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Terence Moore

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COMMENTS
ASPECTS OF THE NO-STRIKE CLAUSE IN
LABOR ARBITRATION

From 1932 to the present, the historic purpose of the federal labor policy has been to attempt a balancing of the power relationship between labor and management. The economic and legal power was almost totally in the hands of management prior to 1932, while today it is generally admitted that the weight of influence has shifted to the unions.

Initial efforts to equalize this dynamic relationship began with the enactment of the Norris-LaGuardia Act.\(^1\) The primary purpose and effect of the act was to create a \textit{laissez faire} atmosphere in which organized labor could engage in bargaining and organizational activities similar in principle to the free enterprise system afforded business under the common law.\(^2\) This was realized primarily by elimination of the federal equity power in bargaining and organizational strikes.\(^3\) Thus, the Norris-LaGuardia Act prohibited the use of injunctions by federal courts to interfere with labor's use of economic strength through strikes and other lawfully effective means in disputes with management. Interestingly enough, section 8 of the act impliedly approves arbitration as a method of settling disputes.\(^4\) It comprises the first step in the long history of legislation and stare decisis moving arbitration to the forefront in federal labor policy. However, this did not manifestly promote collective bargaining, which still retained its common law status, and did not consider a collective agreement to be an enforceable contract. Under such status, the terms of the agreement could not be enforced by an individual employee. He could only endeavor to have such terms incorporated into his own personal contract of hire with the company. Thus, the employee


\(^3\) 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958). “No court of the United States ... shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute ...”

\(^4\) Section 8 prohibits injunctive relief to any plaintiff “who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.” 47 Stat. 70, 72 (1932), 29 U.S.C. § 108 (1958).
would use the collective agreement as a model for obtaining better terms in his own contract of hire.\(^5\)

In 1935, the passage of the National Labor Relations Act, better known as the Wagner Act,\(^6\) abolished this common law concept. The principal result of this legislation was to require an employer to bargain with a properly selected union.\(^7\) Such a union, chosen by a majority of the workers, became the exclusive bargaining representative for all workers in the plant, union members or not, and no worker could fix his own terms of employment since such terms were negotiated only by the union and the employer. The Wagner Act made no mention of enforcing collective agreements, thereby requiring suit by individual workers as at common law. With these concepts the NLRA ushered in the era of the collective bargaining agreement.

In 1947, Congress re-examined the power relationships created in 1932 and 1935 in the light of the intervening twelve years. This resulted in the amendments to the Wagner Act contained in The Labor Management Relations Act, also known as the Taft-Hartley Act.\(^8\) This act had a two-fold purpose: first, it challenged the prior philosophy of self-help and freedom of competition for unions by adding restrictions and requirements to union conduct in organizational and bargaining activities. This was in order to facilitate the removal of certain causes of individual strife which imposed obstructive burdens on interstate commerce.\(^9\) Second, and most important, it placed equal responsibility on both parties to the collective bargaining agreement. This was accomplished by section 310 of the Taft-Hartley Act which removed the common law prohibition of a suit against a union, but allowed federal district courts to hear "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ."\(^10\)

The most recent labor legislation is The Labor Management Reporting and Disclosure Act\(^11\) enacted in 1959. The purpose of this act is to police

\(^5\) This is illustrated by the following example: A collective bargaining agreement stated that an employee covered by the agreement was to receive $1.00 an hour. The employee could not enforce this term, as a part of the collective agreement, but could only attempt to obtain a $1.50 an hour pay rate in his own personal contract of hire with the company.


the internal affairs of labor organizations and to correct certain management-union abuses in the collective bargaining process and the conduct of labor affairs in general.12

Viewing federal labor legislation as a whole, the increasing solicitude of Congress for protection of the public interest becomes manifest and it appears that this laudable end can best be attained by collective bargaining, mutually binding agreements and arbitration.

