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# MICHIGAN LAW REVIEW

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## NO-STRIKE CLAUSES IN THE FEDERAL COURTS

*Frank H. Stewart\**

*"... About all an employer can get in exchange for his commitments in a collective agreement is continued production — no work stoppages for the life of the agreement. Most employers assume that they don't get even this unless the union signs a no-strike pledge and promises that the union officials will take action against wild-cat strikes and work stoppages. Of course, unions say that employers get a supply of labor in exchange for their concessions in collective agreements. But employers get no more labor now than they did before unions existed. . . ." — Charles O. Gregory<sup>1</sup>*

ONE consideration will support several promises.<sup>2</sup> A promisor may extract more than one promise in return for his single undertaking to do — or not to do. It depends upon his bargaining power. His single undertaking may be so valuable that several promises are necessary to induce him to act, or not to act. He is privileged to hold out for the best deal. The law does not examine his motives or reduce his demands. And from this arises the common-law principle that one consideration may support several promises.

This principle is sharply illustrated in the modern collective bargaining agreement. All but one of its typical provisions run from the employer to the union. The one affirmative obligation which flows from the union to the employer is the no-strike pledge. At one time collective bargaining agreements were unenforceable because they imposed no mutuality of obligation.<sup>3</sup> The employer promised everything; nothing came back in return. Mutuality is now supplied by the no-strike clause. This one promise from the union supplies the consideration for all the others.

Although the common-law analogy sharpens the importance of the no-strike clause, it is legally imperfect. Collective bargaining

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<sup>1</sup> Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U.L.Q. 3, 12.

<sup>2</sup> RESTATEMENT, CONTRACTS § 83 (1932).

<sup>3</sup> Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 199-201 (1936).

agreements are not made at common-law bargaining tables. If they were, either party dissatisfied with the proposed bargain could decline and walk away. These agreements are made in the context of legislation making bargaining mandatory.<sup>4</sup> And, although this legislation says neither bargainer need accept a proposal or make a concession,<sup>5</sup> it is administered by an agency whose regulation of the bargaining may control the contents of the bargain.<sup>6</sup>

But from a practical standpoint, the analogy is accurate to a fault. The employer, like his common-law counterpart, approaches the bargaining table with an estimate of what the proposed bargain will cost. He cannot grant a wage increase, or a pension arrangement, or any other exaction if he cannot pay the bill. He cannot pay the bill if he cannot operate, and therefore continued operation is central to his thinking. This may be an automatic — and unwarranted — assumption, but it is an essential one. The no-strike clause is how the employer secures this result from a labor organization. For these reasons, employers insist on inclusion of these clauses,<sup>7</sup> and for these reasons employers take strikes to get them.

In giving up the right to strike for a time, a labor organization releases its strongest weapon. Sometimes it wishes it hadn't. In labor law, as elsewhere, agreements are broken. Expediency of the moment then gives the lie to promises of unswerving rectitude. The strike may be openly sponsored, or it may be the work of the capricious few, for whom the contracting union has no public sentiment but grave disapproval. In either event, the result to the employer is the same — the freedom from work stoppages is over.

## I.

A strike in breach of contract irreparably harms the employer. Orders are lost. Customers transfer their favor to employers who

<sup>4</sup> 61 Stat. 141 (1947), 29 U.S.C. §§ 158 (a) (5), (b) (3) (1958).

<sup>5</sup> 61 Stat. 142 (1947), 29 U.S.C. § 158 (d) (1958), says that the obligation to bargain in good faith does not "compel either party to agree to a proposal or require the making of a concession. . . ."

<sup>6</sup> See Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1078-86 (1958).

<sup>7</sup> Insistence on a no-strike clause is not a refusal to bargain. *NLRB v. United Clay Mines Corp.*, 219 F.2d 120 (6th Cir. 1955). This article treats certain aspects of the law of no-strike clauses in the federal courts. While it does not make policy suggestions, it must be obvious that no-strike clauses are of little value unless they are enforced. Weak and vacillating policies toward strikes in breach of contract invite their repetition; firm policies lessen their incidence. These policy considerations are well set forth in Mangum, *Taming Wildcat Strikes*, Harv. Bus. Rev., March-April 1960, p. 88. For a perceptive analysis, see SLIGHTER, HEALY & LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 663-91 (1960).

meet deadlines. The discharge of strike leaders does not end the strike; at best, it stops future efforts. A damage action, tried years later to the vagaries of a jury, is small recompense to the employer denied business because he cannot deliver. Equitable relief is not only the most appropriate remedy, but also the only effective one. The order of the court<sup>8</sup> compelling the union to refrain from engaging in a work stoppage in breach of contract has, as a practical matter, the effect of immediately ending the strike. The proposition is easy to state; it is not quite so simple to apply. Before considering the possibility of equitable relief in the federal courts, the theory of federal pre-emption must be disposed of.

### A.

The doctrine of federal pre-emption states that activity in interstate commerce, arguably protected or prohibited by the Taft-Hartley Act, must first be ruled on by the National Labor Relations Board. All other forums must stay their hands until the Board rules on its jurisdiction to take the case, and, generally, on the merits of the case itself. The ramifications of this doctrine are exceedingly wide. It is a vineyard tilled well and often by others.<sup>9</sup> For this purpose it is enough that the tangled skein of cases arising from federal pre-emption have little application.<sup>10</sup>

Federal pre-emption appears when state courts or boards try to rule on behavior governed by federal statute. Then the NLRB and not the state has first authority to rule on the activity. But a

<sup>8</sup> Orders in equity against strikes run to the union, preventing it from concerted action in publicizing, organizing, or otherwise supervising the work stoppage; they generally contain mandatory provisions requiring the union to take affirmative action, rescinding previous orders, etc. See the order in the national steel strike in 1959, *United States v. United Steelworkers*, 178 F. Supp. 297, 297-98 (W.D. Pa.), *aff'd*, 271 F.2d 676 (3d Cir.), *aff'd* 361 U.S. 39 (1959), 58 MICH. L. REV. 595 (1960). Such an order does not violate the involuntary servitude prohibition in amendment XIII of the Constitution. See *General Elec. Co. v. International Union, UAW-CIO*, 93 Ohio App. 139, 108 N.E.2d 211 (1952), *appeal dismissed*, 158 Ohio St. 555, 110 N.E.2d 424 (1953).

<sup>9</sup> The best of all treatments is, in my opinion, Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6, 269 (1959). The important developments since Professor Meltzer's article are analyzed in Gregory, *Federal or State Control of Concerted Union Activities*, 46 VA. L. REV. 539 (1960).

<sup>10</sup> Of course, I have oversimplified. See the basic analysis in Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52 (1957), and Professor Meltzer's realistic appraisal at 59 COLUM. L. REV. 269 (1959). For differing aspects of the problem, see Notes, 69 YALE L.J. 309 (1959), and 69 HARV. L. REV. 725 (1956). Yet the net conclusion of all this scholarship is that the courts, and not the NLRB, are most competent to deal with a violation of contract, especially one like the no-strike clause that goes to the heart of the agreement. Federal courts are decidedly chilly to claims of NLRB pre-emption of their own power to adjudicate contract violations. See *Lodge 12, IAM v. Cameron Iron Works, Inc.*, 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958).

breach of contract is of no concern to the Board. In the same statute which enlarged the NLRB and its activities, Congress gave federal courts authority to hear and decide cases arising from breach of labor agreements.<sup>11</sup> To facilitate these suits Congress removed the usual requirements of diversity of citizenship and amount in controversy. Labor agreements were for the courts; unfair labor practices for the Board. For this reason Congress rejected a proposal to make breach of the collective bargaining agreement an unfair labor practice: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."<sup>12</sup> The "usual processes of the law" certainly include equitable relief, unless otherwise prohibited. Here, of course, the major bar to equitable relief in the federal courts is the Norris-LaGuardia Act.<sup>13</sup>

### B.

The Norris-LaGuardia Act was passed by Congress to eliminate federal equity power in organizational and bargaining strikes.<sup>14</sup> The force of these strikes depends on growing economic and psychological momentum. An injunction snaps this force. The injunction is especially effective when the judge is receptive to the employer's theories of criminal conspiracy, and before 1932 federal judges were very receptive indeed. They, in effect, wrote labor policy through *ex parte* orders.<sup>15</sup> Congress concluded that the ease with which employers obtained injunctions from friendly judges gave them an unfair advantage in defeating organization or in rejecting bargaining demands. Therefore Congress removed the advantage. It did so in very broad language. Hereafter no "court of the United States"<sup>16</sup> could issue restraining orders or

<sup>11</sup> 61 Stat. 156 (1947), 29 U.S.C. § 185 (a) (1958).

<sup>12</sup> H.R. REP. NO. 510, 80th Cong., 1st Sess. 42 (1947); 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 546 (1948) [hereinafter cited LEGISLATIVE HISTORY]. The Board honors this direction. It has repeatedly said it will not adjudicate contract violations. *United Tel. Co.*, 112 N.L.R.B. 779 (1955). The rejected proposal would also have made it an unfair labor practice to refuse to submit an arbitrable issue to arbitration. H.R. REP. NO. 510, *supra* at 42; 1 LEGISLATIVE HISTORY 546. The undesirability of bringing agreements to arbitrate under the Board's jurisdiction was spelled out in 61 Stat. 139-40 (1947), 29 U.S.C. § 154 (1958): "Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis."

<sup>13</sup> 47 Stat. 70-73 (1932), 29 U.S.C. §§ 101-15 (1958).

<sup>14</sup> See GREGORY, *LABOR AND THE LAW* 455 (2d rev. ed. 1958).

<sup>15</sup> See Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 HARV. L. REV. 354, 355-56 (1958).

<sup>16</sup> 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958).

injunctions in a "labor dispute." The labor disputes insulated from federal equity power included "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. . . ." <sup>17</sup> Congress wanted unions to come to the bargaining table freed of equitable restraints. What then happened at the table was the concern of the parties who sat at it. In 1932, Congress had no further interest.

The history of the Norris-LaGuardia Act in debates and reports shows legislative desire to allow unions to bargain without hindrance from federal courts. The House Report said the object of the bill was to "protect, first, the right of free association, and, second, the right to advance the lawful object of the association."<sup>18</sup> Similarly, the Senate: "A single laborer, standing alone, confronted with such far-reaching, overwhelming concentration of employer power, is absolutely helpless to *negotiate* or to assert any influence over the fixing of his wages or the hours and conditions of labor."<sup>19</sup> These statements were mirrored in the declaration of policy which opens the Norris-LaGuardia Act. "[U]nder *prevailing* economic conditions, developed with the aid of governmental authority for owners of property . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract . . . 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. . . ." <sup>20</sup> This reads like a faded daguerreotype today. The literature accompanying Norris-LaGuardia with its inflamed pamphleteer style is hardly in tune with the "economic conditions" that prevail today. The labor organizations that faced Senator McClellan are not the fledglings of whom Congress was so solicitous in 1932.

The 1932 Congress immunized unions from equitable remedies to give them the power to extract an agreement in writing from the employer. Congress said employer power was largely created by governmental action; governmental action must even the odds for the countervailing power. This it did. It went no further. It did not intend to free unions from the one effective remedy after agree-

<sup>17</sup> 47 Stat. 73 (1932), 29 U.S.C. § 113 (c) (1958).

<sup>18</sup> H.R. REP. No. 669, 72d Cong., 1st Sess. 10 (1932). The same report refers to organizational efforts to *obtain* favorable conditions. *Id.* at 9.

<sup>19</sup> S. REP. No. 163, 72d Cong., 1st Sess. pt. 1, at 9 (1932). (Emphasis added.)

