

ENFORCEMENT OF NO-STRIKE CLAUSE BY INJUNCTION, DAMAGE ACTIONS AND DISCIPLINE

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I. INTRODUCTION

The general purpose of a collective bargaining agreement is to stabilize the bargaining relationship and to preserve industrial peace. As we all know, the agreement is all too often a one-sided affair with no-strike and arbitration provisions being the union's sole material commitment. This discussion is intended to review the possible remedies presently available to employers upon a union's breach of its contractual no-strike commitment.

The potential remedies of subcontracting and rescission of the contract for a material breach are not of sufficient practical value and will not be discussed. The counterpart economic right of an employer to lock out or lay off his employees has recently been upheld by the Supreme Court in the *Brown*¹ and *American Shipbuilding*² cases, but in most situations neither of these remedies is particularly useful and they serve only to escalate the dispute without also serving as a deterrent to future unauthorized strike action.

Section 8(b)(3) of the National Labor Relations Act and the obligation of a union to "bargain in good faith" would appear to provide unfair labor practice remedies including perhaps the seeking of injunctive relief by the National Labor Relations Board under the discretionary language of section 10(j) of the act. However, the Supreme Court in the 1960 *Insurance Agents* case³ held that slow-downs and other forms of economic harrassment, while unprotected, are not per se unlawful. Then the Board itself in its 1961 *Lumber and Sawmill Workers* decision,⁴ which relied heavily on the *Insurance Agents* case, nullified this approach, expressly ruling that a strike in breach of a no-strike clause does not constitute a refusal to bargain. Parenthetically, it should be noted that the Board recently (1) has found a union in violation of section 8(b)(3) when it strikes to induce a midterm contract modification without first serving written notice

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¹ NLRB v. Brown Food Store, 380 U.S. 278 (1965).

² American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965).

³ NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

⁴ Lumber & Sawmill Workers, 130 N.L.R.B. 235 (1961).

on the company and federal and state mediation agencies as required by section 8(d) of the act,⁵ and injunctive relief may be available under section 10(j) in this situation; and (2) has relieved the employer of his *duty* to bargain for as long as the union's breach continues.⁶ Thus NLRB remedies, while not too significant, may not be altogether foreclosed.

The balance of this paper will deal with the other, more practical alternative remedies against the union's breach of its no-strike contract such as court and arbitral injunctions, damage actions and the disciplining of employees. It must be noted, however, that under the Supreme Court's decision in *Drake Bakeries*,⁷ an employer, whose agreement with the union contains a broad arbitration clause, must submit the question of damages for breach of the no-strike clause to the arbitration process rather than to the courts. Thus both discipline and damage action remedies (which will be discussed below) will probably involve an arbitrator's consideration of such factors as employer provocation, union good faith, mitigation of damages and the other many vagaries of the arbitration process. Further, if money damages awarded months or years later were adequate recompense to an employer whose business was crippled by a strike, employers presumably would not seek injunctions, nor would courts grant them, since equitable relief is predicated upon the lack of adequate legal redress. As Mr. Justice Brennan stated in his *Sinclair* dissent, "[an injunction] alone can effectively guard the plaintiff's right."⁸

II. JUDICIAL ENFORCEMENT

A. Court Injunctions

Ever since the Supreme Court's *Lincoln Mills* decision,⁹ Section 301 of the Labor Management Relations Act¹⁰ has served as the

⁵ Sheet Metal Workers, 153 N.L.R.B. No. 50 (June 25, 1965).

⁶ International Shoe Corp., 152 N.L.R.B. No. 74 (May 19, 1965).

⁷ *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, 370 U.S. 254 (1962).

⁸ *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 219 (1962) (Brennan, J., dissenting), quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 773 (1961). In the course of his dissenting opinion, Mr. Justice Brennan returned several times to this point, emphasizing 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 remedy may be essential to the uncrippled performance of the Court's function under § 301." *Id.* at 216-17. And, "to hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." *Id.* at 217, n.2, quoting *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962).

⁹ *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

¹⁰ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

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foundation for a body of "federal common law" fashioned by the federal courts with regard to contractual obligations arising under collective bargaining agreements. However, neither the act nor high court judicial decisions before 1962 dealt with the nature of the remedies available to an aggrieved party to a labor contract. In the 1962 *Charles Dowd Box Co.* case,¹¹ the Supreme Court ruled that state courts were not deprived of jurisdiction over disputes involving the breach of a collective bargaining agreement and that federal and state courts have concurrent jurisdiction in this area. In the same year the Supreme Court, in the *Lucas Flour* case,¹² stated that while both federal and state courts have jurisdiction over such cases, federal substantive law must be applied to insure uniformity throughout the judicial system.

Thus the state of the law in 1962 regarding judicial enforcement of collective bargaining agreements may be summarized as follows: Section 301 of the Taft-Hartley Act grants to the federal courts authority to write a body of substantive law to enforce collective bargaining agreements and to decide cases arising thereunder; the states retain concurrent jurisdiction to decide such cases; in so doing, however, the states must apply the federal substantive law.

Then, in *Sinclair Ref. Co. v. Atkinson*,¹³ the Supreme Court ruled that the Norris-LaGuardia Act¹⁴ prohibited a federal court from granting injunctive relief against a strike by a union in breach of a collective bargaining agreement. As a result of the *Sinclair* decision, a basic conflict (as outlined by Mr. Justice Brennan dissenting in *Sinclair*) has arisen between the *Lincoln Mills* concept, contemplating the development of a uniform national labor policy on the one hand, and the *Steelworker* trilogy concept of a more effective enforcement of collective bargaining agreements on the other.¹⁵

It is well known that the no-strike clause is normally about the only meaningful promise made by a union in the entire contract. If the Supreme Court's *Sinclair* decision is applicable to the state courts and precludes their granting injunctive relief, there is little purpose, from the employer's point of view, in obtaining the no-strike contract provisions.

The key questions in light of *Sinclair* and the various conflicting state and federal decisions are:

¹¹ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

¹² *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962).

