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FEDERAL COURTS UNDER SECTION 301

O. S. HOEBRECKX*

I. LEADING UP TO LINCOLN MILLS

The Eightieth Congress, in the Labor-Management Relations Act of 1947, granted the federal courts jurisdiction over suits brought by or against labor organizations for violation of contracts, and made unions liable as an entity for the payment of money damages. This statute, as construed by the United States Supreme Court in the Lincoln Mills case, opened up a wholly new and practically uncharted area for the intervention of federal courts in union-management disputes.

Prior to the passage of the Labor-Management Relations Act in 1947, the activity of the federal courts in the field of union-management disputes was largely limited to issues arising under the Railway Labor Act, the review and enforcement of orders as issued by the National Labor Relations Board, a few injunction cases where the employer considered it possible to meet the rigid requirements of the Norris-LaGuardia Act, and an occasional case brought against a union as co-defendant with an employer in a Sherman Antitrust case.

The suability of unions as an entity in the federal courts is not a novel concept in American jurisprudence. That issue was decided in 1922 in the first Coronado Coal Co. case.

In that case, Chief Justice Taft, writing for a unanimous court, after referring to numerous federal statutes which had recognized unions as entities, stated:

In this state of federal legislation, we think that such organizations are suable in the federal courts for their acts, and

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1 Labor-Management Relations Act (Taft-Hartley) §301(a), 61 Stat. 156 (1947), 29 U.S.C. §185(a) (1952). “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.” §301(b). “Any labor organization which represents employees in an industry affecting commerce as defined in this Act, and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.”


that the funds accumulated to be expended in conducting strikes
are subject to execution in suits for torts committed by such
unions in strikes. The fact that the Supreme Court of Arkansas
has since taken a different view in Baskins v. United Mine
Workers of America, supra, cannot under the Conformity Act
operate as a limitation on the federal procedure in this regard.4

However, the right of employers to bring suits against unions for
contract violations in the federal courts was limited by minimum
amount and diversity of citizenship requirements, and later by the
anti-injunction provisions of the Norris-LaGuardia Act,5 passed by
Congress in 1932.

Congress, in 1935, passed the Wagner Act,6 imposing on employers
the legal obligation to bargain collectively with a union that had been
selected by a majority of the employees in an appropriate unit. The
National Labor Relations Board, however, was not given authority to
enforce labor agreements. As a result, the question of union re-
sponsibility for its contracts was a major item of consideration by
Congress in the passage of the Labor-Management Relations Act of
1947. Report No. 45, issued by the majority of the House Labor Com-
mittee, sought to justify giving federal courts jurisdiction in contract
dispute cases as follows:

When labor organizations make contracts with employers,
such organizations should be subject to the same judicial reme-
dies and processes in respect of proceedings involving violations
of such contracts as those applicable to all other citizens. Labor
organizations cannot justifiably ask to be treated as responsible
contracting parties unless they are willing to assume the respon-
sibilities of such contracts to the same extent as the other party
must assume his. Public opinion polls in evidence before the
committee show that nearly 75 percent of the union members
themselves concur in this view. For this reason, not only does
the section, as heretofore pointed out, make the labor organiza-
tion equally suable, but it also 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.7

The House Minority Report also assumed that the purpose for
giving federal courts jurisdiction in union contract violation disputes
was primarily directed against unions. The minority pointed out that
there were only 13 states where union funds could not be reached in
satisfaction of judgment, and that there were 25 states which permit
suits against unions as an entity.8 The minority announced that re-

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4 Id. at 576.
7 Legislative History of the Labor-Management Relations Act, 1947, at 337.
8 Id. at 399-400.
moving the $3,000 jurisdictional amount would "involve the federal courts already overburdened with a great mass of petty litigation."9

The debate in both the Senate and the House also indicates that Congress assumed that the main function of the bill would be to provide employers with an adequate remedy for union contract violations. Senator Taft, commenting on this section of the bill, stated:

As a matter of law, unions, of course, are liable in theory on their contracts today, but as a practical matter, it is difficult to sue them.10

Senator Ball also contended that employers should have an easier way to sue labor unions for contract violations.11 Senator Pepper, an articulate opponent of the Taft-Hartley Act, characterized this section as "authorizing suits in the federal courts against labor organizations with the right of recovery against their treasuries, all their dues, all their assets—."12 Senator Hatch characterized the section as a "salutary provision," but professed to fear that employers might "use it as a means of harassing unions and decreasing their effectiveness by filing actions indiscriminately every time one member of a union deviates slightly from the terms of his contract."13

The fears of the opponents, of course, never did materialize. Labor agreements, as we know them in the United States, impose very few affirmative obligations on a union. Essentially, the only enforceable right against a labor union that the employer secures in the average labor agreement is the right to have disputes over compliance with the contract determined through the process of arbitration rather than through strike action. While undoubtedly the right of an employer to sue a union for damages for violation of a no-strike clause has tended to reduce strikes in violation of contract commitments, the fact is that very few employers have used Section 301, either to collect damages or in an effort to enjoin strike action.

On the other hand, unions, because of the very nature of labor agreements, have turned what was characterized as an anti-union piece of legislation in 1947 into a tremendous asset during the 12 years that followed the passage of the Taft-Hartley Act. An analysis of the cases reported in 37 Labor Cases, covering cases reported from late April to late August 1959, brought in the federal courts under Section 301, shows that 18 actions were brought by unions against employers, and 11 were brought by employers against unions. Only 8 of the reported cases during this period involved a suit in which an employer brought an action for damages for contract violation against a union. Fifteen

9 Id. at 400.
10 Id. at 1014, 1654.
11 Id. at 1497, 1524.
12 Id. at 1600.
13 Id. at 1483.
of the cases involved issues which arose out of the arbitration provisions in labor agreements. Most of these cases dealt with a situation where the union was requesting the court’s assistance in compelling an employer to arbitrate a specified dispute which the employer contended was not arbitrable under the labor agreement.

Prior to arbitration legislation, the courts, applying the common law, uniformly held that an agreement between parties to arbitrate any future dispute that may arise between them was not enforceable. The ground generally assigned was that agreements to arbitrate such disputes constituted an attempt to oust the courts from normal jurisdiction. This common law doctrine was subsequently changed by action of many state legislatures enacting statutes which authorized the state courts to enforce arbitration agreements. However, most of these laws exempted “employment contracts” from the provisions of the statute. The Wisconsin statute exempted from its provisions “contracts between employers and employees or between employers and associations of employees.” The United States Supreme Court sustained the validity of the New York Arbitration Act, in *Red Cross Line v. Atlantic Fruit Co.* A federal arbitration act, also excluding from its coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” was passed in 1925, which law later was made part of the Federal Code in 1947. The combination of the U.S. Arbitration Act and Section 301 was the original springboard for injecting into the federal courts many disputes involving the application of labor arbitration agreements.

