CHAPTER 6

SECTION 301—PROBLEMS AND PROSPECTS

PHILIP G. MARSHALL *

Section 301 of the Taft-Hartley Act is now fifteen years old and hence it is a good time to review our experience under it.

As a practicing lawyer and arbitrator, I have had to plan these remarks without benefit of the services of bright and eager graduate students, which may account for the lack of organization. Because time does not permit a comprehensive history of our experiences under Section 301, I intend to limit myself to four areas of inquiry:

First, a brief look at the extent and character of the litigation initiated under Section 301;

Second, an examination of some of the jurisdictional problems which we have encountered and may expect to encounter in the future;

Third, a review of the extent to which the federal courts have been willing to use their equity powers in Section 301 cases;

And, fourth, some observations on the use of referees and special masters by the federal courts.

I. *Extent and Character of Litigation*

In 1947, when Section 301 of the Taft-Hartley Act (29 U.S.C. 185) threw open the doors of the federal courts to suits by and against unions for breach of labor contracts, the law was viewed by many as paving the way for a multitude of harrassing suits by employers against unions. Indeed, the inclusion of Section 301 in the Taft-Hartley Act authorizing such suits without regard to the amount in controversy or to the citizenship of the parties, together with the determination of the question of agency as con-

* Attorney and Arbitrator, Milwaukee, Wisconsin.

tained in Subsection (e) of Section 301, constituted the principal reasons why the Taft-Hartley Act was called by labor oriented critics a "slave labor" law.

The labor press and labor spokesmen pointed to Section 301 with scorn and viewed with alarm "this new device for applying the thumb screws of the federal courts to labor unions." It was predicted that unions would be rendered impotent by the weight of litigation and the "terrible burdens heaped upon them by a decadent, senile and anti-union federal judiciary." (Quotes from clipping file, *Milwaukee Journal* Reference Library.)

Yet even in the first year of the existence of Section 301, unions were plaintiffs more often than defendants in suits brought in the federal courts. And as each succeeding year passed by, the percentage of suits brought by unions as compared with those instituted by employers under Section 301 grew in increasing measure.

I have not made a comprehensive statistical analysis of the reported cases, but I have examined the annotations to Section 301 as contained in 29 *U.S.C.A.* 185 and found that in ten representative categories of annotations contained in the *United States Code Annotated,* unions were the plaintiffs in excess of two-thirds of all reported cases.

In the twelve-year period from January 1950 to the end of 1962, there were 23 Section 301 cases started in my home judicial district, the United States District Court for the Eastern District of Wisconsin. In sixteen of these cases, unions were the plaintiffs, while employers were the plaintiffs in the remaining seven cases. Seven additional cases were removed to the federal court from the state courts and the Wisconsin Employment Relations Board and in five of the seven cases, it was the union that secured the removal order.

I believe it is also significant that most of the important landmark cases arising under Section 301 were brought by labor unions: *American Thread, Westinghouse Electric, Lincoln Mills,* the *Steelworker trilogy, Dowd Box, Lion Dry Goods,* as well as many others.

II. *Jurisdictional Problems*

As the volume of Section 301 cases increases in the federal

courts, there will be the inevitable pressure on them to "strip off" as much of this volume of impending litigation as can conveniently be accomplished.

The "stripping off" process of a certain amount of litigation in this field has been immeasurably enhanced by the decision of the United States Supreme Court of February 19, 1962, in the case of *Dowd Box Company* v. *Courtney,* 7 L.Ed.2d 483, 49 LRRM 2619. The sole question presented to the U. S. Supreme Court in this case was whether the state court's jurisdiction over the suit was divested by Section 301 of the Labor Management Relations Act. The case had originally been brought in the state court of Massachusetts, and the Massachusetts Appellate Court had sustained the jurisdiction of the state tribunal. On certiorari, the Supreme Court of the United States affirmed the Massachusetts Appellate Court. In a unanimous opinion, the United States Supreme Court held that: "State courts can exercise concurrent jurisdiction with the federal courts in cases arising under federal law where state jurisdiction is not excluded by express provision of the federal statute or by incompatibility in its exercise arising from the nature of the particular case." The Court went on to observe that: "concurrent jurisdiction has been a common phenomenon in the judicial history of the United States, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."

Prior to the *Dowd* decision, there was considerable indecision in the federal courts as to the preemptive effect of Section 301 even though the state courts have always been in general agreement that the statute did not oust them of jurisdiction in breach of contract actions. (*American Bar Association, Section of Labor Relations Law,* 1961 proceedings, report of Committee on State Labor Legislation, page 138.)

A brief review of the important federal cases involving jurisdiction may well be in order at this point. Prior to *Lincoln Mills* (*Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 230, 1 L.Ed.2d 972, 40 LRRM 2113 (1957)), the federal courts were having difficult time applying the doctrine of the then ruling case, *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation,* 348 U.S. 437, 99 L.Ed. 510, 35 LRRM 2643

(1954). While prior to this decision the courts found Section 301 a fertile source of difficulty, after the *Westinghouse* case, the courts found Section 301 a complete and total maze. The *Westinghouse* case enunciated the dubious doctrine that federal district courts could not entertain an action brought by a union on behalf of the employees to recover from the employer damages resulting from the latter's breach of a collective bargaining contract where such relief sought was grounded on what the court referred to as a "uniquely personal right."

The *Westinghouse* case is a "sport" case if ever there was one. Mr. Justice Frankfurter who announced the judgment of the court wrote the first appearing opinion in which he was joined by Mr. Justice Burton and Mr. Justice Minton. A separate concurring opinion was filed by Mr. Chief Justice Warren and Mr. Justice Clark, both of whom, while concurring in the result, renounced most, if not all, of the language and reasoning of the Frankfurter opinion, and based their concurrence upon grounds at variance with the views expressed by the Frankfurter opinion. Mr. Justice Reed filed a separate concurring opinion which it is difficult to categorize. A separate dissenting opinion was filed by Mr. Justice Douglas with which Mr. Justice Black concurred. I believe that it is a fair generalization to state that the precise holding of the *Westinghouse* case confounded most labor lawyers whether they represented management or unions and that the rationale of the case defied any reasonable precise statement.

It is good to know that the *Westinghouse* case has finally been laid to rest. In the recent case of *Smith* v. *Evening News Association,* decided December 10, 1962 (9 L.Ed.2d 246, 250, 51 LRRM 2646), Mr. Justice White said, ". . . . subsequent decisions here have removed the underpinnings of Westinghouse and its holding is no longer authoritative as a precedent."

