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Substantive Law and the Labor Contract—Two Nebraska Puzzles

Fredric H. Kauffman

University of Nebraska College of Law, fkauffman@clinewilliams.com

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*Comments*SUBSTANTIVE LAW AND THE LABOR CONTRACT—
TWO NEBRASKA PUZZLES

The purpose of this article is to analyze certain characterizations of "substantive law" by the United States Supreme Court in the labor contract field; to determine what impact these designations may have on Nebraska law; and finally, to solve the two jigsaw puzzles created by the interplay of these decisions with both Nebraska and other federal law. The Supreme Court has held that Section 301 of the Labor-Management Relations Act¹ creates a body of federal substantive contract law.² The question involved with respect to Nebraska law is whether this creation of federal contract law has any effect upon the Nebraska rule against enforcement of arbitration agreements.³ To be considered also are the problems raised by an attempt to enforce, through injunction, a no-strike clause contained in a labor contract. It is from these framework pieces that the first puzzle must be constructed.

The second puzzle with which this article will deal is the combined result of the Nebraska "right-to-work" law,⁴ a recent Supreme Court holding that state courts may enforce their prohibitions against an agency shop union security agreement,⁵ and a statement by the Court that state substantive law determines whether a particular union security device is prohibited.⁶ The questions here raised concern the possible situations in which Nebraska law can determine the validity of a clause in a collective bargaining contract which otherwise would be valid under federal law, and, further, the point at which this state power commences.

The dominant theme is thus one of pre-emption in situations where Section 301 of the Labor-Management Relations Act or Section 14(b) of the National Labor Relations Act⁷ are operative.⁸

¹ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

² *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

³ *Rentschler v. Missouri Pac. R.R.*, 126 Neb. 493, 253 N.W. 694 (1934). See discussion at subsection A of Part I, *infra*.

⁴ NEB. REV. STAT. § 48-217 (Supp. 1961).

⁵ *Retail Clerks International v. Schermerhorn*, 84 Sup. Ct. 219 (1963).

⁶ *Retail Clerks International v. Schermerhorn*, 373 U.S. 746 (1963).

⁷ 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

⁸ A third major area of pre-emption in the labor relations area is the so-called Garmon doctrine. In *San Diego Bldg. Trades Council v. Gar-*

These problems have been raised by Supreme Court characterization of "substantive law," and are particularly important to the Nebraska attorney because the Nebraska internal law in these and related areas is significantly affected.

PART I

THE ARBITRATION AGREEMENT—LINCOLN MILLS AND RENTSCHLER

A. THE NEBRASKA RULE ON ARBITRATION AGREEMENTS

The Nebraska Supreme Court has firmly committed itself to the doctrine that an executory agreement to arbitrate a dispute will not be enforced,⁹ nor will it constitute a valid defense to an action based upon the disputed matter which the parties agreed to arbitrate.¹⁰ There has been, however, only one Nebraska decision in which the arbitration agreement sought to be enforced formed a part of an employer-employee working agreement. In *Rentschler v. Missouri Pac. R.R.*¹¹ an employee brought an action against the

mon, 359 U.S. 236 (1959) the Supreme Court held that when an activity is arguably subject to § 7 or § 8 of the National Labor Relations Act the jurisdiction of both the state and federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board. See *e.g.*, *Local 207, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 373 U.S. 701 (1963); *Local 100, United Ass'n of Journey-men & Apprentices v. Borden*, 373 U.S. 690 (1963); *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173 (1962). *But see* *Smith v. Evening News Ass'n*, 371 U.S. 175 (1962), discussed at note 38 *infra*, and *Retail Clerks, Local 1625 v. Schermerhorn*, 84 Sup. Ct. 219 (1963), discussed in Part II D *infra*, for the labor contract areas in which exceptions to the *Garmon* doctrine have been engrafted.

⁹ *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950); *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555, 92 N.W. 746 (1902); *Schrandt v. Young*, 62 Neb. 254, 86 N.W. 1085 (1901); *National Masonic Acc. Ass'n v. Burr*, 44 Neb. 256, 62 N.W. 466 (1895); *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 60 N.W. 907 (1894); *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N.W. 519 (1893); *German-American Ins. Co. v. Ether-ton*, 25 Neb. 505, 41 N.W. 406 (1889).

¹⁰ *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 174, 43 N.W.2d 657, 665 (1950) ("Whatever distinction may be made elsewhere between arbitration generally and arbitration as to damages only, it is well settled in this state that a provision in a contract requiring arbitration . . . will not be enforced, and that refusal to arbitrate is not available to the parties in an action growing out of the contract."); *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N.W. 911 (1895).

¹¹ 126 Neb. 493, 253 N.W. 694 (1934).

railroad to recover wages claimed due him as the result of being laid off when he had seniority rights. One of the defenses¹² advanced by the railroad was that the plaintiff-employee should not have resorted to court action until he had exhausted the arbitration plan of adjusting grievances provided for in the working agreement between the union and the railroad. The Nebraska court, quoting from one of its prior opinions,¹³ reiterated the following rule:¹⁴

Whatever may be the rule elsewhere it is now the firmly established doctrine here that though the parties to a contract provide that if a dispute arise between them that such dispute shall be submitted to arbitration, refusal to arbitrate or no arbitration is not a defense to an action brought on such a contract by one of the parties thereto, as the effect of such agreement is to oust the courts of their legitimate jurisdiction and is contrary to public policy and therefore void.

It is significant that the court, in reaching the above conclusion quoted from the Nebraska Bill of Rights:¹⁵

All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay.

The reliance upon this provision, plus the characterization of the arbitration agreement as "void" raises two questions. First, is the arbitration agreement void, or is it merely unenforceable? Second, is the basis for the nonrecognition of the agreement one of public policy, or is it founded upon some constitutional mandate? The answers to these questions are by no means clear.

The earlier cases indicate the agreement, as a matter of state substantive law, is void rather than merely incapable of enforcement. In *Wilson & Co. v. Fremont Cake & Meal Co.*,¹⁶ however, the court's approach to the problem is somewhat inconsistent with the conclusions drawn from prior decisions. The court refused to allow an attempt to enforce a commercial arbitration agreement

¹² The defendant further claimed that a contract between a union and an employer does not establish a contract between the individual members and the company, and therefore, an action on that contract cannot be sustained by the individual. The court thoroughly discussed the issue and concluded that the individual could enforce his contractual rights on a third party beneficiary basis.

