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A PARADOX OF OUR NATIONAL
LABOR LAW

WILLIAM G. RICE, JR.*

The goal of collective bargaining is to stabilize, or govern, the relation between an employer (or group of employers) and all his (or their) employees in a bargaining unit through standards and rules jointly evolved by the representatives of the parties and usually to some degree jointly administered. This is most explicitly stated in the Railway Labor Act in defining general purposes and general duties:¹ particularly, "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise."² The Supreme Court found the same meaning in the National Labor Relations Act,³ since "the House Committee recommended the legislation as 'an amplification and clarification of the principles enacted into law by the Railway Labor Act,'" and added that the employer's obligation includes, upon demand of the other party, signing a written statement of any agreement reached.⁴ This obligation the Taft-Hartley revision of the N.L.R.A. expressly imposes on both parties.⁵

But what is the legal consequence of breaking such contracts once made? Whatever the remedy before 1947, another section of the Labor Management Relations (Taft-Hartley) Act opens the national courts to suits for their violation,⁶ thus emphasizing their basic signifi-

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¹ Railway Labor Act §2, 8 U.S.C. §151a, §152.

² R.L.A. §2 First (1926 and 1934), 8 U.S.C. §152 first.

³ N.L.R.A. (1935) §8(5). Where the N.L.R.A. is cited without date the part cited is the same in the Wagner Act (1935) and the Taft-Hartley Act (1947). The 1935 text appears in 29 U.S.C. §151-§166 (1947) and the 1947 text in the pocket supplement §151-§167. Since the numbering of the sections of the Act and that of the U.S.C. sections correspond, only the former is used hereinafter.

⁴ H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514 (1941).

⁵ Each party is "to bargain collectively" upon demand of the other, N.L.R.A. (1947) §8(b)(3), which is defined to mean "performance . . . of mutual obligation . . . to . . . confer in good faith with respect to wages, hours and other terms and conditions of employment . . . and the execution of a written contract incorporating any agreement reached if requested by either party," N.L.R.A. (1947) §8 (d).

⁶ Labor Management Relations Act (1947) §301(a), 29 U.S.C. §185(a), which "was not enacted merely to provide a new forum for the enforcement of contracts theretofore enforceable solely in the state courts . . . but . . . was

cance in labor relations. The majority report of the Senate Committee on Labor and Public Welfare⁷ explained the responsibilities created by the bill it reported. A provision giving the N.L.R.B. authority to hear charges of breach of contract and presumably to redress such breaches by specific order, which was later removed from the bill, was said by the Committee to be "not sufficient. . . . We feel that the aggrieved party should also have a right of action in the federal courts." In the United States courts, says this committee report, however, "The Norris-LaGuardia Act⁸ has insulated labor unions, in the field of injunctions,⁹ against liability for breach of contract," and many state courts are limited by laws of like tenor. Turning to the law of financial liability of associations, the report continues: "It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract." But the committee thought this result was not evident in the four states¹⁰ that had enacted laws "to secure

designed to protect interstate and foreign commerce by creating a new substantive liability actionable in the federal courts." *Schatte v. Theatrical Stage Employees*, 182 F. (2d) 158 (9th cir., 1950), denying redress for a breach occurring before the Act was in effect.

⁷ S. Rep. 105, 80th Cong. 1st Sess. (1947) on S. 1126. This is the only Committee report discussing more than superficially the contract-enforcement provision. Briefly stated positions, pro and contra, on the provision of the similar House bill (H.R. 3020) are found in the majority and minority views expressed in H. Rep. 245.

⁸ Act of March 23, 1932, 47 Stat. c. 90, 29 U.S.C. §101-§115. Since the numbering of the fifteen sections of the Act and that of the U.S.C. sections correspond, only the former is used hereinafter.

⁹ The most drastic provisions almost completely free picketing from judicial restraint, but the law as a whole applies more broadly.

¹⁰ The states—California, Colorado, Minnesota, and Wisconsin—are named, but the acts are not identified. Probably the provisions are these: (1) Calif. Labor Code §1126 (enacted 1941 and still in effect: "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law and in equity, and a breach . . . shall be subject to the same remedies, including injunctive relief, as are available on other contracts. . . .") (2) Colo. Stat. Ann. c. 97 (enacted 1943 and still in effect) §94(6): "(1) It shall be an unfair labor practice for an employer individually or in concert with others: . . . To violate the terms of a collective bargaining agreement. . . . (2) It shall be an unfair labor practice for an employee individually or in concert with others: . . . (c) To violate the terms of a collective bargaining agreement. . . ." By §94(8)(4), final orders (of the State Industrial Commission) in an unfair labor practice proceeding may "require the person complained of to cease and desist from the unfair labor practices found to have been committed. . . ." Also §94(22) gives an action for damages for unfair labor practices. (3) Minn. Stat. c. 179 (enacted 1939 and still in effect) §179.11: "It shall be an unfair labor practice: (1) For any employee or labor organization . . . to violate the terms of such [valid collective] bargaining agreement. . . ." §179.12: "It shall be an unfair labor practice for an employer: (1) To . . . violate the terms and conditions of such [valid collective] bargaining agreement. . . ." §179.14: "When any unfair labor practice is threatened or committed, a suit to enjoin such practice may be maintained. . . . The provisions of §§185.02 to 185.19 [resembling the anti-injunction provisions of the Norris-LaGuardia Act] shall not apply." (Less stringent procedural safeguards must be observed.) (4) Wisconsin Stat. §111.06(1) (f), §111.06(2) (c), §111.07(4) (enacted 1939 and still in effect) are the same as those of Colorado, above

some measure of union responsibility for breach of contract." Though the statutes of all these states grant specific redress for breach of labor agreements, yet this Committee in recommending L.M.R.A. §301, which declares that "suits for violation of contracts between an employer and a labor organization" may be brought in United States courts, and which does not mention the Norris-LaGuardia Act,¹¹ did not indicate whether the remedy in suits under §301 could be anything but a "money judgment."¹²

Other Congressional committee reports, however, make clear that Congress intended to leave the Norris-LaGuardia Act operative in this area¹³ as well as that Congress thought that that Act severely restricted injunctive relief for breach of contract.¹⁴

The United States courts have since then declared that the Norris-LaGuardia Act applies to restrict specific redress for breach of contract.¹⁵ Thus, in *Alcoa Co. v. McMahon*, the U.S. Court of Appeals

quoted; but enforcement is entrusted exclusively to the Wisconsin Employment Relations Board. Cf. Millis and Katz, A Decade of State Labor Legislation, 15 U. of Chi. L. Rev. 282, 308 (1948).

¹¹ This Act is mentioned elsewhere, however. (1) By N.L.R.A. §10(h) it is inapplicable to proceedings under N.L.R.A. §10. (2) By L.M.R.A. §208 (b), 29 U.S.C. §178(b), it is made inapplicable to the "national emergency" procedure. (3) By §302(e), 29 U.S.C. §186(e), it does not affect proceedings to prevent unlawful payments by employers to unions.

¹² L.M.R.A. §301(b), 29 U.S.C. §185(b).

¹³ In the bill, H.R. 3020, that passed the House, §302 was the section which resembles §301 of the Act. Since §302(e) of the House bill expressly exempted actions for breach of collective agreement from the Norris-LaGuardia Act, the omission of this exemption from the enacted §301 left the Act applicable. H. Conf. Rep. 510.

¹⁴ The Senate report already quoted so states, citing *Wilson and Co. v. Birl*, *infra* note 15, *Nevins v. Kasmach*, *infra* note 47, and *Bulkin v. Sacks*, *infra* note 40.

So do the following passages from the House report on H.R. 3020, H. Rep. 245, 80th Cong 1st Sess. (1947). The majority stated that §302(e) of H.R. 3020, which was later struck out, "makes the Norris-LaGuardia Act inapplicable in suits and proceedings involving violations of contracts which labor organizations voluntarily and with their eyes open enter into." The minority spoke of "the complete inadvisability" of opening up "the federal courts to petition for injunction in disputes involving violations of union agreements despite the provisions of the Norris-LaGuardia Act banning injunctions in labor disputes, except after full hearing and upon certain findings."

It is obvious that some sections of the Norris-LaGuardia Act, notably §4 and §5, keep the U.S. courts from restraining activities only of employees and unions. *Textile Workers Union v. Alco Mfg. Co.*, 27 L.R.R.M. 2164 (D.C. M.D. N.C., 1950). But the remainder of the Act is operative, whoever may be plaintiff or defendant.

