

STUDENT COMMENTS

LABOR ARBITRATION AND ANTI-INJUNCTION: THE CASE FOR ACCOMMODATION

I. INTRODUCTION: THE *New Orleans Steamship* CASE¹

The collective bargaining agreement signed by the New Orleans Steamship Association and the General Longshore Workers, I.L.A. Local 1418 contained a no-strike clause, an arbitration clause providing for quick, final and binding arbitration, and a clause empowering the arbitrator to issue a desist order.² A dispute arose between the management and the union concerning alleged work stoppages. The matter was submitted to binding arbitration according to the terms of the agreement. The arbitrator, having found that the work stoppages were in violation of the contract, issued an order directing the union to cease and desist from work stoppages.³

When, according to the management, work stoppages continued, the company brought suit in the federal district court for an order enforcing the award of the arbitrator. The district court dismissed the complaint,⁴ relying upon the Norris-LaGuardia Act⁵ and *Sinclair Ref. Co. v. Atkinson*,⁶ where the Supreme Court had held that federal courts may not enjoin strikes in breach of no-strike clauses. The Circuit Court of Appeals for the Fifth Circuit, in *New Orleans S.S. Ass'n v. General Longshore Workers Local 1418*,⁷ reversed, and held that a federal court may, by an affirmative order, grant enforcement of an arbitrator's desist order against violations of a no-strike clause where the arbitrator is specifically granted such power in the contract. The Supreme Court denied certiorari.⁸

¹ *New Orleans S.S. Ass'n v. General Longshore Workers Local 1418*, 389 F.2d 369 (5th Cir.), cert. denied, 393 U.S. 828 (1968).

² 393 F.2d at 370.

³ *Id.* The agreement provided that "the arbitrator shall make findings of fact concerning the alleged violation and shall prescribe appropriate relief, including an order to desist therefrom." The parties interpreted this language as empowering the arbitrator to enjoin work stoppages and therefore did not dispute the jurisdiction of the arbitrator over the subject matter. *Id.* at 371.

⁴ *Id.* at 369.

⁵ 29 U.S.C. §§ 101-15 (1964).

Section 4 provides:

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

(a) Ceasing or refusing to perform any work or to remain in any relation of employment

29 U.S.C. § 104 (1964).

⁶ 370 U.S. 195, 203 (1962).

⁷ 389 F.2d 369 (5th Cir. 1968).

⁸ 393 U.S. 828 (1968).

In its decision, the court of appeals was required to resolve two basic questions. First, whether the situation presented fell within the Supreme Court's decision in *Sinclair* or the circuit court's own opinion in *Gulf & South American S.S. Co. v. National Maritime Union*,⁹ and secondly, whether the prohibition of the Norris-LaGuardia Act against injunctions applied to the case. After responding in the negative to each of these questions, the court proceeded to make the policy-oriented decision in favor of enforcement. This policy determination undoubtedly signals the possibility of a significant expansion of the power of the arbitrator in the no-strike area. However, before this possibility may be realistically assessed, it is necessary to examine the court's resolution of the applicability of prior case law and of the Norris-LaGuardia Act.

In *Gulf & South American* the court held that absent power or jurisdiction in the arbitrator, which can originate only from the agreement of the parties, there can be no judicial enforcement of his award.¹⁰ In that case the court found that the arbitrator had exceeded his authority in making the award because the no-strike question was not arbitrable per se and thus could not alone serve as a basis for the arbitrator's jurisdiction to order the union to cease the work stoppage.¹¹ The distinguishing feature of the *New Orleans* case, according to the court, was that the arbitrator was *specifically authorized* to resolve the work stoppage issue. Thus, *Gulf* presented no bar to enforcement of the award in the instant case.

In *Sinclair*, again, the Supreme Court held that the Norris-LaGuardia Act applied to prohibit federal courts from enjoining strikes concededly in violation of no-strike clauses, even where the contract contained an arbitration provision. However, as the court in *New Orleans* indicated,¹² *Sinclair* did not involve an arbitration award, the suit having been brought before the dispute had been arbitrated. In *New Orleans*, on the other hand, the breach itself had been the subject of final and binding arbitration, consistent with the agreement of the parties. On the basis of this factual distinction the court concluded that *Sinclair* was not controlling.¹³ A second reason for distinguishing *Sinclair* rested, according to the court, "on the more than semantical ground that there is a real difference between an ordinary injunction and an order enforcing the award of an arbitrator although the end result is the same."¹⁴

This latter argument had been advanced earlier by the Third Circuit Court of Appeals in *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, Local 1291*.¹⁵ There the court avoided the proscription of

⁹ 360 F.2d 63 (5th Cir. 1966).

¹⁰ Id. at 65.

¹¹ Id.

¹² 389 F.2d at 371.

¹³ Id.

¹⁴ Id. at 372.

¹⁵ 365 F.2d 295 (3d Cir. 1966), rev'd, 389 U.S. 64 (1967). The Tenth Circuit Court of Appeals in *Teamsters Local 795 v. Yellow Transit Freight Lines, Inc.*, 282 F.2d 345 (10th Cir. 1960), had also delineated between an injunctive decree for a negative purpose and an affirmative order enforcing the agreement of the parties. However, this

the Norris-LaGuardia Act by reasoning that it was not issuing an injunction nor what it considered a restraining order, but rather an *affirmative* order calling upon the defendant union for specific performance of the arbitration award.¹⁶ The Supreme Court, relying on Rule 65(d) of the Federal Rules of Civil Procedure,¹⁷ reversed the case because of the imprecision of the court's order.¹⁸ In a dissenting opinion, Mr. Justice Douglas questioned the advisability of the court's dismissal of the case on this ground for the reason that if the district court's order was an "injunction" within the meaning of Rule 65(d) of the Federal Rules, it would also appear to be an "injunction" within the meaning of the Norris-LaGuardia Act. Viewing the situation presented in *Philadelphia Marine* in this light, district courts would consider *Sinclair* controlling.¹⁹

If a valid distinction exists between an injunction and an affirmative order, it is extremely difficult to conceptualize. While the courts mentioned above have recognized such a distinction, others have not been able to appreciate it.²⁰ The commentators are also divided on the question; some claim that the Norris-LaGuardia Act includes only *negative* prohibitions,²¹ while others contend that such a distinction is one without a difference.²² It is submitted that if there is a distinction between an injunction and an affirmative order, it is of itself insufficient ground upon which to avoid the Norris-LaGuardia Act. Furthermore, it would appear that in those cases adopting the distinction, the resolution of the issue whether the proscriptions of the Norris-LaGuardia Act *should* apply to a particular situation was essentially policy motivated, with the *subsequent* rationalization that the order was not an injunction employed simply as a means to effectuate that policy determination. With this assumption in mind, it seems at least arguable that when the court distinguished *Sinclair* on the basis of the difference between an injunction and an affirmative order enforcing an arbitrator's award, just as when in *Gulf & South American* it did not recognize the distinction on the facts of that case,²³

decision was reversed per curiam by the Supreme Court, citing *Sinclair*, 370 U.S. 711 (1962).

¹⁶ 365 F.2d at 301.

¹⁷ Fed. R. Civ. P. 65(d) states, in pertinent part:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . .

¹⁸ 389 U.S. 64, 73-74, 76 (1967).

¹⁹ Id. at 77. Since it is evident that the majority did not wish to reach the question presented by *Sinclair*, it seems that Justice Douglas' conclusion was unwarranted. Possibly he was overstating his case for the purpose of emphasis.

²⁰ See, e.g., *Marine Transp. Lines, Inc. v. Curran*, 65 L.R.R.M. 2095 (S.D.N.Y. 1967); *Commercial Can Corp. v. Local 810, Steel Fabricators*, 61 N.J. Super. 369, 160 A.2d 855 (App. Div. 1960).

²¹ See, e.g., *Stewart, No-Strike Clauses in the Federal Courts*, 59 Mich. L. Rev. 673, 682-83 (1961).

²² See, e.g., *Rice, A Paradox of Our National Labor Law*, 34 Marq. L. Rev. 233, 246 (1951).

²³ That decision [*Sinclair*] . . . is direct authority on the question and is controlling. There the employer sought the injunction directly while here the

the court was implicitly concluding that the policy of the Norris-LaGuardia Act does not apply once the dispute has been arbitrated.

Having distinguished the prior cases, the court was still faced with the broad provisions of the Norris-LaGuardia Act itself. The force of this statute did not apply to the *New Orleans* case, according to the court, because the instant controversy was outside the scope of a labor dispute as such.²⁴ In other words, "labor dispute," as used in the Norris-LaGuardia Act, does not include a grievance which has been processed through binding arbitration consistent with the terms of a contract providing for arbitration of all disputes in lieu of self-help remedies.²⁵ One commentator has urged a similar interpretation on the theory that in 1932, when the Norris-LaGuardia Act was passed, the only labor disputes contemplated were "battles of industrial warfare," not divergent views of the terms and administration of collective bargaining agreements.²⁶ Along similar lines, another commentator argues that "[j]udges who still confuse violations of collective bargaining agreements with § 13 labor disputes and § 4 conduct have . . . lost contact with reality."²⁷ A third argues that to view a strike in breach of a collective bargaining agreement as a labor dispute is to foster the incongruity that "legislation designed to equip unions with bargaining power should free them to breach an agreement reached by virtue of the same legislation."²⁸ All three of these contentions were acknowledged, and rejected, by the majority in the *Sinclair* case.²⁹ The majority opinion in that case insisted that a strike in breach of a no-strike clause is a labor dispute within the meaning of the Norris-LaGuardia Act.³⁰ However, one must not lose sight of the fact that the *Sinclair* case did not concern an arbitration award.³¹ The Court has not yet decided whether a labor dispute which has gone through arbitration has in fact experienced such a metamorphosis that it is no longer a "labor dispute" within the meaning of Section 13 of the Act. The *New Orleans* court felt that arbitration had this cathartic effect. It is submitted, however, that the interpretation of "labor dispute" is also, in the last analysis, a policy decision. This position finds support in the *Sinclair* majority opinion, dismissing the definition of "labor dispute" offered by the authors cited above on the ground that these writers

injunction is sought under the guise of enforcing the award of an arbitrator but this is a distinction without a difference under the facts of this case, and any other result would be exalting form over substance.

360 F.2d at 65.

²⁴ 389 F.2d at 372.

²⁵ "We have before us a contract wherein the parties have ceded their remedy of self-help in a labor dispute to arbitration even to the point of permitting the arbitrator to grant a desist order." *Id.*

²⁶ "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." Rice, *supra* note 22, at 250.

²⁷ Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 645-46 n.39 (1959).

²⁸ Stewart, *supra* note 21, at 678.

²⁹ 370 U.S. at 201-02 & n.12.

³⁰ *Id.* at 200.

³¹ *Id.* at 197.

were expounding labor policy as they thought it should be, rather than as Congress had established it.³²

Even if a different interpretation of "injunction" does not provide a self-sufficient ground upon which to distinguish *Sinclair*, the factual distinction provided by the existence of the arbitration award in *New Orleans* is undoubtedly significant. Since the arbitration process is reputed to be the instrument to replace industrial strife,³³ then strikes before and after arbitration are essentially different. For this reason, *Sinclair* does not necessarily control the situation of a strike in violation of a collective bargaining agreement and an arbitrator's desist order.³⁴ However, a court seeking to enjoin a strike, after distinguishing *Sinclair*, must then proceed to the more important issue of the Norris-LaGuardia Act itself. A narrow construction of "labor dispute" enabled the *New Orleans* court to skirt this statute. The court viewed labor disputes before arbitration as essentially different once processed through contractual arbitration. This argument is hardly compelling, for both before and after arbitration labor and management may be in dispute over an issue. However, where the parties have agreed to submit alleged violations of a no-strike clause to arbitration, and have expressly given the arbitrator power to grant a desist order against the strike, they may realistically be taken as having agreed to end strikes in violation of their contract and to replace them with arbitration. This creation of private judicial processes by the parties does, arguably, provide a basis upon which to ground avoidance of the literal proscriptions of the Norris-LaGuardia Act. At the same time, however, the prospect of automatic enforcement of these private judicial processes by the courts presents the ultimate issue of the weight to be given the anti-injunction policy underlying the statute.

The underlying and determinative factor in the *New Orleans* decision, it would appear, was the policy determination that the court should restrict, rather than extend, the sweep of the Norris-LaGuardia Act. Implicit in the *New Orleans* opinion are two judgments made sub silentio by the court: (1) judicial enforcement of awards is necessary for effective arbitration; (2) the court is simply enforcing a contractual agreement of the parties. These two conclusions underlay the affirmative response to the question whether policy considerations dictated the granting of enforcement in this situation.

The court cited Section 301 of the Labor-Management Relations Act,³⁵ *Textile Workers Union v. Lincoln Mills*,³⁶ and the *Steelworkers' Trilogy*³⁷ for the proposition that the congressional and judicial policy is to foster the arbitration process. Moreover, federal courts may compel parties to collective

³² Id. at 200-02.

³³ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); Goldberg, A Supreme Court Justice Looks at Arbitration, 20 Arb. J. 13, 14 (1965).

³⁴ See Isaacson, The Grand Equation: Labor Arbitration and the No-Strike Clause, 48 A.B.A.J. 914, 918 (1962).

³⁵ 29 U.S.C. § 185 (1964).

³⁶ 353 U.S. 448 (1957).