<sup>20</sup> 47 Stat. 70 (1932), 29 U.S.C. § 102 (1958). (Emphasis added.)

ment was reached.<sup>21</sup> Indeed, in 1932 there were few labor agreements to breach. Even the most random thought shows a vast difference between protecting an organization from judicial interference to enhance its bargaining power and permitting that organization effectively to breach the agreement once reached.<sup>22</sup> Courts have nonetheless so read Norris-LaGuardia.<sup>23</sup> I think they are mistaken, because I do not believe strikes in breach of contract are labor disputes as written in the Norris-LaGuardia Act.<sup>24</sup> It is incongruous that legislation designed to equip unions with bargaining power should free them to breach an agreement reached by virtue of the same legislation. Of course, it would be foolish to deny that a literal reading of the Norris-LaGuardia Act refutes my definition of a labor dispute. But the Norris-LaGuardia Act has seldom been read literally. The Supreme Court has repeatedly relaxed its bans when it has divined a subsequent — and overriding — policy. Professor Smith has truthfully remarked the act “could be profitably re-examined in light of the fairly numerous exceptions which the courts have engrafted upon it.”<sup>25</sup>

<sup>21</sup> Perhaps I read too much into congressional silence. Those who opposed Norris-LaGuardia urged that its provisions would prevent injunctions for breach of contract. S. REP. No. 163, *supra* note 19, at 9. The majority said nothing about it.

<sup>22</sup> See GREGORY, *op. cit. supra* note 14, at 455-56.

<sup>23</sup> Before Taft-Hartley: *Wilson & Co. v. Birl*, 105 F.2d 948 (3d Cir. 1939). After Taft-Hartley: *W. L. Mead, Inc. v. Int'l Bhd. of Teamsters*, 217 F.2d 6 (1st Cir. 1954).

<sup>24</sup> The idea is hardly original with me. See, e.g., *Farrand Optical Co., Inc. v. Local 475, Int'l Union of Elec. Workers*, 143 F. Supp. 527 (S.D.N.Y. 1956); *Mountain States Div. 17, Communications Workers v. Mountain States Tel. & Tel. Co.*, 81 F. Supp. 397 (D. Colo. 1948); Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 645 (1959).

<sup>25</sup> Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195, 251 n.203 (1960). E.g., the Supreme Court has allowed an injunction against a railroad which refused to bargain with the certified representative of its employees; Norris-LaGuardia was held inapplicable on policy grounds and no other, for the Railway Labor Act could not “be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act.” *Virginia Ry. v. System Fed'n 40, Ry. Employees Dep't*, 300 U.S. 515, 563 (1937). Moreover, federal courts have jurisdiction to grant injunctions to Negro petitioners seeking nondiscriminatory representation by their unions. The Court could hardly be more emphatic. “If . . . there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now.” *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232, 240 (1949); *accord*, *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *cf.* *Syres v. Oil Workers Union*, 350 U.S. 892 (1955) (same result under NLRA). Recently the Court authorized an injunction against a union which strikes in violation of the compulsory arbitration provisions of the RLA. *Brotherhood of R.R. Trainmen v. Chicago R. & Ind. R.R.*, 353 U.S. 30 (1957). The Court assumed that read literally Norris-LaGuardia would bar equitable relief, but the result was justified with the statement that Norris-LaGuardia and the RLA must be accommodated “so that the obvious purpose in the enactment of each is preserved.” *Id.* at 40. See generally Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 COLUM. L. REV. 381 (1960).

## C.

But Congress in 1935 apparently thought its predecessor in 1932 had not done enough to even the scales of economic power between organized labor and organized business. In 1932 it denied the federal judiciary the power to supervise labor's strongest bargaining weapon; in 1935 Congress entered the bargaining arena, apparently forever, by *requiring* the employer to bargain with a properly selected union.<sup>26</sup> The rest is familiar history. The negative protection of the Norris-LaGuardia Act and the affirmative requirements of the Wagner Act swelled the power of organized labor. Major industries recognized union representation — sometimes after a peaceable election, sometimes after violent upheavals. And the collective bargaining agreement became a common item instead of a legal freak.

Many in the Congress and elsewhere thought the objectives of 1932 and 1935 in equalizing power had outreached themselves. After World War II it was a trifle fatuous to view unions as creatures of underprivilege. The stereotype had outlived its political use. A rash of nation-wide strikes in 1946 and post-war political changes which sent conservatives back to Washington in recognizable numbers brought matters to a head. Congress decided to examine the power relationships it created in 1932 and 1935. It did so by amending the Wagner Act; these amendments were embodied in the Taft-Hartley Act.<sup>27</sup>

One of Congress' principal concerns was to impose equal responsibility on both parties to a labor agreement. Employers had always been suable for their breach, but it was difficult to sue unions because the common law of many states required that, in order to sue an unincorporated association, the plaintiff had to serve each and every member — a virtually impossible task.<sup>28</sup> Another barrier, in the federal courts, was the Norris-LaGuardia Act. The Third Circuit, in *Wilson & Co. v. Birl*,<sup>29</sup> said the Norris-LaGuardia Act prevented federal courts from issuing injunctions to remedy breach of no-strike clauses. The Senate Report spoke disapprovingly of this reading of the 1932 act which "insulated labor unions, in the field of injunctions, against liability for

<sup>26</sup> National Labor Relations Act (Wagner Act) § 8 (5), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158 (a) (5) (1958).

<sup>27</sup> 61 Stat. 136-59 (1947), 29 U.S.C. §§ 141-87 (1958).

<sup>28</sup> S. REP. No. 105, 80th Cong., 1st Sess. 15 (1947); 1 LEGISLATIVE HISTORY 421.

<sup>29</sup> 105 F.2d 948 (3d Cir. 1939).



breach of contract."<sup>30</sup> After all, the major "advantage which an employer can reasonably expect from a collective bargaining agreement is assurance of uninterrupted operation. . . ."<sup>31</sup> Therefore, in section 301 of Taft-Hartley, Congress allowed federal district courts to hear "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ."<sup>32</sup> This disarmingly simple language bore a marked resemblance to its 1946 predecessor in the Case bill, which President Truman vetoed on the ground that it "largely repeals the Norris-LaGuardia Act and changes a long-established Congressional policy."<sup>33</sup>

Read alone, 301 means just what it says — suits may be brought to enforce labor agreements in federal courts. Federal courts may hear these suits and grant whatever relief prayed for seems proper. Since "suits" encompasses legal or equitable proceedings, the federal courts should be able to issue injunctions, or to award damages, or both.

Of course, it is not that easy. Norris-LaGuardia remains on the books. Moreover, the NLRB is expressly authorized by the Taft-Hartley amendments to section 10 of the NLRA<sup>34</sup> to seek injunctions in federal district courts for various unfair labor practices. Do these considerations mean 301 was restricted to damage actions? The Supreme Court said "no" in *Textile Workers v. Lincoln Mills*.<sup>35</sup>

The Court was there faced with a union's request for equitable enforcement of an agreement to arbitrate, certainly a Norris-

<sup>30</sup> S. REP. NO. 105, *supra* note 28, at 17; 1 LEGISLATIVE HISTORY 423.

<sup>31</sup> S. REP. NO. 105, *supra* note 28, at 16; 1 LEGISLATIVE HISTORY 422.

<sup>32</sup> 61 Stat. 156 (1947), 29 U.S.C. § 185 (a) (1958).

<sup>33</sup> See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 512 (1957) (dissenting opinion).

<sup>34</sup> 61 Stat. 149 (1947), 29 U.S.C. §§ 160 (j), (l) (1958). The House counterpart of § 301 removed the prohibitions of Norris-LaGuardia in suits involving breach of a labor agreement. H.R. 3020, 80th Cong., 1st Sess. 65 (1947); 1 LEGISLATIVE HISTORY 222. The final bill removed only the Norris-LaGuardia concepts of agency, 61 Stat. 146 (1947), 29 U.S.C. § 160 (1958); H.R. REP. NO. 510, *supra* note 12, at 66; 1 LEGISLATIVE HISTORY 570. Any negative inference that Congress thereby intended Norris-LaGuardia to remain in full force and effect in § 301 actions is untenable, for such an inference would prove *Lincoln Mills* was wrongly decided. Note also that LMRA § 208 (b), 61 Stat. 155 (1947), 29 U.S.C. § 178 (b) (1958), specifically makes Norris-LaGuardia inapplicable to national emergency strikes.

<sup>35</sup> 353 U.S. 448 (1957). The decision inspired a great deal of writing. The legislative background is exhaustively treated in Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). Professor Feinsinger took a decidedly pessimistic view in *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261 (1957). The best is still Professor Bunn's clear and sensible analysis in *Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247 (1957).

LaGuardia labor dispute; it granted the request. The Court found the legislative history of 301, though cloudy and confusing,<sup>36</sup> conveyed one dominant idea: Congress wanted labor agreements as enforceable against unions in the courts as they always had been against employers. It did so in a grant of general jurisdiction to the federal courts, which were in turn authorized to weave a federal substantive law of labor agreements. Equitable relief was quite proper. Hadn't Representative Barden said the House equivalent to 301 allowed damage actions and "other remedial proceedings, both legal and equitable, as might be appropriate under the circumstances. . . ."<sup>37</sup>

Norris-LaGuardia was no problem. "The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed."<sup>38</sup> But Congress had not discussed enforcement of agreements to arbitrate in 1947; it spoke specifically of no-strike clauses and generally of enforcing labor agreements. Again, no problem. The agreement to arbitrate is "the *quid pro quo* for an agreement not to strike."<sup>39</sup> Since Congress wanted no-strike clauses enforced, it must have intended equal fare for the concomitant pledge. And then, at the end of a very artful opinion, the Court iced the cake: it saw "no justification in *policy* for restricting section 301 (a) to damage suits. . . ."<sup>40</sup>

## II.

Congress in 1947 invited employers to enforce no-strike clauses in the federal courts. *Lincoln Mills* said arbitration, the natural correlative of the no-strike clause, could be enforced by federal equity powers. Since equity could bind the correlative, could it bind the first principle? It could in the Tenth Circuit;<sup>41</sup> it could not in the Second.<sup>42</sup>

In the Tenth Circuit the Teamsters violated their agreement not to strike against the Yellow Transit Company. In the lower

<sup>36</sup> 93 CONG. REC. 3656-57 (1947), cited in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

<sup>37</sup> *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

<sup>38</sup> *Id.* at 458.

<sup>39</sup> *Id.* at 455.

<sup>40</sup> *Id.* at 458. (Emphasis added.)

<sup>41</sup> *Teamsters Union v. Yellow Transit Freight Lines, Inc.*, 282 F.2d 345 (10th Cir.), *cert. granted*, 364 U.S. 931 (1960).

<sup>42</sup> *A. H. Bull S.S. Co. v. Seafarers' Union*, 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958), 56 MICH. L. REV. 1205 (1958). Professor Cox observes that the denial of certiorari in the *Bull* case is of even less than usual significance because of the Court's strong policy of refusing to review interlocutory orders. Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MOUNT. L. REV. 247, 253 n.38 (1958).

court the employer asked for, and got, an order restraining the strike. The Tenth Circuit held it was properly issued. There were several ways for the court to read section 301 with the Norris-LaGuardia Act:

1. A breach of contract is not the type of labor dispute the 1932 Congress had in mind. Norris-LaGuardia does not apply.

2. A strike is a strike. By definition it is a labor dispute. Its origin makes no difference. Norris-LaGuardia prohibits an equitable order.

