CHAPTER III

ARBITRATION IN THE FEDERAL COURTS: AFTERMATH OF THE TRILOGY

BENJAMIN AARON *

I.

The United States Supreme Court's three landmark decisions dealing with the federal law of arbitration,[1] now sometimes referred to as "the arbitration trilogy," evoked a predictable variety and breadth of responses—reactions ranged from enthusiastic approval to emphatic disapproval. Some have taken the view that the three rulings have dispelled the specter of judicial intrusion into the arbitration process created by the Court's earlier decision in the *Lincoln Mills* case.[2] Others have darkly observed that, far from resolving any problems, the latest judicial pronouncements threaten to undermine the entire structure of labor-management relations;[3] to them the decisions constitute a trilogy in the classic sense of that term, that is to say, a group of three related tragedies. Still others, while expressing complete or qualified agreement with the Court's conclusions, have characterized the accompanying opinions in such unflattering terms as romantic, unrealistic, or naïve.[4]

---

* Professor of Law and Director, Institute of Industrial Relations, University of California, Los Angeles, and President (1962-63), National Academy of Arbitrators. The author is indebted to Mr. Julius Reich for research assistance in the preparation of this paper.

[1] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 34 LA 569, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 34 LA 561, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 34 LA 559, 363 U.S. 564 (1960).

[2] *E.g.*, Davey, "The Supreme Court and Arbitration: The Musings of an Arbitrator," 36 *Notre Dame Law.* 138 (1961).

[3] *E.g.*, Petro, "Labor Relations Law," in *1960 Annual Survey of American Law* 131 (1961); Snyder, "What Has the Supreme Court Done to Arbitration?" 12 *Lab. L. Jnl.* 93 (1961).

[4] *E.g.*, Hays, "The Supreme Court and Labor Law, October Term, 1959," 60 *Colum. L. Rev.* 901 (1960); Wallen, "Recent Supreme Court Decisions on Arbitration: An Arbitrator's View," 63 *W. Va. L. Rev.* 295 (1961).

The three cases have been the subject of such widespread comment that there is no need, especially before this audience, to review the fact situations passed on by the Court. It is sufficient for this discussion to repeat the summary of the holdings made by Sam Kagel in the paper he presented at last year's Academy meeting:

> "*On arbitrability:* The courts are limited to finding whether there is a collective bargaining agreement in existence; whether there is an arbitration clause; and whether there is an allegation that a provision of the agreement has been violated. If the arbitration clause is broad enough to include the alleged 'dispute,' then arbitration must be ordered.
>
> "*On enforceability of awards:* If the arbitrator stays within the submission and makes his award on his construction of the contract, then the award must be enforced.
>
> "In either arbitrability or enforcement cases the courts are not to get into the merits of the cases; they are not to substitute their judgment for that of the arbitrator; they shall not refuse to act because they believe a claim is frivolous or baseless." [5]

Most of you are doubtless aware that, with relatively few exceptions, the lower federal courts have faithfully, albeit somewhat unenthusiastically, applied the law of the trilogy in appropriate cases coming before them since June, 1960. This development should not be taken wholly for granted. Legal principles of both a procedural and a substantive nature enunciated by the Supreme Court have not always been so readily accepted by the subordinate federal tribunals; one thinks immediately, for example, of the resistance by the circuit courts of appeals to the limitation of their powers of judicial review of NLRB decisions under the Wagner Act.[6]

Apparently, the promptness with which the district and circuit courts of appeals fell into line in applying the new federal law of arbitration is attributable in major part to the wide-ranging dicta in the Supreme Court opinions which have evoked so much adverse comment. As David Feller pointed out at the Academy meeting last year,

---

[5] Sam Kagel, "Recent Supreme Court Decisions and the Arbitration Process," in *Arbitration and Public Policy* (Washington: BNA Incorporated, 1961), pp. 1, 3-4.

[6] "The circuit courts early were skeptical of the Act and the Board and set aside about 2 in 10 orders coming before them, and modified another 4, enforcing only 4 in full." Millis & Brown, *From the Wagner Act to Taft-Hartley* 84 (1950).

> "The notion that arbitrators are better judges in this area than courts was not an easy one for the courts to accept. And so the Supreme Court, of necessity, had to spell out, perhaps in somewhat extravagant terms, exactly why arbitrators are better able to make decisions in this area than the courts." [7]

Although the exuberant language in the Court's opinions has been widely deplored by practitioners and occasionally regretted by arbitrators, it seems to have accomplished the intended results. While emitting occasional literary grunts of disapproval or sighs of resignation, the great majority of federal district and circuit court judges have seen their duty clearly and have done it. Clarity is, indeed, the watchword if the decisions of the Court of Appeals for the Third Circuit are representative: the law of the trilogy is "very clear" to Judge Hastie; [8] "indubitably clear" [9] and "abundantly clear" [10] to Judge Staley; and "sun-clear" [11] to Judge Goodrich.

State courts, acting on the reasonable assumption that they have concurrent jurisdiction over suits brought under section 301(a) of the Labor Management Relations (Taft-Hartley) Act,[12] have uniformly applied federal substantive law; [13] but they have not all deferred as submissively as their brethren in the federal judiciary to the pronouncements of the Supreme Court.

Connoisseurs of judicial invective will relish the concurring opinion of a judge of the Tennessee Court of Appeals, who managed, in seven short paragraphs, to pay his disrespects to the

---

[7] David Feller, "Discussion," in *Arbitration and Public Policy*, pp. 18, 23.

[8] *Radio Corp. of America* v. *Association of Professional Eng'r Personnel*, 291 F. 2d 105, 109 (3d Cir. 1961).

[9] *International Tel. & Tel. Corp.* v. *Local 400, Int'l Union of Elec. Workers*, 290 F. 2d 581, 583 (3d Cir. 1961).

[10] *International Tel. & Tel. Corp.* v. *Local 400, Int'l Union of Elec. Workers*, 286 F. 2d 329, 330 (3d Cir. 1960).

