Winter 1964

Employer Remedies for Breach of No-Strike Clauses

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Labor and Employment Law Commons

Recommended Citation

Available at: http://www.repository.law.indiana.edu/ilj/vol39/iss2/7
EMPLOYER REMEDIES FOR BREACH OF NO-STRIKE CLAUSES

No-strike clauses in which unions promise not to strike or engage in work stoppages appeared in more than 94 per cent of all collective bargaining agreements in 1960.¹ The no-strike clause is of manifest importance to the employer, for it is obtained as its sole assurance that business operations will continue uninterrupted by inevitable labor-management disagreements. It has long been thought that specific enforcement was the only satisfactory employer remedy for breach of a no-strike clause,² but a recent decision of the United States Supreme Court, *Sinclair Refining Co. v. Atkinson*,³ has held that federal courts may not issue injunctions for breach of a no-strike clause and has cast grave doubt upon the appropriateness of the injunctive remedy in state forums as well. Because of the widespread use and importance of the no-strike clause, and because *Sinclair* has limited the possible remedies available for its violation, it is of value to collect and review the remedies presently available to an employer. The remedies reviewed in this note are the injunction, rescission of the collective bargaining agreement, award of damages, discharge and other discipline, and subcontracting.⁴

I. INJUNCTION

Federal Court Injunction

Section 301 of the Labor Management Relations Act (Taft-Hartley) permits parties to collective bargaining agreements in "an industry affecting commerce" to seek redress in federal courts for violations of the agreement,⁵ but the act does not indicate what remedies are

¹. LAB. REL. REP. EXPEDITOR 94 (1960).
   The discharge of strike leaders does not end the strike; at best it stops future efforts. A damage action, tried years later to the vagaries of a jury, is small recompense to the employer denied business because he can't deliver. Equitable relief is not only the most appropriate remedy, but also the only effective one.
⁴. Although not technically a legal remedy or a remedy generally agreed upon in a labor contract, subcontracting may be a practical remedy. Its possible utility to employers hampered by a strike is sufficient to warrant a treatment of the legal problems engendered by its use.
⁵. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958) provides:
   Suits for violation of contracts between an employer and a labor organiza-
available in such suits. This grant of jurisdiction to the federal courts, without specification of remedy, created difficult problems in regard to injunctions as possible remedies for strikes or work stoppages violating a no-strike clause because Section 4 of the earlier-enacted Norris-LaGuardia Act⁶ deprived federal courts of jurisdiction to issue injunctions in cases involving or growing out of labor disputes. In *Sinclair* the Supreme Court resolved the immediate problem of the apparent conflict between the two acts by holding that Norris-LaGuardia deprives federal courts of jurisdiction to grant an injunction in section 301 suits prohibiting strikes in violation of a no-strike clause. The court reviewed the language and legislative history of Taft-Hartley and found no indication that section 301 had been intended to repeal any part of Norris-LaGuardia. The court also rejected policy arguments urged by the employer that federal labor policy favors arbitration so strongly that an injunction against peaceful strikes should be available to make arbitration effective.⁷ But while the Court in *Sinclair* answered a basic question, it created others equally as difficult.

**State Court Injunction**

The most obvious problem created is the availability of injunctive relief in state courts for union violations of a no-strike clause. Section 4 of Norris-LaGuardia expressly applies only to federal courts and does not

---


No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment. . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute. . . .

on its face deprive state courts of jurisdiction to issue injunctions.\(^8\) Moreover, under section 301 of the Taft-Hartley Act, state courts have concurrent jurisdiction with federal courts in suits for violation of contract between an employer and a labor organization.\(^8\) The Supreme Court has held in *Local 174, Teamsters Union v. Lucas Flour Co.*\(^9\) that in cases brought in state courts under section 301, those courts must, in order to achieve uniformity in the disposition of section 301 cases, apply federal labor law. The question thus is whether state remedial law, which may include the injunction, is inconsistent with substantive federal labor law. Ultimately the answer will be supplied by the circuit courts through unanimity of decision, or the Supreme Court, and will depend on whether or not it is found that the pervading policy of section 301 of Taft-Hartley and previous Supreme Court decisions implementing that section\(^11\) require restricting state court remedies so as to allow an employer in a state court only those forms of relief which are available in federal courts. In order to decide this question the federal judiciary will be forced to choose between two contradictory, but equally convincing arguments.

The argument against allowing state courts to issue injunctions restraining contract violations has been cogently stated by Professor Benjamin Aaron.\(^12\) He asserts that the Supreme Court’s reasoning in the *Sinclair* case leads to the conclusion that state courts should not be allowed to grant injunctions in section 301 cases. This conclusion is drawn principally from the belief that an injunctive remedy against strikes is of such a different character from other remedies that “it must be considered a separate right rather than merely an alternate form of relief.”\(^13\) If an injunction is a “right,” and state courts are allowed to grant them while federal courts may not, the discrepancy between the federal and state
practice would preclude the development of a uniform federal labor law for the enforcement of collective bargaining agreements—a result which the Supreme Court has held to be required by section 301.\textsuperscript{14}

The argument in favor of allowing state court injunctions is equally persuasive. Since there is nothing in section 4 of Norris-LaGuardia which prevents state court injunctions, section 301 of Taft-Hartley must provide the proscription. But it is relatively clear that nothing in the legislative history or actual wording of section 301 deprives state courts of the right to grant injunctions in cases involving labor disputes.\textsuperscript{15} In fact, it would seem quite unreasonable to construe section 301, a provision passed to strengthen the enforcement of collective bargaining agreements, to deprive employers of effective remedies which they enjoyed prior to its enactment.\textsuperscript{16} The leading state court case decided prior to \textit{Sinclair} adopted this argument,\textsuperscript{17} and in the only state court case since \textit{Sinclair} to date, a New York Supreme Court declared that its action in granting an injunction against a union to prevent further breaches of a no-strike clause was not proscribed by the holding of \textit{Sinclair}.\textsuperscript{18}

