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NOTES

THE ENFORCEABILITY OF THE NO-STRIKE AND INTEREST ARBITRATION PROVISIONS OF THE EXPERIMENTAL NEGOTIATING AGREEMENT IN FEDERAL COURTS

INTRODUCTION

The "Experimental Negotiating Agreement" (ENA) represents a new and a highly sophisticated approach to collective bargaining in the steel industry. Prior to the commencement of collective bargaining negotiations in 1974 and again in 1977, the United Steelworkers of America (USWA) and ten major steel producers entered into the ENA. The ENA was developed by the USWA and the steel producers as a means to avoid strikes and lockouts. Such methods of economic warfare had been used by the parties throughout their history of collective bargaining. In recent negotiations they had become increasingly aware that these methods were not suited to the steel industry.

It was the express purpose of the ENA to avoid interruptions in continuous production in the steel mills. To accomplish this goal,

1. See MONTHLY LAB. REV. 62 (May, 1973), for a description of the ENA and its major provisions. The President of the Steelworkers observed that the ENA accomplishes the following:
   It provides certain guaranteed preliminary benefits for our members in the Basic Steel Industry; it protects certain existing benefits and rights; it allows the parties to negotiate freely in almost all economic and fringe benefit areas; it safeguards certain management rights; it eliminates the possibility of a nationwide strike or lockout in the steel industry; and it provides for voluntary arbitration of any unresolved bargaining issues.

Abel, Exploring Alternatives to the Strike—Basic Steel's Experimental Negotiating Agreement, MONTHLY LAB. REV. 39 (September, 1973) [hereinafter cited as Abel]


3. See note 1 supra.

4. The preamble to the ENA provides:
   [i]t is highly desirable to provide stability of steel operations, production and employment for the benefit of the employees, customers, suppliers...
the parties agreed, with certain exceptions, to submit all unresolved collective bargaining issues to binding arbitration. Instead of the strike, the arbitration procedures were to settle all disputes. The agreement, therefore, is experimental in that it practically eliminates the strike as a possible method for resolving disputes over collective bargaining issues. Arbitration of such issues had not been attempted before on such a large scale in the steel industry.

The existence of ENA presents some difficult questions for judicial review. If, for example, the Union refuses to arbitrate or elects to strike in violation of ENA, it is not yet settled whether federal courts should enforce the terms of the agreement. Beginning with its decision in *Textile Workers Union of America v. Lincoln* and stockholders of the Companies, and the public. To obtain this objective requires that the Union and the Companies settle issues which arise in collective bargaining in such a way as to avoid industrywide strikes or lockouts or government intervention. The parties are confident that they possess the requisite ability and skills to resolve whatever differences may exist between them in future negotiations through the process of free collective bargaining.

Experimental Negotiating Agreement (unpublished) [hereinafter cited as ENA].

Prior to the ENA, the strike or threat of a strike over collective bargaining issues had created problems that were threatening the vitality of the industry. When negotiations started, consumers began stockpiling steel and ordering foreign steel in anticipation of a strike. As a result, around the time that an agreement was made, demand for steel was extremely low. Craft, *The ENA, Consent Decrees, and Cooperation in Steel Labor Relations: A Critical Appraisal*, 27 LAB. L.J. 633, 634-35 (1976) [hereinafter cited as Craft].

In 1971 the demand was so low that some mills shut down as much as one month before the collective bargaining agreement expired. Losses to the steel industry as the result of stockpiling and related problems in 1971 are estimated at 80 million dollars. I. ABEL, *COLLECTIVE BARGAINING RELATIONS IN STEEL: THEN AND NOW* 57-62 (1976) [hereinafter cited as ABEL]. The arbitration panel may still make determinations in almost all economic and fringe benefit areas. Abel, supra note 1.

5. Once the procedure has been initiated the parties have only a very limited control over the possible award. Neither the Union nor the companies wanted to risk losing certain things. Section D-6 of the ENA excludes from arbitration certain matters that the parties felt were too important to trust to the uncertainties that inhered in such a procedure. The matters excluded include: the Union Membership and Checkoff provisions, the Cost-of-Living Adjustment provisions, the uniformity of wages and benefits between and among the various units, plants or operations, certain wage increases and bonuses, the no-strike and no-lockout provisions, and the management rights provisions of the collective bargaining agreements between the Companies and the Union. ENA, supra note 4.

Mills’ through its decision in Buffalo Forge Co. v. United Steelworkers of America, the United States Supreme Court has been developing a federal labor policy to apply to grievance arbitration and no-strike provisions under an existing collective bargaining agreement. Basically, that policy recognizes that such provisions are enforceable in federal courts. However, the type of arbitration called for under the ENA is different in several respects from grievance arbitration. As a result, many commentators are of the opinion that the reasoning of Lincoln Mills and related cases should not be applied to an interest arbitration provision of the type comprehended by the ENA.

Although the Lincoln Mills decision dealt with a grievance arbitration agreement, it should not be distinguished from interest arbitration cases on its facts. The arguments that favor limiting Lincoln Mills and related decisions to their facts are not compelling. Before Lincoln Mills, federal courts felt that section 4 of the Norris-La Guardia Act restrained them from issuing injunctions in most labor-management contract disputes. Furthermore, federal courts were not certain that section 301(a) of the Labor Management Relations Act (LMRA) provided any substantive law which could be used generally to enforce collective bargaining agreements. In Lincoln Mills, however, the Court decided that section 301(a) of the LMRA provided jurisdiction to grant equitable remedies under certain circumstances. Also in Lincoln Mills, the Supreme Court said that section 301(a) of the LMRA gave the federal judiciary the power to develop its own body of law to apply to labor-management

10. See text pages 60-62 infra for an explanation of the differences between grievance arbitration and interest arbitration.
11. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), was the first of several cases in which the United States Supreme Court decided that grievance arbitration agreements should be enforceable in federal courts. See text pages 10-15 infra for a discussion of relevant cases.
12. See text pages 62-65 infra for an explanation of how the ENA proposed to settle collective bargaining disputes through arbitration.
14. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458 (1957), the Court could “see no justification in policy for restricting § 301(a) [LMRA] to damage suits” and thus ordered specific performance of an agreement to arbitrate grievance disputes.
disputes.16 The Lincoln Mills decision was supported convincingly by reference to the federal labor policy that favors peaceful resolution of industrial disputes.17 This policy applies to interest disputes as well as to grievance disputes.18 Unless there is a uniform application of the law under section 301(a) of the LMRA, the federal labor policy will not be fully implemented.

This note will examine the differences between interest arbitration and grievance arbitration. The distinction between these two forms of arbitration is thought by some to be of such significance that an agreement to arbitrate interests should be treated differently under section 301(a) of the LMRA than an agreement to arbitrate grievances. It is the contention of this note that the differences between these two forms of arbitration are not so overwhelming that they should be treated differently under our federal labor law. In support of that contention, this note will trace the development of our federal labor law in Lincoln Mills and subsequent cases. The argument will be propounded that the policies that supported the enforcement of grievance arbitration agreements in those cases also support the notion that interest arbitration agreements of the type contained by the ENA should be enforced. Finally, this note will discuss the various ways in which the parties might violate the interest arbitration provisions of the ENA and how federal labor law should be applied to such violations.

DIFFERENCES BETWEEN INTEREST AND GRIEVANCE ARBITRATION AND A DESCRIPTION OF THE ENA

There are several kinds of arbitration used for the resolution of labor-management disputes.19 Those which are significant for this discussion are grievance arbitration and interest arbitration. They are often considered to be quite different,20 the purposes are clearly not the same.21

17. 353 U.S. at 453-454.
18. See notes 94-100 infra and accompanying text.
19. One commentator has noted that there are four basic types of arbitration used to settle labor-management disputes: contract interpretation, legislation, policy, and interest. The first three can be combined into one type labeled grievance arbitration. Fleming, Reflections on the Nature of Labor Arbitration, 61 Mich. L. Rev. 1245, 1249 (1963) [hereinafter cited as Fleming].
Grievance arbitration\textsuperscript{22} is concerned with settling disputes over the application or implementation of existing provisions of a collective bargaining agreement.\textsuperscript{23} Thus, in the case of grievance arbitration, the parties have already agreed to specific contractual provisions which are to govern their relationship.\textsuperscript{24} Disagreements often arise as to how these provisions are to be applied, or what they mean. Many collective bargaining agreements outline a grievance procedure for the possible resolution of such problems.\textsuperscript{25} Occasionally the dispute is not settled in the grievance procedure. Agreements often provide that in this event the parties must submit the question to an impartial third party—an umpire or arbitrator—who, acting in a quasi-judicial capacity, makes a determination by which the parties have agreed to be bound.\textsuperscript{26}

\textsuperscript{22} Another term for grievance arbitration is "arbitration of rights." P. HAYES, LABOR ARBITRATION/A DISSENTING VIEW 15-16 (1966) [hereinafter cited as HAYES].

