COMMENTS

ENFORCEMENT OF COLLECTIVE-BARGAINING AGREEMENTS UNDER SECTION 301

By J. Q. DAVIDSON, JR.*

ENFORCEMENT OF NO-STRIKE CLAUSES

In 1957, the Supreme Court decided the landmark case in the interpretation, construction, and definition of section 301 of the Labor Management Relations Act.[1] In *Textile Workers Union v. Lincoln Mills*,[2] a union sought specific performance of the employer's agreement to arbitrate grievance disputes. In affirming the district court's granting of the relief sought, the Supreme Court declared that: (1) section 301 (a) is more than merely a jurisdictional statute—it authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. (2) In section 301 suits the appropriate substantive law to apply is federal law, which the federal courts have the obligation to fashion from the policy expressed in the national labor law. (3) The core of the policy of the national labor laws is the promotion of collective bargaining and the encouragement of bargaining contracts which provide for agreements not to strike. "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."[3] Therefore, it was also the policy of the national labor laws that arbitration agreements be enforced in federal courts. (4) The Norris-LaGuardia Act[4] did not prevent the use of equitable remedies to enforce the arbitration provisions of collective-bargaining agreements, since failure to arbitrate was not part and parcel of the disputes against which the Norris-LaGuardia Act was aimed.

It can thus be seen that with *Lincoln Mills* the Supreme Court had struck a balance between the employer's obligation to arbitrate grievances and the union's obligation not to violate no-strike clauses in collective-bargaining agreements—the former was the *quid pro quo* for the latter. This balance was temporarily upset by the Supreme Court's decisions in the 1960 *United Steelworkers* trilogy in which the employer's obligation to arbitrate was expanded, while the union's responsibility not to strike over grievance disputes in the face of no-strike clauses remained within the confines of the *Lincoln Mills* determination. In the first of the 1960 trilogy, *United Steelworkers of America v. American Mfg. Co.*,[5] the union sought to compel the employer

*Third-year student, Walter F. George School of Law, Mercer University.

1. 61 Stat. 156 (1947), 29 U.S.C. §185 (1964).
2. 353 U.S. 448 (1957).
3. *Id.* at 455.
4. 47 Stat. 70 (1932), 29 U.S.C. §§101-15 (1964).
5. 363 U.S. 564 (1960).

to arbitrate the employees' grievances. The relief sought was granted because of the federal policy behind section 301 in favor of arbitration under which the union's no-strike agreement is the *quid pro quo* for the employer's promise to arbitrate grievances. The Supreme Court held that federal courts should not weigh the merits of any grievance claim, even one seemingly frivolous, but they should look only to the collective-bargaining agreement to determine whether the grievance in question is arbitrable.

This trend toward expanding the employer's obligation to arbitrate was taken a step further in the second of the 1960 trilogy, *United Steelworkers of America v. Warrior & Gulf Nav. Co.*,[6] wherein the union sought arbitration in regard to the employer's alleged right to contract out maintenance work to independent companies. Once again, the Supreme Court granted arbitration, holding that any doubts as to whether a particular dispute is within the employer's agreement to arbitrate grievances must be resolved in favor of its being subject to arbitration and that any exclusion of a particular grievance from the employer's agreement to arbitrate must be expressly stated in the collective-bargaining agreement.

The third member of the 1960 trilogy, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,[7] dealt the trilogy's final blow to the *Lincoln Mills* balance of the *quid pro quo* scales. In *Enterprise,* the union sought to enforce an arbitrator's award which the employer resisted as being unauthorized because (a) it was made for a period extending beyond the duration of the collective-bargaining agreement, and (b) it was too vague to be understood and was therefore invalid. The Supreme Court ordered enforcement of the arbitrator's award. However, the Court also ordered the award to be made more specific, because of the underlying policy of section 301 favoring arbitration and because arbitration was the method for settling disputes agreed upon by the parties. The Supreme Court held that federal courts have no power to review the merits of valid arbitration awards.

