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Circumventing Norris--LaGuardia with Arbitration Clauses

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I. Introduction and Scope

The regulation of labor-management relations has always been wrought by the especial type of passionate controversies engendered by the confrontation of apparently irreconcilable policy considerations. Not the least of these controversies has been the dilemma faced by those who attempt to reconcile effective enforcement of "no-strike" provisions in collective bargaining agreements with the anti-injunction mandate of federal labor policy.[1] Absent solution, this problem will render no-strike promises illusory since enjoining the violation remains the only effective means of specifically enforcing such a clause. The infirmities of the alternative — an action for damages — are patent; delay and unenforceability stand out, while often the actual damage caused by an unauthorized work stoppage is so subtle as to defy accurate determination. Even where damages are ultimately collectible, remoteness in time from the actual occurrence significantly dilutes their coercive effect.

The proponents of enforcement by injunction have tried several basic approaches. While the risks of categorization are apparent, three significant patterns emerge. The first approach was to seek outright an injunction in the federal courts. The arguments were premised on the fact that, while section 4 of the Norris-LaGuardia Act[2] was still vital to protect the rights of labor to organize and bargain collectively, the mechanisms of section 301 of the Taft-Hartley Act[3] took precedence over the anti-injunction mandate in the realm of enforcement of such collective agreements once they had been made. While this argument was both rational and appealing, it was ultimately and conclusively rejected by the Supreme Court.[4]

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1 Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1964), enumerates specific acts which are not subject to restraining orders or injunctions. In pertinent part, it reads:

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

2 The policy of section 4 is actually expressed in section 2 which permeates the entire statute. 29 U.S.C. § 102 (1964) reads in part:

> The individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; . . . .

3 29 U.S.C. § 185(a) (1964) reads:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined by 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.

4 *See* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

Concurrent with the rise and demise of the direct approach in federal courts, some employers sought specific enforcement of the no-strike provisions in state courts. These local tribunals readily accepted jurisdiction and proceeded with the assumption that, while bound to apply federal substantive law, they were, at the same time, free to grant remedies as they saw fit, unfettered by any federal anti-injunction policy.[5] But while this would appear to enshrine the state courts as the preferred tribunals, the fact that jurisdiction over section 301 suits was vested specifically, albeit not exclusively, in the United States District Courts[6] apparently made such suits automatically removable from state courts upon proper motion.[7] However, the various districts and circuits differed as to the feasibility of such a procedure.[8] Subsequently, the Supreme Court made its pronouncement in favor of removability[9] which, combined with its federal anti-injunction mandate, relegates these state court proceedings to a judicial limbo.

The third, and most viable, approach has been to directly confront the anti-injunction policy with the unquestioned national policy favoring enforceable arbitration.[10] This confrontation is achieved by inclusion of a broad arbitration clause in the collective agreement vesting the arbitrator with power to invoke a "quickie" fact finding procedure at the request of the parties, and to order cessation of work stoppage if it is found to be in violation of the contract. If the order is not complied with, suit can be brought under section 301 for enforcement of the arbitrator's award.[11] While the Supreme Court has yet to rule conclusively on this approach, the results in the lower courts to date have been encouraging.[12]

Since comment is already voluminous,[13] no exhaustive survey of the strictly

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5 *See* McCarroll v. Los Angeles Co. Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957).

6 See note 3 *supra.* The fact that suits "may be brought" does not imply exclusion and does not preclude enforcement of these rights in other tribunals with proper jurisdiction over the parties.

7 28 U.S.C. § 1441(a) (1964) states the general removal provision:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

8 *See, e.g.,* Avco Corp. v. Aero Lodge No. 735, IAM, 376 F.2d 337 (6th Cir. 1967), *aff'd,* 390 U.S. 557 (1968) (allowed removal of such an action from a state court); American Dredging Co. v. Local 25, Marine Div. IUOE, 338 F.2d 837 (3rd Cir. 1964) (denied the original jurisdiction of the federal court in the suit).

9 Avco Corp. v. Aero Lodge No. 735, IAM, 390 U.S. 557, 560 (1968).

10 *See, e.g.,* Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). All three of these decisions recognized the Court's role in enforcing valid arbitration awards.

11 That there is a "violation" of the contract can be inferred from the refusal to invoke arbitration, and the refusal to abide by the award, as well as from the stoppage of work in violation of the "no-strike" clause itself.

12 *See, e.g.,* New Orleans S.S. Ass'n v. General Longshore Workers, 389 F.2d 369 (5th Cir. 1968) and text accompanying notes 61-67 *infra.*

13 *See generally* Gregory, *The Law of the Collective Agreement,* 57 MICH. L. REV. 635 (1959); Stewart, *No-Strike Clauses in the Federal Courts,* 59 MICH. L. REV. 673 (1961); Note, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia,* 70 YALE L.J. 70 (1960); Spelfogel, *Enforcement of No-Strike Clauses By Injunction, Damage Actions, and Discipline,* 7 B. C. IND. & COMM. L. REV. 239 (1966).

judicial methods discussed above is attempted here. A brief recapitulation of their demise, however, will set the stage for exposing the necessity of the arbitration enforcement approach and some of the problems which must be anticipated by its proponents. The primary emphasis of this Note will center on exploration of the present state of the law regarding such arbitration enforcement.