[11] *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 283 F. 2d 93, 95 (3d Cir. 1960).

[12] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[13] *McCarroll* v. *Los Angeles County District Council of Carpenters*, 49 Cal. 2d 45, 315 P. 2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); *International Union of Elec. Workers* v. *General Elec. Co.*, 4 CCH Lab. L. Rep. (43 Lab. Cas.) ¶ 50,376 (Conn. Sup. Ct. Err., Sept. 29, 1961); *Lodge 774, Int'l Ass'n of Machinists* v. *Cessna Aircraft Co.*, 186 Kan. 569, 352 P. 2d 420 (1960); *Courtney* v. *Charles Dowd Box Co.*, 169 N.E. 2d 885 (Mass. 1960), *cert. granted*, 365 U.S. 809 (1961); *Volunteer Elec. Cooperative* v. *Gann*, 46 LRRM 3049 (Tenn. Ct. App.), *rehearing denied*, 47 LRRM 2251 (Tenn. Ct. App. 1960).

Supreme Court, the arbitration trilogy, the Federal Mediation and Conciliation Service, the arbitration process, and arbitrators. The Supreme Court, he said, has now "obtained complete mastery over its coeval branches of government and has adopted the principle of the French Kings, some of whom went to the guillotine, 'le roi le veut' (the King wills it)." As for the trilogy, the three holdings are "blows at the independence of the judiciary, a further evisceration of the Tenth Amendment, and another long step down the road towards state socialism." They have also added "therapeutics" to "psychology" as a "touchstone in judicial construction." Finally, voicing what he claimed is the "consensus among employers," the learned jurist declared that "compulsory arbitrations under the aegis of the [FMCS] require management to play an extended form of Russian roulette with every chamber in the revolver loaded; the result being predestined and foreordained in favor of the employee by a two-thirds vote." [14]

One can derive considerable comfort from outbursts such as this. They tend to strengthen the conviction that the Supreme Court, despite its probably excessive confidence in the judgment of arbitrators, was nevertheless basically correct in its conclusion that, generally speaking, arbitrators are better equipped than judges to deal with grievances arising under collective agreements, including disputes over arbitrability.

II.

The assignment originally given to me on this program was (1) to report on those cases in which the lower federal courts have interpreted and applied the law of the arbitration trilogy; (2) to appraise the results to date; and (3) to call attention to some problems that are as yet unresolved. I soon discovered, however, that others,[15] including our distinguished colleague, Russell A. Smith,[16] had done most of that job already. Moreover, this year's report of the Academy's Committee on Law and Legislation covers the first two parts of the assignment in con-

[14] *Volunteer Elec. Cooperative* v. *Gann*, 46 LRRM 3049, 3056 (Tenn. Ct. App. 1960).

[15] See particularly, Devaney, "Federal Labor Arbitration," in *Symposium on Labor Relations Law* 307 (Slovenko, ed. 1961).

[16] *The Question of "Arbitrability"—The Roles of the Arbitrator, The Court, and the Parties*, Address, 8th Annual Institute on Labor Law, Southwest Legal Foundation, Nov. 4, 1961. (Mimeo.)

siderable detail. Consequently, I have decided to concentrate on the third part. The balance of this paper will be devoted to a discussion of three problems which seem to me both interesting and important; I shall refer to recent cases only for purposes of illustration.

The first problem is whether a suit for damages under section 301 of the LMRA, based on an alleged violation of a no-strike clause, should be stayed or dismissed if the claim on which the suit is based is arguably subject to arbitration under the collective agreement. The illustrative cases are *Sinclair Refining Co.* v. *Atkinson* [17] and *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers.*[18]

In the *Sinclair Refining* case, the company, alleging violation of a no-strike clause, sued the union and a number of its individual officers employed by the company for damages, declaratory judgment, and injunctive relief under section 301 of the LMRA. Defendants filed a motion to dismiss and a motion to stay. The federal district judge denied both motions with respect to the action for damages against the union, but dismissed the action against the individual defendants for damages and against all defendants for declaratory and injunctive relief. The Court of Appeals for the Seventh Circuit reversed the lower court's judgment dismissing the action for damages against the individual defendants, but affirmed as to the rest. The Supreme Court has granted certiorari.

For the moment, however, I wish to concentrate on the first issue: the denial of the motion to stay the action for damages against the union, pending arbitration of grievances arising out of the work stoppage alleged in the company's complaint. The collective agreement between the parties included a pledge by the union that there would be no strikes or work stoppages for any cause subject to the grievance and arbitration procedure or "for any other cause," except upon written notice by the union to the company, followed by negotiations and a lengthy waiting period. "Grievance," was defined as "any difference regarding wages, hours, or working conditions . . . which might arise within

[17] 290 F. 2d 312 (7th Cir. 1961), *cert. granted,* 30 U.S. Law Week 3192 (U.S. Dec. 11, 1961) (Nos. 430, 434).

[18] 294 F. 2d 399 (2d Cir.), *withdrawing original opinion,* 287 F. 2d 155 (2d Cir. 1961), *cert. granted,* 30 U.S. Law Week 3232 (U.S. Jan. 23, 1962) (No. 598).

any plant or within any region of operation." On the basis of these facts the appellate court unanimously concluded:

> "Defendants' reliance upon Warrior and the similar teachings found in [the American Manufacturing and Enterprise Wheel cases] is misplaced. . . . The claim of the employer for damages relates to neither wages, hours nor working conditions. It does not involve a subject which it has contracted to submit to arbitration. . . . We conclude that giving the language of the arbitration clause here under consideration its broadest scope it is not susceptible of an interpretation that covers the asserted dispute." [19]

The court was similarly unimpressed by the union's contention that because the company had agreed to arbitrate some grievances filed by the individual defendants, it was bound to arbitrate its claim for damages. On this point the court observed:

