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## Arbitration as a Remedy in Labor Disputes

William F. Powers\*

**L**ABOR ARBITRATION is a proceeding presided over by one or more individuals, selected by the parties, for the determination of a labor dispute arising under a collective bargaining agreement between the employer and a labor organization, acting as representative of the employee.<sup>1</sup> The arbitration process purports to be a system of industrial "... self government created by and confined to the parties..."<sup>2</sup> "... in lieu of a judicial proceeding."<sup>3</sup> The object of arbitration is the final disposition of the dispute in a non-technical, less expensive and more expeditious manner, by persons having expertise in labor management relations.<sup>4</sup>

Labor arbitration should not be categorized as a substitute for litigation.<sup>5</sup> Labor arbitration is a device which "[S]ubstitutes the judg-

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<sup>1</sup> Trotta, *Labor Arbitration*, 32 (1961); Braun, *Labor Disputes and Their Settlement*, 149 (1955); CCH Lab. L. Rep. § 57,001, at 81011.

<sup>2</sup> Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, at 1016 (1955). The Supreme Court rendered approval of the arbitration process "as the heart of industrial self government": *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L. Ed. 2d 1409, 46 L.R.R.M. 2416 (1930); Congress, by passage of the Taft-Hartley Act (Labor Management Relations Act) § 203(d), 61 Stat. 153 (1947), 29 U.S.C. 173(d) demonstrated its intent to favor arbitration as a method of settling industrial disputes

[F]inal adjustment by a method agreed upon by the parties . . . is the most desired method for settlement of grievance disputes arising over application or interpretation of an existing collective bargaining agreement.

<sup>3</sup> 5 Am. Jur. 2d *Arbitration and Award* § 1, 519; Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959). The arbitration process can be viewed as a private proceeding designed by the parties for the purpose of serving their requirements. But, pragmatically, the arbitration system is acquiring more of the judicial trappings and procedural requirements, which the system sought to circumvent; Fleming, *The Labor Arbitration Process: 1943-1963*, 52 Ky. L.J. 817 (1964).

In *Goldberg*, A Supreme Court Justice Looks at Arbitration, 20 Arb. J. 13 (1965), Justice Goldberg recognized that the criticism of the arbitration process was partially justified and warned the supporters of this system to guard against its resembling the "tortuous course of litigation." Stephen Vladeck, lecture, Seminar in Labor Arbitration, New York University Graduate School, Dec. 2, 1968 stated:

"The more the courts compel arbitration to resemble the procedure of the courts, the less effective the arbitration process will become." Professor Vladeck, on Dec. 16, 1968, stated that, "The parties have created their own forum with their own rules in order to resolve a dispute arising during the life of the collective contract concerning the application or interpretation of such contract." Thus, "arbitration process is a child of the parties and [as such] must articulate their intent. If the parties keep to their agreement, that arbitration is to be a private proceeding between themselves, then that is what it will be—private." But, "as soon as one of the parties seek review of the proceedings, then the privateness has been lost."

<sup>4</sup> Trotta, *supra* note 1, at 33; *Goldberg*, *supra* note 3, see generally.

<sup>5</sup> *Goldberg*, *supra* note 3, at 14.

ment of a third party for the use of economic force.”<sup>6</sup> In 1957 the United States Supreme Court, in *Textile Workers v. Lincoln Mills of Alabama*,<sup>7</sup> judicially accepted the arbitration of labor disputes as being within the scope of the national labor policy. The substitution of peaceful procedures for economic force in a labor dispute in order to “promote industrial peace”<sup>8</sup> was encouraged by the court.

The arbitrator of labor disputes is “[P]art of the system of self-government created and confined to the parties. He serves their pleasure only to administer the rules established by their collective agreement.”<sup>9</sup> The arbitrator is created by the parties for their own purposes and the parties themselves are the source of the arbitrator’s power, through the labor contract.<sup>10</sup> He cannot “innovate” or impose upon the parties his own “social or economic philosophy.”<sup>11</sup> “An arbitrator is chosen to determine whether there has been a violation of the contractual agreement. Usually, though not always, violation of the agreement is followed by some kind of remedial order.”<sup>12</sup>

Arbitrators are of two distinct types: temporary and permanent. The permanent arbitrator is an individual selected for the length of the collective bargaining agreement or some other specific period of time. The temporary or “*ad hoc*” arbitrator is usually employed by the parties for hearing specific disputes.<sup>13</sup>

The Federal Courts did not possess the power to enforce agreements to arbitrate labor disputes until Congress passed the Labor Management Relations Act (Taft-Hartley Act) in 1947.<sup>14</sup> Congressional intent favoring the voluntary arbitration of labor disputes is proclaimed in Sec. 203

<sup>6</sup> *Id.* at 14.