It has been said that the *Lincoln Mills* case established once and for all the validity of Section 301 and the jurisdiction of federal district courts to hear and determine suits between unions and employers. It also established that in the exercise of this jurisdiction the federal courts could use their equity powers to compel enforcement of collective bargaining agreements without regard to whatever any lower courts had previously viewed as

specifically prohibited by the provisions of the *Norris-LaGuardia Act.* The opinion in the *Lincoln Mills* case also stated: "The legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way" (1 L.Ed.2d 972 at 979); and, further: "We conclude that the substantive law to apply in suits under Section 301 (a) is federal law which the courts must fashion from the policy of our national labor laws" (1 L.Ed.2d 972 at 980) ; and, further: "We see no justification in policy for restricting Section 301 (a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act." (I L.Ed.2d 972 at 981.)

Hard on the heels of *Lincoln Mills,* the federal courts were deluged with cases which concerned the arbitrability of grievance disputes and posing vexatious problems concerning the respective roles of the courts and the arbitrator in labor arbitration cases. This flood of cases culminated in the historic Steelworkers trilogy of cases decided by the United States Supreme Court on June 20, 1960. (*United Steelworkers of America* v. *American Manufacturing Company,* 363 U.S. 564, 46 LRRM 2414; *United Steelworkers of America* v. *Warrior and Gulf Navigation Company,* 363 U.S. 574, 46 LRRM 2416; and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593, 46 LRRM 2423.) The Steelworkers trilogy, and more particularly the opinion in the *Warrior* case by Mr. Justice Douglas, went so far in entrenching the jurisdiction of the arbitrator that the arbitrator (speaking of him as a generic person) was the first to want to run for the nearest exit. As one arbitrator has observed: "Few arbitrators today possess, nor do they desire, the virtually unlimited charter of authority which Mr. Justice Douglas seems determined to grant to them." (Harold W. Davey, 36 *Notre Dame Lawyer* 138, 143 (1961) .) In the Steelworkers trilogy, Mr. Justice Douglas seems to conclude that federal courts should order arbitration unless it could be said with "positive assurance" that the subject was not arbitrable with all doubts being resolved in favor of arbitrability. (For an excellent short analysis of the Steelworkers trilogy cases, see Robert A. Levitt, *Proceedings of New*

York University, 14th Annual Conference on Labor, pp. 217-238 (1961).)

From my own observations as an arbitrator, I conclude that employer representatives are so overwhelmed by the "Douglas Doctrine" as enunciated in the Steelworkers trilogy that they proceed voluntarily to arbitrate grievances of the most frivolous kind without ever suggesting to the arbitrator the possible presence of the issue of arbitrability. Many of these same representatives were of the kind who in the past always argued the issue of arbitrability whether or not there was any conceivable basis for its urging.

Many practitioners are failing to make the distinction between the question of how frivolous and remote an issue must be to defeat the judicial enforcement of an agreement to arbitrate and the question of how germane an issue must be for an arbitrator to seriously undertake to determine the merits of the issue.

The most dangerous aspect of the "Douglas Doctrine," as I see it, is not to be found in the issue of arbitrability, which can be rationalized, as I have suggested immediately above, by distinguishing between the pure question of arbitrability as arbitrators have generally applied that concept and the degree of frivolity necessary to render an agreement to arbitrate unenforceable in the federal courts. Rather, the danger lies in the high degree of expertness which Mr. Justice Douglas seems to confer upon arbitrators as a class and the frightening suggestion that his award may be based upon his judgment as to whether plant "tensions will be heightened or diminished" by his decision. I had always thought it fundamental that the decision of an arbitrator be based upon the collective bargaining agreement and the evidence presented and not on an evaluation of the issue based upon the specialized knowledge of the arbitrator. (3 *Am. Jur.,* Arbitration & Award, Sections 3 and 4; and 85 *ALR* 2d 780.)

The Use of the Court's Equity Powers

The Supreme Court, in leaping from *Westinghouse,* to *Lincoln Mills,* to the Steelworkers trilogy, appeared to be well on its way to making available to Section 301 litigants the full arsenal of the equity powers of the Court. However, on June 18,

1962, the Supreme Court, in the case of *Sinclair Refining Company* v. *Atkinson,* 8 L.Ed.2d 440, 50 LRRM 2420, seems to have made a complete circle, and Mr. Justice Black, in the majority opinion of the Court, seems to say that the equity powers of the federal court will, in the future, be limited to directions to arbitrate, thus placing upon the *Lincoln Mills* decision the narrowest of all possible constructions.

In the *Sinclair Refining Company* case, the employer sought injunctive relief against the union's breach of the collective bargaining agreement by repeated strikes and work stoppages over grievances which the agreement required to be arbitrated. The district court denied injunctive relief on the ground that the court was without jurisdiction to do so by virtue of Section 4 of the *Norris-LaGuardia Act* (29 U.S.C.A. 104), which bars federal courts from issuing injunctions in any case involving a labor dispute. The United States Court of Appeals for the Seventh Circuit affirmed the order of dismissal for the same reasons (290 F.2d 312). An opinion by Mr. Justice Black, speaking for a majority of the Court, upheld the lower court's decision. There was a dissent by Justices Brennan, Douglas and Harlan; and Mr. Justice Frankfurter, because of illness, did not participate.

The opinion of the majority in the *Sinclair Refining Company* case is as difficult to understand as was the earlier *Westinghouse* case with its "uniquely personal rights theory." The majority sought to distinguish the *Lincoln Mills* case by stating:

> There the Court held merely that it did not violate the anti-injunction provisions of the Norris-LaGuardia Act to compel the parties to a collective bargaining agreement to submit a dispute which had arisen under that agreement to arbitration where the agreement itself required arbitration of the dispute. . .
>
> The court pointed out that the equitable relief granted in that case—a mandatory injunction to carry out an agreement to arbitrate—did not enjoin any one of the kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of United States Courts. . .
>
> Nor can we agree with the argument made in this Court that the decision in Lincoln Mills, as implemented by the subsequent decisions in United Steelworkers v. American Manufacturing Co., United Steelworkers v. Warrior & Gulf Navigation Co., and United Steelworkers v. Enterprise Wheel & Car Corp. requires us to recon-

> sider and overrule the action of Congress in refusing to repeal or modify the controlling commands of the Norris-LaGuardia Act. To the extent that those cases relied upon the proposition that the arbitration process is 'a kingpin of federal labor policy,' we think that proposition was founded not upon the policy predelictions of this Court but upon what Congress said and did when it enacted Section 301. . .
>
> It is doubtless true, as argued, that the right to sue which Section 301 gives employers would be worth more to them if they could also get a federal court injunction to bar a breach of their collective bargaining agreements.