¹³ 370 U.S. 195 (1962).

¹⁴ 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1964).

¹⁵ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

(1) Whether state courts may still enjoin labor union activities which violate a no-strike provision in a collective bargaining agreement; and

(2) If state courts may so enjoin, can a labor union remove such actions to the proper federal district court where injunctive relief is unavailable due to the restrictions of the Norris-LaGuardia Act.

It should be observed that, prior to *Sinclair*, the courts of at least ten states had granted injunctions against strikes in breach of collective bargaining agreements. These decisions were based essentially on the grounds that (1) such disputes concerned pure contract law involving the states' fundamental and inherent equity jurisdiction, and (2) the principal purpose of Taft-Hartley was to encourage the negotiation and effective enforcement of collective bargaining agreements.¹⁶ Perhaps the best pre-*Sinclair* pronouncement on the subject was Justice Traynor's widely cited majority opinion in *McCarroll v. Los Angeles County Dist. Council of Carpenters*,¹⁷ which enunciated the principles that formed the foundation for Mr. Justice Brennan's *Sinclair* dissent¹⁸ and provided the basis for the Pennsylvania Supreme Court's 1965 *Shaw* decision.¹⁹

In *McCarroll*, the employer brought an action for damages and an injunction against a strike in breach of a collective agreement. The union, relying *inter alia* upon the "pre-emption" doctrine, urged (1) that exclusive jurisdiction was vested in the NLRB inasmuch as its actions arguably constituted unfair labor practices, and (2) that, alternatively, exclusive jurisdiction had been vested in the federal courts by virtue of Section 301 of Taft-Hartley and *Lincoln Mills*.

Justice Traynor, in language foreshadowing to a substantial degree several later United States Supreme Court decisions,²⁰ ruled that (1)

¹⁶ *Lion Oil Co. v. Marsh*, 220 Ark. 678, 249 S.W.2d 569 (1952); *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958); *Armour & Co. v. United Packinghouse Workers*, Sup. Ct. No. 38795, Dist. Ct. Minn., June 7, 1962; *Anchor Motor Freight N.Y. Corp. v. Local 445*, 12 Misc. 2d 757, 171 N.Y.S.2d 506 (Sup. Ct.), aff'd, 5 App. Div. 2d 899, 171 N.Y.S.2d 511 (1958); *General Elec. Co. v. International Union, UAW*, 93 Ohio App. 139, 108 N.E.2d 211 (1952), aff'd, 158 Ohio St. 555, 110 N.E.2d 424 (1953); *Weisfield's, Inc. v. Haeckel*, 28 L.R.R.M. 2055 (1951); *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n*, 382 Pa. 326, 115 A.2d 733, cert. denied, 350 U.S. 843 (1955); *General Bldg. Contractors' Ass'n v. Local 542*, 370 Pa. 73, 87 A.2d 250 (1952); *International Longshoremen's Ass'n v. Galveston Maritime Ass'n*, 50 L.R.R.M. 2172 (1962); *Associated Gen. Contractors of America, Inc. v. Trout*, 59 Wash. 2d 90, 366 P.2d 16 (1961).

¹⁷ *Supra* note 16.

¹⁸ *Sinclair Ref. Co. v. Atkinson*, *supra* note 13, at 215.

¹⁹ *Shaw Elec. Co. v. International Bhd. of Elec. Workers*, 58 L.R.R.M. 2852 (March 22, 1965).

²⁰ *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); *Sinclair Ref. Co. v. Atkinson*,

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the breach of contract did not per se constitute an unfair labor practice; (2) neither the federal courts nor the NLRB possessed exclusive jurisdiction; and (3) section 301, rather than excluding state court action, provided an additional forum for such disputes. Furthermore, he stated that although state courts were required to apply the federal substantive law in enforcing federal rights in this area, they were not necessarily limited to federal remedies. In regard to the availability of equitable relief, Justice Traynor concluded that Congress must take the state courts as it finds them.²¹

Following Justice Traynor's lead, and despite *Sinclair*, state courts, ever jealous of their jurisdiction and prerogatives, have been reluctant to abdicate the traditional state injunctive relief remedies merely because the United States Supreme Court refused to allow the federal courts this privilege. Thus, in eleven cases since *Sinclair*, courts in five states (California, Florida, Illinois, New York and Pennsylvania) have enjoined picketing in breach of the contract, declining to follow the federal rule.²² Especially noteworthy is the following brief excerpt from a recent opinion of New York Supreme Court Justice Supple:²³

It is now settled that section 807 Labor Law [New York Anti-Injunction Law] is not violated when an injunction issues against a violation of a no-strike clause in a contract. . . .

The federal preemption argument also has no application to the fact situation here presented [citing *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261] . . . [even though] in the instant matter the employer has filed unfair labor practice charges with the National Labor Relations Board [which are still pending] . . . (Emphasis added.)

supra note 13; *Teamsters Local v. Lucas Flour Co.*, supra note 12; *Charles Dowd Box Co. v. Courtney*, supra note 11; *NLRB v. Insurance Agents' Union*, supra note 3.

²¹ *McCarroll v. Los Angeles County Dist. Council of Carpenters*, supra note 16, at 62, 315 P.2d at 331.

²² *United Concrete Pipe Corp. v. Local 89*, 58 L.R.R.M. 2172 (1964); *RCA v. Local 780*, 160 So. 2d 150 (Fla. App.), cert. denied, 169 So. 2d 390 (Fla. 1964), cert. denied, 380 U.S. 985 (1965); *Gilmour v. Local 74*, 54 L.R.R.M. 2457 (Ill. 1963); *C.D. Perry & Son, 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); *Employers Ass'n v. Operating Eng'rs*, 60 L.R.R.M. 2006 (April 21, 1965); *Lithograph Corp. v. Lithographers' Union*, 59 L.R.R.M. 2678 (June 28, 1965); *Sperry Gyroscope Co. v. International Union of Elec. Workers*, Civil No. 7373/65, N.Y. Sup. Ct., May 20, 1965; *Stroehmann Bros. v. Doe*, Index No. 26254, Spec. Term Erie County, N.Y., July 27, 1965; *Price Erecting Co. v. Robilotto*, Cal. No. 224, Spec. Term Albany County, N.Y., Oct. 23, 1964; *Dairymen's League Co-op. Ass'n v. Conrad*, 33 Misc. 2d 914, 228 N.Y.S.2d 420 (Sup. Ct.), aff'd, 16 App. Div. 2d 869 (1962); *Shaw Elec. Co. v. International Bhd. of Elec. Workers*, supra note 19.