¹⁵ *Alcoa Co. v. McMahon*, 81 F. Supp. 541 (D.C. S.D. N.Y., 1948), *affd.* 173 F. (2d) 567 (2d cir., 1949), *cert. den.* 338 U. S. 821 (1949) (strike in violation of contract and of union government). *Duris v. Phelps Dodge Corp.*, 87 F. Supp. 229, 232 (D.C.N.J., 1949) (interunion contest over bargaining rights). Both *Teller (Labor Disputes and Collective Bargaining (1940) Vol. 2, §436 n. 36)* and the Senate Labor Committee (S. Rep. 105, 80th Cong. 1st sess., 1947) say that the earlier case of *Wilson and Co. v. Birl*, 27 F. Supp. 915 (D.C.E.D. Pa., 1939), *affd.* 105 F. (2d) 948 (C.C.A. 3d, 1939) where injunction was denied, involved a breach of contract. This is questionable, for the existence of a contract is witnessed only by a vague left-handed reference

for the Second Circuit said:¹⁶ "The only question is as to the employers remedies for this breach of contract. That they may recover judgment from the defendants for damages is undoubted; that they may recover a similar judgment against the union is conceivable;¹⁷ that they could have procured an injunction in some form before the Norris-LaGuardia Act we will assume. . . . The defendants' position is that, in spite of the declaratory judgment [holding the defendants to be in breach], the refusal [to obey the judgment declaring the contract obligations] raised 'a controversy concerning the terms and conditions of employment' which by [the Act's] definition is a 'labor dispute.' We agree. . . ."¹⁸ So the court refused the injunction sought.

In so doing this court was following the unanimous assumption of the Supreme Court underlying its elaborate discussion in *U.S. v. United Mine Workers*¹⁹ of whether a dispute between the government and the U.M.W. as representative of the miners in the mines of which the government was in possession, was reached by the Norris-LaGuardia Act. This assumption that the Act does not except from its provisions litigation over obligations created by collective contract is most clearly stated in the concurring opinion of Justice Frankfurter: "The controversy arising under the Lewis-Krug contract concerned 'terms and conditions of employment' and was therefore a 'labor dispute'. . . ."²⁰ This declaration was irrelevant to Justice Frankfurter's ground of decision and therefore only dictum. It was essential only to support the dissenting conclusion of Justices Murphy and Rutledge. But no judge and no attorney in the case showed any disagreement with it.²¹

The application of the Norris-LaGuardia Act to breaches of contract creates a serious inconsistency between it and our national labor policy of promoting collective bargaining to the formation of con-

in the district judge's opinion, 27 F. Supp. at 918. But the Alcoa decision was foreshadowed by *U.S. v. United Mine Workers of America*, 330 U.S. 258 (1947), where the opinion of the court said (at 270) that it would "probably be conceded" that if the plaintiff were a private employer instead of the U.S. "the characteristics of the present case would be such as to bring it within" the prohibitions of the Norris-LaGuardia Act. The decision (though not the opinion) would have been the same whether or not this "concession" were made.

¹⁶ 173 F. (2d) 567, 568 (1949).

¹⁷ The action was primarily against workers who were striking in violation of contract and of union discipline. On the responsibility of the union, see 63 Harv. L. Rev. 1035 (1950).

¹⁸ The District Court judge also held it to be "indisputable" that this was a "labor dispute," for which the Norris-LaGuardia Act expressly barred specific relief. 81 F. Supp. 541, 543 (1948).

¹⁹ 330 U.S. 258 (1947).

²⁰ *Ibid.* at 312.

²¹ For the similar statement in the "opinion of the court," see *supra* note 15. Neither the trial judge, 70 F. Supp. 42 (D.C. D.C., 1947), nor any of the attorneys in brief or argument discussed whether breach of contract is within the coverage of Norris-LaGuardia.

tracts.²² The result is the stranger in that contract enforcement proceedings before courts of states where such suits may be brought (or before administrative agencies in Colorado and Wisconsin) can not be defeated by any assertion by the contract-breaker of a substantive federal right not to be subjected to specific enforcement. For the pertinent sections (§4-§9) of the Norris-LaGuardia Act regulate the operation of United States courts, and do not define substantive rights.

L.M.R.A. §301 provides (or confirms) the only national remedy for breach of collective agreements, but several states have done better.

Collective agreements usually contain machinery for adjudication of controversies concerning their application. The 1200-page 1949 book of *Cases on Labor Relations* by Schulman and Chamberlain contains nothing but selected decisions of these contractually-fabricated tribunals. Their awards are again and again not of money but of specific redress. The employer is required to restore an employee to his job, to install a safety device, to allow smoking at certain places and times, to discharge a person employed contrary to contract standards, etc. Or the union is required to refrain from soliciting memberships or collecting dues at certain times and places. Duties so defined are performed more readily, it seems, than duties imposed by general law, first, because they are basically self-imposed (imposed through the process of bilateral bargaining in the formation and administration of the labor relations agreement); second, because the price of non-performance may be interruption of production (which up to this point usually has not occurred); and, third, because public opinion will almost certainly condemn the party which refuses to carry out the award of an arbitrator chosen by the parties. Under these circumstances compliance is rarely withheld. And if it is, it is usually because the award relates to only a part of the discord between the parties. So even when compliance does not occur, enforcement by judicial process is rarely tried, because enforcement of the award alone will not settle the discord. Yet since the award is nothing but a declaration of the duties of the parties to the contract and an order to do them—a determination of just what they ought to do in order to redress a failure to do what they have voluntarily engaged themselves to do—there is every reason that the obligation stated by the award should be enforceable to exactly the same extent as it would be enforceable if it had been explicitly stated by the parties in their contract.²³ Just as “the Constitution is

²² This inconsistency was noted even before the enactment of L.M.R.A. §301, 29 U.S.C. §185. Note, 51 Harv. L. Rev. 520, 531 (1938). Cf. Gregory, *The Collective Labor Agreement, its Nature and Scope*, 1949 Wash. L. Q. 3, 13.

²³ A court will give specific enforcement to an arbitral award “to the same extent to which it would compel specific performance had the award been contractually agreed upon by the parties themselves.” *Goldstein v. I.L.G.W. Union*, 328 Pa. 385, 394, 196 A. 43, 48 (1938).

what the judges say it is,"²⁴ so the contract is what the arbitrator says it is—the parties have chosen him as their common agent to add these derivative refinements to fit the particular circumstances of their controversy and thus to settle it. And the courts, when occasionally called on, should give effect to these derivations as fully as to the original text. How do state agencies deal with refusal to obey such awards, refusal to arbitrate when the agreement requires arbitration of disputes and violation of terms when the agreement does not call for arbitration?

In Colorado and Wisconsin, an administrative agency was created by the Labor Peace Act to deal with breaches of collective labor agreements, and refusal to carry out arbitration awards under them. Thus, whether or not a controversy concerning the meaning and application of a collective agreement results in an interruption of work, the state provides for its settlement a permanent specialized tribunal which issues interlocutory and final orders readily convertible into judicial decrees.²⁵

The Labor Peace Act of both states makes it an unfair labor practice for either party "to violate the terms of a collective agreement including an agreement to accept an arbitration award,"²⁶ or not to carry out such an award.²⁷ These provisions are not obscured by the N.L.R.A. for the latter does not reach the performance of agreements.²⁸

²⁴ Charles Evans Hughes, *Addresses and Papers* (2d ed. 1916) 185.

²⁵ *Supra*, note 10. Enforcement of orders of the Industrial Commission (Colorado) or the Employment Relations Board (Wisconsin) in state courts is much like enforcement of N.L.R.B. orders in U.S. courts.

While the general arbitration act of Wisconsin (Wis. Stat. c. 298), unlike that of Colorado (Code of Civ. Proc. Rule 109), excepts arbitration of labor disputes (Wis. Stat. §298.01), voluntary arbitration submissions to the Wisconsin Employment Relations Board (Wis. Stat. §110.10) or the Colorado Industrial Commission (Colo. Stat. Ann. c. 97 §94(10)) are subjected to the statutory arbitration procedure. But since neither a refusal to perform a promise to arbitrate labor disputes that have arisen or may arise, nor a refusal to carry out any award other than one obtained through recourse to this agency of government, is reached—at least in Wisconsin—by the provision of the arbitration act, it is the Labor Peace Act that provides public administrative enforcement of collective labor contracts generally.

