provisions was adopted. As Senator Taft, chairman of the Conference Committee, explained the results of the joint conference to the Senate: "The Conferees . . . rejected the repeal of the Norris-LaGuardia Act."[48] Accordingly, the majority of the Court concluded that the legislative history of section 301 amply demonstrated Congress' rejection of the repeal of Norris-LaGuardia's anti-injunction provisions and that "[i]n doing so, it [had] set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration"[49] and the enforcement of collective bargaining agreements. In so concluding, the Court was undoubtedly correct as a matter of statutory construction and interpretation. But since when were principles of statutory construction, to the complete exclusion of considerations of federal labor policy, utilized by the Court to resolve such basic questions in the law of labor relations and the enforcement of collective bargaining agreements? Certainly, there was precious little legislative history to support the Court's conclusion in *Lincoln Mills* that section 301 called for the creation of a uniform national law of labor contracts. As a matter of federal labor policy the decision of the majority in *Sinclair* was, and still is, open to serious question.

THE DISSENT IN *Sinclair* — ACCOMMODATION

In a powerful dissent, Mr. Justice Brennan, joined by Justices Douglas and Harlan, took the Court to task on this score. Conceding that "§ 301 of the Taft-Hartley Act did not, for purposes of actions brought under it, 'repeal' § 4 of the Norris-LaGuardia Act . . .", but recognizing that "the two provisions do coexist [and] that they apply to the case before us in apparently conflicting senses," Mr. Justice Brennan saw the Court's duty as seeking out "that accommodation of the two which will give the fullest possible effect to the central purposes of both. . . ."[50] Thus, Mr. Justice Brennan would have resolved "the surface conflict between the two statutory commands"[51] by "judicial accommodation,"[52] that is, by reading them together as a harmonizing whole. This, of course, would have resulted in placing section 301 actions beyond the ambit of the anti-injunction provisions of Norris-LaGuardia. In support of this theory of "accommodation," Mr. Justice Brennan pointed to earlier decisions of the Court in which

48. 93 CONG. REC. 6445-56 (1947), *quoted in* 370 U.S. at 208.
49. 370 U.S. at 213.
50. *Id.* at 215-16.
51. *Id.* at 217.
52. *Id.* at 224.

Norris-LaGuardia's anti-injunction provisions were accommodated to the objectives of the Railway Labor Act.[53] Reliance was also placed on the Court's decision in *Lincoln Mills:*

> It is strange, I think, that § 7 of the Norris-LaGuardia Act need not be read, in the face of § 301, to impose inept procedural restrictions upon the specific enforcement of an employer's contractual duty to arbitrate, but that § 4 [of the Norris-LaGuardia Act] must be read, despite § 301, to preclude absolutely the issuance of an injunction against a strike which ignores a union's identical duty.[54]

Furthermore, Mr. Justice Brennan did not believe that either section 301 or its legislative history required the majority's decision; the legislative history of section 301 was viewed as ambiguous at best. In the light of *Lincoln Mills* and the *Steelworkers Trilogy,* section 301 surely was not limited to damage actions. More likely than not, Congress never anticipated that a body of law would develop around section 301 in such a manner as to bring it into a head-on collision with Norris-LaGuardia. In such a situation, concluded the dissent, appropriate resolution of the statutory "surface conflict" lies in "judicial accommodation" of the competing interests. In the view of the dissent, the power to enjoin a strike over an arbitrable grievance was "essential to the uncrippled performance of the Court's function under § 301."[55]

Mr. Justice Brennan then addressed himself to the confusion, he felt, the majority's decision had created in the development of a uniform body of federal law governing suits under section 301:

> The question arises whether today's prohibition of injunctive relief is to be carried over to state courts as a part of the federal law governing collective agreements. If so, § 301, a provision plainly designed to *enhance* the responsibility of unions to their contracts, will have had the opposite effect of depriving employers of a state remedy they enjoyed prior to its enactment.
>
> On the other hand if, as today's literal reading suggests . . . States remain free to apply their injunctive remedies against con-

53. In Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 40 (1957), the Court concluded that there "must be an accommodation of [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." *See also* Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949) and Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 562–63 (1937), which as stated in note 22 *supra,* were relied upon by Mr. Justice Douglas in *Lincoln Mills* in support of the majority's conclusion that Norris-LaGuardia did not prevent specific enforcement of an employer's promise to arbitrate grievances.

54. 370 U.S. at 219–20.

55. *Id.* at 216–17.

certed activities in breach of contract, the development of a uniform body of federal contract law is in for hard times. So long as state courts remain free to grant the injunctions unavailable in federal courts, suits seeking relief against concerted activities in breach of contract will be channeled to the States whenever possible. Ironically, state rather than federal courts will be the preferred instruments to protect the integrity of the arbitration process, which *Lincoln Mills* and the *Steelworkers* decisions forged into a kingpin of federal labor policy. Enunciation of uniform doctrines applicable in such cases will be severely impeded. Moreover, the type of relief available in a particular instance will turn on fortuities of locale and susceptibility to process — depending upon which States have anti-injunction statutes and how they construe them.

I have not overlooked the possibility that removal of the state suit to the federal court might provide the answer to these difficulties. But if § 4 is to be read literally, removal will not be allowed. And if it is allowed, the result once again is that § 301 will have had the strange consequence of taking away a contract remedy available before its enactment.[56]

Sinclair's IMMEDIATE AFTERMATH — FEDERAL REMOVAL

The fact that *Sinclair* raised more questions than it answered is undeniable. Mr. Justice Brennan's "judicial accommodation" theory would have settled these issues before they arose but, of course, those views did not carry the day. The most important question left in the wake of *Sinclair* was whether the anti-injunction provisions of Norris-LaGuardia were now part of the federal common law of section 301 heralded by *Lincoln Mills* and, therefore, to be applied by the states in section 301 actions in keeping with the decision in *Lucas Flour,* despite section 301's clear purpose to increase — not decrease — the effective enforcement of collective bargaining contracts. While *Sinclair* did not restrict or limit federal court jurisidiction, as it has existed since the time of the passage of Norris-LaGuardia, the application of Norris-LaGuardia to state court section 301 actions would obviously extend the anti-injunction provisions of that Act into an area — the states — previously free of such restrictions unless voluntarily enacted in a state's own laws.[57]

56. *Id.* at 226–27.

57. For excellent but differing appraisals of the *Sinclair* decision and its impact, *see* Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 COLUM. L. REV. 1027 (1963); Hanslowe, *Labor Relations Law,* 16 SYRACUSE L. REV. 244, 254 (1965); Moskowitz, *Enforcement of No-Strike Clauses By Injunction,* 46 B.U.L. REV. 343 (1966); Note, *Specific Enforcement of No-Strike Clauses: The Enigma of Sinclair v. Atkinson,* 19 RUTGERS L. REV. 507 (1965).

However, with state courts, jealous of their otherwise rapidly contracting jurisdiction, and, therefore, hardly ready to adopt such a view, the more immediate problem was whether state court actions under section 301, as permitted by *Dowd Box,* were subject to removal to federal district courts as suits arising under a law of the United States, *i.e.,* section 301, and within the original jurisdiction of the federal courts. In an attempt to avoid such removal, employers faced with strikes or work stoppages in violation of labor contracts, commenced the practice of not including damage claims in their state suits for injunctions against such activities. This practice was adopted on the theory that since section 4 of Norris-LaGuardia uses the language "No court of the United States shall have jurisdiction to issue any restraining order," a state suit for only an injunction could not be removed to a federal district court as one within the original jurisdiction of the federal courts; whereas, if a damage claim for breach of the labor contract were included, a federal court might with more justification choose to assert its jurisdiction and, in its exercise thereof, dismiss the request for injunctive relief as beyond its power under Norris-LaGuardia, thereby leaving the employer with damages only, a weak substitute for performance of the labor agreement.[58]

With this adjustment in pleadings, employer's attorneys continued to seek and obtain state court injunctions against strikes in violation of collective bargaining agreements comfortable in the thought that removal would be denied because of Norris-LaGuardia's no-jurisdiction language. This view reached its apogee in 1964 in the Third Circuit Court of Appeals' decision in *American Dredging v. Marine Local 25.*[59] Therein, on a motion by the employer to remand its suit for an injunction against a strike in breach of its labor contract to a state court, it was held that (1) the action was based "solely on a state-created right to bring suit for violation of a collective bargaining agreement and sought only a remedy available under state law . . ."[60]; (2) the action, therefore, did not arise under section 301 or any other law of the United States; and (3) the action was not within the origi-

58. 28 U.S.C. § 1441 (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 non-removable 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.