²³ *Employers Ass'n v. Operating Eng'rs*, supra note 22, at 2007.

Analysis of these various opinions discloses the inherent reluctance of the state courts to relinquish traditional powers in this area and the extent to which the courts have drawn upon the *McCarroll* rationale and upon Justice Brennan's dissent in *Sinclair*. But the following passages from the majority opinion of the Pennsylvania Supreme Court's *Shaw* decision perhaps best sum up what may be described as the "majority view" today:²⁴

The opinion in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S. Ct. 519, 49 LRRM 2619 (1962), reinforces our conclusion that Congress did not intend to limit the jurisdiction of state courts by passage of Section 301 [Labor Management Relations Act, 1947]. The Supreme Court recognized that Congress was completely familiar with the laws of the various states as well as the availability of relief, the alternate means of recovery, and the scope of remedies with respect to suits involving bargaining contracts. The Court noted that the "clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations".

Nor do the policies underlying the Supreme Court's decision in . . . *Lucas Flour Co.*, *supra*, require the anti-injunction restriction of the Norris-LaGuardia Act to be read as a limitation on state proceedings. In holding that Section 301 mandates the use of substantive principles of federal labor law, the Supreme Court emphasized the importance of uniformity in the interpretation of contractual provisions as the rationale for its conclusion. However, different meanings with respect to the same contractual terms would not result from the exercise of the historic state judicial power to grant injunctive remedies

It is true that the [Norris-LaGuardia] Act expresses a congressional policy against injunctions, but only injunctions granted by federal courts. Congressional enactment of Section 301, without amendment of the Norris-LaGuardia Act, with Congress fully aware of state court remedies, strongly indicates reaffirmance of existing federal labor policies which limit the injunctive jurisdiction of federal courts, but which do not attempt to limit that of state courts.

²⁴ *Shaw Elec. Co. v. International Bhd. of Elec. Workers*, *supra* note 19 at 2855-56.

There is, however, contrary authority. In a 1962 decision, *Commercial Can Corp. v. Local 810*, the New Jersey Superior Court, in a thorough opinion in which the state and federal authorities, writers and law reviews are scanned and carefully evaluated, decided that a strike contrary to the terms of a labor contract was a labor dispute which could not be enjoined under the New Jersey statute forbidding injunctions in cases involving labor disputes.²⁵

More recently, in 1964, the same court again denied an injunction against a breach of a collective bargaining agreement on the ground that "in light of the preceding statements of the United States Supreme Court [in *Lucas Flour*], this Court believes that it must either apply the Norris-LaGuardia Act . . . directly . . . or at least interpret our own Anti-Injunction Act in light of the Norris-LaGuardia Act so that it is not incompatible with it" and "The 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 [i.e., Labor Management Relations Act, 1947, § 301]."²⁶

The Maryland Court of Appeals, relying heavily on the New Jersey rule as enunciated in the *Commercial Can* case, decided in accordance with the New Jersey and the federal rule that the Maryland Anti-Injunction Act prohibited the granting of an injunction against a strike in breach of a no-strike clause in the union contract.²⁷

Who is right? Or in a more realistic vein, who is a better prophet of United States Supreme Court decisions—the Pennsylvania and California Supreme Courts, together with a handful of lower court judges in Texas, Washington, Illinois, Ohio, Arkansas, Oregon, New York, Florida and Minnesota, or New Jersey trial judges and the Maryland Court of Appeals? Until the Supreme Court resolves this problem which it expressly left open in the *Dowd Box* case, the labor practitioner—especially one whose clients do business in more than one state—must (1) be familiar with the rules as they are applied in the various state jurisdictions and (2) consider the problem of removal to the federal courts of a petition filed in a particular state court.

B. *The Right to Remove to Federal Courts*

Justice Brennan saw clearly in his dissent in *Sinclair* that, if unions lost the argument that the rule in *Sinclair* applied to state

²⁵ *Commercial Can Corp. v. Local 810*, Steel Fabricators & Warehousemen, 61 N.J. Super. 369, 160 A.2d 855 (1960).

²⁶ *Independent Oil Workers v. Socony Mobil Oil Co.*, 85 N.J. Super. 453, 458, 205 A.2d 78, 82 (1964). See also *Lamena v. Camden Local 396*, 80 N.J. Super. 203, 193 A.2d 285 (1963).

²⁷ *Tidewater Express Lines v. Freight Drivers Local*, 230 Md. 450, 187 A.2d 685 (1963).

courts, their attorneys would immediately attempt to remove the breach of contract suit to the proper federal courts.

The federal removal statute reads in pertinent part as follows:²⁸

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Accordingly, if a case is within the original jurisdiction of the federal district court, the defendants may remove the case from a state to a federal court. Suits for an alleged violation of a collective bargaining agreement are within this jurisdiction by virtue of Section 301 of the Taft-Hartley Act. Obviously, because of the *Sinclair* decision, at least until its applicability to state court injunction powers is resolved, a union, as the defendant in a state court injunction suit for violation of a no-strike clause, could petition for removal to the federal district court under this section. The theory is that the action is one within the federal court's original jurisdiction under the breach of contract provisions of section 301. Whether removal should be allowed depends ultimately upon the meaning given the term "jurisdiction" within Section 4 of the Norris-LaGuardia Act. The question is whether the act divests courts of subject matter jurisdiction, that is, the capacity to take cognizance of or to entertain the suit; or whether the act merely allows the court to hear the dispute, but strips it of the power to grant injunctive relief.