<sup>7</sup> 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957).

<sup>8</sup> *Id.* at 454; see also Fleming, Arbitrators and The Remedy Power, 48 Va. L. Rev. 1199 (1962); *Drake Bakeries v. Local 50, Bakery Workers*, 370 U.S. 254, 263, 82 S. Ct. 1346, 8 L. Ed. 2d 474, 50 L.R.R.M. 2440 (1962), the court stressed that the best method to settle labor disputes is one that is agreed to by the parties.

<sup>9</sup> Shulman, *supra* note 2, at 1024.

<sup>10</sup> M. Beatty, Labor Management Arbitration Manual, at 109 (1960); Proceedings of the 13th Annual Meeting of the Nat’l Academy of Arbitrators Jan. 27-29th (1960), see I. Bernstein’s discussion at 49-50. This commentator is of the opinion that arbitrators are of two types, “strict constructionists” whereby his sole power is derived from the contract, and “broad constructionists” who attempt to fashion an award that will both be within the contractual intent and still provide equitable relief. For a discussion of the broad constructionist position, see generally E. Stein, Remedies in Labor Arbitration, in Proceedings of the 13th Annual Meeting of the Nat’l Academy of Arbitrators 1960 (published by B.N.A.), at 45, Professor Stein is of the opinion that an arbitrator’s powers “should equal” those powers available to a court of equity and “that the arbitrator ought to be empowered to direct whatever is necessary to right the situation” before him.

<sup>11</sup> Beatty, *supra* note 10, at 109.

<sup>12</sup> Fleming, *supra* note 8, at 1222.

<sup>13</sup> CCH Lab. L. Rep., Union Contracts Arbitration § 57,040, 81,043-047.

<sup>14</sup> 61 Stat. 136, 29 U.S.C. § 141 et seq., hereinafter cited as L.M.R.A.

(d) of L.M.R.A.<sup>15</sup> Federal courts were granted jurisdiction over actions to enforce agreements to arbitrate by Sec. 301 (a) of the L.M.R.A.<sup>16</sup> The Supreme Court held in the *Lincoln Mills* case<sup>17</sup> that agreements to arbitrate were specifically enforceable in a federal forum and that Sec. 301 granted the federal courts authority to fashion federal substantive law consistent with the national labor policy of substituting peaceful methods for disruptive economic pressures in the settlement of labor disputes.<sup>18</sup>

In light of this federal policy favoring the enforcement of agreements to arbitrate labor disputes the question of what issues are arbitrable arises. The *Lincoln Mills* decision favoring arbitration as the method that best effectuates the federal labor policy has been extended by a series of cases known as the *Steelworkers Trilogy*<sup>19</sup> to cases arising out of Sec. 301 of the L.M.R.A. Section 301 requires federal courts: (a) to fashion substantive law for enforcement of collective bargaining agreements and (b) to afford a means by which agreements to arbitrate could be enforced by the federal courts. Prior to the *Steelworkers Trilogy*, the federal courts held that the questions of arbitrability and the arbitrators remedy power were questions of law for the court and not for the arbitrator to decide.

In the first case the United States Supreme Court in *Steelworkers v. Warrior Gulf Navigation* stated that Sec. 301 of the L.M.R.A. "assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate."<sup>20</sup> The Court reasoned that a party cannot be forced to arbitrate a dispute, which he has not agreed by contract to submit to arbitration. All other disputes between the parties, not specifically excluded,<sup>21</sup> are within the arbitration provision and as such are questions "for the arbiter, not for the court."<sup>22</sup> "Doubts [as to

<sup>15</sup> 29 U.S.C. § 173(d) (1947).

<sup>16</sup> 61 Stat. 156 (1947); 29 U.S.C. § 185(a) (1947):

Suits for violation of contracts between an employer and a labor organization . . . in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

<sup>17</sup> *Textile Workers v. Lincoln Mills*, *supra* note 7, at 457,

Federal interpretation of the federal law will govern not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

<sup>18</sup> *Id.* at 455.

<sup>19</sup> *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L. Ed. 2d 1403, 46 L.R.R.M. 2414 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *op. cit. supra* note 2; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424, 46 L.R.R.M. 2423 (1960).

<sup>20</sup> 363 U.S. 574, at 582.

<sup>21</sup> See discussion of submission and stipulation agreements, *infra*, note 37.

