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The writer here examines recent unfair labor practice decisions of the Supreme Court, focusing on the case of Smith v. Evening News Association. Mr. Kovarsky concludes that the holding in the Smith case may threaten desired uniformity in the administration of legislation in this area.

I. Introduction

On December 10, 1962, the United States Supreme Court, in *Smith v. Evening News Ass'n*,[1] established several principles of law which may rival the well-known decision of *Textile Workers Union v. Lincoln Mills*[2] in importance. The purpose of this comment is to examine the far-reaching implications of *Evening News* and related Supreme Court decisions.

The public need for a uniform labor policy to control firms and unions operating in interstate commerce has received considerable attention from the Court.[3] Because of this need for uniformity, the impact of state law on labor relations has been minimized. While conceding the desirability of uniform regulation, the majority opinion in *Evening News* has maximized the possibility of conflict, since state courts, federal courts, the NLRB, and, apparently, arbitrators are authorized to decide the same question under different provisions of the Taft-Hartley Act. The NLRB will continue to take action under section 8 when unfair labor practice charges are preferred, and section 301 permits state courts, federal courts, and arbitrators to hear the same controversy.

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1. 371 U.S. 195 (1962).

2. 353 U.S. 448 (1957).

3. *In re* Green, 369 U.S. 689 (1962); Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959); Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383, 399 (1951).

II. SMITH V. EVENING NEWS ASS'N IN THE MICHIGAN COURTS

The plaintiff, a building maintenance employee and assignee of the claims of forty-nine other employees, sued his employer in the Wayne County Circuit Court in Michigan for failing to abide by a collective bargaining agreement negotiated with the Newspaper Guild of Detroit.[4] The agreement provided that " 'There shall be no discrimination against any employee because of his membership or activity in the Guild.' "[5] Members of another union struck the employer, and nonunion, white-collar personnel were fully compensated even though unable to work.[6] Many members of the Newspaper Guild, including the plaintiff, requested work during the strike but were refused by the employer.

The plaintiff, because of the six-month statute of limitations controlling unfair labor practice charges, was not entitled to NLRB adjudication and was forced to seek a remedy through the courts for the alleged contract violation.[7] Why a state court was preferred to a federal court is not indicated. Suing for loss of pay, the plaintiff contended that the employer had violated the agreement by discriminating, contrary to contract, against union employees. The employer claimed that the discrimination constituted an unfair labor practice, regulated exclusively by the NLRB. Agreeing with the employer's defense that a state court is legally prevented from adjudicating a breach of contract suit if it concerns an unfair labor practice, the trial court dismissed the case.

On appeal the plaintiff, claiming that Congress had not intended the doctrine of pre-emption to apply to all labor law problems,[8] cited as authority *United Construction Workers v. Laburnum Construction Corp.*[9] and *UAW v. Russell.*[10] In these cases, the Supreme Court had ruled that a state court may properly award damages for union violence even though an unfair labor practice had been committed. The Court permitted recovery because persons injured by a tort traditionally are entitled to seek relief in a state court; furthermore, federal regulation of labor-management affairs would not be hampered by allowing such actions. Foreseeing a threat to the uniform regulation of labor-management relations, Justice Douglas dissented in both cases.[11]

4. 371 U.S. at 195-96.
5. Smith v. Evening News Ass'n, 362 Mich. 350, 351, 106 N.W.2d 785, 786 (1961).
6. *Ibid.*
7. 371 U.S. at 197 n.5.
8. 362 Mich. at 353-54, 106 N.W.2d at 786-87.
9. 347 U.S. 656 (1954).
10. 356 U.S. 634 (1958).
11. 356 U.S. at 647; 347 U.S. at 669. In *Russell,* Justice Douglas joined in Chief Justice Warren's dissenting opinion.

Acknowledging difficulty in determining whether Congress exercised its power of pre-emption and "vested exclusive jurisdiction in the National Labor Relations Board,"[12] the Michigan Supreme Court, relying on and quoting from *San Diego Building Trades Council v. Garmon*,[13] ruled that " 'When an activity is arguably subject to section 7 or section 8 of the [Taft-Hartley] act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted.' "[14] In *Garmon*, the defendant union peacefully picketed the employer, thereby violating the tort provisions of the California Civil Code. Justice Frankfurter, deciding that the federal interest in controlling unfair labor practices was not a "peripheral concern,"[15] held that state and federal courts are not free to regulate conduct "arguably subject to § 7 or § 8 . . . ."[16] Justice Frankfurter limited state court jurisdiction to "violence and imminent threats to the public order."[17] The Michigan Supreme Court quoted from Justice Harlan's concurring opinion in *Garmon*,[18] which also relied on *Laburnum* and *Russell*.[19] Justice Harlan in *Garmon* said:

> In determining pre-emption in any given labor case, I would adhere to the *Laburnum* and *Russell* distinction between damages and injunctions and to the principle that state power is not precluded where the challenged conduct is neither protected nor prohibited under the federal Act. *Solely because it is fairly debatable whether the conduct here involved is federally protected, I concur in the result of today's decision.*[20]

He did not agree with Justice Frankfurter and would not limit state jurisdiction to periods of violence. Rather, he asserted that if the activity is federally protected, state courts cannot regulate it. In *Russell* and *Laburnum*, Justice Harlan decided that the violence was not federally protected so that it "could then only have been classified as prohibited or 'neither protected nor prohibited.' "[21] In *Garmon*, he indicated that he would permit, in a state court, a tort suit, though the activity also constituted an unfair labor practice, if such activity is neither federally protected nor prohibited. He expressed concern

12. 362 Mich. at 355, 106 N.W.2d at 787.
13. 359 U.S. 236 (1959).
14. 362 Mich. at 358, 106 N.W.2d at 789.
15. 359 U.S. at 243.
16. *Id.* at 245.
17. *Id.* at 247.
18. In fact, most of the opinion of the Michigan Supreme Court is a quotation from *Garmon*.
19. 362 Mich. at 360-64, 106 N.W.2d at 790-93.
20. 359 U.S. at 254. (Emphasis added.)
21. *Id.* at 251.

because the majority opinion in *Garmon* would cut "deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct . . . ."[22]

The Michigan Supreme Court in *Evening News* concluded:

> Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the *plain* mandate of Congress—that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices. If the rule were otherwise, then Federal and State courts could assume jurisdiction over all types of unfair labor practices under the guise of enforcing the terms of the collective bargaining agreement, provided the agreement contains terms governing such matters, and thereby circumvent the *plain* mandate of Congress.[23]

The United States Supreme Court in *Garmon* expressed a desire to limit the jurisdiction of state courts. Justice Frankfurter stated:

> When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting . . . [unless] the activity regulated was merely a peripheral concern of the Labor Management Relations Act . . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.[24]

Acknowledging a possible unfair labor practice violation, Justice Frankfurter felt that state and federal courts "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[25] Justice Frankfurter would deny damages under state law even where the NLRB declines to assert jurisdiction; the awards in *Laburnum* and *Russell* were upheld only because of "compelling state interest . . . in the maintenance of domestic peace. . . ."[26]

It seems that the Michigan Supreme Court in *Evening News* was reversed by the United States Supreme Court merely because of a change in personnel.

III. LUCAS FLOUR, DOWD BOX, AND ATKINSON

In deciding *Smith v. Evening News Ass'n*,[27] Justice White relied

22. *Id.* at 253.
23. 362 Mich. at 364-65, 106 N.W.2d at 793. (Emphasis added.)
24. 359 U.S. at 243-44. (Footnotes omitted.)
25. *Id.* at 245.
26. *Id.* at 247.
27. 371 U.S. 195 (1962).

on *Local 174, Teamsters Union v. Lucas Flour Co.*,[28] *Charles Dowd Box Co. v. Courtney*,[29] and *Atkinson v. Sinclair Refining Co.*,[30] decisions made by the United States Supreme Court after the Michigan Supreme Court published its opinion. These pertinent decisions, as well as others, will now be reviewed.