The problem of the state court injunction in section 301 cases may be rendered moot by the possibility of removal of such cases to federal courts should those courts allow removal, dismiss because of \textit{Sinclair} and

\begin{itemize}
\item \textsuperscript{14} Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
\item \textsuperscript{15} State courts have uniformly held that they possess the power to issue such injunctions. Foley Constr. Co. v. Truck Drivers Local 100, 47 L.R.R.M. 2156 (Ohio C.P. 1960); McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal.2d 45, 315 P.2d 322 (1957), \textit{cert. denied}, 355 U.S. 932 (1958); Philadelphia M.T. Ass'n v. International Longshoremen's Local 1291, 382 Pa. 326, 115 A.2d 733 (1955). See also, McClean Distr. Co. v. Brewery & Beverage Drivers Local 993, 254 Minn. 204, 94 N.W.2d 514 (1959).
\item \textsuperscript{16} See Mr. Justice Brennan's dissent in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).
\item \textsuperscript{17} McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal.2d 45, 315 P.2d 322 (1957), \textit{cert. denied}, 355 U.S. 932 (1958) (pre-\textit{Sinclair}). A suit was brought in a state court under section 301. It was held that a state court was not precluded from issuing an injunction in section 301 cases merely because a federal court might not have jurisdiction to grant the same relief. The court was of the opinion that Congress had not, in passing Taft-Hartley, withheld equitable remedies available in the states, and the policy behind section 301 was to correct inequities in labor laws which were thought to favor unions. Hence, to deny employers injunctive relief would iron-\textit{ically} place them in a worse position than they had been in before passage of the act.
\item \textsuperscript{18} C. D. Perry & Sons v. Robilotto, 39 Misc.2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963). The court in granting a temporary injunction first held that a strike in violation of a no-strike clause was not a "labor dispute" within the state anti-injunction statute, and consequently, there was no state prohibition against issuing an injunction in such a case. The court said that \textit{Sinclair} did not hold that the federal prohibition against injunctions applied to state courts; and, even if state courts were required to follow federal labor law policy under section 301, \textit{Sinclair} was not a policy determination, but rather a statutory construction. Because that is precisely the question to be explored, this decision is obviously not conclusive.
\end{itemize}
then deny a motion to remand. If a case is within the original jurisdiction of the federal district court, as are suits for an alleged violation of a collective bargaining agreement by virtue of section 301, Section 1441 (a) of the Judicial Code permits the defendant or defendants to remove the case from the state court to the federal district court. Obviously, because of the Sinclair decision and at least until its applicability to state court injunctive powers is resolved, a union as defendant in a state court injunction suit for violation of a no-strike clause would petition for removal to the federal court under section 1441 (a). Whether removal should be allowed depends ultimately upon the meaning given the term "jurisdiction" within section 4 of Norris-LaGuardia, viz., whether it means "lack of authority to take cognizance of the suit or lack of authority to act after taking cognizance of the suit." Some courts have held in relevant pre-Sinclair decisions that the language of section 4 means a federal court cannot even take cognizance of the claim for injunctive relief, and hence removal is not allowable; others have held that regardless of how a federal court finally disposes of the action, Norris-LaGuardia does not deprive federal courts of jurisdiction to take cognizance of cases in which injunctive relief is sought, nor to grant other than injunctive relief.

A few federal courts in pre-Sinclair decisions distinguished between suits in which an injunction was the only remedy sought and suits in which both an injunction and damages were sought. In National Dairy Products Corp. v. Heffernan the court stated that while it would have no jurisdiction to hear an employer action seeking only an injunction, the court would nevertheless have original jurisdiction of a suit seeking both an injunction and damages. The complaint was dismissed as to injunctive relief "for lack of jurisdiction, but not on the merits," and remanded to the state court; the suit for damages was not dismissed. Professor Aaron states that a majority of relevant cases in an informally

23. FED. R. CIV. P. 54(c) permits unrequested relief:
"Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."
24. For an extended discussion of the possible complexities involved in a suit for both damages and injunction, see Aaron, supra note 7, at 1046-51.
26. Id. at 156.
27. Ibid.
conducted survey of federal court practice suggest that federal courts have permitted removal of the damage claim while remanding the request for injunctive relief to the state court.\textsuperscript{28}

In those federal courts which permit removal, the question remains whether the court will dispose of the suit on its merits. Because of Norris-LaGuardia and the \textit{Sinclair} decision a disposition on the merits would constitute a dismissal of the claim for injunctive relief through a lack of jurisdiction. Moreover, whether or not the court disposes of the case on the merits (\textit{i.e.}, dismisses for lack of jurisdiction), it must also decide whether or not to remand the case to the state court. The only relevant federal cases since \textit{Sinclair} have allowed removal and denied remand of the claim for injunctive relief, even though it was joined with claims for other relief, and thereby foreclosed any possibility of a state court injunction.\textsuperscript{29} The denial of the motion for remand in these cases was based upon a finding that federal labor law prohibits state court injunctions; but neither case adequately discussed the complex problems involved in such a decision.\textsuperscript{30} Nevertheless, the cases may represent the beginning of a trend in the federal courts to allow removal, deny remand and dismiss for lack of jurisdiction—all on the grounds of “federal labor policy.” This practice enables the federal courts to reach the result they feel is required without discussing and resolving all the procedural and substantive complexities. Because of the great confusion in this area, and the importance of the question presented, it is possible that the Supreme Court will decide the matter in the very near future.

\textbf{Arbitrator’s Award}

An arbitrator’s cease and desist order is a third possible source of injunctive relief for an employer seeking to enjoin a union’s breach of a no-strike clause in a collective bargaining agreement. In \textit{Ruppert v. Égelhofer}\textsuperscript{31} the New York Court of Appeals held that when a union violates a no-strike clause, no ground exists for invalidating an arbitrator’s cease and desist order if it is found that the particular bargaining agreement