59. 338 F.2d 837 (3d Cir. 1964), *cert. denied,* 380 U.S. 935 (1965). *See also* California Packing Co. v. Local 142 ILWU, 253 F. Supp. 597 (D. Hawaii 1966); Dixie Machine Welding & Metal Works v. Marine Engineers Beneficial Ass'n, 243 F. Supp. 489 (E.D. La. 1965); Merchants Refrigerating Co. v. Warehouse Union, 213 F. Supp. 177 (N.D. Cal. 1963).

60. 338 F.2d at 846.

nal jurisdiction of the district court because, under Norris-LaGuardia, the district court was without jurisdiction to *entertain and determine* the suit. Accordingly, the Court directed that the case be remanded to the state court as having been improperly removed at the behest of the union.

Other federal courts, however, had reached the contrary result holding that all actions for violations of collective bargaining contracts arose under section 301, were within the original jurisdiction of the federal courts, *i.e.,* the federal courts possessed the capacity to *entertain although not to determine* such suits, and were therefore removable.[61] A split of opinion on this issue developed in the Courts of Appeals during 1966 and 1967 with the Ninth Circuit's decision in *Johnson v. England,*[62] and the Sixth Circuit's decision in *Avco Corp. v. Aero Lodge No. 735, I.A.M. & A.W.*[63] Both these Courts of Appeal expressly declined to follow the Third Circuit's decision in *American Dredging* and refused to remand employer's suits for injunctive relief against strikes in breach of no-strike clauses to state courts. The Sixth Circuit held in *Avco* that (1) in the light of *Lincoln Mills* and *Lucas Flour* "State law does not exist as an independent source of private rights to enforce collective bargaining contracts . . ."[64]; (2) the employer's contention that its action was founded upon a breach of contract arising under state law was therefore without merit; and (3) the action was within the district court's original jurisdiction for that court possessed the capacity to entertain it, although it was without power to grant the kind of injunctive relief requested. The Sixth Circuit opinion in *Avco* further stated that even if the action had remained in the state court, the state court, in keeping with *Lincoln Mills* and *Lucas Flour,* would have had to apply federal labor law and, consequently, would have been "limited to the remedies available under Federal law . . ."[65] which, of course, in the light of *Sinclair,* do not include injunctions against strikes in breach of collective agreements.

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61. *See, e.g.,* Sea-Land Service, Inc. v. Hall, 276 F. Supp. 56 (S.D.N.Y. 1967); Sealtest Foods Division v. Conrad, 262 F. Supp. 623 (N.D.N.Y. 1966); Publishers' Ass'n v. Newspaper Union, 246 F. Supp. 293 (S.D.N.Y. 1965); Tri-Boro Bagel Co. v. Bakery Union, 228 F. Supp. 720 (E.D.N.Y. 1963); Crestwood Dairy, Inc. v. Kelley, 222 F. Supp. 614 (E.D.N.Y. 1963).

62. 356 F.2d 44 (9th Cir. 1966).

63. 376 F.2d 337 (6th Cir. 1967).

64. *Id.* at 340.

65. *Id.* at 343.

FEDERAL REMOVAL UPHELD:

Avco Corp v. Aero Lodge 735

With a direct conflict between Circuits, the Supreme Court granted a writ of certiorari in the *Avco* case and, on April 8, 1968, in a rather brief opinion, without dissent, affirmed the Sixth Circuit's judgment upholding federal removal of section 301 actions.[66] Citing *Lincoln Mills,* the Court held that a suit for breach of a collective bargaining agreement between an employer or union in an industry affecting commerce arises under section 301, a law of the United States, and is within the original jurisdiction of the federal courts for "the breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a different question from whether the court has jurisdiction over the parties and the subject matter. . . . Title 28 U.S.C. § 1337 says that, 'The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . .' It is that original jurisdiction that a § 301 action invokes."[67]

The Court, however, reserved decision on the question of whether "the remedies available in State Courts are limited to the remedies available under Federal law,"[68] saying "[t]hat conclusion would suggest that state courts are precluded by § 4 of the Norris-LaGuardia Act from issuing injunctions in labor disputes, even though the defendant does not exercise his right — which we confirm today — to remove the case to the District Court . . . . We have no occasion to resolve that matter here, since respondents did elect to have the case removed."[69] The Court also expressed no opinion on the district court's dissolution of the state court-issued injunction observing "[w]hether it did so because it felt that action was required by *Sinclair Refining Co. v. Atkinson* . . . or because of its equity powers or both is not clear."[70] The concurring Justices expressed their hope that the Court would "have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion."[71]

The Court's decision in *Avco* thus laid to rest the question of the removability of suits for breaches of collective bargaining agreements

66. Avco Corp. v. Aero Lodge No. 735, I.A.M. & A.W., 390 U.S. 557 (1968) (Justices Stewart, Harlan and Brennan concurring).
67. 390 U.S. at 561-62.
68. *Id.* at 560, n.2.
69. *Id.*
70. *Id.* at 561, n.4.
71. *Id.* at 562. It is interesting to note that Mr. Justice Brennan concurred in the result in *Avco*, despite his statement in his dissent in *Sinclair* that removal should be denied. He did, however, continue to question the validity of *Sinclair* as federal labor policy.

but did nothing to clarify the question of the impact of *Sinclair* upon state courts. The two critical questions — does *Lincoln Mills* require the state courts to apply Norris-LaGuardia's anti-injunction provisions to state-instituted section 301 actions as part of the federal substantive law of labor contracts; and, does *Sinclair* require federal district courts to which state-commenced section 301 suits have been removed to dissolve state-issued injunctions as in violation of Norris-LaGuardia — remain unanswered.

The strongest federal authority in support of the state courts' continuing jurisdiction to issue injunctions in section 301 suits is undoubtedly the Third Circuit's opinion in *American Dredging* which, although now overruled by *Avco* on the issue of federal removability, extensively reviewed the legislative and decisional history of the Norris-LaGuardia Act and concluded that the Act, "enacted as it was under Congress' constitutionally granted power to regulate the jurisdiction of inferior federal courts, limits only the jurisdiction of such courts; that the Act did not preempt the field with respect to litigation of the type here involved; and Congress cannot constitutionally limit the remedial powers of state courts where it has not preempted the field."[72] In other words, removal or not, state courts remain free to issue injunctions against breaches of collective bargaining agreements provided only their own laws do not prohibit the issuance of such decrees.[73]

However, at least two post-*Avco* federal decisions have held otherwise.[74] In *General Electric Co. v. Local 191,*[75] the Fifth Circuit affirmed dissolution of a state court-issued injunction following removal of the action to a federal district court, saying: "We are of the view that the District Court did not err in dissolving the injunction, not because either either [*sic*] *Sinclair* . . . or *Avco* . . . explicitly dictates that result, but because, in our view, once this case was removed, a failure to dissolve the state court injunction would have been tantamount to issuance of that same injunction by the federal district court, which, as we have just noted, would be proscribed by the Norris-LaGuardia Act under the *Sinclair* decision. [T]he case . . . having been removed as one falling within the District Court's original federal question, rather than diversity, jurisdiction, federal law is applicable."[76] The decision in *Day-Brite Lighting Division v. I.B.E.W.,*[77] rendered

72. 338 F.2d 837, 855 (3d Cir. 1964), *cert. denied,* 380 U.S. 935 (1964).
73. *See* Ford v. Boeger, 362 F.2d 999, 1005 (8th Cir. 1966).
74. As, indeed, does the Sixth Circuit's 1967 opinion in the *Avco* case itself.
75. 71 L.R.R.M. 2903 (5th Cir. 1969).
76. 71 L.R.R.M. at 2904.
77. 72 L.R.R.M. 2054 (N.D. Miss. 1969).

subsequent to, but not relying on, *General Electric,* restates the same position: "Federal jurisdiction being present, this court is required to dissolve the ex parte state court injunction which issued in a labor dispute affecting interstate commerce. § 4 of the Norris-LaGuardia Act so requires. . . . The state court injunction must be dissolved, not on the ground of its unlawfulness but because of paramount federal labor policy. . . ."[78]

The practical effect of *Avco* has, therefore, been to increase the already great concern of employers for the continuing enforceability of no-strike clauses — at least in state courts. Although 24 of the 50 states have "little Norris-LaGuardia Acts" on their books,[79] 10 such states do not apply their acts to strikes in violation of collective bargaining agreements.[80] Consequently, with "little Norris-LaGuardia Acts" an effective bar to state court injunctions in section 301 suits in only 14 states, the magnitude and potential impact of the issue posed by *Sinclair* and left unanswered in *Avco* is immediately apparent.[81]

78. 72 L.R.R.M. at 2059.