II. Demise of Strictly Judicial Enforcement

A. Rejection of Federal Court Injunctions

The question of applicability of the Norris-LaGuardia Act to enforcement of violations of no-strike clauses occasioned a divergence of opinion at the court of appeals level. The Tenth Circuit considered the question in *Chauffeurs, Teamsters and Helpers Local Union No. 795 v. Yellow Transit Freight Lines,*[14] where a group of interstate motor carriers sought to enjoin the union from violating no-strike clauses of separate collective bargaining contracts. The Tenth Circuit assumed that section 301 was a grant of general jurisdiction aimed at equal enforceability of contract, a specific objective that must prevail over the sweeping prohibitions of the Norris-LaGuardia Act.[15] The court recognized the validity of differentiating between negative orders enjoining organization — a valid objective of the Norris-LaGuardia prohibitions — and affirmative enforcement of agreements after formation. It underscored this delineation by stating:

> It is one thing to utilize an injunctive decree for the negative purpose of interfering with full freedom of association, self-organization and designation of representatives to negotiate the terms and conditions of employment. It is quite another to utilize the judicial processes to preserve and vouchsafe the fruits of a bargain which the parties have freely arrived at through the exercise of collective bargaining rights.[16]

The decision in *Yellow Transit* was hailed as a proper and reasonable result[17] and there was a solid ground for acceptance. The Supreme Court, in *Textile Workers Union of America v. Lincoln Mills,*[18] had applied federal equity power to the enforcement of an agreement to arbitrate. Since the no-strike clause was a reasonable correlative of an arbitration clause, it would, of necessity, require correlative enforcement.[19] But the view of the Tenth Circuit did not prevail when the same question was presented to the Seventh Circuit in *Sinclair Refining Company v. Atkinson.*[20] That court rejected the technical delineation that had been made in the *Yellow Transit* decision and instead accepted the reasoning of its lower court denying the injunction.[21] The federal district court in

14 282 F.2d 345 (10th Cir. 1960).
15 *See* Stewart, *supra* note 13, at 682, where the commentator discusses the Tenth Circuit's interpretation of section 301.
16 282 F.2d 345, 349-50 (10th Cir. 1960).
17 *See* Stewart, *supra* note 13, at 682-83, & n.45.
18 353 U.S. 448 (1957).
19 *See* Hays, *The Supreme Court and Labor Law, October Term 1959,* 60 COLUM. L. REV. 901, 918 (1960).
20 290 F.2d 312 (7th Cir. 1961), *aff'd,* 370 U.S. 195 (1962).
21 *Id.* at 320-21.

Sinclair had concluded that the controversy was unquestionably a "labor dispute" within the definition of the Norris-LaGuardia Act and therefore within the anti-injunction proscription.[22] The Supreme Court, noting that the First and Second Circuits had reached determinations similar to that of the Seventh,[23] granted certiorari to solve the controversy.

In *Sinclair Refining Company v. Atkinson,* the Supreme Court laid any developing technical distinctions aside and brought the injunctive action clearly within the purview of the Norris-LaGuardia Act. The conflict was held to be a "labor dispute" according to section 13,[24] and thus no injunction would lie.[25] The Court rejected the contention that section 301 of the Taft-Hartley Act had impliedly overruled the Norris-LaGuardia prohibition, reasoning that the two Acts must be construed according to their terms.[26] This interpretation revealed a legislative implication that, although arbitration of disputes was desirable, if either of the parties chose to disregard this provision of their agreement, there would be a limit to what the courts could do to effectuate it. The limit seems to be that while Norris-LaGuardia "does not impair the right of an employer to obtain an order compelling arbitration of any dispute that may have been made arbitrable by the provisions of an effective collective bargaining agreement,"[27] on the other hand, it does not allow the employer "to enjoy the benefits of an injunction along with the right which Congress gave him in § 301 to sue for breach of a collective agreement."[28] The Court recognized that "the right to sue which § 301 gives employers would be worth more to them if they could also get a federal court injunction to bar a breach of their collective bargaining agreements,"[29] but it was left up to Congress to decide if the judiciary was to return to the "business of enjoining strikes" under such circumstances. The decision was by a vote of 5 to 3; Justice Brennan's dissent exposed the violence that the majority opinion perpetrated upon the orderly progression of arbitration law and pointed to methods of peaceful coexistence between the two provisions.[30] Yet, on the basis of the majority opinion, the federal injunction was rendered impotent as a tool for enforcement of no-strike clauses.