> "The fact that a grievance under arbitration and a court action may share some issue or factor in common does not establish identity of subject matter. What plaintiff has submitted to arbitration under its contract to arbitrate are matters different from the subject matter of its suit." [20]

The *Drake Bakeries* case involved a problem similar to the first issue raised in the *Sinclair Refining* case; as of this moment, however, the decision appears to have gone the other way. The inconclusiveness of my statement is occasioned by the rather unusual history of the case, which was initiated when the company filed suit under section 301 of the LMRA to recover damages for an alleged breach of the no-strike provision in its collective agreement with the defendant union. The union moved under the U.S. Arbitration Act [21] for a stay pending arbitration under the agreement. Noting that the agreement provided that "*all* complaints, disputes or grievances *shall* be submitted to arbitration," the federal district judge granted the stay.[22]

The judgment of the district judge was reversed by the Court of Appeals for the Second Circuit. In the opinion Judge Swan pointed out that although the grievance article in the agreement required an "attempt to adjust all complaints, disputes or grievances . . . involving questions of interpretation or application of

[19] *Sinclair Refining Co.* v. *Atkinson*, 290 F. 2d 312, 316 (7th Cir. 1961).
[20] *Id.* at 316.
[21] 9 U.S.C. §§ 1-14 (1958).
[22] *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 196 F. Supp. 148, 149 (S.D.N.Y. 1960).

any . . . matter covered by this contract or any conduct or relation between the parties hereto, directly or indirectly," it also provided "that in the handling of grievances there shall be no interference with the conduct of the business." He noted also that the arbitration provision gave either party the right to arbitrate grievances "not adjusted" under the grievance procedure, and that the no-strike clause was very broad, excepting only those instances in which either party failed to abide by an arbitrator's decision. On these facts Judge Swan concluded:

> "Where the no-strike clause is as specific as in the case at bar, it seems clear that the parties intended the grievance-arbitration procedure to supplant strikes as a means of resolving industrial disputes, but did not intend to subject alleged breaches of the no-strike clause to arbitration when a strike was resorted to before making any attempt to utilize the grievance-arbitration procedure." [23]

At this point, however, the procedural plot began to thicken. The case was submitted to and considered by the six active judges of the court of appeals, after a majority of them had voted to grant the union's motion for rehearing in banc. Three judges voted to affirm the order of the district court, on the authority of the Supreme Court trilogy. Three judges considered those decisions not to be controlling and expressed their agreement with the decision of the panel of the court and with the accompanying opinion of Judge Swan. Four judges concluded that, under such circumstances, the order of the district court was affirmed; but the remaining two dissented on the ground that the opinion of the panel of the court remained in effect and should not be withdrawn.[24] Understandably, the company has now petitioned for certiorari, which the Supreme Court has just granted.

The question whether arbitration, rather than litigation, is the proper and required method of resolving an employer's claim that the union has breached a no-strike provision in a collective agreement [25] seems to be one that can be answered either way, depending on the language of the collective agreement. In my view, however, the considerations stressed by the Supreme Court in the three landmark arbitration decisions should

[23] 287 F. 2d 155, 158 (2d Cir. 1961).
[24] 294 F. 2d 399 (2d Cir. 1961).
[25] See generally, Devaney, *supra* note 15, at 349; Stewart, "No-Strike Clauses in the Federal Courts," 59 *Mich. L. Rev.* 673 (1961).

not be controlling in respect to this particular issue. It is now generally recognized that arbitration is a substitute for the strike,[26] although the scope of arbitration and no-strike provisions in the same collective agreement may not always be coextensive. The gravity of a strike in violation of a no-strike clause cannot be overestimated, since it deprives the employer of uninterrupted production—the principal benefit he usually hopes to derive from the collective agreement.[27] This is true even when the issue involved is specifically excluded from arbitration; and when the issue is clearly subject to arbitration, the last possible justification for the strike disappears.

Moreover, determination whether there has been a strike or stoppage of work proscribed by the no-strike clause and, if so, whether any legal justification for such strike or work stoppage exists, can hardly be said to be "not normal" or "foreign to the competence" of the courts. Indeed, even when that determination is intrusted to an arbitrator, his "source of law," like that of the courts, is likely to be "confined to the express provisions of the contract." [28]

Of course, if the arbitration provision broadly includes "all grievances," and if the employer, as in the *Drake Bakeries* case, is expressly given the right to file grievances and appeal them to arbitration, it may be argued that his claim that the union has violated the no-strike clause should be handled in the same manner as any other grievance.[29] But that argument overlooks several important considerations. First, the assessment of damages

[26] "The grievance [and arbitration] procedure is . . . a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." Douglas, J., in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 34 LA 561, 363 U.S. 574, 581 (1960).

[27] Gregory, "The Collective Bargaining Agreement: Its Nature and Scope," 1949 *Wash. U.L.Q.* 3, 12.

[28] "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . . The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." Douglas, J., in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 34 LA 561, 363 U.S. 574, 581 (1960).

[29] *Tenney Eng'r, Inc.* v. *United Elec. Workers*, 174 F. Supp. 878 (D.N.J. 1959); *Armstrong-Norwalk Rubber Corp.* v. *Local 283, United Rubber Workers*, 167 F. Supp. 817 (D. Conn. 1958), *appeal dismissed*, 269 F. 2d 618 (2d Cir. 1959); *Brady Transfer & Storage Co.* v. *Local 710, Meat Drivers*, 30 LRRM 2535 (N.D. Ill. 1952); *Lewittes & Sons* v. *United Furniture Workers*, 95 F. Supp. 851 (S.D. N.Y. 1951). The reasoning of these cases is sharply criticized in Stewart, *supra* note 25, at 702-04.

for breach of contract is not a normal function of arbitrators and is only rarely provided for in collective agreements.[30] Thus, in the usual case, the arbitrator would lack the authority, to say nothing of the informed judgment, to determine the measure of damages, even though he found that the union had violated the no-strike clause.[31] Second, the arbitrator's award is not self-enforcing. The employer would thus be put to the additional trouble of securing his damages by court action after he had won his case on the merits in arbitration.[32] Therefore, absent specific language in the agreement giving the arbitrator jurisdiction over claims that the no-strike clause has been violated, I think that considerations of fairness and common sense favor determination of that issue and the granting of appropriate relief in the nature of damages by the courts.[33]

Please observe that I said "appropriate relief *in the nature of damages.*" Whether federal courts may properly enjoin strikes in violation of no-strike clauses is a question involving other considerations, which are outside the scope of this discussion.[34]

---

[30] Devaney, *supra* note 15, at 349.