It early appeared that the principal obstacle to an expansion of federal court activity in the labor arbitration field was the “contracts of employment” exemption as contained in Section 1 of the U.S. Arbitration Act. The question became—what was a “contract of employment.” The Supreme Court had held in 1944 that:

Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what

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14. U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007 (S.D. N.Y. 1915). “There has long been a variety of available reasons for refusing to give effect to the agreement of men of mature age . . . when the intended effect of the agreement was to prevent proceedings in any and all courts and substitute therefor the decision of the arbitrators.”

15. Wis. Stat. §298.01 (1957).


often has been called a trade agreement, rather than in a contract of employment.\textsuperscript{18}

In this same year, the Federal Court of Appeals for the Sixth Circuit refused to stay an action by an employee for wages allegedly due under a collective bargaining agreement on the theory that the employee here was suing under a "contract of employment," and that, therefore, the U.S. Arbitration Act did not apply.\textsuperscript{19}

On April 25, 1956, the Court of Appeals for the First Circuit, in \textit{Local 205, UE v. General Electric Co.},\textsuperscript{20} followed the Sixth Circuit, holding that collective bargaining agreements were not "contracts of employment" within the purview of the U.S. Arbitration Act, and specifically enforced the provisions of an arbitration clause in the labor agreement before it. This case was ultimately appealed to the United States Supreme Court.\textsuperscript{21}

In the meantime, the Third Circuit, in \textit{Amalgamated Association v. Pennsylvania Greyhound Lines, Inc.},\textsuperscript{22} and the Fifth Circuit, in \textit{Lincoln Mills v. Textile Workers Union},\textsuperscript{23} followed a contrary route, holding that collective bargaining agreements were contracts of employment within the prohibition of the U.S. Arbitration Act. These courts held that, notwithstanding the provisions of Section 301, the federal courts were without authority to grant relief specifically enforcing arbitration provisions in collective bargaining agreements. The \textit{Lincoln Mills} and the \textit{Local 205} cases converged in the U.S. Supreme Court at the same time and were disposed of by decisions issued on the same day.

The Circuit Courts of Appeal, prior to the Supreme Court decision in \textit{Lincoln Mills}, had also been wrestling with the problem as to whether or not Section 301 required the federal courts to apply state law to the contract issues presented for decision. One line of cases held that Section 301 was merely jurisdictional, and not the source of new substantive rights. This line was followed by the Fifth,\textsuperscript{24} Seventh,\textsuperscript{25} and Tenth Circuits. Other appellate courts held that Section 301 created substantive rights under federal law and:

\textsuperscript{18} J. I. Case Co. v. NLRB, 321 U.S. 332 at 334, 8 L.C. 51, 173 (1944).
\textsuperscript{20} 233 F.2d 85, 30 L.C. 69,908 (1st cir. 1956) aff'd. 353 U.S. 547, 32 L.C. 70,735 (1957).
\textsuperscript{21} Ibid.
\textsuperscript{22} 192 F.2d 310, 20 L.C. 66,616 (3d cir. 1951).
\textsuperscript{23} 230 F.2d 81, 29 L.C. 69,729 (5th cir. 1956).
\textsuperscript{24} Int'l Ladies Garment Workers' Union v. Jay-Ann Co., 228 F.2d 632 (5th cir. 1956).
\textsuperscript{26} Mercury Oil Refining Co. v. Oil Workers Union, 187 F.2d 980 (10th cir. 1951).
. . . authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements.27

The Second,28 Third,29 Fourth,30 Sixth,31 Eighth,32 and Ninth33 Circuits followed this line. The United States Supreme Court, in Lincoln Mills, completely disregarded the “contract of employment” issue raised under the U.S. Arbitration Act. The court elected to approach the problem more broadly and simply held that Section 301 was more than jurisdictional, that 301 created substantive rights, and further directed the federal courts to utilize their “judicial inventiveness”34 in developing a body of federal law to be applied in these situations.35

Particularly in the field of labor arbitration, the majority opinion written by Justice Douglas, has opened wide the door of the federal courts for employers and unions desiring to litigate disputes arising under collective bargaining agreements. Practitioners in the field of union-management relations will have a rare opportunity to contribute to the molding of a body of federal law which will have important implications on political and economic developments in the United States. Rightly or wrongly, the United States Supreme Court has directed the lower federal courts to legislate in this field, and this legislation will be enacted without any public hearing or debate. The quality of the body of law to be developed will therefore depend to a large extent on the awareness of the attorneys for the contesting parties that they are not only representing their clients in the litigation, but have broad responsibilities to the public for a thorough and fair presentation of the issue or issues involved. There can be little question that the courts, in applying and construing federal and state laws affecting union-management relations, have contributed substantially to the position of power, both political and economic, that unions in the United States enjoy today. Under the mandate of Lincoln Mills and without the guiding restraint of specific legislation, except as may be found in the labor contracts involved in the disputes presented, federal courts will

27 Supra note 2, at 451.
28 Shirley-Herman Co. v. Int’l Hod Carriers Union, 182 F.2d 806 (2d cir. 1950).
33 Schatte v. Int’l Alliance, 182 F.2d 158 (9th cir. 1950).
34 Supra note 2, at 457.
35 The significance of the majority opinion in the Lincoln Mills case was emphasized in a lengthy and learned dissent by Justice Frankfurter in which he questioned the majority holding and went on from there to question the constitutionality of the grant of jurisdiction.
be in a position to influence seriously the trend in labor-management relations for years to come. The federal courts, in fashioning this body of law, shall have to take care that their "inventions" are not the medicines that kill the American economic system.

II. Arbitration Under 301

At the present time, it appears that the most fertile field for the intervention of the federal courts in union-management disputes is in the area of labor arbitration. The type of case most frequently presented to the federal courts in the arbitration field is the case wherein the court is asked to determine whether or not a particular dispute is arbitrable under the parties' labor agreement. The issue most often arises where the employer, and occasionally the union, refuses to proceed with arbitration of a contract dispute. However the issue of arbitrability can also be raised in connection with a motion for a stay of court proceedings to permit arbitration under the parties' agreement. The third type of situation in which arbitrability has been raised, and may be raised more often in the future, is where an action is brought under Section 301, either to enforce or vacate an arbitration award, and the jurisdiction of the arbitrator to decide the dispute is contested.

While it hardly can be contended that the courts, both federal and state, have been unsympathetic to union causes litigated in the last 30 years, the trend in the current cases indicates that the unions still prefer to have a private arbitrator determine the issue rather than a court. One of the reasons for this preference, of course, is the fact that there is no appeal from an arbitrator's decision, and since the union is almost invariably the aggressor in arbitration cases, it has everything to gain and nothing to lose from the arbitration proceeding. The union, having gained a favorable decision, prefers to avoid the risk of reversal on appeal. The other reason, of course, why unions would rather try their issues before an arbitrator arises from the fact that many labor dispute arbitrators agree with the concept that a collective bargaining agreement is a "living document," and that the function of an arbitrator is not to determine issues presented on a judicial basis—that is, applying the contract as he finds it—but rather to approach the problem in the light of what the arbitrator considers to be sound industrial relations policy and proceeding therefrom on a legislative or mediational basis. Many unions have discovered that they can secure through the arbitration process what they were unable to secure through collective bargaining. Unions assume, and properly so, that the courts will take a judicial approach in determining the rights of the parties under their agreement. Experience has also demonstrated, as manifested in the 1959-60 steel strike, that once a union secures
concessions through the arbitration process, it is next to impossible to
correct the situation through subsequent collective bargaining.

