

mitted itself greater latitude in reviewing the justification for specific action of the military at the scene of civil crisis. The attention of the court is thus directed not only to the exigencies of the general situation, but also to the reasonableness of the particular means taken to handle it. To the federal courts, therefore, rule by martial law should present a problem no different than that of any other state action subversive of individual rights. The nature of permissible action by the National Guard in dealing with civil disorder should be defined by its position as an arm of state power and not by the status of the troops as a military force. When the military contemplates overriding individual rights it must, therefore, be guided by those judicial decisions outlining the permissible scope of their invasion, and must be prepared to justify its action in court. Unreasonable use of state power cannot be conjured into legality simply by invoking the talisman of martial law.

Conclusion: The governor of a state has no power to rule by martial law. The governor's power to use the troops in civil disturbances arises from his duty to see that the laws are executed. This duty does not encompass the power to suspend civil government, but requires only the use of that force necessary to quell lawlessness. In carrying out their mission the troops are bound to follow legal procedures. The extent of their power is that of any peace officer acting under similar circumstances.

ARBITRATION OF NO-STRIKE CLAUSE BREACHES: AN ANSWER TO SECTION 301 OF THE TAFT-HARTLEY ACT

Under Section 301 of the Taft-Hartley Act labor unions are subject to suit in federal courts for non-compliance with no-strike provisions in collective bargaining agreements.¹ Litigation of union liability is maintained despite provisions in the agreements for grievance and arbitration procedures designed for the settlement of disputes arising between the parties. The result may well mean invasion and frustration of the voluntarily established processes by which the parties have agreed to govern their relations.

Some form of no-strike provision is included in more than 89 per

argues that martial law in a theater of war could be proclaimed at the discretion of the President, and therefore is not subject to judicial review.

1. 61 STAT. 157 (1947); 29 U.S.C. § 185 (1952).

cent of modern day collective bargaining agreements.² The union usually pledges not to engage in any "strike, stoppage, or other interruption of work" during the life of the agreement.³ The pledge is either unconditional or conditioned on the company's adherence to the terms and conditions of the agreement.⁴ It may also except union-authorized strikes in the event of exhaustion of the grievance procedure or a deadlock during collective bargaining.⁵ The use of grievance and arbitration procedures is the parties' alternative to strikes and lockouts to enforce their demands. The arbitration provision usually covers "all disputes, differences, and grievances concerning matters in this contract."⁶

Whatever the form of the provisions, they reflect increasing responsibility and insight on the part of both labor and management which has led to reliance upon amicable settlement of disputes. Unions are now content to restrict their right to economic action. This bilateral ap-

2. This figure is even higher in plant union agreements. BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 15:325 (1954). Of the 11% of collective bargaining agreements which do not contain a no-strike clause, 9 to 10% contain some form of arbitration procedure. The future of no-strike clauses was placed in doubt by a recent decision of the First Circuit in *International Brotherhood of Teamsters, AFL v. W. L. Mead, Inc.*, 37 L.R.R.M. 2679 (1956), which held that an arbitration procedure which is the "exclusive" means of settling disputes is the equivalent of a no-strike clause. The decision affirmed an award of damages totaling \$359,000 against a local union which struck over a dispute rather than taking it to arbitration. For the district court background of the case, the facts of which are illustrative of the type of situations which may arise in the area, see 129 F. Supp. 313 (D. Mass. 1955); 126 F. Supp. 466 (D. Mass. 1954). See also BNA, LABOR RELATIONS REPORTER, 37 ANALYSIS 81 (1956). If the Mead case is followed, under 98 to 99% of the nearly 100,000 collective bargaining agreements presently in force, a striking union may be faced with substantial liability regardless of whether the contract contains no-strike provisions. The leading study of no-strike clauses prior to 1947 is Daykin, *The No-Strike Clause*, 11 U. PITT. L. REV. 13 (1949). For the effect of Taft Hartley, see Fulda, *The No-Strike Clause*, 21 GEO. WASH. L. REV. 127 (1952) (1952 Report of the Committee on Improvement of Administration of Union-Employer Contracts of the American Bar Association), reprinted in MATTHEWS, READINGS ON LABOR LAW 121 (1953).

3. See, e.g., contract quoted in *Colonial Hardwood Flooring Co. v. Int'l Union, United Furniture Workers*, 76 F. Supp. 493, 494 (D. Md. 1948); CCH UNION CONTRACT CLAUSES 701.021 (1954).

4. With the advent of long-term contracts, unconditional no-strike clauses are passing from vogue. The Bureau of National Affairs estimates that less than 40% of collective bargaining agreements contain unconditional strike bans. See note 2 *supra*. Conditional no-strike pledges lift bans if one or more of the following conditions occur (percentages based upon the BNA estimate of prevalence): (1) the grievance machinery is followed to its final step without resolution of a dispute, 15%; (2) an arbitration award is violated, 7%; (3) the agreement itself is violated, 5%; (4) a deadlock is reached in reopening negotiations, 22%; (5) an issue is not considered a proper subject for the grievance procedure or arbitration, 5%; (6) the strike is called in accordance with the union's constitution and by-laws, 2%; (7) a vote of the employees is taken, 3%.

5. See note 4 *supra*.

6. See, e.g., contract quoted in *Pennsylvania Greyhound Lines, Inc. v. Amalgamated Association of Street Employees*, 98 F. Supp. 789, 790 (W.D. Pa. 1951); CCH UNION CONTRACT CLAUSES 51,552 (1954).

proach to labor relations points the way to continuity of production, which must be the goal of both parties. The creation of a competing forum in the federal courts under section 301 has threatened to break down this voluntary system.