\begin{itemize}
\item \textsuperscript{28} Aaron, \textit{supra} note 7, at 1051-52.
\item \textsuperscript{30} In Tri-Boro Bagel Co. v. Bakery Drivers Union, \textit{supra} note 29, remand was denied because “federal” law is to be applied “with uniform force in all the courts of the land” 54 L.R.R.M. at 2320. But the court failed to specify which federal law prohibits state court injunctions. In Lott, Inc. v. Hoisting Engineers, \textit{supra} note 29, remand was denied on the broad ground of required uniformity.
\item \textsuperscript{31} 3 N.Y.2d 576, 148 N.E.2d 129 (1958).
\end{itemize}
contemplated the inclusion of that order in an arbitrator’s award. Because federal courts liberally construe arbitration clauses and the scope of an arbitrator’s authority under collective bargaining agreements, it is possible that federal courts too would be willing to enforce an arbitrator’s cease and desist order. Indeed one federal case, where the court reasoned in the same fashion as the New York court in Ruppert, supports this view: because the parties there had by their collective bargaining agreement authorized the arbitrator to grant a cease and desist order, Norris-LaGuardia did not preclude a federal court from enforcing the arbitrator’s order that the union cease work stoppages in violation of their contract. However, both of the above decisions are pre-Sinclair, and whether they declare the present status of federal and state court enforcement of arbitrator cease and desist orders is uncertain since such enforcement arguably is tantamount to issuing an injunction. It could be maintained that in such a situation a court does not issue an injunction in the traditional sense, but merely confirms an award of the arbitrator by ordering compliance with it. The distinction is admittedly tenuous, but could arguably serve as the basis for supporting the arbitrator’s award. Moreover, a grant of the injunctive power to arbitrators by the parties to a collective bargaining agreement is voluntary, and presumably was bargained for and desired by them. There would be obvious inequity in permitting a union to escape its voluntary agreements, though it must be recognized that the Court in Sinclair was not persuaded by that position.

But there are nevertheless two factors which militate against the conclusion that Sinclair would proscribe the judicial enforcement of arbit-

---


33. See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). In these three decisions, often referred to as the Steelworkers Trilogy, the Supreme Court held in essence that in disputed cases concerning the coverage of the arbitration clause, the function of the court is merely to determine whether the collective bargaining agreement contemplated that the arbitration clause was to cover the grievance or dispute in question. Once coverage is established, the interpretation of the agreement is for the arbitrator and not the court. Any doubt about coverage of a particular dispute should be resolved in favor of coverage. See also, Drake Bakeries, Inc. v. Local 50, American Bakery Workers, 370 U.S. 255 (1962).


35. Generally, collective bargaining agreements do not expressly grant or withhold arbitrator injunctive power. Rather, to decide if such power has been impliedly conferred, courts must look to the intent of the parties to see what remedies they necessarily contemplated could be granted by the arbitrator. Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129 (1958). See also Annot., 70 A.L.R.2d 1055, 1057 (1960).
trator injunctive awards. First, there is, as has been seen, a strong federal labor policy which favors the maintenance of an effective arbitration process, and the injunction is uncontroversially the most speedy and flexible arbitrator power. Second, and perhaps most important, judicial enforcement of arbitrator cease and desist orders would permit federal and state courts to uniformly deny injunctions for violations of a no-strike clause, yet the severity of such a denial would be mitigated by permitting unions and employers to contractually empower a mutually agreed upon third party, the arbitrator, to enjoin such conduct.

II. Rescission, Damages, Discharge and Other Discipline, and Subcontracting

Introduction: Arbitrators and the Collective Bargaining Agreement

The employer remedies of rescission, damages, discharge and other discipline, and subcontracting are frequently modified by the collective bargaining agreement. This modification is accomplished either by including the remedy within the scope of the arbitrator's authority to award, as is sometimes the case with damages, or by being expressly or impliedly within the arbitrator's authority to review, e.g., as a "dispute" which the agreement authorizes the arbitrator to consider. In the latter case the arbitrator determines, if permitted by the contract, the rights of the parties under the contract. In the light of such a determination he will either annul, alter or confirm the employer's attempted rescission or disciplinary action. Because there are cases in which an arbitrator will in effect determine the remedy available to the employer, it is necessary to mention the nature of arbitrator treatment of the collective bargaining agreement.

Arbitrator interpretive treatment of collective bargaining agreements ranges over a continuum extending from very loose or liberal interpretation, in which the agreement is treated as a vital instrument or constitution and the arbitrator as its physician, to absolute literalness of interpretation where the arbitrator is a most stern and strict judge. Obviously then, when an employer's remedy is subject to an arbitrator's determination, it is impossible to predict the result unless a particular agreement and the specific arbitrator's style of arbitration are considered together. These factors must be kept in mind when considering the arbitrator's decisions cited below. At most, because some arbitrators view

36. See note 33 supra.
37. For a recent treatment of this subject see Fuller, Collective Bargaining and the Arbitrator, 1963 Wis. L. Rev. 3.
38. Id. at 4.
39. Id at 3.
NOTES

the awards of others with the respect often accorded precedent, a decision may reflect the beginnings of vaguely articulated standards; at the least, since some arbitrators view each collective bargaining agreement and its setting as unique, the decisions will indicate merely what these arbitrators have found significant in the determination of a particular claim.

Rescission

A collective bargaining agreement is a contract, and although it has unique characteristics which render it a specialized form of contract, contract law in regard to rescission and breach applies to it. In this regard it has been held that the violation of a no-strike clause in a collective bargaining agreement is a material breach which will justify rescission of the contract by an employer. However, if under the terms of the collective bargaining agreement the existence or non-existence of a condition precedent to the employer's right to rescind is subject to arbitration, then a favorable decision by an arbitrator will become a necessary intermediate step before the employer may rescind.

For example, if there is a question as to whether or not the union has actually breached a no-strike clause, as might be the case when the strike was a "wildcat" strike which the union in fact attempted to discourage, and the arbitration clause in the agreement is sufficiently broad, a court would find that union responsibility for the strike was an arbitrable question under the contract. Since the contract is between employer and union, rather than between employer and individual employees, the union cannot be said to have refused to perform it in some material respect unless union responsibility for or condonation of the strike is shown. The finding of a union breach in any particular case depends, of course, upon the facts, the contract provisions which relate to union responsibility for the acts of its members and union responsibility to preserve the contract. If the question of union responsibility for the breach


of a no-strike clause is arbitrated and the union found responsible, the employer will be able to rescind the contract. On the other hand, if the union is found not responsible, the employer will be unable to rescind unless a court should thereafter vacate the arbitrator's award.

When there is a breach material enough for the employer to rescind the contract if it wishes, such as a union's breach of a no-strike clause, the employer may either rescind, or continue the contract and sue for the damages caused by its breach. If the employer elects to rescind the agreement it will not be allowed to recover damages for the breach which induced it to rescind. The remedies are mutually exclusive. Consequently, an employer who finds itself in a position to rescind must consider carefully whether or not it would be of more value to it to continue the contract and sue for damages. Rescission will leave it without a labor contract. In that case a new contract would have to be negotiated, with all the difficulties that portends. On the other hand, the employer must recognize that damages may be difficult to prove. Numerous considerations must enter the employer's judgment, but little that is both general and concrete can be said. The particular facts and circumstances of each specific case must be weighed in relation to the possible benefit to be gained from the damages obtainable before any decision can be made.