\textsuperscript{23} The collective bargaining agreements that have been negotiated between the parties to the ENA are called Basic Labor Agreements (BLAs). Coordinating Committee Steel Companies v. United Steelworkers of America, No. 77-861 (W.D. Pa. July 29, 1977).

\textsuperscript{24} Actually, in arbitrating grievance disputes, the arbitrator may be called on to do more than simply apply specific contractual provisions. It is generally recognized that the parties cannot foresee every possible contingency that may arise throughout the term of their collective bargaining agreement. Thus, the arbitrator may be called upon to resolve disputes when no specific contractual provision comprehends such a dispute. See HAYES, supra note 22, at 6-7.

\textsuperscript{25} The 1974 Basic Labor Agreement between United States Steel Corporation and the United Steelworkers of America provides for a grievance—arbitration procedure that is typical of those that apply to the other nine companies that are parties to the ENA. It provides in pertinent part:

The provisions of this agreement constitute the sole procedure for the processing and settlement of any claim by an employee or the Union of a violation by the Company of this agreement. As the representative of the employees, the Union may process complaints and grievances through the complaint and grievance procedure, including arbitration, in accordance with this agreement or adjustment or settle the same. (Paragraph 0.2)

Coordinating Committee Steel Companies v. United Steelworkers No. 77-861 (W.D. Pa. July 29, 1977) (quoting the basic labor agreement between United States Steel Corp. and the Union).

\textsuperscript{26} See Fleming, supra note 19, at 1245.

\textsuperscript{27} Section 7d3 of the Basic Labor Agreement between Midwest Steel Division, National Steel Corporation and United Steelworkers of America, Local Union 6103 Production and Maintenance Employees—Portage, Indiana (Aug. 1, 1974) provides: "The decision of the Arbitrator on any issue properly before him in accordance with the provisions of this Agreement shall be final and binding upon the Company, the Union and all employees concerned." See also Coordinating Committee Steel Companies v. United Steelworkers, No. 77-861 at 8-9 (W.D. Pa. July 29, 1977).
Interest arbitration is different than grievance arbitration in that the arbitrator in the former is not asked to determine the parties' intention as evidenced by an existing contractual provision. Rather, sitting as an impartial third party in a quasi-legislative capacity, he is called upon to formulate terms of a new collective bargaining agreement for prospective application. Interest arbitration is normally used when the parties are in the midst of collective bargaining and are unable to agree on some matter or matters crucial to reaching an agreement. Although the parties usually do not decide to use interest arbitration until they reach such an impasse, in some cases it has been agreed to in advance and incorporated into the collective bargaining agreements. The ENA, however, is the first instance where a large, crucial industry has voluntarily agreed in advance to submit unresolved collective bargaining issues to arbitration.

Experimental Negotiating Agreement

In 1973, the United Steelworkers of America (the union) and ten of the major steel producers in this country (the companies), entered into the Experimental Negotiating Agreement (ENA). This agreement was used to control the 1974 negotiations over collective bargaining issues in the steel industry. It was subsequently adopted to regulate the 1977 collective bargaining negotiations.

The ENA provides for the resolution of all industry-wide issues through the normal collective bargaining process. However,

29. See generally MORRISON AND MARJORIE HANDSAKER, THE SUBMISSION AGREEMENT IN CONTRACT ARBITRATION (1952) [hereinafter cited as HANDSAKER].
31. See note 2 supra.
32. See note 1 supra.
33. In 1973 the steel companies and the union agreed to resolve their collective bargaining demands for the 1974 negotiations through the procedures established by the ENA. ABEL supra note 4, at 59-60.
34. The parties were satisfied with the operation of the ENA during the 1974 collective bargaining negotiations. Accordingly, they agreed to extend it to the 1977 negotiations. Id. at 60.
35. Industry-wide issues are those that are negotiated between the companies and the union at the international level and that apply generally to all the plants of all
in the event that the parties are unable to reach accord over such questions, they have agreed to submit them, with certain exceptions,\textsuperscript{36} to an impartial arbitration panel.\textsuperscript{37} The ENA also prohibits the customary\textsuperscript{35} use of strikes or lockouts to facilitate resolution of any issues of the type that the parties have agreed to submit to ar-

the companies. See Coordinating Committee Steel Companies v. United Steelworkers, No. 77-861 (W.D. Pa. July 29, 1977). A better way to define industry-wide issues is to say that they are everything that local issues are not. Section D-5-a of the ENA defines Local Collective Bargaining Issues as:

A local collective bargaining issue is an issue entered at plant level, proposing establishment of or change in a condition of employment at that particular plant which:

(1) would not, if adopted, be inconsistent with any provision of a company agreement (as defined below) or involve any addition to or modification of any such provision or agreement:

(2) would not be an arbitrable grievance as defined in the applicable basic labor agreement; and

(3) does not relate to a grievance settlement or an arbitration award: provided, however, this subparagraph (3) does not apply to nonarbitrable grievances.

\* \* \*

... The term "company agreement" means any basic labor agreement and all related appendices, understandings, or agreements... which contain the kinds of provisions, although not identical in language, included in such agreements between the International Union and the United States Steel Corporation. Any provision of a company agreement that is solely applicable to a particular plant and is not the kind of provision contained in such agreements between the International Union and the United States Steel Corporation shall not be considered part of a company agreement for the purpose of this definition.

ENA, supra note 4.

36. See note 5 supra.

37. Section E of the ENA provides for the appointment of the impartial arbitration panel as follows:

1. Appointment

The Impartial Arbitration Panel shall consist of five members, one appointed by the Union, one appointed by the Companies and three impartial members appointed by agreement of the parties. Two of the three impartial members shall be persons who are thoroughly familiar with collective bargaining agreements in the steel industry. The Union and the Companies will agree upon the three impartial members of the Panel and designate a Chairman on or before February 1, 1977 and will inform each other as to the identity of their respective members prior to the commencement of any arbitration hearing.

ENA, supra note 4.

38. "Since the end of World War II there have been 10 negotiations in which the Steelworkers had the right to strike. There have been five major strikes: 1946 (26 days), 1948 (45 days), 1952 (59 days), 1956 (36 days), and 1959 (116 days)." E. LIVERNASH, COLLECTIVE BARGAINING IN THE BASIC STEEL INDUSTRY (1976) [hereinafter cited as LIVERNASH].
bitration. As consideration for these promises to arbitrate and to refrain from striking over industry-wide disputes, the union gained the right to strike at individual plants in support of local collective bargaining issues. A description of these local issues was carefully detailed in the ENA.

Compelling reasons prompted the union and companies to agree to submit collective bargaining issues to binding arbitration. The parties especially wanted to avoid economic warfare. The strike or the threat of a strike that co-existed with collective bargaining in the steel industry prior to the ENA had caused some serious problems to develop which had adversely affected both parties. In anticipation of a possible strike, customers accumulated large stockpiles of steel prior to the negotiating deadline. Additionally, the threat of a strike encouraged foreign steel producers to enter the domestic steel market. Since they could provide steel throughout the term of a domestic strike, they were in an excellent bargaining position. Steel makers from other nations could promise delivery while the domestic producers could not. Thus, many foreign competitors gained access to the domestic market which would otherwise have been unavailable to them.