³⁷ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

bargaining contracts to carry out their agreements to arbitrate,³⁸ and will enforce arbitration awards up to the point of those matters proscribed by the Norris-LaGuardia Act.³⁹ In this case, since the court had determined that the matter was not a "labor dispute" under the Norris-LaGuardia Act, the court felt that it must enforce the award to be consistent with the policy favoring arbitration, as enforcement, practically speaking, was the last step in the arbitration process. In this latter regard, the court stated: "We think the logic of the arbitration policy compels this result; otherwise one of the parties to a collective bargaining agreement containing arbitration and no strike or work stoppage clauses has a hollow right indeed."⁴⁰ The sentiment expressed in this statement, that arbitration becomes ineffective unless duly arbitrated work stoppages can be enjoined, was dismissed by the Court in *Sinclair* as insufficient reason to override the proscription of the Norris-LaGuardia Act:

The argument to the contrary seems to rest upon the notion that injunctions against peaceful strikes are necessary to make the arbitration process effective. But whatever might be said about the merits of this argument, Congress has itself rejected it. In so doing, it set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration and it is not this Court's business to review the wisdom of that decision.⁴¹

In light of the fact that in *Sinclair* a prior arbitration award was not before the Court, this statement is arguably dicta. The Supreme Court has not yet considered whether enforcement of an arbitrator's injunction is *necessary* to insure the efficacy of the arbitration process. Because there are a number of divergent views on the question,⁴² and because the issue itself is so important, it is submitted that the Supreme Court should not allow this dicta to be controlling, but rather should decide the exact question in its factual context. Undoubtedly, little can be read into a denial of certiorari, but from the mere fact that the *New Orleans* case was not reversed it is at least arguable that the Court is reconsidering its interpretation in *Sinclair* of the meaning of congressional inactivity on the question of the Norris-LaGuardia Act and arbitration. Congress has not responded to the *Sinclair* decision, and it has been suggested that because of the large body of federal law the courts have fashioned in the area it is not likely to do so.⁴³ Thus the

³⁸ *Id.*

³⁹ See, e.g., *Minute Maid Co. v. Citrus & Cannery Workers, Drivers Local 444*, 331 F.2d 280 (5th Cir. 1964); *Fontainebleau Hotel Corp. v. Hotel Employees' Local 255*, 328 F.2d 310 (5th Cir. 1964).

⁴⁰ 389 F.2d at 372.

⁴¹ 370 U.S. at 213.

⁴² See, e.g., Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1024 (1955) (suggesting that the law stay out of arbitrable disputes); *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 216 (1962) (dissenting opinion) (noting that court enforcement *may* be necessary for effective arbitration).

⁴³ 1964-1965 Annual Survey of Labor Relations Law, 6 B.C. Ind. & Com. L. Rev. 815, 834 (1965). On September 25, 1967, Sen. Paul Fannin introduced a bill, S. 2455, "to amend the Norris-LaGuardia Act so as to permit the granting of injunctive relief in suits brought to enforce the provisions of contracts between employers and labor organiza-

policy determination of the application of the Norris-LaGuardia Act will likely be made by the Court. Until a final pronouncement on the question is made by the Supreme Court, however, each court faced with enforcing an arbitrator's injunction must decide for itself the policy which it wishes to favor. This situation certainly does not promote uniformity in the law. It also allows the social and economic beliefs and prejudices of the different courts to play a large part in an area where such license previously had led to abuse.

The court in *New Orleans* also buttressed its decision with the argument that by enforcing the arbitrator's award it did nothing more than carry out the agreement of the parties.⁴⁴ The court emphasized that the parties had *voluntarily* agreed to submit the dispute to arbitration and had granted the arbitrator injunctive power. Furthermore, the court indicated that the union's contention in the face of the suit in the district court was simply that the court lacked jurisdiction to remedy the breach.⁴⁵ Implicit in these statements is the reasoning that an obvious inequity would result if the union were to escape its voluntary agreements. This appreciation of the equities proved decisive of the issue in at least two other cases where arbitrators' injunctions were enforced. One case, *Ruppert v. Egelhoffer*,⁴⁶ was decided by a state court; the other, *New Orleans S.S. Ass'n v. General Longshore Workers Local 1418*,⁴⁷ by the district court which had refused enforcement in the instant case. In commenting upon these two decisions, one writer sought to capsule the reasoning of the courts:

[I]nasmuch as the parties had, by their collective bargaining agreement, authorized the arbitrator to grant a cease and desist order against work stoppages in violation of their contract, the respective anti-injunction acts in each jurisdiction did not preclude a state or federal court from enforcing the arbitrator's order since the parties themselves, and not the court, has sanctioned the remedy.⁴⁸

The court of appeals in *New Orleans* appeared to adopt this reasoning. It viewed the matter as simply one of contract and, since damages were inadequate, it felt compelled to order specific performance. This reasoning would seem to overlook an important distinction. An action for specific performance will lie if money damages are not adequate,⁴⁹ yet before a court will issue an injunction it must generally be satisfied that stricter and more comprehensive equity safeguards are met.⁵⁰ The failure to draw this distinction, and con-

tions." The bill was read twice and referred to the Committee on the Judiciary. 90th Cong., 1st Sess. (1967). Sen. Fannin (for himself and Sen. Goldwater) reintroduced the same bill, now known as S. 1482, on March 11, 1969. Once again the bill was read twice and referred to the Committee on the Judiciary. 91st Cong., 1st Sess. (1969).

⁴⁴ 389 F.2d at 372.

⁴⁵ *Id.* at 371.

⁴⁶ 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958).

⁴⁷ 49 L.R.R.M. 2941 (1962).

⁴⁸ Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Actions and Discipline*, 7 B.C. Ind. & Com. L. Rev. 239, 250 (1966).

⁴⁹ "The essential foundation of the jurisdiction to entertain a bill for the specific performance of a contract is the inadequacy of the remedy at law for its breach." *Hazleton v. Miller*, 25 App. D.C. 337, 341 (D.C. Cir. 1905).

⁵⁰ *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 228 (1962) (dissenting opinion).

centration upon the contractual nature of the court's remedy, thus presents the possibility that the traditional requirements of equitable relief will be relaxed.

It therefore becomes important to analyze the effects of the *New Orleans* decision and rationale with an eye to the policy underlying the Norris-LaGuardia Act. The following analysis will isolate three paths of development open to the law after *New Orleans*: (1) a rejection of *Sinclair* and complete affirmation of *New Orleans*; (2) a compromise position, a middle ground as it were, between *Sinclair* and *New Orleans*; and (3) a complete rejection of *New Orleans* and extension of *Sinclair* into the arbitration area.

II. AFFIRMATION OF *New Orleans*

The conclusion that the Norris-LaGuardia Act does not bar enforcement of arbitrators' strike injunctions, in light of the limited review of arbitrators' awards allowed the courts by the *Steelworkers' Trilogy*,⁵¹ would seem to result in *automatic* judicial enforcement of an arbitrator's cease and desist order. Furthermore, if a court considers the question simply as a matter of contract, then enforcement is not discretionary but rather peremptory, because this is the remedy to which the parties have agreed. Thus, judicial affirmation of the *New Orleans* case would mark labor arbitration as having indeed come of age. The grievance and arbitration procedure could then truly be said to be a private judicial system established by agreement of the parties. At this point, it would seem that arbitration of the scope of that in *New Orleans* would effectively replace economic warfare in labor disputes. Committed as it now is to the arbitration process, management would certainly welcome this result since it insures uninterrupted production.

Since management is desirous of the end reached in the *New Orleans* decision, it will undoubtedly imitate the means through which this result was attained, namely, the specific provisions of the collective bargaining agreement enabling the court to decide as it did. Thus, one would expect a number of labor-management contracts to include, along with the now traditional no-strike clause, a provision providing for quick, final and binding arbitration, and a clause empowering the arbitrator to issue a desist order. In view of the court's emphasis of this latter provision,⁵² the express grant of injunctive power to the arbitrator would seem to be a *sine qua non* for judicial enforcement. However, the New York court in *Ruppert* implied the same from the general tenor of the contract.⁵³

The contract in *New Orleans* had a "Dispute Procedure and Arbitration" provision stressing celerity in grievance settlement. By the terms of this provision, the parties accepted "the principle that any dispute involving the interpretation or application of the terms of this agreement shall be resolved in an orderly and expeditious manner."⁵⁴ Step 1 of the procedure

⁵¹ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

⁵² 389 F.2d at 372.