¹³ *National Masonic Acc. Ass'n v. Burr*, 44 Neb. 256, 62 N.W. 466 (1895).

¹⁴ 126 Neb. 493, 505-06, 253 N.W. 694, 700 (1934).

¹⁵ NEB. CONST. art. I, § 13.

¹⁶ 153 Neb. 160, 43 N.W.2d 657 (1950).

under the Federal Arbitration Act.¹⁷ The agreement was not denominated as void, but procedurally unenforceable.¹⁸ The syllabus of the court stated that "the issue is one of procedure and not of substantive right."¹⁹ No mention was made of the prior decisions categorizing such an agreement as void.

Another factor lending itself to the conclusion that the agreement to arbitrate is unenforceable only and not void is the Nebraska rule that once there has been a voluntary submission to arbitration, an award will be final and binding upon the parties.²⁰ This result is reached even though the submission is pursuant to a prior agreement to arbitrate,²¹ and even though the procedure used does not comply with that provided for by statute.²²

The more critical of the two problems raised by the Nebraska decisions concerns the grounds used by the court in refusing to give effect to these agreements. The use of the Nebraska Constitution indicates that the unenforceability is due to a constitutional directive against an agreement which imposes a limitation on the power of the courts. On the other hand, there is a definite flavor from the many opinions that the basis is at least not solely constitutional in nature, but stems from public policy, part of which has been formulated by our constitution. For example, where a fire insurance policy contained an agreement to arbitrate damages, Commissioner Roscoe Pound, concurring in the holding that such an agreement was unenforceable, stated: "Were the question a new one, I do not believe this court would take the stand to which it is now committed."²³ Pound's position does not denote a constitutional bar against enforcement; to the contrary, it evidences a feeling

¹⁷ 61 Stat. 669 (1947), 9 U.S.C. § 1-14 (1958).

¹⁸ See note 10 *supra* where the language used by the court is quoted.

¹⁹ *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950): "Where arbitration constitutes a part of the contract between parties to it and an attempt is made to enforce arbitration by invoking the Federal Arbitration Act, in the courts of this state the issue is one of procedure and not of substantive right, and the laws of this state are controlling." (syllabus of court).

²⁰ *Hughes v. Sarpy County*, 97 Neb. 90, 149 N.W. 309 (1914); *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740, 69 N.W. 118 (1896).

²¹ *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740, 745, 69 N.W. 118, 119 (1896): "An award, whether under the statute or at common law, is, in the absence of fraud or mistake, binding upon the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to impeach it."

²² NEB. REV. STAT. §§ 25-2103, 25-2110 (Reissue 1956).

²³ *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 588, 92 N.W. 736, 737 (1902).

that the basis of these decisions can be found in the public policy of the state.

The importance of ascertaining the basis for the Nebraska position becomes apparent when evaluating the effect of Section 301(a) of the LMRA on Nebraska law. As will be seen, the only factor which could preclude Section 301 (a) from changing the position with respect to a labor-management arbitration arrangement would be the lack of jurisdiction in Nebraska courts to enforce these agreements.²⁴ Public policy as a basis is certainly not sufficient to oust the Nebraska courts of their jurisdiction;²⁵ moreover, it is highly doubtful that Article I, § 13 of the Nebraska Constitution would have this operative result.²⁶ Assuming the agreement would impose a limitation on the power of the courts, this limitation refers only to the fact the parties are precluding themselves from using the courts until after arbitration; the actual jurisdiction of the court is in no way limited.

B. EFFECT OF SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT

Section 301(a) of the Labor-Management Relations Act²⁷ provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

After enactment of this section there was considerable dispute

²⁴ See discussion in subsection C *infra*.

²⁵ Public policy, of course, affects only the procedural enforceability of a cause of action, and not jurisdictional limits which are set by statutory and constitutional provisions. Even assuming that public policy could operate upon the jurisdiction of the Nebraska court, this state's former policy has been supplanted by that of federal law, at least insofar as labor arbitration agreements are concerned. See text at notes 55 and 56 *infra*.

²⁶ This provision may not be the only constitutional section involved. In *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902) art. I, § 6 of the Nebraska Constitution, guaranteeing the right to trial by jury, was mentioned in the court's holding that an arbitration agreement was void. However, Pound, C., concurring, stated: "I do not think the constitutional provision with reference to trial by jury has any bearing upon the question involved in this case. The same provision is to be found in the constitution of the United States and in the constitutions of the several states." 66 Neb. at 588-89, 92 N.W. at 737-38.

²⁷ 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

whether it was merely jurisdictional or whether it created a federal substantive law to be fashioned by the federal courts.²⁸ The doubt was finally resolved in *Textile Workers Union v. Lincoln Mills*.²⁹ When the employer refused to arbitrate grievances the union brought an action in federal district court under Section 301 to compel arbitration. Faced head-on³⁰ with the question of the applicable law in suits under Section 301(a), the Court stated: "We conclude that the substantive law to apply in suits under Section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."³¹ The United States Supreme Court then went on to hold that Section 7 of the Norris-LaGuardia Act³² did not prevent a federal court from ordering arbitration.

It is thus evident that a federal district court will enforce an agreement to arbitrate. The internal law of the forum state would have no bearing on the question of whether the arbitration agreement should be enforced.

The next piece which must be fitted into our puzzle is a determination of whether the jurisdiction of the federal court in Section 301(a) actions is exclusive, or whether a state court might exercise concurrent jurisdiction. The solution is found in *Charles Dowd Box*

²⁸ Those cases which held § 301(a) to be merely jurisdictional include *International Ladies' Garment Workers' Union, AFL v. Jay-Ann Co.*, 228 F.2d 632 (5th Cir. 1956); *United Steelworkers of America, CIO v. Galland-Henning Mfg. Co.*, 241 F.2d 323 (7th Cir. 1957); *Mercury Oil Ref. Co. v. Oil Workers Int'l Union, CIO*, 187 F.2d 980 (10th Cir. 1951). Among the decisions to the effect that § 301(a) created substantive law include *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 210 F.2d 623 (3d Cir. 1954); *United Elec., Radio & Machine Workers v. Oliver Corp.*, 205 F.2d 376 (8th Cir. 1953); *Textile Workers Union, CIO v. Arista Mills, Co.*, 193 F.2d 529 (4th Cir. 1951); *Hamilton Foundry & Mach. Co. v. International Molders & Foundry Union*, 193 F.2d 209 (6th Cir. 1951); *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 806 (2d Cir. 1950); *Schatte v. International Alliance*, 182 F.2d 158 (9th Cir. 1950).