The efforts of Mr. Justice Black to distinguish the decision in *Sinclair Refining Company* from the earlier *Lincoln Mills* decision are strained and difficult to follow. I believe that it is significant to note that Mr. Justice Black did not participate in any of the decisions which made up the Steelworkers trilogy.

The dissenting opinion of Mr. Justice Brennan, with which Mr. Justice Douglas and Harlan joined, pointed out:

> Of course, Section 301 of the Taft-Hartley Act did not, for purposes of actions brought under it, 'repeal' Section 4 of the Norris-LaGuardia Act. But two provisions do coexist, and it is clear beyond dispute that they apply to the case before us in apparently conflicting senses. Our duty, therefore, is to seek out that accommodation of the two which will give the fullest possible effect to the central purposes of both. Since such accommodation is possible, the Court's failure to follow that path leads it to a result . . . which is wholly at odds with our earlier handling of directly analogous situations and which cannot be woven intelligibly into the broader fabric of related decisions. . .
>
> * * *
>
> The enjoining of a strike over an arbitrable grievance may be indispensable to the effective enforcement of an arbitration scheme in a collective bargaining agreement; . . .
>
> * * *
>
> Norris-LaGuardia Act does not stand in isolation. It is one of several statutes which, taken together, shape the national labor policy.

(The Court here cites *Brotherhood of Railroad Trainmen* v. *Chicago River R. Co.*, 353 U.S. 30, 39 LRRM 2578.)

> Chicago River makes this plain. We there held that the federal courts, notwithstanding Norris-LaGuardia, may enjoin strikes over disputes as to the interpretation of an existing collective

> agreement, since such strikes flout the duty imposed on the union by the Railway Labor Act to settle such "minor disputes" by submission to the National Railroad Adjustment Board rather than by concerted economic pressures. . .
>
> * * *
>
> In any event, I should have thought that the question was settled by *Textile Workers v. Lincoln Mills*, . . . In that case, the Court held that the procedural requirements of Norris-LaGuardia's Section 7, although in terms fully applicable, would not apply so as to frustrate a federal court's effective enforcement under Section 301 of an employer's obligation to arbitrate. . .
>
> * * *
>
> There is nothing in the words of Section 301 which so much as intimates any limitation to damage remedies when the asserted breach of contract consists of concerted activity. . . . Taking the language alone, the irrestible implication would be that the District Courts were to employ their regular arsenal of remedies appropriately to the situation. That would mean, of course, that injunctive relief could be afforded when damages would not be an adequate remedy. . .
>
> * * *
>
> Insistence upon strict application of Norris-LaGuardia to a strike over a dispute which both parties are bound by contract to arbitrate threatens a leading policy of our labor relations law.

The dissenting opinion also points out that it is difficult, if not impossible, for the *Sinclair Refining Company* decision to "be fitted harmoniously into the pattern of prior decisions on analogous and related matters."

The dissenting opinion also argues that if the majority opinion in *Sinclair Refining* is to be given the effect as a literal reading would suggest:

> . . . the development of a uniform body of federal contract law is in for hard times. So long as state courts remain free to grant the injunctions unavailable in federal courts, suits seeking relief against concerted activities in breach of contract will be channeled to the States whenever possible. Ironically, state rather than federal courts will be the preferred instruments to protect the integrity of the arbitration process, which Lincoln Mills and the Steelworkers decisions forged into a kingpin of federal labor policy. . .
>
> I have not overlooked the possibility that removal of the state suit to the federal court might provide the answer to these difficulties. But if Section 4 is to be read literally, removal will not be allowed.

The sum of the minority opinion in *Sinclair Refining* is contained in the quotation of this single sentence toward the end of that opinion: "The decision deals a crippling blow to the cause of grievance arbitration itself."

There has not been enough experience or a sufficient volume of reported cases in the federal courts following the *Sinclair Refining Company* decision of June 18, 1962, to fully assess the impact that it will have on both federal and state litigation in enforcing collective bargaining agreements. There is no doubt but what the *Sinclair Refining Company* case appears to place serious restrictions upon the remedial powers of federal courts in enforcing a collective bargaining agreement. What effect this will have upon enforcement of awards is highly speculative at this point.

The only decision of significance which has been handed down by the Supreme Court after *Sinclair Refining* is that of *Smith* v. *Evening News Association,* 9 L.Ed.2d 246, 51 LRRM 2646, decided December 10, 1962.

The *Evening News* case held that (1) the National Labor Relations Board's authority to deal with an unfair labor practice which also violates a collective bargaining contract does not destroy the jurisdiction of the courts under Section 301; (2) suits to vindicate individual employee rights are not excluded from the coverage of Section 301; and (3) the coverage of Section 301 extends to suits brought by employees as well as suits brought by unions. In addition, as I mentioned earlier, this case also specifically overruled the *Westinghouse* case.

In connection with the enforcement of arbitration awards, you as arbitrators will, I feel sure, be interested in two recent cases. In one of these which arose in the United States District Court for the Western District of Pennsylvania (*Steelworkers* v. *A. M. Byers Co.,* 50 LRRM 2870) the court found that it could not enforce an arbitration award because the award of the arbitrator lacked particularity in its application to the grievance involved. The court therefore directed:

> IT IS FURTHER ORDERED that the arbitrator is directed to submit to the Court his evaluation and opinion of the matters referred to herein at the earliest possible date. Should the arbitrator desire the appearance of the parties in order to clarify the

> dispute which exists, the Court has been assured by counsel that they will appear and offer testimony at any time directed.

I believe we have in this case a unique situation. In effect, the court here went much farther than directing the parties to arbitrate; it made the arbitrator an arm of the court without going through the usual procedure of making the arbitrator a special master.

Another case which I believe you will find of interest as arbitrators is that of *In re Borrazas,* 50 LRRM 2891, which, while not a Section 301 case, involves the enforcement of an award in the New York Supreme Court. The Court here enunciates the curious rule that it will enforce any award of an arbitrator so long as his award is not "completely irrational." The State of New York has always been noted for its liberal and forward-looking acceptance of the arbitration process. This case seems to be an extension of the limit.

III. *Enforcement of Contracts With No Provision For Arbitration*

There is a class of cases arising under Section 301 which though not many in number are interesting because of the effect their litigation may have on the collective bargaining process.