3. Section 301 is a grant of general jurisdiction. The sweeping prohibitions of Norris-LaGuardia cannot hamper the aims of equal enforceability 301 was intended to encourage. Where the two conflict 301 prevails.<sup>43</sup>

The Tenth Circuit favored the last view. It assumed 301 does not restore unlimited equity powers to the federal courts where the suit involves an employer and a labor organization.<sup>44</sup> The court saw a vital difference in a negative order enjoining strikes to achieve a labor agreement and an affirmative decree making unions honor their agreements.

“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.”<sup>45</sup>

<sup>43</sup> See Comment, 25 U. CHI. L. REV. 496, 497 (1953).

<sup>44</sup> 282 F.2d at 349.

<sup>45</sup> *Id.* at 349-50.

On December 2, 1960 the District Court for the Western District of Kentucky issued a preliminary injunction enjoining a slowdown in breach of a clause prohibiting “interruption or impeding of work, work stoppage, strike. . . .” *American Radiator & Standard Sanitary Corp. v. International Molders & Foundry Workers*, Civil No. 4051, W.D. Ky., Dec. 2, 1960. In issuing the preliminary injunction the court specifically found in its conclusions of law that the provisions of the Norris-LaGuardia Act were “inapplicable to this suit under Section 301 [of the LMRA] . . . for violation of a contract between an employer and a labor organization . . . to enforce the provisions of a collective bargaining agreement through injunctive process.” *Accord*, *American Chain & Cable Co. v. United Steelworkers*, Civil No. 60-793, W.D. Pa., Dec. 12, 1960; *contra*, *Baltimore Contractors, Inc. v. Carpenters’ District Council*, 188 F. Supp. 382 (E.D. La. 1960). The district court in the *American-Standard* case also cited the defendant unions for civil contempt when they refused to abide by the preliminary injunction and end the slowdown. *American Radiator & Standard Sanitary Corp. v. International Molders & Foundry Workers*, Civil No. 4051, W.D. Ky., Dec. 23, 1960.

The result is correct. It should be sustained by the Supreme Court. If, as the Supreme Court believes, the no-strike clause is the *quid pro quo* for an agreement to arbitrate — and both were present in *Teamsters Union v. Yellow Transit Freight Lines, Inc.*, it is obvious “that the no-strike clause is no real ‘*quid pro quo*’ for an arbitration provision unless it is specifically enforceable by the employer, just as the arbitration clause is specifically enforceable by the union. . . .”<sup>46</sup> The result is consonant with *Lincoln Mills*; it does no violence to the principles of the Norris-LaGuardia Act. Norris-LaGuardia was devised to prevent judges from reading their own social and economic views into labor law. A federal judge has no *carte blanche* when asked to enjoin a breach of a labor agreement. He reads the agreement, he decides if the breach is material, and, perhaps, if it is justified by a prior breach. Then he decides if the breach warrants relief in equity. He is confined to enforcing a voluntary undertaking. He is restricted to what the litigants have written. His opinions on the wisdom of the agreement are of no importance.

I believe a flat holding that breach of contract is not a Norris-LaGuardia labor dispute would sustain *Yellow Transit* but would provide a far cleaner reading of the exact limits of § 301 in relation to the Norris-LaGuardia Act. Perhaps this avenue is unlikely. The view prevails that collective bargaining agreements are unique commitments that have no relationship to common law contracts. The Supreme Court finds this view to its liking.<sup>47</sup> And the flexible attitude advanced by the Tenth Circuit gives courts wide latitude in laying down a federal common law of labor agreements. And this is, after all, the net result of *Lincoln Mills*.

*Yellow Transit* applies the principles of equity announced by Professor Chafee.<sup>48</sup> It was his view that it was a mistake to read the Norris-LaGuardia Act as depriving federal courts of “power” to issue equitable orders. All courts have “power” when they acquire jurisdiction over the person and over the subject matter. Courts may, of course, be reversed; but on appeal the issue is whether the issuance of the equity order was wrong — not whether

Others agree that no-strike clauses should be specifically enforced in the federal courts. GREGORY, *op. cit. supra* note 14, at 455-56; COX, *supra* note 42, at 252-56; HAYS, *The Supreme Court and Labor Law, October Term, 1959*, 60 COLUM. L. REV. 901, 918 (1960); Comment, 25 U. CHI. L. REV. 496, 506 (1958).

<sup>46</sup> HAYS, *supra* note 45, at 918.

<sup>47</sup> *Ibid.*

<sup>48</sup> CHAFEE, SOME PROBLEMS OF EQUITY 364-80 (1950).

the order was void *ab initio* due to lack of jurisdiction. In short, Norris-LaGuardia merely lays down "right principles for [the courts'] decision."<sup>49</sup> The act does not withdraw the power to hear and determine disputes and, if necessary, to remedy them with orders in equity. "Right principles for decision" require equal enforcement of the obligations accepted. The Norris-LaGuardia Act's emphasis on voluntary settlement of labor disputes enforces this reasoning. True, this application of Chafee's view is foreign to its origin, but the analysis loses none of its edge because it cuts both ways. Professor Chafee would be the first to concede this — perhaps wryly.

The Eastern District of New York ventured a similar analysis in *A. H. Bull S.S. Co. v. Seafarers' Union*<sup>50</sup> only to be reversed in the Second Circuit.<sup>51</sup> That court reconciled denial of an injunction with *Lincoln Mills* in this fashion. *Lincoln Mills* refused to arbitrate; the Bull Steamship Company faced a strike. The circuit said that the refusal to arbitrate was not conduct protected by Norris-LaGuardia; a strike was. The flaw in this reasoning is that *Lincoln Mills* said the refusal to arbitrate was also a Norris-LaGuardia labor dispute.<sup>52</sup> Clearly an employer's refusal to arbitrate is as much a dispute between employers and employees as a strike.

Although the Second Circuit recognized that Norris-LaGuardia openly encouraged arbitration,<sup>53</sup> it did not pursue this concept to its end. For years federal courts and the NLRB have held that a promise to arbitrate all disputes between an employer and a union is an implied no-strike clause.<sup>54</sup> Suppose a union which signed a clause like this refused to arbitrate a dispute, but struck instead. Any district court in the Second Circuit would be compelled by *Lincoln Mills* to order the union to arbitrate. Yet that same court, under *Bull*, would be powerless to enjoin the strike in direct breach of a promise it must specifically enforce — an interesting predicament for a court of equity.<sup>55</sup>

<sup>49</sup> *Id.* at 367-68.

<sup>50</sup> 155 F. Supp. 739 (E.D.N.Y. 1957), *rev'd*, 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958). "The Norris-LaGuardia Act circumscribed federal jurisdiction. . . . The Labor-Management Relations Act of 1947 conferred such jurisdiction." 155 F. Supp. at 741.

<sup>51</sup> 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958).

<sup>52</sup> 353 U.S. at 458.

<sup>53</sup> 47 Stat. 72 (1932), 29 U.S.C. § 108 (1958).

<sup>54</sup> See notes 106-15 *infra*, and accompanying text.

<sup>55</sup> *Cf. Johnson & Johnson v. Textile Workers Union*, 184 F. Supp. 359 (D.N.J. 1960).

The long and the short of it is that the modern labor agreement needs equal and dispassionate handling by the federal courts. The courts can hardly weave an ingenious pattern of law from § 301 when it concerns an agreement to arbitrate, yet return to a pristine reading of *Norris-LaGuardia* when it concerns an agreement not to strike. If labor unions can enforce in equity but one of the promises that flow to them from the compulsory bargaining process, it is exceedingly unfair to deny employers the same treatment for the only important promise that runs to them from the union. This is really the reasoning underlying *Yellow Transit*, and here it is faultless. It is only what a district court in Washington said not long ago: "If that [*Lincoln Mills*] language means what it plainly says, surely simple justice and common fairness would dictate that sauce for the goose be such for the gander."<sup>56</sup>

### III.

"[T]he agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike,"<sup>57</sup> said the Court in *Lincoln Mills*. The Court has repeated this equation.<sup>58</sup> It is therefore a part of the federal law of collective labor agreements that binds the lower federal courts. I mention it again not because I wish to cavil with such authority, but because I do not understand what the Court means.

The Court's statement can be taken at least three ways.

1. In every collective bargaining agreement a no-strike clause is expressly agreed to in exchange for a grievance procedure that ends in arbitration.

<sup>56</sup> *American Smelting & Ref. Co. v. Tacoma Smeltermen's Union*, 175 F. Supp. 750, 754 (W.D. Wash. 1959). One author said that *Lincoln Mills* required no such reading, because substantial damages deterred unions from violating no-strike clauses, while damages for an employer's refusal to arbitrate afford the union only nominal relief. Note, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 *YALE L.J.* 70, 99 (1960). This reasoning was based on "a proper adjustment to the differences in the tactical positions of management and labor when either refuses to arbitrate." *Id.* at 99. The author misconceives the tactical positions. Substantial damages do not deter wildcat strikes; indeed, a union may well risk a damage action tried years later for the moment's advantage. The author's misconception lies deeper, for he writes of judicial relief purely from the standpoint of remedy for but one side to a collective agreement. I doubt if he would agree to the following statement: "Injunctive relief against a union's refusal to live up to the no-strike clause is necessary because a damage action for breach of the promise to submit disputes to arbitration would furnish the employer only nominal relief. But when the employer refuses to arbitrate, the prospect of substantial damages makes the damage award a substantial deterrent." Yet it is the corollary of what he has said — from another standpoint.

<sup>57</sup> 353 U.S. at 455.

<sup>58</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

This interpretation assumes that collective bargaining is a neat and orderly affair. It suggests a quiet room where two negotiators tick off their proposals one by one, changing, perhaps, the original proposal after objections or counter-proposals, and upon agreement passing to the next point. Nothing could be further from the fact. Collective bargaining is a show of economic strength, or a sideshow, or an arena for bargaining skill of a high order; it is seldom, if ever, a precise affair with each proposal dovetailed to its counterpart. Rarely are issues so carefully set out that any observer could with certitude say: "If the employer would agree to the union's arbitration procedure, the union would agree to the employer's no-strike clause and the agreement would be closed."

An example will do. Suppose the *ABC* Company and *X* Union have negotiated for a month. They are agreed on wages, hours of work, insurance and other fringe benefits. Two issues remain. *ABC* wants a broad prohibition on strikes, slowdown, picketing or any other interference with work. In the event of a work stoppage *ABC* wants to retain the unlimited right to discipline any or every striker who violates the agreement — the only arbitrable subject will be the striker's participation in the wildcat strike. *X* Union has no objection to a no-strike clause, and it does not balk over discharge of strikers taking part in a breach of contract, but it wants two modifications: *ABC* must absolve the union of financial liability for "unauthorized" strikes, and *ABC* must submit "any dispute" with the union to arbitration before going to court. This the employer will not do. Both refuse agreement unless these proposals are agreed to. Suddenly *ABC* offers an extra contribution to the cost-of-living allowance conditioned on acceptance of its no-strike clause alone. *X* Union drops its arbitration procedure and signs the agreement. This no-strike clause is the *quid pro quo* for the arbitration procedure *plus* the additional money. There are many so negotiated.

The point of this recital is simply to indicate the impossibility of stating that one clause in a labor agreement is the *quid pro quo* for any other. This is especially so of the no-strike clause. It is, after all, the only decisive promise a union makes an employer. True, a union may recede from a bargaining demand, but this is hardly a positive undertaking that may be enforced in court. Therefore, in a very real sense, the promise not to strike is the *quid pro quo* for every promise running from the employer to the union, for it is the only binding commitment the union offers.