²⁶ Wis. Stat. §111.06(1)(f), §110.06(2)(c); Colo. Stat. Ann. c. 97 §94(6)(1)(f), §94(6)(2)(c) (with insignificant variations). This duty was enforced in *Madison Bus Co. v. W.E.R.B.* (Dane County Circuit Court, Oct. 28, 1949), supporting the order of the W.E.R.B.

²⁷ It is an unfair labor practice "to refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination, after appeal, if any, of any tribunal having competent jurisdiction of the same or whose jurisdiction [the refusing party] accepted." Wis. Stat. §111.06(1)(g), §111.06(2)(d); Colo. Stat. Ann. c. 97 §94(6)(1)(g), §94(6)(2)(d) (with insignificant variations). This duty was enforced in *Allis Chalmers v. W.E.R.B.*, 254 Wis. 484, 37 N.W. (2d) 36 (1949), supporting the order of the Board.

²⁸ So, despite the eclipse of state legislation by such recent decisions as *Hill v. Florida*, 325 U.S. 538 (1945), *Bethlehem Steel Co. v. N.Y.S.L.R.B.*, 330 U.S. 767 (1947), *Plankinton Packing Co. v. W.E.R.B.*, 338 U.S. 953 (1950), and *U.A.W. v. O'Brien*, 339 U.S. 454 (1950), this national law does not hinder the

Nor does the fact that Labor Management Relations Act §301 gives an action in United States courts for breach of labor agreements detract from the sanction provided by these state laws, for the sanction provided by the state Labor Peace Act is in addition to or alternative to any civil action in a state or national court.²⁹ And naught in §301 calls for any curtailment of existing remedies.

So in these states the victim of breach of contract may get specific redress if the administrative agency sees fit to give this remedy.³⁰ And the agency's order will be enforced by the courts.³¹ Thus the law of these states resolves the conflict by subjecting the anti-injunction policy to the policy of full support of collective contracts.

Redress of breach of collective agreements—including provisions relating to arbitration—is indeed an increasing concern of the Wisconsin Employment Relations Board. Recently these cases have constituted more than half of its unfair labor practice decisions.³²

state in dealing with breaches of contract. Compare *Int. Union v. W.E.R.B.*, 336 U.S. 245 (1949). But this view is questionable in the opinion of Cox and Seidman, *Federalism and Labor Relations*, 64 Harv. L. Rev., 211, 227, 243 (1950).

Under N.L.R.A. (1947) §8(d)(4), if a party to a collective agreement resorts to a strike or lockout before the time when proper notice of his desire to modify or terminate it is effective, he commits the unfair labor practice of "refusal to bargain." Here, as in other instances of unfair labor practices, the N.L.R.B. by redressing the unfair practice may be ordering—and under §10(f) and (j) obtaining enforcement of—specific redress for breach of contract. But casual coincidence of breach with national unfair labor practices does not bar states from creating new forms of redress for breach, as by designating it as a state unfair labor practice.

²⁹ In both states the Labor Peace Act so provides. Wis. Stat. §111.07(1); Colo. Stat. Ann. c. 97 §94(8)(1). The Colorado Act also gives a civil action as alternative remedy for all unfair labor practices. Colo. Stat. Ann. c. 97 §94(22). The N.L.R.B. does not authorize such actions, *Amazon Mills v. Textile Workers Union*, 167 F. (2d) 183 (C.C.A. 4th, 1948), *California Ass. v. Building Trades Council*, 178 F. (2d) 175, 178 (9th cir., 1949), but *L.M.R.A.* §303 gives a civil action, including specific redress, for the strikes described in N.L.R.A. (1947) §8(b)(4). And some of the new unfair labor practices coincide with preexisting torts, *North Electric Mfg. Co.*, 84 N.L.R.B. 136 (1949).

³⁰ In both states the agency *must* act (quasi-judicially) when an interested party files a complaint. In Colorado it *may* take over the complaint as its own or initiate a proceeding. Wis. Stat. §111.07(2)(a); Colo. Stat. Ann. c. 97 §94(8)(2)(a). The actual practice in Colorado, however, seems to be to proceed only if the defendant consents.

³¹ Wis. Stat. §111.97(7) and (8); Colo. Stat. Ann. c. 97 §94(8)(7) and (8). These statutes, unlike N.L.R.A. §10(h), do not explicitly exclude the application of the anti-injunction act (Wis. Stat. §103.56; Colo. Stat. Ann. c. 97 §31) as a bar to enforcement of orders in unfair labor practice cases, but the anti-injunction act clearly does not bar such enforcement. Cf. *Public Service Employees Union v. W.E.R.B.*, 246 Wis. 190, 16 N.W. (2d) 823 (1944), where the Board was sustained in an order prohibiting continued breach of contract (a strike).

³² The Colorado Commission informs me that it has entered only one cease and desist order and this was reversed in district court. Letter of secretary, dated April 25, 1950. See Killingsworth, *State Labor Relations Acts* (1948) 137.

Of the Wisconsin Board's recent unfair labor practice decisions, however, more than half deal with complaints of breach of collective agreement. Between March 31, 1949, and March 30, 1950, inclusive, it announced decisions

Typical of the Board's attitude in these cases is its opinion of May 20, 1949, in *Amalgamated Association v. Madison Bus Co.* (Decision No. 2083-A), which involved the relatively rare contract term that the parties shall arbitrate unagreed terms of a successor contract. Ordering the employer to arbitrate, the Board said:

"Some doubt arose in the minds of this Board as to whether or not provisions contained in collective bargaining agreements which provide for the arbitration of future disputes are enforceable in Wisconsin. It is clear that at common law, a general agreement to submit to final determination by arbitration the rights and liabilities of the parties with respect to any and all disputes that may hereafter arise out of the contract is voidable by either party at any time before a valid award is made, and will not be enforced by the courts.³³ 5 Am. Juris. 857. In so far as commercial arbitrations are concerned, this rule was changed by Section 298.01 of the Wisconsin Statutes. That provision of the Statutes made enforceable any agreement to settle by arbitration any controversies arising out of contracts, but excluded from those enforceable, those between employers and employees, or between employers and associations of employees, except as is provided in Section 111.10 of the Wisconsin Statutes. Section 111.10 authorizes the parties to a labor dispute to agree in writing to have the Wisconsin Employment Relations Board act or name arbitrators to act in such disputes. When such an agreement is made, it can be enforced by the courts. It is apparent that the only agreement between an employer and a union to submit questions in dispute to arbitration that will be enforced by the courts in Wisconsin under chapter 298 of the Statutes, is an agreement naming this Board or one of its appointees to arbitrate such dispute.

"The State of Wisconsin has been a leader in attempting to devise methods of reducing industrial disputes. The uniform trend in legis-

in 43 unfair labor practice cases, for which it issued an opinion and a mimeographed release. Of these 23 dealt with alleged breaches of collective agreement, 21 being brought by a union or an employee against an employer, one by an employer against a union, and one by an employee against a union. The board gave redress to the complainant in 12 of the 21 cases against an employer and in the case of the employee against the union.

A count of all the Wisconsin Board's cases charging violation of the paragraphs of the Statutes mentioned in notes 26 and 27, *supra*, shows that in 1939-42 (3½ years) final decisions (by Board or court reviewing Board) disposed of 16 cases, in 1943-46 (4 years) 21 cases, in 1947-50 (3½ years) 56 cases, total (11 years) 93 cases, about 30 of which in the last year and a half. Every one of the 16 Board decisions of this type carried to the courts has been affirmed. Of the 93 cases, 77 were complaints against employers under §111.06(1) (f), 11 under §111.06(1) (g), 3 complaints against unions under §111.06(2) (c), and 2 under §111.06(2) (d).

³³ It would be more exact to say that courts refuse specific performance, and loss can rarely be proved with sufficient certainty to win damages. 47 L.R.A. (N.S.) 408-410.

lation throughout the country has been toward the encouragement of collective bargaining. Nothing will encourage labor and management to settle disputes without resort to force more than a labor agreement reached by the parties. The grievance machinery in most of these collective bargaining agreements provides for a peaceful means of disposing of future controversies arising out of the contract by arbitration. There is no good reason why such machinery could not be set up in the agreement and used by the parties. We are satisfied that the Legislature had these thoughts in mind when they included among the unfair labor practices in Section 111.06 (1) (f) and (2) (c), this policy. By making it an unfair labor practice for either the employer or the union to violate the terms of a collective bargaining agreement, including an agreement to accept an arbitration award, the Legislature was endeavoring to encourage labor and management to settle its disputes without force and through a grievance machinery culminating in arbitration. Such agreements were made enforceable, and the enforcement of them entrusted to this Board.