In *Dowd Box*, the Supreme Court limited its opinion to a consideration of whether the Taft-Hartley Act divests "a state court of jurisdiction over a suit for violation of a contract between an employer and a labor organization."[31] After settling a number of contractual problems, a "Stipulation" was signed by union and employer representatives. The employer publicized the "Stipulation" to employees, but later changed his mind and reverted to the terms of the expired agreement because "its bargaining representatives had acted without authority in negotiating the new agreement, and . . . the union had been so advised before any contract had actually been concluded."[32] As a result, the union, in a Massachusetts court, sought to establish "a valid and binding collective bargaining agreement. . . ."[33] Claiming federal pre-emption via section 301 of the Taft-Hartley Act, the employer questioned the jurisdiction of the state court. The Massachusetts Supreme Judicial Court, favoring concurrent jurisdiction, decided that neither section 301 nor *Lincoln Mills* vested exclusive jurisdiction in federal courts over contract actions and that "In the absence of a clear holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own courts. . . ."[34]

Agreeing with the Massachusetts court, the United States Supreme Court could not find in section 301 a grant of exclusive jurisdiction to federal courts.[35] According to Justice Stewart, who wrote the opinion in *Dowd Box, Lincoln Mills* was a mandate to federal courts to hear claims arising under section 301.[36] He said:

> Such a construction [exclusive federal jurisdiction] of § 301(a) would also disregard the particularized history behind the enactment of that provision of the federal labor law. The legislative history makes *clear* that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations.

28. 369 U.S. 95 (1962).
29. 368 U.S. 502 (1962).
30. 370 U.S. 238 (1962).
31. 368 U.S. at 503.
32. *Id.* at 504.
33. *Ibid.*
34. Courtney v. Charles Dowd Box Co., 341 Mass. 337, 339, 169 N.E.2d 885, 887 (1960).
35. 368 U.S. at 506.
36. *Id.* at 507.

> Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.[37]

Recognizing a possible violation of the employer's obligation to bargain in good faith, Justice Stewart referred to section 8(a)(6).[38] Apparently, the employer violated section 8(a)(5) by refusing to abide by the terms of the "Stipulation," by failing to complete the preliminary agreement,[39] and by not appointing management representatives with authority to negotiate a binding agreement.[40]

Justice Stewart in *Dowd Box* acknowledged the applicability of the Norris-LaGuardia Act to a contract action controlled by federal law but brought in a state court had not been answered by the Supreme Court.[41] Furthermore, "whether there might be impediments to the free removal to a federal court of such a suit" was not considered.[42] The union in court sought recognition of the temporary agreement, damages, an accounting, and "an order enjoining the company from terminating or violating [the "Stipulation"] . . . ."[43] The trial court "declared the agreement to be valid, and ordered the payment of specific amounts to members of the class for whom the suit was brought."[44] Since an injunction is not mentioned, presumably one was not issued. Furthermore, the Court did not toy with the problem of an arbitrator making awards in controversies which are also unfair labor practices. Although the Supreme Court has "blessed" arbitration,[45] the question whether an arbitrator may properly make an award if an unfair labor practice occurs remains unanswered.[46]

Since it concerned both an unfair labor practice and a contract, *Dowd Box* was considered by Justice White in *Evening News* to be

37. *Id.* at 508-09. (Emphasis added.) Is the legislative history really "clear"?
38. *Id.* at 510-11.
39. H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).
40. Great Southern Trucking Co. v. NLRB, 127 F.2d 180 (4th Cir. 1942).
41. 368 U.S. at 514 & n.8.
42. *Id.* at 514 n.8.
43. *Id.* at 504.
44. 341 Mass. at 338, 169 N.E.2d at 886.
45. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 n.2 (1957). The three 1960 *Steelworker* cases protecting the arbitration process still leave open the question whether the arbitrator is authorized to make a decision under the collective bargaining agreement.
46. In Mastro Plastic Corp. v. NLRB, 350 U.S. 270, 282-83 (1956), the United States Supreme Court did indicate that the "strike and lockout clauses (and the claim of an unfair labor practice) are natural adjuncts of an operating policy aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships. The main function of arbitration under the contract is to provide a mechanism for avoiding similar stoppages due to disputes over the meaning and application of the various contractual provisions." See also Dunau, *Contractual Prohibition Of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52 (1957); Note, 69 HARV. L. REV. 725 (1955).

authority for the proposition that courts can deal with contractual violations which are unfair labor practices.[47] Since he did not disagree with Justice White in *Evening News,* Justice Stewart, like Justice Harlan in *Garmon,*[48] did not consider this a disadvantage and willingly accepted concurrent NLRB and court jurisdiction.

In *Local 174, Teamsters Union v. Lucas Flour Co.,*[49] an employee was discharged for inefficiency. Protesting the discharge, the union struck the employer for eight days. The discharge was later arbitrated, and the Board of Arbitration favored the employer. Meanwhile, the employer brought suit in a Washington court to recover damages inflicted by the strike. The Washington court, applying state contract law, awarded damages to the employer.[50] The court doubted that the strike constituted an unfair labor practice violation. In *Black v. Cutter Laboratories,*[51] the United States Supreme Court had permitted state contract law to prevail over federal law when an employee was discharged for either his Communist sympathies or the employer's antiunion bias. *Black,* decided before *Lincoln Mills,* thus appears to stand for the proposition that state contract law governs even though an unfair labor practice is involved. On the other hand, *Lincoln Mills* indicates that federal contract law must be fashioned and applied. The Court in *Dowd Box* did not consider this question.

Justice Stewart, writing the majority opinion for the Supreme Court in *Lucas Flour,* without mentioning *Black,* followed the rationale expressed in *Lincoln Mills* and said that "there was no claim of any variance in relevant legal principles as between the federal law and that of Massachusetts,"[52] but that "incompatible doctrines of local law must give way to principles of federal labor law"[53] and state courts are required to follow federal law in a section 301 proceeding. Justice Stewart favored federal law and uniform regulation in order to minimize "disruptive influence upon both the negotiation and administration of collective agreements."[54] Although the collective agreement did not contain a no-strike clause, Justice Stewart, in order to invoke section 301, implied a union promise not to strike. Justice Stewart plunged the needle of federalism deeper, preferring federal regulation over agreements to arbitrate. He concluded:

47. 371 U.S. at 197.
48. 359 U.S. at 250-51.
49. 369 U.S. 95 (1962).
50. Lucas Flour Co. v. Teamsters Union, 57 Wash. 95, 356 P.2d 1 (1960).
51. 351 U.S. 292 (1956). In fact, the arbitrator had ruled in this case that the discharge of the employee was based on an antiunion motive, an unfair practice violation. See 15 Lab. Arb. 431 (1950).
52. 369 U.S. at 102.
53. *Ibid.* (Footnote omitted.)
54. *Id.* at 103.

> What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration. Nor is it to suggest that there may not arise problems in specific cases as to whether compulsory and binding arbitration has been agreed upon, and, if so, as to what disputes have been made arbitrable. But no such problems are present in this case. The grievance over which the union struck was, as it concedes, one which it had expressly agreed to settle by submission to final and binding arbitration proceedings. The strike which it called was a violation of that contractual obligation.[55]

Justice Black, who had concurred in *Dowd Box*, dissented in *Lucas Flour* because the union had not contractually relinquished its right to strike—*i.e., to* imply an agreement not to strike was in poor legal taste.[56] Justice Black did not question the applicability of federal law in a state court.