<sup>22</sup> *Supra* note 20, at 585.

whether the dispute is arbitrable] should be resolved in favor of coverage.”<sup>23</sup> Courts should not deny an order to arbitrate the dispute unless they can say “with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”<sup>24</sup>

*Steelworkers v. American Manufacturing* held that where “[t]he parties have agreed to submit all questions of contract interpretation to the arbitrator,” the court is “confined to ascertaining whether the . . . claim . . . on its face is governed by the contract.”<sup>25</sup> The parties have bargained for the arbitrator’s interpretation and not the courts, thus, the courts are restricted from looking into the merits of the dispute. The standard arbitration clause makes every grievance arbitrable which alleges a breach of the collective contract. Since courts cannot reject the contractual basis of the claim as being frivolous without evaluating the merits or substantive basis of the dispute, the court in doing so “usurps a function which . . . is entrusted to the arbitration tribunal.”<sup>26</sup>

Judicial inquiry pursuant to Sec. 301 is confined to whether a collective bargaining agreement exists, whether the agreement contains an arbitration clause, and whether the parties agree in the clause to arbitrate the dispute at issue.<sup>27</sup> Any other inquiry would be inconsistent with the peaceful settlement of labor disputes through grievance arbitration.

A continuing problem arises when the arbitration clause is more restrictive than the standard clause. The courts then must construe the contractual language that limits the promise to arbitrate. The courts in determining arbitrability of a dispute must exercise caution so they do not encroach upon the “merits” of the grievance in determining whether the particular issue is within the limiting contractual language.<sup>28</sup>

## State vs. Federal Jurisdiction

The next question is whether Sec. 301 pre-empts state court jurisdiction in actions seeking enforcement of the arbitration agreement. In *Dowd Box Co. v. Courtney*,<sup>29</sup> the Supreme Court held that suits based

<sup>23</sup> *Id.* at 583.

<sup>24</sup> *Id.* at 582-3.

<sup>25</sup> 363 U.S. 564, at 567-8.

<sup>26</sup> *Id.* at 569.

<sup>27</sup> Strutz, Arbitrators and their Remedy Power, in Proceedings of the 16th Annual Meeting of the National Academy of Arbitrators § 4 (M. Kalk, ed. 1963).

<sup>28</sup> Lesnick, Arbitration as a Limit of the Discretion of Management, Union and N.L.R.B., N.Y.U. 18th Conf. on Lab. See also, Telephone Co. v. Communications Workers, 51 L.R.R.M. 2405 (1962).

<sup>29</sup> 368 U.S. 502, 507, 82 S. Ct. 519, 7 L. Ed. 2d 483, 46 L.R.R.M. 2619 (1962).

State courts can exercise concurrent jurisdiction with the federal courts in cases arising under federal law where state jurisdiction is not excluded by express provisions of the federal statute or by incompatibility in its exercise arising from the nature of the particular case . . . Exclusive federal jurisdiction over cases arising under federal law has been the exception and not the rule.

on Sec. 301 may be brought in state as well as federal courts. The Supreme Court further held in *Local 174, Teamsters Union v. Lucus Flour Co.*,<sup>30</sup> that state courts must apply federal substantive law in an area covered by the federal labor law. Thus local law must give way to the principles of federal labor law unless it is compatible with the purpose of Sec. 301.<sup>31</sup>

After the issue of arbitrability has affirmatively been decided any procedural questions arising from the dispute which relate to the determination of the dispute should be left to the arbitrator. Thus, the Supreme Court held in *John Wiley & Sons v. Livingston*<sup>32</sup> that "procedural arbitrability" rests with the arbitrator and not the courts. The reasoning of the court was that most labor disputes "cannot be broken down so easily into their 'substantive' and 'procedural' aspects."<sup>33</sup> The court's role apparently ends once it determines that the substantive dispute is arbitrable. Procedural disagreements therefore are not regarded "as separate disputes but as aspects of the dispute which called the grievance procedure into play."<sup>34</sup>

The Supreme Court in *Steelworkers v. Enterprise Wheel* stated that the arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies."<sup>35</sup> The courts will deny enforcement of the award when the arbitrator's award is not within the framework of the contract.<sup>36</sup>

The parties can extend or limit the remedy powers of the arbitrator through the bargaining agreement.<sup>37</sup> Thus the stipulation agreement<sup>38</sup> can be used by the parties to resolve the arbitrator's authority to award remedial relief where the collective bargaining contract does not refer

<sup>30</sup> 369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593, 49 L.R.R.M. 2717 (1962).

<sup>31</sup> *Id.* at 104. See also, *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P. 2d 322 (1957), *cert. denied*, 355 U.S. 932, 41 L.R.R.M. 2431 (1958).

<sup>32</sup> 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964).

<sup>33</sup> *Id.* at 556.

<sup>34</sup> *Id.* at 559. For discussion of procedural arbitrability in detail see Note, 73 Yale L.J. 1459 (1964).