"We are satisfied that chapter 298 of the Wisconsin Statutes in no way conflicts with the provisions of chapter 111 . . . Nothing is more important for the maintenance of industrial peace than for both parties to peacefully carry out any agreements they may have entered into. Here we have an agreement which, by its terms, provides for a method of settlement when the parties are unable to agree upon such settlement themselves. The union has requested the employer to comply with such agreement. Although the employer has refused, it has by the order made today, been required to comply with such agreement."³⁴

The steady increase of contract-breach cases that are coming to the Wisconsin Board in its eleven years of operation, though the cases are not impressive in numbers or importance, is, I believe, an indication that agencies of government fit for this type of adjudication will be more and more wanted.³⁵ The private umpire system now so common has much to recommend it to the employers' association or the very large employer, but it is an extravagant system where a contract

³⁴ The Board's order was enforced by the Circuit Court for Dane County, Madison Bus Co. v. W.E.R.B. (Oct. 28, 1949). This case was not appealed. A few days later a declaratory judgment on the question of breach of a contract provision for arbitration was sustained by the state Supreme Court. Local 1111 v. Allen Bradley Co., 255 Wis. 613, 39 N.W. (2d) 740 (1949). "Whether the respondents would be entitled to a further remedy in a court of equity need not now be considered." *Ibid.* at 618 and at 742.

³⁵ Wolf, The Enforcement of Collective Labor Agreements: A Proposal, 5 Law and Contemporary Problems 273 (1938). Pipin, Enforcement of Rights under Collective Bargaining Agreements, 6 U. of Chi. L. Rev. 651 (1939). Cf. bill S. 937, 80th Cong., 1st Sess. (1947). Labor courts of this kind have proved useful in Sweden and other countries. Schmidt and Heineman, Enforcement of Collective Bargaining Agreements in Swedish Law, 14 U. of Chi. L. Rev. 184 (1947). International Labour Office, *Labour Courts* (1938); *Labour Courts in Latin America* (1947).

covers a small group of workers, for arbitration has to be set up specially for each of the occasional controversies that arise. While the governmental agency widely available—the regular courts—has disadvantages of formality, delay, and inexpertness in labor relations that make it unattractive (at least to the union, usually the initiating party), a state agency which itself or by its experienced delegates operates as an arbitrator of contract disputes will have all the advantages of public authority, economy, and continuity that characterize courts, combined in some degree with the advantages of flexibility,³⁶ speed, and special knowledge of labor relations that give value today to the party-chosen permanent umpire under the contracts of large corporations or employers' associations in the automobile, meat packing, hosiery, and other industries. Whatever we think of "socialized medicine," socialized adjudication is a tradition of long undisputed standing. Even when parties have agreed to arbitrate, as in the *Madison Bus Company* case, public command may still be necessary to assure performance.

Today, before such "labor courts" have developed, the state courts handle enough labor contract cases³⁷ to make it important to note how they are dealing with the conflict between legislative policies of promoting collective bargaining and of denying specific relief for breach of collective contract. This question arises in state courts because acts similar to the Norris-LaGuardia Act have been passed by many states. What are "labor disputes," what is a case "involving or growing out of a labor dispute," to which these statutes apply?

These state statutes are not always mere reflections of the national act.³⁸ Starting with the same statutory definition of "labor disputes," the courts of different states have disagreed; and the question whether a case in which the issue is breach of collective agreement is one involving a labor dispute has come up in a number of states.³⁹

³⁶ Predictability of Results in Commercial Arbitration, 61 Harv. L. Rev. 1022, 1026 (1948). Case Law or Free Decision in Grievance Arbitration, 62 Harv. L. Rev. 118, 125 (1948).

³⁷ Witmer, Collective Bargaining Agreements in the Courts, 48 Yale L. J. 195 (1938). Lenhoff, The Present Status of Collective Contracts in the American Legal System, 39 Mich. L. Rev. 1109 (1941). Pipin, Enforcement of Rights under Collective Bargaining Agreements, 6 U. of Chi. L. Rev. 651 (1939).

³⁸ The Wisconsin Act, Wis. Laws of 1931 c. 376, antedated the national act, and is more sweeping. Teller, Labor Disputes and Collective Bargaining (1940) §434, says that statutes of five other states are of this type, while 13 have followed the national act more closely. With the adoption of diverging amendments state statutes are becoming more and more differentiated from one another and from the national act.

³⁹ Teller, *id.* §436. Whether or not a suit to enforce a collective agreement is a "labor dispute," picketing to cause an alleged contract-breaker to comply with the contract is said to be such. *Marvel Bakery Co. v. Teamsters Union*, 5 Wn. (2d) 346, 105 P. (2d) 46 (1940) (injunction against picketing reversed; also because of lawfulness of picketing). But picketing to obtain redress for breach of a contract that has expired is said not to be a labor dispute. *Jensen v. Local Union No. 356*, 194 Minn. 58, 259 N.W. 811 (1935).

In Pennsylvania the courts no longer have to answer this question because the legislature in 1939⁴⁰ amended the anti-injunction act to provide that it should not apply in any case "involving a labor dispute as defined herein, which is in disregard, breach, or violation of, or which tends to procure the disregard, breach, or violation of, a valid subsisting labor agreement" arrived at between employer and representatives of his employees, pursuant to the state or national labor relations act, provided the plaintiff has not committed an unfair labor practice or violated the agreement.⁴¹

The Minnesota legislation of 1939 similarly settled the question in favor of contract enforcement.⁴²

Colorado's anti-injunction act, without having been invoked in any reported contract-breach cases, was repealed in 1943 by the Labor Peace Act.⁴³

The Oregon act was said to be no bar to specific redress of contract-breach and a new law in 1947 makes this certain. The cases are examined later.⁴⁴

But the Indiana Supreme Court has recently ruled, without an opinion, that breach of collective agreement is a "labor dispute" within the act.⁴⁵

(injunction against picketing sustained). Cf. *Dorchy v. Kansas*, 272 U.S. 306 (1926).

⁴⁰ 1939 P.L. 302, 43 P.S. §206d(a). A lower court had applied the anti-injunction act to such a dispute. *Bulkin v. Sacks*, 31 Pa. D. and C. 501 (C.P., Philadelphia Co., 1938).

⁴¹ Interpreting this act: *Ralston v. Cunningham*, 143 Pa. Super. Ct. 412, 18 A. (2d) 108 (1940); *Carnegie-Illinois Steel Corp. v. United Steelworkers of Am.*, 353 Pa. 420, 45 A. (2d) 857 (1946) (esp. the dissenting opinion). See also *infra* note 73, quoting an Oregon act apparently of similar effect.

⁴² *Supra*, note 10. *J. F. Quest Foundry Co. v. Int'l. Molders Union*, 216 Minn. 436, 13 N.W. (2d) 32 (1944). Prior to the act of 1939 and while a Norris-LaGuardia-like state act was in force, it was held that picketing to obtain redress for breach of a collective contract that had expired was not a "labor dispute" covered by that act. *Jensen v. Local No. 356*, *supra*, note 39. Whether picketing to obtain compliance with an existing contract would be a labor dispute hardly needs decision, since the conduct would probably be lawful self-help unless prohibited by the contract. See *Marvel Bakery Co. v. Teamsters Union*, *supra*, note 39. But these cases, in which the alleged breach is by the plaintiff, shed no light on our problem of what redress may be obtained against a contract-breaking defendant.

⁴³ *Supra*, note 10.

But the 1943 act reenacts it in part: Colo. Stat. Ann. c. 97 §94(16), similar to §4 of the Norris-LaGuardia Act. The probable effect of this is to restrict specific relief on demand of a litigant in court, but not to affect the Industrial Commission's handling of unfair labor practices. In court a suitor may get "damages" for any unfair labor practice, §94(22). But this does not necessarily mean that he may not get specific relief in court for the unfair labor practice of breach of contract or for the common law wrong. There are no reported cases. The Secretary of the Commission believes that no court has construed §94(22). Letter to me dated April 25, 1950.

⁴⁴ *Infra*, note 71, and related text.