If the employer elects to rescind the contract it is necessary that it do so completely, for failure may result in a determination that there was no rescission. Employer activity after the alleged breach in pursuance of the allegedly repudiated contract, e.g., deduction of union dues and processing and adjusting pending grievances under the contract grievance procedure, may lead to an arbitrator or judicial determination that the employer has waived the violation for purposes of rescission.

**Damages**

As seen above damages are an available remedy for a union's breach of a no-strike clause in a collective bargaining agreement. Furthermore,

---

43. Boeing Airplane Co. v. Aeronautical Lodge 751, IAM, supra note 42.
44. Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).
45. Local 748, IUE v. Jefferson City Cabinet Co., 315 F.2d 192 (6th Cir. 1963). In Brynmore Press, Inc., 7 Lab. Arb. 648 (1947) (Harry H. Rains), an arbitrator held that by proceeding to arbitration the employer had waived his right to rescind.
Any labor organization which represents employees in an industry affecting
NOTES

the fact that such a violation of contract may also constitute an unfair labor practice does not deprive the courts of jurisdiction under section 301 of Taft-Hartley to hear the case. But of paramount importance in damage suits for violation of no-strike clauses are those contract provisions which define the area and depth of arbitration. Recourse must always be had to such provisions to determine whether the employer has obligated itself to have its damage claims heard by the arbitrator rather than the courts, the authority of the arbitrator to award damages and any other indication in the contract that might lead a court to conclude that the employer has totally relinquished its right to bring a damage suit for violation of contract or, at least, has forfeited the right until the arbitration process has been exhausted.

In Drake Bakeries v. Local 50, American Bakery Workers the union requested a stay of the employer’s damage suit for breach of a no-strike agreement on the ground that its claim was an arbitrable matter under the contract. Relying heavily on the fact that the contract contained a very broad arbitration clause which did not expressly exclude breaches of the no-strike provision, the court held that the parties intended such a claim to be arbitrable. When the Drake Bakeries’ approach of letting the specific provisions of each arbitration clause control the issue of arbitrability is read in conjunction with the Supreme Court’s holdings in the Steelworkers Trilogy and reiterations of the principles stated there, it appears that unless the collective bargaining agreement expressly or by manifest implication excludes the possibility that the commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in the district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

49. The court rejected the employer’s argument “that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise.” Id. at 262. See, however, Local 721, United Packinghouse Workers v. Needham Packing Co., 119 N.W.2d 141 (Iowa 1963), rev’d. 32 U.S. Law Week 4202 (1964), where a state court purporting to apply federal law held that violation of a no-strike clause by a union constitutes a waiver of the union’s right to demand arbitration pursuant to the contract.
question of damages shall be subject to arbitration in the event of a contract violation, the question will be deemed arbitrable.\textsuperscript{51} Thus, if there is any doubt as to the interpretation of the contract in regard to the arbitrator’s authority to hear a damage claim, a court is likely to grant at the union’s request a stay of the damage suit pending arbitration,\textsuperscript{52} unless the arbitration clause is narrowly drawn or some union activity makes it reasonable or equitable to deny it a stay.\textsuperscript{53}

This does not mean that should a court decide that an employer’s damage claim for a union’s violation of contract is within the arbitration clause, for example as a dispute over the meaning of the contract, the employer will in all cases be unable to bring suit for damages. In many instances it means only that because the union has requested a stay of the action until arbitration procedures have been followed, the employer must withhold the suit until that process is completed as stipulated by the agreement. Of course, if it is found that the arbitrator has authority to award damages, the employer will not be permitted to bring suit; in that case the employer’s sole recourse to the judiciary is through proceedings to modify, vacate or enforce the arbitration award.

If the action for damages is brought in a state court, as is permissible since section 301 of Taft-Hartley does not deprive state courts of jurisdiction, and the problem of the arbitrative nature of the question of damages is resolved in favor of its exclusion from the arbitration clause of the contract, the state court must nevertheless apply federal labor law.\textsuperscript{54}

Measure of Damages

The general formula for measurement of damages resulting from the violation of a collective bargaining agreement allows recovery for all expenses and losses occasioned by the violation. Obviously there are a great many difficulties in determining and subsequently proving the monetary effect of a strike upon an employer. Arbitrators have held

\begin{itemize}
\item \textsuperscript{51} “In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where \ldots the exclusion clause is vague and the arbitration clause quite broad.” United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960).
\item \textsuperscript{52} See, e.g., Drake Bakeries, Inc. v. Local 50, American Bakery Workers, 370 U.S. 255 (1962).
\item \textsuperscript{53} See, e.g., Simonds Const. Co. v. Local 1330, International Hod Carriers, 315 F.2d 291 (7th Cir. 1963), where the union was held not entitled to a stay pending arbitration of an employer’s action under section 301 for damages for breach of a no-strike agreement where the union failed to appeal the initial denial of stay for one year after the employer had filed suit.
\item \textsuperscript{54} Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).
\end{itemize}
that damages will be awarded for loss of net profit,\textsuperscript{55} constant and increased overhead costs\textsuperscript{58} (which may possibly include salaries of office and managerial staff, depreciation of fixed assets, utilities, insurance, taxes, cost of fringe benefits and increased storage and equipment costs\textsuperscript{57}) and loss of good will.\textsuperscript{55} Courts have allowed in addition to the above items recovery for increased direct labor costs,\textsuperscript{69} and losses resulting from specific inefficient operation occasioned by the strike.\textsuperscript{60} Adjustments will be made, as circumstances of the particular case may dictate, for sales which were postponed rather than lost because of the strike.\textsuperscript{61} Furthermore, an arbitrator has found that the employer has a duty to mitigate those damages occasioned by the strike in violation of the collective bargaining agreement, and a failure to do so will result in reduction of the claim.\textsuperscript{62} Finally, there are two situations sometimes present when strikes in violation of contract occur which have affected arbitrator awards. First, if the union believes in good faith that under the terms of the contract it has a right to strike—that is, that the no-strike clause is a limited one which does not proscribe their particular contemplated activity—then it may be found that the union action was justifiable as a reasonable interpretation or misinterpretation of the agreement.\textsuperscript{63} Such a finding may reduce an otherwise proper award even though damages are measured solely by the employer's loss, particularly where evidence of damage is not strong. Second, if the employer engaged in action which can be shown to have provoked the strike in violation of contract, it may be held to a degree responsible for the strike and its damages.