It should be noted that Section 2 of the Norris-LaGuardia Act states that the act is concerned with the jurisdiction of the courts of the United States and contains limitations upon jurisdiction of the federal courts.²⁹ The first sentence of the anti-injunction provision in section 4 begins:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction

²⁸ Removal Act of 1948, 62 Stat. 937 (1948), 28 U.S.C. §§ 1441(a), (c) (1964).

²⁹ 47 Stat. 70 (1932), 29 U.S.C. § 102 (1964).

in any case involving or growing out of any labor dispute. . . .
(Emphasis supplied.)³⁰

Section 13(d) of the act provides:

The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.⁸¹

There are many cases which indicate that the Norris-LaGuardia Act refers only to the courts of the United States,³² and at least one Supreme Court Justice has stated that the act "explicitly applied only to the authority of the United States courts to issue a restraining order or injunction. All other remedies in federal courts and all remedies in state courts remain available."³³

Be that as it may, federal courts which have passed on the point show a split on the removal question almost as sharp as the disagreement among courts as to whether the Norris-LaGuardia Act, through *Sinclair*, deprives state courts of the right to grant injunctive relief against breaches of a labor contract.

Prior to *Sinclair*, federal courts in at least seven states had denied removal of state court suits for breach of contract strike injunctions and remanded to the state courts for further proceedings.³⁴ In addition, the Sixth Circuit appears to have concluded that this type of action was not one over which federal courts possessed original jurisdiction, and it, too, favored remand.³⁵

³⁰ 47 Stat. 70 (1932), 29 U.S.C. § 104 (1964).

⁸¹ 47 Stat. 73 (1932), 29 U.S.C. § 113 (1964).

³² See, e.g., *Sinclair Ref. Co. v. Atkinson*, supra note 13; *Marine Cooks v. Panama S.S. Co.*, 362 U.S. 365 (1960); *Brotherhood of R.R. Trainmen v. Toledo, Peoria & W. R.R.*, 321 U.S. 50 (1944); *United States v. Hutcheson*, 312 U.S. 219, 231 (1941); *Milk Wagon Drivers v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91 (1940).

³³ *Frankfurter & Greene, The Labor Injunction* 220 (1929).

³⁴ *Armour & Co. v. United Packinghouse Workers*, Civil No. 3-62-129, D. Minn., June 13, 1962; *Swift & Co. v. United Packinghouse Workers*, 177 F. Supp. 511 (D. Colo. 1959); *Pennsylvania Garment Mfg. Ass'n v. Newman*, Civil No. 23164, E.D. Pa., Sept. 4, 1957; *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n*, Civil No. 18747, E.D. Pa., March 24, 1955; *Associated Tel. Co. v. Communications Workers*, 114 F. Supp. 334 (S.D. Cal. 1953); *Richman Bros. v. Amalgamated Clothing Workers*, 114 F. Supp. 185, rehearing denied, 116 F. Supp. 800 (N.D. Ohio 1953), connected case, 211 F.2d 449 (6th Cir. 1954), aff'd, 348 U.S. 511 (1955); *Castle & Cooke Terminals, Inc. v. Local 137*, 110 F. Supp. 247 (D. Hawaii 1953); *American Optical Co. v. Andert*, 108 F. Supp. 252 (W.D. Mo. 1952); *General Elec. Co. v. Local Lodge 729*, Civil No. 2921, S.D. Ohio, June 25, 1952.

³⁵ *Direct Transit Lines v. Starr*, 219 F.2d 699 (6th Cir. 1955). The court of appeals concluded that the federal district court had no jurisdiction and should have remanded to the state courts. However, it declined to issue a writ of mandamus directing remand, holding that the district court's refusal was not a final order but would be reviewable upon appeal appropriately taken from a final judgment.

Since *Sinclair*, federal courts in two of those states have reaffirmed lack of federal jurisdiction³⁶ and have been joined in ordering the proceedings remanded to state courts by federal district courts in three other states,³⁷ and by the Court of Appeals for the Third Circuit in *American Dredging Co. v. Local 25, Int'l Operating Eng'rs*.³⁸ On the other hand, federal courts in at least four states have, both prior to and since *Sinclair*, permitted removal, rejected motions for remand, and then denied injunctive relief pursuant to *Norris-LaGuardia*.³⁹

To fully appreciate the nature and extent of this cleavage one need only study the situation in New York, where the United States District Court for the Eastern District (covering, among other areas, Brooklyn and Long Island) has in several cases granted removal, denied remand, and then dismissed the action on the ground that *Norris-LaGuardia* precluded it from granting the requested injunctive relief.⁴⁰ The Southern District has in at least one instance followed *American Dredging*, contrary to the Eastern District, and remanded to the New York state courts.⁴¹ However, in a Southern District decision reported October 19, 1965, Judge Levet denied remand of a union's petition to enjoin an employer lockout, allegedly in breach of contract, and then, applying *Norris-LaGuardia* to the removed proceeding, denied the injunction.⁴² Thus, whether injunctive relief is available in New

³⁶ *Merchants Refrigerating Co. of Cal. v. Warehouse Union*, 213 F. Supp. 177 (N.D. Cal. 1963); *Kroger Co. v. Retail Clerks*, 56 L.R.R.M. 2893 (1964); *Pullman, Inc., Trailmobile Div. v. International Union, UAW*, Civil No. 5247, S.D. Ohio, Jan. 24, 1963.

³⁷ *Sperry Gyroscope Co. v. International Union of Elec. Workers*, Civil No. 65-C-1444, May 18, 1965, remanded, Civil No. 65-C-1528, S.D.N.Y., May 26, 1965; *Acme Mkts., Inc. v. Retail Store Employees*, 231 F. Supp. 566 (D. Md. 1964) (also involved violence during picketing); *Local 227 v. Singer Co.*, Civil No. 10467, D. Conn., June 13, 1964.

³⁸ *American Dredging Co. v. Local 25, Int'l Operating Eng'rs*, 338 F.2d 837 (3d Cir. 1964), cert. denied, 380 U.S. 935 (1965).