In addition to the actual economic repercussions caused by strikes, the parties were faced with the omnipresent threat of

39. See notes 5 and 35 supra.
40. Prior to the ENA the Union was not permitted to strike at local plants in support of local bargaining issues. Thus the ability to do so under the ENA was the “quid pro quo for [the Union’s] acceptance of interest arbitration” as provided under the ENA. Coordinating Committee Steel Companies v. United Steelworkers, No. 77-861 at 4 (W.D. Pa. July 29, 1977).
41. See note 35 supra.
42. The strike or the threat of a strike had played havoc with the Companies and the Union members throughout the history of unionization in the steel industry. Out of ten collective bargaining negotiation sessions where a strike was possible, one had actually occurred on five occasions. The result was a direct loss of 282 days of production in a thirteen year period. Livernash, supra note 38. There were economic repercussions of the strike or threat thereof in addition to the lost production that came as a direct result of the strike. Consumers stockpiled large quantities of steel and placed orders with foreign producers in anticipation of a curtailment of domestic steel supplies. As a result, when negotiations ended, the demand for steel was often extremely low. Abel, supra note 4. Thus, it is not suprising that the parties looked to arbitration as a preferable alternative to the strike for settling their collective bargaining differences.
43. Able, supra note 4.
44. Id. See also Craft, supra note 4, at 635.
45. Id.
governmental intervention." The public had become increasingly intolerant of strikes in major industries which could have an adverse effect on the nation's economy. Moreover, the government had manifested an inclination to get involved when the companies and the union were unable to resolve their differences peaceably. The ENA helped to ease governmental concern over contract negotiations in the steel industry and thereby enhanced the opportunity for continued independent resolution of interest disputes.

Thus, the strike and the lockout which were coextensive with collective bargaining in the steel industry had created a critical situation. The actual or threatened loss of production was causing severe economic repercussions. As a result, both the employees and the employers were suffering. To resolve the problem, the parties agreed not to strike or lockout over collective bargaining disputes. They agreed instead to submit such issues to binding arbitration. Despite the intention of the companies and the union to arbitrate their disputes under the ENA, the possibility remains that the agreement will be violated. To determine whether or not an equitable remedy will be available to the damaged party in a federal court, it is necessary to examine how the federal labor policy has been applied by such courts to arbitration and no-strike provisions in collective bargaining agreements.

APPLICATION OF FEDERAL LABOR POLICY TO COLLECTIVE BARGAINING AGREEMENTS

The federal courts have been developing a federal labor policy during the past twenty years in response to the maturing labor-management relationship. Of significance for the purpose of this

46. The federal government has, for a number of years, taken an active interest in the collective bargaining process in the steel industry. This interest ranges in extremes from President Truman's seizure of the mills to present day "jawboning" by the executive. Id. Given this high level of government interest, it is not surprising that the parties feared that the continued possibility of strikes in the industry might someday lead to their loss of the right to bargain collectively. Id.

47. It cannot be disputed that a strike in a major industry is bad for the economy and causes the public to suffer. Thus one commentator has noted that "the public concern is fast reaching a flood-tide that will require governmental action in the form of legislation in the near future." J. Hodgson, Collective Bargaining: Survival in the 70's? 48 (1972).

48. See note 46 supra.

49. "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 251 (1970).
note are two separate categories of cases. One is concerned with the enforceability of no-strike and grievance arbitration clauses that are comprehended by collective bargaining agreements. The other is concerned with the enforceability of contracts to arbitrate interest disputes. The former is the more settled area of the law, because Supreme Court decisions have dealt with it. In contrast, the law regarding enforceability of interest arbitration procedures is still somewhat unsettled, since that issue has not yet been decided by the Supreme Court.

The Court's decisions with regard to the enforceability of no-strike and grievance arbitration provisions in a collective bargaining agreement are not directly applicable to the issue of whether or not a violation of ENA should be enjoined. They are, nevertheless, closely related, and arguably the reasoning of those cases should apply in answering this question. The following review of significant cases that have dealt with varying degrees of this problem will lay the foundation for the argument that a federal court faced with a violation of ENA should order the parties to arbitrate their dispute. At the same time the court should temporarily enjoin the strike pending arbitration of the dispute.

The Conflict Between The Norris-La Guardia And The Labor Management Relations Acts

Before the Court could enforce agreements to arbitrate grievance disputes or no-strike provisions in collective bargaining agreements, it first had to deal with an apparent conflict between section 4 of the Norris-La Guardia Act and section 301(a) of the Labor Management Relations Act (LMRA). Section 4 of the Norris-

53. Some federal courts have held interest arbitration agreements to be enforceable. Others have held that they are not. For a review of the cases holding both ways, see Note, The Enforceability of Interest Arbitration Agreements Under Section 301(a) of the Labor Management Relations Act, 27 SYRACUSE L. REV. 985, 986 n.11, 987 n.12 (1976) [hereinafter cited as Enforceability of Interest Arbitration].
La Guardia Act generally prohibits federal courts from issuing injunctions in labor disputes.\textsuperscript{56} Section 301(a) of the LMRA, however, grants federal courts jurisdiction over suits wherein one of the parties to a collective bargaining agreement in an industry affecting commerce alleges a violation of said agreement.\textsuperscript{57}

The Court first attempted to resolve this inconsistency in \textit{Textile Workers Union of America v. Lincoln Mills of Alabama}.\textsuperscript{58} In \textit{Lincoln Mills}, the company and the union had agreed in their collective bargaining agreement to submit grievance disputes to arbitration when they were unable to resolve them in the grievance procedure.\textsuperscript{59} The company refused to submit a grievance to arbitration and the union, therefore, sought an injunction to compel arbitration of the dispute.

In its effort to resolve the statutory conflict between Norris-La Guardia and the LMRA, the Court looked to the congressional intent behind the enactment of the LMRA. This led the Court to hold that the legislative intent in including section 301(a) was to help stabilize industrial relations.\textsuperscript{60} Furthermore, the Court found that "[t]he failure to arbitrate was not a part and parcel of the abuses against which (section 4 of the Norris-La Guardia Act) was aimed."\textsuperscript{61}

\textsuperscript{56} This section of the Act 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 (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts... \textsuperscript{29} U.S.C. § 104 (1970) (The acts are then defined as strikes and related activities.).

\textsuperscript{57} Section 301(a) of the Labor Management Relations Act provides:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. \textsuperscript{29} U.S.C. § 185(a) (1970).

\textsuperscript{58} 353 U.S. 448 (1957).

\textsuperscript{59} \textit{Id.} at 449.

\textsuperscript{60} The Court quoted from the Senate report, S. REP. NO. 105, 80th Cong., 1st Sess. 17-18 (1947): "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." \textit{Id.} at 453 n.4.

\textsuperscript{61} \textit{Id.} at 458. Prior to Norris-La Guardia, employers were able to obtain injunctions against strikes and other concerted union activity with ease. Often the injunction had the effect of undercutting the union's strength. Thus the courts were used as a tool of management to destroy the union movement. \textit{See} F. FRANKFURTER & N.
Thus, the Court concluded that section 301(a) was more than just a grant of jurisdiction to determine damages in a suit for violation of a collective bargaining agreement.\textsuperscript{62} The Court said that it was also a source of substantive law which was to be fashioned from the policy of our national labor laws.\textsuperscript{63} That policy, the Court concluded, provided a grant of authority to enforce agreements to arbitrate grievances.

In spite of the fact that a literal reading of Norris-La Guardia would have prevented the Court from ordering specific performance of collective bargaining agreements, its review of the legislative history convinced the Court that it should not so limit its jurisdiction. Of special significance in the \textit{Lincoln Mills} decision is the fact that the Court issued a mandate to other federal courts exercising their jurisdiction under the LMRA to use their own inventiveness to develop a federal common labor law to apply to collective bargaining agreements.\textsuperscript{64}

In the famous \textit{Steelworkers Trilogy,\textsuperscript{65}} the Court expanded its holding in \textit{Lincoln Mills}. Even after \textit{Lincoln Mills}, federal courts

\textbf{Greene. The Labor Injunction} (1930). Therefore, the purpose of the Norris-La Guardia Act was to create an atmosphere wherein the unions could grow in strength and stature without the interference of judicial restraint. Section 2 of the Act declares the public policy of the United States to be as follows:

\begin{quote}
Whereas under prevailing economic conditions, . . . the individual organized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .
\end{quote}


\textsuperscript{62} See note 14 supra.

\textsuperscript{63} 353 U.S. at 456.

