ARBITRATION AND THE SUPREME COURT 1962 SPRING TERM

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The federal substantive law to be applied under § 301[1] of the Taft-Hartley Act,[2] which the United States Supreme Court held in *Textile Workers Union v. Lincoln Mills*[3] was to be fashioned by the courts from the policy of our national labor laws, found further form during the 1962 Spring Term of the Supreme Court. The Court during this Term also rendered what must be considered as the most notable decision in the field of labor arbitration and its relationship to § 301 since the *Lincoln Mills* case.

To set the stage for the opinions of the Court during this Term it is necessary to briefly review the *Lincoln Mills* case and the few decisions which followed it. One of the purposes of the Taft-Hartley Act was to eliminate some of the procedural obstacles to suits against labor unions, and to establish a federal forum for suits involving collective-bargaining agreements.[4] To accomplish this purpose Congress enacted § 301 which provides in part:

> (a) 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 and without regard to citizenship of the parties.

In *Lincoln Mills* the Court held that § 301 conferred upon the federal district courts the jurisdiction to issue a mandatory injunction ordering an employer to submit a grievance to arbitration in accord-

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* See Contributors' Section, p. 254, for biographical data.

[1] 61 Stat. 156 (1947), 29 U.S.C. § 185 (1952).

[2] Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1952).

[3] 353 U.S. 488 (1957).

[4] The legislative history of § 301 is summarized in the appendix to the dissenting opinion of Mr. Justice Frankfurter in Textile Workers v. Lincoln Mills, 353 U.S. 448, 485 (1957).

ance with the terms of a collective-bargaining agreement. The majority opinion made no reference to the constitutional question posed by § 301, raised but left unresolved by Mr. Justice Frankfurter in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*,[5] but by holding that the federal district courts in actions under § 301 must apply federal substantive law they put to rest constitutional objections.[6] Possibly recognizing the absence of any substantial body of federal law involving collective-bargaining agreements the Court concluded that "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy."[7] The Court in *Lincoln Mills* made no reference to whether § 301 had the effect of preemption of state jurisdiction, a theory which is not a novel one in the field of labor relations,[8] and left in doubt the part, if any, which the state courts would play in the enforcement of bargaining agreements affecting commerce.

The Supreme Court in a series of three decisions subsequent to the *Lincoln Mills* case held:

1. That while the federal district courts had jurisdiction over collective-bargaining agreements to enforce an employer's agreement to submit a grievance to arbitration, the function of the district court in such actions would not include the right to consider the merits of the grievance;[9]

2. That where a bargaining agreement contained a "no strike" clause only the most forceful evidence of an intention to exclude a particular grievance from arbitration would permit an employer to prevail in an action brought by the union seeking enforcement of the arbitration provisions of his contract;[10]

3. That the federal district courts had the power to grant enforcement of awards made by arbitrators, and that the district court could not substitute its interpretation of the contract for that of the arbitrator so long as the arbitrator's award draws its essence from the collective-bargaining agreement.[11]

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[5] 348 U.S. 437 (1955).

[6] For a discussion of the constitutional questions see International Bhd. of Teamsters v. W.L. Mead, Inc., 230 F.2d 576 (1st Cir. 1956), *petition for cert. dismissed*, 352 U.S. 802 (1956), upholding the constitutionality of § 301; Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 8-14 (1957).

[7] Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957).

[8] See Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947).

[9] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[10] United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

[11] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

By the beginning of the 1962 Spring Term the Court had indeed established the arbitration process as "a kingpin of federal labor policy."[12] The pattern had thus been set and § 301 had now become "virtually as a delegation by Congress to the federal courts of its legislative power to develop a detailed body of law governing collective-bargaining agreements made in commerce."[13]

I. STATE COURT JURISDICTION OVER COLLECTIVE-BARGAINING AGREEMENTS IN COMMERCE

In reviewing an action commenced by a union in the Superior Court of Massachusetts seeking a judgment declaring a bargaining agreement valid and an order enjoining the company (engaged in an industry affecting commerce) from terminating or violating it, and for an accounting and damages, the Court in *Charles Dowd Box Co. v. Courtney*[14] affirmed the decision of the Massachusetts Supreme Court[15] in holding that by the passage of § 301 state courts had not been deprived of jurisdiction of actions to enforce collective-bargaining contracts made in commerce.