³⁹ *Publishers' Ass'n v. Pressmen's Union*, 60 L.R.R.M. 2229 (Sept. 29, 1965); *Food Fair Stores, Inc. v. Retail Clerks Council*, 229 F. Supp. 123 (E.D. Pa. 1964) (effectively overruled by the Third Circuit in *American Dredging Co. v. Local 25, Int'l Operating Eng'rs*, supra note 38); *Lott, Inc. v. Hoisting & Portable Eng'rs*, 222 F. Supp. 993 (S.D. Tex. 1963) (action included prayer for damages thereby giving court discretion to assert jurisdiction or to remand pursuant to federal removal statute, 62 Stat. 937 (1948), 28 U.S.C. § 1441(c) (1964)); *Crestwood Dairy, Inc. v. Kelley*, 222 F. Supp. 614 (E.D.N.Y. 1963); *Tri-Boro Bagel Co. v. Bakery Drivers*, 54 L.R.R.M. 2317 (1963); *National Dairy Prods. Corp. v. Heffernan*, 195 F. Supp. 153 (E.D.N.Y. 1961) (action included prayer for damages); *Pocahontas Terminal Corp. v. Portland Bldg. & Const. Trade Council*, 93 F. Supp. 217 (D. Me. 1950).

⁴⁰ *Crestwood Dairy, Inc. v. Kelley*, supra note 39; *Tri-Boro Bagel Co. v. Bakery Drivers*, supra note 39; *National Dairy Prods. Corp. v. Heffernan*, supra note 39.

⁴¹ *Sperry Gyroscope Co. v. International Union of Elec. Workers*, supra note 37.

⁴² *Publishers' Ass'n v. Pressmen's Union*, supra note 39. The employer's success here in the fairly unusual role of removing party may jeopardize an employer's chances of urging lack of federal jurisdiction and remand in the more common instance where a union is in breach of contract and seeks removal.

York appears to depend upon the particular local court in which the petition is filed and to which federal court removal may lie. Moreover, at least in the Southern District (which covers, among other areas, Manhattan and the Bronx) the availability of injunctive relief may rest upon the designation of the particular federal judge who will hear the matter.

It must be noted that only one case, *American Dredging Co. v. Local 25, Int'l Operating Eng'rs*,⁴³ has reached the United States Court of Appeals since *Sinclair*. In that case, the Third Circuit came down squarely against removal. The court cited a 1926 United States Supreme Court decision which defined the word "jurisdiction" as the "power to entertain the suit, consider the merits and render a binding decision thereon. . . ." (Emphasis added.)⁴⁴ In ordering remand in *American Dredging*, the court pointed out that federal statutes must be construed and applied so as to avoid absurd results and stated:

To say then that a District Court has *subject matter jurisdiction* of a cause of action, so as to authorize it to *take cognizance* of it under the provisions of the Removal Statute, when it does not in the first place have jurisdiction to entertain and decide it upon its merits, is to give sanction to an exercise in futility.⁴⁵

By denying the petition for certiorari in *American Dredging* and thereby foregoing at least one excellent opportunity to resolve the confusion engendered by *Sinclair*, the Supreme Court has intensified the rift among courts and has contributed to the practice of "forum shopping."

Moreover, in addition to the selection of the proper forum to obtain the advantage of the state court's clear right to grant an injunction,⁴⁶ timing becomes of critical import because the injunction may be rendered ineffectual by a successful removal to the federal courts. For example, assuming that removal would be finally granted and remand denied, a state court could grant a temporary restraining order within one to four days following the strike in a proceeding for an order to show cause. Strikers, under the temporary restraining order, could be ordered back to work and union officials ordered to take appropriate action to conform to the order. By the time the union removed and argument could be heard on the remand issue (several days to several weeks), the strike could be effectively broken.

⁴³ Supra note 38.

⁴⁴ *General Inv. Co. v. New York Cent. R.R.*, 271 U.S. 228, 230 (1926).

⁴⁵ *American Dredging Co. v. Local 25, Int'l Operating Eng'rs*, supra note 38, at 842.

⁴⁶ See notes 16 & 22 supra and accompanying text.

Furthermore, under the federal removal statute, removal by the union will not in and of itself render invalid any prior order issued in the state proceedings. Such orders, including injunctions, remain in effect until dissolved or modified by the federal district court.⁴⁷ For this reason, the restraining order could well serve an employer's interest by putting an immediate end to the strike regardless of any eventual adverse disposition on removal or on the merits.

III. ARBITRATOR'S INJUNCTION

In addition to court and NLRB proceedings, an arbitrator's cease and desist order provides a third possible source of injunctive relief. In *Ruppert v. Egelhofer*,⁴⁸ the New York Court of Appeals held that when an arbitrator enjoins a union from violating a no-strike clause, no ground exists for invalidating the cease and desist order if it is found that the particular bargaining agreement contemplated the inclusion of that order in an arbitrator's award. The only federal case on this issue, *New Orleans S.S. Ass'n*,⁴⁹ supports the view taken by the New York high court. The reasoning in both cases is that a grant of the injunctive power to arbitrators by the parties to a collective bargaining agreement is voluntary and, presumably, was bargained for and desired by them; there would be an obvious inequity in allowing a union to escape its voluntary agreements. Thus, inasmuch 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 a federal court from enforcing the arbitrator's order since the parties themselves, and not the court, has sanctioned the remedy.

However, both of the above decisions pre-date *Sinclair*, and whether they declare the present status of federal and state court attitudes toward enforcement of an arbitrator's cease and desist orders is uncertain. In such a situation, although a court does not issue an injunction in the traditional sense, but merely confirms an award of the arbitrator by ordering compliance with it, the technical distinction is a narrow one, and such enforcement is tantamount to issuing the injunction.

The following is a survey of several recent arbitrators' awards seemingly enjoining a strike in breach of a no-strike contract:

⁴⁷ Removal Act of 1948, 62 Stat. 940 (1948), 28 U.S.C. § 1450 (1964).