⁴⁵ *Faultless Caster Corp. v. United Electrical Workers*, 86 N.E. (2d) 703, 706 (Ind. App. 1949). The Appellate Court, following this edict, held also that a labor union can not sue. The net result was that the remedy for an employer's

California has never had an anti-injunction act and in 1941 expressly authorized injunctions for enforcement of collective agreements.⁴⁶

In New York, *Nevins v. Kasmach*⁴⁷ is the only Court of Appeals decision discussing even briefly the application of the anti-injunction act⁴⁸ to a breach of contract claim. Here the injunction was held fitting since the complaint contained "all the allegations required by §876-a of the Civil Practice Act prerequisite to the granting of equitable relief." The decision treats breach of contract as a "labor dispute," but does not elaborate, probably because the statute contains other language⁵⁰ that shows that breach of contract is within its coverage.

But the Court of Appeals subsequently held that it was not a "labor dispute" to picket an employer for complying with a certification of representative by the state labor relations board, saying: "It is impossible [to hold] that any 'labor dispute' . . . under §876-a . . . survived the certification of the Labor Relations Board of the collective bargaining agent for the plaintiff's employees and the execution of the collective bargaining contract."⁵¹ Is there any good reason for holding that a party breaking the contract is engaged in a "labor dispute" when it is held that one interfering with its peaceful performance by the parties to it is *not* engaged in a "labor dispute?" Is not a settlement achieved by contract without a statutory election when there is no contest over representation as deserving of specific protection as one achieved by a statutory election plus a contract?

Despite the statutory language lower New York courts have since the *Nevins* case found ways of avoiding the restriction of §876-a in contract-breach cases. Thus in one case it was held that §876-a(4) contained alternative requirements for qualifying for any injunction,

breach was a money judgment for individual employees if they could show loss. This is hardly twentieth century law.

⁴⁶ *Supra*, note 10.

⁴⁷ 279 N.Y. 323, 18 N.E. (2d) 294 (1938).

⁴⁸ N.Y. Civ. Practice Act. §876-a.

⁴⁹ 279 N.Y. 323, 325, 18 N.E. (2d) 294, 295 (1938).

⁵⁰ Section 876-a(1) requires for issuing an injunction: "(a) that unlawful acts have or a breach of any contract not contrary to public policy has been threatened or committed and such acts or breach will be executed or continued unless restrained. . . .", thus making the act apply to breaches of contract as well as torts. The corresponding language in the Norris-LaGuardia Act §7 is: "(a) that unlawful acts have been threatened and will be continued unless restrained. . . ."

Oddly enough, Judge Rifkind in *Alcoa SS Co. v. McMahon*, 81 F. Supp. 541, note 2 (D.C.S.D.N.Y., 1948), intimated that the N.Y. act and the *Nevins* case, unlike the national act, *excepted* suits for breach of contract from the anti-injunction restriction.

⁵¹ *Florsheim Shoe Store Co. v. Shoe Salesmen's Union*, 288 N.Y. 188, 200, 42 N.E. (2d) 480, 485 (1942) (with vigorous dissent). *Serval Slide Fasteners Inc. v. Molfetta*, 70 N.Y.S. (2d) 411 (S.Ct., Queens Co., 1947). And see New York cases, *infra*, note 68.

though the section clearly states cumulative requirements.⁵² Again *Nevins v. Kasmach*⁵³ was (I think incorrectly) interpreted to mean that where a union violates an agreement not to strike, "the court may accord injunctive relief upon general equitable grounds. In such event compliance with the procedural requirements of the statute does not constitute a condition precedent to the award of relief."⁵⁴ And, on the even slimmer ground that §876-a is merely declaratory of existing law, it was held proper to prohibit picketing and require arbitration according to contract terms.⁵⁵ Moreover breach of collective agreement has been described as not a "labor dispute."⁵⁶ Finally §876-a was completely ignored where specific enforcement of an arbitration clause was obtained.⁵⁷

The upper New York courts, however, undoubtedly recognize §876-a to cover redress for breach of contract,⁵⁸ but are very ready to grant injunctions in these cases.⁵⁹

Massachusetts courts grant specific redress by reasoning that affirmative enforcement is different from prohibition and that the anti-injunc-

⁵² *Vim Electric Co. Inc. v. Solomon*, 67 N.Y.S. (2d) 908 (S. Ct. Kings Co., 1947). Subsection 4 (which is Norris-LaGuardia Act §8) says: "No injunctive relief shall be granted to any plaintiff who has failed to plead and prove compliance with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute. . ." The "or" is not alternative in such a negative command.

⁵³ *Supra*, note 47.

⁵⁴ *Diamond Candle Co. v. Fratello*, 16 N.Y.S. (2d) 346 (S.Ct. Kings Co., 1939).

⁵⁵ *Uneeda Credit Clothing Stores v. Briskin*, 14 N.Y.S. (2d) 964 (S.Ct. Kings Co., 1939), purporting to follow *Greater City Master Plumbers Ass. Inc. v. Kahme*, 6 N.Y.S. (2d) 587 (S.Ct. N.Y. Co., 1937), where, however, the court had declared that "the prerequisite facts necessary to the issuance of an injunction, as provided in §876-a, exist," but the facts stated by the court do not so indicate, and the court cited as precedents cases decided before the enactment of §876-a in 1935. Both these cases relate to strikes apparently in violation of arbitration clauses (though in the Plumbers case the plaintiff is not seeking enforcement of the arbitration clause).

⁵⁶ *J. I. Hass Co. Inc. v. McNamara*, 21 N.Y.S. (2d) 441 (S.Ct. Queens Co., 1940).

⁵⁷ *Ass. of Master Painters v. Brotherhood of Painters*, 64 N.Y.S. (2d) 405 (S.Ct. N.Y. Co., 1946), *affd.* 271 App. Div. 868, 66 N.Y.S. (2d) 626 (1st dept., 1946) (no strike).

⁵⁸ See, for instance, *DeNeri v. Gene Louis, Inc.*, 261 App. Div. 920, 25 N.Y.S. (2d) 463 (2d dept., 1940), dismissed without prej. 288 N.Y. 592, 42 N.E. (2d) 602 (1942).

⁵⁹ *Nevins v. Kasmach*, note 47, above. *Murphy v. Ralph*, 299 N.Y.S. 270 (S.Ct. N.Y. Co., 1937) and *Carroll Towing Co. v. United Marine Division*, 91 N.Y.S. (2d) 431 (S.Ct. N.Y. Co., 1949).

So "in New York . . . some courts hold that such [contract-breach] suits do and others that they do not constitute 'labor disputes' but almost all grant injunctive relief at all events." Teller, *supra*, note 38, 1950 Supp. §441 n. 74a.

As a limitation of remedy against unions, the term "labor dispute" in §876-a (apart from breach of contract cases) is being drained of significance. For if the defendant's tactics are lawful, obviously plaintiff is entitled to no redress; but (despite the statutory language, quoted in note 50, *supra*) "unless the objective of the defendant union is a lawful one, this controversy is not a labor dispute in the sense of §876-a." *Am. Guild of Musical Artists v. Petrillo*, 286 N.Y. 226, 231, 36 N.E. (2d) 123, 125 (1941). Thus "it is now well settled that §876-a does not apply where the union engages in picketing

tion statute refers only to the latter:⁶⁰ "A decree in affirmative form . . . would not in our opinion be an injunction within the meaning" of the anti-injunction act; many of its provisions "would be out of place if the statute had been intended to control the granting of affirmative relief."⁶¹ This distinction seems artificial,⁶² though it is obvious that the anti-injunction statutes speak most appositely of prohibitory injunctions.⁶³

In Wisconsin the anti-injunction act is in part substantive law.⁶⁴ Clearly its statutory declaration that "ceasing or refusing to perform any work" is lawful,⁶⁵ can not mean that it is lawful to refuse to per-

to attain an unlawful objective or to enforce an unlawful demand." *Wilson v. Hacker*, 27 L.R.R.M. 2064, 2071 (N.Y. S.Ct. Erie Co., 1950), citing the foregoing case. But see *Mayer Bros. v. Meltzer*, 27 L.R.R.M. 2027 (N.Y. S.Ct. N.Y., 1950) denying injunction, despite s.c., 274 App. Div. 169, 80 N.Y.S. (2d) 874 (1st dept., 1948).

⁶⁰ *Sanford v. Boston Edison Co.*, 316 Mass. 631, 56 N.E. (2d) 1 (1944).

⁶¹ *Sanford v. Boston Edison Co.*, *supra*, note 60, at 638, and at 5.

⁶² It was rejected by New York courts. *Scafidi v. Debner*, 22 N.Y.S. (2d) 390 (S.Ct. Bronx Co., 1940). *Green Bus Lines v. Blynn*, 61 N.Y.S. (2d) 663 (S.Ct. Queens Co., 1945). See also annotation of the *Sanford* case, 156 A.L.R. 646, 658, 683.