THE NO-STRIKE CLAUSE UNDER BARGAINING AGREEMENTS

The existence of a collective bargaining agreement implies that no work stoppage will take place while peaceful adjustment procedures are available, and almost every agreement outlines in considerable detail the machinery and the steps to be followed for adjusting disputes and other grievances. Many contracts contain explicit prohibitions or restrictions on work stoppages, whether they be strikes or lockouts. Such “no-strike, no lockout” clauses are designed for extra assurance that the contract procedure will be used fully before resorting to undesirable practices.

The restrictions on strikes and lockouts provided in agreements range from outright prohibition of strikes and lockouts during the term of the agreement13 to clauses covering the protection of company property or the necessary care of equipment and finished products while a strike is in progress. Although production interruptions of any kind are frequently forbidden, many contracts merely limit the conditions or specify the circumstances under which a strike may be called. In most agreements not specifically calling for automatic arbitration of disputes within the scope of the agreements, or in those which allow arbitration by mutual consent only, strikes or lockouts are banned only while the grievance machinery is in operation or until it has failed to produce a mutually acceptable solution.14 Some clauses, on the other hand, specifically permit work cessation to secure enforcement of an agreement provision or an arbitration award.15 Others specify a “cooling off” or definite period of waiting after strike notice is served.

12 The rights of union members are protected from union abuses by title I of the Act. An outline of the reporting and disclosure rules designed to protect the public interest and union members from possible union abuses of power constitutes title II. This title and titles III and IV safeguard union trusteeships, elections, and fiduciary relationships, respectively.

13 This type of clause is illustrated by the following example: “There shall be no strikes, lockouts, slowdowns, or other cessation of work... nor shall there be any sympathy strikes, secondary boycotts, or political strikes.”

14 An example is: “No strike, work stoppage, or lockout will be caused or sanctioned until grievance negotiations have continued for at least five days at the final step of the bargaining procedure.”

15 A clause that is a typical example is: “During the term of this agreement there shall be no strikes, slowdowns, picketings, stoppages of work or boycotts by the Union
No-strike terms sometimes include sitdowns, slow-downs, and any interruption or interference with work, as well as a direct walkout. Picketing and sympathy strikes are sometimes prohibited as well. Moreover, the union may pledge itself to refrain from officially calling a strike and not to aid, support, or permit unauthorized strikes by its members.\textsuperscript{16}

The Labor Management Relations Act allows either the employer or the union to bring action in a federal district court for damages incurred by a strike or lockout in violation of the bargaining agreement. Such judgments against unions are enforceable only against the union as an organization and not against any individual member or officer. In determining whether a union is responsible for the acts of its members, the fact of authorization or ratification is not controlling. Because of this factor, a wide variety of contract clauses have been utilized for the purpose of limiting union liability for work stoppages. These are usually one of the following: (1) A clause stating that strikes are not considered a breach of contract, and the union is absolved of liability for strikes of any kind; (2) The union is not liable for unauthorized or "wildcat" strikes, provided it takes measures to prevent and terminate such strikes.\textsuperscript{17}

\textbf{SECTION 301 OF THE TAFT-HARTLEY ACT}

Section 301 of the Taft-Hartley Act\textsuperscript{18} states that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties. . . ." This provision seems to allow unions to sue employers for breach of no-strike clauses as well as to allow suits in converse situations. However, the \textit{Westinghouse Case}\textsuperscript{19} of 1955 demonstrated that

\begin{quote}
or its members, unless the Employer shall fail to abide by the decision of a duly constituted board of arbitration. There shall be no lockout by the Employer unless members of the Union shall fail to abide by the decision of a duly constituted board of arbitration."
\end{quote}

\textsuperscript{16} This is exemplified by the following: "The Union shall not directly or indirectly, assist, encourage, or in any way participate in any unauthorized strike, sitdown, slowdown, or work stoppage during the life of this Agreement. Neither will the Union condone or ratify or lend support to any unauthorized strike, sitdown, slowdown, or work stoppage."