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

⁴⁹ *New Orleans S.S. Ass'n v. General Longshore Workers*, 49 L.R.R.M. 2941 (1962).

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	Date of Violation	Date of Award
(1) <i>Liebman Breweries, Inc.</i> , 35 Lab. Arb. 384 (1960) Expedited arbitration clause	Sept. 2	Sept. 20
(2) <i>Macy's New York</i> , 40 Lab. Arb. 954 (1962) Standard arbitration clause	July 16	July 24
(3) <i>General American Transp. Corp.</i> , 41 Lab. Arb. 214 (1963) Standard arbitration clause but a special submission agreement was entered with the union on Sept. 16, the day of the strike	Sept. 16	Sept. 17
(4) <i>United Parcel Service, Inc.</i> , 41 Lab. Arb. 560 (1963) Hearing could be called by arbitrator designated in the agreement upon 24 hours no- tice, or less in an emergency	Jan. 22	Jan. 24
(5) <i>Ford Motor Co.</i> , 41 Lab. Arb. 619 (1963) Special submission provided in collective bargaining agree- ment	(Date of strike not given)	
(6) <i>New York Shipping Ass'n</i> , 41 Lab. Arb. 809 (1963) Pursuant to grievance ma- chinery of General Cargo agreement. Not clear from case whether or not this pro- vides for expedited arbitra- tion. ⁵⁰	Oct. 23	Nov. 1

⁵⁰ As in *New Orleans S.S. Ass'n v. General Longshore Workers*, *ibid.*, and *Ruppert v. Egelhofer*, *supra* note 48, a court confirmed the arbitrator's award. However, neither this latter case nor *Sinclair Ref. Co. v. Atkinson*, *supra* note 13, were discussed; and it appears that the court did not treat the award as an injunction. In *re N.Y. Shipping Ass'n, Inc.*, 54 L.R.R.M. 2680 (1963).

A further caveat on the New York court's decision in *Ruppert* is in order. Although the contract in that case did not specifically grant the power to issue an injunction to an arbitrator, it contained, in addition to the regular arbitration provisions which governed normal disputes, a special clause requiring speedy disposition of those grievances which resulted in stoppages or slow-downs. This enabled the court to conclude that, according to *that particular agreement*, the parties contemplated the inclusion of an injunction in the award. Therefore, the power to issue an injunction had been impliedly conferred.⁵¹

It is necessary, therefore, to compare closely the grievance-arbitration provisions of the particular contract under consideration with the provisions in the *Ruppert* agreement and those in the agreements involved in the other cases set forth above. If the contract has a "sense of expedition" and gives complete authority to the arbitrator to determine what steps are to be taken to remedy the violation, it may reasonably provide a basis from which the courts as well as the arbitrator may infer the power to issue a cease and desist order to enjoin a strike in order to preserve the issues for the regular grievance procedure.

IV. ACTION FOR DAMAGE

Although not as effective as injunctive relief, damages are an available remedy for a union's breach of a no-strike clause. The fact that such a violation may also constitute an unfair labor practice does not deprive the courts of jurisdiction under Section 301 of the Taft-Hartley Act.⁵²

Normally, however, the employer relinquishes his right to bring a damage suit for violation of contract until the arbitration process has been exhausted. Reading the *Steelworkers* trilogy,⁵³ *Drake Bakeries*⁵⁴ and the *Sinclair*⁵⁵ 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. Thus, where there is a broad and comprehensive arbitration clause, e.g., "questions of interpretation or application of any provision of this agreement" or "all matters of controversy or dispute arising out of this Agreement or affecting relations between the parties," the employer cannot institute its action directly in court, as the court is likely to grant the union's

⁵¹ *Ruppert v. Egelhofer*, supra note 48.

⁵² *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955); *United Steelworkers v. New Park Mining Co.*, 273 F.2d 350, 352 (10th Cir. 1959); *Aaronson Bros. Paper Corp. v. Fishko*, 144 N.Y.S.2d 643 (Sup. Ct.), aff'd, 286 App. Div. 1009, 146 N.Y.S.2d 661 (1955).

⁵³ Cases cited note 15 supra.

⁵⁴ *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, supra note 7.

⁵⁵ *Sinclair Ref. Co. v. Atkinson*, supra note 13.

request for a stay of the damage suit pending arbitration.⁵⁶ The union's breach of the no-strike clause does not constitute a repudiation or waiver of arbitration.⁵⁷ The amount of damages is a permissible matter for arbitrators to decide.⁵⁸ And, if the arbitrator decides he has authority to award damages, recourse to the courts on the damage action will be foreclosed except for proceedings to modify, vacate or enforce the arbitration award.

In determining the elements of damages in judicial awards, courts have included the following: wages paid to idle employees, including overtime to make up for lost hours;⁵⁹ loss of profits, plus actual cost of operation or of standing by;⁶⁰ foreseeable consequential damages after the termination of the strike upon proof that considerable time would be necessary to reattract lost customers;⁶¹ overhead expenses;⁶² compensatory damages in general;⁶³ and the going concern value of a company forced out of business by the strike, including good will.⁶⁴ Moreover, courts require only a reasonable estimate of damages rather than mathematical accuracy.⁶⁵ Courts are reluctant, though, to award punitive damages,⁶⁶ or attorney's fees and court costs,⁶⁷ and generally recognize the employer's obligation to attempt to mitigate damages.⁶⁸

These limitations are relatively insignificant, however, when contrasted with those imposed by arbitrators. In one case, although the arbitrator awarded damages for loss of profits incurred during the strike period, he ruled that consequential damages sought for the period after the strike were speculative despite evidence presented by the employer of abnormal decline in sales during that period.⁶⁹ In another

⁵⁶ See, e.g., *Scalzitti v. International Union of Operating Eng'rs*, Daily Lab. Rep., October 13, 1965 (7th Cir. 1965); *Isbrandtsen Co. v. McKay*, 45 CCH Lab. Cas. ¶ 50,529 (N.Y. Sup. Ct. 1962).