<sup>35</sup> *Supra* note 19, at 597; 363 U.S. 593, at 597.

<sup>36</sup> *Id.*

<sup>37</sup> *Torrington Co. v. Metal Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966), 62 L.R.R.M. 2495; Stein, *supra* note 10, at 48.

Commentators many times refer to the submission and the stipulation agreements as being one and the same. This is a technical error in definition. But, *cf.*, Vladeck, lecture (Nov. 4, 1968) quoted here generally. A submission is merely a statement of the issue. The stipulation is an agreement between the parties as to the specific questions to be resolved by the arbitrator. The stipulation limits the arbitrator's authority to hear only those questions. The stipulation thus modifies the collective agreement for that particular case.

<sup>38</sup> See discussion, *supra* note 37.

to remedies. If the parties agree on a limitation or circumscription of the arbitrator's authority, he is bound by their stipulation and may not depart from its limitations. The parties are in fact arbitrating under the stipulation and not the collective contract as the source of the arbitrator's authority.<sup>39</sup>

The standards under which the arbitration is conducted are another source of the arbitrator's remedy power if the parties agree to be bound by them. These standards are procedural and are generally referred to in the contract. If the contract is silent then the parties can agree on application of agency standards, such as those of the American Arbitration Association.<sup>40</sup>

The New York Court of Appeals<sup>41</sup> upheld an arbitrator's award for specific performance of a personal service contract because the parties had agreed to be bound by a rule authorizing the arbitrator to grant any remedy which he "deemed just and equitable." The proceeding was conducted by the American Arbitration Association pursuant to this rule.

Broad contractual language allows the arbitrator to exercise wide latitude in fashioning an appropriate relief. The parties have bargained for the arbitrator's remedy.<sup>42</sup> If the parties do not want the arbitrator to exercise such latitude in devising an appropriate remedy they can limit his power by a stipulation or submission agreement or by proper restrictions in the underlying contract. Thus the arbitrator has power unless the contract specifically negates such power to award remedies. The problem arises where contractual language is not available concerning remedial power and the parties cannot agree what power the arbitrator has to fashion a remedy.

Prior to the "Trilogy," one court held that the arbitrator was not authorized to award relief not expressly provided for in the contract.<sup>43</sup> The substantial impact of the "Trilogy" caused this same court to take another look at this problem. That court then held in *Lodge No. 12 Machinists v. Cameron Iron Works, Inc.*<sup>44</sup> that the arbitrator, upon finding a breach of the collective bargaining contract, has implied power to fashion a remedy unless restrictive language exists in the contract ne-

<sup>39</sup> Vladeck, lecture, Nov. 4, 1968, *supra* note 37.

<sup>40</sup> CCH Lab. L. Rep. 1 Union Contracts Arbitration, ¶57,099. See, for procedural standards approved by the American Arbitration Assoc.

<sup>41</sup> *Staklinski v. Pyramid Electric Co.*, 6 N.Y.2d 159, 160 N.E.2d 78 (1959).

<sup>42</sup> *Teamsters v. Lucas Flour*, *supra* note 30, at 96. See example of broad arbitration clause:

Should any difference arise between employer and the employee, same shall be submitted to arbitration by both parties . . . they shall mutually appoint a third person whose decision shall be final and binding.

<sup>43</sup> *Refining Employees Union v. Continental Oil Co.*, 268 F.2d 447 (5th Cir. 1959), *cert. denied*, 361 U.S. 896 (1959).

<sup>44</sup> 292 F.2d 112 (5th Cir. 1961), 48 L.R.R.M. 2516, *cert. denied*, 368 U.S. 926 (1961).  
<sup>49</sup> L.R.R.M. 2173.

gating such power. The Supreme Court extended this rule in *Drake Bakeries Inc. v. Local 50, Am. Bakery Workers*<sup>45</sup> by holding that where the arbitration clause is broad the arbitrator's power to afford a remedy is implied.

Commentators are of the opinion that the remedy power of the arbitrator has been broadened and expanded to deal with a situation as he finds it.<sup>46</sup> He may fashion solutions which previously have not been within his powers. It has been held that the national labor policy is only carried out when the collective bargaining agreement is given latitude.<sup>47</sup>

What types of remedial powers are available to the arbitrator? Fleming categorizes the arbitrator's remedy power into three types: (1) damages, (2) specific performance, and (3) injunctive relief.<sup>48</sup> He also states the "most common type of remedy involves compensatory damages."<sup>49</sup> The arbitrator has no trouble in awarding a remedy in damages when he is authorized by the parties to do so.