2. Any union which releases its right to strike for a time needs some way to resolve issues for which it would otherwise strike. The grievance procedure culminating in arbitration supplies this need. Even if one is not the express consideration for the other, the law will construe them as concurrent promises.

This interpretation also dissolves on analysis. A grievance procedure is supposed to quickly resolve complaints, generally about the way the company runs the plant. But it is one thing to say that grievance procedures allow employees to force their employer to honor his agreement. It is quite another to conclude that these procedures are in their daily operation the automatic equivalent of agreements not to strike. If one states the grievance procedure is the inevitable equal of a no-strike clause, one assumes the union will strike for each grievable issue. This is ridiculous. Many grievances are taken to arbitration for reasons that have nothing to do with their merits. Assume the most obvious example — the discharge case. Suppose the *ABC* Company discharges for insubordination an employee with seven years' standing. The employee has been warned before. True, his work record is good, but *ABC* thinks it can hire another who will do good work with obedience. The union leader is caught in a bind. He knows the employee richly deserved his fate. Many of his members privately agree. But the employee publicly demands a grievance, and the demand is hard to refuse. If the steward tells him he deserved the discharge, he will be called a pawn of the employer; if he fails to press the grievance, he is faithless to his stewardship. It is more expedient to let the grievant hear the unwelcome news from an arbitrator. Why not take it to arbitration? Why not, indeed.

The grievance is filed; it is denied at all steps of the grievance procedure, and it finally goes to arbitration. Whether the arbitrator upholds the discharge or reinstates the employee with or without back pay is neither here nor there. The relevance of this grievance is that a strike over it would be unpopular if, in fact, the union could call the strike at all. Airing this grievance may release tensions, it may be the progressive and enlightened way to do things, it may be everything arbitrators say it is. One thing it is not — it is not the *quid pro quo* for an agreement not to strike.

Perhaps the next grievance will be over an issue for which the union would gladly strike; only then is the employer's agreement to hear the matter and accept an adverse decision fairly the equivalent of the promise not to strike.



I realize the agreement to entertain a grievance does not depend on the merits of the particular controversy. The promise to hear includes the promise to hear foolishness. But it must be obvious that the mere presence of an arbitration clause invites its use. A union hardly surrenders its only economic weapon in return for a promise to let an arbitrator hear a dispute largely created by his availability. Unions with experience know their promise not to strike will bring a higher price. Moreover, this second reading of the Court's language assumes that grievances cannot be settled without recourse to arbitration. This, of course, is nonsense. Grievances are settled every day without recourse to either a grievance procedure or to arbitration. It may be that in the Court's view arbitration is the *best* way of settling these matters, but it is by no means the only way.

3. Arbitration is conducive to settling industrial disputes; so are pledges not to strike. Both are in the national interest; both should be encouraged. Since the aim of the no-strike clause and the arbitration procedure is to prevent work stoppages, one is naturally the corollary of the other.

This reading has a surface plausibility. It is based upon the view that the strike is the union's only economic weapon. When it releases the work stoppage for a time, it needs another method of making the employer observe the agreement; and arbitration is the best way of bringing this about. But here the wide variety of no-strike clauses prevents mechanical application of the Court's rule.

A recent survey by the Bureau of National Affairs<sup>59</sup> shows that some form of no-strike clauses appear in 94 percent of the labor agreements reviewed. There are generally two types of clauses: (1) those unconditionally banning work stoppages for the life of the agreement; (2) those requiring the union to refrain from striking only until a condition is fulfilled — such as exhaustion of a grievance procedure, deadlock during a wage reopening and so on. The absolute ban on strikes appears in 48 percent of the agreements reviewed; the conditional bans are provided in 46 percent.

The survey notes that no-strike clauses are generally paralleled not by arbitration promises, but by pledges from employers regarding lockouts. No-lockout pledges appeared in 84 percent of the

<sup>59</sup> 47 LAB. REL. REP. 3 (1960).

contracts reviewed by the survey. Many of these no-strike clauses conform to the Court's desire for an absolute ban on strikes. But many are surrounded with conditions which must be met before a court could enforce it.

A no-strike clause, like an arbitration procedure, is an element of power. It makes the other side honor his agreement. It is valuable only as it is enforceable. If it is hedged with restrictions, it is more difficult to enforce, and less effective as an enforcing agent. It may be a model of draftsmanship, but unless it gets results, it is useless. Parties bargain for weapons, not intellectual equivalents. Consider the agreement where the promise to arbitrate is exceedingly broad and the no-strike clause is extremely limited. For example, Article VIII of the Central States Area Over-the-Road Motor Freight agreement<sup>60</sup> provides that "there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." There follows a grievance procedure with no time limit on its various steps. The second section of this grievance machinery says that "in all cases of an unauthorized strike, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members." The union in turn promises that it "shall make immediate effort to terminate any strike or stoppage of work which is not authorized by it without assuming liability therefor." Twenty-four hours after a wildcat strike begins the employer has an unfettered right to discharge the employees who participated, and the employees have no recourse through the grievance machinery.

A moment's reflection shows that this no-strike clause is hardly the equal of the grievance machinery. "Any controversy" between the employers and the union may be grieved at any time. The grievance procedure may be specifically enforced upon showing that a grievance comes within the arbitration pledge. But should an employer sue the union for a strike in breach of contract, he will immediately be confronted with outward evidence that the union never "authorized" the strike. The employer must prove that the strike was authorized. A union which has fostered a wildcat strike has ample ways of publicly disassociating itself from the strike. Astute cross-examination and careful use of the discovery procedures can sometimes give the lie to writings, telegrams and

<sup>60</sup> 1 CCH LAB. L. REP. [UNION CONTRACTS & ARBITRATION] ¶ 59,944 (1960).

newspaper ads. But these take time — as any union resisting an equitable order well knows. Of course, the employer has the right to discharge employees who strike in breach of contract. But this is negative relief; it is no substitute for judicial action. It is myopic to say that the no-strike clause above recited is the equivalent of the grievance machinery.

Consider the reverse. There are grievance procedures that are narrower than the accompanying no-strike clause. Suppose the agreement provides that any dispute an employee or his representatives may have with the employer may be grieved, but expressly exempts arbitration of grievances arising from test work. The no-strike clause is all-inclusive. If the Court accepts the Tenth Circuit's view of *Norris-LaGuardia* and takes its own alignment of arbitration and no-strike clauses literally, it might refuse to enjoin a strike over grievances concerning test work. After all, the no-strike clause is broader than the arbitration procedure which is supposedly its *quid pro quo*.

What if the no-strike clause is not accompanied by *any* arbitration provisions? A literalistic reading of the Court's observation might prevent any equitable enforcement of the no-strike clause. This reading would rewrite many no-strike and arbitration clauses at the first available moment. If enforcement means revision of work stoppage and arbitration clauses to suit the Court's notions of 301 policy, the parties may have to decide if they are willing to pay the price. It seems incredible that the Court would thrust its conception of a desirable labor agreement into a bargaining process still free. These results are probably what Justices Brennan and Harlan foresaw in their concurring opinion in the three landmark arbitration cases:

“The court makes reference to an arbitration clause being the *quid pro quo* for a no-strike clause. I do not understand the court to mean that the application of the principles announced today depends upon the presence of a no-strike clause in the agreement.”<sup>61</sup>

But perhaps Mr. Justice Douglas' meaning is just what I have suggested:

“Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of

<sup>61</sup> 363 U.S. at 573.

strikes, the arbitration agreement being the '*quid pro quo*' for the agreement not to strike."<sup>62</sup>

The short answer to all this is that 301 gives jurisdiction to entertain "suits for violation of contracts." Congress did not withdraw from the judicial power agreements which the Supreme Court finds distasteful. Congress sets American labor policy, as we have been reminded for many years by the Court and the academicians. Congress called for equal enforcement of voluntary agreements. And courts which refuse to enforce those agreements they do not feel accomplish a "complete effectuation of the federal policy" would bring labor policy full circle with a vengeance. They would thus form a labor policy through their equity powers, quite as much as in the bad old days before Norris-LaGuardia.

#### IV.

Even if the agreement to arbitrate is not always the agreed-upon exchange for the agreement not to strike, the two are intimately connected in another fashion.

#### A.

Often a union sued for damages for breach of a no-strike clause requests the court to stay<sup>63</sup> or dismiss<sup>64</sup> the damage action so it may arbitrate the issues giving rise to the strike,<sup>65</sup> or of the strike itself.<sup>66</sup>

The reason is no mystery. An arbitrator may be far more tolerant of strikes in breach of contract than a court, bound as a court is to common law rules of contractual integrity. Courts enforce agreements as they are written; they cannot map out the societal good as freely as many who answer the arbitrator's calling. Consider a discharge for leadership of a strike in breach of contract. A court, like the NLRB, will consider participation of a union officer determinative;<sup>67</sup> an arbitrator's standards are not so strict. Some arbitrators say a union leader owes responsibility above and

<sup>62</sup> *Id.* at 578 n.4. See also Note, 56 MICH. L. REV. 1205 (1958).

<sup>63</sup> *E.g.*, *Tenney Eng'r, Inc. v. United Elec. Workers*, 174 F. Supp. 878 (D.N.J. 1959).

<sup>64</sup> *Brady Transfer & Storage Co. v. Local 710, Meat Drivers*, 22 CCH Lab. Cas. ¶ 67,121 (N.D. Ill. 1952) (alternative motions to dismiss or stay).

<sup>65</sup> *Armstrong-Norwalk Rubber Corp. v. Local 283, United Rubber Workers*, 167 F. Supp. 817 (D. Conn. 1958), *appeal dismissed*, 269 F.2d 618 (2d Cir. 1959) (motion to stay pending arbitration of discharge giving rise to strike, and/or of the strike itself).

<sup>66</sup> *Gay's Express, Inc. v. International Bhd. of Teamsters*, 169 F. Supp. 834 (D. Mass. 1959).

<sup>67</sup> See *United Elec. Workers v. NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956); *American Gilsonite Co.*, 121 N.L.R.B. 1514 (1958), *aff'd on reconsideration*, 122 N.L.R.B. 1006 (1959).

beyond the normal to control the work stoppage. This school reasons that if leaders order their members to return to work, themselves setting the example, these stoppages would greatly decrease.<sup>68</sup> Others find this treatment discriminatory.<sup>69</sup> They state that a union leader is one employee of many who must be punished as every other. Arbitrators also use a less rigid standard in appraising union responsibility for the strike.<sup>70</sup> They are far more niggardly in their calculation of damages.<sup>71</sup>

In short, the union, like any litigant, seeks the most hospitable forum. Employers, too, move for a stay of a damage action pending arbitration when it suits their purpose.<sup>72</sup>

<sup>68</sup> Note, *Considerations in Disciplining Employees for Participation in Violations of the No-Strike Clause*, 106 U. PA. L. REV. 999, 1017-20 (1958).

<sup>69</sup> *Ibid.*

<sup>70</sup> See the discussion in Note, 58 COLUM. L. REV. 908, 913 (1958).

<sup>71</sup> *Ibid.* See also *Regent Quality Furniture, Inc.*, 32 Lab. Arb. 553 (Arbitrator Turkus).