\textsuperscript{56} Ibid. See also Oregonian Publishing Co., 33 Lab. Arb. 574 (1959) (Paul L. Kleinsorge).

\textsuperscript{57} Canadian General Elec. Co., 18 Lab. Arb. 925 (1952) (Bora Laskin, chairman).


\textsuperscript{60} International Union of Operating Eng'rs v. Bay City Erection Co., supra note 59.


\textsuperscript{63} See International Harvester Co., 14 Lab. Arb. 302 (1950) (Ralph T. Seward) (suspension of union officials unjustified where officials had good reason to believe that stoppage was permissible). Although this is a discipline rather than a damage case, there is, ceteris paribus, no reason to suppose that the reasoning of the award would not apply equally to damage cases.
reduced accordingly.64

In United Shoe Workers v. Brooks Shoe Mfg. Co.65 it was held that punitive damages are not a permissible award in section 301 actions brought in a federal court. It is likely that state courts will similarly not be able to award punitive damages since, according to Local 174, Teamsters Union v. Lucas Flour Co.,66 state courts are required to apply federal labor law in damage suits brought in state courts for section 301 violations of a collective bargaining agreement.67 Because punitive damages are thus not a permissible award in contract actions,68 it would be thought that a state court to grant such damages would have to do so pursuant either to statutory permission or under a tort theory of concerted labor action. But the tort theory of conspiracy through concerted activity by employees and that of malicious and wrongful interference with business have been abolished as a federal cause of action both by a statute which creates a right to concerted activity by employees, and by the policy underlying the statute.69 A state court award of punitive damages by any authority, therefore, would place that tribunal's determination squarely in opposition to the federal practice and policy. The possibility that states might even under these restrictions grant remedies beyond those available in federal courts in section 301 actions does not appear to be applicable in the case of punitive damages; such damages are not a matter of remedial right, and are not part of the damage remedy the employer seeks in the sense that they are not intended to make it whole. It should finally be noted that arbitrators may not award puni-

65. 298 F.2d 277 (3d Cir. 1962).
67. At least one commentator thinks that state courts would follow a rule similar to that of federal courts. Fleming, Arbitrators and the Remedy Power, 48 VA. L. REV. 1199, 1221 (1962).
68. 5 CORBIN, CONTRACTS § 1077 (1951).
69. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other material aid or protection." 49 Stat. 452 § 7 (1935), 29 U.S.C. § 157 (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, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections. 47 Stat. 70, § 1 (1932), 29 U.S.C. § 101 (1958). [The employee] . . . shall be free from interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other material aid or protection. . . . 47 Stat. 70, § 2 (1932), 29 U.S.C. § 102 (1958).
The Labor Management Relations Act establishes unions as entities for the purpose of suit, but also provides that damages may not be obtained both from a defendant union and its individual employee-members. Through a tort theory of interference with business it has been held that an employer may recover damages from individual strikers who participate in a wildcat strike in breach of contract. This holding has been criticized, and whether it represents a correct statement of the law is subject to doubt. Moreover, the employer has little to gain from damage suits against individual employees. It is quite likely that the individuals sued would be unable to satisfy a judgment against them.

---

70. This is true even though the arbitrator is given authority by the contract. The parties to labor controversies have enough devices for making one another “smart” without this Court putting its stamp of approval on another. I can conceive of nothing more disruptive of congenial labor relations than arming employee, union and management with the potential for “smarting” one another with exemplary damages. Even without the punitive element, a damage action has an unfavorable effect on the climate of labor relations. UAW v. Russell, 356 U.S. 634, 653 (1962).


72. Ibid. See also Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 249 (1962): “The national labor policy requires and we hold that when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages.”

73. Louisville & Nashville Ry. v. Brown, 252 F.2d 149 (5th Cir.), cert. denied, 356 U.S. 949 (1958). In this case plaintiff based its claim for damages on three separate theories. The first was violation of a duty allegedly imposed on defendant by the Railway Labor Act to settle disputes without interrupting commerce. See 48 Stat. 1187 (1934), 45 U.S.C. § 152 (1958). The second theory was wrongful interference with plaintiff’s contractual right to have disputes settled according to the procedures of the Railway Labor Act. The third theory was tortious interference with plaintiff’s business. The trial court dismissed all three. The circuit court rejected the first theory, reserved judgment on the second pending the trial court’s determination of the merits of such a claim under state law, and reversed as to the third, saying “a willful interference with appellant’s business without the justification normally flowing from a lawful strike is actionable and warrants a judgment for damages in Alabama.” Louisville & Nashville Ry. v. Brown, supra at 156.

74. In Givens, Responsibility of Individual Employees for Breaches of No-Strike Clause, 14 IND. & LAB. REL. REV. 595 (1961), the following criticisms are made: (1) The thirteenth amendment prohibits imposing damages upon an individual employee for striking in concert with his fellow employees; (2) although striking in breach of contract is not protected for purposes of the employer’s right to discharge, the individual striker is protected from damage suits because of the drastic consequences a successful damage suit would have upon him; (3) in this typical collective agreement, the promise not to strike runs from the union to the employer, not from the individual employee to the employer. In Comment, 59 COLUM. L. REV. 177 (1959), additional criticisms are offered as to the decision in the Brown case. It further contends that the case wrongly interpreted state law as allowing such a tort action, that section 6 of Norris-LaGuardia, 47 Stat. 71 (1932), 29 U.S.C. § 106 (1958), prohibited such a holding in this case and that policy considerations dictate a different result.

75. If damages are recoverable from individual wildcat strikers, the measure of such damages would depend on the theory under which recovery was allowed as well as the factors mentioned above which determine the amount and measure of damages.
except in those cases when the strike caused very little recoverable loss. Rather than serving as a means of compensation for employer loss, this remedy would result, except in the very unusual case, only in antagonizing the employees and may ultimately lead to a greater disruption in industrial relations than was occasioned by the dispute which precipitated the initial violation.