\textsuperscript{64} “The range of judicial inventiveness will be determined by the nature of the problem.” Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957). Thus although the LMRA may not contain substantive law that comprehends a situation, the courts should look to the policy behind that legislation and fashion “a remedy that will effectuate that policy.” \textit{Id.}

often reviewed grievance cases prior to ordering arbitration. If the court found that the dispute was frivolous or outside the scope of the agreement, it would refuse to require specific performance. In the Trilogy, the Court deferred to the highly developed skill of arbitrators in the area of interpreting and applying the provisions of a collective bargaining agreement. The Court said that federal courts are not to decide the merits of a grievance prior to ordering the parties to arbitrate. In addition, the Court found no significance in the fact that an agreement fails to specifically comprehend arbitration of the particular dispute. Rather, unless the dispute is of a type that is specifically excluded from the arbitration clause, the court should order arbitration. The Court also observed that section 301(a) required that doubts about whether a particular disagreement is comprehended by the arbitration clause be resolved in favor of arbitrability. Obviously, the Court felt that its Trilogy decisions were necessary to further implement the legislative policy that favors labor-management tranquility. In declaring all disputes to be arbitrable except those that have been specifically excluded, the

67. In United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Court observed that the courts may not be sufficiently familiar with the considerations applied by a labor arbitrator in fashioning a judgment. Id. at 581. The collective bargaining agreement, said the Court, "is more than a contract . . ." Id. at 578. Thus the arbitrator must do more than apply contract law, he must apply "the common law of a particular industry or . . . plant" when resolving a dispute. Id. at 579. For a rejection of the Trilogy reasoning see generally Hayes, supra note 22.
68. The arbitration provisions of the agreement should be construed as comprehending all matters of disagreement between the parties except those issues which the parties specifically exclude. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).
69. There are too many unforeseeable circumstances. The draftsmen of a collective bargaining agreement cannot possibly anticipate nor include all possible issues that might arise and be subject to the grievance procedure and arbitration. It is enough that they do not exclude the particular issue. Id.
70. The Court noted that when a collective bargaining agreement contains an all inclusive no-strike clause as well as a promise to arbitrate disputes, the no-strike clause implies that every dispute the Union may not strike over is subject to arbitration. Id. at 577-578.
71. Id. at 583.
72. "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." Labor Management Relations Act of 1947, § 203(d), 29 U.S.C. § 173(d) (1970). The Court observed that the policy expressed by this statute could "be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).
Trilogy decisions expanded the Lincoln Mills concept that the parties to a collective bargaining agreement should get what they bargained for.

Despite its reading of the LMRA, which the Court viewed as a grant of authority to order specific performance of agreements to arbitrate grievance disputes, the Court remained unwilling to enjoin strikes in violation of no-strike agreements. Consequently, in its effort to maintain peace in the industrial setting, the Court had created a somewhat anomalous situation. Many collective bargaining agreements had a provision requiring arbitration of grievance disputes as well as a no-strike provision. The unions were left in the enviable position of being free to violate the no-strike clause of an agreement because of the judicial application of the Norris-La Guardia Act. However, they retained the power to force arbitration of any, including meritless, grievances.

When unions struck in violation of no-strike provisions, remedies available to companies were not sufficient. An employer could sue a union for damages for violating a no-strike agreement. Even if the employer won, however, an award of damages was often an inadequate remedy. Customers might be lost due to the employer's inability to fill orders and meet deadlines. The value of these customers would be difficult, if not impossible, to measure. Such a strike would also have a severe, adverse effect on the contin-

73. See Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962). In Atkinson, the collective bargaining agreement contained a broad no-strike provision and an arbitration provision. Over a period comprehended by the agreement the Union engaged in several strikes in violation of the no-strike and arbitration provisions. Nevertheless, the Court "return[ed] to a pristine reading on Norris-La Guardia" and found that the law prevented federal courts from enjoining strikes that were in violation of no-strike agreements. See Stewart, No-STRIKE CLAUSES IN THE FEDERAL COURTS, 59 MICH. L. REV. 673, 685 (1961) [hereinafter cited as Stewart].

74. No-strike provisions appear in most collective bargaining agreements. Furthermore, they often co-exist with an agreement to arbitrate grievance disputes. The combination of these two provisions is intended to "preclude concerted action until internal remedies are exhausted." R. Smith, L. Merrifield, and D. Rothschild, COLLECTIVE BARGAINING AND LABOR ARBITRATION 331 (1970).

75. Politics play a major role in the manner in which a union handles a particular grievance dispute. Even when a grievance is clearly without merit it may tend towards the destruction of an official's union career to tell certain employees that they have no claim. Accordingly, the Union will often pursue such a claim to arbitration. See, e.g., Stewart, supra note 73, at 687.

76. "A strike in breach of a contract irreperably harms the employer. Orders are lost. Customers transfer their favor to employers who meet deadlines." Id. at 674. Thus, "[e]quitable relief is not only the most appropriate remedy, but also the only effective one." Id. at 675.
using employer-employee relationship. The agreement to arbitrate was the quid pro quo for the no-strike agreement,77 yet the company was not getting what it had bargained for. As a result, employers were suffering severe economic repercussions.78 Although the Court could defend its position through a literal reading of Norris-La Guardia,79 its reasoning was subject to severe criticism.80 Finally, in 1970, the Court declared no-strike provisions to be enforceable under the authority of section 301(a) of the LMRA.

Enforceability Of No-Strike Agreements

Apparently, the Court found merit in the criticism leveled at its dual application of section 301(a) of the LMRA. In 1970, in Boys Markets, Inc. v. Retail Clerks Union Local 770,81 the Supreme Court reversed its previous refusal to enjoin strikes that were in violation of no-strike agreements. Admittedly, the Court characterized its holding in Boys Markets as a narrow one.82 The decision stated that the only situation where an injunction could be properly issued was in those cases where the strike was over an arbitrable grievance and the parties had agreed to submit such a grievance to arbitration.83 Therefore, at the same time the injunction is issued, the court must order the parties to arbitrate the grievance dispute. Still, unless the union simply strikes as an act of sympathy for another striking union84 and, therefore, not over an arbitrable

78. Stewart, supra note 73, at 674.
80. It was the consensus of many good lawyers, joined by Justices Black and Douglas, that the purpose of section 301 of the L.M.R.A., 29 U.S.C. § 185 (1970), was to make "every collective bargaining agreement in commerce enforceable at the instance of either party." Gregory, The Law of the Collective Agreement, 57 Mich. L. Rev. 635, 637 (1958-59) (emphasis added) [hereinafter cited as Gregory]. See also Stewart, supra note 73, at 689.
82. Id. at 253.
83. In Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), the Court had refused to enjoin such a strike. In overruling the Sinclair decision, the Court stated: "Sinclair [stood] as a significant departure from [its] otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration and [its] efforts to accede and harmonize [that] policy with those underlying the anti-injunction provisions of the Norris-La Guardia Act." Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 241 (1970).
84. In Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976), the Court ruled that an injunction should not issue against a sympathy strike. Therefore, even though the collective bargaining agreement contained a broad no-strike agreement of which the strike was arguably in violation and an arbitration clause which
grievance, there is good reason to believe that the Court’s characterization of its holding as narrow should not be construed as severely limiting the scope of the decision. That description was probably only meant in a historical sense, since even under the Boys Markets decision, federal courts still are left with considerably less power to enjoin strikes than they had before the Norris-La Guardia Act.

In Gateway Coal Co. v. United Mine Workers, decided four years after Boys Markets, the Court made clear that it did not regard the Boys Markets decision as severely limiting the power of federal courts to enjoin strikes. The Court in Gateway determined that where a collective bargaining agreement contains both a no-strike clause and an arbitration clause, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." Thus, where the no-strike clause prohibits all strikes for any reason, unless certain categories of dispute are specifically excluded from the grievance and arbitration procedure as set forth in the agreement, the dispute should be presumed to be arbitrable.

Prior to Lincoln Mills, federal courts were faced with the Norris-La Guardia Act which generally prohibited them from granting equitable relief in labor-management contract disputes. The Supreme Court found, however, that the LMRA overcomes that pro-

arguably comprehended resolution of the issue of whether the strike violated the no-strike agreement, the Court refused to enjoin the strike. In so deciding, the reasoning of the Court is not persuasive.

The Court observed that the purpose of the strike is not to evade the agreed to arbitration procedure. Id. at 408. Nevertheless, it is clear that the dispute could be settled through arbitration. If the legislative interest is in the peaceful resolution of disputes in a manner agreed to by the parties, Labor Management Relations Act of 1947, § 203(d), 29 U.S.C. § 173(d) (1970), that interest can be served only by enforcing the no-strike clause of a collective bargaining agreement as well as the arbitration clause. "[T]he same public interest in an enforceable quid pro quo is present here as in Boys Markets." Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 419 (1976) (dissenting opinion). Furthermore, the Norris-La Guardia Act was not meant to prevent courts from enjoining sympathy strikes. Id. at 414 (dissenting opinion). Thus it is not clear why the Court elected to return to a pristine reading of Norris-La Guardia in this case. Nevertheless, the Court’s inconsistent ruling in Buffalo Forge Should not affect a decision to enjoin a strike in violation of the ENA and to order arbitration of the underlying interest dispute.