79. These are Arizona, ARIZ. REV. STAT. ANN. § 12-1808 (1956); Colorado, COLO. REV. STAT. ANN. § 80-4-16 (1963); Connecticut, CONN. GEN. STAT. REV. §§ 31-112-13 (1958); Hawaii, HAWAII REV. LAWS § 380 (Supp. 1963); Idaho, IDAHO CODE ANN. § 44-706 (1948); Illinois, ILL. ANN. STAT. ch. 48, § 2a (Smith-Hurd 1950); Indiana, IND. ANN. STAT. § 40-501 (1965); Kansas, KAN. STAT. ANN. § 60-904 (1964); Louisiana, LA. REV. STAT. ANN. § 23.841 (1964); Maine, ME. REV. STAT. ANN. tit. 26, § 5 (1964); Maryland, MD. ANN. CODE art. 100, §§ 63-75 (1957); Massachusetts, MASS. GEN. LAWS ANN. ch. 214, § 9A (1958); Minnesota, MINN. STAT. § 185.02-19 (1966); Montana, MONT. REV. CODES ANN. § 93-4203 (1947); New Jersey, N.J. REV. STAT. § 2A: 15-51-58 (1951); New Mexico, N.M. STAT. ANN. § 59-2-1 (1953); New York, N.Y. LABOR LAW § 807 (1965); North Dakota, N.D. CENT. CODE § 34-08-01 (1959); Oregon, ORE. REV. STAT. § 662.010 (1965); Pennsylvania, PA. STAT. tit. 43, § 206(a) (1965); Rhode Island, R.I. GEN. LAWS ANN. § 28-70-2 (1968); Washington, WASH. REV. CODE § 49.32.010 (1961); Wisconsin, WIS. STAT. § 103.56 (1963); Wyoming, WYO. STAT. ANN. § 27-239 (1957).

80. Colorado, COLO. REV. STAT. ANN. § 80-5-6(2)(c) (1963); Kansas, KAN. STAT. ANN. § 44-809(15) (1964); Louisiana, act declared unconstitutional in Doublas Publ. Serv. Corp. v. Gaspard, 225 La. 972, 74 So. 2d 192 (1954); Minnesota, MINN. STAT. § 179.11(1) (1961), *see* McLean Distrib. Co. v. Brewery Drivers Union, 254 Minn. 204, 94 N.W.2d 514, *cert. denied,* 360 U.S. 917 (1959); Montana, *see* State v. District Court, 61 L.R.R.M. 2159 (Mont. Sup. Ct. 1965); New York, post-*Sinclair*; Perry & Sons v. Robilotto, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (1965); Stretcher-Traung Lithograph Corp. v. Lithographers Union, 46 Misc. 2d 925, 260 N.Y.S.2d 1011 (Sup. Ct. 1965); Thaddeus Suski Productions, Inc. v. Vola, 47 Misc. 2d 773, 263 N.Y.S.2d 275, *aff'd,* 24 App. Div. 559, 260 N.Y.S.2d 826 (1965); Employer's Ass'n v. Operating Engineers, 60 L.R.R.M. 2006 (N.Y. Sup. Ct. 1965); Eastern Freightways, Inc. v. Deperno, 57 L.R.R.M. 2299 (N.Y. Sup. Ct. 1964) (not officially reported). Pre-*Sinclair*: Dairymen's Ass'n v. Conrad, 16 App. Div. 2d 869, 229 N.Y.S.2d 736 (1962); Anchor Motor Freight Corp. v. Teamsters Local 445, 5 App. Div. 2d 869, 171 N.Y.S.2d 511 (1958); McClean Trucking v. Doyle, 8 App. Div. 2d 789, 188 N.Y.S.2d 943 (1959); Oregon, *see* Weisfield, Inc. v. Haeckel, 28 L.R.R.M. 2055 (Ore. Cir. Ct. 1951); Pennsylvania, PA. STAT. tit. 43, § 206(d)(a) (1963); *see* Philadelphia Marine Trade Ass'n v. I.L.A., 382 Pa. 326, 115 A.2d 733 (1955), *cert. denied,* 350 U.S. 843 (1956); Washington, injunction provisions of Act declared unconstitutional in Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P.2d 397 (1936), *see also* Associated Gen'l Contractors v. Trout, 59 Wash. 2d 90, 366 P.2d 16 (1961); Wisconsin, WIS. STAT. § 111.06(2)(c) (1963).

81. In an interesting post-*Avco* decision, the Court of Appeals for the District of Columbia Circuit held in Electrical Workers v. NLRB, 409 F.2d 150 (D.C. Cir. 1969), that an employer did not violate his duty to bargain by insisting on a contract

NORRIS-LAGUARDIA AND THE STATES:

McCarroll v. Los Angeles County District Council of Carpenters

Since *Sinclair,* a number of states have had occasion to determine the applicability of the anti-injunction provisions of the Norris-LaGuardia Act to section 301 actions instituted in their courts and, as might be expected, the large majority of them have held those provisions inapplicable.[82] The earliest and still the leading state court decision on this issue is *McCarroll v. Los Angeles County District Council of Carpenters*[83] in which Justice (now Chief Justice) Traynor of the Supreme Court of California, correctly anticipating the later Supreme Court holdings in *Dowd Box, Lucas Flour* and *Sinclair,* concluded that, although federal courts are restricted in granting injunctions in section 301 suits by Norris-LaGuardia, "state courts enforcing federal rights are not necessarily subject to the same restraint."[84] In support of this conclusion, Chief Justice Traynor argued that "whether or not Congress could deprive state courts of the power to give such [equitable] remedies when enforcing collective bargaining agreements, it has not attempted to do so either in the Norris-LaGuardia Act or section 301."[85] The Norris-LaGuardia Act,

arbitration clause allowing for state court injunctions in the event of the union's breach of a no-strike clause in their labor contract, and by demanding that the union waive its right to seek removal of such an action to a federal district court.