Although the Taft-Hartley Act seemingly promotes voluntary arbitration, the decision by Justice Stewart is another step in the direction of compulsory arbitration. By implying an agreement not to strike where arbitration is provided for, unions must rely on the arbitrator for the settlement of disputes rather than the use of economic pressure. Justice Black recognized this in his dissent.[57]

The majority opinion in *Lucas Flour* creates as many problems as it purports to solve. Can a state court adjudicate a controversy when the federal law is not yet established? Does *Lincoln Mills* require federal judges to establish the controlling substantive law or are state courts permitted to decide federal policy? What if the established federal law affects indirectly the problem presented to a state court—can a state court hear the squabble? When will a no-strike agreement be implied?

In *Sinclair Refining Co. v. Atkinson*,[58] the Court considered the Norris-LaGuardia Act[59] containment of labor injunctions together with section 301. The Norris-LaGuardia Act was ushered in at a time when unions were weak and many federal judges irresponsibly granted injunctions.[60] When Taft-Hartley was enacted in 1947, unions were powerful and federal judges used the injunction sparingly. Congress, however, failed to indicate in section 301 if the injunction sought by an employer was again legally stylish. The Norris-LaGuardia Act was specifically amended as to those situations in which

55. *Id.* at 106. (Footnote omitted.)
56. *Id.* at 106-10.
57. *Id.* at 110.
58. 370 U.S. 195 (1962). See 16 VAND. L. REV. 245 (1962).
59. 47 Stat. 71 (1932), 29 U.S.C. § 107 (1958).
60. FRANKFURTER & GREEN, THE LABOR INJUNCTION (1930), especially ch. 1 at 517, ch. 5.

the NLRB requests an injunction and as to other situations.[61] The question awaiting answer in *Atkinson* was whether section 301 impliedly amended section 4 of the Norris-LaGuardia Act.[62]

In *Atkinson*, the employer agreed to arbitrate disputes "'regarding wages, hours or working conditions. . . .'"; the union in turn faithfully promised not to strike for "'any cause which is or may be the subject of a grievance. . . .'"[63] Violating the agreement, the union struck nine times during a nineteen month period. The employer, claiming irreparable injury, sought an injunction in a federal court to prevent the strikes. The union, latching onto the Norris-LaGuardia Act, claimed that an injunction is improperly issued in a "labor dispute." Agreeing with the district court[64] and the Seventh Circuit Court of Appeals,[65] the Supreme Court ruled that section 13 of the Norris-LaGuardia Act forbade labor injunctions while section 2 protected the right to strike.

Justice Black, writing the majority opinion in *Atkinson*, concluded that Taft-Hartley failed to clip the reach of section 4 of the Norris-LaGuardia Act since section 301 did not specifically amend it and the NLRB was expressly authorized to seek injunctions in other specific situations. According to Justice Black, this signalled a congressional desire to withhold injunctions sought by private persons.[66]

With respect to the legal impact of *Atkinson* on *Evening News*, the employer in the former claimed violations of the agreement to arbitrate and not a series of unfair labor practices. It is doubtful whether the strikes could have been validly classified as unfair labor practices.[67] Apparently, the employer's only remedy in *Atkinson* was to invoke section 301 and seek damages and/or an injunction. Yet Justice White in *Evening News* cited *Atkinson* as authority for concurrent NLRB and court jurisdiction.

Prior to *Lincoln Mills* there was little to indicate that section 301 authorized the labor injunction in federal courts. In *Lincoln Mills*, Justice Douglas decided that the Norris-LaGuardia Act did not pro-

61. 61 Stat. 149 (1947), 29 U.S.C. §§ 160 (h), (j) (1958); 61 Stat. 149 (1947) (amended by 73 Stat. 544 (1959), as amended, 29 U.S.C. § 160 (1) (Supp. III, 1962)); 61 Stat. 155 (1947), as amended, 29 U.S.C. 178 (1958); 73 Stat. 537 (1959), 29 U.S.C. § 186 (Supp. III, 1962).

62. In A.H. Bull S.S. Co. v. Seafarers Int'l Union, 250 F.2d 326 (2d Cir. 1957), the Supreme Court denied certiorari when a temporary injunction was requested. 355 U.S. 932 (1958).

63. 370 U.S. at 197.

64. Sinclair Ref. Co. v. Atkinson, 187 F. Supp. 225 (N.D. Ind. 1960).

65. Sinclair Ref. Co. v. Atkinson, 290 F.2d 312 (7th Cir. 1961).

66. 370 U.S. at 207-10.

67. The district judge said: "There is nothing in the record at this point to indicate that the events claimed to constitute a violation of the contract also involved either protected or prohibited activity. But even the presence of such activities would not give preferential jurisdiction to the Board and oust that of the courts . . . ." 187 F. Supp. at 227.

hibit an injunction to force an employer to abide by an agreement to arbitrate.[68] The formidable front of the Norris-LaGuardia Act was broken on a large scale.[69]

Lincoln Mills was later implemented by *United Steelworkers v. American Manufacturing Co.*,[70] *United Steelworkers v. Warrior & Gulf Navigation Co.*,[71] and *United Steelworkers v. Enterprise Wheel & Car Corp.*,[72] Supreme Court decisions which approved court orders forcing employers to arbitrate or to abide by an award. Had an order been sought in *Atkinson* to force arbitration, the decisions cited would support an employer's request for injunctive help. Justice Black in *Atkinson* said that the restraining orders approved in *Lincoln Mills, American Manufacturing Co., Warrior,* and *Enterprise* did not hamper the type of activity freed from injunction by the Norris-LaGuardia Act. Rather, the injunctions implemented the arbitration process favored by Congress in the Taft-Hartley Act. In fact, in *Lincoln Mills, American Manufacturing Co., Warrior,* and *Enterprise,* injunctions were aimed at employers rather than unions. In *Atkinson,* Justice Black denied relief because "an injunction against work stoppages, peaceful picketing or the nonfraudulent encouraging of those activities . . . ." would frustrate congressional intent expressed in section 4 of the Norris-LaGuardia Act.[73] Evidently, he felt that the Norris-LaGuardia Act protects unions engaging in peaceful economic coercion from injunction, and that a collective bargaining contract does not change congressional intent. His opinion means that injunctions cannot be issued against unions in a federal court, except for violence or fraud, while the employer is not similarly favored.

By ignoring the problem of statutory accommodation, Justice Black chose to disregard an important factor. Employers agreeing to arbitrate disputes recognize the inevitability of industrial conflict and the need to provide a forum to adjust differences. It is unfair to restrict the employer to a suit for damages if it is an inadequate remedy. In *Atkinson,* the NLRB could not hold the union responsible for violating section 8(b). Therefore, not even the NLRB could request an injunction to stop the strikes. The decision by Justice Black fails to promote collective bargaining. If a union cannot be forced to abide by a contract, employers will seek to circumvent good faith bargaining or possibly look for help in a state court.

Justice Breman, dissenting in *Atkinson,* felt that *Lincoln Mills,*

68. 353 U.S. at 457-59.

69. Actually, the anti-injunction provisions had been disregarded in other cases. See Allen Bradley Co. v. International Bhd. of Elec. Workers, 325 U.S. 797 (1945) and Syres v. Oil Workers Union, 350 U.S. 892 (1955).

70. 363 U.S. 564 (1960).

71. 363 U.S. 574 (1960).

72. 363 U.S. 593 (1960).