Thus, after the 1960 trilogy: (1) The role of the courts was limited to determining whether the party seeking arbitration was making a claim which on its face was covered by the collective-bargaining agreement. (2) Courts were not to consider the merits of a grievance under the guise of interpreting the arbitration clause of a collective-bargaining agreement. (3) In suits for the performance of an arbitration agreement, arbitration should be ordered unless it is clear beyond doubt that the dispute was not covered by the collective-bargaining agreement's arbitration clause, doubts being resolved in favor of coverage. (4) An arbitrator's award was enforceable under section 301 where such awards were sought to be enforced, courts were held to be without power to overrule the arbitrator's award merely because their interpretation of the collective-bargaining agreement was dif-

6. 363 U.S. 574 (1960).
7. 363 U.S. 593 (1960).

ferent from his, except where the arbitrator's award was not based on the collective-bargaining agreement.[8]

The *quid pro quo* balance was restored once again in the 1962 Supreme Court case of *Local 174, Teamsters Union v. Lucas Flour Co.*[9] where the union struck in spite of a broad arbitration clause in a collective-bargaining agreement which contained no express no-strike clause. The employer subseqently sued the union for damages in a Washington state court for the loss caused by this strike. The Supreme Court, applying federal law, not state law as the Supreme Court of Washington had, affirmed a judgment in favor of the employer. The Supreme Court held that, by federal law under section 301, the arbitration clause, sub silentio, also required a no-strike clause.[10] The Supreme Court, in effect, held that an agreement to settle grievance disputes by arbitration automatically implies a corresponding agreement not to strike over grievance disputes.[11]

The *quid pro quo* balance again struck in *Lucas* was upset three months later in the federal courts, at least, by the Supreme Court's well-known, holding in *Sinclair Ref. Co. v. Atkinson.*[12] In *Sinclair,* the employer tried to enforce the union's express no-strike clause by enjoining the union's repeated strikes and work stoppages. The Supreme Court, in a 5-to-3 decision, affirmed a dismissal of the employer's suit, holding that section 4 of the Norris-LaGuardia Act[13] prohibited federal courts from granting injunctions against a strike in violation of the no-strike clause since such a strike is a "labor dispute" within the injunctive prohibitions of that section. The Supreme Court refused to recognize the argument that it had the power to "accommodate" the Norris-LaGuardia Act out of existence insofar as it barred federal courts from granting injunctive relief against a union's violation of a no-strike clause in order to effect the policy of section 301. Here, once again, the Supreme Court waivered from the logical development of section 301 by not affording the *quid pro quo* protection to the employer as well as the union. The Supreme Court, as a matter of law, could have accepted "accommodation" in *Sinclair* as it had in *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.,*[14] to give effect to the Labor Manage-

8. See COHEN, LABOR LAW, 396 (1964); Kupinse, *The Supreme Court Development of the Scope of Section 301 of the Labor Management Relations Act,* 49 CORNELL L. Q. 81, 82 (1963), where it was suggested that the reasons underlying the substantive law enunciated by the 1960 trilogy were: (a) the national labor policy in favor of arbitration, (b) the concept that the no-strike agreement is the *quid pro quo* for arbitration [true, but the Supreme Court failed to correspondingly expand the union's responsibility not to strike over grievance disputes, while expanding the employer's obligation to arbitrate grievances], and (c) the arbitrator's greater knowledge of the involved industries.
9. 369 U.S. 95 (1962).
10. See Kupinse, *supra* n. 8.
11. *Ibid.*
12. 370 U.S. 195 (1962).
13. 47 Stat. 70 (1932), 29 U.S.C. §104 (1964).
14. 353 U.S. 30 (1957).

ment Relations Act and to prevent the development of the problems[15] which followed from this decision.

In *Lincoln Mills,* the union's agreement not to strike over grievance disputes was the *quid pro quo* for the employer's agreement to arbitrate grievance disputes; if arbitration agreements are to be enforced, they should be enforced by the only remedy that is effectual for such purpose—their *quid pro quo,* the no-strike clause. The decision in *Sinclair,* by destroying the employer's *quid pro quo* protection, gives the union a greater choice of remedies. The Supreme Court's decision in *Sinclair* is against the policy of our national labor law of trying to promote harmony among the parties to collective-bargaining agreements by encouraging the settlement of labor disputes by arbitration.[16] It will be noted that *Sinclair* did not prohibit an employer from suing a union for damages for its violation of a no-strike clause nor did it prohibit the employer from obtaining a federal court order compelling the union to arbitrate any dispute that may have been made arbitrable by the provisions of the collective-bargaining agreement. It has been suggested that, due to the survival of the above remedies from the decision in *Sinclair,* that decision is not particularily dramatic.[17] The fact that the employer's cause of action for damages for a union's violation of a no-strike clause constitutes an insufficient substitute to balance the *quid pro quo* for the employer's expanded obligation to arbitrate was illustrated by two other Supreme Court cases decided the same day as *Sinclair.*

In *Atkinson v. Sinclair Ref. Co.,*[18] the Supreme Court denied the union's motion to stay the employer's action for damages for the union's violation of a no-strike clause because the employer had not bound itself to arbitrate its claim for damages against the union for breach of the no-strike clause (under the collective-bargaining agreement, only employee, not employer, claims were arbitrable).