B. State Courts and Removal

Section 301 of the Taft-Hartley Act does not expressly exclude state courts[31] from exercising jurisdiction over "labor disputes," and the enforcement of collec-

22 *See* Sinclair Ref. Co. v. Atkinson, 187 F. Supp. 225, 228 (N.D. Ind. 1960).
23 370 U.S. 195, 199 n.7 (1962). *See also* Stewart, *supra* note 13, at 681.
24 29 U.S.C. § 113(c) (1964) provides:
> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

25 Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 199 (1962).
26 *Id.* at 203-04.
27 *Id.* at 214.
28 *Id.*
29 *Id.*
30 *Id.* at 215-29.
31 See the provision cited in note 3 *supra.*

tive bargaining agreements in these courts apparently conflicts with no express federal policy, since the state courts are equally adept at the business of interpreting contracts. From these premises Justice Traynor of the Supreme Court of California, in *McCarroll v. Los Angeles County District Council of Carpenters*,[32] concluded that "[s]tate courts therefore have concurrent jurisdiction with federal courts over actions that can be brought in the federal courts under section 301."[33] Traynor felt unfettered by the federal preemption of jurisdiction over unfair labor practice cases[34] since those cases involve a question of particular expertise which is not pertinent to contract enforcement. He did recognize limitations:

> It is obvious that in exercising this jurisdiction state courts are no longer free to apply state law, but must apply the federal law of collective bargaining agreements. Otherwise the scope of the litigants' rights will depend on the accident of the forum in which the action is brought.[35]

However, Traynor asserted that Norris-LaGuardia was not applicable to state courts, and, therefore, since section 301 did not evince any policy of limitation, the mere fact of concurrent jurisdiction did not preclude state courts from issuing injunctions.[36]

While the assumption of concurrent jurisdiction has apparently never been seriously challenged,[37] the freedom of remedy expressed in *McCarroll* has not escaped scrutiny.[38] However, the efficacy of Traynor's statement has yet to be conclusively denied, and it still finds favor among the state courts. Justice Roberts of the Supreme Court of Pennsylvania spoke similarly in *Shaw Electric Company v. International Brotherhood of Electrical Workers, Local Union 98*[39] when he said, "it does not follow that the Norris-LaGuardia Act, if woven into the fabric of Section 301, would express a national labor policy to prohibit the granting of injunctive relief by state courts."[40]

While concurrent jurisdiction remains a reality, the issue of whether it remains a practicality is open to serious doubt. If these suits are freely removable, the injunctive remedy is almost as effectively thwarted as if the state courts themselves were denied the power to grant it. The Third Circuit, sensing this difficulty, required remand to the original state court in *American Dredging Company v. Local 25, Marine Division, International Union of Operating Engineers, AFL-CIO*.[41] The company had brought suit in a Pennsylvania

32 315 P.2d 322 (Cal. 1957).
33 *Id.* at 330.
34 *See* San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957); Garner v. Teamsters Local 776, 346 U.S. 485 (1953).
35 315 P.2d at 330.
36 *Id.* at 331-32. It is noteworthy in passing that some state courts are precluded from granting injunctive relief by state statutes similar to the Norris-LaGuardia Act. *See, e.g.*, N.Y. LABOR LAW § 807.1(f)(1) (McKinney 1965).
37 *See* Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia*, 79 HARV. L. REV. 757 (1966). *See also* the *American Dredging* and *Avco* decisions, cited in note 8 *supra*, which proceeded upon the assumption that state jurisdiction had been properly invoked.
38 See text accompanying notes 52-54 *infra*.
39 418 Pa. 1, 208 A.2d 769 (1965).
40 *Id.* at 11, 208 A.2d at 775.
41 338 F.2d 837 (3d Cir. 1964).

state court to enjoin breach of a no-strike clause, whereupon the union removed to the United States District Court for the Eastern District of Pennsylvania. The federal court claimed original jurisdiction under section 301, even though it was powerless to grant the injunction requested and was accordingly obliged to dismiss the suit. The Third Circuit then held that the federal district court had misconstrued its "jurisdiction" as that term had been employed in *Sinclair*.[42] Relying on the definition of "jurisdiction" as including the power both to entertain a suit and to render a binding decision on the merits, the court of appeals concluded that deprivation of injunctive power as interpreted in *Sinclair* meant a lack of subject matter jurisdiction in the federal district court and required a remand. In an often cited statement, Judge Kalodner opined:

> It cannot be gainsaid that had the plaintiff initially brought suit in the District Court under § 301, alleging in its complaint a cause of action for breach of its collective bargaining agreement, in the course of a labor dispute, and praying for injunctive relief, that the action would have been dismissed for lack of jurisdiction under Sinclair.
>
> To say then that a District Court has *subject matter jurisdiction* of a cause of action, so as to authorize it to *take cognizance* of it under the provisions of the Removal Statute, when it does not in the first place have jurisdiction to entertain and decide it upon its merits, is to give sanction to an exercise in futility.[43] (Emphasis added.)

The denial of remand would, in the judge's opinion, have the "serious consequences" of: first, precluding the plaintiff-employer from relief possible under state law, including a permanent injunction; second, ousting the state court of jurisdiction in contravention of traditional comity; and third, thwarting the congressional intent of having section 301 supplement rather than displace state jurisdiction.[44]

The Sixth Circuit, however, felt that assumption of an opposite position in *Avco Corporation v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*[45] was constrained by the necessities of a uniform national labor policy. In concluding that the obvious result — dismissal for lack of jurisdiction to grant the relief requested — should not bar removal, the *Avco* court expressed the fear that an intolerable situation would develop: "If remand is granted, State Courts would become the preferred forum for adjusting breaches of no-strike clauses in collective bargaining agreements in industries affecting interstate commerce."[46]

Sensing the importance of the conflict thus presented, the Supreme Court

42 *Id.* at 839-40.

43 *Id.* at 842.