<sup>72</sup> *Metal Polishers Union v. Rubin*, 85 F. Supp. 363 (E.D. Pa. 1949). Prior to *General Elec. Co. v. Local 205, United Elec. Workers*, 353 U.S. 547 (1957), a disagreement had arisen in the circuits as to the application of the United States Arbitration Act, 9 U.S.C. §§ 2-14 (1958), to collective bargaining agreements. Holding that the act applies: *International Union, UAW v. Benton Harbor Malleable Indus.*, 242 F.2d 536 (6th Cir.), *cert. denied*, 355 U.S. 814 (1957); *Signal-Stat Corp. v. Local 475, United Elec. Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); *Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547 (1957); *Tenney Eng'r, Inc. v. United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953) (with the proviso that the exclusion applied to collective bargaining agreements covering transportation workers). Holding that the act does not apply: *United Steelworkers v. Galland-Henning Mfg. Co.*, 241 F.2d 323 (7th Cir.), *rev'd on other grounds*, 354 U.S. 906 (1957); *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957); *United Elec. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221 (4th Cir. 1954); *Commercial Packing Co. v. Butchers Union*, 35 L.R.R.M. 2142 (S.D. Cal. 1954). The disagreement in the circuit courts stemmed largely from applications by unions to stay damage actions for breach of no-strike clauses pending arbitration. Unions sought a stay of these damage actions under § 3 of the Arbitration Act, 9 U.S.C. § 3 (1958), which allows a court to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . . ." Of course, a condition to any such stay was that the issue sought to be arbitrated was referable to arbitration. The circuits split on the qualifying phrase of § 1 of the act, 9 U.S.C. § 1 (1958), which states that the act shall not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This disagreement will probably be resolved at some time by the Supreme Court, although it is probably academic in view of *General Elec. Co. v. Local 205, United Elec. Workers*, *supra*. There the First Circuit, 233 F.2d 85 (1st Cir. 1956), had held that the Arbitration Act provided the substance for § 301, which the First Circuit regarded as exclusively procedural. Harmonizing these two statutes, the First Circuit had ordered arbitration. The Supreme Court followed a rather elliptical path. It sustained the First Circuit, but declined to rule on the Arbitration Act. "We follow in part a different path than the Court of Appeals though we reach the same result." 353 U.S. at 548. If the issue is squarely presented again to the Court, the Arbitration Act will find a powerful opponent in Mr. Justice Frankfurter, who set forth in his dissenting opinion in *Lincoln Mills* the reasons for the act's inapplicability to collective bargaining agreements. "When Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." 353 U.S. at 466.

Whether or not the Arbitration Act does apply to labor agreements really makes little difference now, since under *Lincoln Mills* the federal courts are empowered to fashion

## B.

Unions have always been eager to remove breach of a no-strike clause from the courts to arbitration. Three decisions in the last term of the Supreme Court will encourage their endeavor. A consideration of one will do. In *United Steelworkers v. Warrior & Gulf Nav. Co.*,<sup>73</sup> the union tried for nineteen years to restrict by contract the employer's right to subcontract work. It failed. One day, as in the past, the employer did subcontract some work heretofore done by bargaining unit employees. The union filed a grievance under a clause that forbade any work stoppage to settle disputes, but rather compelled use of the grievance machinery to review "differences . . . between the Company and the Union or its members . . . as to the meaning and application of this Agreement. . . ."<sup>74</sup> The agreement also said that "matters which are strictly a function of management shall not be subject to arbitration under this section."<sup>75</sup> The union filed a grievance to protest this practice of subcontracting; the employer refused to entertain it, and the lower courts held he had a perfect right to. The Supreme Court reversed.

The grievance procedure did not expressly exclude from its scope the employer's contracting out of work. The employer's practice involved a "difference"; it was certainly a "local trouble of any kind" which might be grieved. Any judicial attempt to examine the bargaining history of the parties "necessarily comprehends the merits," and the merits were the arbitrator's preserve upon which judges might not poach. Under a grievance procedure comprehending broad submissions, only express reservations will keep certain issues from its ambit.

But the startling effect of *Warrior* is the possible result of the arbitration it orders. For nineteen years the Steelworkers Union has tried to restrict by contract *Warrior's* practice of subcontracting work to outside firms.<sup>76</sup> It has failed. Now the validity of this practice will be decided by an arbitrator, himself a creature of contract. The power to decide includes the power to decide both

federal substantive law of collective bargaining agreements. Therefore, federal courts may stay actions under § 301, just as if the Arbitration Act applied.

<sup>73</sup> 363 U.S. 574 (1960), 59 MICH. L. REV. 454 (1961).

<sup>74</sup> 363 U.S. at 576.

<sup>75</sup> *Ibid.*

<sup>76</sup> The lower court considered this of deciding importance. See the decision by Judge Tuttle, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 269 F.2d 633, 636-37 (5th Cir. 1959), *affirming* 168 F. Supp. 702 (1958).

ways, and these powers the *Warrior* arbitrator will have in full measure. He may deny the grievance; he may grant it. If he grants it, the full scope of *Warrior* will be there for all to see. For then the union will be awarded a concession by arbitration that it could not achieve in nineteen years of negotiation. The award will bind the parties until it is explicitly overturned in a future agreement. In practical effect, therefore, it amends the agreement.<sup>77</sup> By arbitration one party will have been able materially to modify his undertaking with the other, and he will have done it through a scheme designed to apply the agreement as written. To those who still view arbitration as consensual, this is a jarring result indeed.

As startling as the actual result is the Court's view of the arbitral process. I had always supposed that arbitration was a relatively inexpensive way for two who disagree to compose their differences. The man chosen to do this is confined to the agreement which creates his power. His power is considerable. He binds the parties with his decision unless he steps completely beyond the agreement, or takes a bribe.<sup>78</sup> Of course, there are all manner of arbitrators. Some are intelligent, some are not. Some confine themselves to a careful reading of the agreement which authorizes their presence; others summon a higher wisdom to which they alone are privy. Some are impartial; others are biased; and yet others give truth to the commonly held notion that arbitrators split their justice so they will be asked back again.

Over the years an idea that arbitration is a science approaching the oracular has gained wide currency. This image of arbitration sees men of learning available to few doling out a justice of awesome quality. The image is the creation of men who arbitrate for a fee. Of course, it is not strange for a profession to cloak its practice in mystery so that the herd should approach with reverence. Medicine and the law have done this for generations. The practice is humbug nonetheless. There are few arbitration cases that could not be wisely decided by an intelligent observer who reads the agreement with care and listens with attention to the arguments

<sup>77</sup> Most arbitration clauses prohibit the arbitrator from amending or in any way modifying the agreement. One district court, *Local 725, Int'l Union of Operating Eng'rs v. Standard Oil Co.*, 186 F. Supp. 895 (D.N.D. 1960), read this clause as expressly prohibiting the arbitrator from deciding issues completely rejected in negotiations.

<sup>78</sup> See, e.g., OHIO REV. CODE ANN. § 2711.01 (Supp. Page 1960) and § 2711.10 (Page 1953), which allow vacation of an arbitration award if it was procured by corruption, or evident partiality, or misconduct of the hearing, or if the arbitrator exceeded the powers granted him.

presented to him. Who has not heard arbitrators fulminate at tire-some length over an issue any sensible person — including a federal judge — could dispatch in short order with a little horse sense? Naturally some issues — incentive plans, time-studies, guaranteed annual wage supplements — are technically more demanding than others, but the knowledge to decide can be acquired. It is the job of any litigant to inform the judge. Nevertheless, the view that labor arbitrators are mystagogues is held by many, and among these are at least six Justices of the Supreme Court.

In the view of the *Warrior* Court, the arbitrator in his wisdom “is not confined to the express provisions of the contract.”<sup>79</sup> Far from it. He is to look to “the practices of the industry and the shop”<sup>80</sup> which are “equally a part of the . . . agreement although not expressed in it.”<sup>81</sup> After all, is he not selected because the union and management repose “confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract . . . ?”<sup>82</sup> And in exercising his personal judgment he must consider all manner of things which will be good for the parties — “the productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.”<sup>83</sup> Small wonder that one observer, himself an arbitrator, finds Mr. Justice Douglas’ picture of the arbitration process “more like the praise . . . one might hear . . . at a public function of an arbitration group” than the “hard, practical day to day process of hearing and determining grievances.”<sup>84</sup>

For better or for worse, *Warrior* and its companions give the broadest possible sweep to arbitration. These principles emerge:

1. The court determines arbitrability. “[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”<sup>85</sup>
2. The court, in making its determination, must read the contract from its four corners. “It is confined to ascertaining whether the party seeking arbitration is making a

<sup>79</sup> *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960).

<sup>80</sup> *Id.* at 582.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Hays, *The Supreme Court and Labor Law, October Term, 1959*, 60 COLUM. L. REV. 901, 930 (1960).

<sup>85</sup> 363 U.S. at 582.



claim which *on its face* is governed by the agreement."<sup>86</sup> It may not review bargaining history.<sup>87</sup>

3. All doubts should be resolved in favor of arbitrability.<sup>88</sup>

4. A party asserting non-arbitrability must prove it. He does so through:

(a) an express exclusion of the issue from the grievance or arbitration procedures;

(b) a written collateral agreement excluding the issue from arbitration; or

(c) "most forceful evidence of a purpose to exclude the claim from arbitration. . . ."<sup>89</sup> The evidence showing an issue is not arbitrable must be very forceful indeed; *Warrior's* evidence of nineteen years of demand, refusal and practice was not enough.

Under the impetus of *Warrior*, an arbitrator asked to determine union responsibility for a strike in breach of contract has a wide palette of remedies. He may reason that since the union's treasury is low, the "morale of the shop" would be disastrously affected by an award of money damages to the employer. And of course no modern, enlightened employer would decrease morale. He may conclude that the discharge of the stewards who led the strike will heighten tensions — as discharges always do for a time. Therefore, the discharges should be commuted to a layoff. Or if the offending stewards are skilled workers, the arbitrator may reason it will take weeks to train their replacements. "Productivity" will decrease; this is undesirable, a lesser penalty is called for. Or suppose in this industry the employer is alone in its policy of discharge and court action to redress a breach of contract. Its policies are not "the practices of the industry." The arbitrator certainly cannot allow one employer to upset a usage others have created over the years.

All this may seem far-fetched, but it is not impossible. One arbitrator has already reasoned that an employer should not be awarded damages for strikes in breach of a no-strike clause in order

<sup>86</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960). (Emphasis added.)

<sup>87</sup> *Ibid.* This is indeed a radical departure from the customary principles of contractual construction. Mr. Justice Brennan may have some qualms about this wholesale approach. See his concurring opinion, joined by Mr. Justice Harlan, in the three landmark cases. *Id.* at 569.

<sup>88</sup> *Id.* at 568. Where, however, it is clear that the agreement expressly excludes certain issues from arbitration, a district court will not order arbitration, *Warrior* notwithstanding. *International Molders' Union v. American Radiator & Standard Sanitary Corp.*, Civil No. 3948, W.D. Ky., Feb. 9, 1961.

<sup>89</sup> *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960).

“to avoid the regeneration of antagonisms that finally have been dissipated. . . .”<sup>90</sup> In place of damages he ordered “full co-operation with management in making up the production losses. . . .”<sup>91</sup> Arbitrators so inclined must read *Warrior* with relish.

*Warrior's* effect on bargaining for the next few years is not hard to predict. Unions will try to write into labor agreements the widest possible arbitration clauses which, above all, give to the employer an express right to file grievances against the union. Employers will try to constrict the scope of arbitration to exclude specifically the issues they do not wish reviewed. Unions will strike for arbitration clauses which cover the range of their relations with capital; employers will do their best to frustrate these strikes. In the struggle created by the Court's opinions, unions will exert great energy to subject breach of a no-strike clause to the arbitral process. Nowhere will they encounter more resistance.

### C.

Federal courts have been decidedly cool to suggestions that they relinquish to arbitrators the power to judge breach of a no-strike clause. Unions will no doubt argue that *Warrior* has made this attitude obsolete. If the Supreme Court holds that a no-strike clause may be specifically enforced in the federal courts, this attitude will take on added importance.