[31] For an interesting discussion of the inappropriateness of damages as a remedy in an arbitration award see *Baldwin-Lima-Hamilton Corp., Eddystone Div.*, 30 LA 1061, 1064-6, Crawford (1958).

[32] Cf. *Ruppert* v. *Egelhofer*, 3 N.Y. 2d 576, 148 N.E. 2d 129 (1958). The parties agreed that any breach of the broad no-strike clause would waive the grievance procedure. Arbitration could be had, and an award rendered, forty-eight hours after notification. The employer claimed a breach of the no-strike clause, and the arbitrator "enjoined" the unions from this conduct; but the employer had to go to court to enforce the award.

[33] This view was adopted in *Sinclair Refining Co.* v. *Atkinson*, 290 F. 2d 312 (7th Cir. 1961), *cert. granted*, 30 U.S. Law Week 3192 (U.S. Dec. 12, 1961) (Nos. 430, 434); *Vulcan-Cincinnati, Inc.* v. *United Steelworkers*, 289 F. 2d 103 (6th Cir. 1961); *Markel Elec. Prods., Inc.* v. *United Elec. Workers*, 202 F. 2d 435 (2d Cir. 1953); *Yale & Towne Mfg. Co.* v. *Lodge 1717, Int'l Ass'n of Machinists*, 194 F. Supp. 285 (E.D. Pa. 1961); *Structural Steel & Ornamental Iron Ass'n* v. *Local 545, Int'l Ass'n of Bridgeworkers*, 172 F. Supp. 354 (D.N.J. 1959); *Bassick Co.* v. *Bassick Local 229, Int'l Union of Elec. Workers*, 126 F. Supp 777 (D. Conn. 1954); *Square D Co.* v. *United Elec. Workers*, 123 F. Supp. 776 (E.D. Mich. 1954); *Harris Hub Bed & Spring Co.* v. *United Elec. Workers*, 121 F. Supp. 40 (M.D. Pa. 1954).

[34] The creation of a federal substantive law governing the enforcement of collective agreements, and the decision in *Textile Workers* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957), upholding the power of federal courts to grant specific performance of agreements to arbitrate, has led some federal courts to conclude that the Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1958), does not bar an injunction against strikes and picketing which violate a no-strike clause. Others have held to the contrary. Compare *Teamsters, Local 795* v. *Yellow Transit Freight Lines, Inc.*, 282 F. 2d 345 (10th Cir. 1960), *cert. granted*, 364 U.S. 931 (1961), with *Sinclair Refining Co.* v. *Atkinson*, 290 F. 2d 312 (7th Cir. 1961), *cert. granted*, 30 U.S. Law Week 3192 (U.S. Dec. 12, 1961) (No. 434), and *A. H. Bull S.S. Co.* v. *Seafarers' Int'l Union*, 250 F. 2d 326 (2d

Before leaving this topic, and in order to emphasize my point that the crucial issue in the *Sinclair Refining* and *Drake Bakeries* cases was the suit for damages, rather than the alleged strike over an arbitrable dispute in violation of a no-strike clause, I want to express my agreement with the decision in *International Molders Union, Local 239* v. *Susquehanna Casting Co.*[35] Here the union applied to a federal district court for an order to arbitrate the grievances of employees discharged by the company for allegedly violating a no-strike clause. In affirming the district court's order compelling arbitration, the Court of Appeals for the Third Circuit, citing the *Warrior & Gulf Navigation* case, said in part:

> "The fact that the Company alleges that there was a violation of the contract by the Union quite clearly does not relieve it from the responsibility of arbitrating the propriety of the discharges here in question." [36]

The second problem I wish to consider is whether courts can or should require the arbitration of, or enforce arbitration awards based upon, grievances alleging conduct that not only violates a collective agreement, but also constitutes an unfair labor practice under the National Labor Relations Act. The illustrative cases are *Portland Web Pressmen's Union, Local 17* v. *Oregonian Publishing Co.*[37] and *Retail Shoe Salesmen's Union, Local 410* v. *Sears, Roebuck & Co.*[38]

The *Portland Web Pressmen's* case arose out of a strike by the Stereotypers' Union against the company. Although the Pressmen's Union officially advised its members not to strike or to engage in any work stoppage, the individual union members unanimously refused to cross the Stereotypers' picket line. The

---

Cir. 1957), *cert. denied,* 355 U.S. 932 (1958). Commentators are in similar disagreement. Devaney, *supra* note 15, at 322-336, argues that strikes in violation of an agreement to arbitrate are not "labor disputes" as that term is defined in the Norris-La Guardia Act, and may therefore be enjoined; whereas relief against strikes in violation of no-strike agreements is obtainable only through an action for breach of contract. Stewart, *supra* note 25, at 707-09, contends that the federal courts have the authority under § 301 of the LMRA to grant an injunction in either case. There is more general agreement that injunctive relief should be available in federal courts against strikes in violation of an agreement to arbitrate. See Cox, "Reflections Upon Labor Arbitration," 72 *Harv. L. Rev.* 1482, 1484-5 (1959).

[35] 283 F. 2d 80 (3d Cir. 1960).

[36] *Id.* at 81.

[37] 286 F. 2d 4 (9th Cir. 1960).