While provisions to arbitrate have been written into the overwhelming majority of collective bargaining agreements, there are still a significant number of contracts which do not provide for arbitration as a terminal point in the grievance machinery. Many large as well as small companies, and some labor unions, are opposed to the use of the arbitration process. This view is not always shared by both parties to the labor contract. In particular, many unions would like to have a forum for the final resolution of their grievances which has been denied them at the bargaining table. These unions have been resorting to the use of Section 301 to secure a final and binding resolution of their grievances. *Lincoln Mills* and the Steelworkers trilogy, by their emphasis upon the arbitration process, have cast in the shade the litigation one finds under Section 301 involving contract disputes where there is either no arbitration provision, no no-strike provision, or

neither. Cases of this kind can prove vexatious to the federal district judge because they, in effect, force upon him the role of a grievance arbitrator.

As an example of the type of case I mean, I call your attention to two cases which were brought in my own home district, the United States District Court for the Eastern District of Wisconsin (*Tool & Die Makers Lodge No. 78, International Association of Machinists, AFL-CIO* v. *General Electric Company X-Ray Department* and *X-Ray Lodge No. 1916, District No. 10, International Association of Machinists, AFL-CIO* v. *General Electric Company X-Ray Department,* 43 LRRM 2734). When confronted with the imminent prospect of having to decide what was in effect ten separate grievances involved in the Section 301 complaint, the Court entered an order referring the cases to an arbitrator to serve as a special master. Feeling that this order may be of some interest, I set forth the full text of it as follows:

ORDER REFERRING ACTIONS TO SPECIAL MASTER

The above captioned actions having been removed to this court from the Wisconsin Employment Relations Board, and issue having been joined, and the court having examined the pleadings and the statements of fact filed by the respective parties and it appearing that the complainants have alleged ten separate grievances and that trials of these actions to the court would likely involve not only presentation of facts relating to each grievance but also presentation of considerable background evidence, the probative value of which could best be evaluated by one experienced in the field of labor arbitration, and it further appearing that there is a strong probability that certain of the grievances could best be understood by plant visitations and personal observation of on-the-job operating conditions and practices, and it further appearing that appointment of such a person as special master in these actions would result in substantially shortening the time for trial by obviating or at least lessening the necessity of familiarizing the trier of the facts with shop rules and practices, and it further appearing that if no such appointment were made, trial of these actions in the near future would be unlikely due to the congested condition of the court's calendar, and the court having informed the parties of its intention to appoint a special master herein, and the parties having expressed no objection thereto.

Now, on the court's own motion, IT IS ORDERED:

1. That the above captioned actions be and they are hereby referred to Philip G. Marshall as special master for such proceed-

> ings as may be necessary, to hear evidence, to take testimony on all the issues herein, to pass on disputed claims and to report his findings of fact and conclusions of law thereon to the court.
>
> 2. That said special master shall receive such compensation as may hereafter be determined and his actual expenses, an itemized statement of which shall accompany his report, which compensation and expenses shall be paid by such of the parties hereto as the court shall hereinafter specify.

Within the past year, two other cases have been referred to a special master within the same district. So few of the cases arising under Section 301 find their way into the printed reports that I have no way of assessing the extent to which the special master device is called into play. I believe, however, that in labor contract enforcement actions under 301, where the grievance machinery of the contract contains no provision for arbitration, the special master provision is almost as inevitable as it has been for some time past in bankruptcy matters and cases involving complicated questions of damages.

IV. *Conclusion*

And now comes that fateful moment when the speaker says, "And in conclusion." I know that with the sound of those words you all have awakened and are now lending me a sympathetic, even though impatient ear. With your attention thus regained, I want to conclude these remarks with a prediction of things to come in each of the four areas of inquiry which I carved out for myself at the outset.

First, I predict that unions will continue to be responsible for the bulk of the litigation under Section 301.

Second, I predict that the enforcement of labor contracts and arbitration awards will be shared, to a larger extent, by the state court systems than was true in the past.

Third, I predict that the United States Supreme Court, with Mr. Justice White or Mr. Justice Goldberg writing the unanimous opinion, will state (to paraphrase the Court's obituary to the *Westinghouse* case): "Subsequent decisions here have removed the underpinnings of Sinclair Refining Company and its holding is no longer authoritative as a precedent." In short—I

fully expect, and predict, that in the immediate future the federal courts will be using the full arsenal of their equity powers in the enforcement of collective bargaining contracts and arbitration awards.

Fourth, I predict that federal courts will have full or part time "Labor Relations Referees" just as they now have "Referees in Bankruptcy."

Discussion—

FREDERIC D. ANDERSON *

Mr. Marshall's astonishment at the decision of the Supreme Court in *Sinclair Refining Company* v. *Atkinson,* 370 U.S. 195, 50 LRRM 2420 (June 18, 1962), is shared by many lawyers. After a series of cases, in which the Court said that § 301 "expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way"; [1] and in which it said: "The Congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-LaGuardia Act"; [2] the Court held that it was forbidden by the Norris-LaGuardia Act [3] to use its equity powers to enjoin strikes in violation of those very collective bargaining agreements.

It is easy to describe the series of cases in which the Court gave a broader scope to § 301 and the powers of the courts under it. It is harder to explain how that series could have been climaxed by a decision which so completely denied the logic of everything which had been said and done up to that point.

The explanation would seem to lie in the theories of statutory construction which the Supreme Court has adopted; or, more exactly, in the fact that it has shifted theories of statutory construction in the middle of working out the § 301 problem.

* Attorney, Indianapolis, Indiana; member of the Council of the Section on Labor Relations Law, American Bar Association.

1 *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 at 455, 40 LRRM 2113 (1957).

2 *Ibid.,* at 458-459.

3 47 Stat. 70, 29 U.S.C. §104.

In a somewhat over-simplified way, it may be said that there are two techniques of statutory construction involved. One of these finds the law in the words of the statute which Congress enacted and which the President signed. This is the theory that the statute means what it says, no more and no less.

The other theory is that what Congress actually does is to adopt a policy and a purpose; that whatever will implement that policy and purpose, is the law; that it is the function of the court to determine this (the stylish word is "fashion"); and that the operative language of the statute enacted by Congress can largely be ignored, either in its affirmative or limiting provisions, in carrying out this process.

The Supreme Court approached the present problem from this second point of view. First in *Lincoln Mills,* and then in the Steelworkers trilogy,[4] the Supreme Court found that Congress had adopted a broad policy and purpose, and that it was up to the Supreme Court to fashion a whole body of law, substantive and procedural, to carry out this policy and purpose.