87. Id. at 382.
hibition in certain instances and contains substantive law that requires the parties to a collective bargaining agreement to live up to the terms of the agreement. Today, if the parties agree to settle disputes over an existing contract through arbitration, they will not be allowed to reject that agreement. A strike over an arbitrable grievance will be enjoined, and the court will order the parties to arbitrate.

Until now, however, the Supreme Court has only held that agreements to arbitrate grievances are enforceable. Requiring the union or the company to arbitrate grievances only partially resolves the overall problem. One question that remains is whether the parties should be able to gain court enforcement of an interest arbitration clause of the type that is comprehended by the ENA. Violations of the ENA are imminent; policy considerations suggest that the agreement should be enforced when violations do occur.

POSSIBLE VIOLATIONS OF THE ENA AND POLICY CONSIDERATIONS THAT FAVOR ENFORCING THE AGREEMENT

Despite the reasons which compelled the parties to agree to the binding arbitration and no-strike provisions of the ENA, there remains the possibility that during the course of negotiations one of the parties will decide that it would prefer to resort to traditional economic warfare to force the other party to concede to its demands.88 This decision might manifest itself in more than one way. One of the parties might simply refuse to submit an unsettled issue to arbitration. Alternatively, a party might agree to arbitrate an issue with the hope that the award will be favorable. If the award is not to its satisfaction, the disappointed party might condemn the award, attempt to thwart implementation of the award, or simply refuse to accept it.89 In the latter case, the dissatisfied party would probably either attempt to reopen negotiations or strike after rejecting the arbitrator's decision.90 A final way one of the parties might violate the agreement would be to reach accord on all industry-wide issues and then strike at local plants in an attempt to win concessions over

88. In 1977 after reaching accord over industry-wide collective bargaining issues, the Union ignored the provisions of the ENA and elected to strike at local plants over non-local issues. Coordinating Committee Steel Companies v. United Steelworkers No. 77-861 (W.D. Pa. July 29, 1977). For an explanation of local and non-local issues, see note 35 supra.
89. Handsaker, supra note 29, at 69.
90. A rejection of an arbitration award and a subsequent strike might bring a court injunction. However, it might also force the company to concede to the union demands. Id.
non-local issues. Any of these activities would be a violation of the ENA.

However the violation might occur, it raises a question as to whether equitable remedies would be available to the damaged party. Some courts have refused to grant such a remedy. In support of this refusal, these courts point out that policy considerations lead them to conclude that the legislature should first speak to the issue if it intends interest arbitration agreements to be enforced.

**Evaluation Of Policy Considerations**

Some policy considerations that are said to support the non-enforcement of interest arbitration agreements are: the possibility of a burdensome award; the fact that the right to strike is viewed as necessary for the continued ability of unions to function in the collective bargaining scheme; the failure of compulsory arbitration in some contexts; and the fact that the stakes are so high that arguably they should not be left for resolution by a disinterested party. The argument that these considerations necessitate different treatment for interest arbitration under the LMRA is not convincing. It ignores the possibility that the legislature considered the relevant policy arguments before it gave federal courts the power under the LMRA to enforce collective bargaining agreements. Nevertheless, an evaluation of these arguments will add support to the contention that the ENA should be enforced.

The possibility of an extreme award is an issue that the employer and the union must each consider individually before agreeing to arbitrate their interests. Generally, when an employer and a union decide that they want to settle their interest disputes by arbitration, they have expectations that they feel will be better realized through arbitration than by economic warfare. These expectations are not significantly different from those of the parties who agree to arbitrate grievance disputes. More importantly, the parties desire to avoid a work stoppage. When both parties stand to lose too much through a strike or lockout, they look to viable alternatives. Interest arbitration is the most obvious option available.

91. This is what the Union did in the 1977 negotiations. See note 88 supra.
92. See note 133 infra.
93. HANDSAKER, supra note 28, at 69.
94. In the past, the unions and the employers have favored the use of economic warfare to gain advantages in collective bargaining. When the gains they stand to win are outweighed by their possible losses in such warfare, they turn to arbitration. *Arbitration Agreements*, supra note 28, at 112-118.
I.W. Abel, retired president of the United Steelworkers of America, has indicated that the desire to avoid a work stoppage was the inspiration for the ENA. That concept is specifically incorporated into the policy statement of the ENA.

On the surface there is a degree of uncertainty in what the parties hope to gain from the arbitration agreement. The parties seek completeness in the arbitrator's decision and do not desire further bargaining to fill it out. They also hope for a decision that will not create new inequities. Manifestly, neither party wants to be burdened with an award that would cause it to regret the arbitration agreement. Fear of the unknown has caused unions and companies to avoid interest arbitration in the past.

Undoubtedly, it is this same doubt over the outcome that has caused some courts to avoid enforcing interest arbitration agreements. There are, however, steps the parties can take to ameliorate some of the uncertainties that inhere in the arbitration process. In the balance, it is far more important to have consistency in the application of our federal labor law as applied under the LMRA than it is to be preoccupied with uncertainties that the parties can avoid through negotiations. Without uniform application of the law, our federal labor policies will not be completely implemented.

The risk involved in interest arbitration cannot be denied. However, the extreme award can be overcome by limiting the arbitrator's discretion; the parties can limit the issues that the arbitrator may decide. In the ENA, the parties did this, taking care to exclude from the arbitrator's jurisdiction certain issues that they did not want to risk to arbitration. In addition, the parties can establish a framework within which the arbitrator is to make his

95. Abel, supra note 4, at 57-62.
96. See note 4 supra.
97. Handsaker, supra note 28, at 69.
98. Id.
100. See, e.g., Boston Printing Pressmen's Union v. Potter Press, 141 F. Supp. 553, 557 (D. Mass. 1956), where the federal district court wondered "whether such contractual provisions could ordinarily be sufficiently rapidly and fairly interpreted and applied to serve the cause of industrial peace."
101. See note 5 supra.
decision. This framework might include appropriate criteria upon which the arbitrator is to base his determination.\textsuperscript{103} The possibility of an extreme award is also present in grievance arbitration, yet it did not dissuade the courts from requiring the parties to arbitrate their grievances. For the same policy reasons this risk should not stand in the way of an order to arbitrate interest disputes.

Another objection of some courts and commentators to enforcing interest arbitration agreements is the view that the right to strike is essential to the collective bargaining process.\textsuperscript{104} It is argued that judicial intervention would be destructive of this basic right and would toll the death of collective bargaining. Inherent in this argument is the notion that the purpose of our federal labor law is simply to remove impediments to negotiations and to "leave the parties at the door of the bargaining room."\textsuperscript{105}

Enforcement of the ENA and other interest arbitration agreements would not be destructive of the collective bargaining process. It would be, instead, a guarantee that a bargaining procedure to which the parties had agreed would be carried out. Thus, the vitality of collective bargaining would still be maintained. The notion that the right to strike is essential in labor-management relations is a concept that belongs to a different period in the history of collective bargaining.\textsuperscript{106} At one time, strikes were used to settle day-to-day grievances under agreements just as they were used to settle collective bargaining disputes.\textsuperscript{107} Today, however, federal courts have taken cognizance of the legislative preferences for peaceful settlement of disputes. Accordingly, they have agreed to enforce grievance arbitration and no-strike agreements.

\textsuperscript{103} If the arbitrator is confined to certain issues, and if he must base his decision only on certain specified criteria, the risks are greatly reduced. See HANDSAKER, supra note 29.

\textsuperscript{104} As previously noted, any court refusing to enforce an interest arbitration agreement would necessarily be relying on the general proscriptions contained in Norris-La Guardia. See note 61 supra. See also Schulman, Reason, Contract, and Law in Labor Relations, 68 HARV. L. REV. 999, 1024 (1955).