The Court, by failing to find in the legislative history of § 301 any intention by Congress to deprive state tribunals of jurisdiction in this field, avoids the argument that only the federal judiciary is capable of properly achieving the creative task of establishing a body of federal substantive law governing contracts between unions and employers as envisioned by *Lincoln Mills.* The Court recognizes that the choice Congress made may result in diversities and conflicts but views this as not necessarily an unhealthy prospect.

It is implicit in the Court's holding that the state courts will not be left to their own devices but must follow federal law, and in its absence must effectuate the federal policy.

The decision alludes to but leaves unresolved the applicability of the Norris-LaGuardia Act[16] to actions brought in state courts against labor unions to enforce bargaining agreements and the problems concerning removal of actions to federal courts.[17] It has been suggested that the better view is that the Norris-LaGuardia Act is applicable to

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[12] The Court in Sinclair Ref. Co. v. Atkinson, 82 Sup. Ct. 1328, 1338 (1962) states "that [this] proposition was founded not upon the policy predilections of this Court but upon what Congress said and did when it enacted § 301."

[13] Gregory, *The Law of the Collective Agreement,* 57 MICH. L. REV. 635, 640 (1959).

[14] 82 Sup. Ct. 519 (1962).

[15] Courtney v. Charles Dowd Box Co., 341 Mass. 337, 169 N.E.2d 885 (1960).

[16] 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1952).

[17] Charles Dowd Box Co. v. Courtney, 82 Sup. Ct. 519, 526 n.8 (1962).

state court actions despite its governing only the jurisdiction of federal courts as it represents an important part of the federal labor policy;[18] however there is authority to the effect that the Norris-LaGuardia Act is not applicable to state courts.[19] The problem is further complicated by the fact that a number of states have statutes limiting the use of injunctive relief in labor disputes.[20] Assuming that the Norris-LaGuardia Act is binding upon state courts, the question arises as to what extent the procedural provisions of the act would apply, particularly if these provisions conflict with the procedural provision of state statutes. Presumably this would depend on a determination of the extent the procedural provisions of the act were considered to be part of the federal labor policy.

II. Actions of Damages for Breach of Collective-Bargaining Agreements

A. *Recoverability of Damages for Strikes in Absence of No-Strike Provisions*

If *Lincoln Mills* left unanswered the question of whether the federal law to be developed under § 301 must be a uniform national law[21] and if any question remained after the *Dowd Box* case, it was conclusively resolved in *Local 174, Teamsters Union v. Lucas Flour Co.*[22] In *Lucas Flour Co.* an employer had brought an action in the Washington state court for damages for breach of a bargaining contract by the union representing its employees. The arbitration provisions of the contract required that any difference as to the interpretation of the contract be submitted to arbitration. The discharge of an employee precipitated an eight day strike, following which the issue of the discharge was submitted to arbitration. The employer recovered judgment for damages sustained as a result of the strike, which was affirmed on appeal by the Supreme Court of Washington.[23] In the majority opinion delivered by Mr. Justice Stewart the Court holds that the federal substantive law to be fashioned from § 301 must be uniform, and that state courts are not free to apply individualized local rules.

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[18] *The Supreme Court, 1956 Term*, 71 Harv. L. Rev. 85, 178 (1957).

[19] McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Ohio Valley Builders Exch. Inc. v. Steel Valley Carpenter's Dist. Council, 45 C.C.H. Lab. Cas. § 50,616 (1962).

[20] See, *e.g.*, Ariz. Rev. Stat. Ann. § 12-1808 (1956).

[21] *The Supreme Court, 1956 Term, supra* note 18, at 178-79.

[22] 82 Sup. Ct. 571 (1962).

[23] Lucas Flour Co. v. Local 174, Teamsters Union, 57 Wash. 2d 95, 356 P.2d 1 (1960).

For the purposes of this article the paramount importance of *Lucas Flour Co.* does not lie in the holding that a uniform federal common law is required as it is submitted that this result was a predictable one, but rather the importance is found in the Court's treatment of what is depicted as the ultimate issue, *i.e.*, "Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract. . . ."[24]

The agreement did not contain a no-strike clause explicitly covering the subject of the dispute over which the strike resulted, and it was argued that in the absence of a no-strike provision the union was not in violation of the contract. The Court, however, rejected this contention as contrary to "the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare. . . ."[25] and found an implied no-strike agreement in areas where, as in the instant case, it had been agreed would be exclusively covered by compulsory terminal arbitration. The judgment against the union was thus affirmed. The federal labor law therefore requires that a union, even in the absence of a no-strike provision, not strike in an effort to impose economic pressures to support a grievance if the collective-bargaining agreement requires that the grievance be submitted to arbitration. Its failure to submit the grievance to arbitration will result in the union's being held accountable for damages sustained by the employer during any such strike.