44 *Id.* at 843. Concerning the function of state court jurisdiction, the Supreme Court in *Lincoln Mills* had earlier concluded:

> [T]he *substantive law* to be applied in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . Federal interpretation of the federal law will govern, not state law. But state 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.* 353 U.S. 448, 456-57 (1957) (emphasis added).

45 376 F.2d 337 (6th Cir. 1967).

46 *Id.* at 343.

granted certiorari in the *Avco* case,[47] but not until the problem had generated considerable confusion.[48] It placed a reserved stamp of approval upon the Sixth Circuit's view in its ultimate determination,[49] finding that such a suit was one arising "under the laws of the United States" as well as being within the "original jurisdiction" prescribed by the general federal removal statute.[50] It distinguished the question presented in *Sinclair* by stating that "[t]he nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy."[51]

Although the Sixth Circuit in *Avco* had gone so far as to dictate that "the *remedies* available in State Courts are limited to the remedies available under Federal law,"[52] the Supreme Court expressly reserved decision as to the effect of *Sinclair* on this question.[53] However, since the Court impliedly accepted as an accurate prognostication the obvious preference for state courts which would arise if removal was held inapplicable, the indication is that it would, under proper circumstances, extend its ruling to limit state courts to non-injunctive remedies; such a holding would be an attempt to preserve uniform national policy, even though it would possibly engender a constitutional battle.[54] However, this whole issue may have been rendered moot; it is difficult to envision a situation in which a state court would retain jurisdiction of a case long enough to exercise its injunctive powers, for astute union counsel would undoubtedly recognize the distinct advantages of immediate removal.

II. The Arbitrator's "Injunction"

A. The Federal Courts

Having observed the demise of the outright injunction, it remains to inquire whether we can gain judicial cognizance for another national policy — avoidance of concerted work stoppage by arbitration — which is sufficiently distinguishable from pure anti-injunction policy so as to be judicially enforceable. It has been held and reaffirmed that the Norris-LaGuardia Act does not impair

47 389 U.S. 819 (1967).

48 A group of cases in the federal district courts of New York are illustrative of this confusion. Removal was granted in Sealtest Foods Div. of Nat. Dairy Prod. Corp. v. Conrad, 262 F. Supp. 623 (N.D.N.Y. 1966); Sea-Land Service, Inc. v. Hall, 276 F. Supp. 56 (S.D.N.Y. 1967); Publishers' Ass'n v. New York Newspaper Printing Pressmen's Union Number Two, 246 F. Supp. 293 (S.D.N.Y. 1965); Tri-Boro Bagel Co. v. Bakery Drivers Local 802, 228 F. Supp. 720 (E.D.N.Y. 1963). Removal was denied in New York Shipping Ass'n v. ILA, 276 F. Supp. 51 (S.D.N.Y. 1967). The positions of the two different judges of the Southern District were taken within weeks of each other, leaving one to conclude that until the Supreme Court's answer was given, the rights of the parties depended upon which judge was on the bench.

49 Avco Corp. v. Aero Lodge No. 735, IAM, 390 U.S. 557, 560 (1968).

50 28 U.S.C. § 1441(a) (1964). The text of this provision is quoted in note 7 *supra*.

51 Avco Corp. v. Aero Lodge No. 735, IAM, 390 U.S. 557, 561 (1968).

52 376 F.2d at 343 (emphasis added).

53 *See* 390 U.S. at 562 (Stewart, J., concurring). While the District Judge had dissolved the state injunction, it was not clear whether he had done so under compulsion of *Sinclair* or if he had merely exercised his equity power under 28 U.S.C. § 1450 (1964). Thus, no mention was made of the propriety of the state injunction.

54 *See* McCarroll v. Los Angeles Co. Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322, 331-32 (1957) where Justice Traynor questions the power of the federal government to deprive the state courts of such remedial power.

the right of an employer to obtain an order "in the nature of an injunction" compelling arbitration under the provisions of an effective collective bargaining agreement.[55] Where the provision is such that the parties have ceded power to an arbitrator to order an end to a work stoppage, there would seem to be more than an ordinary no-strike clause. It would seem rather fruitless to enforce arbitration under such a clause and then refuse to provide judicial sanction to the arbitrator's award simply because it has the effect of an injunction, thus falling under the prohibition of *Sinclair* and the removal mandate of *Avco*.

The Fifth Circuit, considering several significant cases, has provided a convincing exposition which differentiates between "enforcement" of these awards and the issuance of an ordinary injunction. The first major case to deal with court enforcement of an arbitrator's award on the federal level was *Gulf and South American Steamship Company v. National Maritime Union*.[56] Although the arbitrator's award was not enforced in that case, the factual context indicates why such a result was reached and how it helped pave the road to judicial enforcement. The contract in question provided that the no-strike and arbitration provisions would apply only if the situation evolved from an arbitrable dispute, and no specific power to issue a cease and desist order was given to the arbitrator. The district court had dismissed the action upon its determination that the anti-injunction rationale of *Sinclair* precluded enforcement,[57] but the court of appeals did not go so far. It held instead that the question was one of jurisdiction of the arbitrator.[58] Since it found that a relationship of the no-strike clause to an arbitrable issue had not been established, the arbitrator was without jurisdiction to issue any order whatsoever. The court stated:

> The power of the arbitrator lies in the subject matter being drawn from the agreement to arbitrate, and absent such power or jurisdiction there may be no judicial enforcement. This was purely and simply an effort to obtain a federal injunction to stop a labor dispute. The federal courts may not grant such relief.[59]