All federal cases granting or denying stay of court action require construction of the contract under which arbitration is requested. But the differing results in the circuits cannot be dismissed as mere disagreements on the meaning of language; courts have arrived at opposite results when presented with virtually identical wording. For the reader's ease I have arranged the cases according to their theories.

1. *A strike in breach of contract is not a "grievance" as that word is commonly used.* This view was most positively articulated by the Sixth Circuit.<sup>92</sup> That court has since reiterated this view.<sup>93</sup> The Fourth Circuit<sup>94</sup> and probably the Fifth agree.<sup>95</sup> These courts

<sup>90</sup> *M. Singer & Sons*, 13 Lab. Arb. 533, 536 (Arbitrator Scheiber).

<sup>91</sup> *Ibid.*

<sup>92</sup> *Hoover Motor Express Co. v. Teamsters Union*, 217 F.2d 49, 53 (6th Cir. 1954).

<sup>93</sup> *International Union, UAW v. Benton Harbor Malleable Indus.*, 242 F.2d 536, 541 (6th Cir.), *cert. denied*, 355 U.S. 814 (1957).

<sup>94</sup> *International Union, United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 35 (4th Cir. 1948); *United Elec. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 223 (4th Cir. 1954).

<sup>95</sup> *Lodge 12, IAM v. Cameron Iron Works, Inc.*, 257 F.2d 467, 471 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958).

have applied this reasoning to clauses employing wide terms in describing possible submissions.<sup>96</sup>

These courts reason that "grievance" or a synonym refers to the daily disagreements that naturally arise where employees are governed by written contract. Every "grievance" alleges a breach of contract. The employer did or did not violate the agreement by his computation of overtime, or schedule of vacations, or subcontracting of work. The critical difference between these "breaches" and strikes in violation of the agreement is that these "breaches" are contemplated. The grievance procedure is there to let employees and the union prove them. A strike in violation of contract, however, ruptures the entire agreement — especially that part of it designed to settle "breaches" peacefully.

The Second<sup>97</sup> Circuit at one time disagreed; the Third<sup>98</sup> still does. These decisions are not based upon an analysis of "grievance" and what it means, but rather upon a generous endorsement of arbitration; the arbitrator, and not the court, determines what "grievance" means.

2. *A strike in breach of contract is a repudiation of an agreement to arbitrate.* The Fourth,<sup>99</sup> Sixth,<sup>100</sup> First<sup>101</sup> and Seventh<sup>102</sup>

<sup>96</sup> *Benton Harbor*: "shall difference arise . . . as to the meaning and application of this Agreement, or should any local trouble arise. . ." 242 F.2d at 538.

*Miller Metal Products*: "all differences, disputes and grievances that may arise between the parties to this contract with respect to the matters covered in this agreement. . ." 215 F.2d at 223.

<sup>97</sup> *Signal-Stat Corp. v. Local 475, United Elec. Workers*, 235 F.2d 298 (2d Cir. 1956), cert. denied, 354 U.S. 911 (1957). It is impossible to reconcile the theories of *Signal-Stat* and *Markel Elec. Prods., Inc. v. United Elec. Workers*, 202 F.2d 435 (2d Cir. 1953). *Signal-Stat* is based on a broad philosophical encouragement of arbitration; it was decided by Judges Clark, Frank, and Hincks. *Markel*, in which Judge Clark dissented, is based on a close reading of the agreement; it was decided by Judges Swan and Chase. The scope of arbitration agreement was equally broad in both. The Circuit has recently returned to the *Markel* reasoning in *Drake Bakeries, Inc. v. Local 50, American Bakery Union*, 47 L.R.R.M. 2612 (2d Cir., Feb. 17, 1961) (Judges Lumbard, Swan, Moore).

<sup>98</sup> *Tenney Eng'r, Inc. v. United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953), on remand, 174 F. Supp. 878 (D.N.J. 1959).

<sup>99</sup> See the cases cited in note 94 *supra*. The scholarly and precise analysis of Judge Parker in *Colonial Hardwood* merits careful study by all interested in this area.

<sup>100</sup> See notes 93 and 96 *supra*.

<sup>101</sup> *W. L. Mead, Inc. v. International Bhd. of Teamsters*, 129 F. Supp. 313 (D. Mass. 1955), *aff'd*, 230 F.2d 576 (1st Cir.), *petition for cert. dismissed per stipulation*, 352 U.S. 802 (1956). For companion litigation, see *W. L. Mead, Inc. v. International Bhd. of Teamsters*, 217 F.2d 6 (1st Cir. 1954), denying a temporary injunction for breach of the same no-strike clause giving rise to the damage action.

The arbitration and grievance procedures in cases applying the principle that a strike in breach of contract is a repudiation of an agreement to arbitrate are quite broad. The *Benton Harbor* and *Miller Metal Products* clauses are quoted in note 96 *supra*; the *Mead* clause is even broader: "should any dispute, grievance or complaint arise during the life

Circuits are fond of this theory. It is based upon considerations of fairness. Arbitration provides the union a swift way to remedy "breaches" of the agreement by the employer. A strike in breach of contract is diametrically opposed to settlement of the dispute by arbitration. The union has the right peacefully to challenge the employer's decision within the plant; it should not simultaneously bring additional pressure from without. The union has elected to strike, not arbitrate. It does not get two bites at the apple. The point is articulated by the Seventh Circuit:

"The Unions chose to act suddenly and without warning in using the economic force or pressure of a sit down strike. Obviously, a chief purpose of the arbitration agreement was to avoid a strike. When the Unions embarked upon the strike they voluntarily by-passed arbitration. When they struck the wrong was done and the damage to plaintiff [employer] began. Then it was that plaintiff's right of action for damages and injunctive relief to prevent further damage accrued."<sup>103</sup>

I think the Supreme Court will agree. In *Warrior* the Court said grievance arbitration is "the substitute for industrial strife."<sup>104</sup> And it is possible the Supreme Court has already accepted this view this term. Prior to *Lewis v. Benedict Coal Corp.*<sup>105</sup> the circuits split over the meaning of a labor agreement with an extremely broad arbitration clause but with no prohibition on strikes. The First,<sup>106</sup> Fourth<sup>107</sup> and Sixth<sup>108</sup> Circuits reasoned that a promise by the union to submit all conflicts with the employer to arbitration was an implied no-strike clause. The NLRB agreed.<sup>109</sup> When the union struck over an issue it did not submit to arbitration it violated the implied no-strike clause. The employer could then

of this agreement . . . the dispute, grievance or complaint shall be referred to the arbitration panel. . . ." 217 F.2d at 7. See also *W. L. Mead, Inc.*, 113 N.L.R.B. 1040 (1955), where the NLRB agreed with the First Circuit's construction of this clause.

<sup>102</sup> *Cuneo Press, Inc. v. Kokomo Paper Handlers' Union*, 235 F.2d 108, 111 (7th Cir.), cert. denied, 352 U.S. 912 (1956). There is strong indication in this decision that the unions forfeited their right to arbitrate the issue giving rise to the strike because they chose the strike to resolve it. 235 F.2d at 112.

<sup>103</sup> *Cuneo Press, Inc. v. Kokomo Paper Handlers' Union*, *supra* note 102, at 111.

<sup>104</sup> 363 U.S. at 578. (Emphasis added.)

<sup>105</sup> 361 U.S. 459 (1960).

<sup>106</sup> *W. L. Mead, Inc. v. International Bhd. of Teamsters*, 129 F. Supp. 313 (D. Mass. 1955), *aff'd* 230 F.2d 576 (1st Cir.), *petition for cert. dismissed per stipulation*, 352 U.S. 802 (1956).

<sup>107</sup> *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir.), cert. denied, 350 U.S. 847 (1955).

<sup>108</sup> *Lewis v. Benedict Coal Corp.*, 259 F.2d 346 (6th Cir. 1958), *aff'd on this point by an equally divided Court*, 361 U.S. 459 (1960).

<sup>109</sup> *W. L. Mead, Inc.*, 113 N.L.R.B. 1040 (1955).

sue for damages in the courts; he committed no unfair labor practice in firing the strikers. The rationale of these courts was that "the purpose of the strike was to effect a determination of the question without an adjudication. The strike, in other words, was intended to be a *substitute* for the arbitration procedure."<sup>110</sup> The Board's reasoning was similar.<sup>111</sup> However, the District of Columbia Circuit which in a different context had refused to hold such an arbitration clause to be an implied no-strike pledge<sup>112</sup> has since *Benedict Coal* reaffirmed this earlier stand.<sup>113</sup>

The arbitration clause in *Benedict Coal* could hardly be broader. It expressly contemplated submission of a work stoppage to arbitration. "[A]ny and all disputes, stoppages, suspension of work, and all claims, demands or actions growing therefrom . . . shall be . . . settled" by the grievance machinery.<sup>114</sup> The Sixth Circuit read this clause as an implied no-strike clause in an opinion by Judge, now Justice, Potter Stewart. The Supreme Court affirmed by an equally-divided Court, Mr. Justice Stewart abstaining. Though an affirmance by an equally-divided Court imparts no opinion on the merits,<sup>115</sup> the reason for the equal division of the Court will undoubtedly carry weight in the minds of practitioners and perhaps the lower federal courts.

The *Benedict Coal* reasoning makes sense. It does no violence to *Warrior* and its companion cases. Broad as the *Warrior* principles are, they relate to internal disagreements between the parties. They do not go to a breach of the agreement that suspends the whole undertaking.

3. *A strike in breach of contract is not arbitrable unless the grievance procedure gives the employer a right to file a grievance with the union and process it to arbitration.* This reasoning is expressly endorsed by the Sixth<sup>116</sup> and Second<sup>117</sup> Circuits, and various district courts.<sup>118</sup> It is based on a close analysis of the terms and philosophy of a grievance procedure.

<sup>110</sup> *W. L. Mead, Inc. v. International Bhd. of Teamsters*, 126 F. Supp. 466, 467 (D. Mass. 1954). (Emphasis added.)

<sup>111</sup> *W. L. Mead, Inc.*, 113 N.L.R.B. 1040, 1043 (1955).

<sup>112</sup> *International Union, UMW v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958).

<sup>113</sup> *Miles Branch Coal Co. v. UMW*, 47 L.R.R.M. 2423 (D.C. Cir. Jan. 12, 1961).

<sup>114</sup> 259 F.2d at 350.

<sup>115</sup> *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), 59 MICH. L. REV. 447 (1961).

<sup>116</sup> *International Union, UAW v. Benton Harbor Malleable Indus.*, 242 F.2d 536, 541 (6th Cir.), *cert. denied*, 355 U.S. 814 (1957).

<sup>117</sup> *Markel Elec. Prods., Inc. v. United Elec. Workers*, 202 F.2d 435, 437 (2d Cir. 1953). But see the discussion in note 97 *supra*.

<sup>118</sup> *Square D Co. v. United Elec. Workers*, 123 F. Supp. 776, 782-83 (E.D. Mich. 1954); *Bassick Co. v. Bassick Local 229, Int'l Union of Elec. Workers*, 126 F. Supp. 777 (D. Conn.

Arbitration is generally the last step in a grievance procedure. Few are the cases which go directly to arbitration. The reasons are excellent. Many grievances are dropped after they are aired in the conferences and meetings required before arbitration. The heinous injury is not quite so bad after a few days; one side has misread the agreement; the union and the employer swap this grievance for that. The various steps afford "opportunity to subordinate authorities to participate and effect adjustments within their special competence and concern."<sup>119</sup> Moreover, arbitration can be expensive. Both parties want to know the strength of their positions before taking them to the umpire. The best way to test them is at the grievance meetings. For these reasons and others like them, courts and arbitrators are loathe to permit arbitration where the grievance procedures have not been exhausted.<sup>120</sup> They lead to the sensible conclusion that arbitration is no broader than the process which precedes it unless the parties give it original jurisdiction.