Prior to 1947, management, hindered by low or nonexistent union funds, difficulty in proof of damages, and in a few cases, procedural inability to sue an unincorporated body, normally did not litigate or arbitrate a union's financial responsibility for a strike.⁷ Then, Congress responded to what it believed was a desperate need for legislation by enacting section 301.⁸ The section provides for suits in federal courts for violations of collective bargaining agreements, and abolishes for this purpose the customary requirements of diversity of citizenship and jurisdictional amount.⁹ The net effect of the section has been that manage-

7. No instances of litigation, which occurred prior to the Taft-Hartley Act, are reported, and only two arbitrations of union financial liability for strikes could be found. See *Motor Haulage Co., Inc.*, 6 Lab. Arb. 721 (1947); *Brynmore Press, Inc.*, 7 Lab. Arb. 649 (1947). Both awarded damages for breach of a no-strike clause. The former, however, was reversed, *Motor Haulage Co. v. Teamsters*, 69 N.Y.S.2d 656 (Sup. Ct. 1947), on the ground that the strike was unauthorized and beyond the power of the union to prevent.

8. According to Senator Taft, the need for section 301 did not arise from the problem of substantive enforceability but from that of procedural difficulty in obtaining jurisdiction over labor unions. "All we provide in this amendment," he said, "is that voluntary associations shall in effect be stable as if they were corporations. . . ." 93 CONG. REC. 4265 (1947). Opponents of the measure point to the fact that, in 1947, union funds could not be reached in only 13 states. See Kaye and Allen, *Union Responsibility and the Enforcement of Collective Bargaining Agreements*, 30 B.U.L. REV. 1, 7-15 (1950); Note, 103 U. PA. L. REV. 902 (1955).

9. Grave constitutional issues were raised against the section in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955). Although the net result of the decision was merely to limit the coverage of the section by disallowing a suit by a union seeking unpaid wages for its members, the opinion leaves the section's future in doubt. The possibility of unconstitutionality, as raised by Mr. Justice Frankfurter's opinion, *id.* at 439, stems from the fact that Congressional history shows Congress intended only a procedural grant. See note 8 *supra*. See also 93 CONG. REC. 4153, 5118 (1947); 92 CONG. REC. 5705 (1947). Since diversity and jurisdictional amount were waived, federal jurisdiction must be based on the "arising under" language of Article III, Section 2 of the Federal Constitution. Thus, the right which a party seeks to vindicate in a 301 suit must be one "arising under" the laws or Constitution of the United States, and if the section failed to create substantive rights, it may well be unconstitutional. *Gully v. First National Bank*, 299 U.S. 109 (1936); *Osburn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). But see *Bell v. Hood*, 327 U.S. 678 (1946). Although there is no doubt as to the power of Congress to legislate in the area, *NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1 (1947), the only justification for the constitutionality of section 301 would be an unspoken mandate on the part of Congress to the federal judiciary, ordering the development of a federal labor law. The lower federal courts have held the section constitutional by finding "implied" substantive rights. *Colonial Hardwood Flooring Co. v. International Union, United Furniture Workers*, 76 F. Supp. 493 (S.D.N.Y. 1948), *aff'd*, 168 F.2d 33 (4th Cir. 1948); *Textile Workers, CIO v. Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951); *Shirley-Herman Co. v. International Hod Carriers*, 182 F.2d 806 (2d Cir. 1950); *Waiialua Agricultural Co. v. United Sugar Workers*, 114 F. Supp. 243 (D. Hawaii 1953); *Pepper and Potter, Inc. v. Local 977, United Automobile Workers, CIO*, 103 F. Supp. 684 (S.D.N.Y. 1952);

ment, in the event of a union-sponsored walkout, is not as intent on disciplining the employees guilty of the breach¹⁰ but, instead, institutes an action against the union for damages.¹¹ The propriety of resort to a lawsuit rather than to arbitration is questionable.

The fact situation which gives rise to the problem follows a general pattern. In their collective bargaining agreement the union and management provide a no-strike clause, a grievance procedure, and an arbitration procedure. The union, in disregard of an unconditional pledge, or, if the pledge is conditioned on management's adherence to the terms of the agreement, thinking there has been a breach, calls a strike. Management institutes a suit for damages under 301. The union enters and

Wilson & Co. v. United Packinghouse Workers, CIO, 83 F. Supp. 162 (S.D.N.Y. 1949). It is probable that Mr. Justice Frankfurter believes the section unconstitutional but could not gain the agreement of a majority in the Westinghouse case, the facts of which could be solved by limitation rather than invalidation. He was joined in his opinion by Mr. Justice Burton and Mr. Justice Minton. Chief Justice Warren and Mr. Justice Clark concurred in the result but expressly refused to consider the issue of constitutionality. Mr. Justice Harlan did not participate. A subsequent case, squarely in point, could effect the demise of the section. See Wallace, *The Contract Cause of Action Under the Taft-Hartley Act*, 16 BROOKLYN L. REV. 1 (1950); Miller and Ryza, *Suits By and Against Labor Organizations Under the National Labor Relations Act*, 1955 U. ILL. L. FORUM; Mishkin, *The "Federal Question" in the District Courts*, 53 COLUM. L. REV. 157, 185-94 (1953); Note, 57 YALE L. J. 630 (1948).

10. Prior to the advent of the Taft-Hartley Act, the issues which arose over no-strike bans usually covered penalties assessed against individual workers guilty of wildcat or union-sponsored walkouts. The doctrine of individual liability for contract violations is based on NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939), where the Supreme Court held that employees striking in breach of a contract provision were outside the protection of the National Labor Relations Act. The Board applied the Sands doctrine in upholding penalties which included discharge in Kittinger Co., Inc., 65 N.L.R.B. 1215 (1948); Joseph Dyson & Sons, Inc., 72 N.L.R.B. 445 (1947); The Fantfair Bearing Co., 73 N.L.R.B. 1008 (1947). For judicial reiteration of the Sands doctrine, see NLRB v. Reynolds Int'l Pen Co., 162 F.2d 680 (7th Cir. 1947) (striking employees not protected by NLRA).

The allowable penalties included discharge or suspension, loss of specified contractual benefits, loss of strike time, or fines. For representative arbitrations concerning penalties, see Lancaster Iron Works, 4 Lab. Arb. 759 (1946) (rehiring); Par-Metal Products Corp., 4 Lab. Arb. 794 (1946) (damages); Pittsburgh Tube Co., 1 Lab. Arb. 285 (1946) (discharge); Bethlehem Steel Corp., 2 Lab. Arb. 207 (1945) (loss of pay); Fruehauf Trailer Co., 1 Lab. Arb. 155 (1944) (discharge); January and Wood Co., 1 Lab. Arb. 577 (1942) (discharge).