One court, in *Minute Maid Co. v. Citrus Workers Local 444*,<sup>50</sup> held even where the contract is silent regarding the remedy power available to the arbitrator he may award back pay to employees discharged unjustly, even for a period beyond the termination date of the contract. Evidently the contractual authority to reinstate an employee unjustly discharged carries with it the power to make the employee whole through damages in the form of back pay. The most prominent exceptions to this rule are: (1) where a damage claim arises out of a violation of a no-strike clause, and (2) when the arbitrator's award is thought to be against public policy or contrary to statute.<sup>51</sup>

The commentators do not find justification for an award of punitive damages. Their basic opposition is that the parties have a continuing relationship pursuant to the collective bargaining agreement which "cannot operate effectively unless the parties have a basic desire to live together."<sup>52</sup> Punitive damages by their very definition are assessed as a punishment for aggravated violations of the contract. Thus it is only logical to assume that such an award would cause hostility between the

<sup>45</sup> 370 U.S. 254, 82 S. Ct. 1346, 8 L. Ed. 2d 474, 50 L.R.R.M. 2440 (1962). See also, Fleming, *Arbitrators and the Remedy Power*, 48 Va. L.R. 1199, at 1214 (1962).

<sup>46</sup> Stein, *Remedies in Labor Arbitration*, in *Proceedings of the 13th Annual Meeting of the Nat'l. Academy of Arbitrators* (published by BNA).

<sup>47</sup> *Humble Oil & Refining Co. v. Independent Industrial Workers*, 337 F.2d 321 (5th Cir. 1964), *cert. denied*, 380 U.S. 952, 85 S. Ct. 1084, 13 L. Ed. 2d 969, 61 L.R.R.M. 2410.

<sup>48</sup> Fleming, *supra* note 45, at 1202.

<sup>49</sup> *Id.* at 1202.

<sup>50</sup> 331 F.2d 280 (5th Cir. 1964); 49 CCH Lab. L. Rep. 18,935.

<sup>51</sup> Fleming, *supra* note 45, at 1202-03.

<sup>52</sup> Stein, *supra* note 46, at 45. See also, Fleming, *supra* note 45, at 1221; Strutz, *Arbitrators and Their Remedy Power*, 16th Annual Meeting of the Nat'l Academy of Arbitrators 54 (M. Kalk, ed. 1963).



parties and destroy their willingness to live together pursuant to the labor contract.<sup>53</sup>

It is evident that the parties can agree to liquidated damages as a remedy. If this is the parties' intent the arbitrator will be empowered to award them where he finds an appropriate violation of the contract.<sup>54</sup>

An arbitrator cannot award a remedy which is in violation of law; one court has held that such a remedy is against public policy and thus is not enforceable by the courts.<sup>55</sup> In that case the arbitrator reinstated an employee who had been prosecuted and convicted of a misdemeanor (gambling) while on his employer's premises. The arbitrator was of the opinion that the penalty of summary discharge was too severe and awarded reinstatement without back pay. The court held that they could not go to the merits, as the arbitrator's decision on questions of fact is not reviewable. The court reasoned, however, that the collective bargaining contract and the arbitrator's authority pursuant to it are limited by and must yield to the over-riding public policy. Arbitrators, being "creatures of contract," are "no more above public law than the parties from whom they derive their powers."<sup>56</sup>

Another Federal District Court has held that arbitrators pursuant to the contract may arbitrate whether an employee was discharged for cause, because of his violation of a state gambling law, disregarding the existence of the state public policy against gambling. The rationale of the court was that state public policy must yield to the substantive principles of the national labor law.<sup>57</sup> There is also a federal case holding that an arbitration award will be refused judicial enforcement if it is contrary to state public policy, only when such policy has been clearly shown to exist. Thus where the state public policy is not clear the court applying federal law cannot take account of it.<sup>58</sup> It is this writer's opinion that these cases cannot be reconciled with the *Enterprise Wheel* case for the reason that in order for the courts to determine the violation of public policy they must of necessity examine the substantive merits of the dispute. The courts in doing so are encroaching within the arbitrator's jurisdiction.

Beside damages the arbitrator has the power to render awards of specific performance and provide for injunctive relief pursuant to his contractual authority. The problem arises in connection with a party's

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<sup>53</sup> *United Auto Workers v. Russell*, 356 U.S. 634, 653 (1958).

<sup>54</sup> *Fleming*, *supra* note 45, at 1202.

<sup>55</sup> *Local 453 Electrical Workers v. Otis Elevator Co.*, 201 F. Supp. 213 (S.D.N.Y. 1962); See generally Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 Rutgers L. Rev. 217 (1960).

<sup>56</sup> *Id.* at 218.

<sup>57</sup> *Jenkins Bros. v. Local 5623, Steelworkers* 56 L.R.R.M. 2058 (D.C. Conn. 1964).