**Discipline and Discharge**

As with its damage remedy, it is possible that the employer may have limited its right to discipline by the terms of the collective bargaining agreement. If the arbitration clause is broad, the holdings in the *Steelworkers Trilogy* would apply so that doubts as to the extent of the agreement's arbitration clause would be resolved in favor of coverage. The matter depends entirely on court construction of the contract, and no court will do more than determine whether the action in question was covered by the arbitration agreement. In cases of inclusion, discharge and other disciplinary action which the employer may have taken against employees because of participation in a strike which violated the contract, will be subject to enforced arbitration. Of course, if the employer has expressly reserved without restriction its right to discipline and discharge, or if the court should interpret the contract as not including employer disciplinary action within the scope of the arbitration clause, then such action will be subject only to the employer unfair labor practice proscriptions of the National Labor Relations Act.

If the employer's disciplinary action is determined to be an arbitrable matter then, on arbitrator review of the action in light of the contract terms, the employer may be required to justify the kind and severity of the disciplinary action taken. As would be expected, justification of

---

76. *E.g.*, "The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly." Quoted in *Drake Bakeries, Inc. v. Local 50, American Bakery Workers, 370 U.S. 255, 257 (1962).*

77. *Jefferson City Cabinet Co. v. IUE, Local 748, 313 F.2d 231 (6th Cir.) cert. denied, 373 U.S. 936 (1963).* In this case the court relied upon *Drake Bakeries* in holding that a union did not waive its right to demand arbitration of discharges by engaging in a strike in violation of the contract. See note 49 *supra.*

78. *United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960)*; "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

79. In the following arbitration cases involving no-strike clauses, employer action was held to be either justified or too severe: *Pittsburgh Steel Co., 34 Lab. Arb. 598 (1960) (Harry H. Platt) (six month suspension too severe); Eljer Co. Brass Div., 34 Lab. Arb. 741 (1960) (Wayne T. Geissinger) (discharge justified); Alside, Inc.,
that discipline used in each particular case depends in large measure upon
the employee's role in the strike. In those cases which have dealt
specifically with strikes in violation of a no-strike clause, employees have
been classified by arbitrators according to the facts in each case as
(1) instigators and leaders, i.e., those fully aware of the nature of their
action who did all in their power to instigate and sustain the strike;
(2) direct followers, or those willing to strike and desirous of helping
the strike along; and (3) bystanders, or those carried along by group
pressure who have little realization of the significance of events. Need-
less to say, the penalty exacted by the employer and sanctioned by the
arbitrator should be commensurate with the role played by the individual
in the strike. If, for example, the instigators and leaders of a strike are
punished by discharge, an arbitrator is likely to find that the same penalty
applied to direct followers is too severe. Moreover, the responsibility
for the origin of the strike in violation of the collective bargaining agree-
ment will be a factor in the arbitrator's consideration of the discipline
imposed by the employer. If the union has through a good faith belief
in the propriety of its action encouraged or permitted a strike, perhaps
because contract ambiguities have obfuscated the extent of the no-strike
clause, the arbitrator is likely to make a reduction in any discipline im-
posed. Since all collective bargaining agreements do not contain a
broad no-strike clause, but prohibit strikes only under certain conditions,
e.g., until the grievance procedure has been followed and exhausted, this
limitation on employer discipline is often a real one. Similarly, if the

33 Lab. Arb. 194 (1959) (Edwin R. Teple) (discharge of instigators of strike justified);
Borden Chem. Co., 34 Lab. Arb. 325 (1959) (Saul Wallen) (discharge of
union official justified); General Elec. Co., 31 Lab. Arb. 28 (1958) (Burton B. Turkus)
(suspension justified); Wesson Oil & Snowdrift Co., 29 Lab. Arb. 622 (1957)
(Peter M. Kelliber) (discharge justified); International Minerals & Chem. Corp., 28
under the circumstances); Goodyear Atomic Corp., 27 Lab. Arb. 321 (1956) (Paul N.
Lehoczky) (two week lay-off justified); Chrysler Corp., 18 Lab. Arb. 379 (1952)
(David A. Wolff) (discharge unduly severe penalty); H. J. Heinz Co., 16 Lab. Arb.
664 (1951) (Paul N. Lehoczky) (discharge of participants justified; discharge of
bystanders too severe); Borg-Warner Corp., 4 Lab. Arb. 4 (1945) (Clarence M. Updegraff)
(non-discriminatory discharge of union officials justified; discharge for minor
part in strike too severe).


81. See, e.g., Eljer Co. Brass Div., 34 Lab Arb. 741 (1960) (Wayne T. Geissinger);
Pittsburgh Steel Co., 34 Lab. Arb. 598 (1960) (Harry H. Platt); Borden
Chem. Co., 34 Lab. Arb. 325 (1959) (Saul Wallen); Alside, Inc., 33 Lab. Arb. 194
Lehoczky).


(1961), states that 48 per cent of the nation's collective bargaining agreements contain
an absolute ban on strikes, while 46 per cent are of a conditional or limited nature.
employer is found by the arbitrator to have provoked the strike by its action, the arbitrator may reduce the penalty imposed by the employer in accordance with his estimation of the employer's responsibility for the strike. And employer conduct following disciplinary action may also affect the final award of the arbitrator. For example, if the employer unconditionally agrees to reinstate discharged strikers, perhaps out of economic necessity, the agreement to reinstate may be treated by the arbitrator as a condonation of the strike and, consequently, as a waiver of the right to discharge. Additional criteria which arbitrators have used to modify or set aside employer action are: equality of treatment of strikers depending upon such circumstances as responsibility for and leadership of the strike, the type, extent and circumstances of the strike, union and company history, and the effect of the discipline on further occurrences of a similar nature, as well as on union and employee morale, plant harmony and future labor-management relations.

If the contract imposes responsibility upon union officials to attempt to terminate strikes in violation of a no-strike clause, instigation or leadership of such a strike by a union official would be adequate reason for discharge, provided that employees not union officials but also respons-

85. Speer Carbon Co., 16 Lab. Arb. 247 (1951) (Jacob J. Blair) (discharge too severe a penalty where unauthorized management representations deceived employees and where foreman made no effort to dissuade walkout).