15. *E.g.,* is the *Sinclair* holding binding on state courts in prohibiting the granting of injunctions against union strikes in violation of a no-strike clause in suits under section 301?; Can the power of state courts to issue injunctions against union strikes in violation of a no-strike clause, in states without "little Norris-LaGuardia Acts," following the view of *McCarroll,* be defeated by removing the section 301 action to a federal district court under 28 U.S.C. §1441 (1964)?

16. See Sullivan & Tomlin, *The Supreme Court and Section* 301 *of the Labor Management Relations Act,* 42 TEXAS L. REV. 214, 229 (1963), wherein it is asserted that the net result of *Sinclair* may be to strengthen the policy of the national labor law by forcing employers to resort to bi-lateral arbitration clauses to accomplish indirectly what *Sinclair* forbids them to accomplish directly, *i.e.,* since according to the decision in *Sinclair,* the employer could not require the union to perform a no-strike clause by enjoining a union strike in violation of the clause, the employer would be compelled to include a broad, bi-lateral arbitration clause in the agreement whereby both the employer and the union agree to arbitrate grievance disputes, the agreement of the employer being the *quid pro quo* for the agreement of the union. Such broad, bi-lateral arbitration clauses would not fall within the prohibitions of *Sinclair,* since the Norris-LaGuardia Act does not prohibit specific performance of arbitration agreements nor does it prohibit the employer's compelling the union to arbitrate where the arbitration provision is bi-lateral. Thus, the employer could prohibit a strike indirectly without running afoul of *Sinclair.*

17. See Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 COLUM. L. REV. 1027 (1963).

18. 370 U.S. 238 (1962).

In *Drake Bakeries v. Local* 50, *American Bakery Workers,*[19] the Supreme Court granted the union's request to stay the employer's action for damages for the union's breach of a no-strike clause, since under the collective-bargaining agreement the employer's claim against the union for violations of the no-strike clause was arbitrable. The Supreme Court reasoned that the granting of a stay of a claim which was the basis of the breach-of-contract action while also being subject to arbitration would give effect to both the arbitration and no-strike agreements. Thus, under the doctrine in *Drake Bakeries,* if the collective-bargaining agreement contains a broad arbitration clause, the employer may be required to arbitrate, rather than litigate, his claim that the union violated its no-strike clause, which would in effect render the employer's damage claim in such circumstances meaningless. Even if the employer's damage claim is not rendered meaningless by the doctrine of *Drake Bakeries,* the remedy will probably be inadequate to replace the employer's remedy prohibited by *Sinclair* in view of the employer's increased responsibility to arbitrate since damages are frequently an inaccurate and inadequate measure of the injury to the employer's business due to the union strike, because such intangibles as loss of favorable trade relations, inter and intra industry and business good will, and customer attraction are difficult to mathematically calculate and are seldom, if ever, accorded sufficient weight in compensation considerations. Moreover, the employer may be hesitant to take advantage of an available damage claim for fear that such would disrupt, or even prospectively preclude, the maintenance of a stable and harmonious relationship with the union which would be required to satisfy the employer's damage claim. Especially would this be true had production resumed.

At this juncture might be parenthetically noted the close analogy between the ultimate result in *Drake Bakeries* and the ultimate result in *Humphrey v. Moore*[20] and *Republic Steel Corp. v. Maddox*[21] discussed below. Under the doctrine in *Drake Bakeries,* the employer and the union must exhaust their internal remedies before maintaining a section 301 breach-of-contract action for damages, while under the *Moore-Maddox* doctrine, apart from all matters which the parties specifically exclude, all disputes between the parties must have been submitted to all the internal grievance procedures which must have been exhaused before the individual employee can maintain a section 301 breach-of-contract action for damages. It also seems appropriate to note at this juncture that federal courts are not deprived of jurisdiction over section 301 breach-of-contract actions merely because the alleged breach also constitutes an unfair labor practice for which a remedy is also available through the NLRB[22] (the same rule applies to section

19. 370 U.S. 254 (1962).
20. 375 U.S. 335 (1964).
21. 379 U.S. 650 (1965).
22. Hod Carriers, Local 33 v. Mason Tenders Dist. Council, 291 F.2d 496 (2d Cir. 1961).