[38] 185 F. Supp. 558 (N.D. Cal. 1960).

strike began on November 10, 1959. On December 31, 1959, while it was still in progress, the Pressmen's contract with the company expired; and on January 2, 1960, the Pressmen officially called a strike of their own against the company. Commencing on December 27, 1959, the Pressmen unsuccessfully sought a meeting with the company to negotiate a new contract. On January 15, 1960, the Pressmen brought suit in federal district court under section 301 of the LMRA to compel the company to arbitrate the controversy. The district court granted the company's motion to dismiss and the Pressmen appealed.

The judgment below was affirmed by the Court of Appeals for the Ninth Circuit. It agreed with the district judge that any rights which the Pressmen might claim would arise under the NLRA, and that the NLRB would have exclusive jurisdiction. After reviewing the history of the controversy, the appellate court concluded that the Pressmen's Union had presented no claim that during the life of its contract with the company anything had occurred which entitled any individual members of the union to reinstatement or back pay. Instead, said the court, the only right the Pressmen were seeking to assert was the right to bargain collectively with the company as the exclusive representative of the pressroom employees. As to that issue, the court observed:

> "Whether the Pressmen represented the employees of the Publishers and . . . was the proper bargaining agent for the Publishers to deal with in negotiating a new contract, are questions that the NLRB can properly determine. In fact, the parties could not by private agreement take away from the Board the right to make those determinations. . . . To hold otherwise would be to hold that by a collective bargaining contract the parties are able to take disputes that Congress has assigned to the exclusive jurisdiction of the NLRB . . . and put them in the hands of a private arbitrator." [39]

Finally, the court rejected the union's claim that the dispute was governed by the law of the trilogy. None of the three cases, said the court, was in point; in each of them, if the arbitrator had found that the employer's action was wrongful, the individual union members affected would have been entitled to some compensation. In the instant case, on the other hand, there was no claim that the Pressmen's members would be entitled

[39] 286 F. 2d at 9-11.

to any substantial redress even if the arbitrator decided every issue submitted to him in the union's favor.

Refusal to cross a picket line was also involved in the *Sears, Roebuck* case. An independent union having established the picket line, members of the plaintiff union of Retail Clerks refused to cross it. During the period of their absence, they were replaced by the company. The Retail Clerks, alleging that this deprivation of work constituted a violation of its collective agreement with the company, brought suit under section 301 of the LMRA to compel arbitration of the controversy.

The federal district court directed arbitration as requested by the union. Referring first to the substantive law applicable to the situation described in the complaint, the court said:

> "It is conceded by the parties that replacement [of the employees who had refused to cross the picket line] may be made. . . . However, it is equally clear that arbitrary and capricious conduct cannot be engaged in by the defendant, nor may the replacement thesis be used as a subterfuge in order to create reprisals as against otherwise innocent employees. . . ." [40]

The court next turned to the company's contention that since the union had filed a charge with the NLRB, the court should defer action. To this contention the court responded: "this court under the circumstances must not stand still and permit the collective bargaining agreements to be superseded by administrative proceedings." [41] In support of this conclusion, it cited with approval the view expressed in the *Ryan Aeronautical* case that "where there is a contract violation which may also be said to be an unfair labor practice, and the matter is submitted to arbitration in compliance with a contract provision . . . jurisdiction to decide the contractual dispute should be in the arbitrators, and the Courts should have the jurisdiction to determine the validity of the award."[42]

The problem raised by the foregoing cases involves some rather nice distinctions which are often quite difficult to make. The NLRB has exclusive jurisdiction over questions of representation and unfair labor practices as such, and is not bound by court decisions or arbitration awards purporting to dispose of

[40] 185 F. Supp. at 560.
[41] *Id.* at 560.
[42] *Ryan Aeronautical Co.* v. *International Union, UAW*, 179 F. Supp. 1, 4 (S.D. Cal. 1959).

such issues outside the purview of Board procedures. Thus, in *NLRB* v. *Walt Disney Prods.*, the Court of Appeals for the Ninth Circuit said:

> "Clearly, agreements between private parties cannot restrict the jurisdiction of the board. . . . [W]e believe the Board may exercise jurisdiction in any case of an unfair labor practice when in its discretion its interference is necessary to protect the public rights defined in the Act." [43]

The initial difficulty arises when conduct constituting an unfair labor practice is also prohibited by the terms of a collective agreement. The prevailing view is that although the unfair labor practice issue is exclusively for the Board, the breach-of-contract issue may properly be submitted to arbitration.[44] It follows, therefore, that courts may in appropriate cases compel the arbitration of the latter issue [45] and also enforce the arbitration award.[46]

The trouble with this division of authority, however, is that it gives to the complaining party, at least in theory, two chances of obtaining relief. Assume a collective agreement prohibiting discharge for union activity, which is also specifically denominated an unfair labor practice under the NLRA. The union president is discharged and files a grievance, alleging he was fired for union activity, in violation of the agreement. The arbitrator rules against the grievant, who then files an unfair labor practice charge against the company. The Board's policy

---

[43] 146 F. 2d 44, 48 (9th Cir. 1944).

[44] See *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467, 475 (5th Cir. 1958), *cert. denied*, 358 U.S. 880 (1958), in which the court stated: "Within the spirit of the *Lincoln Mills* case, and consonant with other well-reasoned decisions, the fact that the conduct here involved may constitute an unfair labor practice will not prevent it from being also an arbitrable contract violation." Also, as Mr. Justice Frankfurter noted in *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 443-4, n. 2 (1955), "It is significant . . . that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the [NLRB].' (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 [1947])."

[45] *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467 (5th Cir. 1958), *cert. denied*, 358 U.S. 880 (1958); *Grunwald-Marx, Inc.* v. *Los Angeles Joint Board, Amalgamated Clothing Workers*, 52 Cal. 2d 568, 343 P. 2d 23 (1959); *Post Publishing Co.* v. *Cort*, 334 Mass. 199, 134 N.E. 2d 431 (1956).