The policy and purpose can be stated briefly as follows: The terms and conditions of employment are to be established by collective bargaining. The purpose of this is to reduce the burden on the economy caused by strikes. This objective can be achieved only if collective bargaining agreements are not merely made, but are also carried out; and if disputes over their interpretation, performance and enforcement are settled by peaceable means rather than by strikes. Therefore, the federal courts are to be open to suits to enforce them; and the procedure for doing so is to be made more convenient and effective. The parties have, in most collective bargaining agreements, provided a means of settling such disputes and enforcing the contracts which is even better than litigation in the courts. This is grievance arbitration. Therefore, if there is any remote possibility that the parties have agreed that a question shall be submitted to arbitration, such an agreement shall be found and enforced. This shall be done even

---

4 *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

if the question is whether the parties have agreed to submit the question to arbitration.

Furthermore, when the arbitrator has decided, his decision, unless plainly beyond his authority, will be enforced by the court. The Court has decided that this is the law partly because the Court has found that arbitrators are both smarter and better informed than judges. All other legal and equitable procedures and remedies, including actions for damages, injunctions, and declaratory judgments shall be available, and can be sought in either state or federal courts.

This then is the law as reflected by *Lincoln Mills* and by the Steelworkers trilogy, and as implemented since that time by other cases.

It does not arise out of the language of § 301, the language upon which Congress voted and ultimately passed over the President's veto. It arises out of the second technique of statutory construction described above. It arises because the Supreme Court decided that Congress, instead of just enacting the language of § 301, had declared a policy and a purpose, and the Supreme Court constructed the law to carry out what it understood to be that policy and purpose.[5]

There is much merit in the legal structure which the Court thus constructed, apart from whether the process of construction was a proper one or not. There is a great deal of merit in the idea that the promises of the collective bargaining agreement must be carried out by the parties; that if a party does not perform its promise, the courts will force it to do so; and that the judicial process, or something akin to it, rather than strikes and lockouts, ought to resolve questions of contractual interpretation and enforcement.

At this point, however, the Court came to the case of *Sinclair Refining Company* v. *Atkinson,* 370 U.S. 195, 50 LRRM 2420

[5] "The Court has avoided the difficult problems raised by § 301 of the Taft-Hartley Act, 61 Stat. 156, 29 U.S.C. § 185, by attributing to the section an occult content. This plainly procedural section is transmuted into a mandate to the federal courts to fashion a whole body of substantive federal law appropriate for the complicated and touchy problems raised by collective bargaining." (Frankfurter, J., dissenting, in *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 at 460-461, 40 LRRM 2113 (1957).)

The majority was able to do that despite its own view that "The legislative history of § 301 is somewhat cloudy and confusing. But there are a few shafts of light that illuminate our problem." (Douglas, Jr., *ibid.* p. 452.)

(1962). Here the contract contained a promise by the Union not to strike. In the average collective bargaining agreement, this is the only promise made by the union party to the contract. All other promises are made by the employer. The Court has said repeatedly that this promise not to strike is the *quid pro quo* for the promise to arbitrate, and has interpreted the promise not to arbitrate very liberally, because it considered this *quid pro quo* so important.[6] Indeed, it might be said that this promise not to strike is the *quid pro quo* for the *whole* collective bargaining agreement, since it may be assumed that one side of the bargain is the *quid pro quo* for the other side of the bargain, and the promise not to strike is the only promise which the union makes.

Having announced the policy of requiring the parties to carry out their promises in collective bargaining agreements; and having announced its intention to fashion remedies effective to bring this about; it might have been expected that the court would say that the union had to carry out its promise not to strike, and that an effective remedy would be fashioned to bring this about.

Both practically, and by any standard of traditional equity relief, the only remedy appropriate to enforce the no-strike clause is the injunction.[7] The question in *Sinclair Refining Company* v. *Atkinson,* 370 U.S. 195, 50 LRRM 2420 (1962), was whether the Company could be granted an injunction to enforce the union's

6 "Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the 'no strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other. The question is not whether in the mind of the court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." (Douglas, J., *United Steelworkers of America* v. *American Manufacturing Company,* 363 U.S. 564 at 567, 46 LRRM 2414 (1960).)

"Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." (Douglas, J., *Textile Workers* v. *Lincoln Mills,* 353 U.S. 455, 40 LRRM 2113 (1957).)

7 "But the enjoining of a strike over an arbitrable grievance may be indispensable to the effective enforcement of an arbitration scheme in a collective agreement; thus the power to grant that injunctive remedy may be essential to the uncrippled performance of the Court's function under § 301. Therefore, to hold that § 301 did not repeal § 4 is only a beginning. Having so held, the Court should—but does not—go on to consider how it is to deal with the surface conflict between the two statutory commands." (Brennan, J., dissenting, *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 at 216-217, 50 LRRM 2420 (1962).)

promise not to strike, a promise violated by a series of harassing strikes.

At this point the Supreme Court was faced by the Norris-LaGuardia Act. The Supreme Court was also faced by a choice of techniques of statutory construction. It is submitted that if the Supreme Court had continued along the course which it had followed up to that point in this field; if the Supreme Court had used the technique of statutory construction which it used in *Lincoln Mills* and in the Steelworkers trilogy; the answer would have followed automatically. It would have found that the injunction could be granted.

But at this point the Supreme Court shifted techniques. At this point, it decided that the law was to be found in the language which the Congress enacted. It decided not to look to the overriding policy and purpose, which it has seen so clearly in *Lincoln Mills* and in the Steelworkers trilogy. It decided that it did not have a mandate to fashion a structure of federal substantive and procedural law to carry out that policy and purpose. It decided that the law was to be found in the language of the statute.[8]

The present highly unsatisfactory state of the law under § 301 can be attributed almost exclusively to the fact that the Supreme Court saw fit to shift its theory of statutory construction.[9]

This discussion does not deal with the question of the validity of either method of statutory construction. That is a large and separate subject. But it is submitted that the shift from one to the other was monumentally illogical.

---

[8] "Moreover, the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself. We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeatedly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction." (Black, J., *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 at 202-203, 50 LRRM 2420 (1962).

[9] "In any event, I should have thought that the question was settled by *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448. In that case, the Court held that the procedural requirements of Norris-LaGuardia's § 7, although in terms fully applicable, would not apply so as to frustrate a federal court's effective enforcement under § 301 of an employer's obligation to arbitrate. It is strange, I think, that § 7 of the Norris-LaGuardia Act need not be read, in the face of § 301, to impose inapt procedural restrictions upon the specific enforcement of an employer's contractual duty to arbitrate; but that § 4 must be read, despite § 301, to preclude absolutely the issuance of an injunction against a strike which ignores a union's identical duty." (Brennan, J., dissenting, *Sinclair Refining Co.* v. *Atkinson* 370 U.S. 195 at 219-220, 50 LRRM 2420 (1962).)