301 suits in state courts)[23] nor are federal courts deprived of jurisdiction because of the involvement of either NLRA-protected or -prohibited activities, since section 301 makes it the responsibility of federal courts to enforce union contracts.[24]

Two recent Supreme Court decisions added nothing to this particular area of enforcement of no-strike clauses. *Local* 721, *United Packinghouse Food Allied Workers v. Needham Packing Co.*[25] was disposed of on the basis of the *Drake Bakeries* doctrine. *Independent Petroleum Workers of America, Inc. v. American Oil Co.*[26] was disposed of in a manner similar to the decision in *Atkinson v. Sinclair Ref. Co.*

The *quid pro quo* balance may have been further upset by one recent Supreme Court decision and two recent Court of Appeals decisions in which the concept of "the employer," whose responsibility to arbitrate grievance disputes has already been expanded, was expanded itself in a series of "change of ownership" cases. In *John Wiley & Sons, Inc. v. Livingston*,[27] the Supreme Court abrogated the traditional common-law privity-of-contract rule to compel the successor employer to arbitrate grievances against the predecessor employer (which had merged with the successor employer during the duration of the collective-bargaining agreement in question) arising after the expiration of the collective-bargaining agreement entered into by the union and the predecessor employer and to which the successor employer was not a party. The Supreme Court held that "the disappearance by merger of a corporate employer who entered a collective-bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in *appropriate circumstances,* present here, the successor employer may be required to arbitrate with the union under the agreement."[28] The "appropriate circumstances" which the Supreme Court found present in this case to justify such a holding were: (1) that a "substantial continuity of identity" existed in the business enterprise both before and after the change and (2) that the union made its position well known before the merger.

In two recent Court of Appeals cases, *United Steelworkers v. Reliance Universal Inc.*[29] and *Wachenhut Corp. v. International Union, United Plant Guard Workers,*[30] arbitration was directed where the sale of all of the assets of a predecessor employer to a successor employer resulted in a change of ownership that had a negligible impact on the employees, *viz,* there was no geographical shift of employees and the employment remained sub-

23. See Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Local 174, Teamsters Union v. Lucas Flower Co., *supra* n. 9; Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).
24. Atkinson v. Sinclair Ref. Co., *supra* n. 18.
25. 376 U.S. 247 (1964).
26. 377 U.S. 930 (1964).
27. 376 U.S. 543 (1964).
28. *Id.* at 548 (Emphasis added.)
29. 335 F.2d 891 (3d Cir. 1964).
30. 332 F.2d 954 (9th Cir. 1964).

stantially unchanged, on the basis of *Wiley*'s "substantial continuity of identity in the business enterprise" test. The Third Circuit in *Reliance* broadened the *Wiley* test by not requiring the union to make its claims known before the change of ownership in that it failed to consider the fact that in *Reliance* the union had not made its claims known until after the change of ownership. This broadening of the *Wiley* test has been supported[31] on the ground that this latter element of the "original" *Wiley* test was only a estoppel-laches type of rule for the union which should have no bearing on the initial and primary element of the "original" *Wiley* test, since the successor employer in ascertaining whether to effect a change of ownership with the predecessor employer surely would know of the existing collective-bargaining agreements entered into by the latter which the successor employer would certainly expect the union to demand that the agreement be honored, if and when a change of ownership was, in fact, effected. These two Court of Appeals cases were much clearer cases for the application of the "true" *Wiley* test (*Reliance* version), since in these cases there was no necessity for a geographical shift of employees from the predecessor's to the successor's plants, *viz,* clearly "substantial continuity in the business enterprise."[32]

ENFORCEMENT OF COLLECTIVE-BARGAINING AGREEMENTS IN STATE COURTS

FEDERAL PRE-EMPTION

In two 1962 cases, *Charles Dowd Box Co. v. Courtney*[33] and *Local* 174, *Teamsters Union v. Lucas Flour Co.*,[34] the Supreme Court held that section 301 did not oust state courts of jurisdiction over section 301 suits; that jurisdiction over suits within section 301 was to be concurrent between the state and federal courts; and that federal law was the *substantive* law to be applied in section 301 suits in state courts since the subject matter of section 301 was peculiarly one that calls for uniform law—uniform federal law. In *Garner v. Teamsters Union*,[35] the Supreme Court concurred in the holding that where a violation of the NLRA is present, exclusive jurisdiction over the controversy lies with the NLRB. In *San Diego Bldg. Trades Council v. Garmon*,[36] the Supreme Court held that when "it is clear