B. *Necessity to Arbitrate Question of Damages for Breach of Collective-Bargaining Contracts*

Lucas Flour Co. presents an interesting comparison with the later decision of *Drake Bakeries, Inc. v. Local 50, Bakery Workers.*[26] In *Drake Bakeries* an employer sought damages under § 301 in the federal district court for the breach of a bargaining agreement. The district court entered a stay of the action pending completion of arbitration, as it was concluded that the employer's claim was an arbitrable matter.

The arbitration provisions of the contract involved in *Drake Bakeries* not only provided for the arbitration of disputes regarding the interpretation of the provisions of the contract but also disputes involving an act of either party. Since the strike for which the em-

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[24] Local 174, Teamsters Union v. Lucas Flour Co., 82 Sup. Ct. 571, 577 (1962).
[25] *Id.* at 578.
[26] 82 Sup. Ct. 1346 (1962).

ployer sought damages was an act of the union, a majority of the Court in an opinion written by Mr. Justice White concluded that the matter of damages was the proper subject of arbitration.

The argument that the strike in question was such a breach or repudiation of the contract as to excuse the employer from arbitration was rejected, and the Court left unresolved the question of under what circumstances, if any, will a strike in violation of a no-strike clause permit the employer to rescind or abandon the contract or justify a refusal to submit the question of damages sustained as a result of the strike to arbitration. However the Court suggests that the arbitration provisions will survive anything short of repudiation of the arbitration provision itself, and even then may survive depending upon the reasons for the refusal to arbitrate.

The decision recognizes that the question of the necessity to submit disputes regarding damages to arbitration was not involved in the *Lucas Flour Co.* case as that contention was never made by the union.[27] The question is thus presented as to whether an arbitration provision such as was considered in *Lucas Flour Co.*,[28] which is perhaps of the nature more generally found in bargaining agreements than that considered in *Drake Bakeries*, is sufficiently broad to require arbitration of a claim for damages for an alleged breach of the bargaining agreement.

The majority opinion cites[29] with apparent approval two Circuit Court of Appeals cases holding that the question of damages for breach of collective agreements should be submitted to arbitration under arbitration provisions similar to those found in the contract considered in *Lucas Flour Co.*

In *Signal-Stat. Corp. v. Local 475, United Elec. Workers*,[30] the arbitration provision provided:

> All disputes, grievances or differences that may arise between the parties of this agreement. . . .[31]

and in *Yale & Towne Mfg. Co. v. Local 1717, Int'l Ass'n of Machinists*:[32]

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[27] Drake Bakeries, Inc. v. Local 50, Bakery Workers, 82 Sup. Ct. 1346, 1351 n.8 (1962).

[28] Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. 82 Sup. Ct. 571, 573 (1962).

[29] Drake Bakeries, Inc. v. Local 50, Bakery Workers, 82 Sup. Ct. 1346, 1352 n.14 (1962).

[30] 235 F.2d 298 (2d Cir. 1956).

[31] *Id.* at 299.

[32] 299 F.2d 882 (3d Cir. 1962).

> It is understood and agreed that either party may invoke the grievance procedure in the consideration of any difference between the Company and an employee or group of employees involving the interpretation or application of the provisions of this Agreement.[33]

In both cases the employer had sought damages for breach of the no-strike clause and motions to stay the proceedings pending arbitration of the issue of damages were held proper. It therefore appears that an arbitration provision requiring arbitration of "any or all disputes or differences" includes "all disputes . . . involving any act . . . or any conduct of either party,"[34] and strikes constitute acts or conduct which under the *Drake Bakeries* case are the subject of arbitration.