⁶³ The words enjoin and injunction in legal speech, because usually referring to negative orders, have acquired a secondary meaning of prohibit and prohibition. It is regrettable that when we say that a court "enjoins" certain conduct, we may mean either that the court commands it, requires it, or, its direct opposite, forbids it, outlaws it. The words might well be abandoned since words in plenty are the equivalent of each meaning and of that meaning alone.

⁶⁴ Laws of 1931 c. 376. The section (now Wis. Stat. §103.53) resembling Norris-LaGuardia Act §4 starts: "The following acts, whether performed singly or in concert, shall be legal: (a) ceasing or refusing to perform any work. . ." This act is sometimes called the Wisconsin labor code, sharply differentiating it from the New York act, which quite properly is part of the Civil Procedure Act.

Its effect as substantive law is recognized in *Senn v. Tile Layers Union*, 301 U.S. 468 (1937), and *Lauf v. E. G. Shimmers Co.*, 303 U.S. 323 (1938), both relating to occurrences prior to the national and state labor relations acts. The Wisconsin Act, however, is procedural (or remedial) as well as substantive, for, besides declaring these activities legal (in Wisconsin), it also forbids Wisconsin courts to prohibit these activities (anywhere). One is reminded of *U.S. v. Hutcheson*, 312 U.S. 219 (1941), where the Supreme Court read the Norris-LaGuardia Act as an enlargement of the Clayton Act (substantive), though at the same time it remains a procedural (or remedial) restriction on U.S. courts in all litigation. But the *Hutcheson* case did not—and Congress has no constitutional power to—declare such conduct generally lawful; it declared only that the curse of the Sherman Act no longer reached it. This amalgamation of the Norris-LaGuardia Act with the Clayton Act is feasible only because the Sherman Act is enforced only by U.S. courts.

Despite this national legislation state legislation or common law remains in force; for the Sherman Act, it is said, "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce . . . Whether the respondents' conduct amounts to an actionable wrong . . . under Pennsylvania law is not our [the U.S. court's] concern" in a case based on the Sherman Act. *Hunt v. Crumbock*, 325 U.S. 821, 826 (1945). If, like the N.L.R.A., *supra*, note 28, the Sherman-Clayton-Norris legislation eclipsed state law in the same field, *Giboney v. Empire Co.*, 336 U.S. 490 (1949), would have been decided the other way.

⁶⁵ Wis. St. §103.53(1)(a). The exception of breach of *lawful* promises is clearly implied, for the subsection denies the exception of breach of *unlawful* promises (the "yellow dog" contracts outlawed by §103.52).

form work even if you have contracted to perform it; and—another provision in the same section that does not appear *in his verbis* in the national act—the declaration that “peaceful picketing and patrolling, whether engaged in singly or in numbers, shall be legal”⁶⁶ can not mean that even if the union is bound by collective contract not to strike and picket but to arbitrate, it is still lawful for it to picket. And though the rest of the act, including the definition of “labor dispute,” is like the Norris-LaGuardia Act, the limitations on injunctive relief might easily (though of course not inevitably) be interpreted to imply the same exceptions of breach of contract duty, as are implied in the subsections quoted above. The courts have enforced orders of the state Employment Relations Board requiring compliance with contracts without mention of the anti-injunction act.⁶⁷

Thus state anti-injunction acts (except that of New York, which expressly mentions breach of contract) are not being applied to hinder specific relief for breach of contract. I have not tried to dig out the legislative history of these acts. It is hard to find, scarce at best, and has not been mentioned by the courts. But it may be said with the assurance of general knowledge, though specific ignorance, that the states were not consciously departing from the Norris-LaGuardia Act when they enacted their statutes at approximately the same time and used the same language in defining labor disputes. The state court decisions therefore to some slight extent may, indeed, be treated as interpretations of the Norris-LaGuardia Act.

Is it then reasonable for the United States courts to treat the Norris-LaGuardia Act as a bar to specific relief against breach of contract? May not “labor dispute” properly have a narrower meaning than *any* dispute between unions and management concerning terms of work? To be sure, these Acts say it means “any controversy concerning terms or conditions of employment or concerning representation of persons in negotiating . . . maintaining . . . seeking to arrange” such terms, language which could include breach of the terms agreed on. Yet, despite this language, a controversy “concerning representation” in settlement of which the Board has certified a bargaining representative, is beyond the reach of state anti-injunction acts.⁶⁸ And the same question

⁶⁶ Wis. St. §103.53(1) (1).

⁶⁷ *Supra*, notes 31 and 34. Other (circuit court) cases are summarized in the digest of Labor Peace Act decisions now in preparation for publication by the Board.

⁶⁸ *Supra*, note 51, for New York cases and *infra*, note 71, for Oregon cases. Cox, Labor Management Relations Act, 61 Harv. L. Rev. 1, 27, n. 109 (1947), cites other leading state cases.

The only state cases that arrive at a contrary conclusion are based either on an aggrandizement of the constitutional protection of freedom of speech, e.g. the cases cited by Cox as *contra*, that has since been rejected in *Building Service Employees Union v. Gazzam*, 339 U.S. 532 (1950), affg 34 Wn. (2d) 38, 207 P. (2d) 699 (1949), or on the view that sometimes picketing of labor

on the national level has been dealt with by statute in the same way.⁶⁹

Nor is there anything in the legislative history of the Norris-LaGuardia Act that indicates whether it was intended to restrict specific remedies for breach of contract duties. Indeed nothing in its congressional history indicates any concern about enforcement or preven-

supply is not directed to make the *employer* dishonor the certification, but to persuade the *workers* to support or shift allegiance to the picketing union, e.g. *State v. Superior Court*, 24 Wn. (2d) 314, 164 P.(2d) 662 (1945), and *Park and Tilford Corp. v. Int. Brotherhood*, 27 Cal. (2d) 599, 165 P. (2d) 891 (1946) (lawfulness the issue; no anti-injunction act in Cal.). A representation contest that has not yet been settled or that has revealed that no union is favored by the employees, leaves the anti-injunction act effective. *Grossman v. McDonough*, 27 L.R.R.M. 2056 (N.Y. S.Ct., 1950). *Stein's Wines, Inc. v. O'Grady*, 75 N.Y.S. (2d) 627 (S. Ct. N.Y. Co., 1947). *Baker Hotel v. Employees Local*, 187 Ore. 58, 207 P. (2d) 1129 (1949) (under an act that might easily be read to provide the reverse). *Contra* (where the "no union" preference of the employees was indisputable, but there had been no decision by public authorities): *Gazzam v. Building Service Employees Union*, 29 Wn. (2d) 488, 188 P. (2d) 97 (1947), 34 Wn. (2d) 38, 207 P. (2d) 699 (1949), *aff'd*, 339 U.S. 532 (1950). Also it has been held that the employer may have an injunction against a rival union when there is a contract made pursuant to a bargaining relationship duly established though without Board certification. *Dinny and Robbins, Inc. v. Davis*, 290 N.Y. 101, 48 N.E. (2d) 280 (1943) (with vigorous dissent), *cert. den.* 319 U.S. 774 (1943). *Loevin Inc. v. Harlem Labor Union*, 92 N.Y. S. (2d) 776 (S.Ct. N.Y. Co., 1949). *Pac. Nav. Inc. v. Nat. Org. of Masters*, 33 Wn. (2d) 675, 207 P. (2d) 221 (1949). But if there is doubt about whom the employees wish to have represent them and an accessible public agency to settle the doubt (which there was not in Washington), such rulings are wrong, for the court is really passing on a representation question that belongs to that agency, certainly a labor dispute. However, the New York Court of Appeals holds that a contract is presumed valid until the Board finds otherwise. *Matter of Levinsohn Corp.*, 299 N.Y. 454, 87 N.E. (2d) 510 (1949). When a certified union, with which the employer has a contract, splits, the employer does not have to satisfy the anti-injunction act in order to obtain specific protection against picketing by either fraction. *Wolchok v. Kovenetsky*, 274 App. Div. 282, 83 N.Y.S. (2d) 431 (1st dept., 1948).