Application of this reasoning shows the folly of processing breach of a no-strike clause through the normal route of grievances. Most grievance procedures begin when an employee presents his complaint to his immediate foreman. It would be rather peculiar for an employer to ask lower supervision to calculate damages sustained in a strike. For example, in *Square D Co. v. United Elec. Workers*,<sup>121</sup> the union requested a stay of a damage action pending arbitration. It claimed the breach was arbitrable under a clause calling for arbitration of "all disputes." However, arbitration was the last step in a grievance procedure, and "the entire procedure is geared to adjust grievances of employees and . . . it is completely silent as to any possible grievances by the employer. If the last paragraph, on which defendants so strongly rely, includes within its ambit claims by the employer for breach of contract, how would it proceed? It is not an employee and it would be absurd to suggest that it should initiate a grievance or complaint with the shop foreman. . . ."<sup>122</sup>

This reasoning seems likely to survive *Warrior*. *Warrior* states that a party who asserts non-arbitrability must prove it, and he can

1954); *Borg-Warner v. United Farm Equip. Workers*, 22 Lab. Arb. 443 (N.D. Ill. 1954); *Harris Hub Bed & Spring Co. v. United Elec. Workers*, 121 F. Supp. 40, 43 (M.D. Pa. 1954).

<sup>119</sup> SHULMAN & CHAMBERLAIN, *CASES ON LABOR RELATIONS* 6 (1949).

<sup>120</sup> 58 COLUM. L. REV. 908, 912 (1953).

<sup>121</sup> 123 F. Supp. 776 (E.D. Mich. 1954).

<sup>122</sup> *Id.* at 783. *Accord*, *Markel Elec. Prods., Inc. v. United Elec. Workers*, 202 F.2d 435, 437 (2d Cir. 1953).

do so by showing an express exclusion of the issue from the grievance machinery. It would be difficult to imagine a more express exclusion than failure to allow a claimant a method to present his claim. After all, the agreement could easily be written to make the grievance machinery run both ways. Moreover, this is perfectly consonant with *Warrior's* command to the lower courts to read only the agreement. Whether the employer can file a grievance against the union is perfectly plain from the face of the contract.

The result is also supported by common sense. Most employers do not bargain for a right to file grievances for a good and simple reason: they don't need to.<sup>123</sup> Unless the employer is limited by contract, he runs his plant as he pleases. Certainly the *Warrior* Court recognized this. "[A]bsent a collective bargaining agreement . . . [management functions] may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions."<sup>124</sup> If the union thinks the employer has misapplied the agreement, the grievance procedure is there to bring the employer to terms. A grievance procedure is written into an agreement for the *union's* use. Of course, agreements can provide a grievance procedure for the employer, and some do.<sup>125</sup> But it would be foolish to presume its presence.

The effect of such a presumption is perfectly exemplified by *Tenney Eng'r, Inc. v. United Elec. Workers*.<sup>126</sup> The Tenney Company had agreed to an extremely broad grievance procedure. It called for arbitration of "all differences, disputes and grievances" which were not settled under the procedure set forth in the agreement.<sup>127</sup> The grievance was first referred to the department steward and the foreman, then to the shop committee and plant superintendent, and then to an international representative of the union and a designated officer of the employer. The union struck in breach of its no-strike clause and the employer sued for damages. The union moved for a stay of the action pending arbitration. Its request was granted. The court conceded that the first two steps of the grievance procedure were hardly appropriate to determine

<sup>123</sup> GREGORY, LABOR AND THE LAW 494-95 (2d rev. ed. 1958).

<sup>124</sup> 363 U.S. at 583.

<sup>125</sup> See article VII of the agreement between the Brooklyn Union Gas Co. and Local 101, Transp. Workers Union, 1 CCH LAB. L. REP. [UNION CONTRACTS & ARBITRATION] ¶ 59,911 (1960).

<sup>126</sup> 174 F. Supp. 878 (D.N.J. 1959).

<sup>127</sup> *Id.* at 879.

the issue of a wildcat strike. The court felt, however, that in the third step of the grievance procedure the union representative and one from the employer could initiate the issue of responsibility and damages. And arbitration was desirable as a general matter.

I believe the case was incorrectly decided. The result distorts a grievance procedure which left nothing to the imagination. The grievance procedure did not waive the first two steps if the no-strike clause was breached. It was mandatory that any grievance start at the beginning, no matter how serious. The incongruity of *Tenney* and like cases<sup>128</sup> is thrown into high relief if the Supreme Court finds that 301 allows equitable relief for breach of a no-strike clause. Then under the *Tenney* rule the employer, before asking the federal court for a restraining order, would have to seek out the union's international representative to present his claim that the union was responsible for the breach of the agreement. The international representative might deny all responsibility for the strike; he might indicate the strike would cease the moment the employer capitulated on the issue giving rise to the strike. He might not be available until next week. The dispute would probably go to arbitration. If the parties could agree on an arbitrator, a hearing *might* be set within seventy-two hours.

To state the *Tenney* results is to answer them. They are ludicrous. And especially so because parties can expressly agree to waive the grievance procedure in dealing with a strike in breach of contract. They can, and they have. In *Ruppert v. Egelhofer*<sup>129</sup> the parties agreed that any breach of the broad no-strike clause would waive the grievance procedure. Arbitration could be had, and an award rendered, forty-eight hours after notification. The employer claimed a slowdown in breach of the agreement, the arbitrator "enjoined" the unions from this conduct, and the New York courts upheld the award.

The solution is novel, but as a remedy for irreparable injury it has one special drawback. The arbitrator's award is not self-enforcing. The *Ruppert* award had to go to court. I believe

<sup>128</sup> *Lewittes & Sons v. United Furniture Workers*, 95 F. Supp. 851 (S.D.N.Y. 1951); *Armstrong-Norwalk Rubber Corp. v. Local 283, United Rubber Workers*, 167 F. Supp. 817 (D. Conn. 1958), *appeal dismissed*, 269 F.2d 618 (2d Cir. 1959); *Brady Transfer & Storage Co. v. Local 710, Meat Drivers & Helpers, Int'l Bhd. of Teamsters*, 22 CCH Lab. Cas. ¶ 67,121 (N.D. Ill. 1952).

The court's attempt to distinguish a contrary case in its own district, *Structural Steel & Ornamental Iron Ass'n v. Local 545, Int'l Ass'n of Bridgeworkers*, 172 F. Supp. 354 (D.N.J. 1959), is extremely unconvincing. And see *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, 47 L.R.R.M. 2612, 2615 n.8 (2d Cir., Feb. 17, 1961).

<sup>129</sup> 3 N.Y.2d 576, 148 N.E.2d 129 (1958), 58 COLUM. L. REV. 908 (1958).



similar awards would follow the same route. The arbitrator has no powers of contempt; a finding that his award has been violated may be forced to a court decree. And all of this takes time. Moreover, a hearing before the arbitrator would probably be on the merits. Temporary restraining orders, or preliminary injunctions, are designed to end speedily irreparable injury without an extended hearing. Under federal practice the hearing on the merits is set down shortly after the order is signed, so that if it was wrongly issued, it will be quickly dissolved.

The essential ineffectiveness of an arbitrator's injunction of a strike in breach of contract leads to the most important disadvantage of subjecting this breach to the arbitral process. I repeat that the no-strike clause is the only provision in a labor agreement of direct benefit to the employer. No employer who thinks of the matter abandons by inference his right to enforce this clause in the most effective forum — the courts. The law should be reluctant to presume relinquishment of so important a right.

## V.

It must be obvious that traditional contract doctrine has run a zigzag course in its application to collective labor agreements. It is a favored theory that these agreements are so unique that none but the initiate may understand them. They are said to be so peculiar in their structure and so singular in their application that none but the expert may interpret them. Collective bargaining agreements *are* odd ducks. Whether they are a third-party beneficiary contract, a trade agreement, or a fiduciary relationship,<sup>130</sup> they bear marked differences to familiar contracts. They are designed to cover many people. They are generally of short duration.<sup>131</sup> The bargaining leading to their execution is compelled by *law*.<sup>132</sup> Sometimes their execution is attended by strikes, boycotts, or the good offices of politicians attending the public weal. They are just different enough from ordinary undertakings that some listen to the votary who says *this* undertaking is beyond judicial competence.

Naturally, this reading is gratifying to the proclaimed expert. It gives him a license to develop the law as he goes along. Depar-

<sup>130</sup> See generally GREGORY, *op. cit. supra* note 123, at 445-52; Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).

<sup>131</sup> The NLRB encourages this by holding that a collective bargaining agreement is not a bar to a petition for an election by a rival union for more than two years. Pacific Coast Ass'n of Pulp & Paper Mfrs., 121 N.L.R.B. 990 (1958).

<sup>132</sup> 61 Stat. 141 (1947), 29 U.S.C. §§ 158 (a) (5), (b) (3) (1958).

ture from traditional concepts is easy to explain — the expert is dealing with “industrial reality.”

A great deal of this talk is nonsense. Collective bargaining agreements are negotiated to bind an employer and a union. The law contemplates an agreement which holds both parties to their bargain. Section 8 (d) of the act speaks of “the negotiation of an agreement . . . and the execution of a written contract incorporating any agreement reached. . . .”<sup>133</sup> The arrangement which binds the parties is the same one jurisprudence has found effective for some years — a written contract. And in section 301, Congress allowed federal courts to hear suits for violation of contracts, not suits for violation of unique legal hybrids.

It would be tempting to analyze the concepts of offer, acceptance, and consideration in light of NLRB rules of the bargaining practice, but this is beside the point in an article on the no-strike clause. “A total breach of contract is a breach whose remedial rights provided by law are substituted for all the existing contractual rights, or can be so substituted by the injured party.”<sup>134</sup> Clearly breach of a no-strike clause is a material breach of contract. It is certainly so in light of the quotation which opened this article and the bargaining concepts which I have already discussed.

Because it is a material breach, a strike in violation of a no-strike pledge immediately gives rise to several rights of action by the employer.

1. *The employer may treat the strike as a total breach and rescind the agreement.* In *United Elec. Workers v. NLRB*<sup>135</sup> the union struck in breach of contract. The employer told all employees by letter that they had been removed from the payroll; that all who had taken part in the strike were discharged; that the contract was cancelled; and that the company would no longer bargain with the union. The Board found that these acts did not violate the act,<sup>136</sup> and the District of Columbia Circuit upheld this finding. It bottomed its reasoning on general principles of contract law, citing so conventional a source as the *Restatement of Contracts* for the proposition that one party to an agreement need not perform if the other party refuses in a material respect to do so.

“Moreover, in cases where the breach is a strike in violation of a collective bargaining agreement, as in the instant

<sup>133</sup> 61 Stat. 142 (1947), 29 U.S.C. § 158 (d) (1958).

<sup>134</sup> RESTATEMENT, CONTRACTS § 313 (1) (1932).

<sup>135</sup> 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956).

<sup>136</sup> *Marathon Elec. Mfg. Corp.*, 106 N.L.R.B. 1171 (1953).

case, application of the rule is supported by the rationale underlying such agreements. . . . A no-strike provision is 'The chief advantage which an employer can reasonably expect from a collective labor agreement.' The walkout was a material breach which justified the subsequent rescission of the contract by the Company."<sup>137</sup>

The court imposed an affirmative obligation on the participants of the strike to disavow their activity. All employees had received the employer's letter informing them of their discharge for breach of contract. All remained silent. By taking no steps to disavow the action of their agent, the union, the Board was justified in concluding that the employees had acquiesced in the union's action. They therefore shared with the union its penalty.