31. See *Enforcement of Collective Bargaining Agreements Under Section* 301, 6 B. C. IND. & COM. L. R. 815 (1965).

32. The Seventh Circuit, in Piano Workers & Musical Instrument Workers Union v. W. W. Kimball Co., 333 F.2d 761 (7th Cir. 1964), improperly applied the "true" *Wiley* test in cases where there was no change of ownership and there was no substantial identity in the enterprises and location between the original plant and the plant to which the enterprise moved (plant-removal case). The "true" *Wiley* test should be applied only to cases where there is a new employer who was not a party to the bargaining contract in question and where the "substantial identity" test is satisfied. On December 14, 1964, the Supreme Court reversed this case on certiorari (379 U.S. 913 (1964)), grounding its decision on the *American Mfg.* trilogy cases and on the *Wiley* case.

33. 368 U.S. 502 (1962).

34. *Supra* n. 9.

35. 346 U.S. 485 (1953).

36. 359 U.S. 236 (1959).

or may fairly be assumed that the activities which a state purports to regulate are protected by section 7 of the Taft-Hartley Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that state jurisdiction must yield."[37]

In 1962, the Supreme Court in *Smith v. Evening News Ass'n*,[38] one of the truly landmark decisions under section 301, held, *inter alia*, that the pre-emption rule announced in *Garmon* does not bar actions brought under section 301 even where the complaint in the section 301 suit alleges an unfair labor practice because (1) prior cases such as *Dowd* and *Lucas* manifest that the pre-emption rule does not apply to section 301 actions, and (2) the NLRB's authority to deal with an unfair labor practice which also violates the collective-bargaining agreement, while not displaced by section 301, does not itself destroy the jurisdiction of the courts thereunder.

THE NORRIS-LAGUARDIA ACTS IN STATE COURTS

The Supreme Court's holding in *Sinclair*, that federal courts were barred by section 4 of the Norris-LaGuardia Act to grant injunctive relief against a union's strike in violation of a no-strike clause in a collective-bargaining agreement because the strike was a "labor dispute" within the injunction prohibitive provisions of the Norris-LaGuardia Act, not only created problems by upsetting the *quid pro quo* balance sought to be established by *Lincoln Mills*, but also created problems in the area of federal-state court concurrent jurisdiction under section 301. The Norris-LaGuardia Act, which was the basis of the Court's holding in *Sinclair*, by its express terms, is limited in its application to the federal courts only; yet, the Supreme Court in the *Lucas* case held that the substantive law to be applied in section 301 suits in state courts was the federal law. To still complicate matters worse, some twenty-five states have enacted "little Norris-LaGuardia Acts."

Prior to the full crystalization of this problematical situation, Judge Traynor, speaking for the Supreme Court of California in *McCarroll v. Los Angeles County Dist. Council of Carpenters*,[39] "concluded that since the Norris-LaGuardia Act purports to limit the *jurisdiction* of the federal courts, it has no application to state court remedies."[40] In *American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs*,[41] the Third Circuit, in effect, held that an employer could bring a state court action, under state law in a state without a "little Norris-LaGuardia Act" to enjoin a union's violation of a no-strike clause in a collective-bargaining agreement. The Su-

37. *Id.* at 244.
38. 371 U.S. 195 (1962).
39. 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958).
40. Kline, *Jurisdiction of Federal Courts to Enjoin Labor Disputes*, 32 TENN. L. REV. 264, 281 (1965). The writer points out that the view expressed in *McCarroll* was followed in two other state court cases: (1) Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958); (2) C. D. Peery & Sons, Inc. v. Robilotto, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963). *Contra*, Independent Oil Workers v. Socony Mobil Oil Co., 85 N.J. Super 453, 205 A.2d 78 (1964).
41. 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 978 (1965).

preme Court denied certiorari.[42] The import of the holdings of these cases seems clear—the employer has been returned his *quid pro quo* by being allowed the injunctive relief, denied in federal courts under the holding in *Sinclair,* in state courts in states without "little Norris-LaGuardia Acts" in section 301 suits against unions for violations of no-strike clauses. There has been much written pro and con about the result in these cases.