²⁹ 353 U.S. 448 (1957).

³⁰ This question was previously before the Court in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), but four Justices could not reach a conclusion as to the effect of § 301(a).

³¹ 353 U.S. 448, 456 (1957).

³² 47 Stat. 71 (1932), 29 U.S.C. § 107 (1958). Basically, § 7 of the Norris-LaGuardia Act was that provision which curtailed the injunctive powers of the federal courts in cases "involving or growing out of a labor dispute."

Co. v. Courtney,³³ a 1962 Supreme Court decision. It was there determined that a state court could exercise concurrent jurisdiction, as there is "nothing in the concept of our federal system [which] prevents state courts from enforcing rights created by federal law."³⁴ and because, furthermore, Section 301(a) itself does not speak in terms of exclusive jurisdiction.³⁵

Again, it should be noted that merely because a state court has concurrent jurisdiction in this area it is not free to apply state law in interpreting the contract. *Lincoln Mills*³⁶ and, more recently, *Teamsters Union v. Lucas Flour Co.*³⁷ dictate that state courts must apply the federal substantive law when such agreements are before them, or, in the alternative, apply state law to the extent it is compatible with the federal law.

The state courts exercise concurrent jurisdiction not only with the federal courts, but also with NLRB in Section 301 actions. In *Smith v. Evening News Ass'n*³⁸ an employee commenced a state court action against the employer asserting a claim for damages which resulted from an alleged breach of the collective bargaining

³³ 368 U.S. 502 (1962).

³⁴ 368 U.S. 502, 507 (1962).

³⁵ The precise language of § 301(a) appears in the text at note 23 *supra*. "The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises . . . [and] the result of these discussions has, in our judgment, been . . . to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." *Claflin v. Houseman*, 93 U.S. 130, 136 (1876).

³⁶ 353 U.S. 448 (1957). "Federal interpretation of the federal law will govern, not state law. [citations omitted] But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. [citations omitted] Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." *Id.* at 457.

³⁷ 369 U.S. 95 (1962). The Court expressly held that "incompatible doctrines of local law must give way to principles of federal labor law." *Id.* at 102. The decision is further significant because of the federal substantive law it developed. A bargaining agreement reserved the right of the employer to discharge for cause, and provided that differences in interpretation should be settled by arbitration. An employee was fired and the union called a strike to compel rehiring. Despite the absence of a no-strike clause, this was held to be a violation of the contract, and a state court damage suit was upheld.

³⁸ 371 U.S. 195 (1962).

agreement. The Michigan Supreme Court viewed the actions of the employer as constituting an unfair labor practice, thus depriving the state court of jurisdiction.³⁹ The Supreme Court reversed, rejecting the pre-emption argument, and holding that the state courts could exercise concurrent jurisdiction with the Board.⁴⁰ The fact that the contract violation was an unfair labor practice would not act to deprive the state court of its Section 301 jurisdiction.

C. SECTION 301 (A) "SUBSTANTIVE LAW" AND THE RESULTING NEBRASKA PUZZLE

At this juncture, the Nebraska problem emerges. As we have seen, Section 301 (a) creates a federal substantive law of contracts applicable to labor-management collective bargaining agreements, and there is no question but what a state court has authority to enforce these contract rights. The question, therefore, is whether the Nebraska courts can deny enforcement of an arbitration agreement contained in such a contract on the basis of state law.⁴¹

In regard to state enforcement of federally created rights, it is clear that a state may not act in a discriminatory manner by refusing to enforce the federal right, while, at the same time, enforcing analogous forum-created rights.⁴² That is, if a state enforces a forum-created right, an analogous federally-created right must likewise be enforced. This assumes, of course, concurrent jurisdiction between the two courts. On the other hand, it has never been decided whether a state court must enforce a federal right where no analogous state created right exists. It is at least doubtful that the Supremacy Clause would force such a requirement upon the

³⁹ 362 Mich. 350, 106 N.W.2d 785 (1961). The Michigan court relied upon the Garmon rule that if the particular action is at least arguably an unfair labor practice, the NLRB has exclusive jurisdiction. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

⁴⁰ "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." 371 U.S. 195, 197 (1962).

⁴¹ This ensuing discussion is limited solely to § 301 contracts, that is, those arbitration agreements entered into "between an employer and a labor organization representing employees in an industry affecting commerce" as defined by the National Labor Relations Act.

⁴² *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Testa v. Katt*, 330 U.S. 386 (1947); Hart, *The Relations Between State And Federal Law*, 54 COLUM. L. REV. 489, 507 (1954).

states.⁴³ Fortunately, this question need not be handled in dealing with the problem now under discussion. It appears that the only situation in which such a problem would be faced is that instance where the state court actually lacks jurisdiction to hear the matter.⁴⁴

Preliminary examination should begin with Section 301 itself. The primary motive behind its passage "was the belief that the courts of many States could provide only imperfect relief because of rules of local law which made suits against labor organizations difficult or impossible, by reason of their status as unincorporated associations."⁴⁵ Thus, the problem was not one of state recognition of a cause of action arising under a labor contract, but rather one of procedural difficulties attendant upon an attempt to sue a labor organization as an entity.⁴⁶ No attempt was being made by Congress to create a cause of action where one did not exist by state law. The cause of action was already recognized.

The Nebraska rule against enforcement of arbitration agreements cannot stand as a sufficient basis to deny enforcement of

⁴³ In *Testa v. Katt*, 330 U.S. 386 (1947), the Court, after deciding that Rhode Island was bound to enforce a penal act of the United States, concluded: "It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. Its courts have enforced claims for double damages growing out of the Fair Labor Standards Act. Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim." *Id.* at 394. See *Clafflin v. Houseman*, 93 U.S. 130 (1876); *THE FEDERALIST* No. 82, at 514 (Wright's ed. 1961) (Hamilton).

⁴⁴ In *Testa v. Katt*, 330 U.S. 386 (1947), it was argued that Rhode Island had no more obligation to enforce a penal law of the United States than it has to enforce a penal law of a sister state. To this assertion the Court responded: "It disregards the purpose and effect of Article VI of the Constitution which provides: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' " *Id.* at 389.

⁴⁵ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 510 (1962).