11. The only significant change in the wording of no-strike clauses caused by section 301 resulted from subsection (e), which provides that employers and labor organizations will be liable for the acts of their agents. Whether the specific acts performed were actually authorized or subsequently ratified will not be controlling. This was an obvious attempt to circumvent section 6 of the Norris LaGuardia Act, 47 STAT. 71 (1932), 29 U.S.C. 106 (1952), which disclaimed liability of unions or their officers and members for unlawful acts of others "except upon clear proof of actual participation in, or actual authorization of, such acts. . . ." See United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1946). Unions, foreseeing unlimited liability for wildcat strikes over which they had no control, immediately began including disclaimers of liability for unauthorized or forbidden walkouts. See CCH UNION CONTRACT CLAUSES 51,701.06 (1954); Note, 49 COLUM. L. REV. 384 (1949).

moves for a stay in the proceedings pending arbitration of its liability which it contends was provided in the agreement. In the past, the fate of these motions has depended on two issues: the scope of the arbitration clause in the individual agreements and the applicability of the United States Arbitration Act,¹² upon which the unions base their motions for stay.¹³

The issue over the scope of the arbitration clause frequently arises from ambiguous provisions and lack of foresight on the part of union and management in drafting their agreements.¹⁴ These faults have been aggravated, however, by the federal judiciary's insistence on strict construction and a lack of sympathy for policies favoring arbitration over litigation.¹⁵

The problem stems originally from the inclusion of the provision for arbitration as a final step in the grievance procedure or its placement immediately thereafter, which implies dependence on the grievance procedure.¹⁶ Thus, an agreement may include in its grievance procedure a series of three to five steps, the first of which calls for the aggrieved employee to take his complaint to his department foreman. The final

12. 9 U.S.C. §§ 1-9 (1952).

13. See p. 480 *infra*. See Sturges and Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 580, 605 (1952); Note, 103 U. PA. L. REV. 902, 912 (1955).

14. At least two courts have pointed out the mistakes made by the parties and impliedly urged their correction. See *International Union, United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 35 (4th Cir. 1948); *Bassick Co. v. Bassick Local 229*, affiliated with International Union of Elec. Workers, CIO, 126 F. Supp. 777, 779 (1954).

15. In dissenting in *Markel Elec. Products, Inc. v. United Elec. Workers*, 202 F.2d 435, 438 (2d Cir. 1953), where the court denied a motion to stay, Judge Clark said, "Even had it seemed to me less clear I should have thought such a broad and enlightened interpretation desirable in the context of modern labor practice; if arbitration is to be fostered against conflicting statutory provisions . . . surely it should be upheld where agreement points and law does not forbid. If there be a binding agreement to arbitrate the resort to a strike here, the existence of the very cause for arbitration cannot constitute a breach ending the defendant's right to arbitrate as the district court held."

Courts have also applied strict contract principles in denying stays. The district court in the Markel case, U. S. DIST. CT. (W.D.N.Y. 1952), held that the calling of a strike was a material breach of the contract which terminated it, thereby relieving the company of any duty it might otherwise have had under the contract to submit to arbitration. In the Colonial Hardwood case, 168 F.2d 33 (4th Cir. 1948), the court appears to have used a "clean hands" theory in denying a stay. "Damages resulting from strikes and lockouts could not reasonably be held subject to arbitration under a procedure which expressly forbids strikes and lockouts and provides for the settlement of grievances in order that they may be avoided." *Id.* at 35. See also *Metal Polishers Union, AFL v. Rubin*, 85 F. Supp. 363 (E.D. Pa. 1949). This same court, in *Philadelphia Dress Joint Board v. Rosinsky*, 134 F. Supp. 607 (1955), implied it would enforce arbitration either by granting a motion to stay or a claim for specific performance only where the moving party had not first broken terms of the contract. *Id.* at 609.

16. See, *e.g.*, contract quoted in *United Elec. Workers v. Miller Metal Products, Inc.*, 215 F.2d 221, 223 (4th Cir. 1954).

step may call for a meeting of the union committee and the plant management. If no settlement is reached, either party may invoke the arbitration procedure.¹⁷ Yet, most arbitration clauses, regardless of their position in relation to the grievance procedure, call for settlement of problems other than employee grievances by words such as "all disputes, differences, and grievances that may arise between the parties to this contract. . . ." The breadth of this language and the complexity of plant relationships indicate the parties' intention to provide arbitration of problems independent of employee grievances. Most contracts, however, are silent as to what additional scope is intended.

Other contracts fail even to hint that the employer might have a need for resort to arbitration. They contain a step-by-step procedure for employee grievances, the last step of which provides that if no settlement is reached, the dispute may be referred to arbitration.¹⁸ It is possible to argue that since the employer is not an employee, it cannot initiate a grievance and, consequently, could never take its claims to arbitration.¹⁹ The better drafted agreements, however, include breaches of the agreement within the scope of arbitration,²⁰ define a grievance to include

17. Courts have generally denied motions to stay in cases arising under contracts such as this on the ground that the disputes which may be taken to arbitration are limited to those which could have been the subject of a grievance. *United Elec. Workers v. Miller Metal Products, Inc.*, *supra* note 16; *Harris Hub and Spring Co. v. United Elec. Workers*, 121 F. Supp. 40 (D. Pa. 1954).