⁵⁷ *Local 721 v. Needham Packing Co.*, 376 U.S. 247 (1964); *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, supra note 7.

⁵⁸ *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942); *Hiller v. Liquor Salesmen's Union*, 226 F. Supp. 161 (S.D.N.Y. 1964); *Marchant v. Mead-Morrison*, 252 N.Y. 284 (1929).

⁵⁹ *Alcoa S.S. Co. v. Conerford*, 25 L.R.R.M. 2199 (1949).

⁶⁰ *W.L. Mead, Inc. v. International Bhd. of Teamsters*, 129 F. Supp. 313 (D. Mass. 1955), aff'd, 230 F.2d 576 (1st Cir. 1956).

⁶¹ *Ibid.*

⁶² *Structural Steel & Ornamental Iron Ass'n v. Shopmens Local*, 172 F. Supp. 354 (D.N.J. 1959).

⁶³ *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962).

⁶⁴ *Plumbers Union v. Dillion*, 255 F.2d 820 (9th Cir. 1958).

⁶⁵ *International Union of Operating Eng'rs v. Bay City Erection Co.*, 300 F.2d 270 (5th Cir. 1962); *United Elec. Workers v. Oliver Corp.*, 205 F.2d 376 (8th Cir. 1953).

⁶⁶ *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, supra note 63.

⁶⁷ *New Park Mining Co. v. United Steelworkers*, 288 F.2d 225 (10th Cir. 1961); *Upholsterers' Union v. Star Upholstery*, 46 L.R.R.M. 2069 (1960).

⁶⁸ *Alcoa S.S. Co. v. Conerford*, supra note 59.

⁶⁹ *Regent Quality Furniture, Inc.*, 32 Lab. Arb. 553 (1959).

case, actual damages were awarded for an employer's expenses incurred in paying personnel for standing by, payments on equipment rendered unproductive by the strike, and overtime pay for make-up work. However, the arbitrator ruled that any loss of good will was too speculative to be considered an appropriate element of damages.⁷⁰ Similarly, arbitrators have refused to award damages for loss of good will generally, unless the employer could prove a sufficient loss of future earnings resulting specifically from the union's breach.⁷¹

Although declining to include punitive damages in his award, one arbitrator has included, among the elements of damages awarded, extra costs incurred when the union refused to operate presses at speeds ordered by the employer. These included payroll costs for the rest of the shift incurred when personnel were sent home, pressroom costs for printing elsewhere and extra mailing costs.⁷²

More typical of arbitrator's awards, however, are the *Brynmore Press*⁷³ and the *Publishers' Ass'n*⁷⁴ cases. In *Brynmore*, the arbitrator considered as possible items of damage the salaries of office and managerial staff, depreciation of fixed assets, utilities, insurance, taxes, cost of fringe benefits, increased storage and equipment, and loss of good will; but he limited the total award to \$500 in view of the employer's failure to invoke the arbitration process until four weeks after the strike commenced, which constituted a failure to "mitigate its damages."⁷⁵ In the *Publishers'* case, after weighing the evidence and the various elements of damages introduced, the arbitrator concluded:

. . . the Union, however, is the responsible party and a substantial amount of money damages must be assessed against it. However, in light of the efforts of the officials of the Union this amount will be less than the direct damages suffered by the Publisher.⁷⁶

Synthesis of the above cases indicates 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.

⁷⁰ American Pipe & Const. Co., 43 Lab. Arb. 1126 (1964).

⁷¹ Oregonian Publishing Co., 33 Lab. Arb. 574 (1959).

⁷² Publishers' Ass'n, 38 Lab. Arb. 943 (1962); Publishers' Ass'n, 37 Lab. Arb. 509 (1961).

⁷³ Brynmore Press, Inc., 7 Lab. Arb. 648 (1947).

⁷⁴ Publishers' Ass'n, 42 Lab. Arb. 95 (1964).

⁷⁵ Brynmore Press, Inc., *supra* note 73.

⁷⁶ Publishers' Ass'n, *supra* note 74, at 95.

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Moreover, in some instances of clear cut breaches of the "no-strike" commitment, arbitrators have shied away from awarding damages altogether on the ground that the contract grievance machinery did not expressly provide for such damages,⁷⁷ or that the employer, though warning the breaching union of possible "disciplinary and legal" action, neglected to specifically warn of a damage action,⁷⁸ or that the employer had failed to establish clearly the union's instigation or encouragement of the contract breach.⁷⁹

These decisions not only demonstrate the desirability of judicial rather than arbitral consideration of the damage issue, but also emphasize the need for extreme care in drafting contract language.

V. DISCIPLINE AND DISCHARGE OF EMPLOYEES

Although the employer has the right to discipline and even to discharge employees who strike in breach of a contract, the employer must ordinarily justify the kind and severity of the disciplinary action before an arbitrator. The arbitration decisions reviewed indicate that most arbitrators will uphold discipline meted out to employees involved in a breach of a no-strike clause, and most appear willing to sustain more severe penalties for the leaders of the strike or slowdown. However, when the penalty is discharge, many arbitrators, as in discharge cases generally, find an extenuating circumstance and declare the penalty too severe. This, of course, creates potential liability for back-pay. Occasionally, an arbitrator will find that penalties were imposed in an unequal or discriminatory manner. Again, back pay may be involved in such a decision.

A survey of twenty-one recent published awards in which arbitrators have been asked to rule on the propriety of disciplinary action taken as a result of a violation of a no-strike clause reveals the following: (1) In seven cases discharges were sustained; (2) in ten cases layoff or other disciplinary action was sustained; (3) in two cases workers who had been discharged were reinstated without back pay. In summary, nineteen of the twenty-one cases recognize the employer's right to administer discipline where employees strike in violation of their contract. However, in several of the cases, the arbitrators moderated the degree of discipline imposed.⁸⁰

⁷⁷ High Standard Mfg. Corp., 38 Lab. Arb. 509 (1961).

⁷⁸ Ibid.