73. 370 U.S. at 212.

American Manufacturing Co., Warrior, and *Enterprise* authorized the use of the injunction.[74] Finding nothing in section 301 to limit the choice of remedies, he advocated an accommodation of the Norris-LaGuardia Act to section 301.[75] He believed that *Lincoln Mills* opened Pandora's box and determined that, in the interest of equality, injunctions should be issued against unions ignoring a collective bargaining contract. As indicated, Justice Black accepted the failure to amend the Norris-LaGuardia Act as evidence that Congress wished to maintain the *status quo.*[76] Justice Brennan on the other hand reasoned as follows:

> Sound reasons explain why repeal of Norris-LaGuardia provisions, acceptable in other settings, might have been found ill-suited for the purpose of § 301. And those reasons fall far short of a design to preclude absolutely the issuance under § 301 of any injunction against an activity included in § 4....[77]
>
> [Although Congress specifically modified the effect of the Norris-LaGuardia Act in sections 10(h), 208(b), and 302(e) of the Taft-Hartley Act, the problems created under section 301 are different.] The Congress understandably may not have felt able to predict what provisions would crop up in collective bargaining agreements . . . . The consequences of repealing the anti-injunction provisions in this context would have been completely unknowable, and outright repeal, therefore, might well have seemed unthinkable. Congress, *clearly,* had no intention of abandoning wholesale the Norris-LaGuardia policies in contract suits; *but it does not follow that § 301 is not the equal of § 4 in cases which implicate both provisions.*[78]
>
> It follows that to construe the Conference Committee's elimination of the House repeal as leaving open the possibility of judicial accommodation is at least as reasonable as to conclude that Congress, by its silence, was directing the courts to disregard § 301 whenever opposition from § 4 was encountered.[79]

Justice Brennan did not urge complete abandonment of the Norris-LaGuardia Act in section 301 disputes if "breaches of private contracts do not threaten any additional public policy," such as where a "binding agreement to arbitrate" is not agreed to. However, "insistence upon strict application of Norris-LaGuardia to a strike over a dispute which both parties are bound by contract to arbitrate threatens a leading policy of our labor relations law . . . ."[80]

74. *Id.* at 216 & n.1.
75. *Id.* at 218-19.
76. *Id.* at 204.
77. *Id.* at 221. Justice Black was equally certain of his position. He states, "If Congress had intended that § 301 suits should also not be subject to the anti-injunction provisions . . . it *certainly* seems likely that it would have made its intent known . . . ." *Id.* at 204. (Emphasis added.)
78. *Id.* at 222-23. (Emphasis added.)
79. *Id.* at 224. (Footnotes omitted.)
80. *Id* at 225.

In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*,[81] the Supreme Court, relying on congressional intent, had decided that an injunction was proper to force unions to submit disputes to the Railroad Adjustment Board, irrespective of the Norris-LaGuardia Act. Justice Black decided in *Atkinson* that the Railway Labor Act provides for compulsory arbitration "as the *exclusive* means of final determination of such 'minor' disputes,"[82] while section 301 of the Taft-Hartley Act does not require compulsory arbitration and other means of legal redress are provided. On this basis, he distinguished the two cases. It seems unlikely that Justice Black meant that the employer could turn to the NLRB for help, since, as already indicated, there is nothing to show a violation of section 8(b). The employer's recourse was to sue for damages or request an order to force arbitration.

In *NLRB v. Radio & Television Broadcast Engineers Union*,[83] the Supreme Court had ruled that the NLRB must determine which of two unions engaged in a jurisdictional dispute is entitled to the disputed work. Justice Black, writing for a unanimous Court, decided that Congress intended to provide "an effective compulsory method of getting rid of what were deemed to be the bad consequences of jurisdictional disputes."[84] In a word, Congress had provided for the compulsory arbitration of jurisdictional disputes. Would Justice Black permit the issuance of an injunction in a section 301 suit if the contract violation involved jurisdictional warfare forbidden by section 8(b)(4)? If, as the preceding analysis suggests, the distinction between *Chicago River* and *Atkinson* was the determination by Congress that there must be compulsory mediation under the Railway Labor Act, he might well do so under Taft-Hartley.

Justice Brennan, on the other hand, felt that *Chicago River* clearly expressed the Supreme Court position "that there 'must be an accommodation . . . so that . . . the . . . purpose in the enactment of each [law] is preserved.' "[85] Based on his interpretation of *Chicago River*, Justice Brennan felt that an injunction was proper in *Atkinson* even though Congress had not spoken clearly concerning the remedies available under section 301.

It can be argued, with equal vigor, that Congress was uncertain concerning, or failed to consider adequately, the meaning of section 301.[86] Attempting to glean congressional intent, a time-honored

81. 353 U.S. 30 (1957).
82. 370 U.S. at 211. (Emphasis added.)
83. 364 U.S. 573 (1961).
84. *Id.* at 582.
85. 370 U.S. at 217. (Footnote omitted.)
86. Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 637 (1959).

judicial occupation, is often hazardous. It seems that judicial construction might be more sound if judges relied less on ascertaining congressional intent in doubtful cases and placed greater reliance upon public need. In many attempts made to determine congressional intent, I am reminded of the currently popular parody entitled "The Ballad of Oh Boy." My reaction to judicial construction is often, "oh boy"!

In *Chicago River, Lincoln Mills, Warrior, Enterprise,* and *American Manufacturing Co.,* the Supreme Court decided that Congress intended to support public and private arbitration, accommodating the Norris-LaGuardia Act to the Railway Labor and Taft-Hartley Acts. In *Atkinson,* the Supreme Court ignored the arbitration process in order to protect the right of a union to strike. Congress, according to the Supreme Court, did not intend to reinstate the use of the injunction even though a crippling blow was dealt to arbitration. Justice Black would leave it to Congress to make any necessary changes in the Norris-LaGuardia Act. Justice Douglas in *Lincoln Mills*[87] and *American Manufacturing Co.*[88] used a *"quid pro quo"* rationale: an employer agrees to arbitrate in exchange for a union's promise not to strike. The Supreme Court in these cases discovered a congressional intent to force an employer to abide by his agreement to arbitrate, to the benefit of the unions. But the *"quid pro quo"* is lacking in *Atkinson* because the employer cannot force a union to refrain from striking. In the interest of mutuality and fairness, it seems that both factions should be forced to live up to their agreements if the public interest factor is properly weighed. It is unreasonable to assume that Congress, to force an employer to arbitrate, intended an accommodation of the Norris-LaGuardia Act to section 301, but that a similar accommodation was not intended if a union ignores an existing agreement. Such an approach does not maximize industrial peace. Justice Douglas joined Justice Brennan in his dissent in *Atkinson.*

There is irony in the position taken by some of the Justices. Although the majority of Justices agreed with Douglas in *Lincoln Mills* and *American Manufacturing Co.,* his *"quid pro quo"* rationale, evidently, was not taken too seriously; *Atkinson* points to this conclusion. Justice Brennan, in a concurring opinion in *American Manufacturing Co.,* did not accept the *"quid pro quo"* reasoning advanced by Justice Douglas.[89] But in *Atkinson,* Justice Brennan impliedly accepts the *"quid pro quo"* thesis by favoring the issuance of an injunction.[90]

Justice Brennan in *Atkinson* considered another factor ignored by

87. 353 U.S. 448, 455 (1957).
88. 363 U.S. at 567.
89. *Id.* at 573.
90. 370 U.S. at 218-19.