⁴⁶ Interestingly, this was no problem in Nebraska, for NEB. REV. STAT. § 25-313 (Reissue 1956) provides: "Any company or association of persons formed for the purpose of (1) carrying on any trade or business, (2) holding any species of property in this state or (3) representing employees in collective bargaining with employers, and not incorporated, may sue and be sued by such usual name as such company, partnership or association may have assumed to itself or be known by."

such an agreement which is part of a labor-management contract falling within the purview of the National Labor Relations Act. As mentioned, this is not a question of enforcement of a federally created right which did not exist under state law, nor do the Nebraska courts lack jurisdiction. As a matter of state law, the cause of action on the contract exists; Section 301 gives rise to the same cause, but under federal law. What is involved is the question of the enforceability of a segment of that contract—the arbitration clause.

The argument against the enforcement of a Section 301 arbitration clause in Nebraska can be predicated on two possible lines of reasoning, both of which, would probably prove unsuccessful. The first argument is that the Nebraska courts lack jurisdiction to enforce arbitration agreements and this cannot be forced upon them by Congressional enactment. This argument has been refuted above; the courts do have jurisdiction, and the Supremacy Clause, imposing upon the judges of the several states the duty of enforcing the laws of the United States, precludes this line of reasoning. The second possible argument takes the following form: Enforceability is a matter of state procedure, and Congress has not seen fit to substitute federal procedure in this area. This position must also fail.

The Nebraska court has applied the procedural label to an arbitration agreement in order to avoid enforceability under one federal act.⁴⁷ Furthermore, the Supreme Court, in at least one instance, has characterized commercial arbitration as remedial.⁴⁸ Such a label, however, has not been attached to arbitration in the labor contract field. In fact, the Court has stated:⁴⁹

⁴⁷ *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950). The developments since this decision are interesting. In *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U. S. 909 (1960), *cert. dismissed*, 364 U.S. 801 (1960), it was decided that the Federal Arbitration Act created a body of federal substantive law, and a part of this substantive law was the arbitration agreement.

⁴⁸ *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924). See 73 HARV. L. REV. 1382 (1960), which discusses *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), the case referred to in note 45 *supra*. It is pointed out that Congress was keenly aware of the *Red Cross Line* case when it enacted the Federal Arbitration Act, and relied upon the characterization of arbitration as remedial. 73 HARV. L. REV. 1382, 1383 (1960).

⁴⁹ *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by the courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

The enforceability of arbitration agreements in the labor-management area is not, therefore, a procedural or remedial question. It has become an integral part of the collective bargaining process, and thus a matter of federal substantive law.⁵⁰

As the *Lincoln Mills* decision dictates that federal substantive law must govern the construction of Section 301(a) contracts, the Nebraska courts, on this basis, must recognize the validity and enforceability of arbitration agreements contained in such contracts. The federal substantive law replaces or supplants existing state law insofar as state law is inconsistent with federal law. Contained within this federal substantive law is the enforceability of arbitration agreements. The Nebraska rule being contrary, federal law pre-empts, and the Nebraska courts would be required to recognize and enforce this segment of the contract.

The characterization of arbitration agreements as a part of the federal substantive law of Section 301(a) contracts is not the only basis for arriving at the above conclusions. This same proposition can be derived through additional reasoning, though perhaps in reality founded upon identical concepts.

⁵⁰ Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 509 (1962) ("The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements."); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) ("But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement."). With regard to the function and importance of arbitration see also *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959).

In cases arising under the Federal Employers' Liability Act⁵¹ the Supreme Court has indicated that a federal right cannot be defeated by the application of local rules of pleading or practice contrary to those applied in federal courts.⁵² Although the Court has yet to set up any precise standards⁵³ by which to judge whether local rules will be allowable in state enforcement of federally created rights, the problem is basically one of statutory construction. If Congress intended a particular federal rule or procedure to be applicable, then the Supremacy Clause makes it incumbent upon the state court to follow this procedure.⁵⁴ In the labor contract field there is no uncertainty about the attitude of Congress toward arbitration agreements—they are definitely favored. Consequently, the predictable result is that the Court will not allow the substitution of a local practice which frustrates this policy.

There is an additional theory upon which the enforceability of a Section 301 arbitration agreement in the Nebraska courts could possibly rest. As Section 301 creates a body of federal substantive contract law, it could be argued that such a contract, with its arbitration agreement, was entered into by the parties as a federal contract. That is, though the parties may have negotiated and signed the contract in Nebraska, the operation of Section 301 and

⁵¹ 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1958).

⁵² *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952) (issue of fraud in obtaining releases could not be decided by judge, as was done in state practice, but must, as a matter of federal law, go to the jury); *Brown v. Western Ry.*, 338 U.S. 294 (1949) (strict local rule of construing pleading against the drafter was not allowed; the federal rule of construing the pleading in the light most favorable to the drafter was applied); *Central Vermont Ry. v. White*, 238 U.S. 507 (1915) (contrary to the state rule which placed on the plaintiff the burden of proving himself free from contributory negligence, the federal rule which placed the affirmative burden on the defendant was applied).

⁵³ In a diversity of citizenship situation *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires that state substantive law be applied. The test now applied to determine what is substance and what is procedure is the "significantly affecting the outcome" test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Mr. Justice Frankfurter stated the test as whether "it significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court." 326 U.S. at 109. In the converse *Erie* situation, absent any express Congressional design, this same test could very well be applied. That is, whether the result is significantly affected if the state court disregards federal law which would control had the action been originally commenced in federal court.

⁵⁴ *Testa v. Katt*, 330 U.S. 386 (1947). See note 41 *supra*.

the *Lincoln Mills* decision caused it to become a federal contract rather than a Nebraska contract. The question of the enforceability of the arbitration agreement in such a case would possibly⁵⁵ be governed by rules usually applicable to an interstate conflict of laws situation.⁵⁶

Nebraska has adopted the following rule in respect to contracts made in another jurisdiction and sought to be enforced here:⁵⁷

[T]he validity of a contract, the obligations thereof, and the capacity of the parties thereto are to be determined by the *lex loci contractus* unless there is something in the contract which is prohibited by express statute or infringes upon some positive rule of public policy.