\textsuperscript{106} The labor movement is no longer in its infancy. It has emerged as a collective bargaining equal with employers. Consequently, labor can make collective bargaining gains without the aid of a strike. ABEL, supra note 4. Furthermore, our nation no longer enjoys the secure place that it once did in the world economic community. Strikes in major industries carry with them a highly destructive potential. See Fleming, "Interest" Arbitration Revisited, 7 U. MICH. J. L. REV. 1, 3 (1973) [hereinafter cited as Fleming].

\textsuperscript{107} Taylor, The Voluntary Arbitration of Labor Disputes, 49 MICH. L. REV. 787, 791 (1951).
In support of this preference for the peaceful resolution of disputes, one commentator has noted that "the gravity of a strike in violation of a no-strike clause cannot be overestimated, since it deprives the employer of uninterrupted production—the principle benefit he usually hopes to gain from the collective bargaining agreement." The right to strike can no longer be viewed as an essential right. It is too destructive a force to permit once the parties have agreed not to use it.

Some countries require unions and companies to arbitrate their collective bargaining differences. The failure of such compulsory arbitration to effectively resolve disputes and to accomplish industrial peace abroad is often cited as a reason not to enforce interest arbitration agreements in the United States. It has been hypothesized that government intervention of the type manifested in compulsory arbitration has a tendency to destroy incentives to reach agreement in collective bargaining. The contention is that if the parties know that they will ultimately have to rely on arbitration if they fail to reach accord, they will not come to the bargaining table with a commitment to resolve their differences.

A comparison with compulsory arbitration is particularly unrevealing. The differences between compulsory arbitration of the


109. "Humanitarians who believe that to strike is a basic human right, used to further economic justice, have been mislead." W. HUTT, THE THEORY OF COLLECTIVE BARGAINING 1930-1975 125 (1975). For a list of the destructions that the strike visits on the economy in general as well as on the individual participants, see id. at 125.

110. See note 121 infra and accompanying text.


112. The experience in Australia has been that compulsory arbitration did not eliminate strikes, but may have actually encouraged short term strikes. Id. See Sykes, Labor Regulation by Courts: The Australian Experience, 52 NW. U.L. REV. 462, 485-486 (1957).

113. In Boston Printing Pressmen's Union v. Potter Press, 141 F. Supp. 553 (D. Mass. 1956), the court observed that an enforcement of an interest arbitration agreement "comes . . . perilously close" to an attempt at compulsory arbitration. Id. at 557. See also Enforceability of Interest Arbitration, supra note 52, at 1006.

114. LIVERNASH, supra note 38, at 208.

115. Id. See also HANDSAKER, supra note 29, at 38-39. This fear proved warrantless in the 1974 collective bargaining in the steel industry when the ENA was first applied. The parties apparently bargained with the same intensity to avoid arbitration as they had in previous years to avoid a strike or lock out. See ABEL, supra note 4.
type found in foreign countries and interest arbitration of the type comprehended by the ENA are too extensive to explore at length here. 116 It should suffice to say that the latter requires a joint agreement between the employer and the union to permit a third party to resolve specific collective bargaining issues. Compulsory arbitration requires no such agreement. It is forced upon the parties by the law of the land and leaves nothing to the discretion of the individuals involved. Judicial enforcement in either event will visit arbitration on an unwilling party. 117 The courts, nevertheless, have been willing to do that in grievance arbitration cases.

It is unlikely that enforcement of an agreement to arbitrate interests will be a deterrent to effective collective bargaining. The risk of an extreme award has already been discussed, and it is precisely the element of risk that makes arbitration such an effective substitute for the strike. Only when the parties have something to lose in arbitration are they likely to try to avoid it. The efforts that the parties will expend to accomplish that avoidance should guarantee good faith bargaining.

In addition to the possibility of an extreme or unduly burdensome award resulting from an arbitrator's resolution of a collective bargaining agreement, there is some concern that the stakes are so high that they should not be forced on an unwilling party. The answer to this is that in resolving grievances, arbitrators are often charged with deciding matters that involve stakes equally as high as those involved in interest arbitration. 118 Furthermore, the parties often leave matters relatively unsettled in their collective bargain-


117. It has been said that if one of the parties is not willing to have a dispute arbitrated, there is no difference between enforcement of an interest arbitration agreement and legislatively compelled arbitration. Enforceability Of Interest Arbitration, supra note 53, at 1006.

118. In Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974), the Union struck and demanded the discharge of several foremen before they would return to work. The foremen involved had falsified air flow records, thus risking the lives of all the men who worked in the mine. There was a no-strike clause and an arbitration clause in the collective bargaining agreement. However, the dispute was at least arguably not within the arbitrator's jurisdiction. Furthermore, the strike was arguably not prohibited by the no-strike agreement. Despite the fact that employees' lives were at stake, the Court held that the Union must discontinue the strike and arbitrate the dispute.
ing agreements. When a dispute arises the arbitrator is left to develop a resolution for prospective application.\textsuperscript{119} The courts have recognized that this type of issue is properly within the arbitrator's jurisdiction and have ordered arbitration of such issues.\textsuperscript{120} It is difficult, if not impossible, to perceive a difference between this type of arbitration and interest arbitration.

Perhaps if the consequences of a strike and refusal to arbitrate in violation of ENA were confined to the parties to the agreement, there would be a stronger argument in favor of the courts' refusal to enforce the agreement. However, that will not be the case. The consequences of such violations will have far reaching effects on the entire public.\textsuperscript{121} Consumers will be relying on continued steel production. These consumers will lose production if their reliance is frustrated. Jobs will be lost, and those outside the steel industry will suffer reduced income and buying power.

The benefits of waiting for a specific political resolution of the matter are overcome by the economic havoc such a strike might visit on the national economy as well as on the individual participants. There appears to be no reason to wait for a political resolution when one considers that the legislature has already declared that collective bargaining agreements should be enforced.\textsuperscript{122}

Problems presented by an interest arbitration agreement, such as the fears of an unduly burdensome arbitration award and the general fear that the parties may not genuinely bargain when they know they must rely on the arbitrator to resolve their differences, are not insurmountable. When the parties are sufficiently mature to

\textsuperscript{119} It should be noted that in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Union tried for nineteen years to get a limitation in the collective bargaining agreement on the Company's right to contract out certain work. Despite the fact that the Union failed to get such a limitation in the agreement, the Court ordered the parties to arbitrate a dispute over work that the Company contracted out. See Stewart, No-Strike Clauses in the Federal Courts, 59 Mich. L. Rev. 673, 693-694 (1961). See also Fleming, supra note 106, at 2-3.

\textsuperscript{120} United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).


\textsuperscript{122} The policy of section 301 of the LMRA is to make contracts between labor and management enforceable. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Section 301 does not confine itself to grievance disputes under collective bargaining agreements. Rather, the term contract as used in section 301 should be given a construction that comprehends interest arbitration agreements. A. Seltzer & Co. v. Livingston, 253 F. Supp. 509, 513 (S.D.N.Y.), aff'd, 361 F.2d 218 (2d Cir. 1966).
develop so sophisticated an agreement as the ENA, they are entirely capable of curing any of these problems when they bargain for the agreement. Certainly, if arbitration is regarded by the parties as something they seek to avoid, it can serve as effectively as the strike to spur the parties to bargain collectively. The fears expressed by some courts and commentators are not sufficient reason to ignore the legislative and judicial mandates that should control such a case.

In addition to these general policy considerations, the federal labor law favors the enforceability of the ENA. The ENA is no less a collective bargaining agreement than the Basic Labor Agreements that govern the relationship between the union and the companies for a period of years. Therefore, the no-strike and arbitration clauses of the ENA should be specifically enforced in federal courts under the authority of section 301 of the LMRA as interpreted by the Supreme Court.

APPLICATION OF FEDERAL LABOR LAW TO VIOLATIONS OF THE ENA

Violations of the ENA are contractual and thus within the jurisdiction of federal courts under the LMRA. However, such violations all relate to an interest arbitration provision. Until now, only strikes over grievances that are subject to an agreement's arbitration clause have been enjoined under the authority of Supreme Court decisions. Furthermore, under the authority of past decisions the strike may only be enjoined if it is also in violation of a no-strike clause.

There does not appear to be any compelling reason to limit these Supreme Court decisions to grievance arbitration disputes. Grievance and interest arbitration are used in different contexts and at different stages in the genesis and life of the collective bargaining agreement. However, the same federal policy considerations that are served by enforcing grievance arbitration clauses would be undermined if they were denied effect to enforce interest arbitration provisions. Thus, violations of the ENA at either the industry-wide or the local level should be enjoined.