Thus, the court avoided the question of whether an arbitrator's order, issued under properly invoked jurisdiction, would be enforceable in light of *Sinclair*. One commentator suggested that

> [i]n fact the opinion might be interpreted to conclude that if there is no provision in the agreement to the contrary, and the finding is made that the issue giving rise to the work stoppage is an arbitrable one, then an arbitrator's cease and desist award is a valid one and is enforceable.[60]

Indeed, that very determination was made when the Fifth Circuit, in *New*

55 *See, e.g.*, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962).
56 360 F.2d 63 (5th Cir. 1966).
57 *Id.* at 64-65.
58 *Id.* at 65.
59 *Id.*
60 McDermott, *Enforcing No-Strike Provisions via Arbitration*, 18 LABOR L.J. 579, 583 (1967).

Orleans Steamship Association v. General Longshore Workers,[61] reversed a contrary decision of the United States District Court for the Eastern District of Louisiana which had just been rendered when the above-quoted observation was published. The enforced order evolved from a "quickie" arbitration clause under which either party could bypass the prior steps of the grievance procedure and obtain immediate arbitration under certain circumstances. It gave the arbitrator power to grant "appropriate relief, including an order to desist."[62] Thus, the jurisdictional obstacle encountered in *Gulf and South American* was not present, and enforcement turned directly upon interpretation of the *Sinclair* holding. Citing the established principle that parties can be compelled to arbitrate according to the terms of their agreements,[63] and noting that it has become commonplace for federal courts to enforce arbitration awards where matters other than strikes are involved,[64] the court went on to distinguish *Sinclair* "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."[65] The court was of the opinion that the logic of arbitration policy compelled the following result:

> Norris-LaGuardia is limited to labor disputes and we consider the instant controversy to be outside the scope of a labor dispute as such. We have before us a contract wherein the parties have ceded their remedy of self-help in a labor dispute to arbitration even to the point of permitting the arbitrator to grant a desist order. Once the arbitration was completed, the matter became ripe for specific performance and fell outside the scope of Norris-LaGuardia.[66]

The court reasoned that, in light of the congressional policy of encouragement and compulsion of arbitration, to deny enforcement would be imputing anomalous intention to Congress and would go beyond the Court's interpretation in *Sinclair.* Asserting that various policies of labor relations must be construed compatibly, the court expressed its conviction that "the vitality of Norris-LaGuardia is in no wise diminished by the judicial enforcement of the award of an arbitrator made pursuant to a contract."[67]

The Fifth Circuit has thus recognized the right of parties to contractually create private judicial processes, to waive their right to economic self-help in order to provide a meaningful mechanism for preserving industrial peace, and to establish the correlative duty to honor and be bound by the decisions of the tribunal which they have created. The court was fully aware of the implications of its decision, for one month later, speaking in the context of enforcing a "non-injunctive" type of general arbitration award in *Safeway Stores v. Amer-*

61 389 F.2d 369 (5th Cir.), *cert. denied,* 37 U.S.L.W. 3133 (U.S. Oct. 15, 1968).
62 *Id.* at 370.
63 The Supreme Court so held in the *Lincoln Mills* decision and its progeny, particularly *United Steelworkers of America v. American Manufacturing Company,* 363 U.S. 564 (1960).
64 389 F.2d at 371. *See also* United States Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).
65 389 F.2d at 372.
66 *Id.*
67 *Id.* at 373.

ican Bakery and Confectionary Workers,[68] it alluded to the *New Orleans Steamship* case: "[I]t must be remembered that . . . a consensually adopted contract arrangement . . . can hold for, as well as against, the employer, even to the point of outlawing labor's precious right to strike."[69]

The Fifth Circuit was not actually a "lone voice crying in the wilderness," for in *Philadelphia Marine Trade Association v. International Longshoremen's Association, Local 1291,*[70] the Third Circuit had ruled similarly. The court thought the issue to be one of jurisdiction:

> Under the facts and the law, the holding of the District Court that it had the jurisdiction to enforce the crystal clear judgment of the arbitrator was sound and right. It was not in conflict with the Norris-LaGuardia Act but completely within the Lincoln Mills and Steelworkers opinions . . . and a vital part of all important enforcement of the specific performance of the admittedly agreed to arbitration clause in the labor contract before us.[71]

The court took the position that the order was neither an injunction nor reasonably to be construed as a restraining order, but rather that it was an entirely different but familiar animal, namely specific performance of contract.[72]

The Third Circuit's stand was robbed of significance to some degree, however, when the Supreme Court, having granted certiorari to consider the questions,[73] did not even reach the ultimate issue.[74] The Court instead held that this particular award was unenforceable due to the impreciseness of the order granting relief as drawn by the district court in which the action originated. Noting that the primary emphasis of the arguments below centered upon the injunction-enforcement dichotomy, it ruled:

> We do not, however, reach the underlying questions of federal labor law these arguments present. For whatever power the District Court might have possessed under the circumstances disclosed by this record, the conclusion is inescapable that the decree which the court in fact entered was too vague to be sustained as a valid exercise of federal judicial authority.[75]