The Court suggests[35] that had the parties intended to exclude damages from the grievance procedure they could have specifically so provided, and in the absence of a provision specifically excluding such matters from the arbitration clause the Court found an intention to submit the question of strike damages to the arbitration forum. Mr. Justice Harlan in his dissent found the antithesis to be true.[36]

It is however not every arbitration clause which fails to specifically exclude strike damages from arbitration that precludes an employer from bringing an action under § 301 for damages sustained as a result of the union's failure to honor its undertaking not to strike during the term of the contract. Thus in *Atkinson v. Sinclair Refining Co.*,[37] in a unanimous decision[38] written by Mr. Justice White, the Court held that an arbitration provision[39] limiting the arbitration process to employee grievances did not obligate the company to arbitrate its claim for damages against the union for breach of the no-strike provisions of the contract, and that the lower court had properly denied a motion to stay the action commenced under § 301. There are other examples of arbitration clauses which have been held to be sufficiently limiting in scope so as not to require arbitration of a damage claim for breach of contract;[40] however in view of the *Drake*

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[33] *Id.* at 883.
[34] Drake Bakeries, Inc. v. Local 50, Bakery Workers, 82 Sup. Ct. 1346 (1962).
[35] *Id.* at 1353.
[36] *Id.* at 1354.
[37] 82 Sup. Ct. 1318 (1962).
[38] Mr. Justice Frankfurter took no part in the decision.
[39] See appendix to the decision for the full text of the "Grievance and Arbitration Procedure," 82 Sup. Ct. 1318, 1325 (1962).
[40] Vulcan-Cincinnati, Inc. v. United Steelworkers, 289 F.2d 103 (6th Cir. 1961) finding an intention that employer grievances not be submitted to arbitration where provisions regarding grievance procedure referred only to "aggrieved employee"; International Union, UAW v. Benton Harbor Malleable Indust., 242 F.2d 536 (6th Cir. 1957) finds a similar intention where provisions relating to grievance steps began "any *employee* having a grievance." (Emphasis added.)

Bakeries decision it would seem advisable for an employer who does not desire to arbitrate a claim for damages for breach of the contract by the union to seek to include a provision specifically excluding such matters from the grievance procedure in his contract negotiations.

C. *Liability of Individual Employees for Breach of Collective-Bargaining Agreement*

In *Atkinson v. Sinclair Refining Co.*[41] the employer in addition to seeking damages against the union as an entity, in a second count in its complaint, also sought to recover damages for the unauthorized strike against the individual employees who had participated in the strike. Apparently conceding that § 301 does not purport to give the district courts jurisdiction over the individual members of the union without regard to the amount in controversy or citizenship of the parties, the count for damages against the employee was based on diversity jurisdiction.[42]

The Court held that despite the employer's attempt to avoid the provisions of the Taft-Hartley Act, § 301 was nevertheless controlling. Section 301-b provides:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.[43]

Congressional reaction against the *Danbury Hatters* case[44] was found to have prompted the enactment of § 301 (b) and in construing this section the Court held:

> Consequently, in discharging the duty Congress imposed on us to formulate the federal law to govern § 301 (a) suits, we are strongly guided by and do not give a niggardly reading to § 301 (b). 'We would undercut the Act and defeat its policy if we read § 301 narrowly. . . .' We have already said in another context that § 301(b) at least evidences 'a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it. . . .' The national labor policy requires and we hold that when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages.[45]

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[41] 82 Sup. Ct. 1318 (1962).
[42] 28 U.S.C. § 1332 (Supp. IV, 1957).
[43] 61 Stat. 156 (1947), 29 U.S.C. § 185(b) (1952).
[44] Lawlor v. Loewe, 235 U.S. 522 (1915); Loewe v. Lawlor, 208 U.S. 274 (1908); Loewe v. Savings Bank, 236 Fed. 444 (2d Cir. 1916).
[45] Atkinson v. Sinclair Refining Co., 82 Sup. Ct. 1318, 1325 (1962).

It is not the author's intent to speculate under what circumstances, if any, individual officers or members of a union may be personally liable for damages for acts which constitute a breach of the collective agreement,[46] but merely to observe that under the *Atkinson* decision it will be an unusual case which justifies such a result. It would appear clear from the *Atkinson* case that § 301 (b) represents part of the uniform federal labor law which must be followed and applied by state courts under *Lucas Flour Co.* when considering actions involving collective agreements in commerce.