⁵³ 3 N.Y.2d at 581, 148 N.E.2d at 130, 170 N.Y.S.2d at 787.

⁵⁴ 389 F.2d at 370.

called for immediate discussion between appropriate representatives of the employer and the local union when a problem arose. If a settlement were not reached either party could request immediate referral to the next level. Step 2 brought the problem before a permanent disputes committee. If this committee did not resolve the point in dispute within 48 hours ("or within such additional time mutually agreed upon"),⁵⁵ the dispute would be taken to final and binding arbitration. This roundabout route to arbitration could be curtailed because either party to the dispute could by-pass the procedure leading up to arbitration and obtain arbitration immediately upon allegation of a violation of the no-strike or no-lockout clause.⁵⁶

The arbitration process itself also mirrored the parties' interest in quick settlement. A panel of six permanent arbitrators had been selected by the parties for the duration of the agreement.⁵⁷ The arbitrator would be notified by telegram and would hold a hearing within 72 hours after receipt of notice. The award would be rendered within 12 hours after the hearing. Quick resolution of a problem is ordinarily welcomed by both sides because, generally, neither labor nor management wishes to halt the wheels of production. In most cases, too, the arbitrator's decision is accepted as final.⁵⁸ Furthermore, if the *New Orleans* decision is followed, voluntary acceptance will become even more commonplace because both sides will know court enforcement is obtainable. However, one can expect an occasion to arise when a party will disregard the award, and, as here, the union might continue its work stoppages or its strike. In this situation the quick arbitration procedure is unavailing if there is not also a quick judicial disposition of the confirmation and enforcement of the award. Presumably, summary judgment would suffice,⁵⁹ but even that procedure might give a recalcitrant union sufficient leverage to wring from management the concession which it was not willing to yield in the bargaining sessions. To avoid this problem the labor bar can be expected to attempt acceleration of the judicial process of enforcement by agreement of the parties. One possibility would appear to be a provision in the collective bargaining agreement waiving the statutory time limits for delivery of the award and for service of notice for confirmation or modification proceedings, and the substitution of shorter time periods. Another provision might state that with the application for judicial confirmation within a designated (short) period of time, the party's right to appeal for modification of the award would be waived. Still another attempt to hasten court enforcement would be a provision whereby the parties agree that immediate temporary relief may be granted *ex parte*, that is, temporary enforcement of the arbitrator's award until a hearing is held and judgment is entered by the court.

Provided that management is able to incorporate these provisions into the

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See F. Elkouri, *How Arbitration Works* 10 (1952); Rice, *supra* note 22, at 237.

⁵⁹ See, e.g., *Fontainebleau Hotel Corp. v. Hotel Employees' Local 255*, 328 F.2d 310 (5th Cir. 1964); cf. *Local 418, IUEW v. American Bosch Arma Corp.*, 234 F. Supp. 221 (E.D.N.Y. 1964).

contracts, the more serious question remains whether the courts will accept them. Courts will not readily appreciate waivers of their procedural rules, and the mere mention of *ex parte* labor injunctions will surely evoke unpleasant memories.⁶⁰ Yet if one accepts the proposition that arbitrators' injunctions are to be enforced as the remedy to which the parties have agreed, then little reason remains for delay in requiring the parties to conform to their own remedy, and therefore little reason not to accept their swift and consensual judicial proceedings. Furthermore, a court viewing the enforcement of arbitrator's desist orders as necessary for effective arbitration and recognizing its limited review of arbitration, would appear justified in the enforcement of the entire agreement of the parties, including their agreement for quick court processing. Consistency would seem also to require even the acceptance of agreements to enter *ex parte* orders.⁶¹

Before the *New Orleans* decision federal courts would not enjoin peaceful strikes even though they violated arbitrators' awards and collective bargaining agreements. For this reason, a union signing a no-strike clause did so with the knowledge that it had only nominally relinquished its most effective economic weapon. The union would, of course, be subject to a damage suit, but even this sanction is somewhat softened by the fact that the damage issue is itself arbitrable.⁶² The disciplining of participating employees is an alternative sanction, but the disciplining itself is also an arbitrable issue.⁶³ Furthermore, if the commentators are correct, these two remedies not only do not sufficiently compensate for the breach, but also do not serve as effective deterrents.⁶⁴ The most effective deterrent would be knowledge of the availability of judicial enforcement of the arbitrator's injunction. Future affirmation of *New Orleans* would effect this result. At the same time it would seemingly change the present concept of a no-strike clause. The union's surrender of this weapon at

⁶⁰ See generally F. Frankfurter & N. Greene, *The Labor Injunction* (1930).

⁶¹ It must be noted, however, that the acceptability of *ex parte* enforcement provisions may in reality be an illusory problem, for unions are likely to be extremely reluctant to agree to such a provision because of their unhappy experience with *ex parte* labor injunctions in the past. Unless management occupies a very strong bargaining position, therefore, an *ex parte* provision would probably come at such a high price that insistence on it would be improvident. Waiver of statutory time limits, however, would seem to be less offensive to unions. On the other hand, this entire process of bringing a quick end to work stoppages in violation of no-strike clauses may result in reconsideration of ready acceptance of no-strike clauses by unions.

⁶² Reading the *Steelworkers* trilogy, *Drake Bakeries* [370 U.S. 254 (1962)] and the *Sinclair* cases conjunctively, it is concluded that, unless the collective bargaining agreement expressly excludes the possibility that the damage issue shall be subject to arbitration in the event of a contract violation, it will be deemed arbitrable.

The reason why arbitrability softens the blow is that courts are generally more liberal in both what will be considered a proper element of damages and in the amounts awarded. On the other hand, while most arbitrators appear willing to award an employer provable damages in some amount for a union's breach of a no-strike contract, arbitrators exhibit a general reluctance to award substantial damages, even where the union's breach is open and flagrant.

Spelfogel, *supra* note 48, at 252, 254.

⁶³ *Id.* at 255.

⁶⁴ See, e.g., Stewart, *supra* note 21, at 675; Rice, *supra* note 22, at 253.

the bargaining table would be final and literal. For this reason, extension of the *New Orleans* decision may be expected to make collective bargaining a little more difficult because for the first time both labor and management must assess for themselves the value of the waiver of the right to strike.

III. THE MIDDLE GROUND

An alternative to the *New Orleans* decision is the view that, although the Norris-LaGuardia Act should not be interpreted to apply directly to court enforcement of arbitration awards, the policy behind the statute does have continuing validity in this setting. Therefore, the matter is not simply a contract action to be handled summarily by the court. Rather, the court should have discretionary power in the decision whether this particular strike should be enjoined. This position represents a middle ground between *Sinclair* and *New Orleans*.