[46] *United Elec. Workers* v. *Worthington Corp.*, 236 F. 2d 364 (1st Cir. 1956); *McAmis* v. *Panhandle Eastern Pipe Line Co.*, 273 S.W. 2d 789 (Mo. Ct. App. 1954).

designed to deal with this kind of problem was enunciated in the *Spielberg Mfg.* case.[47] It there declared that where "the [arbitration] proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act . . . we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award." [48]

Let us now return to my two illustrative cases and examine them within the general context that I have just described. The *Portland Web Pressmen's* case seems to have been correctly decided, since the collective agreement had expired and the union was seeking only to reestablish its status as exclusive bargaining representative. The Board had exclusive authority to resolve that issue, and the court properly refused to order that it be submitted to arbitration.

The *Sears, Roebuck* case was, I think, also rightly decided; but the court's opinion indicated a basic confusion in respect to the controlling principles. The union alleged a breach of contract; under the law of the trilogy, and in the light of the evidence that there was a valid collective agreement in effect which arguably provided for arbitration of the grievances upon which the union's action was based, the court had no alternative but to decree arbitration. The court referred to the trilogy, but only in respect to another issue in the case, and it seems to have been under the impression that it had the authority and duty to decide whether the union's complaint was based on a grievance arbitrable under the contract or on an alleged unfair labor practice determinable only by the NLRB.

As I read the law of the trilogy, however, so long as a union petitioning to secure specific performance of an agreement to arbitrate alleges (a) that there is in existence a valid collective agreement which includes an arbitration clause; (b) that the company has violated the agreement; and (c) that the arbitration clause is broad enough to encompass the grievance, the court cannot refuse to grant the petition solely on the basis of its belief that the grievance is sustainable only under the statute and not under the contract. By way of illustration, let me put

[47] 112 NLRB 1080 (1955).
[48] *Id.* at 1082.

the following hypothetical case. Assume a collective agreement which includes a very broad arbitration clause, permitting arbitration of "any unresolved claim that the Employer has violated this Agreement," and a provision that "the Employer shall not discriminate against any employee for union activity." Now suppose that an official of the union, previously employed by another company, applies for employment with this employer and is told by the director of personnel that "we don't hire troublemakers here." Suppose finally that the union files a grievance over this incident and subsequently seeks a court order compelling arbitration, on the ground that the employer has violated the non-discrimination provision of the collective agreement. On these facts I think it clear that the court would be compelled, according to the law of the trilogy, to order arbitration, even though it would seem that the employer's offense was at most an unfair labor practice and not a breach of an agreement applicable by its terms only to "employees."

If my analysis is correct, the court would also have to enforce an arbitration award in the union's favor, even though the court believed the arbitrator's decision was wrong as a matter of law. Suppose, however, that the arbitrator, although ruling that the employer has violated the non-discrimination provision of the agreement, declined to order instatement of the rejected applicant, as requested by the union, on the ground that such a remedy would "have an adverse effect on productivity and heighten tensions in the shop." [49] If the union then filed an unfair labor practice charge against the employer with the NLRB, the Board might well refuse to recognize the arbitrator's award on the ground that the refusal to grant instatement was "repugnant to the purposes and policies of the Act." [50]

[49] "The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished." Douglas, J., in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 34 LA 561, 363 U.S. 574, 582 (1960).

[50] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Donald H. Wollett has suggested that "the Board should, as a matter of discretion, forego the exercise of its power in such situations in deference to the arrangement to which the parties have committed themselves." He offers as an appropriate analogy "the doctrine of equitable abstention which has been developed by the federal courts in . . . cases that involve questions of the constitutionality of state executive or legislative action." "The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?" 10 *Lab. L. Jnl.* 477 (1959).

On the other hand, if the arbitrator granted the remedy of instatement of the rejected applicant with back pay, basing his award on the authority given him under the arbitration provision of the agreement to "grant appropriate relief" in cases in which the employer was found to have violated the agreement, the court would probably have to enforce the award, even though it believed the arbitrator's decision to be wrong as a matter of law and the remedy to invade the exclusive jurisdiction of the NLRB.

Finally, suppose the arbitrator issues an award ordering the employer to commit an unfair labor practice, such as discharging an employee who has lost his union membership for reasons other than the non-payment of dues. Must the court enforce such an award? Note that here the arbitrator has not merely invaded the jurisdiction of the NLRB; he has also misapplied, and required the employer to violate, applicable federal law. Perhaps the court might escape from its dilemma by invoking that mysterious statement by Mr. Justice Douglas in the *Enterprise* case that the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement";[51] it could declare that the essence of this particular award could not have been drawn from the collective agreement, because if the agreement so provided, it would be illegal. This kind of "reasoning," however, opens up a dangerous leak in the dike, or, if I may change metaphors in mid-sentence, represents a major concession to creeping metaphysics. Those who reject this approach may be more sympathetic toward the position taken by Frank Cummings, who says:

> "In a sense, the problem calls not for resolution but for dissolution. The answer lies not in finding means to insure that awards are *consistent* with the act, but insuring that those cases which involve Board questions *are not arbitrated at all.*"[52]

I'm not sure that all this speculation leads to any significant conclusion. It is not that I am embarrassed by my admittedly far-fetched hypotheticals; stranger cases have come to my attention. Nor do I doubt that the egregious errors I have attributed

---

[51] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 34 LA 569, 363 U.S. 593, 597 (1960).

[52] Cummings, "NLRB Jurisdiction and Labor Arbitration: 'Uniformity' vs. 'Industrial Peace'," 12 *Lab. L. Jnl.* 425, 433 (1961).

to my mythical arbitrator could be matched by equally unfortunate judicial blunders. Perhaps my speculations boil down simply to this: in cases of the type under discussion the interrelationships between arbitrators, the courts, and the NLRB are somewhat amorphous and not susceptible to precise delineation; and the law of the trilogy may have the possible effect of blurring still further the shadowy demarcation lines that presently exist.