The decisions of the Supreme Court decided during the 1962 Spring Term thus far discussed, while adding substance to the congressional mandate to formulate a federal substantive law governing bargaining agreements did not arrive at any startling results, but rather further strengthened arbitration as "a kingpin of federal labor policy." The kingpin was to become a tenpin in *Sinclair Refining Co. v. Atkinson*[47] at which the Court rolled a ball in the form of the Norris-LaGuardia Act which "struck" at the very foundation of the arbitration process as a solution to industrial strife.

III. THE QUID PRO QUO — EMPLOYER'S RIGHT TO ENFORCE UNION'S OBLIGATION TO SUBMIT GRIEVANCES TO ARBITRATION

In the *Sinclair Refining Co.* case[48] an employer sought an injunction enjoining the union from acting, participating in, ratifying, etc., any strike or stoppage of work. The union moved to dismiss on the ground that the complaint sought injunctive relief which the District Court had no jurisdiction to grant under the Norris-LaGuardia Act. The Court of Appeals for the Seventh Circuit affirmed the lower court's dismissal of the count for injunctive relief[49] and the Court granted certiorari[50] to resolve a conflict between the Court of Appeals on this important question. Although there had been prognostications that a contrary result was to be expected,[51] the Court in a 5-3 decision written by Mr. Justice Black affirmed the dismissal of the count seeking injunctive relief.

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[46] See Baun v. Lumber & Sawmill Workers, 46 Wash. 2d 645, 284 P.2d 275 (1955); Wilson & Co. v. United Packinghouse Workers, 181 F. Supp. 809 (N.D. Iowa 1960).

[47] 82 Sup. Ct. 1328 (1962).

[48] This was a companion case to Atkinson v. Sinclair Refining Co., 82 Sup. Ct. 1318 (1962).

[49] Sinclair Refining Co. v. Atkinson, 290 F.2d 312 (7th Cir. 1961).

[50] Sinclair Refining Co. v. Atkinson, 368 U.S. 937 (1961).

[51] Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1484 (1959); Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 640 (1959).

The majority opinion approaches the problem in the following manner:

1. The grievances which had precipitated strikes at the employer's plants were controversies concerning terms and conditions of employment and therefore involved a "labor dispute" as defined by § 13 of the Norris-LaGuardia Act.[52]

2. Section 4 (a) of the act[53] provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing . . . any of the following acts: . . . .
>
> (2) Ceasing or refusing to perform any work or remain in any relation of employment.

This clearly precludes injunctive relief in the instant case unless § 301 of the Taft-Hartley Act narrows the application of the Norris-LaGuardia Act to permit injunctive relief where it is sought as a remedy for breach of a collective-bargaining agreement.

3. In considering the effect of § 301 on the Norris-LaGuardia Act the Court fails to find anything in the express provisions of § 301 or its legislative history evidencing an intention by Congress to repeal the Norris-LaGuardia Act insofar as suits based upon collective-bargaining agreements are concerned. Indeed, a contrary intent is found by the Court in its examination of the legislative history of § 301.

4. *Brotherhood of R.R. Trainmen v. Chicago R. & Ind. R.R.*,[54] which held that the Norris-LaGuardia Act did not deprive the federal district court of jurisdiction to issue necessary injunctive relief to enforce compliance by a railroad union with the Railway Labor Act[55] which required that "minor disputes" be submitted to the National Railroad Adjustment Board instead of attempting settlement by the strike[56] is distinguished and held to be not controlling.

5. The argument that *Lincoln Mills* is controlling and supports the reversal of the dismissal of the count seeking injunctive relief is

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[52] 47 Stat. 73 (1932), 29 U.S.C. § 113 (1952). Section 113(c) provides: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment. . . ."

[53] 47 Stat. 70 (1932), 29 U.S.C. § 104(a) (1952).

[54] 353 U.S. 30 (1957).

[55] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1952).

[56] The *Chicago River* decision finds the purpose of the Norris-LaGuardia Act and the Railway Labor Act are reconcilable by an "accommodation" of the two statutes to preserve the obvious purpose of both statutes, a concept which the majority found "startling" in Sinclair Refining Co. v. Atkinson, 82 Sup. Ct. 1328 (1962).

also rejected, as the *Lincoln Mills* case "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."[57]

The dissenting opinion written by Mr. Justice Brennan in which he is joined by Justices Douglas and Harlan considers the majority opinion as having dealt "a crippling blow to the cause of grievance arbitration itself"[58] and would "accommodate" the Norris-LaGuardia Act to permit what the dissent finds to be the intended purpose of both acts.