Federal policy is clearly opposed to compulsory arbitration of labor
disputes, but admittedly encourages "voluntary" arbitration of such
disputes. Title II of the Labor-Management Relations Act of 1947
provides that it is the policy of the United States that:

\[
... \text{the settlement of issues between employers and em-
ployees through collective bargaining may be advanced by mak-
ing available full and adequate governmental facilities for con-
ciliation, mediation, and voluntary arbitration to aid and encour-
ge employers and the representatives of their employees to}
\]

reach and maintain agreements concerning rates of pay, hours,
and working conditions, and to make all reasonable efforts to
settle their differences by mutual agreement reached through
conferences and collective bargaining or by such methods as may
be provided in any applicable agreement for the settlement of

(emphasis added)

and later provides that employers and unions shall:

\[
... \text{whenever a dispute arises over the terms or applica-
tion of a collective-bargaining agreement and a conference}
\]

is requested by a party or prospective party thereto, arrange
promptly for such a conference to be held and endeavor in such
conference to settle such dispute expeditiously;}\footnote{61

The question of compulsory arbitration in connection with national
emergency disputes was considered by Congress in connection with the
passage of the Labor-Management Relations Act of 1947, and was
rejected. Notwithstanding that fact, certain labor relations experts, not
immediately connected or affected by what they propose, have con-
stantly suggested compulsory arbitration, particularly with disputes
affecting the national interest. On the other hand, employers and unions
have almost invariably opposed such proposals. But we are not here
concerned with the arbitration of basic labor agreements in the
legislative sense, as is ordinarily involved in the proposals before
Congress. We are, however, concerned with the concept of voluntary
arbitration of disputes under existing labor arguments. Arbitration
ceases to be voluntary when a party to an agreement is compelled to
accept the decision of an arbitrator over an issue which the parties did
not either specifically or impliedly agree to submit to arbitration.
Arbitration under such circumstances, in effect, amounts to compul-
sory arbitration.

Despite the former and inherent reluctance on the part of the
courts to abdicate their jurisdiction in favor of private arbitration,
there has been in recent years a tendency on the part of the courts
to construe arbitration clauses in labor agreements "liberally" or to decree private arbitration on the theory that public policy encourages arbitration in labor cases without too much regard to the explicit terms of the labor agreement. Such an approach not only implies the necessity of employing different standards when construing a labor agreement, but also negates the fundamental principal that a party to a contract is entitled to have any dispute under that contract determined by the courts unless he explicitly authorizes some private party to determine the dispute. In this way the courts have contributed substantially to expanding the role of the private arbitrator. While, at the present time, unions are ordinarily the beneficiaries of such decisions, time has a way of changing the circumstances. Unions, in the light of their rising economic power, may find themselves embarrassed by decisions which they have successfully sought when, under different circumstances, they may prefer to use that economic power rather than permit an arbitrator influenced by a changed public opinion to determine the issue.

The question of arbitrability under labor contracts was not always so lightly dealt with by the courts. The courts of the State of New York, which prior to *Lincoln Mills*, had developed a vast experience in connection with labor arbitration issues, were formerly inclined to give strict application to labor arbitration agreements. In the *IAM v. Cutler-Hammer* case, decided in 1947, the New York Supreme Court Appellate Division held:

If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate, and the contract cannot be said to provide for arbitration.\(^3\)

The court's *per curiam* opinion also significantly asserted:

While the contract provides for arbitration of disputes as to the 'meaning, performance, non-performance or application' of its provisions, the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue.\(^4\)

Another New York Appellate Division, two years later, reaffirmed *Cutler-Hammer* and held:

If there is no real ground of claim, the court may refuse to allow arbitration, although the alleged dispute may fall within the literal language of the arbitration agreement.\(^5\)

It should be noted that, in both of the above mentioned cases, the

\(^4\) Id. at 318.
\(^5\) Ibid.

union alleged a violation of a specific provision in the contract, but the court, applying the fact situation against the arbitration provisions of the contract, in essence found the claim baseless and refused to order arbitration. A United States Court of Appeals, as late as 1956, in *Local 205, UE v. General Electric Co.*\(^{42}\) seemed to reaffirm the *Cutler-Hammer* doctrine by asserting that, if the claim of arbitrability is not frivolous or patently baseless, the court may issue an order directing arbitration.\(^{43}\) The Federal Court of Appeals for the Second Circuit also seemed to reaffirm this position in *Engineers Association v. Sperry Gyroscope Co.*\(^{44}\)

The courts are in uniform agreement that the issue of arbitrability is for the court to decide in the first instance unless the parties, by their agreement, specifically authorize the arbitrator to determine his own jurisdiction. As the *Cutler-Hammer* and other decisions indicate, the court very often, in determining the arbitrability of the issue, at the same time in effect determines the merits of the case. If the union’s claim does not assert an actual violation of the contract, it is not arbitrable. The court, in order to find the issue arbitrable, is required almost at least impliedly to find a contract violation.

The Second Circuit, in the *Engineers Assn.* case, was faced with this quandary and dealt with it as follows:

> It should be observed, however, that even in a case such as the present one, where the same facts are determinative of both arbitrability and the merits of the controversy, an order compelling the parties to submit to arbitration does not impinge upon the power of the arbitrator to decide the merits of the dispute. The difference between the two proceedings is in the quantum of proof necessary for the moving party to obtain relief. In the arbitration hearing, the party seeking relief must fully establish his claim that the opposing party has violated the contract. Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim. Once the tendency of the evidence to support the claim has been established, it is then the function of the arbitrator to weigh all the evidence and to then determine whether the contract was broken.\(^{45}\)

This quantum of proof theory requires some delicate balancing on the part of the court. As a practical matter, an arbitrator determining

\(^{42}\) *Supra* note 20.

\(^{43}\) In *Local 205, U.E. v. General Electric Co.*, 233 F.2d 85 at 101 (1st cir. 1956) the court said: "The scope of an arbitration pledge is solely for the parties to set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation." And later the court held: "Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrators or leaves them for decision by the court."

\(^{44}\) 251 F.2d 133 (2d cir. 1956) *cert. denied* 356 U.S. 932 (1957).

\(^{45}\) *Id.* at 137.
a dispute under the circumstances of the *Engineers Assn.* case, would certainly require considerable new evidence not presented in the court proceeding to find against the union. While the courts may attempt to save the situation as did the *New Bedford Defense Prod. Div. of Firestone Tire & Rubber Co. v. Automobile Workers, Local 1113*, by asserting:

"Issues do not lose their quality of arbitrability because they can be correctly decided only one way" it would appear that, as found in *Cutler-Hammer*, if the claim is baseless, there is no ground or reasonable basis for submitting the issue to arbitration on the alleged merits.