However, the "impreciseness" rationale merely paved the way for further confusion in the area, for it was predicated upon a federal procedural rule requiring preciseness in drafting *injunctive* relief.[76] Emphasizing the history and application of that rule in both prohibitory and affirmative decrees,[77] the Court said:

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68 390 F.2d 79 (5th Cir. 1968).
69 *Id.* at 83-84.
70 365 F.2d 295 (3d Cir. 1966), *rev'd on other grounds,* 389 U.S. 64 (1967).
71 *Id.* at 299-300.
72 *Id.* at 301.
73 Local 1291, ILA v. Philadelphia Marine Trade Ass'n, 386 U.S. 907 (1967).
74 Local 1291, ILA v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1967).
75 *Id.* at 73-74.
76 FED. R. CIV. P. 65(d) reads:
> 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 be reference to the complaint or other document, the act or acts sought to be restrained; . . . .

77 *See* 389 U.S. at 75 &nn.11-12. Rule 65(d) is successor to section 19 of the Clayton Act, which "was intended to be 'of general application' to the end that '[d]efendants . . . never be left to guess at what they are forbidden to do . . . . ' ". *Id.* at 75.

> 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). Viewing the decree as "specifically enforcing" the arbitrator's award would not alter this conclusion.[78] (Emphasis added.)

The Court underscored the fact that in *Sinclair* it had referred to its order in *Lincoln Mills* as a "mandatory injunction to carry out an agreement to arbitrate."[79] Fortunately perhaps, the only significance presently attached to these statements was that they required the decree to be more specifically drawn; they left open to speculation the inquiry whether the Court would find a significant distinction between the "order granting an injunction" of Rule 65(d) and the "injunction" prohibited by Norris-LaGuardia.[80] Justice Douglas emphasized the impending confusion in his partial dissent. While reiterating his basic objections to the Court's holding in *Sinclair,* he noted the semantical difficulties of the Court's present determination: "If the order of the District Court is an 'injunction' within the meaning of Rule 65(d), then I fail to see why it is not an 'injunction' within the meaning of the Norris-LaGuardia Act."[81] Thus, on the basis of a strained factual distinction, the *Philadelphia Marine* case was properly distinguished by the Fifth Circuit in *New Orleans Steamship* as bearing no significance on the issue there decided.[82]

The logical innovations of the courts of appeals in the *New Orleans Steamship* and *Philadelphia Marine* decisions have found opponents in the lower federal courts, and the rejection has turned on the very principles of differentiation espoused. In *Marine Transport Lines v. Curran*[83] Judge McLean flatly declined to follow the Third Circuit's *Philadelphia Marine* decision,[84] and he revealed a reasoning quite different from that of *New Orleans Steamship* when he said: "This is a labor dispute. Petitioner does not claim otherwise. The court is being asked to enjoin a work stoppage. This is the reality of the situation, whatever may be the form of the proceeding."[85] Referring to *Sinclair Refining Company v. Atkinson,* he refused to distinguish the situation:

> In Sinclair the employer sought to enjoin a work stoppage before the arbitration took place in order to make the arbitration effective. Here the employer seeks to enjoin a work stoppage after the arbitration has taken place and after the arbitrator has directed that the work stoppage cease. In my opinion, there is no significant difference between the two situations, as far as the power of this court is concerned.[86]

Judge McLean even went so far as to eliminate any similarity to the *Gulf and South American* case by recognizing that the arbitrator in *Curran* did have

78 *Id.* at 75.
79 *Id.* at 75 n.10.
80 *See id.* at 76-77 (Brennan, J., concurring).
81 *Id.* at 77.
82 *See* New Orleans S.S. Ass'n v. General Longshore Workers, 389 F.2d 369, 371-72 (5th Cir. 1968).
83 65 L.R.R.M. 2095 (S.D.N.Y. 1967).
84 *Id.* at 2097.
85 *Id.*
86 *Id.*

jurisdiction to render such an order;[87] the court simply could not enforce this type of award in any case.

This opinion can be characterized only as one of judicial obstinance. It smacks of inconsistency, for in purportedly refusing to distinguish the situation from that in *Sinclair,* it indeed points to significant differences demanding an opposite result. In the *Sinclair* situation the injunction was sought *before* arbitration was invoked, and was thereby without significant opportunity for adequate fact finding, ostensibly presenting an opportunity for action ultimately prejudicial to a justified position. While the merits of denying an injunction in the *Sinclair* situation are not without challenge, the *Curran* situation presents clear circumstances where even these minimal infirmities are eliminated. There the facts had been found according to an impartial procedure contractually agreed upon by the parties, thus minimizing the incidence of prejudice. Furthermore, the judge was not being called upon to "enjoin" anything, at least in the prohibitory sense of that term; he was merely being asked to order specific performance of a contract. The fallacy of the *Curran* opinion was lucidly exposed by the treatment of the Fifth Circuit in *New Orleans Steamship.*