The majority opinion would appear to offer a more classical approach to the problem as opposed to the "startling" accommodation approach taken by the minority opinion. An incisive analysis of the merits of *Sinclair Refining Co.* will be left to the legal scholars. Articles discussing the pros and cons of the decision will most assuredly follow;[59] however the *Sinclair Refining Co.* case will in all probability remain law for some time to come unless Congress sees fit to amend § 301 to repeal the Norris-LaGuardia Act insofar as it may apply to collective-bargaining contracts, and therefore the practical considerations which must be given to the effect of the decision in *Sinclair Refining Co.* and the other arbitration cases decided by the Supreme Court during the 1962 Spring Term remains to be discussed.

IV. THE 1962 SPRING TERM — ITS PRACTICAL EFFECT UPON THE ARBITRATION PROCESS

If *United Steelworkers v. American Mfg. Co.*,[60] *United Steelworkers v. Warrior & Gulf Nav. Co.*[61] and *United Steelworkers v. Enterprise Wheel & Car Corp.*[62] failed to sufficiently illustrate the necessity for careful draftsmanship of the grievance and arbitration provisions of collective-bargaining agreements, the cases decided by the Court during the 1962 Spring Term offer positive proof of the necessity of labor and management to reevaluate the arbitration provisions in their contracts and give consideration to revising such provisions to specifically reflect the intention of the parties. Too often the arbitra-

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[57] Sinclair Refining Co. v. Atkinson, *supra* note 56, at 1338.
[58] *Id.* at 1345.
[59] For an example of a comprehensive analysis of the *Lincoln Mills* case see, Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).
[60] 363 U.S. 564 (1960).
[61] 363 U.S. 574 (1960).
[62] 363 U.S. 593 (1960).

tion provisions of collective-bargaining agreements go year after year untouched because the negotiations are predominated by wage, hour and fringe benefit consideration. It is difficult for a union to convince its rank and file that an employer has made a major concession, or indeed any concession, by its having successfully negotiated changes in the grievance procedure unless during the term of the preceding contract some undesirable result was experienced.

Employers are hesitant to renegotiate the arbitration provisions of the prior contract for fear that to be successful will require some wage or hour concession or an additional fringe benefit resulting in a net economic loss. Such feelings during the strained period of negotiations for a new labor contract are understandable. However employers will zealously guard the provision reserving them the right to make managerial decisions such as the right to contract out work as dictated by economic considerations, only to find that very matter the subject of a grievance which must be submitted to arbitration under an arbitration provision covering differences which arise between the union and the employer regarding the meaning and application of the provisions of the agreement.[63]

Just as an employer who, because of his experience with arbitration, prefers it to the often slower and more expensive judicial process he may find himself unable to insist upon arbitration of a claim for damages sustained as a result of an unauthorized strike in violation of a no-strike provision in the contract because the arbitration provision is limited to employee grievances.[64]

It therefore becomes necessary for both parties to the contract to make a decision as to which grievances it wants to submit to arbitration and draft the contract to exclude those employee or employer grievances which are intended to be left to another forum.

The undertaking by a union not to strike or cause a work stoppage during the term of the contract has resulted in a willingness by employers to make major concessions in arbitration provisions, but the majority holding in *Sinclair Refining Co.* that an employer cannot obtain an injunction enjoining the continuance of a strike or work stoppage contrary to the terms of the bargaining agreement has given cause for employers to reconsider the advisability of agreeing to broad

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[63] United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).
[64] Atkinson v. Sinclair Refining Co., 82 Sup. Ct. 1318 (1962).

arbitration provisions.[65] In evaluating the effect of the *Sinclair Refining Co.* decision on the desirability of agreeing to submit employee grievances to terminal arbitration as the *quid pro quo* for an agreement not to strike, an employer should consider the alternative remedies available in the event the union fails to perform its obligation not to strike. Certainly an employer is entitled to damages for an unjustified strike or work stoppage, and the union's liability for, and the amount of damages, can be determined in either one of two forums, namely, arbitration or the judicial process. If the claim can be initiated in the state or federal courts any money judgment awarded in such an action would be enforceable by levy of execution or other methods available to judgment creditors. If under the terms of the bargaining contract the claim must be initiated in the form of a grievance and ultimately submitted to arbitration, then the arbitration award would be enforceable by either the state or federal court,[66] or perhaps the award could be withheld from union dues collected by the employer under a check-off provision under the contract.[67]

Under *Atkinson v. Sinclair Refining Co.*[68] a damage award against the union is collectible from the assets of the union only, and the personal assets of the officers or members cannot be reached, and this is true even when the union is without assets to pay the judgment. This is as it perhaps should be, but necessitates that an employer, whose only remedy may be an action for damages, give consideration to the financial responsibility of the union in evaluating the worth of a no-strike agreement.