It negated the whole scheme of the law in this field, as enunciated by the Court. The purpose, it was said, was to protect commerce from interruptions by strikes. The means of accomplishing that purpose, it was said, was to encourage the making of collective bargaining agreements, and then to enforce them effectively. Effective judicial or arbitrational enforcement was supposed to be a substitute for strikes and was supposed to eliminate them.

This whole scheme could succeed only if in fact the strikes were eliminated. When the Supreme Court got down, however, to implementing that part of the scheme, it decided that the federal courts were powerless effectively to eliminate strikes. It said that the courts could carry out every step of this scheme of law except the step which accomplished the announced purpose of the scheme.

It is interesting to speculate on why this happened. But anything which is suggested must plainly be labelled speculation, and it is offered only on that basis.

It goes back to the atmosphere in which the Norris-LaGuardia Act was passed. This was three years before the Wagner Act. It was at a time when the labor movement in this country was much smaller; unions were much weaker; collective bargaining was less frequent; there was less public, and particularly less industry acceptance of unions and collective bargaining; and there was, perhaps, some court hostility to the labor movement. In those times, union leaders, and their supporters, came to hate the labor injunction. They felt that the injunction deprived employees of their opportunity to organize and to bargain effectively. The Norris-LaGuardia Act arose out of that circumstance and that state of mind. It became an article of faith that it was wrong for courts to enjoin strikes.

It is suggested that the unwillingness of the Court, when it came to *Sinclair Refining Company* v. *Atkinson,* to carry to a logical and successful conclusion the policy, purpose and scheme of law which it had been evolving, resulted from this historic underlying inhibition against enjoining strikes. It has been said that hard cases make bad law. To someone whose philosophy is much influenced by the antipathy to labor injunctions of the twenties and thirties, a suggestion that strikes can be enjoined despite the

Norris-LaGuardia Act is a "hard case." It is submitted that it made bad law.[10]

If this is the explanation, then it represents a failure of logic. The injunction sought in *Sinclair Refining Company* v. *Atkinson,* bears no resemblance to the strike injunctions which were intended to be forbidden by the Norris-LaGuardia Act. The injunctions of the twenties and thirties were impediments to organization, and to the establishment of collective bargaining. The injunction sought in *Sinclair Refining Co.* v. *Atkinson* was designed to implement, make successful and enforce the agreement which was the fruit of organization and collective bargaining. It was intended to carry out the very policy and purpose which the Supreme Court had so readily found, in *Lincoln Mills* and in the Steelworkers trilogy, to be the national policy, and which it there announced its duty to implement.

Sinclair Refining Co. v. *Atkinson* is a mistake which may not readily find a remedy. As a matter of practical politics, it would be as hard to remedy it by appropriate amendment or repeal of the Norris-LaGuardia Act, as it would have been to obtain the enactment of a statute which said the things which the Supreme Court found to be the law in *Lincoln Mills* and the Steelworkers trilogy. The only solution would seem to be Supreme Court reversal, express or by limiting implication, of this mistaken decision.

References to Arbitrators as Special Masters

Mr. Marshall reports an interesting practice of referring § 301 cases to special masters and the use of experienced arbitrators for this purpose.

---

[10] Mr. Justice Frankfurter, dissenting in *Lincoln Mills,* saw that the logic of the *Lincoln Mills* decision led inevitably to the labor injunction, and, therefore, warned against it.

"It should also be noted that whatever may be a union's *ad hoc* benefit in a particular case, the meaning of collective bargaining for labor does not remotely derive from reliance on the sanction of litigation in the courts. Restrictions made by legislation like the Clayton Act of 1914, 38 Stat. 738, § § 20, 22, and the Norris-LaGuardia Act of 1932, 47 Stat. 70, upon the use of familiar remedies theretofore available in the federal courts, reflected deep fears of the labor movement of the use of such remedies against labor. But a union, like any other combatant engaged in a particular fight, is ready to make an ally of an old enemy, and so we also find unions resorting to the otherwise much excoriated labor injunction. Such intermittent yielding to expediency does not change the fact that judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes; nor are the conditions for its effective functioning thereby altered." (353 U.S. 448 at 462-463)

Apparently this can be done only with the consent of the parties. Such references are limited by Rule 53 (b) of the Federal Rules of Civil Procedure.[11] The most recent Supreme Court decision applying this rule is *La Buy* v. *Howes Leather Co.,* 352 U.S. 249 (1957). The Court there construed strictly the requirement that there shall not be a reference except upon a showing that "some exceptional condition requires it." It rejected the grounds "that the cases were very complicated and complex"; "that they would take considerable time to try"; and that the court's "calendar was congested." The Court concluded that the orders of reference "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." (352 U.S. 249 at 256.) See Barron & Holtzoff, *Federal Practice and Procedure,* Rules Edition (St. Paul, 1960), § 1162, pages 578-587.

If the parties want the particular case tried by an arbitrator, they can agree to submit it to arbitration even in the absence of an arbitration provision in their collective bargaining agreement. If they persist in their opposition to the use of the arbitration process, they should not be forced into it by calling it a reference to a special master. Probably Rule 53 (b) protects them from it.

Discussion—

DAVID PREVIANT*

Mr. Marshall has approached this subject like the good arbitrator he is—objectively, dispassionately, and with a little comfort for everybody. I am afraid I am much more of an advocate, but any disagreements which I may have with him surely do not reflect any diminution of my high regard for him as a friend, practitioner and arbitrator.

First I should say that I am not as surprised as Mr. Marshall and others seem to be that the unions are using Section 301 more than

11 "(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

* Attorney; Milwaukee, Wisconsin.

the employers. This may be but an illustration of the old maxim, "If you can't beat 'em, join 'em." But more than that—the fact that labor unions are using Section 301 more frequently than employers would seem to me to bolster organized labor's stated position during the legislative debates that the law was wholly unnecessary to protect the right of the employer to sue in the federal courts for the simple reason that the incidents of breach of contract by labor unions was remarkably small and existing state remedies were adequate. Labor unions, in other words, had been and are adhering faithfully to their contracts. On the other hand it would appear from the figures that there still are many employers who seek to escape their obligations under collective bargaining agreements, particularly the obligation to submit grievances to arbitration and to comply with arbitration awards.