Justice Black. Since federal courts must fashion a body of federal law to control collective agreements and state courts are obliged to apply federal law, can a state court issue an injunction when a union violates its contract?[91]

In *McCarroll v. Los Angeles County District Council*,[92] Judge Traynor of the California Supreme Court decided that a state court may properly issue an injunction restraining a strike which does not violate the federal unfair labor practice provisions.[93] (It has been noted that the union conduct in *Atkinson* probably did not constitute an unfair labor practice.[94]) Judge Traynor said:

> Thus the purpose behind section 8(d) does not encompass strikes whose aim is not to bring about a change in contractual relations, such as a strike to compel an employer to comply with his contract or to protest conduct wholly ungoverned by the contract. A union may of course bind itself not to engage in a strike . . . but it is only with strikes used as a weapon in the bargaining process that Congress has in 8(d) shown sufficient concern to make them an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board.[95]

Judge Traynor evidently felt that if an unfair labor practice strike was in progress, the NLRB would be entitled to exclusive jurisdiction. The United States Supreme Court in *Evening News* did not agree.

Judge Traynor examined the federal law regulating collective agreements and could find nothing in section 301 granting exclusive jurisdiction to federal courts.[96] Favoring concurrent state and federal court jurisdiction in disputes arising under section 301, he did decide that state courts must apply the federal law.[97] This position was later upheld by the United States Supreme Court in *Dowd Box* and *Lucas Flour*. Discussing the injunction, Judge Traynor took the position later adopted by Justice Black in *Atkinson*. Referring to *Lincoln Mills* and federal courts, he said that "the Norris-LaGuardia Act was never intended to prohibit specific enforcement of agreements to arbirtate, the Supreme Court has not suggested otherwise; strike injunctions clearly were intended to fall under the ban of the act."[98] But the state courts applying federal laws are not bound by the Norris-LaGuardia Act, according to Judge Traynor, and cannot be compelled to adopt federal remedies. Judge Traynor, in applying a state remedy,

91. *Id.* at 226-27.
92. 49 Cal. App. 2d 45, 315 P.2d 322 (Dist. Ct. App. 1957), *cert. denied*, 355 U.S. 932 (1958).
93. 315 P.2d at 325-26.
94. See note 67 *supra*.
95. 315 P.2d at 328.
96. *Id.* at 329.
97. *Id.* at 330.
98. *Id.* at 331.

did not specifically categorize Norris-LaGuardia as a procedural law; but neither did he tag the act as substantive law.[99] And he could find nothing which would frustrate the federal law if an injunction was granted.

Although section 301 was not considered in *Weber v. Anheuser-Busch, Inc.*,[100] the Supreme Court unanimously agreed that a state court improperly granted an injunction to end conduct constituting an unfair labor practice. In *UAW v. Wisconsin Employment Relations Board*,[101] the Supreme Court held that state court injunctions were proper if a tort had been committed. *McCarroll* was decided on the basis of a contract, and injunctive aid was permitted by the California Supreme Court; Judge Traynor, however, carefully pointed out that an unfair labor practice had not been committed.

On January 21, 1963, the United States Supreme Court once again considered the propriety of an injunction issued by a state court.[102] Although a contract violation was not claimed, the Court nullified a state court injunction ending union picketing of a nonunion contractor because there was "at least an arguable violation of section 8(b) . . . ."[103] Even though the picketing may be contrary to a state right-to-work law, the federal interest is paramount, according to the Supreme Court.

Justice Brennan in *Atkinson* believed that Justice Black and *McCarroll* indicated that state law controls the injunction in a state court. Fearing damage to the uniformity of collective bargaining law, Justice Brennan said:

> So long as state courts remain free to grant the injunctions unavailable in federal courts, suits seeking relief against concerted activities in breach of contract will be channeled to the States whenever possible. Ironically, state rather than federal courts will be the preferred instruments to protect the integrity of the arbitration process . . . .[104]

Actually, Justice Black did not discuss whether a state court is free to apply the state law regulating injunctions in section 301 disputes.

IV. Smith v. Evening News Ass'n and the United States Supreme Court

Justice White, conceding that the employer violated section 8(a), was unable to find an exclusive grant of jurisdiction to the NLRB.[105]

99. Comment, *Injunction in State Court Against Breach of Collective-Bargaining Agreement*, 10 Stan. L. Rev. 575, 579-80 (1958).
100. 348 U.S. 468 (1955).
101. 351 U.S. 266 (1956).
102. Local 438, Gen. Laborers Union v. Curry, 52 L.R.R.M. 2188 (1962).
103. *Id.* at 2189.
104. 370 U.S. at 226.
105. Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962).

As a result, a court is authorized to adjudicate an unfair labor practice if a contract is breached. Justice White pointedly refused to permit concurrent NLRB and court jurisdiction in all controversies. Adopting an *ad hoc* approach, frequently more sensible than trying to establish a firm rule, Justice White said:

> If . . . there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them, in our view, and the National Labor Relations Board is in accord.[106]

Submitting an *amicus curiae* brief in behalf of the NLRB, Solicitor General Cox took the position "that ousting the courts of jurisdiction under § 301 in this case would not only fail to promote, but would actually obstruct, the purposes" of the Taft-Hartley Act.[107] Why "the purposes" of the Taft-Hartley Act would not be obstructed in *Evening News* was not specifically pinpointed. Since an unfair labor practice charge was not made within six months, presumably justice would be obstructed if the plaintiff was denied access to the courts.

It is interesting to speculate why the NLRB chose to have its viewpoint made known. Since the NLRB usually decides whether an unfair labor practice is committed, its policy is known and an *amicus curiae* brief is unnecessary. In *Evening News*, the controversy originated in a state court so that the NLRB decided to make its opinion known. But why did the Board favor concurrent NLRB and court jurisdiction? Was the Board concerned with social justice (because of the expiration of the six-month period)? Or was the Board interested in reducing its case load by providing another forum?

The thrust of *Evening News* is inconsequential if read to permit court adjudication only when the six-month statutory period of limitations prevents access to the NLRB. If Justice White intended to limit court intervention, and such an interpretation is possible, *Evening News* will have little impact on the exclusive jurisdiction of the NLRB. It seems, however, that Justice White favored concurrent NLRB and court jurisdiction unless "serious problems . . . arise . . . ." If I interpret Justice White's opinion correctly, *Evening News* will reduce the number of unfair labor practice charges heard by the NLRB and forum-shopping will mount. An important reason for creating the NLRB was to minimize judicial intervention and permit experts to deal with labor problems.[108] In addition section 301, which

106. *Id.* at 197-98. (Footnote omitted.)
107. 371 U.S. at 198 n.6.
108. S. REP. No. 105, 80th Cong., Part II, 1st Sess. 13 (1947) (Senator Thomas); S. REP. No. 573, 74th Cong., 1st Sess. 15 (1935).

promotes arbitration, is also designed to minimize court intervention. Justice White in *Evening News* obviously decided that courts are equally competent to deal with labor problems and ignored the risk of conflicting opinion (unless of "serious problems") and other procedural problems.

In *Atkinson,* Justice Brennan expressed the opinion that many controversies would be channeled into state courts where the Norris-LaGuardia Act is not applicable.[109] One means of limiting the exodus of section 301 controversies to state courts is to restrict the jurisdiction of *all* courts in conflicts satisfactorily resolved by the NLRB. Yet, in *Evening News* Justice Brennan agreed with the majority of justices and favored concurrent NLRB and court jurisdiction. Justice White in *Evening News* could find nothing in the Taft-Hartley Act which gave the NLRB an exclusive grant of jurisdiction. Although section 301 is free of any jurisdictional limitations, Justice White could have prevented court adjudication by turning to section 10(c).[110] Section 10(c) empowers the NLRB to make all unfair labor practice decisions, and an inference can be made that section 301 should not be used to dodge Board jurisdiction. In addition, section 303(b) permits suits for damages when the union violates section 8(b)(4).[111] Can this be taken as an indication that the only unfair labor practice suits in which Congress wished to permit court intervention were those covered in section 8(b)(4)?