The third problem I have selected for discussion concerns the jurisdiction of the federal courts under section 301 of the LMRA and the Federal Declaratory Judgments Act [53] to issue declaratory judgments as to the arbitrability of disputes. The illustrative cases are *Weyerhaeuser Co.* v. *International Bhd. of Pulp Workers* [54] and the *Sinclair Refining* case, previously discussed in another connection.[55]

In the *Weyerhaeuser* case the collective agreement between the parties contained an arbitration provision stating in part: "Except for disputes, claims or grievances concerning wages, any dispute, claim, or grievance arising out of, or relating to this agreement, shall be submitted to arbitration . . ." [56] An employee's grievance alleging misclassification and requesting a wage adjustment having been denied by the company, the union demanded arbitration. The company refused and brought suit in the federal district court under section 301 of the LMRA, seeking a declaratory judgment that the decision of any arbitrator on the grievance would be null and void, and requesting an order enjoining the union from proceeding further in any such arbitration. The union countered with a motion to dismiss, on the ground that the court lacked jurisdiction of the subject matter.

There being no diversity of citizenship between the parties, the question presented was whether the company's complaint would properly be construed as a suit "for violation of contracts between an employer and a labor organization," within the meaning of section 301(a). Rejecting the contention that the words "suits *for* violation" in section 301(a) preclude suits for declaratory judgment because they do not allege violations of contract,[57]

[53] 28 U.S.C. §§ 2201-02 (1958).
[54] 190 F. Supp. 196 (S.D. Me. 1960).
[55] See text, notes 17-19, *supra*.
[56] 190 F. Supp. at 197.
[57] The leading case supporting that point of view is *Mengel Co.* v. *Nashville Paper Workers Union*, 221 F. 2d 644 (6th Cir. 1955).

the court ruled that it had jurisdiction over the subject matter of the action.

To reach this conclusion the court had to take some liberties with the language of section 301(a). It had to concede that "a suit which seeks a declaration that arbitration will not be binding upon a party to a collective bargaining contract, on the ground that the contract does not require the parties to arbitrate the particular dispute involved, is clearly not a suit for violation of the contract." [58] Nevertheless, the court declared that it had authority to grant declaratory relief "by virtue of the combined authority of Section 301(a), conferring jurisdiction, and the Federal Declaratory Judgments Act . . . authorizing the procedure." [59]

The principal basis for the court's decision was that if the company had simply refused to arbitrate and the union had then brought suit to compel arbitration, the court would undoubtedly have had jurisdiction of the action. The question to be decided in such a case would have been whether the collective bargaining agreement was violated by the company's refusal to arbitrate. That same ultimate question was at issue in the instant case, said the court, "and as to that question there is an actual controversy between the parties. The fact that the plaintiff, instead of the defendants, chose to litigate this question should not negative jurisdiction." [60]

The very purpose of the Federal Declaratory Judgments Act, the court continued, was to enable one in the company's position to seek a clarification of its rights in a case of this type; and nothing in section 301(a) "precludes use of the declaratory judgment procedure in cases of actual controversy which, if the parties were reversed, would fall within the jurisdiction which [that section] confers." [61]

The *Sinclair Refining* case, you will recall, involved an action by the company under section 301 for damages, an injunction, and declaratory relief, based on an alleged violation by the union and its officers of a no-strike agreement. The lower court denied both injunction and declaratory relief.[62] On appeal, the company

[58] 190 F. Supp. at 199.
[59] *Id.* at 198.
[60] 190 F. Supp. at 199.
[61] *Id.* at 199.
[62] 187 F. Supp. 225 (N.D. Ind. 1960).

argued that since its complaint had included in a single count a prayer for both an injunction and a declaration of "the rights of the parties," it was an error for the district court to dismiss the entire count, even though the court lacked the authority to grant injunctive relief. The court of appeals nevertheless affirmed the judgment below. It conceded that the count referred to did "pray a declaration that the no-strike and grievance procedure clauses are legal, binding and enforceable," but pointed out that the company had failed to allege the existence of a controversy between the parties as to the validity or enforceability of either clause. This being so, the court saw no reason to consider the matter further.

The most interesting questions raised by the *Weyerhaeuser* and *Sinclair Refining* cases are more closely related to the subject of federal jurisdiction than to the field of labor law. Although a thorough analysis of these questions would exceed my capacity and tax your patience beyond endurance, I think it worthwhile at least to mention some of the problems, which are easier to identify than to resolve.

Of the several difficulties raised by the *Weyerhaeuser* case, that presented by the language of section 301(a) was perhaps the easiest to surmount. It is true that language in the corresponding provision of the House (Hartley) bill would have, if adopted, completely obviated the problem; [63] so rejection of the language in the conference might be regarded as militating against the construction adopted by the court in the *Weyerhaeuser case*. On the other hand, nothing in the legislative history of the LMRA indicates that in adopting the present language of section 301(a) the conference committee intended to prohibit

[63] Section 302(a) of H. R. 3020 provided: "Any action for *or proceeding involving* a violation of an agreement between an employer and a labor organization . . . may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause." See *Textile Workers* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 516 (1957) (legislative history appendix to opinion of Frankfurter, J., dissenting). (Italics added.) Compare the language of § 302(a) of the LMRA, note 12, *supra*.