The trend away from *Cutler-Hammer*, as manifested in the *Engineers Assn.* and the *Firestone* cases, reached full fruition in a case decided on September 29, 1959, by the Court of Appeals for the Tenth Circuit: *Local 1912, IAM v. U.S. Potash Co.*

In that case, the union filed a grievance against the company, claiming that it violated the contract by subcontracting work on its premises which fell within the employee's job classification set up in the contract. The parties' agreement contained no clause specifically prohibiting such subcontracting. The parties' agreement provided that the normal management functions:

... are exclusively within the jurisdiction of the Company and not subject to Union action or consent or to arbitration except such ... conditions of employment affecting the employer-employee relationships as are specifically provided for in the terms of this agreement ....; and in the 'Arbitration Article,' that 'only a question or questions as to the proper interpretation or application of any of the provisions of this agreement may be submitted to arbitration.' (emphasis added)

The company refused to arbitrate the subcontracting grievance on the ground that it was not covered by any of the provisions of the bargaining contract. The court, adopting the "issues do not lose their quality of arbitration because they can be correctly decided only one way" approach, assessed its role in this situation in the following language:

"We interpret only to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract. If so, the judicial function is at an end and the proper interpretation of the contract is for the arbitrator."

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48 270 F.2d 496, 38 L.C. 65,787 (10th cir. 1959).
49 Id. at 497.
50 Id. at 498.
One might ask as to what is left for the "proper interpretation" by the arbitrator after the court has found, as it must, that the contract in some ways limits the right of the employer to do what the union has complained of. The issue that will have to be determined by the arbitrator, as it was by the court, is whether or not the contract prohibits the subcontracting complained of by the union.

The court overlooked the obvious fact that, had the parties intended by their agreement to outlaw subcontracting, they would have found language to do so. The same court, in a later case, held:

... and courts have affirmed the right, whether inherent or expressed, to subcontract work usually performed by employees, without violating its bargaining contract, in the absence of an expressed agreement not to do so.¹

Disregarding this fact and the limiting language in the agreement, the court asserted that the mere fact that the contract did not prohibit subcontracting "does not necessarily mean that subcontracting is excluded from the scope of the bargaining agreement." Instead, the court, in its opinion, talks about "interpretable implications of coverage . . . implied covenant of good faith and fair dealings . . . the very life blood of collective bargaining agreements . . . the right of the other party to receive the fruits of the contract . . . ." The court, taking a typical arbitrator's approach in determining the rights of the parties under the contract, defined its duty in the following language:

It would stifle the underlying purposes of the whole agreement to construe it according to its dry words. It is for us to meat on the skeleton rather than tear the flesh from the bones.²

The most significant aspect of the U.S. Potash decision is that the court, in effect, puts the burden of proving lack of arbitrability on the defense, thus, even rejecting the quantum of proof doctrine enunciated by the Second Circuit in the Engineers Assn. case, supra. The court in U.S. Potash case observed:

The contract is not couched in terms of specified grievances which are to be arbitrated, thereby excluding all others by implication. Nor does it specify the grievances which are not to be arbitrated, thereby including all others.

The court sums up its position in this respect by stating:

... it is plain that the grievance dispute does not lie wholly outside the provisions of the contract, and arbitration is therefore enforceable.³

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² Id. at —.
³ Supra note 48, at 498.
It is apparent that, if the Tenth Circuit is right in this decision, the whole basic concept of voluntary arbitration has been altered. The approach now, at least in labor arbitration cases, is that a party to a labor agreement is obligated to arbitrate any dispute which is claimed to arise under that agreement unless the agreement specifically excludes such grievance from arbitration. Union-management negotiators, at least in the Tenth Circuit, are put on notice that the old "interpretation and application" clauses are of little value to parties desiring to avoid "open end" arbitration obligations.

Labor agreements very often provide that either time limits or specific procedures, or both, must be followed as a condition precedent to arbitration. These time limit provisions, particularly important in discharge, layoff, and other cases involving accumulating financial liability, are often stated in terms of waiver of the grievance if the grievance is not appealed within certain time limits. Whether these limitations are stated in terms of condition precedent or waiver, the question arises as to whether or not it is for the court or the arbitrator to determine the arbitrability of the grievance. In most situations, particularly where a waiver is involved, the defending party will normally present the non-compliance with the time provisions as a defense in the arbitration proceeding. However, because of the disinclination of arbitrators to enforce what they refer to very often as "the technical provisions" of the agreement, there may be situations where a court determination of the question may be preferable.

The courts have treated such procedural clauses as going to the heart of arbitrability, and have regarded such issues as matters for preliminary determination by the court rather than by the arbitrator.

The Court of Appeals for the First Circuit, in the *Boston Mutual Life Insurance Co.* case, held specifically:

... whether the employer had agreed to submit this matter to arbitration depends upon a determination by the court as a preliminary matter, whether all the conditions precedent to arbitration have been fulfilled. ...\(^5\)

The court premised its holding on the classic concept that the authority of an arbitrator to determine such an issue must be based on a promise in the collective bargaining agreement to submit the issue of arbitrability to the arbitrator. The Seventh Circuit, in a recent case, *Brass & Copper Workers v. American Brass Co.*,\(^6\) Dec. 1959, followed the rationale of the *Boston Mutual* case, and affirmed a decision of the district court which held that, where the union failed to comply with the specific procedural requirements of the contract, it had waived its


\(^6\) 273 F.2d ——, 38 L.C. 66,049 (7th cir. 1959).
right to arbitrate the grievance, and the employer's refusal to arbitrate was justified.

While objections to this approach have been voiced by certain professional arbitrators, it would appear that, in these procedural cases, just as in the other arbitrability cases, there is no reason for a court to refer to arbitration an issue which is not arbitrable under the provisions of the parties' agreement.

Section 10 of the U.S. Arbitration Act, as well as the usual state arbitration act, authorizes the courts to vacate an award where an award was procured by fraud, where there is evident partiality by the arbitrator, and most importantly, where the arbitrator has exceeded his powers. We are primarily concerned with situations wherein the jurisdiction of the arbitrator to determine the particular dispute is raised.

As has been pointed out, the normal procedure is to raise the question of arbitrability before arbitration proceedings are undertaken and an award is issued. However, in the labor relations field, most employers are reluctant to litigate labor disputes and are inclined to permit the arbitrator to determine the question of arbitrability in the first instance. If such is to be the approach, and in the absence of specific covering provisions in the union agreement, the party raising the issue as to arbitrability should make it clear, not only during the grievance steps preceding the arbitration, but in the papers resulting in the appointment of the arbitrator and at the arbitration hearing itself, that the jurisdiction of the arbitrator is being questioned and that the right is reserved to review the question of arbitration in a court proceeding after the award is issued.