Automatic court enforcement of arbitrators' desist orders would seem to ignore completely the Norris-LaGuardia Act and would be, as the majority stated in *Sinclair*, a repeal by implication of a very significant piece of legislation.⁶⁵ Such repeals are not favored in the law generally,⁶⁶ so, a fortiori, they become even less desirable in the case of a statute "deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction."⁶⁷ The Act was not only a negative reaction to excessive judicial injunction of strikes, but also a reaffirmation of the workingman's right to strike.⁶⁸ This policy has not been repudiated by Congress, and therefore would appear to be an important consideration for a court asked to enjoin a strike by enforcement of an arbitrator's desist order.

If the courts do ignore the policy behind the Norris-LaGuardia Act and view their orders simply as specific enforcement of a contract, the result, as noted, is equitable relief without traditional equity safeguards. Equity power in the form of injunction is historically an extraordinary remedy.⁶⁹ However, the labor arbitrator apparently does not view this power as such.⁷⁰ Typically his award takes the form of a mandatory injunction directing a party to do, or preventing him from carrying out, some specified future act.⁷¹ Thus, in arbitration, equitable relief is the rule, whereas in the courts it is the exception. Furthermore, an arbitrator, having injunctive power, faced with a strike in breach of a no-strike clause in a collective bargaining agreement which

⁶⁵ 370 U.S. at 196, 209-10.

⁶⁶ *Safe Harbor Water Power Corp. v. United States*, 37 F. Supp. 9, 11 (E.D. Pa. 1941); *Giles v. Dennison*, 15 Okla. 55, 62-63, 78 P. 174, 177 (1904).

⁶⁷ *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 203 (1962).

⁶⁸ [The individual worker] shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .
29 U.S.C. § 102 (1964).

⁶⁹ See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941) (dicta); *F. Frankfurter & N. Greene, The Labor Injunction* 47, 52 (1930).

⁷⁰ See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

⁷¹ See *Rice, A Paradox of Our National Labor Law*, 34 Marq. L. Rev. 233, 237 (1951).

ARBITRATION AND ANTI-INJUNCTION

includes a comprehensive grievance and arbitration provision, and viewing damages as inadequate relief, presumably *must* enter a desist order. If this arbitration award is subsequently confirmed by a court which, in the first place, considers its review as very limited, and secondly, regards its action as only an order of specific performance, then the result is clearly an abuse of equity power. This abuse lies in the absence of a considered balancing of "the employer's need for such an injunction against the harm that might be inflicted upon legitimate employee activity."⁷²

This incautious expansion of the equity court's power was illustrated in *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*⁷³ The court there was called upon to confirm a commercial arbitration award which, in conformity with the express powers given by the parties to the arbitrators, directed specific performance of a building contract. The court confirmed the award and ordered specific performance, stating

[a]nd here we do not even have an equity suit but a motion made as of right to confirm a completely valid arbitration award conforming in all respects to the express conferral of authority on the arbitrators and meeting all statutory requirements for confirmation.

. . . .

Arbitration is by consent and those who agree to arbitrate should be made to keep their solemn, written promises.⁷⁴

Protesting this result, the dissenting judge noted a recent case in that jurisdiction holding that courts would enforce specific performance of an employment contract "even though a court of equity would not compel a man to work for another or to continue another in his employment. . . ."⁷⁵ So, too, in the instant case the dissent felt that the decision "lends the enforcement machinery of the courts, to implement specific performance directed by arbitration that extends beyond any equitable relief which the courts have heretofore granted. . . ."⁷⁶ Thus, the court was permitting the arbitrator to order what the courts could not, and yet call upon the courts to enforce his decree.

A court which does not apply the Norris-LaGuardia Act literally to arbitration but does give effect to the policy behind that statute is doing no more than accommodating the Norris-LaGuardia Act with Section 301 of the Labor-Management Relations Act and its favored policy of arbitration. This position was urged by Mr. Justice Brennan in his dissenting opinion in *Sinclair*. His dissent rested on the premise that

the enjoining of a strike over an arbitrable grievance may be indispensable to the effective enforcement of an arbitration scheme in a collective agreement; thus the power to grant that injunctive rem-

⁷² *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 229 (1962) (dissenting opinion).

⁷³ 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).

⁷⁴ *Id.* at 138, 168 N.E.2d at 379, 202 N.Y.S.2d at 306-07.

⁷⁵ *Id.* at 139, 168 N.E.2d at 380, 202 N.Y.S.2d at 307.

⁷⁶ *Id.*

edy may be essential to the uncrippled performance of the Court's function under § 301.⁷⁷

For this reason, according to Justice Brennan, the conflict between the federal policy against enjoining strikes and the federal policy of fostering effective arbitration compels an accommodation of the Norris-LaGuardia Act and the Labor-Management Relations Act.

On the other hand, the majority in *Sinclair* read the Norris-LaGuardia Act prohibition as absolute, stating that "[a]n injunction against work stoppages, peaceful picketing or the nonfraudulent encouraging of those activities would, however, prohibit the precise kinds of conduct which subsections (a), (e) and (i) of § 4 of the Norris-LaGuardia Act unequivocally say cannot be prohibited."⁷⁸ In response, the dissent noted that in the past "the Court has recognized that Norris-LaGuardia does not invariably bar injunctive relief when necessary to achieve an important objective of some other statute in the pattern of labor laws,"⁷⁹ and cited three cases⁸⁰ brought under the Railway Labor Act.⁸¹ One of these, *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*,⁸² held that despite the Norris-LaGuardia Act, federal courts may enjoin strikes over disputes as to the interpretation of a collective bargaining agreement. The Court concluded that these strikes ignore the obligation imposed on the union by the Railway Labor Act to settle "minor disputes" by submission to the National Railroad Adjustment Board, rather than by self-help remedies.⁸³ The rationale for this conclusion was that establishment of this Board for the settlement of disputes had provided unions with a *reasonable alternative* to open economic warfare.⁸⁴ If a reasonable alternative to industrial strife is all that is needed to avoid the Norris-LaGuardia Act, argued Justice Brennan, then the statute should not apply where the employer's obligation to arbitrate is specifically enforceable. Arbitration would appear as a reasonable alternative; at least, the parties must have considered it as such or they would not have put it into the contract.

Justice Brennan, in addition, contended that the availability of the injunctive remedy in the arbitration setting is far more necessary to the accomplishment of the purposes of section 301 than it would be detrimental to those of the Norris-LaGuardia Act.⁸⁵ Since on a similar argument the Court had accommodated the Norris-LaGuardia Act and the Railway Labor Act in *Chicago River*, he felt it should now accommodate the Norris-LaGuardia Act and section 301. This resolution of the two conflicting policies, he reasoned, would promote the congressional intent behind both statutes because

⁷⁷ 370 U.S. at 216-17.

⁷⁸ *Id.* at 212.

⁷⁹ *Id.* at 217.

⁸⁰ *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515 (1937).

⁸¹ 45 U.S.C. § 151-88 (1964), as amended, 45 U.S.C. §§ 153, 154 (Supp. III, 1965-67).

⁸² 353 U.S. 30 (1957).

⁸³ *Id.* at 39-40.

⁸⁴ *Id.* at 41.

⁸⁵ 370 U.S. at 218.