86. United Elastic Corp., 84 N.L.R.B. 768 (1949).


88. Lehigh Portland Cement Co., 34 Lab. Arb. 866 (1960) (Clair V. Duff) (discharge penalty too severe where wildcat strike was first that had occurred in plant, discharged employees each had 25 years service without prior disciplinary penalties, tension in plant made strike possible and employees shut down equipment in such a way as to protect it); Pittsburgh Steel Co., 34 Lab. Arb. 598 (1960) (Harry H. Platt) (arbitrator considerations in regard to disciplinary treatment: circumstances, seriousness, employee record and length of service, plant conditions, character of disciplined employee's behavior, possibilities of mitigation); Fern Shoe Co., 14 Lab. Arb. 268 (1950) (J. A. C. Grant) (employees did not realize seriousness of their act; penalty reduced).


90. Under an arbitrator, treatment of problems subject to the arbitration clause is individualistic, directed to the specific problem arising between a specific company and specific union, each having their own unique problems. The following is a good statement regarding discipline: "The modern approach of employers is individualistic and clinical in method. . . . [U]nderlying causes for employee misbehavior are carefully investigated and efforts made to fit penalties both to the offense and to the individual employee." Pittsburgh Steel Co., 34 Lab. Arb. 601 (1960) (Harry H. Platt).

ible for leadership or instigation of the strike are punished in the same manner. To accord different treatment to the union officials might be discriminatory and therefore productive of an unfair labor practice charge.

Subcontracting

At first glance, subcontracting work which would otherwise not be performed because of a union strike in violation of a collective bargaining agreement is an attractive "remedy" for a struck employer. The employer by subcontracting might be more readily enabled to meet its business obligations, particularly if the time of performance is critical and it does not appear likely that the strike will terminate before substantially interfering with its obligations. Thus, the "remedy" of subcontracting is a form of self-help which can produce results that before *Sinclair* were assured only by the injunction—i.e., a steady flow of goods available for the employer's customers—a result which quite obviously does not flow from the remedies of rescission, damages and discharge and other discipline.

In order to examine subcontracting as a form of employer self-help against a union's breach of a no-strike clause, the permissibility of subcontracting under other circumstances must be considered first. The question of when an employer may subcontract work is currently in a state of flux and confusion, and the disorder is heightened by the fact that one answer may result when the Board considers the question to determine if there has been an unfair labor practice, and another when a court considers the permissibility of subcontracting, outside of the context of unfair labor practices.

When the collective bargaining agreement contains no arbitration clause several courts have found that subcontracting is solely a management prerogative, unless there is language in the contract which says or implies otherwise. However, when the contract contains an arbitra-

---

95. Amalgamated Ass'n of Motor Coach Employees v. Greyhound Corp., supra note 94.
96. In Local 391, UAW v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962), the court held that the presence of a union shop provision implies that management has forfeited the right to make unilateral decisions to subcontract.
tion clause, subcontracting will be held to be an arbitrable matter unless there is specific language in the agreement which indicates that the parties did not intend to submit that matter to arbitration.\footnote{This result follows from the Supreme Court’s decision in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), which held that subcontracting was arbitrable even though the contract included a management prerogative clause and was otherwise silent as to subcontracting. The lower courts have followed this decision faithfully, even though some have indicated their disagreement. See, e.g., Independent Petroleum Workers of America v. American Oil Co., 215 F. Supp. 1 (N.D. Ind. 1963); United Cement Workers Int’l v. Celotex Corp., 205 F. Supp. 957 (E.D. Pa. 1962). For an extensive discussion of subcontracting and arbitration see Goshko, Subcontracting: The Labor Management Relations Act and the Warrior Doctrine: A Lateral Analysis, 41 U. Det. L.J. 1 (1963).}

When the contract contains no arbitration clause and no express or implied restrictions on management’s right to subcontract,\footnote{That is, in courts which recognize such a right. See note 94 supra.} there is no reason why the employer should not be able to exercise this right when the union strikes in violation of the contract. Breach of a no-strike clause would have no significance in such situations. But, if the employer’s right to subcontract is subject to arbitration, it might be argued that the union’s violation of a collective bargaining agreement by breach of a no-strike clause would be sufficient to excuse the employer from arbitrating. Unfortunately, no categorical answer can be given to that proposition, for as had been seen the Supreme Court has held that a strike violating a no-strike clause is not per se a sufficient breach or repudiation of the arbitration clause to excuse the employer from arbitrating,\footnote{Drake Bakeries, Inc. v. American Bakery Workers, 370 U.S. 255, 261-62 (1962): “We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause . . . entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union.” This amounts to saying that the agreement to arbitrate is not a \textit{quid pro quo} for the union’s promise not to strike: [We have not enuiciated] . . . a flat and general rule that these two clauses are properly to be regarded as exact counterweights in every industrial setting, or to justify either party to the contract in wrenching them from their context in the collective agreement on the ground that they are mutually dependent covenants which are severable from the other promises between the parties. Id. at 261, n.7. The failure of performance of the one, therefore, does not justify non-performance of the other. See also Yale & Towne Mfg. Co. v. Int’l Ass’n of Machinists, 299 F.2d 882 (3rd Cir. 1962), and note 49 supra.} and the court has not clearly delineated what circumstances attending a union’s breach of a no-strike clause would relieve an employer of its duty to arbitrate. Undoubtedly each decision would in large measure depend upon the terms of the arbitration clause itself, \textit{i.e.}, whether the clause was framed in broad and comprehensive language or was narrowly drawn.\footnote{The following cases held the arbitration clause so broad as to compel arbitration in the face of the union’s violation of the no-strike clause: Drake Bakeries, Inc. v. American Bakery Workers, supra note 99 (all complaints, disputes or griev-}
but the party's prior construction of that clause\(^\text{101}\) and perhaps even the severity of the strike might be additional factors.\(^\text{102}\)

However, when considering the same contractual terms, the Board may find that the employer has no right to subcontract. This is because, under the NLRA, an employer has a statutory duty to bargain collectively during the term of the agreement.\(^\text{103}\) Presently the duty imposed by section 8(a)(5) extends to subcontracting, unless otherwise provided in the collective bargaining agreement, for the NLRB has recently held that subcontracting by the employer is a mandatory subject for bargaining.\(^\text{104}\) It has also been determined, however, that an employer is excused from the duty to bargain collectively while employees are breaching a no-strike clause in the labor contract.\(^\text{105}\) Consequently, if the union

\(\text{NOTES}\)

\(^{101}\) Id. at 266.