If the employer elects to rescind he cannot subsequently sue the union for damages. He has elected his remedy.<sup>138</sup> Of course, the NLRB does not enjoin these strikes or award damages for them because a breach of contract, by clear congressional direction, is left to the courts. The Board redresses these breaches within its own bailiwick. It rules that the employer may discharge any or all employees who strike in breach of contract;<sup>139</sup> the Board does not weigh relative guilt. Since the employer may discharge all employees who strike in breach of contract, he may pick and choose which of the strikers he will rehire.<sup>140</sup> The Board also reasons that union leaders bear a greater responsibility to remedy breach of a no-strike clause; their discharge for failure to do so is not discriminatory.<sup>141</sup> Moreover, the Board suspends compulsory bargaining during a strike in breach of contract.<sup>142</sup>

<sup>137</sup> 223 F.2d at 341.

<sup>138</sup> *Boeing Airplane Co. v. Aeronautical Indus. Dist. Lodge, IAM*, 91 F. Supp. 596 (W.D. Wash. 1950), *aff'd*, 188 F.2d 356 (9th Cir. 1951).

<sup>139</sup> *American Gilsonite Co.*, 121 N.L.R.B. 1514 (1958), *aff'd on reconsideration*, 122 N.L.R.B. 1006 (1959); *United Elastic Corp.*, 84 N.L.R.B. 768 (1949).

<sup>140</sup> *Michigan Lumber Fabricators, Inc.*, 111 N.L.R.B. 579 (1955); see also the following administrative rulings of NLRB General Counsel: Case No. K-719, 39 L.R.R.M. 1024 (1956); Case No. F-854, 44 L.R.R.M. 1112 (1959); Case No. F-1095, 44 L.R.R.M. 1319 (1959).

<sup>141</sup> *Stockham Pipe Fittings Co.*, 84 N.L.R.B. 629 (1949); see also the following administrative rulings of NLRB General Counsel: Case No. F-854, 44 L.R.R.M. 1112 (1959); Case No. F-253, 41 L.R.R.M. 1329 (1958).

<sup>142</sup> *Valley City Furniture Co.*, 110 N.L.R.B. 1589 (1954), *enforced*, 230 F.2d 947 (6th Cir. 1956).

It will be noted that the cases cited in notes 139-42 span two political administrations. Whatever the effects of a national election on the NLRB, it seems safe to predict consistent treatment of the no-strike clause.

I repeat that the text oversimplifies. Section 8 (d) of the act, 61 Stat. 142 (1947), 29 U.S.C. § 158 (d) (1958), writes into every agreement at least a sixty-day no-strike clause. See Note, 69 *YALE L.J.* 309 (1959). The most obvious problem will arise when a strike breaches a no-strike clause and § 8 (d) as well, and the Board chooses to exercise its discretionary powers to ask for an injunction under § 10 (j) of the act, 61 Stat. 149 (1947), 29 U.S.C.

2. *The employer may treat the strike as a partial breach, subject to an injunction or damages or both.* He may ask the state courts to enjoin the strike or award damages under section 301 or state common law.<sup>143</sup> It is the thesis of this article that he should be able to follow a similar course in the federal courts under 301.

There is nothing strange in these principles. Their result is just. Judges should demand more than the predilections of an expert as reason for scrapping them. Indeed, departure from these principles produces bizarre results. Consider *Mastro Plastics Corp. v. NLRB*.<sup>144</sup> That case is said to mean that a union is privileged to strike in violation of a no-strike clause when the strike is in protest of an employer's unfair labor practices. The *Mastro Plastics* unfair labor practices were many and serious. The employer, favoring one union over another, gave every form of assistance to the favored union, including the discharge of some seventy-seven employees who refused to join the union the employer preferred. The Board,<sup>145</sup> the Second Circuit,<sup>146</sup> and the Supreme Court<sup>147</sup> held that a strike over these unfair labor practices was protected activity, in spite of the presence of the no-strike clause. They ordered reinstatement of strikers discharged for violation of contract. Professor Cox has aptly remarked that traditional contract principles would have produced the same result without the tortured reasoning employed by all three forums.<sup>148</sup> The law implies in every agreement a covenant of good faith that neither party will attempt to destroy the existence of the other, thereby preventing fulfillment of the agreement. When *Mastro Plastics* attempted to destroy the identity of the union with which it had an agreement by discharging seventy-seven of its members, it violated the prom-

§ 160 (j) (1958). The short answer to this is probably that the NLRB is not the only forum capable of effectuating a national labor policy. The district court hearing a petition by an employer for an order restraining breach of a no-strike clause could grant the relief pending an appearance by the Board (certain to be delayed). One court has already denied a motion to stay a damage action for breach of a no-strike clause and a jurisdictional dispute governed by § 8 (b) (4) (D). *L. R. Young Constr. Co. v. United Ass'n of Journeymen*, 33 CCH Lab. Cas. ¶ 70,932 (E.D. Ill. 1957). Even if the reader were patient, there is neither time nor space to develop these and related problems.

<sup>143</sup> Under § 301: *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958).

Under common law: *General Elec. Co. v. International Union, UAW-CIO*, 93 Ohio App. 139, 108 N.E.2d 211 (1952), *appeal dismissed*, 158 Ohio St. 555, 110 N.E.2d 424 (1953).

<sup>144</sup> 350 U.S. 270 (1956).

<sup>145</sup> *Mastro Plastics Corp.*, 103 N.L.R.B. 511 (1953).

<sup>146</sup> 214 F.2d 462 (2d Cir. 1954).

<sup>147</sup> 350 U.S. 270 (1956).

<sup>148</sup> Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 16-19 (1958).

ise of good faith implicit in every agreement. This was a material breach of contract. The union was privileged to elect non-performance of its obligation. Hardly a momentous result. It scarcely warrants the Court's statement that only an *express* reservation in the no-strike clause would hold it operative in the face of employer unfair labor practices.

It is one thing to discharge seventy-seven members who refuse to join the union an employer chooses; it is quite another to discharge but one man. In *Mid-West Metallic Products, Inc.*,<sup>149</sup> the employer discriminately discharged an employee one day. His action prompted a strike in breach of a no-strike clause the next. The employer discharged various strikers. The trial examiner, after finding the initial discharge unlawful, concluded that the remaining strikers protested an unfair labor practice, justifying their action. All discharges violated section 8 (a) (3). The Board agreed the discharge which started it all was unlawful; the other discharges were not. But to rationalize this result with *Mastro Plastics* is to put the square peg in a round hole. The Board noted that the union had a perfectly ample way to remedy the discharge in the grievance procedure, particularly since the grievance procedure required discharge cases to be processed in approximately five days. The Board concluded that "unlike the union in the *Mastro Plastics* case, the instant union did not jeopardize its very existence by renouncing self-help against unfair labor practices for a substantial period of time."<sup>150</sup> The difficulty with this is that *Mastro Plastics* too had a grievance procedure—an extremely broad one.<sup>151</sup> The real reason, of course, is that the single unfair labor practice in *Mid-West Metallic* was minor compared to those in *Mastro Plastics*.

Had the Board resorted to classic contract doctrine it could easily have achieved the same result without its labored reasoning. Not every breach of contract is a material breach which justifies non-performance by the other party. If the agreement is partially breached, then the wronged party seeks legal relief or, in this case, the relief provided by contract. He is not privileged to rescind his agreement unless the corresponding breach is material. Therefore, in *Mid-West Metallic Products*, the Board could easily have reasoned that the discharge, albeit discriminatory, was a partial breach of contract. The union was entitled to pursue the grievance pro-

<sup>149</sup> 121 N.L.R.B. 1317 (1958).

<sup>150</sup> *Id.* at 1320.

<sup>151</sup> 103 N.L.R.B. at 514-15.

cedure and, if necessary, legal and equitable remedies. But the breach was not such as to permit the union to avoid its undertaking altogether. The agreement remained in effect and so did all of its pertinent clauses.

Consider the reverse. Suppose a union threatens a new employee with loss of his job if he does not join the union in five days. The agreement — and the law — give the employee thirty days. The union has breached its agreement; it has also committed an unfair labor practice.<sup>152</sup> Yet no court would allow the employer to rescind. Why? The breach is not material.

The point of all this is to emphasize the validity of conventional contract principles in analyzing breach of a no-strike clause. Courts understand these principles. They are especially competent to apply them. Moreover, these principles have served society well for a number of years. They should hardly be discarded because an industrial system provides new challenges to a traditional theory. The ability of the common law to meet fresh tests is one of its finest qualities. It doubtless prompted Mr. Justice Frankfurter to say:

“There is no reason for jettisoning principles of fairness and justice that are as relevant to the law’s attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements.”<sup>153</sup>

## VI.

One irony — at least — emerges from *Lincoln Mills* and *Warrior*. These decisions bring judges and lawyers back to an area where for years the experts said they had no place. This is inescapable. Both cases present no mean problems in draftsmanship. It is likely lawyers will do the drafting. And federal judges will have to review their efforts.

Some will wring their hands over the appearance of the law on sacrosanct land. I think their alarm illusory. The collective bargaining agreement has come of age. Its breach no longer needs the care of a hothouse rose. Whatever may be said for solution of *internal* breaches of the agreement by expertise, external breaches can and should be subject to traditional remedies that have worked so well in the past. Of course, any private individual can “award”

<sup>152</sup> *Local 404, Int'l Bhd. of Teamsters*, 100 N.L.R.B. 801, 811 (1952).

<sup>153</sup> *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 475-76 (1960) (dissenting opinion).

specific performance, damages, reformation, and rescission. The difference is that courts can make them stick. And courts have applied these remedies for years: to *A*'s refusal to deliver his horse to *B* as agreed, or to make *X* deliver two million dollars in products to *Y*. These remedies have been applied by courts to breach of contracts as vital to the signatories as any labor agreement. These remedies are strict, and sometimes harsh, but they provide a foundation of respect for contracts an advanced society can hardly do without. It is time they were equally applied to breach of labor agreements. The forum to apply them is the court, for, as one arbitrator has observed, "damages for strikes and lockouts in violation of the contract is a remedy normal to the courts — but not to arbitration. When parties seek such extra-arbitral remedy, the proper tribunal is, and has been, the courts — unless the contract specifically authorizes the arbitrator to invoke such a remedy..."<sup>154</sup>

Too much has been said of the dissimilarity of labor agreements to ordinary contracts. Yet in one respect the collective labor agreement is vastly different from any other undertaking, and on this difference the commentators are curiously silent. The labor agreement has a political importance that attaches to no other undertaking. Its negotiation is often trumpeted in the press. One side or the other appeals for sympathy — and pressure — to anyone it feels favorable — civic leaders, professors, the clergy. It is often the result of a long and violent strike. Perhaps for this reason above all Congress gave a non-elected judiciary the jurisdiction to hear suits for their violation. It was a sensible choice. Naturally, federal judges bring their disposition and capacities to the bench with them. But more than any other, a federal judge is free from the elective pressures that sway labor agencies and some state courts. He has tenure for life and good behavior; he is adequately paid. Unlike an arbitrator, he cannot be dismissed after an unfavorable award. His job does not depend on the whim of anyone. He is the ideal person to shape the law of breach of the labor agreement.

<sup>154</sup> Baldwin-Lima-Hamilton Corp., 30 Lab. Arb. 1061, 1064 (Arbitrator Crawford).