[a]ccommodation requires only that the anti-injunction *policy* of Norris-LaGuardia not intrude into areas, not vital to its ends, where injunctive relief is vital to a purpose of § 301; it does not require unconditional surrender.⁸⁶ (Emphasis added.)

As this passage makes clear, the *policy* behind the Norris-LaGuardia Act should be upheld, even in those situations where accommodation is necessary. The courts should still consider the injunction an extraordinary remedy, and thus ensure the protection of equity safeguards. Thus, before issuing its order, the court must

consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.⁸⁷

It is submitted that this concern for the *policy* of the Norris-LaGuardia Act, and for the traditional requirements for the invocation of equity powers, is equally as important in the situation presented in *New Orleans*. No justification appears for the exercise by a court of its equity jurisdiction without the application of equity principles, and particularly so in an area where a strong congressional policy exists against injunction.

This accommodative approach, which would permit injunctions against strikes in some cases, but only after ordinary principles of equity are satisfied, recognizes that possibly the grievance and arbitration process cannot completely supplant economic warfare.⁸⁸ Furthermore, if the court views its enforcement of an arbitrator's desist order as discretionary, it will be able to appreciate that a particular situation may be better decided by the parties involved. Recognition would then be given to the uniqueness of the labor-management dispute where, unlike usual litigation, after the fact the parties must bind their wounds and work together. This middle ground also recognizes that in a particular situation restraining workingmen from striking may be futile, for, "[e]ven if the workmen obeyed the injunction, it would be possible and likely that they would perform their services in such a manner as would not promote the interests of the employers."⁸⁹ Given broad discretion to decide whether the injunction is appropriate, courts possess the alternatives of enjoining the strike or not, of awarding money damages, or, as the court did

⁸⁶ Id. at 225 (dissenting opinion).

⁸⁷ Id. at 228 (dissenting opinion).

⁸⁸ One commentator has suggested as much. He argues that a strike is more than a test of strength over a particular issue, noting the drama and excitement of a strike, the cohesive effect which it can have on union members, and the fact that it is a proving ground for union leaders. He concludes that "[a] strike substitute, if it is to be a genuine substitute, must therefore do more than resolve the issue in dispute; it must also accommodate some of the social and psychological pressures which are associated with industrial strife." R. Fleming, *The Labor Arbitration Process* 203 (1965).

⁸⁹ *Great N. Ry. v. Brosseau*, 286 F. 414, 421 (D.N.D. 1923).

in *Tanker Serv. Comm'n, Inc. v. International Organization of Masters*,⁹⁰ awarding money damages contingent upon the union's refusal to abide by the arbitrator's decision. In addition, this procedure will, hopefully, preserve and sustain the *policy* of Norris-LaGuardia and the traditional safeguards attached to equitable relief.

IV. EXTENSION OF *Sinclair*

The third alternative open to a court faced with the situation presented in *New Orleans* is outright rejection of the result reached in that case on the ground that the reasoning of *Sinclair* is equally as compelling here as in the situation where the injunction is sought prior to arbitration of the dispute.⁹¹ Since such a rejection of the *New Orleans* case would close the federal courts to actions for enforcement, management's efforts may focus on the state courts. A recent case in the District of Columbia Circuit, *United Electrical Workers v. NLRB*,⁹² illustrates one such attempt.

The International Brotherhood of Electrical Workers (IBEW) had represented the employees of Star Expansion Industries Corporation (management) from 1957 through 1963. In the following year, the United Electrical Radio and Machine Workers of America (UE) ousted IBEW in a close election and was subsequently certified. The management and the new bargaining agent, UE, met 38 times between March 23, 1964, and January 13, 1965, in efforts to negotiate a new contract. The three principal UE demands were: (1) a 20-cent per hour across-the-board wage increase; (2) a contract term of 2 years; and (3) with some modifications, the retention from the prior IBEW contract of union security, checkoff, grievance arbitration, and management rights clauses. Management, because of the narrow margin of UE's electoral victory, declined to grant union security or checkoff provisions. It also proposed a one-year contract instead of the suggested two-year pact, and new provisions for management rights, subcontractors, and grievance arbitration.⁹³

The grievance arbitration proposal submitted by the management banned all strikes and lockouts and called for arbitration of any dispute involving the interpretation or application of the contract. The clause further provided that the arbitrator could order a forbidden strike or lockout to cease and could seek judicial enforcement of this order in the state courts of New York.⁹⁴ To

⁹⁰ 269 F. Supp. 551 (E.D. Pa. 1967).

⁹¹ Even before *New Orleans* at least one court had already taken this position. Denying a request for an injunction, the court in *Marine Transp. Lines, Inc. v. Curran*, 65 L.R.R.M. 2095, 2097 (S.D.N.Y. 1967), said:

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

⁹² 409 F.2d 150, 70 L.R.R.M. 2529 (D.C. Cir. 1969).

⁹³ Id. at 151-54, 70 L.R.R.M. at 2529-32.

⁹⁴ Id. at 154, 70 L.R.R.M. at 2532.

insure the effectiveness of this last provision, the clause included a waiver by both parties of any right of removal to the federal courts.⁹⁵

The negotiations were marked by two strikes which apparently resulted from management's refusal of the UE's union security clause. The strikes added the problems of rehiring the discharged strikers and the strikers' vacation pay to the already difficult negotiations. By January the management and the UE had come to terms on the wage increase, but could not resolve their differences on the other issues. Negotiations were discontinued and no collective bargaining agreement was ever signed.⁹⁶

The UE brought a complaint before the National Labor Relations Board. The Board found the management guilty of certain violations of Sections 8(a)(1)⁹⁷ and (3)⁹⁸ of the National Labor Relations Act, but dismissed other portions of the complaint alleging section 8(a)(5)⁹⁹ violations. On appeal to the circuit court the issues were narrowed to the charges dismissed by the Board, specifically the alleged violations of section 8(a)(5) as well as other infractions of 8(a)(1) and (3).

In petitioning the court to review the NLRB order, the UE's central claim was that the management had violated section 8(a)(5) by bargaining to an impasse over the proposed arbitration provision. More specifically, the union contended that the provisions of management's arbitration proposal allowing for state court injunctions and requiring waiver of the right of removal were not mandatory bargaining subjects. The union argued further that these provisions were illegal and unenforceable, first, because they would withdraw jurisdiction from the federal courts in an area governed by federal law, and secondly, because the policy of the Norris-LaGuardia Act makes it inappropriate for state courts, as well as federal courts, to enjoin strikes.¹⁰⁰ Despite these contentions, the court denied the petition and held that provi-

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Section 8(a)(1) provides that

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . .

29 U.S.C. § 158(a)(1) (1964). Section 7, 29 U.S.C. § 157 (1964), states that

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

⁹⁸ Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U.S.C. § 158(a)(3) (1964). The Board found that the company's denial of vacation pay to the strikers was in violation of §§ 8(a)(1) and (3), and required it to be paid. The Board dismissed UE's contention that the company's stand on vacation pay converted what had begun as an economic strike into an unfair labor practice strike because the company's refusal to pay prolonged the strike. Also dismissed was UE's charge of an 8(a)(1) violation on the ground that the company had threatened employees for supporting the strike. 70 L.R.R.M. at 2530-31 n.4 & n.6.