In *Tanker Service Committee v. International Organization of Masters, Mates and Pilots,*[88] the United States District Court for the Eastern District of Pennsylvania also refused to order compliance with an arbitrator's award, although not nearly so forcefully or conclusively as had the *Curran* court. In *Tanker Service,* the arbitrability of the no-strike clause and the procedural validity of the arbitrator's award ordering an end to a work stoppage were all conceded. But in considering the authority of the court to enforce the award, it concluded that "[b]y reason of § 4 of the Norris-LaGuardia Act, as interpreted in *Sinclair Refining Co. v. Atkinson,* the Defendant cannot, in this private litigation, lawfully be enjoined from continuing the work-stoppage."[89] However, the court felt that it was its duty to fashion some sort of remedy consonant with the congressional mandate. It thought that a contingent award of damages, from which the union could be relieved by returning to work, would serve as a sufficient lever to encourage compliance with the arbitrator's award.[90] In substance, there is a striking similarity between the result and a finding of contempt for refusal to comply with a judicial order, accompanied by a penalty mitigated upon compliance. That the court in *Tanker Service* was engaging in a purely formal distinction finds support in its curious assertion that, while the Third Circuit's decision in *Philadelphia Marine* sanctioned such a damage remedy, that decision "may go further and approve the use of injunctions as such, where a final arbitration award has been entered."[91] This cryptic statement is not further explained, but it does indicate that, under proper circumstances, the rationale urged in *New Orleans Steamship* and in *Philadelphia Marine* would be acceptable. Thus softened by this semantical cushion, the *Tanker Service* decision is much more palatable than the harsh rejection of *Curran.*

87 *Id.* at 2096-97.
88 56 CCH Lab. Cas. ¶ 12,094 (E.D. Penn. 1967).
89 *Id.*
90 *Id.*
91 *Id.*

B. The State Courts

The case law arising from state courts on the enforcement question also deserves discussion. At the outset, it is necessary to comment on an early New York case, *Ruppert v. Egelhofer*[92] (popularly known as the "Ruppert Brewing" case), that was cited with approval in *New Orleans Steamship*. The propriety of reliance upon this state case is apparent when it is considered that New York State has its own Anti-Injunction Act[93] patterned after the federal Norris-LaGuardia statute. The New York court noted that nothing in the contract specifically granted the arbitrator authority to issue cease and desist orders, but it held that this was not controlling:

> [I]t is apparent that nothing short of an injunction would have accomplished the evident intent of these parties that there be speedy and immediately effective relief against strikes, lockouts, and slow-downs. True, we find no decisions in this court confirming an arbitration award containing an injunction, but we have upheld awards which commanded employers to rehire or retain employees — that is, mandatory injunctions.[94]

The court predicated its disposition on the fact that the decision on the illegality of the slowdown was made by a tribunal mutually agreed upon. It emphasized that "arbitration is voluntary and there is no reason why unions and employers should deny such powers [the right to enjoin illegal work stoppages] to the special tribunals they themselves create."[95]

New York is not alone, for arbitrator's injunctive type awards have also received approval in the state courts of Illinois. Arbitrator Platt, acting in accordance with a contractual procedure, issued a cease and desist order against an unauthorized strike in *Ford Motor Company, Chicago Stamping Plant.*[96] The award was confirmed on the same date in the Illinois Circuit Court of Cook County.[97] The court's decree, in ordering the local, its officers and its members to refrain from the strike, relied upon the Uniform Arbitration Act,[98] and was in terms substantially identical to those contained in the umpire's award.[99]

The rationale of the *Ruppert Brewing* case, when combined with the reference to the Uniform Act, provides cogent support for local enforcement of such orders, especially in those states which have adopted the Uniform Arbitration Act or a similar statute.[100] However, reliance upon state cases may become

92 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958). *See also* Annot., 70 A.L.R.2d 1055 (1960) for a general discussion on the power of arbitrators to award injunctions or specific performance.

93 *See* note 36 *supra.*

94 3 N.Y.2d 576, 581, 148 N.E.2d 129, 130-31, 170 N.Y.S.2d 785, 787 (1958).

95 *Id.* at 582, 148 N.E.2d at 131, 170 N.Y.S.2d at 788.

96 41 Lab. Arb. 619 (1963).

97 *In re* Ford Motor Company, 41 Lab. Arb. 621 (1963).

98 ILL. ANN. STAT. ch. 10, § 101-23 (Smith-Hurd 1961).

99 41 Lab. Arb. at 621.

100 The Uniform Arbitration Act has been adopted by only six states. In addition to Illinois, they are: ARIZ. REV. STAT. ANN. §§ 12-1501 to -1517 (1967 Supp.); MD. ANN. CODE art. 7, §§ 1-23 (1968); MASS. ANN. LAWS ch. 251, §§ 1-19 (1967 Supp.); MINN. STAT. ANN. §§ 572.08-.30 (1967 Supp.); WYO. STAT. ANN. §§ 1-1048.1-.21 (1967 Supp.). As if the size of this list were not unfortunate enough, Arizona adds a section that exempts labor arbi-

less than adequate if federal decisions eventuate in the conclusion that such enforcement is truly the prohibited form of injunction under Norris-LaGuardia. In light of the *Avco* decision, state courts would no longer be an acceptable forum to one defending such an action, and removal, resulting in dismissal for lack of jurisdiction to grant the requested relief, would frequently occur. However, until such a conclusion is reached, the removal mandate will have no direct effect; for although *Avco* will quite probably be advanced as authority for dismissal, it is distinguishable. Access to state or federal courts in enforcement proceedings will remain a matter only of the convenience of the parties, and each court will have to enter its decision as to enforceability without Supreme Court guidance.