There exists, of course, the argument that Nebraska has adopted a "positive rule of public policy" against the enforcement of arbitration agreements. Under the above rationale, so the argument proceeds, enforcement would still be denied. The weight of such a position is doubtful, however, in view of the developments since the early Nebraska decisions. The arbitration agreement under consideration is not the commercial arbitration agreement which historically has been contrary to public policy; instead we are dealing with a labor-management agreement. The United States Supreme Court has stated that not only does such an agreement become part and parcel of the collective bargaining process itself, but

⁵⁵ One difficulty with this argument is that it presupposes a determination that the question of enforceability is substantive in nature. Historically, foreign agreements to arbitrate have been held unenforceable, the question being one of procedure and thus governed by the law of the forum. There have been, however, forceful arguments to the contrary. See generally, STUMBERG, *CONFLICT OF LAWS* 269-76 (3d ed. 1963); Heilman, *Arbitration Agreements and the Conflict of Laws*, 38 *YALE L.J.* 617 (1929); Stern, *The Conflict of Laws in Commercial Arbitration*, 17 *LAW & CONTEMP. PROB.* 567 (1952).

⁵⁶ See GOODRICH, *CONFLICT OF LAWS* 304-09 (3d ed. 1949). "[T]he enforcement of the claim based upon foreign facts is said to be conditioned upon the nonviolation of the public policy of the forum; sometimes expressed by saying that neither the court of the forum nor its citizens must be inconvenienced by giving the contract effect, nor must the consideration of the agreement be immoral. . . . Again the statement is frequently more elaborately stated to exclude the enforcement of admittedly valid contracts: (a) Where the contract in question is contrary to good morals; (b) where the state of the forum or its citizens would be injured through the enforcement by its courts of the kind in question; (c) where the contract violates the positive legislation of the forum, that is, contrary to its Constitution or statutes; and (d) where the contract violates the public policy of the state of the forum." *Id.* at 304-05.

⁵⁷ *Jorgensen v. Crandell*, 134 Neb. 33, 39, 277 N.W. 785, 789 (1938).

it is to be distinguished from the commercial agreement.⁵⁸ Congress has fashioned a public policy in the form of the National Labor Relations Act, and this policy is as much a part of the Nebraska public policy as any forum created rule.⁵⁹ It is a nationwide public policy, and one favoring arbitration.

Any public policy argument against the enforceability of arbitration agreements is far less persuasive when these agreements form a part of a collective bargaining contract. The Nebraska public policy has been supplanted, or at least substantially modified, by Congressional enactment.

D. A COLLATERAL ISSUE — THE NO-STRIKE CLAUSE

Discussion of state enforced Section 301(a) rights is incomplete without some reference to the problem⁶⁰ created by the inclusion of a no-strike clause in the contract. When Section 301 was enacted there arose a divergence of opinion as to whether a court, be it state⁶¹ or federal,⁶² could issue an injunction as a means of en-

⁵⁸ *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

⁵⁹ See *Second Employers' Liability Cases*, 223 U.S. 1, 57 (1912) ("The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.").

⁶⁰ Attention will only be focused on the no-strike clause itself, and the problems raised by attempts toward enforcing this contractual provision. Closely related, however, are the problems concerning the relationship between an arbitration clause and a no-strike clause in the same agreement. The Supreme Court has held that a breach of the clause by a union will not relieve the employer of his duty to arbitrate. In such a situation the arbitration agreement itself has not been repudiated; the two clauses are not so interdependent as to excuse the employer's obligation where the union breaches its promise; and there is no waiver or estoppel. *United Packinghouse Workers v. Needham Packing Co.*, 32 U.S.L. WEEK 4202 (U.S. March 9, 1964); *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, 370 U.S. 254 (1962).

⁶¹ See *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957) discussed following note 62 *infra*.

⁶² Compare *Chauffeurs Union Local 795 v. Yellow Transit Freight Lines, Inc.*, 282 F.2d 345 (10th Cir. 1960) with *Sinclair Ref. Co. v. Atkinson*, 290 F.2d 312 (7th Cir. 1961), *aff'd*, 370 U.S. 195 (1962). See Note, 40 NEB. L. REV. 534 (1961) where the position was taken that the no-strike clause should be accorded specific enforcement.

forcing a no-strike clause contained in a collective bargaining contract. One segment of the conflict concerned the issue of whether Section 301 impliedly repealed Section 7 of the Norris-LaGuardia Act.

In *Sinclair Ref. Co. v. Atkinson*⁶³ the no-strike question was resolved with respect to federal courts. It was determined that a federal court had no injunctive authority to enforce such a clause. The Court would not construe Section 301(a) so as to create an exception to the Norris-LaGuardia injunction prohibitions. It was felt that had Congress intended to repeal these prohibitions, it would have done so expressly, especially since Congressional history demonstrated that consideration had been given to the Norris-LaGuardia Act when Section 301 was enacted.⁶⁴

Although the Court has yet to decide whether Norris-LaGuardia is a part of the federal substantive law of Section 301 contracts, thus prohibiting state enforcement of a no-strike clause; the California court in *McCarroll v. Los Angeles County Dist. Council of Carpenters*⁶⁵ held that such a clause could be enforced by a state court. The decision of the California court appears predicated upon the dual concept that Section 7 of Norris-LaGuardia was applicable only to federal courts, and that Congress had not chosen to exclude expressly the state equitable remedies in actions based upon Section 301 contracts.⁶⁶

The better view, however, would seem to be that adopted by the cogent dissent of Justice Carter. It was his feeling that the

⁶³ 370 U.S. 195 (1962).

⁶⁴ See *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 204-09 (1962).

⁶⁵ 49 Cal. 2d 45, 315 P.2d 322 (1957).

⁶⁶ "[T]he better view would seem to be that the inclusion of specific instances in the Labor Management Relations Act in which injunctive relief is expressly authorized negatives any general repeal of the Norris-LaGuardia Act in respect to the enforcement of collective bargaining agreements. . . . By its holding in *Textile Workers v. Lincoln Mills of Alabama* . . . [353 U.S. 448 (1957)], that the Norris-LaGuardia Act was never intended to prohibit specific enforcement of agreements to arbitrate, the Supreme Court has not suggested otherwise; strike injunctions clearly were intended to fall under the ban of the act.