It is possible for state and federal courts to award damages via section 301, while the NLRB, adjudicating the same controversy, might deny an infraction of section 8(b). Furthermore, courts and the NLRB often quarrel over the proper penalty even if they agree that an unfair labor practice is committed; some courts and geographic areas are more "hostile" to labor than other courts and the NLRB. Would exclusive NLRB jurisdiction serve the public better than regulation in different camps?

A collective agreement binds only the signatories, while section 8 applies to all employers and unions. Many agreements provide for the arbitration of disputes involving unfair labor practices. This leads to a conflict between the expressed national policy of promoting collective bargaining and arbitration with NLRB decision-making. Should one method of handling disputes be favored over the other?

In some situations, the NLRB refuses to adjudicate unfair labor practice charges which are contractually arbitrable.[112] If unions and/

109. Notes 91 & 104 *supra.*
110. 61 Stat. 147 (1947), as amended, 29 U.S.C. § 160(c). (1958).
111. 61 Stat. 158 (1947), 29 U.S.C. § 187 (1958).
112. Consolidated Aircraft Corp. v. NLRB, 141 F.2d 785 (9th Cir. 1944); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955); McDonnell Aircraft Corp., 109 N.L.R.B. 930.

or employers refuse to arbitrate, courts can force them to abide by their agreements.[113] If the contract does not provide for arbitration, courts and the NLRB can deal with unfair labor practices blanketed by an agreement. Where the unfair labor practice conduct is neither contractually controlled nor arbitrable, the aggrieved party can turn only to the NLRB for help. The NLRB, if an unfair labor practice charge is brought, is concerned only with whether section 8 is violated —it is not, for example, concerned with contract interpretation or the reasonableness of the action taken by an employer or union. An arbitrator, on the other hand, will look to the contract and determine if the penalty imposed on an employee is reasonable.[114]

Because of self-imposed monetary yardsticks, the NLRB refuses to hear unfair labor practice charges considered monetarily unimportant.[115] If a collective agreement provides for arbitration or the dispute is specifically controlled by contract, the NLRB monetary exclusion has little public impact. If the unfair labor practice is neither contractually controlled nor subject to NLRB jurisdiction, the aggrieved person cannot resort to any of the three forums discussed. In such a situation the public interest must be considered.

Desiring to avoid duplication and differences in laws, Justice Black, dissenting in *Evening News*, felt that courts should not be permitted to deal with unfair labor practices.[116] If the NLRB adequately deals with unfair labor practices, this position is well-founded. Solicitor General Cox's reason for favoring court intervention in *Evening News* may be valid, but this does not mean that another forum should be opened to hear unfair labor practice charges. Employers prefer judicial intervention and distrust arbitrators simply because arbitration tends to favor unions and employees. Much of the labor litigation since *Lincoln Mills* concerns an employer's refusal to arbitrate.[117]

(1954); Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951). I do not intend to imply that the NLRB has followed a "hands-off" approach in all cases.

113. See note 45 *supra*.

114. Kovarsky, *Discharges for Events Occurring Away From Work*, 13 LAB. L.J. 374 (1962).

115. CCH LABOR LAW COURSE 1963 at 1549-53 (13th ed. 1963).

116. 371 U.S. at 202. Justice Black stated: "One example is enough to show how Congress' policy of confining controversies over unfair labor practices to the Labor Board might well be frustrated by permitting unfair labor practice claimants to choose whether they will seek relief in the courts or before the Board. Section 10(b) of the Act provides that 'no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .' In contrast, the statute of limitations in Michigan covering contract suits like this is six years. The Court's holding thus opens up a way to defeat the congressional plan, adopted over vigorous minority objection, to expedite industrial peace . . . . Instead, by permitting suits like this . . . it is . . . highly probable that unfair labor practice disputes will hang on like festering sores . . . ." *Id.* at 202-03. (Footnotes omitted.)

117. Kovarsky, *Comment: The Enforcement of Agreements to Arbitrate*, 14 VAND. L. REV. 1105 (1961).

Many may also prefer court adjudication to NLRB processing, and *Evening News* permits employers to by-pass the NLRB under the thin disguise of contract enforcement. The three 1960 Supreme Court decisions favoring arbitration[118] spurred employers to the greater detailing of collective bargaining agreements, and *Evening News* provides additional incentive for contract enlargement as a means of circumventing NLRB control. A union, it is said, agrees not to strike in exchange for an employer's agreement to arbitrate disputes. Having more confidence in an arbitrator, whom they help select, than a judge, unions negotiating collective bargaining agreements seek to make as many disputes arbitrable as contractually possible. If the dispute is not arbitrable, union leaders seem to prefer NLRB adjudication to court intervention. In summation, unions prefer arbitration, NLRB adjudication, and court intervention in that order. Employers on the other hand seem to prefer judicial construction over NLRB adjudication and arbitration.

Although employers express a preference for the courts, section 303, curiously, is infrequently resorted to; employers seldom seek damages from unions responsible for violating section 8(b)(4). This may indicate that employers will use section 301 sparingly, even where unions violate the unfair labor practice provisions, because the employer is more interested in injunctive relief than damages. *Atkinson* prohibits an injunction in a federal court to halt a strike; unless the same prohibition applies to state courts, the position taken in *Evening News* signals a wholesale migration to state courts. Section 10(j) authorizes the NLRB to request an injunction when "any person has engaged in or is engaging in an unfair labor practice . . . ."[119] Under section 10(l), the NLRB is required to request an injunction when it is suspected that section 8(b)(4) and 8(e) are disregarded.[120] But because of the Norris-LaGuardia Act employers are not permitted to secure injunctions. If a state court is permitted to issue an injunction, then section 301 may be used as a procedural device to get around the Norris-LaGuardia ban. In *McCarroll,* Judge Traynor decided that the strike was not an unfair labor practice, so that a state court could properly issue an injunction. The propriety of issuing an injunction in a state court to stop a contractual unfair labor practice will have to be considered by the Supreme Court.

In the case of *In re Green,*[121] the Supreme Court ruled in a habeas

118. Steelworkers Union v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers Union v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers Union v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

119. 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(j) (1958).

120. 61 Stat. 149 (1947) (amended 73 Stat. 544 (1959), as amended, 29 U.S.C. § 1601(1) (Supp. III, 1962).

121. 369 U.S. 689 (1962).

corpus proceeding that a state court erroneously held an attorney in contempt for instructing members of a union that a state court cannot issue an injunction while an unfair labor practice charge is processed. Justice Douglas, writing the opinion, stated that "When an activity is 'arguably' subject to the National Board the States must defer to its 'exclusive competence,' 'if the danger of state interference with national policy is to be averted.' "[122] On the basis of a contract, *Evening News* permits court intervention. Justice Harlan, concurring in *Green*, believed that state courts, under *Dowd Box* and *Lucas Flour*, can adjudicate section 301 controversies even if "arguably" subject "to sections 7 or 8 of the National Labor Relations Act" and that *Garmon* does not control.[123] He also indicated that a state court properly invokes injunctive procedure when a union violates a collective agreement by striking.