<sup>58</sup> *U.A.W., Local 985 v. Chace Co.*, 64 L.R.R.M. 2098 (E.D. Mich. 1966).

request for injunctive relief which is sought to restore or retain the *status quo* pending the arbitration of the contractual violation. The Supreme Court interpreted that the legislative intent behind Sec. 301 was that federal courts should enforce agreements to arbitrate. "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."<sup>59</sup> In *Lucas Flour*<sup>60</sup> the Supreme Court held that because the parties agree contractually to submit the dispute to the arbitrator, a no-strike clause would be implied to exist. This rule was further extended in *Drake Bakeries*<sup>61</sup> by the holding that an action for damages in federal court could be stayed, pending the arbitration of the damage claim, where the contract could be interpreted as giving the arbitrator authority over the claim. Thus, from the cases discussed, it seems that the arbitrator's contractual authority to provide for remedies applies to granting injunctive relief for violation of a no-strike clause, and more important, that the courts would enforce such remedies by cease and desist orders against the party in violation of the contract.

This application of the case law was all but destroyed by the court in the case of *Sinclair Refining Co. v. Atkinson*.<sup>62</sup> The court held that Sec. 4 of the Norris-La Guardia Act was not amended by Sec. 301 of L.M.R.A. The federal courts are therefore prohibited by Norris-La Guardia from enforcing an injunction, even though the labor contract contains a no-strike clause. The rationale was that federal courts cannot issue injunctions in labor disputes and that Sec. 301 did not amend or repeal the Norris prohibition against the use of the injunction. Justice Brennan, dissenting in *Sinclair*, argued that the injunction was the only appropriate relief for enforcement of the no-strike clause.<sup>63</sup>

The conflict between the arbitrator's contractual authority to provide injunctive relief and the court's refusal to enforce such an award has not been adequately resolved.<sup>64</sup> The state courts in general<sup>65</sup> hold that they have the authority to enjoin a strike in violation of a no-strike clause. A California decision held that state courts have concurrent jurisdiction over Sec. 301 action with the federal courts but must apply the federal substantive law.<sup>66</sup> The court reasoned that the states can

<sup>59</sup> *Textile Workers v. Lincoln Mills of Alabama*, *supra* note 7, at 455 (1957).

<sup>60</sup> *Supra* note 30 (1962).

<sup>61</sup> *Supra* note 45, at 263-64.

<sup>62</sup> 370 U.S. 195, 82 S. Ct. 1328, 8 L. Ed. 2d 440, 50 L.R.R.M. 240 (1962).

<sup>63</sup> *Id.* at 215.

<sup>64</sup> For articles in criticism of *Sinclair* see: Note, 10 U.C.L.A. L.R. 292 (1963); Aaron, article, 14 Lab. L.J. 41 (1963), Dannett, article, 16th N.Y.U. Conf. Lab. Law 275 (1963).

<sup>65</sup> State courts having anti-injunction statutes or baby Norris-La Guardia Acts forbid the issuance of the injunction in labor disputes. See N.Y. C. Prac. Act, Art. 51, § 876 (a).

<sup>66</sup> *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 60, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932, 41 L.R.R.M. 2431 (1958).

enjoin a strike in breach of the labor contract, even though the federal courts are prohibited by Norris-La Guardia from doing so, except where state law prohibits such an action.<sup>67</sup> The result is that a state court is free to use state remedies, while applying the federal substantive law.

Another state court held in *Ruppert v. Egelhofer*<sup>68</sup> that the arbitrator can issue an injunction ordering a union to cease a slowdown which was in violation of the labor contract. The state court reasoned that the arbitrator's authority was derived from the broad arbitration clause which gave him authority to render appropriate relief, including injunctive relief, unless prohibited by the contract. The court merely enforced the arbitrator's decision; it did not grant the injunctive relief. Thus the New York state anti-injunction statute was held not applicable when enforcement of the arbitrator's injunctive remedy is sought. Some state courts hold that they have authority to enjoin a strike in violation of a no-strike clause because this is not a labor dispute within the meaning of their statute.<sup>69</sup> A Federal District Court has held that it would enforce the arbitration award, which directed the union to cease and desist a work stoppage which was in violation of a labor contract, reasoning that the parties agreed to be bound by the arbitrator's award.<sup>70</sup>

The Fifth Circuit has held that the arbitrator does not have jurisdiction to decide a violation of a no-strike clause when the subject of the dispute is not arbitrable, and the collective contract requires arbitrability as a condition precedent to the no-strike clause becoming operative.<sup>71</sup>

The Second Circuit has held that an injunction may not be issued by a federal court in any case involving labor, regardless of the type of activities against which the injunction is sought.<sup>72</sup> Another Federal District Court has held that state court enforcement of an arbitration award was prohibited by Norris-La Guardia. That court found no distinction between the court enforcement of an arbitrator's award granting an injunction and direct application to the court for injunctive relief.<sup>73</sup> The case further held that the problem of enforcing arbitrators' awards for violation of no-strike clauses was one for the legislature.