While it is a fundamental principle of law that an order, judgment, or award issued by a tribunal having no authority to issue such an award is a nullity, the above procedure is suggested in recognition of some court's inclination to "liberally" construe union agreements and to avoid any contention or finding that the employer, by participating in the arbitration proceeding, impliedly agreed to permit the arbitrator to finally determine his own jurisdiction. If such a procedure is followed and the arbitrator denies the grievance, either on a jurisdictional basis or on the merits, the matter is disposed of, at least insofar as the protesting party is concerned. If the arbitrator, in the view of the protesting party, has acted in excess of the authority granted to him under the parties' agreement, the protesting party, under either Section 301 or the U.S. Arbitration Act, as indicated above, can petition the court to vacate the award. While the Supreme Court, in the Lincoln Mills case, did not find that the U.S. Arbitration Act applies to union-management agreements, there is no apparent reason for the federal courts

58 Wis. Stat. §298.10 (1957).
to disregard the public policy laid down in the U.S. Arbitration Act with respect to enforcement and vacation of arbitration awards.

The Court of Appeals for the Sixth Circuit, prior to the *Lincoln Mills* decision of the Supreme Court, held that the federal courts did not have jurisdiction over an action to vacate an arbitration award construing and applying a union agreement on the ground that, while Section 301 granted jurisdiction to enforce collective bargaining agreements, an action to enforce an award purportedly under that agreement did not come within the purview of Section 301. The court, under its view that the U.S. Arbitration Act was not applicable, rested its decision squarely on its assumption that an award must be considered separate and apart from the contract on which the award was claimed to have been based.

This view, properly in the opinion of these writers, has not been sustained in later decisions. The issue in these cases is whether or not the arbitrator acted within the authority conferred upon him by the parties' agreement. The award cannot be considered as anything else than a determination by the arbitrator as to what the parties' agreement is. The award has no substance without the supporting agreement. If the court's reasoning in *Mengel* is sound, then likewise, the federal courts have no jurisdiction to enforce an award under Section 301. The Sixth Circuit appears to have reversed its view in a case decided after the Supreme Court's decision in *Lincoln Mills*. In *Kornman Co. v. Amalgamated Clothing Workers*, the Sixth Circuit stated:

If the United States District Courts have jurisdiction and may order compliance with the grievance arbitration provisions of a collective bargaining agreement, they must necessarily have jurisdiction to enforce the resulting awards. To hold otherwise would render the entire arbitration machinery merely time consuming and useless.

Likewise, the careful negotiation of union-management agreements is a useless waste of time where either party to the agreement can, through the arbitration process, substantially add to or negate the specific provisions of such agreements. The courts, having been assigned the responsibility by Congress, at least in part, to police and enforce union-management agreements, and having found requisite authority to enforce arbitration awards, are not less obligated to uphold the

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61 Supra note 59.
parties' agreement where such awards are either the result of bias, fraud, or not authorized by the agreement itself. The clear federal policy is to make both parties responsible for the commitments made in union-management agreements. Courts, under Section 301, have the obligation to enforce that policy. If an arbitrator, for whatever reason he may have, issues an award in derogation of that policy, the federal courts, under Section 301, and the policies set forth under the U.S. Arbitration Act, have no alternative but to nullify the arbitrator's action.

Unions are almost invariably the aggressors in arbitration situations. It is common knowledge that unions have used the arbitration process with some success to accomplish results that could not be obtained through collective bargaining. Employers, with their understandable passion for labor peace, have generally accepted the labor arbitration process. However, labor arbitration will survive only so long as it provides a reasonable solution for the problems presented. If labor arbitration is not applied to enforce the rights and obligations of both parties to the labor agreement, it can be well expected that labor arbitration will fall into disrepute. Employers and unions can ill afford to have some third party, whose responsibility is completely terminated, once the award is issued, determine in a binding award what is good for the parties, rather than what are the rights and obligations of the parties as they, themselves, have determined in their labor agreement. What is good industrial relations is best left to the employer and the union to work out rather than be gratuitously dictated in the arbitration process. The solicitousness for union survival and prestige, if ever it was, certainly is no longer justified. The majority of labor unions today not only have the power but the competence to negotiate an acceptable agreement. If collective bargaining is the essence of our national policy, as the means and method of avoiding labor disputes, the product of collective bargaining—that is, the union-management agreement—is entitled to the greatest respect.

The best manner in which to keep labor arbitration respectable and acceptable is to provide a means whereby the actions of arbitrators who fail to meet their responsibility under the parties' agreement can be nullified. If matters determined by arbitrators are not within the terms of arbitration provisions of the contract or arbitrators in their awards go beyond the contemplation of the parties as reflected in the contract, arbitrators exceed their jurisdiction, and their awards should be set aside in an appropriate court proceeding.63

What is being suggested here, as the aforementioned case indicates, is not something new and radical in the field of labor arbitration.

These principles have been recognized, as has been pointed out in both the U.S. Arbitration Act and the Uniform arbitration acts found in many states. All that is being suggested is that there is no reasonable basis for construing, applying, and litigating a labor contract on a basis different than other contracts are dealt with. The pontificating, found in numerous arbitration and court decisions, about "liberally" construing labor agreements and the desirability of encouraging labor arbitration, are often simply lame excuses for either avoiding or expanding on the specific agreement of the parties. Collective bargaining and labor arbitration can best be protected and encouraged by giving full recognition to the policies set down by Congress of compelling both parties to a labor agreement to comply with their agreements as made.

III. Equitable Relief Under 301

As recognized by the United States Supreme Court in *Lincoln Mills*, the entire history of Section 301 "indicates that the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement." Likewise, the no-strike agreement is considered as the *quid pro quo* of the agreement to arbitrate grievance disputes. The Supreme Court, in the majority opinion, seemed to quote with approval a colloquy which occurred during the House debate which specifically recognized that Section 301 "contemplates not only the ordinary lawsuits for damages, but also such other remedied proceedings, both legal and equitable, as might be appropriate in the circumstances."

It is conceded that, where a union, party to a labor agreement, either breaches its agreement not to strike during the term of the contract, or even in the absence of a no-strike clause, violates its agreement to arbitrate all disputes, it is liable for damages. However, it is generally recognized that a suit for damages in a strike situation is not always an adequate remedy. While most international unions today have sufficient financial resources to be collectible on a judgment, very often local unions are the parties to labor agreements, and most local unions could not meet a substantial judgment against them. Moreover, one of the inevitable results of a strike insofar as an employer is concerned, involves losses extending and accruing long after the strike has been terminated; that is, the loss of future business. The courts understandably are reluctant to award such speculative damages especially where labor unions are concerned. The only adequate remedy against a strike in violation of a contract is a prompt court order restraining the union from authorizing, sanctioning, encouraging, or in any way assisting in the conduct of the strike.

The question arises, of course, as to whether or not the Norris-
LaGuardia Act,\textsuperscript{66} applies in these situations. While the Supreme Court referred to the Norris-LaGuardia Act in \textit{Lincoln Mills}, the decision did not specifically reach this question. The decision simply states:

We see no justification in policy for restricting Section 301 (a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that (Norris-LaGuardia) Act.\textsuperscript{67}

The court's reference to the \textit{quid pro quo} relationship between arbitration and no-strike clauses and its quotation from the legislative history quoted above regarding the availability of "both legal and equitable" proceedings seems to indicate that the Supreme Court would not construe the Norris-LaGuardia Act as applicable in Section 301 situations.