\textsuperscript{17} This type is typically worded: "The Company has the right to discipline or discharge anyone guilty of violating the provisions of this Article, but the Union will not be liable for damages in breach of contract in the event of strikes or work stoppages which the Union has not authorized and as to which the Union has used its best efforts to prevent and terminate." Here the limitation on liability is coupled with a measure of union responsibility. Only if the Union takes affirmative steps to prevent or terminate a wildcat strike will there be no liability on the Union's part.


section 301 could not be used successfully by unions to enforce bar-gaining contracts. Justice Frankfurter noted that the section was only procedural and did not create any substantive contract law. In their concurring opinions the other Justices felt that since the rights created were uniquely personal rights of the employees, the union could not enforce them. This presented a dilemma to the workers: they could not sue to enforce rights under section 301; nor could they benefit if the union sued in their behalf. Therefore, there was no effective legal remedy available to the employees under section 301.

What the Supreme Court seemed to neglect is precisely what some authorities have emphasized: that both parties may sue in the federal courts to enforce the collective agreement aside from section 301, under section 1337 of the Judicial Code, irrespective of amount or diversity of citizenship. The Court bases this reasoning upon the fact that these bargaining contract rights arise in mutually agreements under an act of Congress regulating commerce.

Then two years later, in 1957, the case of Textile Workers Union v. Lincoln Mills occurred. Here the employers refused to arbitrate grievances concerning the personal rights of the individual workers and the union sued under section 301. The Supreme Court held that the section did contain substantive law and enforced the promise to arbitrate. However, this did not overrule the Westinghouse case, for the promise to arbitrate had only been made to the union, and had not created any personal rights of the workers. Nevertheless, the Lincoln Mills case forced employers to litigate grievances arising out of collective bargaining agreements before an arbitrator who was the choice of both parties.

Justice Douglas, in the opinion, interpreted section 301 to mean that if the whole agreement was enforceable, then each provision would be too. He stated that section 301(a):

authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances. . . .

He went on to say that:

the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike.

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23 Id. at 451.

24 Id. at 455.
FEDERAL ARBITRATION POLICY

In conjunction with the above, The United States Arbitration Act,\(^{25}\) section 2, provides that any arbitration clause in "a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable ...." Affirmative relief for the enforcement of such agreements is provided for in section 4.\(^{26}\) There have been diverse interpretations of section 1, resulting in much confusion with regard to its meaning. The most confusing part of the section states: "Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Generally, it has been shown that this "contract of employment" portion of section 1 is a limitation placed upon the entire act.\(^{27}\) But this only applies when the courts have construed this phrase to include collective bargaining contracts. This view may be found in the case of *Gatliff Coal Co. v. Cox*.\(^{28}\) Ten years later the same Sixth Circuit Court of Appeals held, in the case of *Hoover Motor Express Co. v. Teamsters Union*,\(^{29}\) that there were distinguishing characteristics between two situations; that if the dispute involved individual rates of pay, then the statute applied to the contract; but if there was a dispute involving part of the collective bargaining agreement, such as a no-strike clause, then there was no "contract of employment" and hence arbitration could then be enforced under the act.\(^{30}\) Thus, if the Arbitration Act would be interpreted in the manner of the *Hoover Motor Express* case, a no-strike clause in a collective bargaining agreement could be enforced under the act. However, it was not until the *Steelworkers Trilogy* cases\(^{31}\) that the scope of and the effect given to arbitration provisions were determined. These cases established the rule that the court determines only whether or not the controversy is arbitrable. The only function of the court then is "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."\(^{32}\) From these decisions, arbitra-


\(^{27}\) Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956).

\(^{28}\) 142 F.2d 876 (C.A. 6, 1944).

\(^{29}\) 217 F.2d 49 (C.A. 6, 1954).


tion has become the pre-eminent basis for all federal labor policy.