In the House debate on H. R. 3020, Representative Barden said: "It is my understanding that section 302 . . . contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could . . . be brought . . . under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract." Representatives Hartley and Case agreed with that statement. *See Textile Workers* v. *Lincoln Mills of Alabama, ibid.*

the federal courts from granting declaratory relief under that section.[64]

A more formidable problem was to find the existence of an "actual controversy" within the meaning of section 2201 of the Federal Declaratory Judgments Act.[65] Though the requirement is clear, courts have experienced difficulty in applying it to specific fact situations.[66] According to Professor Borchard, the plaintiff "must show that his rights are in direct issue or jeopardy; and incidental thereto must show that the facts are sufficiently complete, mature, proximate and ripe to place him in gear with his adversary, and thus to warrant the grant of judicial relief." [67] It is doubtful that the company met the requirements of this rigorous test in the *Weyerhaeuser* case. The record before the court was not such as to lead to the conclusion that if relief were denied, the company would persist in its refusal to arbitrate and the union would apply to the court for an order compelling arbitration. The nature of industrial relations being what it is, we could reasonably assume the possibility, if not the likelihood, of a number of alternative developments: (1) the union might withdraw its demand for arbitration; (2) the parties might settle the case without arbitration; (3) the union might call a strike to force settlement of the grievance on its terms; or (4) the company might seek declaratory relief, with or without an injunction, in a state court.

The first two of these alternative possibilities suggest the wisdom of the federal court's refusing declaratory relief, for obvious reasons; the last two suggest the advisability of granting it. If the court is convinced on the basis of evidence in the record that a strike is imminent, the case does indeed seem "mature, proximate and ripe" for declaratory relief. As interpreted by the court in the *Lincoln Mills* case, section 301 was designed to

[64] Thus, in the *Weyerhaeuser* case the court said: "This Court has been unable to ascertain why the language which ultimately appeared in Section 301(a) was more restrictive than that used in the House bill. In the absence of some affirmative evidence of Congressional intention, this Court cannot regard this change in language as of controlling significance. . . ." 190 F. Supp. at 200, n. 5.

[65] Section 2201 provides in part: "In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

[66] See Vanneman & Kutner, "Declaratory Judgments in the Federal Courts," 9 *Ohio St. L.J.* 209, 224 (1948).

[67] Borchard, *Declaratory Judgments* 36 (2d ed. 1941), cited in Vanneman & Kutner, *supra*, note 66.

facilitate the substitution of peaceful solutions for economic warfare in labor-management relations. If, on the other hand, it appears that the state court having jurisdiction would grant the requested declaratory relief, then we are confronted by a curious anomaly; that is to say, the state court has jurisdiction and can grant declaratory relief based on state law, but only up to the time that one party formally charges the other with a breach of the collective agreement. As of that moment, federal law must govern, even though the parties are in state court.[68] This result seems to me rather absurd.

Sooner or later, I suppose, the Supreme Court will resolve some of these problems. In the meantime, I think it likely that federal courts, in border-line situations like that presented by the *Weyerhaeuser* case, will strain to find the existence of an "actual controversy" in order to prevent the undesirable possibility that the plaintiff who is denied declaratory relief in federal court will seek it in state court.[69]

The *Sinclair Refining* case presents additional aspects of the declaratory judgment problem. The court in that case avoided the issue by holding that it had not been properly raised, but suppose that escape had not been available. Should the court then have granted or denied declaratory relief?

The opinion of the federal district judge in that case seems to suggest that if a court lacks authority to grant injunctive relief, it is similarly barred from granting a declaratory judgment. This approach overlooks the fact that a declaratory judgment is an alternative remedy. Therefore, while it may be correct to say that the existence of jurisdiction to issue an injunction is sufficient to sustain the granting of declaratory relief, it does not follow that if an injunction may not be granted, declaratory relief must also be denied.[70]

Of greater relevance, perhaps, to the question whether declaratory relief was appropriate in the *Sinclair Refining* case was the

[68] See cases cited in note 13, *supra.*

[69] The employer is most likely to seek declaratory relief in the face of an actual or threatened strike over an allegedly arbitrable grievence which the union refuses to arbitrate or over an allegedly non-arbitrable grievance which the employer refuses to arbitrate. Devaney suggests, *supra,* note 15, at 344, that relief is appropriate if there is evidence that the union has taken active steps to promote the strike. However, if the employer has an alternative possibility of filing an unfair labor practice charge with the NLRB, it would seem wiser for the court to withhold relief.

[70] Vanneman & Kutner, *supra,* note 66, at 216.

action for damages arising out of the same set of facts upon which the prayer for a declaratory judgment was based. Had the latter issue been properly raised, the court would have had to decide whether the action for damages was likely to leave unresolved any issues that could be disposed of by a declaratory judgment. From the reported facts in that case, it appears likely that the action for damages probably could have decided all the issues; but here we run into other questions, such as whether the damages case would be heard first, would be heard with or without a jury, and so forth.[71] However, since I have now exhausted my smattering of ignorance about these complex matters, to say nothing of your endurance, I shall drop the subject without further comment.

III.

The problems I have discussed in this paper are obviously of greater concern to judges and lawyers than to unions and employers. Perhaps those representatives of labor and management who are here today will be inclined, after this brief immersion in the dark and murky waters of federal jurisdiction, to agree with me that their best course is to stay away from the courts. The law of the arbitration trilogy has made it fairly easy for them to do so by resolving some of the questions to which the *Lincoln Mills* decision gave rise, and the current term of the Supreme Court should produce further clarification in respect to the most important remaining problems.

Of course, the developing federal law of arbitration has presented imposing challenges to the active participants in the arbitration process. Employers and unions now face the necessity of reviewing the grievance, arbitration, and no-strike provisions of their collective agreements to make sure that those provisions will accomplish the purposes for which they are mutually intended. But this necessity is also an opportunity for the parties to reappraise the character of their relationships and to reach understandings on some fundamental matters with which they have never really come to grips. I suspect that the luxury of the calculated ambiguity in respect to these particular provisions of the collective agreement is becoming more costly than

[71] I am grateful to my colleague, Professor William Cohen, for calling my attention to some of the difficult questions raised by a prayer for declaratory relief in cases of this sort.

most parties can afford. Doubtless, in many cases this process will be a painful one and may even provoke some open breaches; yet I persist in the old-fashioned belief that all conflict (including occasional resorts to economic warfare) is not bad, and that agreements resulting from strikes are frequently more firmly established and longer-lasting than judicial decisions following protracted litigation.