It is evident that in *Sinclair*, the court held that Sec. 4 of Norris-La Guardia forbids the federal courts to enjoin peaceful strikes, even

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<sup>67</sup> *Id.* at 61.

<sup>68</sup> 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785, 29 Lab. Arb. 775 (1958).

<sup>69</sup> *C. D. Perry & Sons Inc. v. Robilotto*, 240 N.Y.S.2d 331 (S. Ct. 1963), 53 L.R.R.M. 2156; *R.C.A. v. Local 780 I.A.T.S.E.*, 160 So.2d 150 (Fla. D. Ct. App. 2d Dist. 1964), 55 L.R.R.M. 2478.

<sup>70</sup> *New Orleans Steamship Ass'n v. Longshore Workers* (E.D. La. 1962), 49 L.R.R.M. 2941.

<sup>71</sup> *Gulf & South American Steamship Co. v. Nat'l Maritime Union*, 360 F.2d 63 (5th Cir. 1966).

<sup>72</sup> *Publishers' Ass'n of New York City v. Mailers' Union*, 317 F.2d 624 (2d Cir. 1963), 55 L.R.R.M. 2253.

<sup>73</sup> *Marine Transport Lines, Inc. v. Curran*, 55 L.C. § 11, 748 (1967).

when such strikes are in violation of a no-strike clause. It is just as clear that the federal courts have not interpreted Sec. 301, L.M.R.A. as vitiating the Norris Act.<sup>74</sup> The states disagree as to whether Sec. 4 of the Norris Act precludes them from enjoining strikes in violation of a contractual no-strike clause. Most Federal Courts have not directly faced the problem since *Sinclair*, but the recent decisions seem to hint that they might enforce an arbitrator's injunctive remedy on the basis that such enforcement is consistent with the National Labor policy, unless specific contractual language prohibits such an award. The Supreme Court held in *Drake Bakeries*<sup>75</sup> that an arbitrator has power to award damages resulting from a violation of a no-strike clause where such remedial power is within the scope of the board arbitration clause. *Sinclair*<sup>76</sup> held that no obligation existed to arbitrate a claim for damages because the arbitration clause was limited to handling grievance disputes and thus the authority to award damages was not present.

It seems to this writer that in the federal courts the injured party is relegated to a claim in damages arising from a breach of a contractual no-strike clause. This is true only where the contract contains a sufficiently broad arbitration clause to enable the arbitrator to fashion such a remedy. The injured party must therefore establish his compensatory damages arising from such a breach. Thus the no-strike clause is actually ineffective to compel arbitration and the struck employer cannot enforce this agreement to arbitrate. He must sit back and await compensable damage to occur before he can bring an action to obtain relief. The only relief which will be enforced is actual damages as punitive damages (previously discussed) is seldom enforced by the courts. The arbitration proceeding therefore, although referred to as the favored method to derive industrial peace, has little effect upon the most disruptive types of economic pressure, the strike.

The reluctance of the federal courts concerning enforcement of an arbitrator's injunctive award is difficult to comprehend in the light of the arbitrator's contractual power to fashion appropriate remedies. It is clear that where the language in the contract or submission does not exclude such remedial relief that the arbitrator has the right and the duty to afford this type of relief.

The problem is that the federal courts and a majority of state courts will not enforce compliance with such a remedial order.<sup>77</sup> It seems highly unlikely that the party found in violation of the no-strike clause will

<sup>74</sup> An accommodation between the Norris-LaGuardia and The Railway Labor Act, 45 U.S.C., §§ 151-188, was held to exist by the Supreme Court in *Brotherhood of Railroad Trainmen v. Chicago River & Ind. Railroad Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L. Ed. 2d 622, 39 L.R.R.M. 2578 (1957).

<sup>75</sup> *Supra* note 45.

<sup>76</sup> *Supra* note 62.

<sup>77</sup> *Avco Corp. Aero Lodge No. 735, Machinists*, 376 F.2d 337 (6th Cir. 1967).

voluntarily comply with the arbitrator's cease and desist order. The courts, in not providing effective enforcement of such remedies, are advising the arbitrator that he has no authority to grant such relief, although his remedy power is derived from the essence of the contract. Therefore, it is impossible for this writer to reconcile the courts' present position with that of *Enterprise Wheel*,<sup>78</sup> which sanctioned the arbitrator's remedy power as long as it was derived from the collective bargaining agreement.