82. *Compare, e.g.,* Dean v. Scott Paper Co., 70 L.R.R.M. 3330 (Ala. Sup. Ct. 1969); Leon Oil Co. v. Marsh, 220 Ark. 678, 249 S.W.2d 569 (1952); United Concrete Pipe Corp. v. Laborers, Local 89, 231 Cal. App. 2d 315, 41 Cal. Rep. 816 (Dist. Ct. App. 1964); Radio Corp. of America v. Local 780, IATSE, 160 So. 2d 150 (Fla. Dist. Ct. App. 1964), *cert. denied,* 380 U.S. 973 (1965); American Device Mfg. Co. v. Machinists, 70 L.R.R.M. 2563 (Ill. App. Ct. 1969); Dugdale Constr. Co. v. Operative Plasterers, 257 Iowa 997, 135 N.W.2d 656 (1965); Armco Steel Corp. v. Perkins, 411 S.W.2d 935 (Ky. Ct. App. 1967); Rust Engineering Co. v. Carpenters Local 403, 69 L.R.R.M. 2115 (La. Ct. App. 1968); McLean Distributing Co. v. Brewery & Beverage Drivers, 254 Minn. 204, 94 N.W.2d 514 (1959); Masonite Corp. v. Woodworkers Union, 69 L.R.R.M. 2831 (Miss. Sup. Ct. 1968); Curtis v. Tozer, 374 S.W.2d 447 (Mo. Ct. App. 1964); State v. District Court, 61 L.R.R.M. 2159 (Mont. Sup Ct. 1965); Thaddeus Suski Productions, Inc. v. Vola, 47 Misc. 2d 773, 263 N.Y.S.2d 275 (1965), *aff'd,* 24 App. Div. 2d 559, 260 N.Y.S.2d 826 (1965); C.D. Perry & Sons, Inc. v. Robilotto, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963), *aff'd,* 260 N.Y.S.2d 158 (1965); General Electric Co. v. International Union, 93 Ohio App. 139, 108 N.E.2d 211 (1952); Shaw Elec. Co. v. IBEW, 318 Pa. 1, 208 A.2d 769 (1965); I.L.A. v. Producers Grain Corp., 70 L.R.R.M. 2375 (Tex. Civ. App. 1969); International Longshoremen's Ass'n v. Galveston Maritime Ass'n, 358 S.W.2d 607 (Tex. Civ. App. 1962); Associated Gen. Contractors v. Trout, 59 Wash. 2d 90, 366 P.2d 16 (1961) (holding state courts free to issue injunctions in section 301 suits) *with* Tidewater Express Lines, Inc. v. Freight Drivers Local 557, 230 Md. 450, 187 A.2d 685 (1963); Independent Oil Workers v. Socony Mobil Oil Co., 85 N.J. Super. 453, 205 A.2d 78 (1964) (holding Norris-LaGuardia bar to state courts' issuance of injunctions in section 301 suits). *See generally* Aaron, *Labor Injunctions in the State Courts,* 50 VA. L. REV. 951, 1147 (1964).

83. 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied,* 355 U.S. 932 (1958).

84. *Id.* at 63, 315 P.2d at 331. Chief Justice Traynor's opinion was rendered on behalf of the Supreme Court of California, sitting en banc, with one justice dissenting.

85. *Id.* at 61, 315 P.2d at 332.

it was pointed out, was drawn as a limitation on the federal courts and "was justified constitutionally on the basis of Congress' power to regulate the jurisdiction of the federal courts."[86] Chief Justice Traynor contended that "[i]t did not limit the remedial power of the state courts . . . and could not constitutionally have done so since its prohibition was not restricted to injunctions in labor disputes affecting interstate commerce or any other subject over which Congress has paramount power."[87] Furthermore, he found nothing in section 301 requiring a state court enforcing rights governed by that section to deny injunctive relief:

> The principal purpose of section 301 was to facilitate the enforcement of collective bargaining agreements by making unions suable as entities in the federal courts, and thereby to remedy the one-sided character of existing labor legislation. . . . We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301.[88]

Finally, Chief Justice Traynor argued that while "[u]niformity in the determination of the substantive federal right itself is no doubt a necessity, . . . such uniformity is not threatened because a state court can give a more complete and effective remedy. . . . [A] state court is not confined to remedies available in a federal court when the restriction on the federal court does not flow from the statute creating the federal right."[89]

The single dissenter in *McCarroll,* citing the *Lincoln Mills* mandate that a body of uniform federal law be developed to govern section 301 suits, contended that "the rights under the bargaining agreement being controlled by federal law, that law must also measure the remedies available for otherwise the federal law is not being applied."[90] A state court's grant of injunctive relief was viewed as a remedy going to the "very essence of the right itself. . . . A 'State may not prohibit the exercise of rights which the federal Acts protect.' . . . [T]he right to be not enjoined under the Norris-LaGuardia Act . . . is a part of

86. *Id.*

87. *Id.* The Act was undoubtedly framed in jurisdictional terms to insure its constitutionality. An earlier state anti-injunction statute had been held to violate the fourteenth amendment. Truax v. Corrigan, 257 U.S. 312 (1921). It was not until 1937, five years after Norris-LaGuardia, that Congressional power to regulate labor relations was held to be within the Commerce Clause. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

88. 49 Cal. 2d 45, 61, 315 P.2d 322 (1957), *cert. denied,* 355 U.S. 932 (1968).

89. *Id.* at 64, 315 P.2d at 332-33.

90. *Id.* at 70, 315 P.2d at 336.

the federal right — a part and parcel of the rights which may be exercised with reference to bargaining agreements."[91] The dissent then concluded "In short the federal law is exclusive in the field of bargaining agreements affecting commerce. When a state entertains jurisdiction and applies that law it should be bound by all the important restrictions including those embraced in the Norris-LaGuardia Act."[92]

In support of the dissent's position, it can certainly be said that the trend toward uniform federal labor policy has been accelerated, not de-celerated, in recent years.[93] Furthermore, any substantive-procedural distinction is probably without merit where, as here, the drawing of such a distinction would result in different outcomes depending upon whether the action was brought in a state or federal court. The availability of injunctive relief only in state courts can therefore probably be characterized as prohibitively "outcome determinative" within the meaning of *Erie R.R. Co. v. Tompkins*[94] and *Guaranty Trust Co. v. York*.[95] However, if the Supreme Court's decision in *Sinclair* is any guide to what the ultimate disposition of the question of the availability of injunctive relief in state court section 301 suits will be, the cogency of Chief Justice Traynor's majority opinion in *McCarroll* must be admitted.[96]

THE QUESTION REMAINS

The Supreme Court rested its decision in *Sinclair* primarily on Congressional intent as evidenced in the legislative history of section

91. *Id.* at 72-74, 315 P.2d at 338, *quoting* United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62 (1956).

92. *Id.* at 74, 315 P.2d at 339.

93. Consider the unfair labor practice area in which state courts are virtually without jurisdiction today, exclusive primary jurisdiction over any conduct "arguably" subject to the Labor-Management Relations Act having been vested in the National Labor Relations Board, and injunctive relief against such "arguable" conduct available only at the behest of the N.L.R.B. in the federal courts, absent violence, coercion or the like. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

94. 304 U.S. 64 (1938).

95. 326 U.S. 99 (1945). This is obviously reverse *Erie* reasoning in that, were it to be applied, state courts would be required to apply federal law, rather than federal courts, state law. However, this approach would hardly be novel today. *Cf.* Hill, *Substance and Procedure in State FELA Actions — The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384 (1956).

96. For another well-reasoned and more recent state court opinion reaching the same conclusion, see the decision of the Supreme Court of Pennsylvania in Shaw Electric Co. v. I.B.E.W., 418 Pa. 1 (1965), in which Mr. Justice Roberts, writing for the majority of the court, concluded that the Norris-LaGuardia Act, as enacted by Congress, limits only the jurisdiction of the federal courts; that the Act did not pre-empt the field with respect to the issuance of labor injunctions; and that nothing in the legislative history of section 301 "remotely suggests that Congress intended to *amend* the Norris-LaGuardia Act so as to extend its anti-injunction limitations to state courts. . . . Where such a legislative declaration of policy is in terms addressed to federal courts only, we do not read *Lucas Flour* as finding in § 301 warrant for transcending that limitation and restricting traditional state remedies. . . ." *Id.* at 8, 13 n.19.