⁶⁹ N.L.R.A. (1947) §8(b) (4) (c) and §10(1) and L.M.R.A. §303(a) (3), 29 U.S.C. §187(a) (3). Injunctive relief is obtainable only by the N.L.R.B., however, not by a private party. Before this statute (and still in situations not covered by it) the picture in the United States courts is hazy. Where the dispute is over representation, it has been held to be a "labor dispute" before the N.L.R.B. has acted. *Fur Workers Union v. Fur Workers Union*, 105 F. (2d) 1 (Ct. of App. D.C., 1939) *aff'd* p. cur. 308 U.S. 522 (1939). Likewise after an N.L.R.B. election in favor of no collective bargaining. *International Brotherhood of Teamsters v. Quick Charge, Inc.*, 168 F. (2d) 513 (C.C.A. 10th, 1948). On the other hand, the Norris-LaGuardia Act was held not to prevent relief to protect the relationship between the employer and the *certified* union. *Oberman and Co. v. United Garment Workers*, 21 F. Supp. 20 (D.C.W.D. Mo., 1937). It has been said that this case has been overruled. *Comment*, 34 Cal. L. Rev. 592 (1946). And certainly courts have denied relief, on the ground that the N.L.R.B. was the only channel of redress (though it could then give none to an employer so harassed). *United Electric Workers v. International Brotherhood*, 115 F. (2d) 488 (C.C.A. 2d, 1940) (without mention of Norris-LaGuardia). *Yoerg Brewing Co. v. Brennan*, 59 F. Supp. 625 (D.C.D. Minn., 1945) (relying on Norris-LaGuardia). And, again unlike state courts, U.S. courts deny relief, because of Norris-LaGuardia, where the dispute arises from a split within a union having a contract. *Duris v. Phelps Dodge Corp.*, *supra*, note 15 (contest over bargaining rights). Yet contests over property rights in union schisms are held not to be "labor disputes" governed by Norris-LaGuardia. *Fitzgerald v. Abramson*, 89 F. Supp. 504, 509 (S.D. N.Y., 1950). *Schnitzler v. Scida*, 27 L.R.R.M. 2025 (E.D.N.Y., 1950).

tion of breach of collective agreements.⁷⁰ So the position of the United States courts that have considered the question has no leg of legislative interpretation to stand on.

Nowhere do I find the argument against this position better stated than by the Oregon Supreme Court in *Markham and Callow, Inc. v. International Woodworkers*,⁷¹ the Oregon statute being the same as the Norris-LaGuardia Act. The court's statement is broader than the case before it necessitated, for it was dealing with picketing by a rival union against an employer who had a contract with the union certified by the N.L.R.B.⁷²

Said Justice Brand for the unanimous court after a detailed review of cases from many jurisdictions:

"In the process of construction it must be remembered that the Oregon Anti-Injunction Act, O.C.L.A. 102-913 et seq., was adopted in 1933, before the enactment of the National Labor Relations Act, and therefore before the procedure for collective bargaining had become standardized. At that time there were grave doubts concerning the validity of union shop contracts. No established procedure existed for determining the appropriate unit for collective bargaining or for the certification of the agency chosen by the majority of the employees in that unit. It can scarcely be thought that it was the intent of the state statute to limit the power of equity when asserted in aid of collective bargaining procedures which were nonexistent at the time that the act was passed. As said by this court:

'It does not, however, follow that in construing the statute for the purpose of determining whether a labor dispute, as defined in §13, exists, the court is precluded from looking at the end sought to be accomplished by the picketing. As in other cases, it is the court's province and duty to be governed, not by the letter, but by the spirit of the law.' *Schwab v. Moving Picture Machine Operators* (*supra*) at p. 619 [165 Ore. 602, 109 P. (2d) 600, 606 (1941)].

"The provisions of the 1933 act should not be construed as nullifying or impeding the peaceful settlement of labor controversies, which settlements have been consummated by contracts lawfully executed between an employer and the legal representative of a majority of his employees. Yet that will be the unfortunate result if the defendants are permitted to picket for the purpose of inducing the breach of the collective bargaining contract in the case at bar.

⁷⁰ This statement is based on a thorough examination of Congressional hearings, reports, and debates on the Act, which was made at my request by Robert D. Junig, a student editor of the Wisconsin Law Review. It is noteworthy that in Frankfurter and Green, *The Labor Injunction* (1930), which helped to precipitate the Act, the enforcement of collective agreements is not mentioned.

⁷¹ 170 Ore. 517, 563-5, 135 P. (2d) 727, 745 (1943).

⁷² *Supra*, notes 51 and 68.

"The Oregon statute itself discloses no such intention. The public policy applicable to the construction of the act is clearly stated in O.C.L.A. 102-913, where it is declared that

'It is necessary that he [the worker] have full freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment. . . .'

"To what purpose is this legislative declaration of policy if the performance of a contract which embodies the 'terms and conditions of his employment' and which was negotiated by 'representatives of his own choosing' may be obstructed by picketing and if the very statute which was intended to foster collective bargaining is to be construed as preventing equity from protecting the very objectives for the attainment of which the Statute was enacted?

"Again, in a case such as this, involving interstate commerce, the intent of the National Labor Relations Act must be fully considered. The question is not whether the statute has been formally amended. If, operating within the commerce power, the federal statute establishes a national public policy, and the instant case involves interstate commerce, as it does, then that policy must be respected by state courts, and the substantive rights concerning collective bargaining which the federal statute creates should not be impaired by construing a state statute to cover situations which were non-existent when the statute was passed."⁷³

So, I submit, "labor dispute" means only the sort of labor controversy for which the parties have not framed a rule or a way of achieving a settlement. In this sort of controversy, but, it seems to me, not in a controversy concerning the meaning and application of a contract, the statute provides that economic pressure, even unlawful economic pressure, shall not be interfered with by specific order of the court except upon fulfillment of stringent conditions. This leaves the parties subject to the criminal law and civil action for damages (both tempered by jury trial). But to deny a plaintiff the support of a specific order

⁷³ Cf. *Stone Logging Co. v. International Woodworkers*, 171 Ore. 13, 135 P. (2d) 759 (1943), where the injunction was denied, the representation contest between the unions being undecided; *Peters v. Central Labor Council*, 179 Ore. 870, 169 P. (2d) 870 (1946), where this distinction was reaffirmed; and *Baker Hotel v. Employees Local*, 187 Ore. 58, 207 P. (2d) 1129 (1949), where despite a majority vote of employees, under Oregon Laws of 1947 c. 355, in favor of terminating a labor dispute, the union and the union-minded minority of employees were held to be entitled to continue picketing. Section 3 of this statute reads in part: "If a majority of the employees in the collective bargaining unit vote . . . against the continuance of the labor dispute or if . . . a collective bargaining agreement is entered into, the labor dispute shall be deemed to be terminated." The latter alternative (not invoked in the *Baker Hotel* case) seems to affirm the view of the court in the case of *Markham v. International Woodworkers*, *supra*, note 71.

of a court to assist in the realization of legal rights arising by collective agreement is to withdraw the power of public command just where long-run decency of relations makes it wholly desirable that it be used. While the Supreme Court seems to regard the Norris-LaGuardia Act as having just this effect, I do not think that the *U.M.W.A.* dictum or the *Alcoa* denial of certiorari⁷⁴ are sufficiently conclusive to foreclose my appeal for a reconsideration (or a thorough first consideration) of the matter.

The opinions in the lower United States courts are not very persuasive. On the one hand, is the *Alcoa* case, full of heed to the purpose of Congress in enacting the Taft-Hartley Act but without inquiry about the purpose of Congress in enacting the Norris-LaGuardia Act. On the other hand, we find cases involving labor arbitration contracts where Norris-LaGuardia is ignored and all attention is paid to the United States Arbitration Act.⁷⁵ It is true that till recently labor arbitration has never been subjected to this act;⁷⁶ but Norris-LaGuardia has never been mentioned as ground for denial of relief, though some sections of it—such as §7 and §9—seem to be very pertinent.⁷⁷

So far as the Norris-LaGuardia Act was intended in 1932 to protect unions from the abuse of "government by injunction," there seems no reason to extend a protection appropriate to arm's length relations—apparently the only ones thought of by the legislators, court enforce-

⁷⁴ *Supra*, note 15.

⁷⁵ 9 U.S.C. §§1-14. Though passed seven years before the Norris-LaGuardia Act, it is not settled whether it applies to collective labor agreements. Comment, Arbitration of Labor Contract Interpretation Disputes, 43 Ill. L. Rev. 678, n. 3 (1948). State anti-injunction acts have not blocked enforcement of such arbitration. *Ibid.* 683.