18. See, *e.g.*, contract quoted in *Borg-Warner v. Farm Equipment Workers*, 22 Lab. Arb. 443 (N.D. Ill. 1954).

19. "It is to be noted that the entire procedure is geared to adjust grievances of employees and that it is completely silent as to any possible grievances by the employer. . . . [I]t is not an employee and it would be absurd to suggest that it should initiate a grievance or complaint with the shop foreman, yet . . . it can proceed to arbitration only after the 'above procedure has been complied with.'" *Square D Co. v. United Elec. Workers*, 123 F. Supp. 776, 783 (E.D. Mich. 1954). See also *Borg-Warner v. Farm Equipment Workers*, 22 Lab. Arb. 443 (N.D. Ill. 1954), in which the court said "but even if a plausible explanation could not be found, the condition upon which arbitration can be invoked, namely, the unsatisfactory answer by the Works Manager, is so definite and inflexible that it cannot be made to yield to an ambiguous over-statement in the definition of a grievance." This was despite a definition which read: "A grievance is a difference of opinion as to the meaning and application of the provisions of the Agreement or as to the compliance of either party hereto with any of its obligations under this agreement." *Id.* at 445. (Emphasis added.)

In *Bassick Co. v. Bassick Local 229*, affiliated with International Union of Elec. Workers, CIO, 126 F. Supp. 777 (D. Conn. 1954), the court obviously felt arbitration was to be desired over litigation but that its hands were tied by the poor draftsmanship which resulted in making the arbitration merely a final step in the grievance procedure. "[T]he company might well feel that labor management relations would be improved by submission of a dispute to arbitration. There is here, however, no separate article, general in nature, providing for arbitration outside the grievance procedure." *Id.* at 779.

20. The arbitration clause cited in *Lewittes & Sons v. United Furniture Workers, CIO*, 95 F. Supp. 851 (1951) provided, "All grievances, complaints, differences or disputes arising out of or relating to this agreement, or the breach thereof, shall be settled in the following manner: . . ." *Id.* at 853. A motion for a stay pending arbitration of

managerial claims²¹ and provide a point at which the employer may enter the grievance procedure and, if no satisfactory settlement is achieved, refer his claim to arbitration.²²

Differences in the scope of arbitration clauses could be explained by the language the parties employed if it were not for the fact that courts have interpreted nearly identical clauses to opposite ends. In *UE Workers v. Miller Metal Products, Inc.*,²³ the arbitration clause extended to "all differences, disputes, and grievances."²⁴ The court indicated that arbitration of an alleged breach of the agreement's no-strike clause was without the scope of arbitration. In *Pennsylvania Greyhound Lines v. Amalgamated Ass'n*,²⁵ the court interpreted an agreement calling for arbitration of "all differences, disputes and grievances, other than discipline and discharge cases . . . between the parties arising out of or by virtue of the within collective bargaining agreement" as covering an alleged

liability for a strike was granted. For an opposite result, however, see the Borg-Warner case, *supra* note 19.

21. "Grievances within the meaning of the grievance procedure and of this arbitration clause shall consist only of disputes about the interpretation or application of particular clauses of the Agreement and about alleged violations of the Agreement. . . . [I]n the event of a desire by *either* party to arbitrate the grievance, it shall be referred to an arbitrator. . . ." Contract between Lever Brothers Co. and Local 336, United Gas Workers, March 4, 1952. Cited in CCH LAB. L. REP. 51,933 (1954). (Emphasis added.)

22. "(54) Any grievances which the Corporation may have against the Union . . . shall be presented by the Plant Manager involved to the Shop Committee of that plant. In the event that the matter is not settled within two weeks . . . it may be appealed to the third step of the Grievance Procedure. . . . [T]hereafter the matter will be considered at the third step of the Procedure. . . . [I]f the matter is not satisfactorily settled at this meeting or within five days thereafter by agreement, the case may be appealed to the Umpire by the Corporation." Contract between General Motors Corp. and United Automobile Workers, CIO, May 29, 1950. Cited in CCH LAB. L. REP. 51,933 (1954).

23. 215 F.2d 221 (4th Cir. 1954), *affirming* 121 F. Supp. 731 (D. Md. 1954). The district court denied the motion to stay on the inapplicability of section 3 of the Arbitration Act but implied that were it not for the act, it would hold the scope of such an all-inclusive arbitration clause as covering union liability for breach of a no-strike clause.

24. *Id.* at 223.

25. 98 F. Supp. 789 (W.D. Pa. 1951), *rev'd on other grounds*, 192 F.2d 310 (3rd Cir. 1951) (Arbitration Act held inapplicable). The District Court, in granting a stay, said, "We believe this language [arbitration clause] is clear and unambiguous and does not admit of any explanation or limitation by parol evidence or otherwise. On the contrary, it seems clear to us that if the employer had occasion to resort to the grievance and arbitration machinery of the contract, it would very likely be in connection with a strike." *Id.* at 791. In *Wilson Brothers v. Textile Workers*, CIO, 132 F. Supp. 163 (S.D.N.Y. 1955), the court granted a stay pending arbitration under a clause similar to the one in *United Elec. Workers v. Miller Metal Products, Inc.*, 215 F.2d 227, 223 (4th Cir. 1954), and those cited in the text above, and said, "A broader grant of arbitration jurisdiction is difficult to envisage." *Id.* at 164.

State courts faced with the issue have granted stays pending arbitration on the strength of all-inclusive clauses. *Hudson Co. v. Allied Trades Council*, AFL, 3 N.J. Super. 327, 65 A.2d 557 (1949); *Application of Stewart Stamping Corp.*, 285 App. Div. 953, 138 N.Y.S.2d 327 (Sup. Ct. 1955).

breach of a no-strike clause and granted a stay pending arbitration.²⁶

The courts have consistently refused to recognize the intent of the parties, as evidenced by the terms of the agreement, to rely on the arbitrator to settle problems arising between them. There is little or no mention by the courts of the relative advantages of arbitration over litigation. What is needed is a policy of liberal interpretation of arbitration clauses aimed at giving effect to the intent of the parties, even in the face of ambiguity. Such a policy would promote a speedy return to normal relations following a strike and would lessen the impact of section 301.²⁷

Even when the arbitration provision is interpreted to include breaches of the agreement, the possible inapplicability of the Arbitration Act remains a substantial barrier to a stay pending arbitration. The circuit courts of appeals are mired in dissention over the scope of the clause in section 1 of the act which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²⁸ Section 3, upon which the unions base their motions, provides for a stay pending arbitration in "any suit or proceeding . . . upon any issue referable to arbitration under an agreement in writing for such arbitration."²⁹

The Fourth Circuit was the first to decide the issue in a section 301 suit.³⁰ Feeling that Congress, in 1925, would not have intended compulsory arbitration of labor contracts, the court held the exclusionary clause applicable to collective bargaining agreements and denied the motion. The Third Circuit has run the gamut of opinion. Although deciding initially that the exclusionary clause was inapplicable to section 3,³¹ the court later ruled that the exclusion prevented a stay.³² More recently,

26. 98 F. Supp. at 790.