In a 1953 case prior to \textit{Lincoln Mills}, the Court of Appeals for the Sixth Circuit construed Section 301 as authorizing the injunctive process for the full enforcement of the substantive rights created by Section 301.\textsuperscript{68}

In 1954, the Court of Appeals for the First Circuit reached the contrary result, holding that a strike called by a union in violation of the arbitration provisions of an agreement, was a dispute within the purview of the Norris-LaGuardia Act, and that the injunction sought by the employer in that case was precluded by that law.\textsuperscript{69}

The Court of Appeals for the Second Circuit, in \textit{Bull Steamship Co. v. Seafarer's Intl. Union},\textsuperscript{70} likewise held that the Norris-LaGuardia Act prohibited the issuance of an injunction against a union striking in violation of a labor agreement. Chief Justice Clark of this court, in an analysis of the \textit{Lincoln Mills} decision, assumed that the Supreme Court would differentiate between an injunction against an employer preventing him from violating an arbitration clause and an injunction against a union preventing the union from violating the no-strike clause.

In April of 1959, the U. S. District Court for the Western District of Washington issued a restraining order against a union requiring the union to comply with the arbitration provisions in the contract and to refrain from in any way contributing to an existing strike.\textsuperscript{71} The Washington court rested its decision squarely on the majority opinion in \textit{Lincoln Mills}.

\textsuperscript{67} \textit{Supra} note 2, at 458.
\textsuperscript{68} Milk & Ice Cream Drivers v. Gillespie Milk Prod. Corp., 203 F.2d 650 (6th cir. 1953).
\textsuperscript{69} W. L. Mead, Inc. v. IBT, Local Union 25, 217 F.2d 6 (1st cir. 1954).
\textsuperscript{71} American Smelting & Refining Co. v. Tacoma Smelterman's Union, 175 F. Supp. 750 (W.D. Wash. 1959).
It would appear that, if, as the Supreme Court determined in *Lincoln Mills*, employers and unions acquired substantive rights under Section 301 in connection with union-management contract enforcement, these substantive rights included in appropriate cases the remedy of an injunction. The emotional attitude toward labor injunctions which led to the passage of the Norris-LaGuardia Act is hardly applicable in a situation where the court is merely requiring the union to comply with its contractual obligations. Likewise, the sanctity of the right to strike is not involved, since the employees, acting through their authorized representative, have for the period of the agreement by contract relinquished that right in return for the employer’s agreement to arbitrate contract disputes.

The prohibitions as contained in Sections 4, 5, and 7 of the Norris-LaGuardia Act, are stated in terms of jurisdiction. Section 301 of the Labor-Management Relations Act, as construed by the United States Supreme Court, grants substantive rights to parties to union-management agreements. The question that is raised, of course, is whether or not Congress impliedly repealed the Norris-LaGuardia Act insofar as it applies to contract violations, over which the federal courts were given jurisdiction in Section 301. The Norris-LaGuardia Act was passed in 1932 at a time when labor organizations were struggling for existence. The Labor-Management Relations Act was passed in 1947 at a time when Congress was alarmed over the fact that unions were calling strikes in violation of their contractual commitments. There is nothing in Section 301 or its legislative history to indicate that Congress intended to limit the type of remedy that could be afforded by the federal courts. The legislative history quoted in *Lincoln Mills* is to the contrary. The Supreme Court, in *Lincoln Mills*, made it clear that Section 301 imposed upon the federal courts considerable leeway in fashioning remedies in actions brought under Section 301. But irrespective of *Lincoln Mills* there is authoritative precedent for the principle that: (1) Subsequent legislation inconsistent with the principles of earlier legislation will be considered as impliedly repealing or amending the earlier act; and (2) If Congress declares an act lawful or unlawful, there is no basis for distinguishing between the remedies to be applied.

In *U. S. v. Hutcheson*, the question arose as to whether or not certain secondary boycott activities of the Carpenters Union afforded a basis for criminal prosecution under the Sherman Antitrust Act. The Supreme Court agreed that the acts set forth in the indictment were crimes under the Sherman Antitrust Act, as amended by Section 20 of the Clayton Act, as the latter Act was construed by the Supreme

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72 312 U.S. 219 (1941).
Court in *Duplex Printing Press Co. v. Deering*. The Clayton Act had been passed in 1914. The Norris-LaGuardia Act, with its restrictions on the federal courts in labor injunction cases, was passed by Congress in 1932. While there is nothing in the Norris-LaGuardia Act which specifically repeals any provision of the Sherman Anti-trust Act or the Clayton Act, the Supreme Court found:

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction, Section 20 of the Clayton Act had left untouched...75

The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light, Section 20 removes all such allowable conduct from the paint of being a violation of any law of the United States, including the Sherman law.76

Having come to the conclusion that the conduct complained of could not be enjoined because of the provisions of the Norris-LaGuardia Act, the court went on to find that, if conduct cannot be enjoined, it cannot be made the subject of a criminal prosecution.

By the same token, it would appear that, if, under Section 301, contract violations can be remedied by an award for damages, there is no basis for assuming they cannot be remedied by an injunction. The Supreme Court, in *Hutcheson*, adverted to the manifest design of the Norris-LaGuardia Act to afford protection for certain activities specified in that Act. As set forth in the *Lincoln Mills* opinion, the same considerations exist in regard to Section 301 and manifest the intention of Congress to provide equitable as well as legal remedies in contract cases.77

IV. STRIKE DAMAGES UNDER 301

Another problem that has been faced by the federal courts is: What is the status of the labor agreement arbitration clause when the union is sued in court for damages resulting from a strike in violation of the labor agreement? The issue ordinarily is raised when, after the employer

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74 254 U.S. 443 (1921).
75 Supra note 72, at 231.
76 Id. at 236.
77 Note Independent Petroleum Workers of N.J. v. Esso Standard Oil Co., 235 F.2d 401 (3d cir. 1956) where the company refused to negotiate new job classifications, and the union brought suit under 301 seeking specific performance of the collective bargaining agreement. The court held that the company must negotiate with the union on a salary rate for the new job classification since such negotiations were provided for in the contract. The reasoning of the court was that since it had so often held that the Norris-LaGuardia Act was not a bar to granting injunctive relief to enforce arbitration provisions in contracts, it was not a bar here to enforce negotiation provisions. Note also Bull Steamship Co. v. Seafarer's Int'l Union 155 F. Supp. 739 (E.D. N.Y. 1957) where the court gives a number of good reasons for allowing equitable relief in the form of injunction when there has been a breach of a "no-strike" clause.
has filed a complaint against the union for damages resulting from the alleged illegal strike, the union moves for a stay of proceedings pending arbitration under the provisions of the labor agreement.

It is recognized that, where the union engages in a strike in violation of a no-strike clause, the employer is entitled to terminate the agreement at his election. However, in the usual situation, this right to terminate is small comfort to the employer, since the union undoubtedly called a strike because it found its own agreement burdensome. Termination under those circumstances simply plays into the union's hands and imposes on the employer the obligation to negotiate a whole new agreement if the union continues to represent a majority of the employees in the bargaining unit. A more practical action for the employer to take is to bring suit to enjoin the strike and for damages arising out of the contract violation.