Mr. Marshall also expresses some fear that the volume of 301 cases will increase. I share this fear, but for different reasons. I think more employers will succumb to the deceptive wiles of the advantages and delays of litigation. But, beyond that, I fear very much that much of such increase will flow out of the United States Supreme Court decision in *Smith* v. *Evening News* [1] which, you will recall, affirmed the right of individual employees to sue for breach of contract under Section 301 although the breach complained of also constituted an unfair labor practice.

There is, of course, the further problem which is present in those relationships governed by contracts which do not provide for final and binding arbitration, the parties having agreed that the ultimate resolution of a deadlock shall be by economic action. Admittedly the number of such contracts is relatively small. But in the trucking industry, they affect many employers, employees and unions. It may be that in those circumstances, more cases will be going to the federal courts. However, I venture to suggest that, as in some contract clauses in the trucking industry, even court action would be precluded in the event of deadlock by the agreement of the parties that only their interpretation and only their method of enforcement of the agreement shall prevail.

[1] *Smith* v. *Evening News Association*, 371 U.S. 195, 51 LRRM 2646 (1962). (Since the Annual Meeting, the United States Supreme Court has made it clear that *Smith*, supra, has completely reversed "Westinghouse" on the question of the right of individuals to sue under Section 301, *Local 89* v. *Riss*, 31 *U.S. Law Week* 4296; 47 L.C. ¶ 18,148 (1963).) 52 LRRM 2623.

Whether employers will run from the arbitration clauses in their contracts to take their chances in the courts will most likely depend, among other things, on such diverse factors as (1) whether the employer has had good or bad experiences in arbitration, (2) whether he has accepted or rejected the principle of unionism, and industrial democracy, (3) his own appraisal of the state and federal judiciary in his district, (4) his own appraisal of the strength or weakness of the unions with which he deals, and (5) his own belief in whether arbitration is really an extension of collective bargaining, and is intended to fill the "calculated ambiguities, interstices and deliberate silences" of the collective bargaining agreement, or whether it is of the nature of the conventional judicial proceeding, requiring, in his opinion, strict adherence to formula and rote.

In this connection, we can expect, or at least hope, that the negotiators will begin to be less vague and more explicit in their handling of problems such as subcontracting, seniority, overtime, management prerogatives, production controls, etc., even though the nature of the compact is such that definitiveness in some of these areas is difficult.

Finally, an employer's tendency or inclination to avoid arbitration and go to the courts may be counter-balanced with the realization that under *Smith* v. *Evening News* he will be exposed to much more expense and insecurity in his relationship with unions by suits of individual employees who may not be bound by closed-end grievance procedures or union settlement.

This brings me back to my earlier statement that one of the principal problems that I foresee in the future is that arising out of litigation brought by individual employees. There have been more and more such cases. We have one in the United States Supreme Court now, in *Moore* v. *Local 89*.[2]

The *Evening News* case indicates that in limited circumstances individual employees may go to court where there is no arbitration clause, but it leaves open the questions of under what circumstances they can go to court to compel arbitration, to enforce an award or for other relief if the union refuses to submit to arbitration.

---

2 *Moore* v. *Local 89*, 356 S.W. 2d 241 (Ky. 1962), 49 LRRM 2677, cert. granted 371 U.S. 967 (193), 52 LRRM 2623.

In a fine article by Professor Clyde Summers, entitled "Individual Rights in Collective Agreements," [3] this subject is thoroughly explored. It would appear that there are varying schools of thought and possibilities:

1. The employee should be able to compel arbitration, even though the employer and the union are persuaded there is no merit to the grievance.

2. He cannot compel arbitration but he can sue the union for its dereliction of duty in failure to go to arbitration.

3. He may sue the employer directly where he can show that it would be idle for him to rely upon his union to protect his interests under the contract.

4. He may wind up without any remedy at all, as in New York, where it has recently been held that even when he sues the union for dereliction of duty, the union as an entity cannot be held, if the dereliction is that of individual officers.

I am inclined to agree with Professor Summers that the courts are going to find a way of protecting the individual against procedural unfairnesses or the lack of adequate remedy to redress his grievances in the industrial hierarchy, and that the parties to the contract themselves might well direct their thinking to devising some manner of doing this.

Professor Summers has suggested that the answer is to permit the individual to invoke the grievance procedure, but have some provision for his payment of costs in the event the grievance is unsuccessful. But this raises the further question with respect to who shall present the grievance in such circumstances, and what arbitrator or tribunal shall be permitted to hear this kind of case. As to the latter problem, Professor Summers does some of you permanent umpires an ill-service by his suggestion that you may be disqualified—your sympathy might not be entirely with the employee who bucks both the union and employer from whence you draw your sustenance. But, as in all well-ordered societies, this approach would give you "ad hoc" unfortunates, or fortunates, some entry to the promised land.

Since I am of a practical turn of mind, I wonder how we can assure that the rugged individual who wants to proceed on his

[3] 37 *N.Y.U. Law Review* 362 (May, 1962).

own will pay the costs, should he lose. You may be concerned too, particularly if it is a discharge case. I suppose some consideration may be given to the posting of a reasonable cash bond or adequate surety in advance, with the employer and union making up the difference if it is not enough to cover all costs, this being their moderate contribution for the luxury of staying out of court.

I should add that while the approach suggested by Professor Summers seems rational enough, it may, because of obvious problems of internal union politics, result in the submission of all grievances, meritorious or not, to arbitration by union officials.

On the other hand, the unions may be more willing to reject the non-meritorious grievances and take their chance in court litigation on the issue of whether such rejection was a failure of fiduciary responsibility or the duty of fair representation. I express no opinion on either alternative.

In connection with this latter problem and the *Evening News* case, some reference should be made to *Miranda Fuel Co.,* 140 NLRB No. 7, in which the Board held it to be a violation of Section 8 (b) (1) (A) of the Act for a union to take action against an employee, in breach of contract, upon considerations or classifications which are "irrelevant, invidious or unfair," and also a violation of Section 8 (b) (2) of the Act (and the employer violates 8 (a) (3)) when "for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of the employee." (There was no arbitration clause in the agreement. See footnote 22 to the Board's opinion.)

We have, then, the Board enforcing breaches of contract as an unfair labor practice, while in the *Evening News* case the court enforcing unfair labor practices as a breach of contract. The law reviews should enjoy the thorough exploration of that reciprocal parallelism.