301. All attempts in Congress to include a provision in section 301 repealing the anti-injunction provisions of Norris-LaGuardia were notably unsuccessful. This same legislative history, however, supports the contrary result with respect to state court injunctions. The House Conference Report stated that enforcement of collective bargaining agreements was to be left to "the usual processes of law."[97] In 1947, these "usual processes of law" did not include federal court injunctions but did include state court injunctions. In the Senate debate in 1946, Senator Ferguson, a spokesman for section 301, unequivocally stated that state court jurisdiction would not be ousted by its enactment:

> MR. FERGUSON. Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts all the present rights of the State courts to adjudicate the rights between parties in relation to labor agreements. The amendment merely says that the Federal courts shall have jurisdiction. It does not attempt to take away the jurisdiction of the State courts. . . .
>
> MR. MURRAY. But it authorizes the employers to bring suit in the Federal courts, if they so desire.
>
> MR. FERGUSON. That is correct. That is all it does. It takes away no jurisdiction of the State courts.[98]

Moreover, the Supreme Court has itself already explicitly recognized Congress' clear intent in enacting section 301. In its 1962 decision in *Dowd Box,* the Court declared:

> The legislative history of the enactment nowhere suggests that, contrary to the clear import of the statutory language, Congress intended in enacting § 301(a) to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal.
>
> The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.
>
> In considering these provisions of the proposed legislation in 1946, Congress manifested its complete awareness of both the existence and the limitations of state court remedies for violation of collective agreements.
>
> The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring

97. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42 (1947).

98. 92 CONG. REC. 5708 (1946).

> jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the various States over contracts made by labor organizations.
>
> [T]he entire tenor of the 1947 legislative history confirms that the purpose of § 301 . . . was to fill the gaps in the jurisdictional law of some of the States, not to abolish existing state court jurisdiction.[99]

In addition, Norris-LaGuardia, of course, was framed in terms of restrictions on federal courts' jurisdiction. As pointed out above,[100] it was not until 5 years after Norris-LaGuardia that Congressional power to regulate labor relations was constitutionally established as within the Commerce Clause.

Thus, if the question of the power of state courts to continue to issue injunctions for violations of no-strike clauses is to be resolved, as was *Sinclair,* on the basis of section 301's legislative history, state courts should be permitted to continue to enjoy such power. However, the disparate results in state and federal courts, which such a ruling would perpetuate, are concededly undesirable. Furthermore, to permit injunctions in state court actions, but only if they are not removed to the federal courts, is obviously no answer at all. The only satisfactory solution to this dilemma would, therefore, seem to be in Congressional amendment of section 301 providing either for the repeal of Norris-LaGuardia's anti-injunction provisions in such suits or, the converse, an absolute prohibition against the grant of injunctions in such suits.[101] Of course, if one understands the Court's decision in *Sinclair* as having read section 4 of Norris-LaGuardia into section 301, the Court has already opted for the latter alternative. Further, unless one reads the Court's opinion in *Avco* as merely a federal procedural decision, limited to the question of removal, this conclusion is reinforced. That the Congress of 1946-47 never contemplated, let alone intended, this state of affairs seems evident. It would therefore appear to be high-time that Congress brought a halt to this judicially created imbroglio and made known its intent in this most important area of our national law of labor relations.[102]

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99. 368 U.S. at 507–12.

100. *See* note 63 *supra.*

101. Whether, in the absence of new legislation pre-empting the field, Congress could be found to have constitutionally precluded the issuance of state court injunctions in section 301 suits, is a most serious question. For negative opinions, see Chief Justice Traynor's opinion in McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal. 2d 45, 61–63, 315 P.2d 322, 331–32 (1957) and American Dredging Co. v. Marine Local 25, 338 F.2d 837, 855 (3d Cir. 1964), *cert. denied,* 380 U.S. 935 (1965).

102. For discussions of the state courts' proper role in this area, *see* Janofsky & Vaughn, *The Affirmative Role of State Courts to Enjoin Strikes in Breach of Collec-*

INJUNCTION BY ARBITRATION — AN ALTERNATIVE?

However, even if Congress should choose not to act in this area, and the Supreme Court should ultimately hold Norris-LaGuardia's anti-injunction provisions applicable to state court section 301 actions, it may nevertheless be too early to sound the death knell for no-strike clauses. An alternative — the product of the ingenuity of lawyers for end-runs and the genius of our law for needed adjustment — may exist. Nothing said thus far has considered the case in which an employer brings an action under section 301 to enforce an arbitration award which has the effect of enjoining a strike in breach of a collective bargaining agreement. The fact that it is an arbitration award, which such a suit would seek to enforce, rather than a bare no-strike clause, could quite conceivably lead to a wholly different result. The Supreme Court might consider itself free to affirm judicial enforcement of an arbitration award, upholding and enforcing a no-strike clause, on the theory that an arbitration award derives its authority from the voluntary agreement of the parties to the labor contract rather than from our national labor laws as such. Such a holding would be in complete accord with the Court's decisions in *Lincoln Mills* and the *Steelworkers Trilogy,* would be in harmony with the purpose of section 301 to increase the enforceability of collective bargaining contracts, and, conceivably, would be outside the injunction proscriptions of Norris-LaGuardia applicable to labor disputes as a result of the parties' contractual agreement to be bound by arbitration awards. *Sinclair* involved a raw labor dispute which had not been submitted to arbitration. Further, Norris-LaGuardia, it should be remembered, itself encourages the settlement of disputes "either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."[103] Thus, the arbitration process could lead to a whole new — and even greater — life for no-strike clauses, provided the employer has access to the arbitrator for management grievances,[104] the arbitrator possesses the authority to enter an award enjoining a strike in violation of the agreement,[105]

tive Bargaining Agreements, 7 B.C. IND. & COM. L. REV. 869 (1966); Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia,* 79 HARV. L. REV. 757 (1966); Stern, *The Increasing Unavailability of State Injunctions for Breaches of No-Strike Provisions Under Section 301,* 40 PA. BAR ASS'N Q. 143 (1968).

103. 29 U.S.C. § 108 (1964).

104. *See* Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962), the companion case to Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

105. *See* Gulf & South Am. S.S. Co. v. Maritime Union, 360 F.2d 63 (5th Cir. 1966); Fleming, *Arbitrators and the Remedy Power,* 48 VA. L. REV. 1199 (1962).

and the judicial enforcement of such an award is determined not to be violative of Norris-LaGuardia's proscriptions against injunctions in labor disputes.

I.L.A. v. Philadelphia Marine Trade Ass'n

During its 1967-1968 term, the Supreme Court had an opportunity to decide this question, but failed to do so, in *Local 1291, I.L.A. v. Philadelphia Marine Trade Ass'n.*[106] The case arose out of a series of strikes along the Philadelphia waterfront. The Philadelphia Marine Trade Association (P.M.T.A.), the employer group, had a collective bargaining agreement with Local 1291, I.L.A., which included a broad grievance and arbitration provision. A controversy arose over the interpretation of a section of a memorandum of settlement (settling an earlier strike) entered pursuant to and forming a part of the agreement. The parties followed the grievance procedure of the agreement and submitted the matter to an arbitrator. The arbitrator ruled in favor of the employer association and against the interpretation urged by the union.[107] Three months and two strikes later the same dispute again erupted between the parties. This time the employer association instituted proceedings in the district court, under section 301, to enforce the earlier arbitration award. The district court ordered the arbiration award "be specifically enforced by defendant, International Longshoremen's Association Local 1291, and the said defendant is hereby ordered to comply with and abide by the said Award."[108] The Court of Appeals for the Third Circuit affirmed, holding that the district court's determination "that it had the jurisdiction to enforce the crystal clear judgment of the Arbitrator was

106. 389 U.S. 64 (1967).

107. *Id.* at 67 n.3. The text of the award was as follows:

> The contention of the Employer, the Philadelphia Marine Trade Association, is hereby sustained and it is the Arbitrator's determination that Section 10(6) of the Memorandum of Settlement dated February 11, 1965, providing gangs "ordered for an 8 A.M. start Monday through Friday can be set back at 7:30 A.M. on the date of work to commence at 1 P.M., at which time a 4 hour guarantee shall apply. A 1 hour guarantee shall apply for the morning period unless employed during the morning period," may be invoked by the Employer without qualification.
>
> The contention of the Union, the International Longshoremen's Association, Local 1291, that Section 10(6) of the Memorandum of Settlement dated February 11, 1965, referred to above, can only be invoked by the Employer because of non-arrival of a vessel in port, is denied.