IV. Reflections and Conclusions

It should be obvious after this lengthy discussion of existing case law that those who would retain some semblance of internal control of labor disputes have but one road up which to turn. The Supreme Court has not aided the cause of enforcement in the past and apparently is not any more disposed to do so presently,[101] though advocates of this procedure may find some flicker of hope in the pronouncements of certain members of the Court. For example, Justice Douglas, in a separate opinion in *Philadelphia Marine* stated:

> [S]ince 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.[102]

Douglas asserts a belief that enforcement of a properly drawn order must be granted in order to avoid the "heads I win, tails you lose" tactics whereby a union will go through arbitration, perhaps even pursuant to a judicial order, and then totally frustrate the arbitration policy by refusing to abide by the award.[103] A separate opinion by Justice Brennan in the same case indicates that he also would draw a distinction between regular injunctions and enforcement orders.[104] Moreover, the concurring opinion of Justice Stewart in the *Avco* case indicates an unwillingness to extend the *Sinclair* reasoning without an exhaustive study of its underlying policy.[105]

Yet, while all of the expositions of valid logic and policy supporting such a differentiation between injunctions and enforcement orders would seem most palatable to a court with any hint of liberal tendency, the more conservative tribunals find themselves victims of the confusion generated by an over-cautious refusal to recognize the obvious distinctions in the situations.[106] The decision in *Marine*

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tration agreements. *See* ARIZ. REV. STAT. ANN. § 12-1517 ('(1967 Supp.). But while most of the major industrial states are absent from the list, the broad provisions of section 301 are hopefully sufficient to make reliance on acts of this nature unnecessary.

101 Certiorari was recently denied on an appeal from the Fifth Circuit. See General Longshore Workers v. New Orleans S.S. Ass'n, 37 U.S.L.W. 3133 (U.S. Oct. 15, 1968).

102 389 U.S. at 77 (1967).

103 *Id.* at 79.

104 *See id.* at 76-77.

105 390 U.S. at 562.

106 See text following note 87 *supra.*

Transport Lines v. Curran was engulfed by the most basic of innocent judicial derelictions as it proceeded logically from its initially invalid premises:

> 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.*[107] (Emphasis added.)

True as this conclusion might have been in *Sinclair* where congressionally manifested anti-injunction was the only inquiry, it fails to comprehend the totality of the present context and leaves much to be desired. Such "separatism" fails to consider that it was the judiciary which, in *Lincoln Mills* and in *The Steelworkers Trilogy,*[108] interpreted the congressional will as intending the enforcement of arbitration agreements. It was also the judiciary which created the existing problem with its decision in *Sinclair,* and which must resolve the conflict between injunction and enforcement. Such blissful simplicity also fails to consider that purely political expediencies may prevent any direct congressional action in such a volatile arena, thus militating judicious use by the courts of the tools that have been provided them for fashioning a labor policy in the spirit of *Lincoln Mills.* Finally, the *Curran* court's reasoning fails to consider whether there is a congressional intent to deny parties a right to set up an enforceable system of private jurisprudence for handling labor problems.[109] The *Curran* decision would impute such an anomalous intent to Congress, while the sounder position recognizes that the intent was properly interpreted in the *Trilogy*:

> It is difficult to believe that the very literal form of reasoning used by the New York court in this decision [*Curran*] will be acceptd by the Supreme Court, for it is completely contrary to the whole lesson set forth in the *Trilogy* decisions.[110]

It is not denied that enforcement of arbitration awards in this context will not be an easy notion for many to swallow, nor it is denied that such a remedy is not a panacea for all that ails labor-management relations. Yet, it is submitted that the suggested distinctions are a necessary step in avoiding stagnation and exploitation in this area.

Acceptance of the arbitrator's role in enforcing no-strike clauses depends upon the recognition that the pendulum has swung since the adoption of the Norris-LaGuardia Act. At that time, in a climate of hostility, fledgling labor organizations seriously needed effective protection in asserting, through economic self-help, their right to bargain collectively. But even accepting the doubtful viability of such necessity, the policy of protection of employees' basic rights is prostituted by sanctioning disregard for the duties imposed by contracts negotiated under its auspices. A policy of enjoining strikes *pending* arbitration has

107 65 L.R.R.M at 2097.
108 United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Mfg. Co., 363 U.S. 593 (1960).
109 *See* McDermott, *supra* note 60, at 585.
110 *Id.*

recognized drawbacks,[111] and is not here advocated; but the considerations militating against such preliminary injunctions are seriously qualified in cases of enforcement of awards *after* arbitration is completed. Far from demanding a similar result the latter command a distinguishable disposition.

Pending a more thorough disposition of the issue by the Supreme Court, it would seem that arbitration clauses granting authority to an arbitrator to order an end to work stoppages in violation of the collective agreement, when carefully drafted to avoid the jurisdictional problem encountered in *Gulf and South American,* are still valuable inclusions in collective bargaining agreements. If more federal courts are faced with the question of enforcement of awards granted in this context, either originally or on removal, then the Court may be forced to make a definitive pronouncement. Hopefully, a mature recognition and acceptance by the contracting parties of their correlative rights and duties will avoid the necessity for further judicial interpretation.

Daniel L. Hebert

111 See text following note 87 *supra.*