⁹⁹ Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." 29 U.S.C. § 158(a)(5) (1964).

¹⁰⁰ 409 F.2d at 154-55, 70 L.R.R.M. at 2532.

sions granting the arbitrator injunctive power and authority to seek state court enforcement, along with a waiver by the parties of their rights of removal, are essentially part of the arbitration and no-strike proposals. As components of such proposals, they are mandatory bargaining subjects.¹⁰¹

In arriving at its decision the court noted that an employer can violate section 8(a)(5) by conditioning his agreement to a contract on acceptance of a company proposal not within the mandatory subjects of bargaining under section 8(d).¹⁰² Grievance arbitration and no-strike clauses, however, are mandatory subjects for bargaining. Furthermore, the federal policy in regard to labor law is to foster arbitration. As the Supreme Court indicated in *United Steelworkers v. Warrior & Gulf Navigation Co.*, "[c]omplete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes. . . ."¹⁰³ Therefore, management's provisions describing the specific manner in which the grievance arbitration and no-strike clause were to function were mandatory subjects of bargaining.

The UE relied on two cases to support its opposing position. The first of these, *Local 164, Painters v. NLRB*,¹⁰⁴ held that a union failed to bargain in good faith because it insisted to a point of impasse on a proposal which required an employer to give a performance bond. The *Electrical Workers* court distinguished this case on the ground that it had turned on a finding that a performance bond cannot be considered part of an arbitration scheme.¹⁰⁵ The court found it more difficult to distinguish the second case, *NLRB v. Dalton Tel. Co.*,¹⁰⁶ where the court held that a company could not make its acceptance of a contract conditional upon the union's registration under a state law so as to make the union an entity amenable to suit in the state court. By analogy, the decision would seem to be very close to the question at bar. However, the court noted that in *Dalton Telephone* the company's insistence on union registration was construed merely as a ploy to avoid reducing to writing an agreement to which the parties had already agreed. Furthermore, "the proposal in *Dalton Telephone* was again not a means to effectuate an arbitration clause, but simply a way to insure that the union could be sued for money damages in a state court."¹⁰⁷

The UE contended also that management had not bargained in good faith because their arbitration provisions could not be reconciled with national labor policy. In answering this argument the court emphasized that the question was limited to the management's good faith, not to their ability as legal

¹⁰¹ *Id.* at 156, 70 L.R.R.M. at 2533.

¹⁰² Section 8(d) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .

²⁹ U.S.C. § 158(d) (1964).

¹⁰³ 363 U.S. at 578 n.4.

¹⁰⁴ 293 F.2d 133, 135 (D.C. Cir.), cert. denied, 368 U.S. 824 (1961).

¹⁰⁵ 409 F.2d at 156-57, 70 L.R.R.M. at 2534.

¹⁰⁶ 187 F.2d 811, 812 (5th Cir.), cert. denied, 342 U.S. 824 (1951).

¹⁰⁷ 409 F.2d at 157, 70 L.R.R.M. at 2534.

prognosticators. Thus, the test of ultimate enforceability of the provisions was rejected as too speculative.¹⁰⁸ The court pointed out that at the time of the bargaining

the Company might have reasonably believed that (1) Sinclair would not be extended to the enforcement of an arbitrator's restraining order, (2) the Norris-LaGuardia prohibition against injunctions would not apply to the states, and (3) the federal courts probably did not have removal jurisdiction over actions brought in state courts for injunctive relief.¹⁰⁹

The court thus reserved decision on the validity and enforceability of the provisions. It noted in passing,¹¹⁰ however, that the Supreme Court had insured the right of removal in *Avco Corp. v. Machinists Aero Lodge 735*,¹¹¹ but had left open the question of enforcing an arbitrator's strike injunction by denial of certiorari in the *New Orleans* case. These decisions, it argued, proved only that legal speculation as to ultimate enforceability was an unreliable test of mandatory bargaining subjects. Rather, the issue was the management's good faith, and since no grounds existed for questioning good faith, the decision of the Board would stand.

The particular provisions in dispute in this case are noteworthy because of the novel powers which they grant the arbitrator. According to the decision of the Board,¹¹² under management's proposals the arbitrator would be authorized, upon telephone or telegram request by one side, to issue a temporary order directing the end of any violation of the no-strike, no-lockout clause. The usual procedure has required the arbitrator to hold a hearing to decide whether the union's action was a strike, and whether this strike breached the agreement, before issuance of the desist order. If a court were subsequently to enforce the arbitrator's temporary order, it would find it difficult to distinguish *Sinclair*, for just as in that case, the court would be enjoining a strike prior to final, binding arbitration. The court in *Electrical Workers* pointed out, however, that management

thought to differentiate *Sinclair* by lodging in the arbitrator, and not in itself, the power to decide when to seek judicial relief against the breach of the no-strike clause, thereby making it the neutral, and not a party to the labor dispute, who is the suitor for the injunction.¹¹³

It is difficult to understand how the arbitrator would have standing to sue for enforcement unless he has somehow been made a party to the agreement. Furthermore, if he has realistically been made a party to the contract, then it would seem to follow that he is also a party to the labor dispute. The

¹⁰⁸ *Id.* at 159, 70 L.R.R.M. at 2536.

¹⁰⁹ *Id.*, 70 L.R.R.M. at 2535.

¹¹⁰ *Id.*

¹¹¹ 390 U.S. 557 (1968). The Court held that an action brought in a state court to enjoin a breach of a no-strike clause in a collective bargaining agreement in an industry affecting interstate commerce is removable to a federal district court.

¹¹² 164 N.L.R.B. No. 95, 65 L.R.R.M. 1127 (1967).

¹¹³ 409 F.2d at 158, 70 L.R.R.M. at 2535.

validity, however, of this provision, as well as that providing for waiver of the right of removal, is, as the court stated, an open question. If the waiver of removal were to be held valid the problem rendered academic by *Avco* would be resurrected, that is, whether the Norris-LaGuardia Act is substantive and therefore part of the federal labor law which state courts must administer in labor disputes.

In *Charles Dowd Box Co. v. Courtney*,¹¹⁴ the Supreme Court ruled that federal and state courts have concurrent jurisdiction over disputes involving the breach of a collective bargaining agreement. In the same year, the Court stated in *Local 174, Teamsters v. Lucas Flour Co.*¹¹⁵ that in deciding collective bargaining agreement suits the state courts must apply federal substantive law in order to insure uniformity throughout the judicial system. The question remains, however, whether a state court, in a suit to enjoin a strike, must recognize the prohibitions of the Norris-LaGuardia Act.

A number of state courts have disavowed the Norris-LaGuardia Act and granted injunctions against strikes.¹¹⁶ The best known of these decisions is that of Justice Traynor in *McCarroll v. District Council of Carpenters*,¹¹⁷ where the California Supreme Court held that the Norris-LaGuardia Act does not bar a state court from enjoining strikes in breach of collective bargaining agreements. Other state courts have rejected Justice Traynor's approach and adhered to the prohibitions of the Norris-LaGuardia Act.¹¹⁸ In *Independent Oil Workers v. Socony Mobil Oil Co.*,¹¹⁹ the New Jersey Superior Court, denying an injunction, declared that "[t]he Norris-LaGuardia Act is certainly part of the federal labor policy and as such must get primary consideration in any suit for an injunction under section 301 [of the Labor-Management Relations Act]."¹²⁰ This view appears to transcend the question whether the Norris-LaGuardia Act is substantive and seemingly accepts the premise that even if the Act is jurisdictional, it expresses a federal policy in this area requiring recognition by state courts.