On the "con" side, it has been said that such a result would make state courts preferred forums and thereby encourage forum shopping; that such a result rejects the policy of the national labor law pronounced in *Lincoln Mills* of formulating uniform federal law to govern section 301 cases; that such a result is contrary to the Supreme Court's holding in *Lucas* that federal law governs section 301 suits in state courts and since, under *Sinclair,* federal law prohibits injunctive relief, state courts cannot grant it; that the Norris-LaGuardia Act is one of the national labor laws which the state courts must apply in fashioning the federal substantive law under section 301, *viz,* the Supreme Court in *Sinclair* took the Norris-LaGuardia Act out of its procedural context and made it part of the body of federal substantive law which state courts must apply in section 301 suits under the *Lucas* doctrine; that if the application of state procedural rules (assuming arguendo that the remedy of injunction is merely procedural) so closely affects the existence of a federal right (to be free of the injunctive remedy in "labor disputes" under section 4 of the Norris-LaGuardia Act) as to destroy it, the procedural rule should yield to the federal substantive law.

On the "pro" side, it has been said that state courts may follow their own procedural rules when enforcing a federally created right and since the injunctive remedy is procedural, state courts are free to apply the remedy of injunction in section 301 suits (assuming that the state does not have a "little Norris-LaGuardia Act"); that the original purpose of section 301 was to increase the enforceability of collective-bargaining agreements, and therefore that state courts should not be deprived of a remedy available for the enforcement of these contracts that existed before the enactment of section 301; that uniform law can be achieved not only by denying injunctive relief, but also by allowing all courts to grant injunctions, *viz,* why not reverse *Sinclair* instead of vice versa?; that allowing employers injunctive relief against union violations of no-strike clauses would reinstate the *quid pro quo* balance sought to be achieved in *Lincoln Mills* and that this result is all the more necessary now that the employer's responsibility to arbitrate grievance disputes has been substantially increased since the *Lincoln Mills* decision.

As the law stands in this area at the present, injunctive relief against unions for violations of no-strike clauses is (1) unavailable in federal courts under section 4 of the Norris-LaGuardia Act under *Sinclair;* (2) unavailable in the state courts of the twenty-five states with "little Norris-LaGuardia

42. 380 U.S. 978 (1965).

Acts" under *Sinclair* by analogy; (3) available in state courts in states without "little Norris-LaGuardia Acts" in those states which follow the view expressed in *McCarroll,* though even in these states the availability of the injunctive remedy in this situation is subject to being defeated by removal to federal courts according to which view of removal is applied.

It is submitted that, under the law as it presently exists, the only logically sound view would be that state courts are precluded from granting injunctive relief against union violations of no-strike clauses whether the state has a "little Norris-LaGuardia Act" or not, since the *Sinclair* decision is binding on state courts under the *Lucas* doctrine. It is further submitted, however, that, although the above is the proper logical result, it is not the better result. The *quid pro quo* balance sought to be established and maintained in *Lincoln Mills,* the desired uniform formulation of national labor law in section 301 cases also enunciated in *Lincoln Mills,* the necessity of applying federal substantive law in state courts in section 301 cases as required by the *Lucas* doctrine, and the avoidance of the "removal controversy" could all be accomplished and realized by allowing the granting of injunctive relief against union violations of no-strike clauses. This "better result" could be achieved by (1) reversing *Sinclair* (highly improbable); (2) applying the power of the federal courts to "accommodate" the Norris-LaGuardia Act out of existence insofar as it impedes the proper and logical effectuation of the policy sought to be realized and achieved by section 301. (This would not seem to be the drastic step that the Supreme Court in *Sinclair* implied it was, especially in view of the fact that much has changed since the Norris-LaGuardia Act was passed, *viz,* the pendulum of strength in labor-management relations has swung toward the side of labor so that now there is and could be no rule by injunction. It would indeed be anomolous to allow such a legislative anachronism as the Norris-LaGuardia Act to frustrate the purpose, policy, and development of such a dynamic piece of legislation as section 301 of the Labor Management Relations Act); (3) obtaining additional legislation in Congress to remedy the situation.

REMOVAL

The "removal problem" was alluded to in the above discussion, but basically it is this—can the power of state courts to grant injunctive relief against union violations of no-strike clauses in states not having "little Norris-LaGuardia Acts" be defeated by removing the state court suit to a federal district court pursuant to 28 U.S.C. §1441 (1964)?[43] "The test of removal to a Federal court is not what the court must ultimately do with the case under Federal law but whether the Federal law applies to and controls

43. Under section 1441, for a state court action to be removable to a federal district court (1) a federal cause of action must appear in the pleadings and (2) the cause of action must be one over which federal courts have original jurisdiction.