Federal labor policy as reflected by the Supreme Court decisions in Lincoln Mills, The Steelworkers Trilogy, Boys Markets, and

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123. See note 23 supra.
124. The word contract in section 301(a) of the LMRA is given a broad construction. It is not limited to collective bargaining agreements. A. Seltzer & Co. v. Livingston, 253 F. Supp. 509, 513 (S.D.N.Y.), aff'd 361 F.2d 218 (2d Cir. 1966). See also Retail Clerks Inter. Ass'n. v. Lion Dry Good, Inc., 369 U.S. 17, 25-28 (1962).
Gateway Coal supports enforcement of the ENA. Indeed, a refusal to enforce such an agreement would necessarily rely on the Norris—La Guardia Act. The Supreme Court, however, has clearly said that Norris-La Guardia is to be strictly applied only in narrow contexts. It is to be applied in conformity with its purpose and in compatibility with section 301 of the LMRA. It would, therefore, be error to apply Norris-La Guardia so as to undermine other federal labor policies.

The enforcement of the interest arbitration and no-strike clauses of the ENA would, in fact, be in furtherance of the legislative purpose behind Norris-La Guardia. Enforcing an obligation that the union freely undertook for its own benefit would be more supportive than destructive of the labor movement. If neither the union nor the company can be forced to perform as promised, the union has lost a significant battle in its struggle to emerge as a collective bargaining equal.

Furthermore, in Lincoln Mills, the Court declared that the federal labor law to be applied under the LMRA was not limited by the express words of the statute. It was to be whatever the courts deemed necessary to further the underlying principles supporting our federal labor law. Clearly, the underlying principles expressed by the Court in recent cases favor the enforcement of interest ar-


127. The following observations by the Court in Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 252-253 (1970), are equally applicable to interest arbitration agreements: "[T]he central purpose of the Norris-La Guardia Act to foster the growth and vitality of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration."

128. See the preamble to the ENA note 4 supra.

129. See note 64 supra.

130. See Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974) (When the parties argue that the dispute is not arbitrable, a presumption of arbitrability will apply, and the court may enjoin a strike pending the outcome of an arbitration award.); Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) (The purpose of arbitration procedures is to avoid strikes while settling industrial disputes. Therefore,
bitration to which the parties have agreed.\footnote{131} If a single concept is the controlling force behind the emerging federal labor law, it would have to be the desire to resolve industrial disputes in a peaceful manner and in a manner to which the parties have agreed. Section 201(b) of the LMRA lends support to this concept in declaring that the policy of the United States favors "the settlement of issues . . . by such methods as may be provided for in any applicable agreement for the settlement of disputes.\footnote{132}"

Although the Supreme Court has not yet determined whether interest arbitration agreements and accompanying no-strike agreements are subject to the same law as are grievance arbitration agreement, several lower federal courts have been faced with that issue. Their decisions have not been harmonious.\footnote{133} Some have felt courts may enjoin strikes and order arbitration of underlying grievances.); \textit{Steelworkers Trilogy}, 363 U.S. 564, 574, 363 U.S. 593 (1960) (presumption of arbitrability—the parties have a duty to arbitrate which the courts will enforce); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (Section 301(a) of the LMRA is a source of substantive law that includes a mandate to federal courts to encourage peaceful settlements of industrial disputes. \textit{But see} Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) (An injunction may not issue against a sympathy strike because there is no underlying grievance.).

\footnote{131} Once the parties have agreed to a peaceful method for resolving their differences, the reasons for denying injunctive relief disappear. In the cases cited in note 130 supra, the Court was admittedly dealing with grievance disputes. That fact, however, should not be regarded as significant. One court faced with a request for an order to enforce an interest arbitration agreement could find "no basis for a distinction" between interest and grievance arbitration provisions in a collective bargaining agreement. Pressmen’s Local 50 v. Newspaper Printing Corp., 399 F. Supp. 593, 599 (M.D. Tenn. 1974), \textit{aff’d}, 518 F.2d 351 (6th Cir. 1975).


that interest arbitration is *sui generis*. Those courts have felt that too much is at stake since the parties may have agreed to the interest arbitration provision without intending it to be judicially enforced. Moreover, it was argued that the courts are not equipped to decide such an important issue. Various courts and commentators have agreed that the matter is of such overwhelming significance that if interest arbitration agreements are to be specifically enforced, the legislature should make that determination. Other courts have found no good reason to distinguish interest arbitration from grievance arbitration. Relying on the doctrine of the *Steelworkers Trilogy*, one such court noted that as long as the court is satisfied that the agreement comprehends arbitration of the dispute, it should order specific performance.

The courts which fail to perceive a difference between interest arbitration and grievance arbitration that would compel a separate treatment under the federal labor law have properly followed the mandate given them in the *Lincoln Mills* decision. These courts recognize that there are differences between the two procedures, but conclude that the differences are not of sufficient magnitude to warrant different treatment.

Most federal courts would concur that they have been issued a mandate to require the parties to arbitrate grievance disputes when they have promised to do so in a collective bargaining agreement. They are not, however, unanimous in their perception of that mandate as extending to agreements to arbitrate interests. Nevertheless, the LMRA does not distinguish between grievance and interest disputes. Section 201 of that Act expressly records the federal labor policy as favoring the peaceful resolution of interest disputes in a manner to which the parties have agreed. That policy

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135. In Boston Printing Pressmen’s Union v. Potter Press, 141 F. Supp. 553 (D. Mass. 1956), Judge Wyzanski observed that the parties agreed to the interest arbitration voluntarily, but he feared that they may have done so “without envisaging a possible judicial enforcement.” *Id.* at 557.

136. *Id.* *See also* Enforceability of Interest Arbitration, supra note 53, at 1009-1010.

137. *See* note 130 supra.

138. *See* notes 68-72 supra and accompanying text.


140. *See* notes 19-30 supra and accompanying text.

141. Courts that have ordered arbitration of interests despite these differences are listed in note 133 supra.
cannot be realized unless federal courts are willing to enforce interest arbitration agreements.

Under the ENA, a refusal to arbitrate interests and a strike in support of industry-wide issues clearly would be in violation of the agreement. Such activity would present a situation that would be comparable to violations of coterminous no-strike and grievance arbitration provisions in a collective bargaining agreement and should, therefore, be enjoined. Violations of the ENA at the local level require closer scrutiny to determine whether or not they should also be enjoined.

Violations Of ENA At The Local Level

Having determined that the arbitration and no-strike provisions of the ENA should be specifically enforced by federal courts, a more difficult question remains. That question is whether a violation of the ENA of the type where the parties reach agreement on all industry-wide issues and subsequently attempt to bargain at the local plants over non-local issues should be enjoined. The problem arises in this type of case when the local union strikes in support of the non-local demands. Normally the union has the right to strike at the local level and to enjoin such activity would usually be a misapplication of the law. However, when the union strikes over non-local issues in violation of the ENA, the courts should enjoin the activity under the authority of section 301 of the LMRA because the parties have agreed to arbitrate these non-local issues.

In the one decision by a federal court concerning this issue, the court denied injunctive relief to the companies when local unions threatened to strike over non-local issues. However, in that case, the companies failed to allege violations of the ENA. They argued instead that the local strikes would be in violation of the existing Basic Labor Agreements. Since the union was seeking to gain provisions that were admittedly not already a part of the existing agreements, the court felt compelled by Buffalo Forge Co. v. United Steelworkers of America, to deny injunctive relief. It is not clear

142. See notes 35 and 88 supra and accompanying text.
143. See note 56 supra.
144. Absent a binding agreement, section 301 of the LMRA is ineffective to give federal courts jurisdiction over a labor dispute. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
147. See note 84 supra.
8 It what the court's decision would have been had the companies alleged a violation of the ENA. However, the court should have granted the relief sought if this argument had been made.

The ENA clearly prohibits strikes at local plants over non-local issues. It does not, however, specifically comprehend arbitration of disputes concerned with whether an issue is of the type over which the ENA precludes local bargaining. Nor does the ENA specifically provide a procedure for the settlement of such disagreements. Nevertheless, the failure of the ENA to provide such arbitration procedures should not be construed by the federal courts as a bar to their authority under the LMRA to enjoin ENA strikes and to order arbitration.