\(^{102}\) In *Drake Bakeries*, the court found that a mere four months preceding suit the employers had submitted to arbitration another claim for damages through the union's breach of contract by strike. The court viewed as one factor in its decision the employer's conduct indicating his belief that the "matter of a union led strike was a dispute to be arbitrated under the provisions of the contract." 370 U.S. at 260.

\(^{103}\) That this might be a factor was hinted in *Drake Bakeries* where the court was seemingly impressed both by the fact that only a "one-day strike" was involved and that the union denied "that there was any strike or any breach of contract at all." Id. at 266.


was responsible for a strike in violation of a no-strike clause, the employer would not be required by the NLRA to bargain collectively concerning his decision to subcontract, at least so long as the strike lasts. This limitation is important because if subcontracting was held to be a violation of the duty to bargain in a particular case, the act of subcontracting would convert the strike from an unprotected "economic" strike into an unfair labor practice strike, and the employer's right to discharge or discipline would be altered. Although persons who strike in violation of contract are ordinarily subject to discharge, the Board has held that a striker must be reinstated, even though he is in breach of contract, if the strike is or becomes a response to an employer's "serious" unfair labor practice.\textsuperscript{106} Thus, the question in each particular case would become whether or not subcontracting was a serious enough unfair labor practice to warrant an order of reinstatement.

Another problem in regard to subcontracting arises from the fact that some strikes in violation of contract are "wildcat" strikes, that is, they are not instigated, supported or sanctioned by the union. If the union is not responsible for the strike, the employer's duty to bargain over subcontracting remains in full force. Of course the union will not be overly receptive to any employer proposal which would vitiate the effectiveness of its members' strike, and hence, in such cases, the employer's right to subcontract for all practical purposes is illusory until a bargaining impasse has been reached.\textsuperscript{107} But even then the remedy could be ineffective. If both parties have bargained in good faith over the employer's subcontracting proposal, enough time may have passed to have resulted in the very injury to the employer's business that the subcontract was designed to avert. Furthermore, for the subcontract to be of any value, it may be necessary for it to encompass the work of the entire unit. If less than all the unit employees are participating in the wildcat strike, the non-striking unit employees will have to be either relocated in

\textsuperscript{106} The severity of the unfair labor practice may depend upon the type of no-strike clause in the contract. In Mastro Plastics Corp., 103 N.L.R.B. 511 (1953) \textit{aff'd on other grounds sub nom.}, Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) the Board held that the employer's unfair labor practice was so serious that the striking employees were protected from discharge. In Mid-West Metallic Products, Inc., 121 N.L.R.B. 1317 (1958) (no-strike clause which barred strikes only until grievance procedures had been exhausted), the Board found that the employer who had discharged employees who struck over an employer unfair labor practice had not violated the act. The Board distinguished \textit{Mastro} by saying that since there the no-strike clause was absolute, the very existence of the union was threatened by the employer unfair labor practice as the union could never strike and be protected by the act.

\textsuperscript{107} This is true because it has been held that an employer may not take unilateral action in regard to a matter which is a mandatory subject for bargaining and is being negotiated at the time, unless a genuine bargaining impasse has been reached. NLRB v. Katz, 369 U.S. 736 (1962).
the plant or laid off; and it is very likely that if there is an arbitration clause in the contract the employer may not do either without being subject to an arbitrator's later determination of the appropriateness of his actions. In such a case even the absence of an arbitration clause does not alleviate the employer's problems, for the act of relocating or laying off the non-strikers in the particular unit may well cause considerable dissatisfaction among the other employees, and perhaps even encourage them to join the strike force.

A final, practical limitation on the use of subcontracting in situations where a strike in breach of contract is involved, is the possibility that the union may lawfully strike the subcontractor as the employer's "economic ally." If an employer subcontracts work during a strike merely as a strike-breaking technique—as though it was in actuality hiring replacements—the striking union will not be prohibited by the secondary boycott provisions of Taft-Hartley's section 8(b)(4) from carrying its dispute to the subcontracting employer, or from inducing its employees to engage in a sympathetic strike.Obviously, if the union strike results either in a sympathy walk out by the subcontractor's employees, or induces the subcontractor to refuse to do the struck work, the employer's "remedy" by subcontracting fails.

It can be safely concluded that unless the employer has expressly reserved the right to make unilateral decisions to subcontract in the collective bargaining agreement, subcontracting as a form of self-help against strikes in breach of contract may be more illusory than real.

III. CONCLUSION

Perhaps the most striking fact that emerges from a collection and delineation of an employer's remedies for breach of a no-strike clause is that there are few "settled" propositions. This lack of adequate guidelines for the employer and union is in large measure due to two factors. First and foremost is the scarcity of court and arbitrator decisions which deal with remedies other than the injunction. This fact is at least partially attributable to the feeling which prevailed among employers prior to Sinclair that the injunction was their most effective remedy, and thus

---

110. It is here assumed that the subcontractor's refusal would in no way violate the "hot cargo" provisions of the Act. § 704(b) 73 Stat. 525 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1959).
for the most part, was the only remedy sought. The second factor, which is now of paramount importance, is that the arbitration process permeates all of the available employer remedies. As has been shown, the legal effect of an arbitration clause in the contexts relevant to employer remedies for breach of a no-strike clause has not yet been thoroughly considered by the courts.\footnote{For example, the vital question of the effect of a union's breach of the no-strike clause upon the employer's duty to arbitrate has not been fully determined. See notes 49, 99 and 100 supra.}

Until the unanswered questions concerning the effect of an agreement to arbitrate in the contexts mentioned in this note are finally settled, much of the uncertainty will remain. For the present, employers will have to place a great deal of reliance on a small amount of precedent of uncertain value in formulating their responses to union breaches of the no-strike clause; and unions will not be able to utilize this particular economic weapon with much foreknowledge of its consequences. Ultimately it is to be hoped that the uncertainties will be resolved by union and management themselves in the form of effectively enforceable promises not to strike, perhaps through allowing arbitrator injunctions within the framework of the court and arbitrator decisions which are sure to come.