the case by its provisions, as brought into operation by the complaint."[44] In what seems to represent the weight of federal authority and the suggested better view, the Third Circuit in *American Dredging Co. v. Local* 25, *Int'l Union of Operating Eng'rs*[45] held that the employer's state court action for injunctive relief against the union's violation of a no-strike clause was not removable to a federal district court. This decision was based on a literal reading of section 4 of the Norris-LaGuardia Act and an interpretation of the word "jurisdiction" in section 4 of that Act to mean authority to entertain or take cognizance of the suit rather than power to grant equitable relief. This, in effect, means that, due to section 4 of the Norris-LaGuardia Act, suits to enjoin union violations of no-strike clauses are not within the original jurisdiction of federal courts and are therefore not removable under section 1441, since a cause of action to be removable under section 1441 must be within the original jurisdiction of federal district courts.[46]

It is submitted that the holding in *American Dredging* represents the better view on removal and that the holding is consistent with what has been submitted as the better view in allowing all courts to grant injunctive relief in section 301 suits for injunctive relief against union violations of no-strike clauses. Any other view would allow unions to defeat the granting of injunctive relief, in those states where it is allowable under the present law, simply by removing the employer's state court action to a federal district court.[47]

44. Pocahontas Terminal Corp. v. Portland Bldg. Council, 93 F. Supp. 217 (D. Me. 1950).
45. *Supra* n. 41.
46. See generally, Aaron, *supra* n. 17; Kline, *supra* n. 40; Sullivan & Tomblin, *supra* n. 16, to the effect that the Norris-LaGuardia Act does not limit the federal courts' original jurisdiction because such a construction of the Norris-LaGuardia Act would prevent the formulation of uniform federal law in section 301 suits and would allow the formulation of a separate and inconsistent body of law to be applied in section 301 suits in states espousing the *McCarroll* view which have not enacted the "little Norris-LaGuardia Acts." The result of this view is that removal may be had in this situation under section 1441 since the employer's suit for an injunction is considered to be within the original jurisdiction of federal courts, this being accomplished by giving a broad interpretation to the word "jurisdiction" in section 4 of the Norris-LaGuardia Act to mean power to grant equitable relief. A recent federal case in accord with the above view is Tri-Boro Bagel Co. v. Bakery Drivers Union, 228 F. Supp. 720 (E.D.N.Y. 1963), where the district court stated: "Removal, moreover, may be had, and an application for remand withstood, even if removal is effected only to be followed by a grantable motion to dismiss on the ground that though the cause is classifiable as a 301 (a) suit, Norris-LaGuardia forbids the award of the injunction sought." *Id.* at 724.
47. There could be the additional problem of remand if the "better view" is followed in a case where the employer joins a claim for damages and a claim for injunctive relief where both claims are inadvertently removed. There are two acceptable solutions to this situation: (1) remand the claim for injunctive relief to the state court under the holding followed by the weight of federal authority under Walker v. UMW, 105 F. Supp. 608 (W.D. Pa. 1952); (2) the alternative solution view of remanding or dismissing without prejudice the claim for injunctive relief as espoused in Swift & Co. v. United Packinghouse Workers, 177 F. Supp. 511 (D. Colo. 1959) and National Dairy Prods. Corp. v. Hefferman, 195 F. Supp. 153 (E.D.N.Y. 1961). The reason both of the above solutions are acceptable under what is submitted to be the "better view" is because both prevent the power of state courts to issue injunction from being permanently defeated by removal.

ENFORCEMENT OF UNIQUELY PERSONAL RIGHTS

In *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*,[48] the Supreme Court held that the union could not sue on behalf of individual employees for wages owed because of the uniquely personal nature of the rights involved. Subsequently, in *Black-Clawson Co. v. International Ass'n of Machinists, Lodge* 355,[49] the Second Circuit held that an employee, as an individual, had no standing under the collective-bargaining agreement in question to compel the employer to arbitrate a grievance. The Second Circuit held that, if the parties to the collective-bargaining agreement wished to allow an individual employee to have such a right, they must expressly provide for such a right in their collective-bargaining agreement.