27. "Employers and unions . . . know that there has to be some convenient and expeditious method for clearing up not only the routine grievances but also the more fundamental issues so frequently arising under collective agreements." GREGORY, LABOR AND THE LAW 405 (rev. ed. 1949).

28. 9 U.S.C. § 1 (1952).

29. 9 U.S.C. § 3 (1952).

30. International Union, United Furniture Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1948). The court reaffirmed its position in United Elec. Workers v. Miller Metal Products, 215 F.2d 221 (4th Cir. 1954).

31. Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945), *cert. denied*, 327 U.S. 777 (1946); Donahue v. Susquehanna Collieries Co., 160 F.2d 661 (3d Cir. 1947); Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948). These cases involved employee claims to recover overtime pay under the Fair Labor Standards Act.

32. Pennsylvania Greyhound Lines, Inc. v. Amalgamated Ass'n of Street Employees, 193 F.2l 327 (3d Cir. 1952). This case was decided after Title 9 of the United States Code, 1946 Ed., which contained the provisions of the Arbitration Act, was codified and enacted into positive law by the Act of July 30, 1947, ch. 392, 61 STAT. 669. By the same act, the Arbitration Act of 1925 was repealed. The court based its change of

it has held the exclusion applicable to agreements of workers directly engaged in interstate commerce but not to agreements of workers merely producing goods for introduction into interstate commerce.³³ The Sixth Circuit holds the exclusionary clause inapplicable since collective bargaining agreements are "trade agreements" rather than "contracts of employment."³⁴ The Tenth Circuit has held the act inapplicable to a suit to enforce specific performance of an arbitration clause,³⁵ and the Second Circuit has stated that the act is inapplicable to collective bargaining agreements.³⁶ The Eighth Circuit, although not forced to decide, has assumed a stay would be available.³⁷ The Fifth Circuit, latest to enter the area, sides with the Fourth Circuit in holding that the act does not authorize the granting of a stay in section 301 suits.³⁸

Although there is little or no Congressional history to provide an answer, the opinion of Judge Parker in the *Colonial Hardwood* case would seem correct.³⁹ To assume that Congress was, 30 years ago, willing to provide for judicial enforcement of the few collective bargaining agreements which then existed is to defy historical fact.⁴⁰

position on the fact that Congress had now made contracts of employment exceptions to the operation of the entire title.

33. *Tenney Engineering, Inc. v. United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953).

34. *Hoover Motor Express Co. v. Teamsters Union, AFL*, 217 F.2d 49 (6th Cir. 1954). *Accord*, *Lewittes & Sons v. United Furniture Workers*, 95 F. Supp. 851 (S.D. N.Y. 1951). *But cf.* *Gatliff Coal Co. v. Cox*, 142 F.2d 876 (6th Cir. 1944). There, the court held the act inapplicable to a suit for wages by an individual employee.

35. *Mercury Oil Refining Co. v. Oil Workers, CIO*, 187 F.2d 980 (10th Cir. 1951). The court cited *Gatliff*, *supra* note 34, as ruling.

36. *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 806, 809 (2d Cir. 1950). The next year, Judge Weinfeld, sitting in the Second Circuit, held the exclusionary clause inapplicable and granted a stay. *Lewittes & Sons v. United Furniture Workers*, 95 F. Supp. 851 (S.D.N.Y. 1951). He explained the Shirley-Herman decision by saying the Second Circuit had merely "suggested" the inapplicability of the act. The circuit later denied a stay on the merits of the arbitration clause while expressly refusing to consider the availability of the act. *Markel Elec. Products, Inc. v. United Elec. Workers*, 202 F.2d 435 (2d Cir. 1953). One of its districts interprets this to mean the circuit is now willing to grant a stay under the act. *Local 207, United Elec. Workers v. Landers, Frary & Clark*, 119 F. Supp. 877, 879 (D. Conn. 1954).

37. *United Elec. Workers v. Oliver Corp.*, 205 F.2d 376, 385 (8th Cir. 1953).

38. *Lincoln Mills of Alabama v. Textile Workers, AFL*, 230 F.2d 81 (5th Cir. 1956).

39. *International Union, United Furniture Workers v. Colonial Hardwood Flooring Co.*, 169 F.2d 33 (4th Cir. 1948). "It is perfectly clear, we think, that it was the intention of Congress to exclude contracts of employment from the operation of all of these provisions. Congress was steering clear of compulsory arbitration of labor disputes. . . ." *Id.* at 36.

40. The most convincing argument for allowing stays under the act is that made by Judge McGranery in *United Office Workers, CIO v. Monumental Life Ins. Co.*, 88 F. Supp. 602 (E.D. Pa. 1950). In holding that a collective bargaining agreement was not a "contract of employment" within the terms of the act, however, the court relied heavily on the Supreme Court's opinion in *J. I. Case Co. v. NLRB*, 321 U.S. 322 (1944), in which Mr. Justice Jackson, solely for the purpose of that case, distinguished contracts of employment and collective bargaining agreements.

Assuming that the stay provision of the Arbitration Act is inapplicable, by virtue of the exclusion, does section 301 provide an independent basis under which federal courts have the power to enforce arbitration? Unions could raise this issue by a counterclaim for specific performance rather than a motion to stay under the Arbitration Act.⁴¹ The leading case granting specific performance under section 301 is *Textile Workers Union v. American Thread Co.*,⁴² in which the union sought an order requiring the employer to submit a dispute over separation pay to arbitration. Judge Wyzanski, although he admitted the legislative language did not lend its full support, held that Congress intended section 301 to provide a nationally available remedy of specific performance.⁴³ In the three years since the *American Thread* decision the federal courts have shown an increasing willingness to grant equitable

While it is not the responsibility of the federal judiciary to return every piece of ambiguous legislation to Congress for clarification, such a far-reaching step as judicial enforcement of arbitration should be instituted by the legislature, especially if it is felt the legislature did not foresee the impact of the legislation in question on an entirely new body of law.