⁷⁶ In *United Office Workers v. Monumental Life Ins. Co.*, 88 F. Supp. 602 (D.C.E.D. Pa., 1950), however, the order to arbitrate was granted, despite *Int. Union of Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F. (2d) 33 (C.C.A. 4th, 1948), where the agreement to arbitrate was not enforced because of the exclusion by the U.S. Arbitration Act of "contracts for employment." Similar exclusions are made by many state arbitration acts. Sturges, *Commercial Arbitration and Awards* (1930) §27. *Supra*, note 25. While the *United Office Workers* case is the first to hold a collective labor agreement fully within the Act (not a contract for employment), Sec. 3 had, by a tortuous construction, been held applicable in *Watkins v. Hudson Coal Co.*, 151 F. (2d) 311 (3rd cir., 1945), cert. den. 327 U.S. 777 (1948).

In *Textile Workers Union v. Alco Mfg. Co.*, 27 L.R.R.M. 2164, 2168 (D.C. M.D. N.C., 1950) the plaintiff union, having satisfied the relevant provisions of the Norris-LaGuardia Act, was held entitled to enforcement of an arbitration award against an employer pursuant to L.M.R.A. §301, 29 U.S.C. §185, but (unexplainedly) "not entitled to relief pursuant to the federal arbitration act."

⁷⁷ The Norris-LaGuardia Act has properly had no influence on the operation of the Declaratory Judgment Act, 28 U.S.C. §2201. Thus in *A.F.L. v. Western Tel. Co.*, 179 F. (2d) 535 (6th cir., 1950), where the action was based in part on the Declaratory Judgment Act, though injunctive relief for breach of contract also was asked, the Court of Appeals reversed dismissal by the District Court and ordered the case to proceed. There was no mention of the Norris-LaGuardia Act.

ment of collective agreements being then in its infancy⁷⁸—into a field of relations based on negotiated agreement. In 1932 the only “labor disputes” thought of were battles of industrial warfare without agreed rules, not battles over rules of industrial relations formulated by the parties, not disputes over the meaning and application of promises voluntarily made by them. The development of no-strike clauses and arbitration as a substitute for industrial strife⁷⁹ has occurred in the last twenty years. Why should the Act of 1932 bar the full realization of this development by withholding from the victims of breaches of collective agreements any remedy that courts afford for preserving contractual relations?⁸⁰

So far as the Norris-LaGuardia Act was intended to take the heat of labor struggles off the courts by relieving them of policing functions—and it may be doubted whether this was even a minor intention of Congress—surely courts can always invoke the self-protecting rule that complexity of supervision is a reason for denying specific relief and leaving the plaintiff to recovery of damages. But the United States courts have not thought the difficulties too great where Norris-LaGuardia does not stand in the way.⁸¹ There is no gainsaying that specific

⁷⁸ Fuchs, *Collective Labor Agreements in American Law*, 10 St. Louis L. Rev. 1 (1924); Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572 (1931). The statement of purpose in §2 of the Norris-LaGuardia Act relates only to the practice of collective bargaining and does not mention performance of agreements.

⁷⁹ “The arbitration clause and the no-strike no-lockout clause in the collective agreement are, in a very real sense, the opposite sides of the same coin. Arbitration and economic contest are alternative ways of solving labor disputes.” Freidin, *Legal Status of Labor Arbitration*, in N.Y.U. First Annual Conference on Labor, 234 (1948).

⁸⁰ Somewhat like the restriction on specific redress imposed by the Norris-LaGuardia Act is the rule regarding strikers that has emerged from the N.L.R.A. The doing of wrong (unless extremely harmful) in the course of concerted activities, while exposing the wrong-doer to criminal and pecuniary liability, does not subject him under the Norris-LaGuardia Act to injunction, nor under the N.L.R.A. to permanent loss of job. *Republic Steel Corp. v. N.L.R.B.* 107 F. (2d) 472 (C.C.A. 3rd, 1939). But if there is a material breach of collective contract—at least a strike in breach of contract—the employer is not required to deal with the contract-breaking union while the breach continues, *United Elastic Corp.*, 84 N.L.R.B. 768 (1949), *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332 (1939), *Hazel-Atlas Glass Co. v. N.L.R.B.*, 127 F. (2d) 109 (C.C.A. 4th, 1942), or to reemploy the contract-breaking strikers, *Nat. Electric Prod. Corp.*, 80 N.L.R.B. 995 (1948). If such strikers are held not to be engaged in concerted activities under N.L.R.A. §7, *N.L.R.B. v. Sands Mfg. Co.*, at 344, *John Dyson and Sons*, 72 N.L.R.B. 445 (1946), should not the courts as readily hold that contract-breaking strikers are not engaged in a “labor dispute” under the Norris-LaGuardia Act? Non-reinstatement of bad actors and contract breakers is self-help very like injunctive relief, so far as the internal operation of the plant is concerned.

⁸¹ *U.S. v. United Mine Workers of America*, 330 U.S. 258 (1947). Cf. *Dubinsky v. Blue Dale Dress Co.*, 292 N.Y.S. 898, 906 (S.Ct. N.Y. Co., 1936), where the defendant seems to have failed to invoke both the contract arbitration clause and the anti-injunction act, N.Y. Civ. Practice Act. §876-a, already enacted in 1935.

relief is a weak engine once a work stoppage has occurred. But specific relief may prevent a work stoppage. And though it has occurred, specific relief is now part of the course prescribed by Congress to meet "national emergencies."⁸²

The paradox that we have examined could of course be easily resolved by legislation—and has been in several states, as we have seen. Without legislation, the courts are uncertain and uneasy.

The public need seems to me to require that specific judicial enforcement should be available for those promises for breach of which a money payment is patently a miserable substitute for performance, including promises to arbitrate and to carry out arbitrators' awards—whether such promises relate to labor relations or commercial relations.⁸³

Indeed collective labor agreements are rather more than ordinary contracts; they have the nature of statutes.⁸⁴ Legislated through agreement of the somewhat antagonistic parties bound by the necessity of agreeing to keep the business operating—as legislators are bound to provide appropriations and other fundamental needs to keep the government operating, they resemble also international treaties which are contracts but *also* (when "self-executing"—or better, self-legislating) law of the land under the "supremacy clause" of our Constitution and like constitutional rules of many other countries. As such they are entitled to the fullest support that the courts can give to effectuate their fulfillment;⁸⁵ and a statute that might be construed to weaken that support, like a statute that might be construed to transgress a treaty, is better construed so as not to enfeeble remedies protecting legal rights of so sensitive a kind.

Whether it is Congress that has created this paradox of national labor law by enacting too sweeping an anti-injunction act in 1932 or

⁸² L.M.R.A. §208, 29 U.S.C. §178.

⁸³ Comment, Arbitration of Labor Contract Interpretation Disputes, 43 Ill. L. Rev. 678 (1948). Apart from arbitration statutes, enforcement of labor contract *promises to arbitrate* has encountered the same common law difficulties as that of commercial contract promises to arbitrate. *Ibid.* 681. Enforcement of *awards* will be granted without benefit of an arbitration act. *Goldstein v. I.L.G.W.U.*, 238 Pa. 385, 387, 394, 196 A. 43, 44, 48 (1938, before amendment of the Pennsylvania anti-injunction act, but without mention of it).

⁸⁴ The collective agreement is "the industrial constitution of the enterprise," *N.L.R.B. v. Highland Park Mfg. Co.* 110 F. (2d) 632, 638 (C.C.A. 4th, 1939); it "may be likened to . . . utility schedules of rates and rules for service," *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 335 (1944). Cf. Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 Col. L. Rev. 829, 844 (1948).

⁸⁵ It is but fair to note, however, that the very satisfactory performance of the Swedish Labor Court has been achieved without its having power to imprison for disobedience to its orders. Schmidt and Heineman, *supra*, note 35, at 194. As these authors say, *ibid.* 199: "The real question is whether the sanctions involved in the injunction procedure under American law are not excessively severe. Perhaps something may be learned from the Swedish experience which relies heavily [in breach of contract] upon the imposition of damages against

by passing the N.L.R.A. without modifying the Norris-LaGuardia Act to save enforcement of contracts, or whether it is the national courts that are guilty because they have interpreted the earlier law to prevent specific enforcement of collective contracts (even after passage of the N.L.R.A.), somehow a reconciliation needs to be effectuated, as it has been by state courts and legislatures, so that the collective bargaining basis of American labor law shall have the benefit of complete support by United States courts.

employers, unions, and employees alike, but does not make use of the ultimate sanction of physical force [against the person]."