This, however, presents a problem when a union submits the issue of breach of a no-strike clause as a grievance subject to the arbitration process. In solving this predicament the majority of federal courts have used the theory that a strike in breach of a no-strike clause is a repudiation *per se* of the contractual agreement to arbitrate. As a result, according to this view, a breach of the no-strike clause renders the entire contract meaningless. A minority of the federal courts formulate a second theory that the commonly understood definition of "grievance" does not include a strike in breach of a no-strike clause. This rationale asserts that "grievances" are merely common-place disagreements occurring in the normal course of labor-management relations. These matters are considered by both parties, who mutually institute procedures to settle them. This is unlike a strike, which violates the entire agreement, including the very procedure designed to amicably adjust the disagreement. By a third viewpoint that has been proposed, there can be no arbitrability of a strike in breach of a no-strike clause unless the employer has been given a right by the grievance procedure to file a grievance with the union.

**FEDERAL INJUNCTIVE RELIEF AS A MEANS OF ENFORCEMENT OF THE NO-STRIKE CLAUSE**

Once it has been determined that a strike in breach of a no-strike clause should be discontinued, the question arises as to what are the available procedural methods by which this may be accomplished. There have been several answers to this question where an action has been brought under section 301 of Taft-Hartley for an injunction addressed to a union in breach of a no-strike clause. The Second Circuit, in *A. H. Bull S. S. Co. v. Seafarers' International Union*, decided that the strike was a

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labor dispute within the meaning of the Norris-LaGuardia Act, and therefore an injunction was not attainable.\textsuperscript{37} In the case of \textit{Teamsters Union v. Yellow Transit Freight Lines},\textsuperscript{38} the Tenth Circuit said that the Norris-LaGuardia Act was not applicable since section 301 of the Taft-Hartley Act granting jurisdiction to federal courts in suits involving violations of contracts between employers and labor organizations imposed equal enforceability as to both arbitration and no-strike clauses. Therefore injunctions were obtainable.

It is apparent that the essence of the problem is to reconcile section 301 of the Taft-Hartley Act with section 4 of the Norris-LaGuardia Act. In \textit{Trainmen v. Chicago River & I.R. Co.},\textsuperscript{39} the Supreme Court came to the conclusion that Norris-LaGuardia does not prohibit the issuance of such an injunction. The Court in its explanation stated: “The Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes.”\textsuperscript{40} Thus, the problem can be solved. The employee is protected in the free exercise of economic power in collective bargaining by the Norris-LaGuardia Act, while the results of such collective bargaining are enforceable against each party by the Taft-Hartley Act. The ultimate result of this accommodation is a \textit{pro tanto} repeal of the Norris-LaGuardia Act by section 301 of the Taft-Hartley Act, thereby preserving the purposes of both statutes.

However, as with most cases, there is a flaw in the theory elaborated above. Such a flaw was exposed in the case of \textit{Mastro Plastic Corp. v. NLRB},\textsuperscript{41} where there was a strike in breach of a no-strike clause because of unfair labor practices by the employer. The Court held, in this case, that a union, when protesting solely against an employer’s unfair labor-practice tactics, is privileged to strike despite the no-strike clause in the bargaining agreement. This means, therefore, that when the jurisdiction of the court is invoked by an employer to enjoin the union’s protest of an unfair labor practice, the judge will refuse to terminate the strike on the ground that it is not within the proscription of the agreement.

Heretofore, the supposition has been that the collective bargaining agreement contained both a no-strike clause and an arbitration provision. But what happens when an agreement contains a no-strike clause, but no provision for arbitration? This situation has created a predicament because without an arbitration clause the possibility of enjoining a strike confers a material advantage to management. Therefore the feasibility of

\textsuperscript{37} As stated in the beginning of this comment, the Norris-LaGuardia Act prohibited Federal Courts from issuing injunctions restraining unions from conducting a lawful strike.

\textsuperscript{38} 282 F.2d 349 (C.A. 10, 1960).

\textsuperscript{39} 353 U.S. 30 (1957).

\textsuperscript{40} \textit{Id. at} 40.

\textsuperscript{41} 350 U.S. 270 (1956).
specific enforcement of the no-strike clause at management's request must be considered along with the solutions there are to this difficulty.