41. See *Evening Star Newspaper Co. v. Columbia Typographical Union*, 124 F. Supp. 322 (D.C.D.C. 1954). Employer sued union, which counterclaimed for specific performance of an arbitration clause. Judgment was given for the union on the sole authority of *Textile Workers, CIO v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953). See also *Wilson Brothers v. Textile Workers, CIO*, 132 F. Supp. 163 (S.D.N.Y. 1954). The action was by an employer for breach of the collective bargaining agreement in by-passing the grievance and arbitration procedure. The court granted a union motion to compel arbitration, holding that the issues were matters properly to be determined by arbitration. For specific performance of arbitration clauses generally, see Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. CHI. L. REV. 233 (1950); Katz and Jaffe, *Enforcing Labor Arbitration Clauses By Section 301, Taft-Hartley Act*, 8 ARB. J. (n.s.) 80 (1953); Note, 64 HARV. L. REV. 1239 (1952); Comment, 21 U. CHI. L. REV. 251 (1954). Proponents of specific performance as a proper remedy under section 301 maintain that had Congress meant to restrict recovery to damages, it could have written "suits for damages" in subsection (a). This view, however, overlooks the general intent of Congress in legislating. See note 8 *supra*.

42. 113 F. Supp. 137 (D. Mass. 1953). See also *United Textile Workers, AFL v. Goodall-Sanford, Inc.*, 131 F. Supp. 767 (D. Maine 1955); *Industrial Trades Union v. Woonsocket Dyeing Co.*, 122 F. Supp. 872 (D.R.I. 1954); *Insurance Agents' Union, AFL v. Prudential Ins. Co.*, 122 F. Supp. 869 (E.D. Pa. 1954); *Local 207, United Elec. Workers v. Landers, Frary & Clark*, 119 F. Supp. 228 (D. Conn. 1954); *Local 379, United Automobile Workers, CIO v. Jacobs Mfg. Co.*, 120 F. Supp. 228 (D. Conn. 1953); *Textile Workers, CIO v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D. N.C. 1950). For union suits to compel compliance with an arbitrator's award, see *Milk Drivers Union, AFL v. Gillespie Milk Products Corp.*, 203 F.2d 650 (6th Cir. 1953); *Mercury Oil Refining Co. v. Oil Workers, CIO*, 187 F.2d 980 (10th Cir. 1951), *affirming in part and reversing in part* 89 F. Supp. 702 (W.D. Okla. 1950).

43. "In short, Congress, had it considered the matter, would have expected federal courts to accord specific performance of arbitration clauses, and would not expect the national judiciary to apply a checkerboard set of remedies adapted to the laws of the several states, most of which do not provide for specific performance. . . . [T]his court can reach no other result than to conclude that § 301 provides, as a nationally available remedy, specific performance of arbitration clauses in labor contracts in industries affecting commerce." 113 F. Supp. at 141.

relief,⁴⁴ and only recently has any effort been made to study the problem.⁴⁵ If section 301 is a mere procedural aid, as was held by Mr. Justice Frankfurter in the *Westinghouse* case,⁴⁶ it creates no power, only a forum, and the *American Thread* doctrine is erroneous.⁴⁷

The salient question is whether the federal judiciary should enforce arbitration in any situation.⁴⁸ The injection of more governmental con-

44. See cases cited in note 42 *supra*, e.g., *United Textile Workers, AFL v. Goodall-Sanford, Inc.*, 129 F. Supp. 859 (D. Maine 1954) (injunction granted under 301 preventing employer from terminating employment of union members). *But cf.* *Rock Drilling Union v. Mason & Hanger Co.*, 217 F.2d 687 (2d Cir. 1955) (section 301 held inapplicable to suit by union for torts committed by employer against employees).

45. *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955). The Fifth Circuit, in two recent decisions, has accepted the challenge of the *Westinghouse* case. In *Lincoln Mills of Alabama v. Textile Workers, CIO*, 230 F.2d 81 (5th Cir. 1956), it reversed a district court's grant of specific performance of an arbitration clause. Both the majority and dissenting opinions are excellent reviews of the entire *Westinghouse-American Thread* problem as to the power given the federal judiciary by section 301. The majority refused specific performance on the ground that there was no common law or statutory background requiring or permitting enforcement of such an agreement. Such a decision is in direct contravention of the *American Thread* holding, and since the latter has assumed the stature of case doctrine, the Supreme Court, almost of necessity, must resolve the conflict. In the second case, *International Ladies' Garment Workers, AFL v. Jay-Ann Co.*, 228 F.2d 632 (5th Cir. 1956), the court held a suit by a union to force an employer to contribute to the employee health and welfare fund was outside the scope of section 301. This case also follows the lead of Mr. Justice Frankfurter in the *Westinghouse* case in finding an absence of any substantial federal question.

46. *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955). See note 9 *supra*.

47. 45 STAT. 70 (1932), 29 U.S.C. §§ 101-15 (1952). Section 4 of the act prohibits federal courts from issuing "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, whether singly or in concert, any of the following acts. . . ." Section 13 (c) defines "labor disputes" as a "controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining . . . terms or conditions of employment. . . ." Judge Wyzanski excused the conflict on the basis of the purposes and Congressional history in the *American Thread* decision. 113 F. Supp. at 142. Subsequent cases have either ignored the problem or relied on *American Thread*. *Insurance Agents' Union, AFL v. Prudential Ins. Co.*, 122 F. Supp. 869 (E.D. Pa. 1954); *Local 397 United Automobile Workers, CIO v. Jacobs Mfg. Co.*, 120 F. Supp. 228 (D. Conn. 1953). The circuits which have mentioned the problem are in at least dicta agreement that the act does not preclude the granting of specific performance. See *Lincoln Mills of Alabama v. Textile Workers, CIO*, 230 F.2d 81, 84 (5th Cir. 1956); *W. L. Mead, Inc. v. Teamsters Union, AFL*, 217 F.2d 6, 9 (1st Cir. 1954); *United Elec. Workers v. Miller Metal Products, Inc.*, 215 F.2d 221, 224 (4th Cir. 1954); *Tenney Engineering, Inc. v. United Elec. Workers*, 207 F.2d 450, 454 (3d Cir. 1953).