I move on now to Mr. Marshall's suggestion that arbitrators today are granted an "unlimited charter of authority" by Mr. Justice Douglas in the *Warrior* case. While it is true that Justice Douglas stated that in determining the question of arbitrability by the courts, all decisions should be resolved in its favor, this appears to be more of an admonition to the courts than the arbi-

trators that the jurisdiction still remains with the arbitrators since they will resolve the ultimate question of arbitrability. Nor do I read such case as permitting the court, as Mr. Marshall seems to suggest, to draw a distinction between whether or not the grievance is frivolous or remote, as distinguished from whether or not it is germane. It seems clear to me that Justice Douglas held only that the question of whether a grievance is frivolous or remote or germane must be determined by the arbitrators, rather than by the court, and that the arbitrator must "seriously undertake to determine the merits of the issue," both on the question of arbitrability and on the question of contract applicability. All that Justice Douglas was saying, in my opinion, was that the question before the federal courts was neither how frivolous, nor how remote nor how germane the claimed grievance is, but whether the parties did actually agree to arbitrate the dispute under any reasonable construction of the contract.

Mr. Marshall expresses fear that the real danger lies in the high degree of expertness which Mr. Justice Douglas seems to confer upon arbitrators as a class, and the "frightening suggestion" that the arbitration award may be based upon his judgment as to whether plant tensions will be heightened or diminished by his decision. But it seems to me that Justice Douglas may have unduly limited the function of the arbitrator, in the *Enterprise* case, when he said the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement." If this language is to be read, and it surely can be read, as diluting other statements in the opinion that the courts are not to review the merits, then clearly it is capable of much mischief, since I had always thought that when the parties agree upon arbitration and the selection of an arbitrator, either permanent or ad hoc, they had agreed that they would accept that arbitrator's decision as long as it was within the submission, regardless of mistakes in fact or law, as long as there was no fraud or chicanery involved. This is as it should be. There must be a finality, good or bad, to the grievance procedure if it is to discharge its purpose. Even the most flagrant of errors by the arbitrator is subject to eventual correction by the parties, and in my experience, has never been fatal to the business enterprise or the union, no matter how shocking to the personal senses.

As to consideration of so-called extraneous matters, such as whether plant tensions will be heightened or diminished, I suppose we get into the age-old debate of whether arbitration is merely a judicial proceeding to interpret and enforce a contract, an extension of collective bargaining, or both. I adhere to the latter view.

This approach always seems to shock the purists. They seem to forget that if it is a body of industrial law that the courts are to fashion, the arbitrators must play the greater role in that process because they do carry with them the highest degree of expertise in this field.

Mr. Marshall's and Mr. Anderson's comments on *Sinclair Refining Co.* v. *Atkinson* [4] create the greatest breach between their views and mine.

The fear is expressed that in *Sinclair* the court has abandoned its equity powers. But it would be more accurate to say that the court really only accepted the clearest of Congressional mandates which sheared it of such powers in labor disputes some 30 years ago.

But, of course, equity powers still remain in courts to require arbitration, appoint arbitrators, enforce awards, etc. Beyond that, it should be apparent that today the courts are not called upon and do not exercise their equity powers to restrain the employer from violating the contract, but direct only that the employer comply with his agreement to arbitrate. Employers are not directed to recall work assignments, to revoke promotions, to rearrange seniority lists, to retime jobs, recall laid-off workers, pay back wages, cease and desist from requiring overtime work, or to reinstate discharged wildcat strikers pending arbitration. Rather, they are directed to comply with their agreement to arbitrate the question of their rights and obligation in those respects. It is the arbitrator, not the court, who decides if there is a contract violation.

Similarly, where it is alleged that a strike is in violation of a contract, the union is directed by the court to arbitrate, and it is the arbitrator who decides if the strike is in violation of contract.

[4] *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195, 50 LRRM 2420 (1962); see also *Local 795* v. *Yellow Transit Co.,* 370 U.S. 711 (1962), 50 LRRM 2478.

The basic question is not whether a strike which is in violation of a contract should be restrained, but whether the strike *is* in violation of the contract.

This is not an easy question. It involves a determination of not only whether there is a no-strike commitment in the agreement, but also, if there is, the scope of such no-strike commitment. It involves the further question of whether the activity complained of is, in fact or law, a strike. And it requires determination of such essentially related matters as contract rescission resulting from substantial breach, waiver, protected strikes, unfair labor practice protest strikes,[5] and similar considerations.

Some 30 years ago in passing the Norris-LaGuardia Act the Congress wisely determined to keep the federal courts out of such disputes since the issuance of the injunction against the strike, right or wrong, will predetermine the dispute. I submit that nothing has happened in the intervening years which casts any shadow on such judgment.

I will not burden you with a detailed defense of *Sinclair,* since we are submitting the position of the labor lawyers on a special "Atkinson-Sinclair Committee" of the Labor Law Section of the American Bar Association to the Section Council this coming Sunday in New Orleans. You may, however, find of interest one suggestion in such report, and that is, that employers are not wholly without a remedy, because of the Norris-LaGuardia Act, where there is a strike in violation of a contract, if the procedures followed in the *Ruppert Brewing*[6] case are given vitality by the federal courts as being beyond the inhibitions of the Norris-LaGuardia Act. There, you will recall, in comparatively expedited proceedings, the arbitrator found a slowdown was in violation of contract and the arbitration award was immediately enforced in the state courts, despite New York's little Norris-LaGuardia Act. Since the decision on whether the strike was in violation of contract was made by the tribunal agreed to by the union, it could hardly refuse to comply with the decision. It was the arbitrator who decided the dispute, and the court merely enforced his decision.

Mr. Marshall concludes by suggesting that the problem of delay

[5] *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 37 LRRM 2587.
[6] *In the Matter of Ruppert,* 3 NY. 2d 576, 148 N.E. 2d 129 (1958), 29 LA 775.

in the federal courts may be met by reference to a Master. In the cases he cited, the district court used the good judgment of selecting as a Master an experienced arbitrator such as Mr. Marshall. I raise only the question whether, in view of the fact that the appointment of Masters has been historically a patronage matter, we can rely upon such continued good judgment on the part of either state or federal courts in this area.

I conclude my own comment by admitting that as I view these developments under Section 302, I find myself more and more in agreement with Justice Frankfurter's vigorous dissent in *Lincoln Mills,* particularly his profound observation that "the meaning of collective bargaining does not remotely derive from reliance on the sanction of litigation in the courts." I have far greater faith in a system of industrial democracy operating under its own voluntary tribunals, familiar as they are with the problems, than I have in the predilections of the courts and the court-appointed masters who, I fear, will come to our problems as well-intentioned, but formalistically-oriented, strangers.