108. *Id.* at 69 n.5. The full text of the decree was as follows:

> ORDER — September 15, 1965
>
> And Now to Wit, This 15th day of September, 1965, after hearing, it is hereby ordered, adjudged and decreed that the Arbitrator's Award in the matter of arbitration between the Philadelphia Marine Trade Association and International Longshoremen's Association Local 1291, issued on June 11, 1965, be specifically enforced by the defendant, International Longshoremen's Association Local 1291, and the said defendant is hereby ordered to comply with and to abide by the said Award.

sound and right. It was not in conflict with the Norris-LaGuardia Act but completely within the *Lincoln Mills* and *Steelworkers* opinion, . . . and a vital part of the all important enforcement of the specific performance of the admittedly agreed to arbitration clause in the labor contract before us."[109] The Supreme Court reversed,[110] without reaching the important labor law question involved, on the ground that the district court's decree did not meet the specificity requirements for injunctions contained in Rule 65(d) of the Federal Rules of Civil Procedure:[111]

> Whether or not the District Court's order was an "injunction" within the meaning of the Norris-LaGuardia Act, it was an equitable decree compelling obedience under the threat of contempt and was therefore an "order granting an injunction" within the meaning of Rule 65(d). [W]hatever power the District Court might have possessed . . . the conclusion is inescapable that the decree which the Court in fact entered was too vague to be sustained . . . .[112]

The majority of the Court thus avoided the real issue. But Mr. Justice Douglas concurring in part and dissenting in part and Mr. Justice Brennan concurring only in the result spoke their minds in this area once again. Mr. Justice Douglas bemoaned the majority's distinction between an "injunction" for purposes of Rule 65(d) and an "injunction" for purposes of the Norris-LaGuardia Act. "I for one see no distinction; and since I feel strongly that *Sinclair Refining Co. v. Atkinson* . . . caused a severe dislocation in the federal scheme of arbitration of labor disputes, I think we should not set our feet on a path that may well lead to the eventual reaffirmation of the principles of that case."[113] Citing *Lincoln Mills,* Mr. Justice Douglas continued:

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109. 365 F.2d 295, 299–300 (3d Cir. 1966).

110. A subsequent decision fining the union for contempt of the order enforcing the arbitration award was also reversed. Philadelphia Marine Trade Ass'n v. Local 1291 I.L.A., 368 F.2d 932 (3d Cir. 1966), *rev'd,* 389 U.S. 64 (1967).

111. FED. R. CIV. P. 65(d) provides:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

It is interesting to note that the next section of Rule 65 — Rule 65(e) — although not mentioned by the Court, states in pertinent part: "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee. . . ."

112. 389 U.S. at 73–74.

113. *Id.* at 77.

> [F]ailure to arbitrate was not part and parcel of the abuses against which the Norris-LaGuardia Act was aimed. We noted that Congress, in fashioning § 301 of the Labor Management Relations Act, was seeking to encourage collective bargaining agreements in which the parties agree to refrain from unilateral disruptive action, such as a strike, with respect to disputes arbitrable by the agreement. Hence, if unions could break such agreements with impunity, the congressional purpose might well be frustrated. Although § 301 does not in terms address itself to the question of remedies, it commands the District Court to hold the parties to their contractual scheme for arbitration — the "favored process for settlement," as my Brother BRENNAN said in dissent in *Sinclair* . . . . I agree with his opinion that there must be an accommodation between the Norris-LaGuardia Act and all the other legislation on the books dealing with labor relations. We have had such an accommodation in the case of railroad disputes. . . . With respect to § 301, "Accommodation requires only that the anti-injunction policy of Norris-LaGuardia not intrude into areas, not vital to its ends, where injunctive relief is vital to a purpose of § 301; it does not require unconditional surrender."[114]

Mr Justice Douglas then drew the distinction between *Sinclair* and *P.M.T.A.:*

> We do not review here, as in *Sinclair,* a refusal to enter an order prohibiting unilateral disruptive action on the part of a union before that union has submitted its grievances to the arbitration procedure provided by the collective bargaining agreement. Rather, the union in fact submitted to the arbitration procedure established by the collective bargaining agreement but, if the allegations are believed, totally frustrated the process by refusing to abide by the arbitrator's decision. Such a "heads I win, tails you lose," attitude plays fast and loose wih the desire of Congress to encourage the peaceful and orderly settlement of labor disputes.[115]

Mr. Justice Brennan, concurring in the result, stated: "But, like my Brother Douglas, I emphasize that today's disposition in no way implies that *Sinclair Refining Co. v. Atkinson* . . . determines the applicability of the Norris-LaGuardia Act to an equitable decree carefully fashioned to enforce the award of an arbitrator authorized by the parties to make final and binding interpretations of the collective bargaining agreement."[116]

114. *Id.* at 77–78. Mr. Justice Douglas was, of course, quoting Justice Brennan's dissent in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 216–25 (1962).

115. 389 U.S. at 78–79.

116. *Id.* at 76.

The stance adopted by Justices Douglas and Brennan on this issue was certainly predictable in light of their opinions in *Lincoln Mills* and *Sinclair*. However, the majority opinion in *P.M.T.A.* reveals not a clue as to the position of any one of the remaining seven Justices. Indeed, the Court, within the past year, denied a petition for a writ of certiorari in a case which arose in the Fifth Circuit and which, following the Third Circuit's decision in *P.M.T.A.*, presented precisely the same issue.[117] One can only hope that the Court will see fit to decide the fate of injunctive arbitration awards — perhaps the only remaining tool for the enforcement of no-strike clauses — in the very near future.

ONE LINE OF REASONING

The key to the question of whether a judicial decree enforcing an arbitration award, which enjoins a strike in breach of a labor contract, constitutes an "injunction" within the meaning of the Norris-LaGuardia Act, may, perhaps, be found, not in any supposed difference in effect between an ordinary injunction and such a decree, but, rather, in the language of the Act limiting its applicability to "any case involving or growing out of any labor dispute."[118] As is well known, Norris-LaGuardia was enacted to take federal judges out of the business of deciding the merits of labor disputes and issuing injunctions based on their own social and economic views. Under the principles established in the *Steelworkers Trilogy,* courts are prohibited from examining the merits of underlying industrial disputes in actions brought to enforce or vacate labor arbitration awards. The judiciary can only examine into the questions of the arbitrability of the controversy, the arbitrator's authority to render the award, and the conduct of the arbitrator, *i.e.,* bias, prejudice, fraud. Thus, in a section 301 action brought to enforce an arbitration award, the court is not asked to, nor can it, embroil itself in the merits of the industrial dispute which gave rise to the award. Hopefully, therefore, such an action may be held not to constitute a case involving or arising out of a labor dispute. In such case, whether a decree enforcing an arbitration award which enjoins a strike in breach of contract is viewed as an "injunction" or not, such decree would not have been issued in a case involving or arising out of a labor dispute and accordingly would not be proscribed by Norris-LaGuardia.

117. New Orleans S.S. Ass'n v. Local 1418, I.L.A., 389 F.2d 369 (5th Cir.), *cert. denied,* 393 U.S. 828 (1968).

118. 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964).

This line of reasoning and its conclusion would have the unique advantage of promoting both the effective enforcement of collective bargaining agreements and the development of a uniform national law of labor contracts as called for by section 301 and *Lincoln Mills,* while, at the same time, being in no way inconsistent with the Court's holding in *Sinclair* which involved only a raw labor dispute. Since the *Steelworkers Trilogy,* it has become commonplace for courts specifically to enforce arbitration awards in all but those cases involving strikes or work stoppages.[119] Under the typical arbitration clause, a strike in violation of a no-strike clause is generally considered to be a matter for arbitration.[120] However, an arbitrator may issue an award, having the force of an injunction, in a strike situation only where the parties, by their contract, have granted him that power.[121] This is so despite the Supreme Court's statement in *United Steelworkers v. Enterprise Corp.,*[122] that an arbitrator is to bring his informed judgment to bear upon an industrial dispute "especially . . . when it comes to formulating remedies . . ." for the reason that the arbitrator derives his powers solely from the contract between the parties. Thus, were the Court to hold arbitration awards enjoining strikes in breach of contracts judicially enforceable, employers would seek in negotiating contracts, to have unions agree to confer injunctive power upon arbitrators and, in the end, both the purpose of section 301 and the uniform enforcement of labor contracts and arbitration awards would be substantially advanced. This, of course, assumes that the Court would also find that an arbitration award in the nature of an injunction would not contravene public policy as enunciated in the Norris-LaGuardia Act and that arbitrators could act in an area in which the federal courts — and ultimately perhaps, the state courts as well — cannot act. But, as noted above, arbitration awards result from the contracting parties' consent, not from governmental or judicial intervention, and for this reason judicial enforcement of arbitration awards upholding no-strike clauses may be found to be without the evil at which Norris-LaGuardia was aimed.