The issue as to whether or not the proceedings should be stayed has ordinarily been raised in connection with a damage suit. The union, preferring to have its liability and damage, if any, determined by an arbitrator instead of a court, moves for a stay of proceedings under Section 3 of the U.S. Arbitration Act, which provides in part that the court, upon application, shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement providing the applicant for the stay is not in default in proceeding with such arbitration." The Court of Appeal for the Fourth Circuit was faced with this issue in a case decided in 1948 prior to Lincoln Mills. The agreement in that case provided that there shall be no strikes or lockouts, but that the grievance procedure shall be the only method of settling disputes "which are the subject of this agreement." While the court in its opinion held that the U.S. Arbitration Act did not apply and that, therefore, the court was not required to grant a stay if the issue was arbitrable, the court held that, at least under this contract, there was no obligation to arbitrate a claim for damages resulting from an illegal strike. The court stated:

Damages arising from strikes and lockouts could not reasonably be held subject to arbitration under a procedure which expressly forbids strikes and lockouts and provides for the settlement of grievances in order that they may be avoided.

The court recognizes that the parties could have agreed to arbitrate strike damage claims and implied that, if the contract could be so
construed, a stay would have been granted. This was simply a recognition of the fundamental principle that parties to a contract can be compelled only to arbitrate such disputes as they have agreed to arbitrate.

The Seventh Circuit, in *Cuneo Press, Inc. v. Kokomo Paper Handlers' Union* #34, without deciding, but assuming that the U. S. Arbitration Act applied, reached the same result as did the Fourth Circuit in the *Colonial Hardwood* case. In the *Cuneo* case, the union called a strike over a grievance after rejecting the employer's demand that the grievance be arbitrated. The contract, in addition to providing for a no-strike clause, specifically provided:

> It is agreed that the procedures herein provided for settling disputes by arbitration shall be used to the exclusion of any other means available to the parties who execute this Agreement, it being understood that all arbitration decisions rendered under the terms of this contract are final and binding on both parties. Any rights or remedies otherwise available to the parties to this contract are hereby expressly waived.

The court, in its opinion, observed that the union had ignored the grievance procedure and arbitration provision and instead instituted a sitdown strike which was in direct violation of the contract. The court commented:

> Obviously, a chief purpose of the arbitration agreement was to avoid a strike. When the unions embarked upon the strike they voluntarily by-passed arbitration. When they struck the wrong was done and the damage to plaintiff began. Then it was that plaintiff's right of action for damages and injunctive relief to prevent further damage accrued."

The Seventh Circuit proceeded on the basis that, notwithstanding the fact that the contract provided that arbitration was the exclusive remedy available to the parties, the union, when it called the strike, was in default of its own agreement and had repudiated arbitration, and having done so, was in no position to assert that the claim for damages arising out of the strike was arbitrable.

The decision of the Seventh Circuit seems to be sound law. As the Supreme Court implied in *Lincoln Mills*, the arbitration provisions in the contract are the *quid pro quo* for the no-strike clause. Moreover, the normal grievance procedure and arbitration provision is intended and designed as a peaceful means of settling the day-to-day disputes that can and do arise under union agreements. A strike in violation of the arbitration and no-strike clauses in an agreement constitutes a repudiation of the grievance procedure as well as a violation of the

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82 235 F.2d 108, 30 L.C. 70,004 (7th cir. 1956).
83 *Id.* at 111.
no-strike clause. While in a technical sense it might be said that an employer can file a grievance against the union, it is also most likely that the parties in providing such a procedure did not intend that a lockout by the employer or a strike by the union in violation of the contract constituted a grievance such as would be handled in the various steps of the grievance procedure.

The Court of Appeals for the Sixth Circuit recognized such a situation in *Automobile Workers v. Benton Harbor Malleable Industries.* The agreement in that case provided that:

> Shall difference arise between the Company and the Union as to the meaning and application of this Agreement, or should any local trouble arise, an earnest effort shall be made to settle such differences, and it is agreed by the Union that there shall be no strike, slowdown, or stoppage of work on the part of the Union or its members and there shall be no lockout on the part of the Company during the term of this contract. The parties shall in all instances resort to the following steps of the grievance procedure.

Here again was a contract which impliedly provided that the grievance procedure was the exclusive means for settling all differences. The union, in support of its motion for a stay of proceedings, argued that the company's claim for damages was a "difference" within the purview of the arbitration clause. The court, citing its own previous decision in *Hoover Motor Express Cr. v. Teamsters,* held:

> In the commonly accepted meaning of the term 'grievance,' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance, and the violation of the no-strike agreement of the collective bargaining contract is not a grievance.

The court, also recognizing the fundamental interdependence between the no-strike clause and the arbitration clause, observed:

> The arbitration called for by this paragraph of the contract was to be used instead of a strike, not to determine whether the strike was justified after it had occurred. The right to strike was not arbitrable issue under this paragraph of the contract.

This appears to be the law at least in the Second, Fourth, Sixth, and Seventh Circuits. If, as is agreed, arbitration is the *quid pro quo* for the "no strike" clause then there is no basis for arbitration in strike damage cases.

A contrary view was taken by the District Court for New Jersey

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86 *Id.* at 538.
88 *Supra* note 85, at 541.
in *Tenney Engineering, Inc. v. Electrical Workers, Local #437*. In this case, the union, after having admittedly called a strike in violation of the arbitration and no-strike clauses, made a formal demand for arbitration on the employer with respect to the employer's claim for damages arising out of the illegal strike. The union moved for a stay of proceedings, contending that the employer was in default in refusing to arbitrate its strike damage claim against the union. The contract in this case provided that:

> All differences, disputes, and grievances between the parties that are not satisfactorily settled after following the procedure set forth shall, at the request of either party, be promptly submitted to arbitration.\(^9\)

The court, in its opinion, distinguished between the grievance which led to the strike and the new "dispute" arising out of the strike; that is, the employer's claim for damages. The court found that the employer, and not the union, was in default of its arbitration obligation, and stayed the proceeding.

There was another twist to the *Tenney* case which undoubtedly influenced the court to reach its conclusion, in addition to the "dispute" reference in the arbitration clause. The union alleged that the strike was a wildcat strike for which it had no responsibility. The court stated:

> It is this very issue of responsibility for this strike or work stoppage which this Court has just found to be the proper subject of arbitration, not of litigation.\(^9\)

This latter approach seems rather tenuous, since the agreement in the *Tenney* case provided:

> . . . the Union will use all reasonable means to keep its employees at work and will not strike nor suffer its members to engage in any strike, work stoppage, slowdown, sitdown, or other interference with the ordinary operation of the Employer.\(^9\)

In any event, it would probably behoove contract negotiators who do not want to waive their right to sue for damages in strike or lockout situations to avoid contract provisions providing that "all disputes" shall be subject to the arbitration provisions of the agreement.