Then, in the landmark case of *Smith v. Evening News Ass'n*,[50] the Supreme Court held, *inter alios,* that neither a union nor an individual employee is necessarily precluded by the wording of section 301 from suing under that section by the mere fact that the union (as in *Westinghouse*) or the employee (as in *Smith*) seeks to vindicate the individual rights of one or more employees as opposed to the collective rights of the union. The majority of the Court in *Smith* disposed of *Westinghouse* as no longer being good law; no decision could be reached as to whether the several employees involved in *Smith* could recover, so the case was remanded for further proceedings on this point. The practical effects of the *Smith* decision were: (1) to hold, in effect, by overruling *Westinghouse,* that suits for the enforcement of individual rights may now be cognizable under section 301; (2) to leave open for future decision the particular circumstances under which a union or an individual employee might maintain a suit under section 301 to enforce uniquely personal individual rights; (3) to hold, when read with *Lucas,* that federal law is to govern not only the substance but the circumstances under which a union or individual employee will be allowed to vindicate individual rights under section 301.[51] After the decision in *Smith,* it appears that unions may maintain actions under section 301 to enforce uniquely personal rights of employees if the claims asserted are subjected to final and binding arbitration under the terms of a collective-bargaining agreement or if the claims are closely related to union rights.[52] If, however, the subject matter of the union's action is based on rights that are uniquely personal to employees and the union's claims are not arbitrable, *Westinghouse* would bar the union's suit on behalf of the employees.[53]

In regard to an individual employee's enforcing uniquely personal rights,

48. 348 U.S. 437 (1955).
49. 313 F.2d 179 (2d Cir. 1962).
50. *Supra* n. 23.
51. See Kupinse, *supra* n. 8.
52. 2 CCH LAB. L. REP., ¶3255.501 (1965).
53. *Ibid.*

the Supreme Court held, in effect, in *Humphrey v. Moore*,[54] that an individual employee may sue under section 301 to vindicate uniquely personal rights when he has first exhausted the grievance procedure provided for in the collective-bargaining agreement in question. The Supreme Court's citing of *Atkinson* and *Drake Bakeries* indicates that an individual employee will be precluded from maintaining a suit under section 301 until and unless he exhausts his internal remedies, whether or not the particular collective-bargaining agreement in question provides for the grievance machinery to be the exclusive mode of redressing employee grievances.[55] In *Republic Steel Corp. v. Maddox*,[56] the effect of the Supreme Court's holding was to place every conceivable claim which the employee might have against his employer under the grievance procedure provided for under the collective-bargaining agreement unless the agreement expressly provided otherwise; as in the *Humphrey* case, the employee must exhaust his internal remedies before he may maintain a section 301 suit. The holdings in *Humphrey* and *Maddox* were seen as necessary in order to aid in the effectuation of the policy of the national labor law in promoting harmonious and stable industrial relations by means of collective-bargaining agreements emphasizing arbitration as the means of settling grievance disputes. Under the "exclusive remedy" doctrine enunciated in *Humphrey* and *Maddox*, the individual employee is not deprived of all means of redressing his uniquely personal rights, since where the union wrongfully refuses to press his claim or only goes through the motions of the grievance procedure, the employee has two remedies: (1) a section 301 suit for breach of contract against his employer and/or his union (as in *Humphrey*); or (2) an unfair-labor-practice suit against his union for breach of its duty of fair representation (as in *Independent Metal Workers Union*[57]).[58]

54. *Supra* n. 20.

55. See Wolk, *The Decline of Individual Rights*, 16 LAB. L. J. 266, 269 (1965), where the author states: "Initially, the worker is now required to submit to arbitration (where such a procedure is present) or to such grievance procedures as may be set forth, all claims for severance pay and contractual damages even though he has ceased to be an employee both in fact and in law. Further, should such grievance be unsatisfactorily handled or should the union be unable (or unwilling) to diligently prosecute said claim, the ultimate resort would have to be in a federal action pursuant to federal substantive law."

56. *Supra* n. 21.

57. 147 N.L.R.B. No. 166 (1964). See Marshal, *Equal Employment Opportunities: Problems and Prospects*, 16 LAB. L. J. 453, 462 (1965), where the writer states: "The 1964 *Hughes Tool* decision . . . made an important departure, which, if sustained by the federal courts, could have important consequences for discrimination in employment. Specifically reversing previous NLRB decisions, the Board ruled for the first time in *Hughes Tool* that a violation of the duty of fair representation is also an unfair labor practice. Previously, the NLRB had interpreted its authority in such cases as limited to the relatively weak and rarely used penalty of revoking a union's certification. Although the Board's interpretation in this case is of doubtful validity in view of Congress' past refusal to give it the power which it has assumed, if the Supreme Court agrees that the union's violation of its duty of fair representation is also an unfair labor practice, the Board can issue, cease and desist orders enforceable in the federal courts. The *Hughes Tool* theory would in effect give the aggrieved person an administrative remedy for the duty of fair representation, making it no longer necessary for him to seek relief in the courts."

58. See n. 31, *supra*.