These two divergent state court opinions illustrate one of the problems raised by acceptance of the waiver of the right of removal suggested in *Electrical Workers*. The difficulty is, of course, the lack of uniformity which will arise in the area of federal labor law.¹²¹ Beyond this, however, lies a more subtle problem. State courts which have enjoined strikes in the past have avoided the Norris-LaGuardia Act essentially by grounding their decisions on

¹¹⁴ 368 U.S. 502 (1962).

¹¹⁵ 369 U.S. 95 (1962).

¹¹⁶ See, e.g., *Radio Corp. of America v. Local 780, Theatrical Stage Employees*, 160 So. 2d 150 (Fla. App.), cert. denied, 169 So. 2d 390 (Fla. 1964); *C.D. Perry & Sons, Inc. v. Robilotto*, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963), aff'd, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (1965); *Shaw Elec. Co. v. Electrical Workers Local 98*, 418 Pa. 1, 208 A.2d 709 (1965).

¹¹⁷ 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958).

¹¹⁸ See, e.g., *Independent Oil Workers v. Socony Mobil Oil Co.*, 85 N.J. Super. 453, 205 A.2d 78 (Ch. 1964); *Tidewater Express Lines v. Freight Drivers Local 557*, 230 Md. 450, 187 A.2d 685 (1963).

¹¹⁹ 85 N.J. Super. 453, 205 A.2d 78 (Ch. 1964).

¹²⁰ Id. at 460, 205 A.2d at 82.

¹²¹ "More important, the subject matter of § 301(a) is 'peculiarly one that calls for uniform law.'" *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

inherent jurisdiction over the matter as a question of pure contract law.¹²² This view of collective bargaining disputes as contract questions bodes ill for the future. As seen in the discussion of *New Orleans*, such an approach leads to injunctive relief without the traditional equity safeguards. Consequently, the route for circumvention of the Norris-LaGuardia Act suggested by the *Electrical Workers* case is equally as offensive as the approach of the *New Orleans* court. The undesirability of these alternatives seems to strengthen the case for the accommodative middle ground of Justice Brennan.

V. CONCLUSION

The crux of the apparent conflict between the Norris-LaGuardia Act and the federal policy favoring arbitration is whether enforcement of arbitrators' desist orders is necessary for effective arbitration. In *Sinclair* the Court avoided the question by the postulate that regardless of the need for enforcement, Congress has decided that such enforcement is impermissible. This conclusion should be re-examined. The dissent of Justice Brennan in *Sinclair* indicates that the absolutist approach to the Norris-LaGuardia Act taken by the majority was inconsistent with past decisions of the Court which accommodated the Act with the Railway Labor Act. If there has been an accommodation of the Norris-LaGuardia Act in the past, the congressional intent behind the Norris-LaGuardia Act, as well as the meaning of congressional inactivity since its enactment, is not as explicit or fixed as the majority in *Sinclair* has suggested. It can be argued that Congress is leaving to the courts the resolution of the conflict between the Norris-LaGuardia Act and the policy favoring arbitration. If this is so, then the Supreme Court should formulate a solution, as the *New Orleans* court attempted to do. The *New Orleans* case provides additional motivation for the Court to act. For just as the literal interpretation of *Sinclair* is deceptively simple, so also is *New Orleans'* rule of case, enjoining a strike whenever the arbitrator orders it. The middle ground between *Sinclair* and *New Orleans* emerges as the firmest because, recognizing that enforcement may be necessary and permissible in some cases, it preserves to the courts sufficient review of the arbitration to insure that the traditional equity safeguards are met before it orders this extraordinary relief.

The *New Orleans* case, however, and particularly the collective bargaining agreement involved there, serves to point up the sophistication of the arbitration system and collective bargaining agreements. Labor and management had there established a responsive, viable private judicial system lacking only the power of enforcement (which would seem necessary in only the rare case).¹²³ To preserve the level of mature self-government attained thus far by labor and management, judicial enforcement of arbitrators' decrees may be necessary, provided of course that equity safeguards are considered.

The *Electrical Workers* case also evidences the sophistication of modern collective bargaining agreements. However, as is apparent from the provisions involved, management is still attempting to reach its long-standing goal of

¹²² See Spelfogel, Enforcement of No-Strike Clause by Injunction, Damage Actions and Discipline, 7 B.C. Ind. & Com. L. Rev. 239, 242 (1966).

¹²³ F. Elkouri, How Arbitration Works 10 (1952); Rice, A Paradox of Our National Labor Law, 34 Marq. L. Rev. 233, 237 (1951).

no strikes. By ruling that management's proposals were mandatory bargaining subjects, the Board and the court in the *Electrical Workers* case indicated that they consider management's desire reasonable. The provisions submitted by management, particularly the waiver of the right of removal, amount to all but a waiver of the Norris-LaGuardia Act. If a union were to accept these provisions it would seem to be acknowledging that a union does not need the protection of the Norris-LaGuardia Act if it has the "reasonable alternative" of arbitration and the traditional protection of an equity court's self-restraint. At the risk of reading too much into the decision, it is submitted that both the Board and the court were admitting that in a situation where the union is protected by an agreement to arbitrate, the union does not need the shelter of the Norris-LaGuardia Act.

Because the result of each leads to injunctive relief against strikes in breach of collective bargaining agreements, both the *Electrical Workers* and the *New Orleans* cases may well cause a re-evaluation of the no-strike pledge. A real, enforceable surrender of the right to strike will introduce a new bargaining area which should indicate the value of a no-strike clause to labor and management, and whether arbitration is an acceptable alternative to the protection of the Norris-LaGuardia Act.

A second contract provision which may be subject to special scrutiny is that conferring injunctive power on the arbitrator. In its decision, the *New Orleans* court relied heavily on this explicit grant of authority. In the past unions have been protected by the bar of the Norris-LaGuardia Act and by the fact that arbitrators' orders are not self-enforcing, but decisions such as *New Orleans*, which lead to automatic court enforcement, may cause unions to have second thoughts about the conferral of such authority in the future. In addition, by emphasis of the express power of the arbitrator to issue a desist order the *New Orleans* decision has left open the question whether this power can be inferred from the agreement. Arguably it should be implied, since in every other situation the arbitrator is given free rein to fashion an appropriate remedy. Such a conclusion seems justified on the ground that arbitration is remedial, not merely fact-finding, in nature, and many situations would seem to require a desist order to remedy the breach effectively. Very possibly the Supreme Court is waiting for such a case where the arbitrator has enjoined the violation of a no-strike clause on the basis of his general remedial powers before it decides whether arbitrators' injunctions can be enforced. Until the Court does resolve this question, and the concomitant issue whether express power is necessary, the law is settled in at least one circuit that if they originate from expressly given injunctive power, arbitrators' desist orders are enforceable.

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