There is no disagreement that strikes over non-local issues are violative of the ENA. In addition, if such a strike occurs, the companies can meet the equitable requirements for an injunction. Therefore, if it is accepted that interest arbitration clauses should be treated the same as grievance arbitration clauses in collective bargaining agreements, the only obstacle to issuing an injunction is a finding that a strike is over an arbitrable dispute.

Federal labor policy supports the view that if either party claims that the dispute is arbitrable, a court should order arbitration. If a strike has occurred, the court should also enjoin the strike pending the arbitration award. In the Steelworkers Trilogy, the

148. The ENA authorizes strikes at local plants only over local issues. See note 35 supra. See also Coordinating Committee Steel Companies v. United Steelworkers, No. 77-861, at 11 (W.D. Pa. July 29, 1977) (finding that the "imminent strikes will violate the no-strike provision of the ENA-77").

149. This has been declared to be a critical defect in the ENA. Coordinating Committee Steel Companies v. United Steelworkers, No. 77-861, at 13 (W.D. Pa. July 29, 1977).

150. The breach of the no-strike clause has caused and will cause irreparable harm to the Companies and the employer would suffer more from the denial of an injunction than the Union would suffer from its issuance; tremendous damage will be incurred by the Plaintiffs if an injunction is not issued, while the harm resulting to the Steelworkers would be only that which they bargained for.

Id. at 14. See Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 254 (1970), for the circumstances under which it is appropriate to issue an injunction.

151. In Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976), the question thought by the Court to be critical was whether the strike was over an arbitrable grievance. Therefore in the case of the ENA, the question must be whether the strike is over an arbitrable interest. See note 84 supra.

Supreme Court found that the draftsmen of a collective bargaining agreement could not have possibly foreseen all possible areas of disagreement. This is the reason for the incorporation of arbitration procedures into labor-management contracts. Accordingly, the Court found that the arbitration provisions of the agreement should be construed as comprehending all matters of disagreement except those which the parties have specifically excluded.

The Trilogy doctrine has not been abandoned; if anything it has been expanded. In Gateway Coal Co. v. United Mineworkers, the Court reiterated the concept. It held that the agreement to arbitrate and the duty not to strike have coterminous application—the all inclusiveness of one applying equally to the other. This concept strengthens the argument that a local strike over non-local issues should be enjoined pending arbitration of the underlying interest dispute.

Clearly, the union agreed not to strike over non-local issues once they accepted the ENA. They have also agreed to arbitrate any dispute over these issues at the industry-wide level. A strike at the local level found to be in violation of the ENA is, therefore, no less a violation of the arbitration provisions of that agreement just because it is executed at the local level. It is, instead, an attempt to avoid arbitration that should not be sanctioned by the courts. In keeping with the Trilogy doctrine, the arbitration panel should be permitted to determine whether the dispute is susceptible to arbitration. Perhaps the panel would determine that the dispute was beyond their jurisdiction. Nevertheless, as long as the dispute is arguably within the jurisdiction of the arbitration panel, the court should refrain from preliminarily deciding that the issue is not arbitrable.

Finally, the arbitration and no-strike provisions of the ENA are broad enough to comprehend arbitration of these local disputes. The ENA does not specifically provide a procedure for settling this kind of problem, but arbitration clauses seldom detail every possible

154. Id.
156. Id. at 382.
dispute that may be decided under them. Thus, even when a strike occurs or an attempt is made to bargain over non-local issues at the local level, the court should enjoin strikes and order arbitration so that collective bargaining disputes between the parties will be resolved as they intended.\footnote{158. The union and the steel companies have agreed to use the ENA again in 1980 when they bargain for their next collective bargaining agreement. Since this note was written, there has been a change in the ENA implementation procedures. A letter dated November 4, 1977 from J. Bruce Johnston for the Coordinating Committee Steel Companies to Lloyd McBride, President of the United Steelworkers of America confirmed the parties' agreement to arbitrate any dispute "concerning whether or not a matter in bargaining meets the ENA-80 requirements of a 'local collective bargaining issue.'"}

**CONCLUSION**

The legislature has recognized the desirability of the peaceful resolution of industrial disputes.\footnote{159. Labor Management Relations Act of 1947, § 203(d), 29 U.S.C. § 173(d) (1970). \textit{See note 72 supra.} Furthermore 29 U.S.C. § 171(b) (1970) declares the policy of the United States to be: The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for . . . voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements . . . and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes.} Accordingly, the courts have been granted jurisdiction over suits for violation of contracts between employers and labor unions in industries affecting commerce.\footnote{160. Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185 (1970).} In the interest of enforcing the legislative intent, the Supreme Court has interpreted this grant of jurisdiction as more than a license to award damages, but has found it also to be an authorization to grant equitable remedies to parties who have been or will be seriously injured by a violation of a collective bargaining agreement and who have no adequate remedy available at law.\footnote{161. \textit{E.g.}, Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). \textit{See notes 81-87 supra and accompanying text.}} Thus, the
Court deemed it proper to order the parties in a collective bargaining agreement to arbitrate disputes that are found to be within the purview of an arbitration clause in the agreement.162 More recently, the Court has deemed it proper to enjoin strikes when they occur because of an arbitrable grievance and when the collective bargaining agreement includes both no-strike and arbitration clauses.163 In such a case, at the same time the strike is enjoined the Court must also order the parties to arbitrate the underlying grievance.164

There is some disagreement about whether the equitable remedies generally available to parties under a collective bargaining agreement should extend to a no-strike provision coupled with a promise to arbitrate interests.165 Under the Experimental Negotiating Agreement (ENA), the United Steelworkers of America and ten major steel producers agreed to avoid strikes by resolving their interest disputes through arbitration. Because the parties to ENA may renge on their agreement and refuse to arbitrate or else attempt to bargain at the local level over non-local issues, it is necessary to consider whether the no-strike and arbitration clauses of the ENA are enforceable in equity.

There are no compelling reasons to treat the interest arbitration and no-strike provisions of the ENA differently than the no-strike and grievance arbitration provisions under a collective bargaining agreement. It has been argued that the stakes are too high in interest arbitration, and, therefore, courts should not require the parties to carry through with their agreement. However, the stakes can be equally high in grievance arbitration.166

It has also been argued that the courts should wait for the legislature to make its intent clear with regard to the enforceability of interest arbitration agreements.167 This argument ignores the possibility that the legislature has already sufficiently clarified its intent.168 The purpose behind the ENA and other interest arbitration

162. See notes 62-72 supra and accompanying text.
164. Id. at 254.
166. See note 118 supra and accompanying text.
168. One observer has noted that "[T]he Court treats Section 301 virtually as a delegation by Congress to the federal courts of its legislative power to develop a
agreements is identical to the purpose behind grievance arbitration provisions in collective bargaining agreements. The parties hope to settle their industrial disputes without a strike.169 Absent an available means for enforcing the agreement, the parties will be left without a cogent reason for entering into the agreement in the first place. Thus, in the interest of uniform application of federal labor law under section 301 of the LMRA, federal courts should enforce the ENA and other interest arbitration agreements.

Finally, when determining whether to order arbitration and enjoin a strike in violation of the ENA, a court should not deviate from established principles that have already been applied to grievance arbitration clauses. If a strike occurs in violation of the ENA, as long as the court can find irreparable injury to the companies and inadequate remedies available at law,170 the court should enjoin the strike and order arbitration. Just as with grievance arbitration, the courts should resolve doubts in favor of arbitration. Only when it is clear that the parties have excluded the particular dispute from the procedure171 should the court refuse to order arbitration.

The courts should not lose sight of the fact that the duty to arbitrate and the proscription against strikes are coterminous. Unless it can be said with assurance that a strike is not over an arbitrable interest,172 the underlying reason for the strike should be presumed to be arbitrable. In the case of strikes at local plants over non-local issues in violation of ENA, the non-local issues are at least arguably subject to the ENA arbitration clause. Therefore, when faced with such a violation of the ENA, federal courts should enjoin the strike and order the parties to arbitrate their dispute.

detailed body of law governing collective agreements made in commerce." Gregory, supra note 80, at 840. If this is true, there is no reason to wait for further congressional action.

169. As long as the parties have agreed to resolve their collective bargaining disputes in arbitration, "[N]othing would be more out of step with our national labor policies than for courts to refuse to enforce such an agreement." Winston-Salem Printing Pressmen and Assistant's Union v. Piedmont Publishing Company, 393 F.2d 221, 227 (4th Cir. 1968).

170. See notes 81-87 supra and accompanying text.