Such "all disputes" provisions can be a liability to a union as well as to an employer. The Court of Appeals for the First Circuit has held that, where such arbitration provisions exist, *and even in the absence of a specific no-strike clause*, any strike with respect to a dispute subject to arbitration under the contract, at least to the extent

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\(^9\) *Id.* at 879.
\(^9\) *Id.* at 881.
\(^9\) *Id.* at 879.
that the contracting employer is not in default in proceeding with arbitration, is a breach of that contract for which damages may be awarded against the union.\footnote{Mead v. Teamsters, 230 F.2d 576 (1st cir. 1956); see also Gay’s Express v. Teamsters, 169 F. Supp. 834 (E.D. Mass. 1959).}

\section*{V. State Courts Under 301}

The question arises as to where the state courts stand in relation to 301. Do the federal courts have exclusive jurisdiction over contract violation suits affecting commerce, or do the state courts retain the jurisdiction they previously had, the federal courts simply constituting an additional forum? If the state courts have concurrent jurisdiction, what are the rights of removal and remand?

It now seems quite clear that, in contract violation cases not involving any unfair labor practices in violation of the National Labor Relations Act, the state courts have concurrent jurisdiction. In the leading case of \textit{McCarroll v. Los Angeles County District Council of Carpenters},\footnote{49 Cal.2d 45, 315 P.2d 322 (1957) \textit{cert. denied} 355 U.S. 932 (1958).} the court held that, while \textit{Lincoln Mills} required that federal law be applied, Section 301 does not grant exclusive jurisdiction to the federal courts. The California court concluded that, while the Norris-LaGuardia Act prevented the federal courts from issuing an injunction against a contract violation strike, such a prohibition did not extend to the state courts. If \textit{McCarroll} and certain federal court decisions are correct with respect to the applicability of Norris-LaGuardia to contract violation strikes, it could be expected that employers in certain jurisdictions would be attracted to the state courts. It appears, however, that such forum shopping is not possible unless the defendant is agreeable to have the state court litigate the issue. Actions for violations of contracts in industries affecting commerce brought in the state court can be removed by either party to a federal court.\footnote{Ingraham Co. v. Electrical Workers Local 260, 171 F. Supp. 102 (D. Conn. 1959); Minkoff v. Scranton Frocks, Inc., 172 F. Supp. 870 (S.D. N.Y. 1959); Underwood Corp. v. Electrical Workers Local 267, 171 F. Supp. 102 (D. Conn. 1959).}

In the State of Wisconsin, under the Wisconsin Employment Peace Act, contract violations are an unfair labor practice over which the State Board has jurisdiction. The District Court for the Eastern District of Wisconsin on petition by the employer removed a proceeding from the State Board to the federal court on the theory that the proceeding before the State Board was in reality a simple suit based on an alleged violation of the union-management agreement; that this was the only violation of law alleged; and that the union could have brought the identical action in the state trial courts rather than before an administrative tribunal. The Wisconsin court held that the creation by a state of a special remedy as an alternative to a traditional court action
cannot operate to deprive a man of the right to have the cause heard in a federal court.\textsuperscript{97}

However, it would seem rather simple for a union to frustrate removal by having an individual employee, instead of the union, file the charge alleging the contract violation with the State Board. Since Section 301 applies only to suits by and against labor organizations, there would seem to be no basis for removal of such action to the federal court. Whether or not an individual employee could bring an action in state court to compel arbitration of his grievance is an issue not within the purview of this article, although it would appear that, since the individual employee is not a party to the contract, he is in no position to compel the union and the employer to arbitrate unless there is bad faith on the part of the union in refusing to handle his individual grievance.

What about the removal of an action brought by the union in a state court to enforce contract provisions dealing with wages, vacations, holiday pay, and discharges of employees? The United States Supreme Court, in the \textit{Assn. of Westinghouse Salaried Employees v. Westinghouse Electric Corp.},\textsuperscript{98} held that the federal courts under Section 301 do not have jurisdiction over actions:

\ldots based upon an employer's failure to comply with the terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee.\textsuperscript{99}

The principle distinction made in the various decisions is that Section 301 gives jurisdiction in contract violation cases involving matters which directly and primarily affect the complaining union as an organization, and procedural matters about the proper administration of the collective bargaining process for which the union as the bargaining agent is responsible. Issues involving "uniquely personal rights of an employee" are not within the purview of Section 301, and the federal courts will not take jurisdiction over such contract disputes. Courts, in applying Section 301, seem to be following the concept set forth by Justice Jackson in \textit{J. I. Case Co.},\textsuperscript{100} relating to the difference between an employment agreement and a collective bargaining agreement which was characterized as a trade agreement.\textsuperscript{101}


\textsuperscript{98} 348 U.S. 437 (1955).

\textsuperscript{99} Id. at 460.

\textsuperscript{100} Supra note 18.

\textsuperscript{101} Interestingly enough, Justice Frankfurter wrote what amounts to the majority opinion in \textit{Westinghouse}, in which opinion he characterized §301 as being largely procedural and not providing a basis for the federal courts to apply substantive law. Justice Frankfurter took this same position in his dissent in \textit{Lincoln Mills}. Justice Douglas, who dissented in \textit{Westinghouse}, wrote the
The line between the two, however, is not as clear as may seem at first glance. For instance, does a suit by a union alleging violation by an employer of his obligation to make contributions to a welfare fund involve the union as an organization or the uniquely personal interests of the employees? The U. S. District Court for the Southern District of New York held that it had jurisdiction over such an action "since it involves an obligation running to a union and, therefore, it is a union controversy and not a uniquely personal right of employees sought to be enforced by a union."

The Court of Appeals for the Tenth Circuit held in the New Park Mining case that the federal courts had jurisdiction of an action between an employer and a union predicated on alleged violation of union contract by discharge of employees and leasing of mining operations. The case was remanded to the district court for a determination as to whether or not the leasing and discharges were made in good faith or were merely subterfuge to evade the collective bargaining agreement.

The decisions of the Tenth Circuit in U. S. Potash and New Park Mining pose the question of whether or not an employer violates the "recognition" clause of a union-management agreement by going out of business or by transferring his operations to another area for the specific purpose of reducing labor costs. If that is found to be the law, judicial inventiveness will have reached its ultimate. It in effect would require an employer to remain in business for the period of the union agreement so that the union, at least during that period, will have members who will continue to pay dues.

Conclusion

It can be expected that the rash of union-management contract dispute cases that have hit the federal courts since the Lincoln Mills decision is only the beginning. The federal courts, having been given the broad mandate in Lincoln Mills to fashion a body of substantive law in the area of union-management contract disputes, have had a tremendous burden placed upon them. Free collective bargaining rather than government fiat remains the backbone of federal industrial relations policy. As indicated by the cases cited in this article, the execution of a union-management agreement does not settle all the issues. Section 301, is available to help the parties peacefully, if not without litigation, to live with their agreements.


4 supra note 51.

majority opinion in Lincoln Mills. While Frankfurter's views with respect to the issues concerning procedural versus substantive law were settled in favor of federal action in Lincoln Mills, the basic holding in Westinghouse with respect to the union's rights to use the federal courts to vindicate the private rights of individual members consistently has been followed by the lower courts.