"If it is assumed that federal courts cannot enjoin strikes in actions under § 301 save in compliance with the strict requirements of the Norris-LaGuardia Act, state courts enforcing federal rights are not necessarily subject to the same restraint. In the first place it is not entirely clear that Congress can compel a state court to withhold a remedy that would be available if the action arose under the contract law of the state." 49 Cal. 2d at 61, 315 P.2d at 330-31 (1957).

federal law, including the available remedies, is to be applied to a state court action under Section 301. The reasons set forth are essentially those hereinbefore given as a basis for the view that the Nebraska prohibition against enforcement of arbitration agreements will not operate as an inhibitory device for state court action. That is, the remedies are a part of the federal substantive law referred to in *Lincoln Mills*; and a state may not prohibit the exercise of rights which the federal statutes protect.⁶⁷

The *McCarroll* result is not only violative of the policy decisions behind labor legislation,⁶⁸ but it would certainly place an exorbitant premium on legal tactics and the artful drafting of pleadings. For example, assuming the existence of an independent state cause of action, a state which allowed a labor injunction as an available remedy in Section 301 suits, would provide the moving party with the dominant hand in determining the extent of judicial power. Furthermore, assuming an employer first commenced the action in state court with the thought in mind of obtaining injunctive relief, the possibilities of removal by the defendant would further complicate the situation. Although the question of removal has not itself been decided by the Court,⁶⁹ an accepted rule in removal of cases arising under federal law⁷⁰ is that the pleadings must show on their face that the cause of action is federal in nature.⁷¹ If an independent state cause exists and this basic rule prevails in Section 301 contract actions, a premium would be placed on the artfully drawn pleading. Such will not be the result; it is altogether clear that this independent cause of action is non-

⁶⁷ The following statement from *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) is significant: "Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." This would seem to preclude any argument that the injunction remedy can be used on account of the existence of an independent state cause of action.

⁶⁸ See note 48 *supra*.

⁶⁹ See *Swift & Co. v. United Packinghouse Workers*, 177 F. Supp. 511 (D. Colo. 1959); *Fay v. American Cystoscope Makers*, 98 F. Supp. 278 (S.D.N.Y. 1951).

⁷⁰ 62 Stat. 937 (1948), 28 U.S.C. § 1441(a) (1958) provides: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

⁷¹ *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

existent when the requirements of Section 301 jurisdiction are met.⁷²

E. SOME CONCLUSIONS

Granted that the availability of Nebraska courts as a forum for Section 301 contract violations involving arbitration agreements is not a necessary prerequisite for either party to enforce fully his available remedies, recent Nebraska litigation indicates that its importance cannot be minimized.⁷³ Certainly, the practitioner who is physically far removed from the sites of the federal district courts in Nebraska would find it advantageous to be able to use state district courts as forum for redress. Furthermore, even in those situations where the physical availability of the court is not a consideration, the use of state courts may be desirable. Crowded dockets, familiarity with local procedure or mere personal preference of state over federal court are perfectly valid reasons for giving the parties their choice of forums.

⁷² There must be a contract between an "employer and a labor organization representing employees in an industry affecting commerce" as defined in the National Labor Relations Act.

⁷³ These issues appear to have been raised for the first time, although in a peripheral manner, in litigation between Omaha Taxi Cab Companies and the Taxicab Drivers Union Local 762 in March 1964. *Safeway Cabs, Inc. v. Taxi Cab Drivers Union Local 762*, Nebraska Court of Industrial Relations, No. 18. The parties entered into an agreement stating that it "shall be in full force and effect from July 1, 1961 to and including June 30, 1963 and shall continue in full force and effect from year to year thereafter unless either party serves upon the other party 60 days notice prior to the expiration date of this Agreement of their desire to negotiate changes, modifications, or terminate this Agreement." In April, 1963, the union notified the cab companies that it was "desirous of continuing this Agreement, but desirous to negotiate changes in said Agreement, and as soon as our proposed changes in said Agreement are prepared, we will forward a copy to you for your consideration." The agreement also contained a grievance procedure providing "any controversy which may hereafter arise over the interpretation of or adherence to the terms and provisions of this Agreement shall be settled by negotiations between the parties. In case no agreement can be reached after forty-eight (48) hours, the disagreement shall be submitted to an arbitrator to be selected by the company and the union. . . . The decision of the arbitrator shall be final and binding on both the company and the union." After bargaining to the point of impasse concerning the proposed changes, the union proposed to strike in February, 1964. The Nebraska Court of Industrial Relations granted a temporary restraining order on the petition of one of the cab companies affected. Later, the union's motion to dismiss was granted for the reason that, on the basis of federal substantive labor contract law, the no-strike provision had no application to a strike after impasse in the negotiations concerning changes. See *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957);

PART II

SCHERMERHORN AND THE NEBRASKA
RIGHT TO WORK LAW

The avowed purpose of this article was to piece together two jigsaw puzzles caused, in part, by Supreme Court characterization of "substantive law" in the labor contract area. Consideration now turns to the second puzzle. The framework pieces consist of the Nebraska "right-to-work" legislation,⁷⁴ Section 14(b) of the National Labor Relations Act⁷⁵ and two recent Supreme Court opinions in *Retail Clerks, Local 1625 v. Schermerhorn*.⁷⁶

A. THE NEBRASKA "RIGHT-TO-WORK" LAW

The significance of Section 14(b) and the *Schermerhorn* decisions is particularly important because of Nebraska internal law. Nebraska is one of a number of states having what is commonly referred to as a "right-to-work" law. The statute provides:⁷⁷

[N]o person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join, affiliate with, or *pay a fee either directly or indirectly* to a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). The court did not pass on the question whether the law preventing a federal district court from issuing an injunction to enforce specifically a no-strike clause also deprives the Nebraska Court of Industrial Relations of jurisdiction in the same situation. See *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962).

In a separate suit filed in the District Court in Douglas County, the District Judge, without the statutory mandate against strikes contained in the Nebraska Court of Industrial Relations Act, refused to award a temporary restraining order in the same situation. The matter was set for a hearing and, in addition to the other issues of federal substantive law and pre-emption, the lack of jurisdiction of a Nebraska court to enforce specifically a no-strike clause because of the limitations on a federal district court in the same situation, and the unavailability of a judicial remedy ending arbitration were extensively argued.

⁷⁴ NEB. REV. STAT. § 48-217 (Supp. 1961); NEB. REV. STAT. §§ 48-218-19 (Reissue 1960). The statute is based on NEB. CONST. art. XV, §§ 13-15.

⁷⁵ 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

⁷⁶ 373 U.S. 746 (1963) (for purposes of the following discussion this decision will be referred to as *Schermerhorn I*); 84 Sup. Ct. 219 (1963) (this decision will be referred to as *Schermerhorn II*).

⁷⁷ NEB. REV. STAT. § 48-217 (Supp. 1961) (Emphasis added).