Where an employer and union agree to arbitrate an unfair labor practice, three forums may be open. According to *Lincoln Mills* and the three 1960 *Steelworkers* cases, a union or employer can be forced to abide by an agreement to arbitrate. Although Justice White in *Evening News* limited his decision to whether a court properly awards damages where section 8 controls, it seems, by analogy, that nothing in the Taft-Hartley Act prevents an arbitrator from making an award. Unless there is a valid reason to deny jurisdiction, *Evening News* permits such a conclusion. Judge Magruder, considering a similar problem in *United Electrical Workers v. Worthington Corp.*, decided:

> [T]he arbitrators in the present controversy had jurisdiction over the allegation that the discharges were not for just cause under the contract, even though it be assumed . . . that the Union was also presenting an allegation of refusal to bargain before imposing a new condition of employment, which latter assertion may be a matter for exclusive cognizance by the NLRB. The majority decision of the arbitrators in fact passed only upon the wrongful discharge aspect of the case and turned aside the refusal to bargain aspect . . . .[124]

As already indicated, employees and unions favor arbitration over NLRB and court adjudication whereas employers prefer judicial determination, particularly if the injunction is available. Depending on which side seeks to enforce the agreement, arbitration or court adjudication will be preferred, and the NLRB will in either instance be relegated to second slot. Is this the result Congress intended when enacting the Wagner and Taft-Hartley Acts? Disregarding congressional intent, is the by-passing of the NLRB desirable? When enacting the federal law, Congress, intending to place courts in a back seat,

122. *Id.* at 693.
123. *Id.* at 694.
124. 236 F.2d 364, 370 (1st Cir. 1956). See discussion in note 46 *supra*.

promoted arbitration and NLRB determination. Unions, if my analysis is correct, will tend to follow the congressional mandate and seek arbitration or prefer unfair labor practice charges while employers, because of *Evening News*, will rely on the courts. If it is decided that state courts can issue injunctions against unions who violate an agreement and section 8(b), then employers will avoid the federal courts as well as the NLRB.

The employer's second defense in *Evening News* was lifted from *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*[125] Here a union, in behalf of its members, sued an employer who failed to compensate employees according to their agreement. Section 301(a) permits "Suits for violation of contracts between an employer and a labor organization . . . or between such organizations . . . ." Justice Frankfurter decided that section 301 only gave "procedural directions to the federal courts"[126] and that "To turn § 301 into an agency for working out a viable theory of the nature of a collective bargaining agreement smacks of unreality. Nor does it seem reasonable to view that section as a delivery into the discretionary hands of the federal judiciary, finally of this Court, of such an important . . . field . . . ."[127] Recognizing the conflicting problem raised—union control versus the presentation of individual grievances[128]—Justice Frankfurter concluded:

> Considering the nature of a collective bargaining contract, which involves the correlative rights of employer, employee *and* union, we might be disposed to read § 301 as allowing the union to sue in this case. With due regard to the constitutional difficulties which would be raised, and in view of the fact that such an interpretation would bring to the federal courts an extensive range of litigation heretofore entertained by the States, we conclude that Congress did not will this result. There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts . . . intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, *terms peculiar in the individual benefit which is their subject matter* and which, when violated, give a cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts . . . .[129]

Justice Douglas dissented in *Westinghouse* because:

125. 348 U.S. 437 (1955).

126. *Id.* at 443. This was later reversed in *Lincoln Mills* by Justice Douglas who declared that § 301 created substantive rights.

127. *Id.* at 456. This was also reversed by *Lincoln Mills* in which power was granted to the federal judges to fix a body of contract law governing collective agreements.

128. 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

129. 348 U.S. at 459-60. (Emphasis added.) (Footnote omitted.)

> We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving the construction and enforcement of the collective bargaining agreement. Individual contracts of employment result from each collective bargaining agreement . . . . The concept of collective bargaining . . . includes . . . the negotiation of the collective agreement and the settling of the terms of the individual contracts . . . .[130]

Although a distinction can be made between *Westinghouse* and *Evening News* in that a union brought suit in the former while an individual employee and assignee claimed redress in the latter controversy, the Court decided to overrule *Westinghouse*. Agreeing with Justice Douglas's dissent in *Westinghouse*, Justice White said in *Evening News*:

> The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. [*Westinghouse* has been overruled.] The rights of individual employees . . . are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, and are to a large degree inevitably intertwined with union interests . . . .[131]

He reasoned that *Lincoln Mills, Enterprise Wheel & Car Corp., Dowd Box, Atkinson,* and *General Electric Co. v. Local* 205, *United Electrical Workers*[132] reversed *Westinghouse. Lincoln Mills,* the legal millennium, came after *Westinghouse,* and it decided that section 301 created a substantive as well as a procedural right. In *Lincoln Mills,*[133] *General Electric Co.,*[134] *Enterprise,*[135] and *Lucas Flour*[136] the unions sought to force employers to abide by contracts calling for arbitration. Although the grievances were pressed by individual union members and the unions had petitioned the courts to force the employers to arbitrate, the Supreme Court did not question the propriety of the suits. In *Atkinson,*[137] the employer sued the union which failed to abide by the terms of the collective bargaining agreement and the question of individual rights was not an issue (although individual grievances led to the dispute).

The employer in *Evening News* claimed that section 301 restricts suit to unions and employers[138] so that state contract law controls em-

130. *Id.* at 465-66.
131. 371 U.S. at 200.
132. 353 U.S. 547 (1957). This is a companion case to *Lincoln Mills.*
133. 353 U.S. at 449.
134. *Id.* at 547-48.
135. 363 U.S. at 595.
136. 369 U.S. at 97.
137. 370 U.S. at 197-98.
138. 371 U.S. at 198.

ployee actions. According to this view, employees cannot invoke section 301 to sue an employer. Justice White decided that Congress did not limit the use of section 301 to employer and union because it would have different meanings under state and federal law and would negatively influence the negotiation and administration of collective agreements.[139] He carefully pointed out that section 301 permits suits by employees; however, whether the plaintiff's action was properly initiated under the no-discrimination clause was not decided.[140] Justice Black, dissenting, argued that the majority

> refrains from saying when, for what kinds of breach, or under what circumstances an individual employee can bring a § 301 action and when he must step aside for the union to prosecute his claim. Nor does the Court decide whether the suit brought in this case is one of the types which an individual can bring . . . . This Court usually refrains from deciding important questions . . . without first satisfying itself that the party raising those questions is entitled . . . to prosecute the case . . . .[141]

Justice Black expressed further dissatisfaction with the majority opinion because it was not decided "whether an employee injured by discrimination of either his employer or union can file and prosecute his own lawsuit in his own way."[142]

V. Conclusion

The Supreme Court is on a concurrent jurisdiction "bender," permitting state and federal courts to adjudicate unfair labor practices if the activities are covered by a contract. The position Justice White took in *Evening News* is questionable because section 10 authorizes the NLRB to decide disagreements blanketed by section 8(a) or (b). By permitting suits, judges are making unfair labor practice decisions even if another jurisdictional label is applied.

Dowd Box and *Lucas Flour* permit state courts to pass on questions of contract violation, providing federal law governs. *Evening News* permits a state or federal court to deal with an unfair labor practice under section 301. *Lincoln Mills*, I believe, stands for the proposition that federal judges establish the federal law necessary to breath life into section 301.[143] But what happens to uniform regulation?

Based on the particular facts in *Evening News*, the decision may be fair because the six-month unfair labor practice charge period had

139. *Id.* at 200-01.
140. *Id.* at 200-01 & n.9.
141. *Id.* at 204.
142. *Id.* at 204-05.
143. 353 U.S. at 451. Justice Douglas states "that it [§ 301] authorizes federal courts to fashion a body of federal law . . . ." *Ibid.*

expired. But is it desirable to open the door wide and permit courts to deal with unfair labor practices regulated by contract? Justice White did not clearly indicate the reach of *Evening News* so that its future impact is easily limited; it is difficult to forecast with conviction compelling judicial reasons for refusing to entertain an unfair labor practice suit.