Further, such a ruling would not only not conflict with the holding in *Sinclair* but would harmonize that decision with both the purpose of section 301 and the developing federal law of labor contracts. In *Sinclair* an injunction was requested in a raw labor dispute

119. *See, e.g.,* Drivers Local 89 v. Riss & Co., 372 U.S. 517 (1963); Local 453, I.U.E.W. v. Otis Elevator Co., 314 F.2d 25 (2d Cir.), *cert. denied,* 373 U.S. 949 (1963); Selb Mfg. Co. v. I.A.M. District 9, 305 F.2d 177 (8th Cir. 1962).

120. *Cf.* Drake Bakeries v. Bakery Local 50, 370 U.S. 254 (1962).

121. *See* Gulf & South Am. S.S. Co. v. Maritime Union, 360 F.2d 63 (5th Cir. 1966); Fleming, *Arbitrators and the Remedy Power,* 48 VA. L. REV. 1199 (1962).

122. 363 U.S. 593, 597 (1960).

— the parties not having resorted to arbitration — the very sort of case to which the prohibitions of Norris-LaGuardia against judicial intervention were directed. Judicial enforcement of arbitration awards enjoining strikes would not put the courts back in the thick of industrial disputes. The courts would enforce such awards, without investigating the merits of the underlying disputes, provided only that the awards were regularly and properly rendered. Such would be in line with the present law regarding enforcement of all other sorts of arbitration awards and would make enforceable, at the risk of contempt, the union's promise not to strike during the term of a collectively bargained labor contract. The advantages of such a result seem obvious. One suspects that not even the unions could be heard to complain about being required to live up to their no-strike promises. But, of course, this line of reasoning must first prevail.[123]

OTHER SIGNIFICANT DECISIONS

In addition to the Third Circuit, in its decision in *P.M.T.A.*, at least one other United States Courts of Appeals has specifically enforced an arbitration award enjoining a strike in breach of contract. In *New Orleans S.S. Ass'n v. Longshore Workers Local 1418*,[124] the Fifth Circuit specifically enforced an arbitration award ordering an end to a union's work stoppages which were in violation of a labor contract. The court distinguished *Sinclair* on the basis that that case did not involve an arbitration award and "on the more than semantical ground that there is a real difference between an ordinary injunction and an order enforcing the award of an arbitrator although the end result is the same."[125] The court also found Norris-LaGuardia inapplicable to the case before it for the reason that that Act "is limited to labor disputes and we consider the instant controversy to be outside the scope of a labor dispute as such."[126] Stated the court:

> We think the logic of the arbitration policy compels this result; otherwise one of the parties to a collective bargaining agreement containing arbitration and no strike or work stoppage clauses has a hollow right indeed. He is told: Our national policy is to encourage arbitration; you may contract to arbitrate and obtain a no strike clause as the *quid pro quo* for your agreement to arbitrate; a recalcitrant party will be compelled to arbitrate any dispute arising therefrom; and the arbitrator may be em-

123. For another expression of this line of reasoning, see Note, *Specific Enforcement of An Arbitrator's Award Which has the Effect of Enjoining a Strike*, 29 U. PITT. L. REV. 517 (1968).
124. 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968).
125. *Id.* at 372.
126. *Id.*

> powered contractually to issue a desist order. We do not believe in light of the body of law which has grown from § 301 that the law will now say to this party that, having done these things, there is no remedy in the event the opposite party decides to ignore the award of the arbitrator to desist the stoppage. No such result should be imputed to Congress; the Supreme Court did not go so far in *Sinclair*.[127]

The United States District Court for the Northern District of California has very recently reached the same conclusion. In *Pacific Maritime Ass'n v. Longshoremen*,[128] that court, observing that in *Sinclair* "there had been no arbitration resulting in an award",[129] held that "where arbitration — as contemplated by § 301 of the Labor Management Relations Act — occurs, an accommodation between that act and the Norris-LaGuardia Act is necessary, and thus this court has jurisdiction to confirm and enforce the arbitrator's award in this case."[130]

To the same effect is the New York Court of Appeals' decision in *Matter of Ruppert (Engelhofer)*,[131] the leading state court decision on this question. Enforcing an award which directed a union to end a slowdown, which was in violation of its labor contract, the New York Court of Appeals stated:

> [O]nce 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. Section 876-a, like its prototype the Federal Norris-LaGuardia Act, was the result of union resentment against the issuance of injunctions in labor strifes. But arbitration is voluntary and there is no reason why unions and employers should deny such powers to the special tribunals they themselves create. Section 876-a and article 84 (Arbitration) are both in our Civil Practice Act. Each represents a separate public policy and by affirming here we harmonize those two policies.[132]

However, the U.S. District Court for the Southern District of New York concluded to the contrary in *Marine Transport Lines v. Curran*.[133] In that case, Judge McLean held that a suit brought

127. *Id. See also* New Orleans S.S. Ass'n v. Longshore Workers Local 1418, 49 L.R.R.M. 2941 (E.D. La. 1962); Johnson & Johnson v. Textile Workers Union, 184 F. Supp. 359 (D.N.J. 1960), which hold that a federal district court decreeing specific performance of an arbitration clause also has power to issue an injunction to prevent acts designed to frustrate its mandate.

128. 71 L.R.R.M. 3117 (N.D. Cal. 1969).

129. *Id.* at 3118.

130. *Id.* at 3119.

131. 3 N.Y.2d 576, 148 N.E.2d 129 (1958).

132. *Id.* at 581–82, 148 N.E.2d at 131.

133. 65 L.R.R.M. 2095 (S.D.N.Y. 1967).

under section 301 to enforce an arbitration award enjoining work stoppages in violation of a labor contract constituted a case involving or growing out of a labor dispute. The court expressly declined to follow the Third Circuit's decision in *P.M.T.A.* Recognizing that *Sinclair* did not involve the enforcement of an arbitration award, the court, nevertheless, held *Sinclair* applicable:

> In my opinion, there is no significant difference between the two situations, as far as the power of this court is concerned. It inevitably follows from *Sinclair* that this court lacks jurisdiction to grant the relief requested here. . . . If it be said that this conclusion impairs the efficacy of no strike clauses and arbitration clauses in collective bargaining agreements, and I agree that it does to a certain extent, the answer can only be, as the Supreme Court held in *Sinclair,* that the remedy lies with Congress and not with the courts.[134]

A wholly different approach to this problem was adopted by Judge Fullam of the U.S. District Court for the Eastern District of Pennsylvania in *Tanker Service Committee, Inc. v. Masters, Local 14.*[135] In this case the typical suit for enforcement of the arbitrator's award was instituted under section 301. The arbitrator had ordered an end to a strike in violation of the parties' contract. The court, troubled by the status of the Third Circuit's decision in *P.M.T.A.,* for the reason that the Supreme Court had earlier agreed to hear that case, but had not yet done so, declined to follow *P.M.T.A.,* but nevertheless concluded that it had "jurisdiction to confirm the arbitrator's award so as to give it at least the effect of a judgment establishing liability for damages on the part of the respondent union."[136] The court entered "a conditional, partial judgment" for compensatory damages in the amount of $250,000 against the striking union, providing that the judgment would become effective only if the union failed to return to work and to arbitration of the underlying dispute within forty-eight hours. The court's judgment further provided that if the union met the conditions the judgment would be vacated, but if the union failed to meet the conditions the judgment would become effective and the court would proceed to determine the full amount of damages sustained by the employer association and thereafter enter a final judgment for such amount. The court also ordered the union to pay any and all damages assessed against it into the registry of the court so that

134. *Id.* at 2097.