Although there has been noticeable absence of judicial construction given this section,⁷⁸ its impact on the agency shop agreement, is relatively clear. Prior to the addition of the amendatory provisions italicized above, an Attorney General's opinion held the agency shop device to fall within the coverage of the statute.⁷⁹ Reliance was placed on the term "affiliation with." With the addition of the phrase "or pay a fee either directly or indirectly to," there is no doubt that the Nebraska law prohibits the agency shop agreement.⁸⁰

B. RETAIL CLERKS, LOCAL 1625 *v.* SCHERMERHORN

Schermerhorn I involved the status of an agency shop union security arrangement⁸¹ entered into between the union and an employer in the state of Florida. An action, based upon the Florida

⁷⁸ *Railway Employee's Dept. v. Hanson*, 351 U.S. 225 (1956) (The Supreme Court decided that the Nebraska statute was inapplicable to labor organizations covered by the Railway Labor Act.); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 31 N.W.2d 477 (1948), *aff'd*, 335 U.S. 525 (1949) (the validity of the legislation was affirmed). For a discussion of the Nebraska law and "right-to-work" legislation generally, see Swindler, *The Right to Work, A Decade of Development*, 36 NEB. L. REV. 276 (1957).

⁷⁹ OPS. NEB. ATT'Y GEN. 295 (1960).

⁸⁰ With regard to enforceability, the Attorney General stated: "[I]t is our opinion that the effect of the law is to make it not a misdemeanor for an individual or corporation or association of any kind to enter into what has been herein defined as an 'agency shop' agreement. The object of the contract clause being for an illegal purpose, the clause itself is illegal and unenforceable." *Id.* at 298.

⁸¹ The contract provided: "Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union. It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above." 373 U.S. 746, 748-49 (1963).

"right-to-work" law,⁸² was instituted in state court by four non-union employees to have the agreement declared void. The Florida Supreme Court held that the "right-to-work" legislation covered an agency shop arrangement.⁸³ On certiorari, the Supreme Court decided that this type of union security agreement came within the purview of Section 14(b) of the National Labor Relations Act, and its legality was thus subjected to the demands of state substantive law.

Section 14(b) provides that "the execution or application of agreements requiring membership in a labor organization as a condition of employment" shall not be authorized if prohibited by state law.⁸⁴ The union's contention was that the NLRB should be the determinant as to whether a particular union security arrangement fell within the language of Section 14(b). The Court, however, adopted the position that state law governed the interpretation and scope of local "right-to-work" statutes. The agency shop arrangement involved was said to be the "practical equivalent" of an "agreement requiring membership in a labor organization as a condition of employment," thus falling within the ambit of Section 14(b).

The question of whether the Florida courts, rather than the NLRB, had jurisdiction to afford the remedy was set aside for reargument. This became the sole issue in *Schermerhorn II*, and was resolved by construing Section 14(b) as a Congressional recognition of the authority of the states to prohibit agency shop arrangements; and further, by finding nothing in the concept of pre-emption to forbid the state courts from exercising jurisdiction to enforce their statutes.⁸⁵ As a consequence, in "right-to-

⁸² FLA. CONST. § 12. ("The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.").

⁸³ 141 So. 2d 269 (Fla. 1962), cert. granted, 371 U.S. 909 (1962).

⁸⁴ Section 14(b) in its entirety reads as follows: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

⁸⁵ *Garmon*, however, does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations; and it did not present

work" states, such as Nebraska, enforcement of these statutes at the expense of union security agreements may now be obtained in the state courts.

C. SCOPE AND EFFECT OF SCHERMERHORN I & II

A proper understanding of the *Schermerhorn* decisions and Section 14(b) must, by necessity, begin with that section of the National Labor Relations Act which was the impetus of Section 14(b)—Section 8(a) (3).⁸⁶ This provision, which was formerly Section 8(3) of the Wagner Act, abolished the use of the closed shop as a union security device. It does, however, allow an employer to make "an agreement with a labor organization to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later."

Section 14(b) was enacted to allow the states to retain the effectiveness of their anti-union security legislation.⁸⁷ In other words, this stop-gap legislation was designed to keep Section 8(a) (3) from

the problems posed by § 14(b), viz., whether the Congress had precluded state enforcement of select state laws adopted pursuant to its authority. The purpose of Congress is the ultimate touchstone. Congress under the Commerce Clause may displace state power [*Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 234-36; *San Diego Council v. Garmon*, *supra*] or it may even by silence indicate a purpose to let state regulation be imposed on the federal regime." 84 Sup. Ct. 219, 222-23 (1963).

⁸⁶ 61 Stat. 140 (1947), as amended, 65 Stat. 601 (1951), 29 U.S.C. § 158(a) (3) (1958).

⁸⁷ H.R. REP. NO. 510, 80th Cong., 1st Sess. 60 (1947): "Under the House bill there was included a new Section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all form of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act . . . to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect."

completely stultifying state policy legislation in this area, which, as a matter of history, was on the upswing.⁸⁸

A final stepping stone must be crossed before further consideration of the *Schermerhorn* decisions. *NLRB v. General Motors*,⁸⁹ decided at the same time as *Schermerhorn I*, dealt with the scope of the term union "membership" as used in the proviso to Section 8(a) (3). In *General Motors* the employer refused to bargain over the union's proposal for the adoption of an agency shop agreement. The immediate question involved was whether this refusal was an unfair labor practice; however, the case turned on whether an agency shop agreement itself was an unfair labor practice or whether it was an authorized union security device within the Section 8(a) (3) proviso. The agency shop proposal was held to be the "practical equivalent" of union "membership"⁹⁰ as that term is used in Section 8(a) (3), and thus a permissible arrangement over which the employer was required to bargain. It was not decided in *General Motors* what effect a state "right-to-work" law would have on the result; this question was reserved for *Schermerhorn I*.

It is to be recalled that the *Schermerhorn* case decided, first, that the validity of an agency shop agreement must pass the test of state substantive law; and, second, that the state courts have the jurisdiction and power to enforce their "right-to-work" statutes at the expense of these agreements. These decisions raised various questions, some of which were answered, while others have been left for future development. Among those questions falling within the "answered" category is that concerning the applicable law governing the interpretation and scope of state legislation. It is clear from *Schermerhorn I* that the states are free to interpret the scope of their own statutes, and federal courts or administrative bodies will be governed by a state determination that a particular union security arrangement falls within the prohibitory language of a "right-to-work" type law. This means that the states may not only apply these statutes to agency shop arrangements, but are free to apply them to other types of security devices if the statute should

⁸⁸ See Swindler, *The Right to Work, A Decade of Development*, 36 NEB. L. REV. 276 (1957).