One consideration is that both section 301 of the Taft-Hartley Act and the Norris-LaGuardia Act taken together in conjunction with labor policy as a whole have as an objective the relative equality between union and management. In order to maintain this status, where there is now an alignment of power favoring management, the original doctrine of the Norris-LaGuardia Act again must prevail and the courts are to be barred from granting an injunction when there exists no equity to balance the strength of the parties.

Another suggestion is that the National Labor Relations Board enter the picture, as an entity to equalize any undue advantage accruing to labor or management created by a contract containing only a no-strike clause. However, this suggestion has not been favored by judicial decision. Evidently the courts, in refusing to follow the above notion, base their refusal upon the philosophy favoring freedom of contract. Such courts feel that no-strike clauses and arbitration provisions are matters for labor and management to resolve at the bargaining table, and if they cannot be decided there, then neither the NLRB nor the Court can force such an agreement.

SUMMARY

It has been noted that the Norris-LaGuardia Act, by prohibiting the use of injunctions by federal courts to interfere with labor's use of economic strength through strikes and other lawful means in disputes with management, was the first piece of legislation which demonstrated the federal labor policy of attempting to balance the power relationship between labor and management. The Wagner Act further exemplified this policy by ushering in the era of the collective bargaining agreement. Twelve years later the Wagner Act was amended by the Taft-Hartley Act, which, in section 301, allowed the employer to bring action in a federal district court against a union for breach of a no-strike clause.

The Supreme Court has determined that section 301 of the Taft-Hartley Act contains substantive law and gives the federal courts jurisdiction to enforce promises to arbitrate against both the union and the employer. Likewise, under the United States Arbitration Act a no-strike clause in a collective bargaining agreement may be enforced. However a quandary arose: How to reconcile section 301 of the Taft-Hartley Act with the

42 The manner in which it is suggested the NLRB could enter would be to allow the union to bring before it the charge alleging a violation, by the employer, of section 8(a)(5) (1958), which requires good faith bargaining by both labor and management. Hence, the unrelenting insistence by management would be claimed to be bad faith bargaining.

Norris-LaGuardia Act so as to have sufficient procedural methods with which to enforce a discontinuance of the strike. The conflict was solved by determining that the Norris-LaGuardia Act protected the employee in the free exercise of economic power in collective bargaining, while section 301 of the Taft-Hartley Act rendered the results of such collective bargaining enforceable.

CONCLUSION

The foregoing analysis and comparisons emphasize the essential point that federal labor policy heavily favors arbitration as the means of settling disputes, and that such arbitration functions efficiently when utilized. It is obvious that the labor-management relationship has undergone many changes. Perhaps the emphasis today on the no-strike provision and the arbitration process is just another change in search of the ultimate goal of industrial peace with social justice.

Today the participants in the labor relations field create the means for arbitration by private negotiations and contract. The scope of the arbitrator’s authority, in fact the very existence of the arbitrator, is subject to the terms agreed upon by union and management and embodied in their collective bargaining agreement. However, it is suggested that governmental regulation is necessary when the parties have agreed to limit their inherent powers of persuasion by the inclusion of arbitration and no-strike provisions in their contract. Government, as the regulator, should guide the negotiations to the extent of coercing the parties, once they agree that one side should be limited, to reach a balance and thus equalize both sides of the labor power struggle.

There have been several approaches by which the positions of labor and management can be brought into equilibrium while at the same time arbitration can be used to settle any disputes that may arise. First, a party should be able to obtain specific enforcement of the terms of the collective bargaining agreement. This, of course, includes compelling both parties to arbitrate and the use of an injunction against a union’s breach of a no-strike clause. Second, the National Labor Relations Board should regulate the negotiations between the parties to the extent of forcing upon both of them a no-strike clause and an arbitration provision once they have agreed to limit their coercive powers. However, the NLRB would not act in such a manner if it found that one of the parties had agreed to include only one provision in the agreement for tactical reasons. Thus, with such remedies available to both labor and management, the power relationship between both parties could be balanced, thereby attaining industrial harmony.

Terence Moore