The final question that must be answered is whether the National Labor Relations Board<sup>79</sup> is bound to honor the arbitrator's award in unfair labor practice<sup>80</sup> cases, that are also a breach of the collective bargaining agreement.

The Board has held that it will honor an arbitrator's award where (1) the parties agreed to arbitrate the dispute, (2) the arbitration proceedings were fair and regular, and (3) the award was not adverse to the policies of the Act.<sup>81</sup> The Supreme Court held in *Smith v. Evening News Ass'n*<sup>82</sup> that suits brought under Sec. 301 of the L.M.R.A. for violation of the collective bargaining contract are not pre-empted by the availability of the Board, even though the activity constituting the breach is also an unfair labor practice and subject to the Board's jurisdiction.

The Board in its administration of the national labor policy must accept the arbitration as "a part and parcel of the collective bargaining process,"<sup>83</sup> and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter. The Board held that while the Board's jurisdiction cannot be displaced by the arbitrator's award, the policies of the Act will be effectuated by giving credence to such an award, unless the arbitration proceedings were clearly irregular or the award was repugnant to the policies of the Act.

*Dubo Manufacturing Corp.*<sup>84</sup> held that the Board would defer actions on the unfair labor practice complaint until arbitration of the same dispute, arising out of a collective contract violation, was resolved by the arbitration panel. Thus the Board will defer hearing a matter under

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<sup>78</sup> *Supra* note 19.

<sup>79</sup> L.M.R.A. § 10 (a), 61 Stat. 146 (1947), 29 U.S.C.A. § 160 (a) (1964) empowers the Board to prevent any person from engaging in any unfair labor practice affecting commerce, but that other means of adjustment established by agreement or law does not pre-empt the power of the Board.

<sup>80</sup> L.M.R.A. §§ 8 (a), (b), 29 U.S.C.A. 158 (a) (b), list the respective employer and labor organization unfair labor practices over which the Board has jurisdiction.

<sup>81</sup> N.L.R.B. v. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

<sup>82</sup> 371 U.S. 195, 83 S. Ct. 267, 46 LC § 17, 961 (1962).

<sup>83</sup> U. S. W. v. *Warrior & Gulf Nav. Co.*, *supra* note 19.

<sup>84</sup> 142 N.L.R.B. 431 (1963).

arbitration until after the proceeding, in order to best effectuate the policies of the Act. It has also been held that where the question to be resolved by arbitration has been fully tried and decided by the Board's Trial Examiner, that a stay of the arbitration process will be granted.<sup>85</sup> The Board does not have to await the court's or the arbitrator's determination as to the meaning of the collective contracts language, for it has power to construe contractual provisions even where the contract does not contain a binding arbitration clause, where it must do so to decide whether an unfair labor practice exists.<sup>86</sup> The Supreme Court has held that where the dispute has been arbitrated before it reaches the Board that the arbitrators award carries considerable weight.<sup>87</sup> The Board must give deference to the arbitrator's award, provided the procedure is fair and the results not repugnant to the Act. But, if the Board disagrees with the arbitrator's decision, then the Board ruling takes precedence. Thus, arbitration is available as an alternative remedy to an N.L.R.B. proceeding as long as it is consistent with the Board's policies.

The Board may also defer action and await the rendition of an arbitrator's award on an unfair labor practice issue where the arbitration of the contractual dispute is likely to determine the unfair labor practice issue in a manner consonant and not repugnant to the policies of the Act.

This paper has attempted to discover a few of the road blocks which have been placed in the path of voluntary arbitration of labor controversies. The courts, while sanctioning arbitration as the most practical and acceptable means devised for the resolution of labor disputes, have been reluctant to release the arbitrator from their procedural grasp. The judiciary is attempting to mold the remedial power of the arbitrator so that it resembles the power of the courts. They look upon the arbitration process and subsequent awards as judicial decisions, and not as industrial solutions to complex industrial problems.

Arbitration is merely a tool of industrial relations agreed to by the parties in order to arrive at a peaceful settlement of their dispute. As such, the remedial relief must be diverse, adequate and binding. Many courts have failed to understand that the traditional remedies which they dispense are in many instances not adequate for the resolutions of labor disputes. Nevertheless, the courts caution the arbitrators to stay well within these traditional remedial boundaries.

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<sup>85</sup> *Kentile, Inc. v. Local 457, Rubber Workers*, 228 F. Supp. 541 (E.D.N.Y. 1964).

<sup>86</sup> *N.L.R.B. v. C.&C. Plywood Corp.*, 385 U.S. 421 (1967).

<sup>87</sup> *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320, 48 L.C. § 50,986 (1964).