135. 269 F. Supp. 551 (E.D. Pa. 1967), *aff'd,* 394 F.2d 160 (3d Cir. 1968).

136. Brief for Appellant at 39a, Tanker Service Committee, Inc. v. Masters Local 14, 394 F.2d 160 (3d Cir. 1968).

any damage award would not "become just one more item for negotiation at the next round of bargaining"[137] and might have coercive effect upon the union to terminate the strike. The union met the conditions imposed by the court in its "conditional, partial judgment" and the decision was dismissed on appeal to the Third Circuit as moot.[138]

This novel utilization of a contract-damage theory to enforce compliance with an arbitration award, enjoining a strike in breach of contract, may, however, run afoul of the rule that damages for a union's breach of a no-strike clause are generally to be determined by an arbitrator, in the first instance, as presenting a question subject to the typical broad arbitration clause contained in most agreements. The employer, of course, must however have access to the grievance machinery of the contract if his damage action is to be stayed pending arbitration.[139] The damages conditionally assessed against the striking union in *Tanker Service* were nothing more or less than ordinary compensatory damages normally recoverable in a section 301 damage suit. The difference between recovery of damages in such a suit and the conditional damage award rendered in *Tanker Service,* of course, lies in the speed with which the latter award was made and the coercive effect which such an award will have when the damages are immediately to be paid into the court's registry and to remain subject to the court's jurisdiction for disbursement purposes.

In *Drake Bakeries v. Bakery Local 50,*[140] the Supreme Court held that an employer's section 301 damage action for a union's breach of its no-strike clause was to be stayed, pending submission to an arbitrator, where the parties' contract contained a very broad arbitration provision, and it could not be said that the union had "flatly repudiate[d] the provision for arbitration."[141] Looking beyond the specific holding in *Drake Bakeries,* it seems clear that a union's "flat repudiation" of its agreement to arbitrate, entitling an employer "to declare its promise to arbitrate forever discharged or to refuse to arbitrate

137. 269 F. Supp. at 553.

138. 394 F.2d 160 (3d Cir. 1968). In Ormet Corp. v. United Steelworkers, ___ F. Supp. ___ (W.D. Pa. 1969), the district court enjoined an imminent strike pending arbitration of the dispute. On appeal, the third circuit stayed the injunctive relief but directed that the district court require the union to post a bond. Ormet Corp. v. United Steelworkers, ___ F.2d ___ (3d Cir. 1969). The district court thereafter required the union to post an $8,000,000. bond. It is submitted that requiring the union to post a *substantial* bond might well constitute a method of maintaining the viability of no-strike clauses, particularly where no initial determination of the dispute has been made by the arbitrator.

139. *Compare* G.T. Schjeldahl Co. v. Local 1680, I.A.M., 393 F.2d 502 (1st Cir. 1968) (only employee grievances arbitrable — no stay) *with* Warehouse Co. v. I.L.A., 404 F.2d 613 (2d Cir. 1968) (employer grievances arbitrable — stay granted).

140. 370 U.S. 254 (1962).

141. *Id.* at 263 n.10.

its damage claims against the union,"[142] is not likely to be found;[143] while the standard arbitration clause, providing for both union and employer grievances, is generally to be read to include claims for damages for breaches of no-strike clauses as arbitrable matters absent express exclusion of such cases from the arbitration provision.[144] With this as the law, the sort of contract-damage remedy employed in *Tanker Service,* as a substitute for specific enforcement of an arbitration award enjoining a strike in breach of contract, may be expected to be short-lived. For, although the conditional award of damages made in *Tanker Service* was not rendered in a damage action, the damages assessed constituted the compensatory damages to which the employer would have been entitled in a damage action. Thus, despite the attractiveness of the remedy fashioned in *Tanker Service* for employers, *Drake Bakeries* would appear to preclude its continued utilization.

This, then, leaves the all-important question of the judicial enforceability of arbitration awards, enjoining strikes in breach of contract, totally unresolved, except in the Third and Fifth Circuits where such awards have been enforced. It may be predicted that the Court will continue to leave this question unresolved until such time as it rules on the applicability of Norris-LaGuardia's anti-injunction provisions to state court section 301 actions.

CONCLUSION

Given *Lincoln Mills'* holding that section 301 is substantive in nature, as well as jurisdictional, there can be no serious quarrel with *Avco's* grant of federal removal in state court instituted section 301 actions. But *Lincoln Mills'* mandate that a uniform body of federal law governing section 301 suits be established ought not be read to make Norris-LaGuardia applicable to the states. Norris-LaGuardia was addressed solely to the federal courts at a time when Congress' power to regulate labor relations under the commerce clause was doubted. Further, it was aimed at an entirely different situation in an entirely different age. While the framers of section 301 of the Taft-Hartley Act refused to repeal the strictures of Norris-LaGuardia with respect to actions brought under that section, they made it perfectly

142. *Id.* at 265.

143. *See* Packinghouse Workers v. Needham Packing Co., 376 U.S. 247, 251 (1964), which reaffirms *Drake Bakeries'* language: "[U]nder this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes."

144. This, of course, is in accord with the Court's holdings in the *Steelworkers Trilogy* of arbitration cases.

plain, as the Supreme Court acknowledged in *Dowd Box,* that state court jurisdiction over section 301 actions was to continue unimpaired under the "usual processes of law." Federal removal, under *Avco,* need not defeat the states' equitable jurisdiction in this area if the federal courts are to apply applicable state law to state court instituted section 301 actions. However, if federal removal is to mean the application of Norris-LaGuardia's anti-injunction provisions to removed state court section 301 actions, under the uniformity doctrine of *Lincoln Mills,* specific enforcement of no-strike clauses, in the absence of an arbitration award, will be effectively abolished.

In this event, it can be anticipated that mounting pressure from Congress and elsewhere will be brought to bear upon the Court to uphold judicial enforcement of arbitration awards, enjoining strikes in breach of labor agreements, as the only remaining vehicle for the enforcement of no-strike clauses. Should the Court, however, turn a deaf ear to these voices and hold Norris-LaGuardia applicable to such injunctive arbitration awards, Congress may be expected to react legislatively to rescue section 301 and the effective enforcement of collective bargaining agreements from so tortured and ignoble a demise. Otherwise, Congress' plain purpose in enacting section 301, which was to make collective bargaining agreements, including arbitration and no-strike clauses, more enforceable — not less enforceable — than they were in 1947, will have been completely sacrificed upon the judicially constructed altar of federal uniformity of labor contract law.

The total unenforceability[145] of no-strike clauses would contradict the fundamental purpose of all federal labor legislation which is, of course, to promote industrial peace and tranquility, would undermine the entire collective bargaining system and, would exacerbate an already intolerable situation. The Court can avoid this result, even if it should eventually hold Norris-LaGuardia applicable to states or to federally removed state court section 301 actions, by simply upholding the judicial enforceability of arbitration awards enjoining strikes in breach of labor agreements. Such a ruling would harmonize the conflict between the developing uniform, national law of labor contracts and the effective enforcement of collective bargaining agreements and would be wholly consistent with all of the Court's prior decisions.

145. This Article has neither attempted to deal with the question of remedies — other than injunction — available to an employer upon a union's breach of a no-strike clause nor has it considered the special issues raised by strikes by public employees. For a good analysis of the former, including damage actions and disciplinary measures against employees as alternative remedies, *see* Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Action and Discipline,* 7 B.C. IND. & COM. L. REV. 239, 252–58 (1966). For a fine discussion of the latter, *see* Bloedorn, *Strike and the Public Sector,* 20 LAB. L.J. 151 (1969).

It is suggested and anticipated that this is the route which the Court will choose to follow, within the next few years, in order to avoid the total unenforceability of no-strike clauses and the widespread uproar which would otherwise surely and justifiably eventuate in both Congress and the states. Such a ruling may, for obvious reasons, be expected to follow close upon the heels of any decision by the Court holding Norris-LaGuardia applicable to states or to federally removed state court section 301 actions.