48. If judicial enforcement of arbitration becomes commonplace, it will be merely another step in the grievance-arbitration procedure. If the moving party, each time it wishes to arbitrate a dispute, must file suit in federal court to compel such arbitration, nothing remains of the voluntary nature of the agreement. If specific performance is denied, the need may arise for legitimate strikes, even in the case of unconditional no-strike clauses. If union and management enter a long-term contract and, shortly thereafter, a dispute arises which the company refuses to arbitrate, or refuses to arbitrate whether the dispute is within the scope of arbitration, the only recourse left for a union, if specific performance is to be denied, would be the strike. If the union could not strike

trols, through the courts or otherwise, in an area already dangerously overcrowded is undesirable. Governmental interference, even to the extent of judicial enforcement, weakens the urge toward voluntary action on the part of both labor and management.⁴⁹

A court is forced to construe terms of the agreement by deciding what the parties meant by their use of language.⁵⁰ If the arbitration clause provides for settlement of "all disputes," the question of whether the parties meant to include employer demands for damages within its scope is one for the arbitrator, not the courts. The only instance in which a section 301 suit would be necessary to decide union liability for a strike would be where the contract contained no arbitration procedure or one expressly excluding breaches of the agreement from the scope of arbitration.

In studying the advisability of section 301, Congress would be aided by an objective study of the merits of arbitration over litigation.⁵¹ The arbitrator, deciding the issue of union liability for non-compliance with a no-strike pledge, is not bound solely by the issue of whether the union sponsored a walkout. If the strike is prompted by company unfair labor

and could not obtain judicial enforcement of the collective bargaining agreement, an irresponsible employer could breach the agreement at will. See notes 54-55 *infra*. See also Howard, *Labor-Management Arbitration: "There Ought to Be a Law"—Or Ought There*, 21 Mo. L. REV. 1 (1956); Note, *Arbitration of Labor Contract Disputes*, 43 ILL. L. REV. 678 (1949).

49. A possible union move in the event of a section 301 suit which avoids some of the undesirable aspects of a counterclaim for specific performance would be a motion to dismiss. The grant of such motion would divest the court of jurisdiction, a contrast to the continuing jurisdiction which exists after an action is stayed pending arbitration. Secondly, the court would avoid judicial enforcement of arbitration. After its action was dismissed, the employer would have a choice of no compensation or voluntarily going to arbitration to determine the union's liability. Further, the motion to dismiss would not meet the problem raised against specific performance by the Norris-LaGuardia Act. FED. R. CIV. P. 12(b)(6) provides: "[T]he following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief may be granted." Whether a federal court would entertain such a motion, based on the ground that the court is precluded from granting any relief since the parties have provided another forum (arbitration), use of which is a condition precedent to litigation, depends largely on the degree of liberality it is willing to use in interpreting the Federal Rules.

50. See, e.g., *United Elec. Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954); *Hoover Motor Express Co. v. Teamsters Union*, 217 F.2d 49 (6th Cir. 1954); *Markel Electrical Products v. United Elec. Workers*, 202 F.2d 435 (2d Cir. 1953); *Philadelphia Dress Joint Board v. Rosinsky*, 134 F. Supp. (E.D. Pa. 1955); *Borg-Warner v. Farm Equipment Workers*, 22 Lab. Arb. 443 (N.D. Ill. 1954); *Bassick Co. v. Bassick Local 229, affiliated with International Union of Elec. Workers, CIO*, 126 F. Supp. 777 (D. Conn. 1954); *Square D Co. v. United Elec. Workers*, 123 F. Supp. 776 (E.D. Mich. 1954); *Harris Hub Bed and Spring Co. v. United Elec. Workers*, 121 F. Supp. 40 (M.D. Pa. 1954).

51. See Kaye and Allen, *Union Responsibility and Enforcement of Collective Bargaining Agreements*, 30 B.U.L. REV. 1, 26-28 (1950); CCH LAB. L. REP. 51,925-31 (1954).

practices or a company breach, the arbitrator will take this into consideration.⁵² In view of the relationship between the parties and the complex nature which their disputes possess, every issue is relevant in determining responsibility. The purpose of the no-strike clause is continuity of production through union responsibility. It should not be used to allow irresponsible management to saddle strike costs on a union which struck because it had no other alternative.⁵³

Arbitration offers other advantages including lower costs, privacy, and the lack of technicalities and inflexibilities inherent in any action at law. The savings in time and money are considerable. Since the arbitration is normally a one-meeting affair, there are no appeals to intermediate or higher courts, marked by high costs and long delays due to

52. At least one federal court has refused to entertain evidence as to the nature of the dispute which gave rise to the strike. *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 806 (2d Cir. 1950). "[T]he court correctly limited the issue before the jury to the single question whether the union had caused a cessation of work without going to arbitration. The merits of the dispute were of no moment, since the union had promised that regardless of the nature of a dispute which might arise, it would not cease work but would keep on the job until the dispute was settled by the machinery provided for in the contract." *Id.* at 810. The NLRB policy toward strikes in the face of employer unfair labor practices has undergone several changes. In *Scullin Steel Co.*, 65 N.L.R.B. 1294 (1948), the Board held the validity of penalties assessed against no-strike violators was conditioned on the employer's not having breached the contract or committed unfair labor practices. See also *Joseph Dyson & Sons, Inc.*, 72 N.L.R.B. 445 (1947); *The Fanfair Bearing Co.*, 73 N.L.R.B. 1008 (1947). In *National Electric Products Corp.*, 80 N.L.R.B. 151 (1948), the Board reversed its position and held a no-strike clause barred strikes even in the face of employer unfair labor practices. The Board reversed itself again in *Mastro Plastics Corp.*, 103 N.L.R.B. 511 (1955), by returning to the Scullin doctrine.