Justice White left another opening for judicial entanglement. He did not hold in *Evening News* that the employee properly brought suit under the no-discrimination clause—he only decided that employees can use section 301 to press claims. Many court decisions will be necessary before the type of contractual violation subject to employee prosecution is established. Moreover, further judicial amplification will be necessary to determine the circumstances in which a union or employer may properly invoke section 301 in conflicts regulated by section 8. In *Evening News* the complainant was an employee. Does an employer or union, certainly more knowledgeable than an employee, properly bring suit under section 301 when the six-month statute of limitation has expired, or should *laches* be invoked? The possibility of *laches* may explain why the suit was brought by an employee rather than the union; since the employee was also the assignee of other employees' claims, it is possible that the union was behind the suit. Did counsel feel that the courts would be more receptive to an action initiated by an employee rather than the union because of the expiration of the six-month period? Is the decision in *Evening News* limited to employee suits? Are the reasons compelling to limit the use of section 301 to an employee? The Court in *Evening News* uses section 301 to protect individual employees. *Lincoln Mills* delegates to federal judges the task of fixing rules to govern employer-union agreements. The judicial inventiveness which Justice Douglas called for in *Lincoln Mills* faces additional strain now that individual employees are permitted access to court, especially where there is an unfair labor practice. The ground rules established by courts to guide unions and employers are not necessarily controlling nor equitable for employees; added judicial "legislation" will be necessary to establish "markers."

Although state courts have turned to state law to determine individual rights under a collective agreement,[144] *Dowd Box* and *Lucas Flour* call for the application of federal law. When has federal law been established and when does it apply? Does *Lincoln Mills* preclude state judges from declaring federal law? State courts can unquestionably adjudicate section 301 controversies once federal law is established. My understanding of *Lincoln Mills* indicates that fed-

144. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959).

eral judges must choose the law which will control employers operating in interstate commerce. Since *Evening News* establishes, probably for the first time, that an individual has a right to rely on section 301 where an unfair labor practice occurs, has Justice White implemented or reversed *Lincoln Mills* by letting a state court consider a dispute never before adjudicated by a federal court? If the controversy opens in a state court and later reaches the United States Supreme Court, a federal judge fixes the federal law as required in *Lincoln Mills*. But this approach fails to come to grips with the problem because few cases reach the Supreme Court, and a state court, in the first instance, is permitted to decide the federal law. Does *Evening News* permit a state court to declare the federal law?

Employers suing unions for damages under section 303 of the Taft-Hartley Act, an action which does not require contractual violation, must proceed in a federal district court. Suits under section 301, on the other hand, require a union-management agreement. If a union breaks its contract and violates section 8(b)(4), can a state court consider the controversy under section 301? Sections 301 and 303 are distinctive rights and apparently the state courts, under *Dowd Box*, can make a decision. On the other hand, a suit hinging on section 303 must originate in a federal court.

Granting individuals (or unions and employers) access to state and federal courts in addition to permitting NLRB adjudication shatters uniform regulation. Where a union or employer commits an unfair labor practice, the exclusive use of the NLRB maximizes the possibility of uniform control. The extent to which NLRB and state and federal court regulation hinders uniformity remains to be seen.

An additional factor stemming from *Evening News* is the union interest when an individual member proceeds under section 301. To some extent, the ability of the union to control the enforcement of the agreement and the rank-and-file is curtailed by permitting individual suits. Furthermore, the number of suits brought to state and federal courts concerning contract violations will increase simply because both a union and its members can sue.[145] From a democratic viewpoint, permitting individuals to sue is appealing, but other factors, such as union control over members and the increasing number of suits, must be considered. In the absence of circumstances indicating a need for individual redress, restricting the right to sue to the union representative may be desirable.[146] Now, *Evening News* is thrown

145. Jenkins v. Wm. Schluderberg-T.J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958).

146. See Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962). Professor Summers maintains that members should be permitted to sue and states: "The question is not the unions' status as exclusive representative in making the collective agreement, nor the union's freedom in negotiating

back to the state court to determine if an employee can sue under a no-discrimination clause. The courts may then decide that the union rather than the individual is a proper party to sue. In *Evening News*, the plaintiff was an assignee of the claims of 49 other employees; it seems unlikely under this circumstance that the courts will be burdened if the individual rather than the union brings suit. Few cases have been brought to court by individual members.[147]

Westinghouse was reversed for sound reasons—it is confusing to distinguish between a union's rights and those of particular interest to its members.[148] The majority of the Court in *Westinghouse* assumed that the employees would have to sue their employer in a state court. Starting with *Lincoln Mills* and culminating with *Dowd Box* and *Lucas Flour*, the Supreme Court firmly established the rule that state and federal courts are authorized to hear controversies under section 301 brought by unions and employers, while emphasizing that federal law controls. *Evening News* permits union members to enter the melting pot, at least to some extent.

Evening News presents another issue requiring further determination. If a court considers an unfair labor practice violation under section 301, does the law developed by the NLRB control? Or must the courts develop a body of substantive law *a la Lincoln Mills*? Since the NLRB has enunciated a vast body of administrative law, much of which has been approved by the courts of appeals and the Supreme Court, it may be wasteful to permit judges to make unfair labor practice decisions under section 301. Section 301 regulates contractual undertakings so that principles of contract law control. Contractual arrangements and unfair labor practice charges brought before the NLRB do not necessarily present the same problem. In a dispute brought under section 301, the court is required to examine the agreement in order to decide whether the plaintiff's suit is well-founded. In a section 8 charge, the NLRB is only concerned with the Taft-Hartley Act and does not consider the agreement. It seems that NLRB and subsequent court of appeals decisions would not be controlling in a section 301 suit brought before a federal district judge or in a state court. Following the Supreme Court view expressed in *Lincoln Mills*, the courts in section 301 controversies can look to NLRB and other decisions and take the course of action deemed most suitable; but the trial judges will decide which

the substantive terms of the collective agreement to make them binding on all employees in the unit. On the contrary, the individual insists that his terms and conditions shall be governed by the substantive provisions of the agreement. He does not appeal for a variance from those provisions, but rather demands compliance with them . . . ." *Id.* at 370.

147. *Id.* at 375.

148. Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167 (1956).

rule shall be applied. This added burden of establishing additional rules of law could have been avoided had the Supreme Court ruled in favor of exclusive NLRB jurisdiction.

Although the Supreme Court in *Evening News* allowed suit for damages for unfair labor practice activity, whether an arbitrator can make an award under such circumstances was not considered. Using the rationale of Justice White, it seems that arbitrators can also decide unfair labor practice questions since there is nothing in the federal law which prevents it.

On March 11, 1963 the Second Circuit Court of Appeals, in a dispute involving arbitrability, decided that "The Supreme Court has all but sounded the death-knell of the theory of exclusive NLRB jurisdiction in cases arising under section 301 . . . ." and referred to *Evening News*.[149] The court did not feel that the conflict between NLRB decision-reaching and arbitration presents a pressing problem even though "the mere rendition of an arbitration award in no way precludes the Board from exercising jurisdiction . . . ."[150] I would disagree with the court because of other factors already reviewed; concurrent jurisdiction maximizes the possibility of conflict. If the NLRB adjudicates a dispute which was submitted to arbitration, then it can also make a decision in a dispute already decided by a state or federal court. And so goes our need for uniform regulation. Oh boy!

149. Carey v. General Elec. Co., 52 L.R.R.M. 2663, 2669 (1963).
150. *Id.* at 2670.