⁷⁹ Merchants Frozen Food Div., 34 Lab. Arb. 607 (1960).

⁸⁰ Barbetta Restaurant, 42 Lab. Arb. 951 (1964) (leader discharge proper, but discharge of other employees reduced to layoff without pay); Fruchauf Trailer Co., 42 Lab. Arb. 474 (1964) (three one-week suspensions and three thirty-day suspensions upheld); American Transp. Corp., 42 Lab. Arb. 142 (1964) (discharge of ten leaders justified); Mack Trucks, Inc., 41 Lab. Arb. 1240 (1964) (discipline upheld); Ford Motor Co., 41 Lab. Arb. 609 (1963) (discharge of eleven leaders upheld but three

Criteria which arbitrators have used to modify, uphold or set aside employer disciplinary action generally include the quality of treatment of strikers depending upon such circumstances as responsibility for and leadership of the strike; the type of strike; union and company history; condonation of strike activity through reinstatement; and the effect of the discipline on further occurrences of a similar nature, as well as on union and employee morale, plant harmony and future labor-management relations.⁸¹

From the above, one may conclude that employee discipline has been consistently upheld in varying degrees by arbitrators, absent unusual mitigating factors or failure of proof. Theoretically, therefore, it can be a useful post-strike remedy. However, as a practical matter, the strike settlement often includes the employer's stipulation to drop disciplinary proceedings against employees, as well as damage suits or other formal proceedings.

Consequently, several fairly recent cases are particularly interesting to employers in that the contracts which were breached limited the arbitrator's power to second guess the degree of discipline by express language falling into three categories: (1) Language specifying, as a remedy, discipline or discharge in the absolute discretion of the employer, without recourse to the grievance machinery;⁸² (2) language limiting the issues subject to the arbitration process to the facts of whether an employee actually participated in the work stoppage, and whether the employer assessed different penalties for the same class of acts;⁸³ or (3) a combination of both.⁸⁴

others reinstated without back pay); *H. O. Canfield Co.*, 40 Lab. Arb. 1209 (1963) (nine employees discharged); *Lehigh Portland Cement Co.*, 40 Lab. Arb. 994 (1963) (one week disciplinary suspension of seventy employees justified); *United States Steel Corp.*, 40 Lab. Arb. 598 (1963) (most suspensions upheld).

⁸¹ *Pittsburgh Steel Co.*, 34 Lab. Arb. 598 (1960).

⁸² *Yale & Towne Mfg. Co.*, 41 Lab. Arb. 1100 (1963). The contract in that case provided that:

Article XVI Discipline and Discharge

"16.1 Any employee who engages in a strike, concerted stoppage or concerted slowdown, unless permitted by Section 27.0 shall be subject to disciplinary action or discharge without recourse to the Grievance and Arbitration provisions of this Agreement provided however that if the Union alleges that [sic] an employee so disciplined or discharged did not participate in such strike, stoppage or slowdown, that fact only shall be subject to the Grievance and Arbitration procedures of this Agreement."

Id. at 1101.

⁸³ *Mack Trucks, Inc.*, *supra* note 80. The pertinent language is as follows: "Section 158

The Union will not authorize or support, nor will it condone participation by any of its members or any employees represented by it, directly or indirectly, whether individually or in concert with others, in any strike, sitdown, slowdown, sympathy strike, concerted refusal to work overtime, or any other kind of work stoppage or restriction of the operations or business of the Company. . . . "Section 160

VI. SUMMARY AND CONCLUSIONS

The decision of the Supreme Court in *Sinclair* left in its wake a continuing conflict—the conflict between the encouragement of the collective bargaining and arbitration processes and the desirability of a uniform national labor policy. Although this conflict may yet be resolved by judicial inventiveness or congressional mandate, either of which could provide a measure of accommodation between Taft-Hartley and Norris-LaGuardia, currently, according to *Sinclair*, there is no accommodation.

Under these circumstances it is essential that the management attorney

(1) be familiar with the availability of injunctive relief in the various local and state courts, as well as the federal court policy on "removal" in those localities; and

(2) attempt to obtain favorable and carefully drawn contract arbitration language

Any employee encouraging or participating in the aforesaid conduct shall be subject to appropriate disciplinary penalty, including discharge. In the event that the Company does discipline an employee for encouraging or participating in such conduct, the only question subject to arbitration shall be:

(a) The fact of that employee's leadership or participation in such conduct (with the understanding that leadership is subject to equal or greater penalty than participation).

(b) Any lack of uniformity in penalties assessed for the same class of acts."

Ibid.

⁸⁴ Fruehauf Trailer Co., *supra* note 80. The arbitrator's power was limited by a clause which stated:

Article VII—Strikes and Lockouts

(26) It is further agreed that in all cases of an unauthorized strike, slowdown in productions, walkout, or any unauthorized cessation of work, that the Union shall not be liable for damage resulting from such unauthorized acts of any employee. While the Union shall immediately undertake every reasonable means to induce such employees to return to their jobs during such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Company during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of discipline short of discharge, and such employees shall not be entitled to nor have any recourse to any other provisions of this Agreement except as hereinafter provided. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Company will have the sole and complete right to immediately discharge any employee participating in any unauthorized strike, slowdown, walkout, or any other cessation of work, and such employee shall not be entitled to nor have recourse to any other provisions of this Agreement except as hereinafter provided.

(27) Any employee disciplined or discharged under the terms of this Article shall have the right to file a grievance on the following issues only, and such grievance shall be subject to the Grievance Procedure (sic) in accordance with Article VI hereof.

(a) That the Company was discriminatory or capricious.

(b) That, in fact, the employee did not participate in such unauthorized action.

Id. at 475-76.

(a) to obtain the benefits of the "quickie" arbitration injunction procedure begotten by the *Ruppert* decision;

(b) to insure judicial rather than arbitral determination of the measure of strike damages; and

(c) to limit the arbitrator's power to modify disciplinary action against strikers; and

(3) support in every way possible legislative efforts to provide for judicial injunctive relief against strikes in breach of contract.