The establishment of the arbitration process as an effective and speedy remedy to labor strife has not been an easy task. The inevitable delay and expense involved in submitting minor disputes regarding the bargaining agreement to the judicial process was frequently used by employers to subvert and frustrate just employee grievances,

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[65] The minority opinion of Mr. Justice Brennan suggests this result in the following language:

> But since unions cannot be enjoined by a federal court from striking in open defiance of their undertakings to arbitrate, employers will pause long before committing themselves to obligations enforceable against them but not against their unions. 82 Sup. Ct. 1328, 1345 (1962).

[66] Charles Dowd Box Co. v. Courtney, 368 U.S. 519 (1962).

[67] In Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960) the Court reversed a holding that an employer had the right to "set-off" damages for breach of the bargaining agreement against payments which he was obligated to make to the U.M.W. Welfare Fund under the terms of the agreement. The Court found that the fund was in no way an asset or property of the union, and to permit the set-off would be contrary to the national labor policy. However, under the check-off provisions of most agreements the amount withheld from employee's earnings is paid directly to the union and goes into its general fund. In such instances it is submitted that the *Lewis* case would not be applicable.

[68] 82 Sup. Ct. 1318 (1962).

and the result has been labor's insistence that the arbitration process be used to provide employees with an inexpensive and swift remedy for settling employee-employer disagreements. Most employers were, and indeed some still are, reluctant to agree to submit employee grievances to the arbitration forum; however most employers with any experience with arbitration would now agree that while the arbitration process has its faults, it is probably a more effective and workable method for settling labor disputes than the judicial process which is not without its faults. This is particularly true when compulsory arbitration offers the employer protection against economic coercion in the form of strikes and work stoppages to settle employee grievances.

However if the employer by agreeing to submit disputes to the arbitration forum cannot assure himself of industrial peace for the term of the contract, and is faced with prolonged and expensive litigation in order to obtain redress for unjustified strikes or work stoppages, then the probabilities are that employers will be even more reluctant to submit employee grievances to the arbitration forum and will prefer to leave such matters to the same forum in which the employer will find himself.

The practical effect of the *Sinclair Refining Co.* case will be precisely as suggested by Mr. Justice Brennan in his minority opinion,[69] and the tendency of employers will predictably be away from the arbitration process. The 1962 Spring Term must therefore be considered a net loss in the field of arbitration. This is not to suggest that the practical effect of the majority opinion in the *Sinclair Refining Co.* case justifies a contrary result. The primary question is whether or not the legal rationale of the decision is sound irrespective of the practical consideration. To be sure, there will be those who will question the legal soundness of the decision; however in evaluating any such critique, it will be difficult to determine to what extent the practical considerations have influenced an argument that the majority opinion is not legally sound.

In evaluating the practical effect of the *Sinclair Refining Co.* case on the arbitration process, it is difficult to determine who is the real loser as a result of the decision. It is clear from the holding that it puts the employer at a marked disadvantage; however if the decision results in a trend away from the arbitration process, then it is submitted that unions will have lost substantial ground as a result of the decision. Perhaps the public whose interest is generally served

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[69] 82 Sup. Ct. 1328, 1339 (1962).

as a result of industrial peace can be considered the primary loser as a result of the decision.

If, as is forcefully argued by Professors Bickel and Wellington,[70] the proper disposition of the *Lincoln Mills* case was to remand the case to Congress for further consideration, the same argument can more forcefully be made with regard to the proper disposition of the *Sinclair Refining Co.* case. The failure of the majority and minority opinions to agree on whether or not Congress intended that § 301 repeal the Norris-LaGuardia Act insofar as bargaining agreements are concerned indicates the need for congressional action to clarify § 301, and the practical effect of the *Sinclair Refining Co.* case on the future of industrial relations requires that further congressional action be forthcoming as soon as possible.

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[70] Bickel & Wellington, *supra* note 59.