53. The doctrine of the *Shirley-Herman* case, note 54 *supra*, may have been impliedly overruled by the Supreme Court in *Mastro Plastic Corp. v. NLRB*, 350 U. S. 270 (1956). "Strikers walked out despite an unconditional no-strike pledge after a union official was fired for his activities in a jurisdictional battle for which the employer was allegedly responsible. The NLRB held that discharge of the strikers was an unfair labor practice and that the strikers, so long as they were striking solely against the employer's actions, would not be subject to punishment for breach of the agreement. The Supreme Court affirmed, saying, ". . . failure of the Board to sustain the right of strike against that conduct would seriously undermine the primary objectives of the Labor Act." *Id.* at 278. The court expressly rejected the employer's plea that the words "any strike" in the no-strike pledge included the instant situation. "[employer's] interpretation would eliminate . . . the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. Whatever may be said of the legality of such a waiver . . . there is no adequate basis for implying the existence without a more compelling expression of it than appears in . . . this contract." *Id.* at 283. The Seventh Circuit reached a similar conclusion in *NLRB v. Wagnér Iron Works*, 220 F.2d 126 (7th Cir. 1955). Although it might be argued that these cases are not in point because they deal with employer sanctions against workers, it seems unlikely that a federal court, in section 301 action against a union based on similar facts, could ignore the language of the Court.

54. For representative arbitrations of union liability for violation of a no-strike clause, see *Canadian General Electric Co.*, 18 Lab. Arb. 925 (1952); *Hoffman Beverage Co.*, 18 Lab. Arb. 869 (1952); *Phillips Chemical Co.*, 17 Lab. Arb. 721 (1951).

overcrowded dockets. An additional advantage is minimization of the combatant attitude engendered by an adversary proceeding. The arbitrator's decision can do much to relieve the strained feelings and discontent which will be the result of litigation, no matter which side is victorious. The strike provokes bitterness and rancor between employer and employee, both of whom feel themselves wronged. A time consuming, technical and costly court battle can only further this animosity.

INITIAL IMPRISONMENT FOR THE VIOLATION OF CITY ORDINANCES

Statutes in thirty-five states authorize municipal corporations to enforce their ordinances by the imposition of initial imprisonment upon convicted offenders as a part of the basic punishment, as well as to enforce the payment of a fine.¹ Although it is well settled that im-

1. *Alabama*: May enforce by fine not exceeding \$100 and by imprisonment or hard labor not exceeding six months, one or both. ALA. CODE tit. 37, § 455 (1940). *Arizona*: \$300 and 3 months limits. ARIZ. CODE ANN. c. 16, §1105 (1939). *California*: \$500 and 6 months limits. CAL. GOV. CODE ANN. §36900 (1951). *Florida*: \$500 and 60 days limits. FLA. STAT. § 165.19 (1955). *Georgia*: Georgia's cities and towns are governed by charters which are altered by special acts. Limitations on cities, etc., must be gleaned from these various charters. In *Calhoun v. Little*, 106 Ga. 336, 32 S.E. 86 (1898), the court declared that under the charter of the town of Waresboro there was no authority to impose initial imprisonment. However, in *Jones v. Langford*, 141 Ga. 336, 81 S.E. 885 (1914), Atlanta charter provisions were construed to allow for initial imprisonment, without any provision for discharge upon payment of a fine. *Idaho*: \$100 and 30 days limits. IDAHO CODE ANN. § 50-1109 (1949). *Indiana*: \$300 and 6 months limits. IND. ANN. STAT. § 48-1407 (Burns 1950). *Iowa*: \$100 and 30 days limits. IOWA CODE ANN. § 366.1 (1949). *Kansas*: No statutory limits on 1st class cities. KAN. GEN. STAT. § 13-424 (1949). \$100 and 3 months limits in 2d and 3d class cities. *Id.* at §§ 14-424, 15-440. *Kentucky*: \$100 and 50 days limits. KY. REV. STAT. §§ 83.010, 85.120, 86.110, 87.060, 88.107 (1955). *Louisiana*: \$100 and 30 days limits. LA. REV. STAT. ANN. § 33:401(32) (1950). But the penalties for driving under the influence of alcohol may be \$500 and 60 days. *Id.* at (Supp. 1956). *Maryland*: \$100 and 90 days limits. MD. ANN. CODE GEN. LAWS art. 23A, § 3 (1951). *Michigan*: \$500 and 6 months limits. MICH. COMP. LAWS § 89.2 (1948). But in home rule cities the limits are \$500 and 90 days. *Id.* at § 117.4i(19). *Minnesota*: \$100 and 3 months limits. MINN. STAT. ANN. § 412.231 (West Supp. 1954). *Mississippi*: \$100 and 30 days limits. MISS. CODE ANN. § 3374-137 (Supp. 1954). *Missouri*: Punishment may be by fine, imprisonment, or both. No limits are stated in the statute. MO. ANN. STAT. § 74.657 (Vernon 1952). *Montana*: \$300 and 90 days limits. MONT. REV. CODES ANN. § 11-950 (1947). *Nebraska*: Cities of the 1st and 2d classes and villages may only fine to enforce ordinances. NEB. REV. STAT. §§ 16-225, 17-505 (1943). Cities of the metropolitan class may impose both fines and imprisonment with no statutory limits. *Id.* at § 14-102(25). Cities of the primary class have limits of \$100 and 6 months. *Id.* at § 15-263 (Supp. 1955). The latter statute, which went into effect on September 18, 1955, for the first time allowed cities of the primary class to impose initial imprisonment. *Nevada*: \$300 and 6 months limits. NEV. COMP. LAWS § 1128 (1929). *New Jersey*: \$200 and 90 days limits. N. J. STAT. ANN. § 40:49-5 (1940). *New Mexico*: \$300 and 90 days limits. N.M. STAT. ANN. § 14:21-47 (1953). *New York*: No limitations stated by