⁸⁹ 373 U.S. 734 (1963).

⁹⁰ "We are therefore confident that the proposal made by the union here conditioned employment upon the practical equivalent of union 'membership' as Congress used that term in the proviso to § 8(a) (3)." *Id.* at 743.

be so broad. State law governs the initial decision of whether the contractual obligation violates state legislation.

It must be emphasized, however, that this does not give the states a completely free rein in governing the legality of union security agreements. Such agreements are allowed as a matter of federal law when the requirements of Section 8(a) (3) have been met. Section 14(b) is the exception, and only in those situations where state law prohibits "*agreements requiring membership in a labor organization as a condition of employment*" does the union security clause lose its validity.

The agency shop arrangement in *Schermerhorn I* was not voided solely because Florida law prohibited it. It was held that as a matter of federal law the agency shop was the "practical equivalent" of union "membership"⁹¹ as that term was used in Section 14(b). The *General Motors* decision, which applied the practical equivalent test to an agency shop viewed in the light of Section 8(a) (3), was the backbone of this result. The Court pointed to the relationship between Section 14(b) and Section 8(a) (3), and concluded that the term union "membership" meant the same thing in both provisions. Consequently, the "practical equivalent" test was applicable to both sections.

An agency shop agreement falls within Section 14(b), not because of state law nor as a result of an express Congressional enactment, but because of the judicial construction of the word "membership" by the United States Supreme Court. The result is a relatively clear and distinct division of governing law in the union security contract area. Before state law invalidates a union security provision, two hurdles must be cleared. The contractual provision must first fall within the prohibitory language of the statute or constitutional provision. The second hurdle which must be cleared is one governed by federal law⁹²—whether the prohibited

⁹¹ "At the very least, the agreements requiring 'membership' in a labor union which are expressly permitted by the proviso are the same 'membership' agreements expressly placed within the reach of state law by § 14(b). It follows that the *General Motors* case rules this one, for we there held that the 'agency shop' arrangement involved here—which imposes on employees the only membership obligation enforceable under § 8(a) (3) by discharge, namely, the obligation to pay initiation fees and regular dues—is the 'practical equivalent' of an 'agreement requiring membership in a labor organization as a condition of employment.'" *Retail Clerks Int'l. Ass'n. v. Schermerhorn*, 373 U.S. 746, 751 (1963).

⁹² These "hurdles," of course, need not be "cleared" in this order. For example, in *Amalgamated Ass'n. of St. Elec. Ry. & Motor Coach Em-*

clause in the contract is the type contemplated by Section 14(b). Federal law determines whether the particular agreement is one "requiring membership in a labor organization as a condition of employment."

Beyond the union shop and agency shop agreements, exactly how far state authority can extend in the union security field under the guise of Section 14(b) legislation is an open question. In view of the scope of this article there will be no attempt to answer this question categorically with respect to the various union security devices.⁹³ In each situation, assuming the hurdle of state law has been passed, consideration must be given to the actual wording of the agreement and its practical operative effect. If the effect is to require the "practical equivalent" of union "membership," there is no reason to believe the Supreme Court will deviate from this subjective test which was established in *NLRB v. General Motors*, and reaffirmed in *Schermerhorn I*. The problem, of course, is the same as in any subjective analysis—the uncertainty of a situation-by-situation approach.

D. EXTENT OF STATE POWER

A final area to be herein considered is the extent of state power in the Section 14(b) situation, a question raised by a concluding paragraph to the *Schermerhorn II* decision:⁹⁴

As a result of § 14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field. As noted, *Algoma Plywood Co. v. Wisconsin Emp. Relations Board*, [336 U.S. 301] upheld the right of a State to reinstate with back pay an employee discharged in violation of a state union security law. On the other hand, picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union security statute lies exclusively in the federal domain (*Local Union 429 etc. v. Farnsworth & Chambers Co.*, 353 U.S. 969 . . . and *Local No. 438 v. Curry*, 371 U.S. 542 . . .), because state power, recognized by

ployees v. Las Vegas-Tonopah-Reno Stage Line, Inc., 319 F.2d 783 (9th Cir. 1963) the court first answered the federal question and then proceeded to inquire into the state law issues.

⁹³ Perhaps the most obvious union security device over which state 14(b) control is uncertain is the hiring hall arrangement. Such a device has been upheld as a matter of federal labor law under the NLRA. *International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961). The question of State authority to prohibit such arrangements has not been discussed, but it is conceivable that a clause of this nature could be considered as the "practical equivalent" of an agreement requiring union "membership."

⁹⁴ *Retail Clerks Int'l. Ass'n. v. Schermerhorn*, 84 Sup. Ct. 219, 233 (1963).

§ 14(b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b)*. Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon.

The logical interpretation of the Court's observation that state power will begin "only with actual negotiation and execution" of the contract is the recognition of this power only after the agreement has been *both* negotiated and executed. Section 14(b) does not in itself limit state power to the situation where the union security clause is in formal contract form; however, the decisions of the Court involving this provision dictate such a requirement.

The analysis again requires reference to the decision in *NLRB v. General Motors* and the two *Schermerhorn* cases. In the *General Motors* case it was held that the employer's refusal to bargain over a union proposal for the adoption of an agency shop agreement was not an unfair labor practice, as the state in which the contract was to govern employment arrangements did not prohibit agency shop agreements.⁹⁵ Reserved for *Schermerhorn I* was the question of "whether a different result obtains in States which have declared such arrangements unlawful."⁹⁶ It was there decided that state laws prohibiting union and agency shops make such arrangements unfair labor practices. Section 14(b) removes the protection afforded these agreements by Section 8(a) (3).⁹⁷

A determination of the existence of state power can, perhaps, be best approached by placing the *General Motors* problem in a state having "right-to-work" legislation. The result, from the stand-

⁹⁵ The agreement covered the Indiana plants of the employer. In *Meade Electric Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959) it was held that the state's "right-to-work" law did not cover the agency shop agreement, and thus such a device was not prohibited.

⁹⁶ *NLRB v. General Motors Corp.*, 373 U.S. 734, 745 (1963).

⁹⁷ Although the Court did not expressly state this principle, this is the obvious inference drawn from the language of the opinion, plus the reservation of the question of state power which was carried over to *Schermerhorn II*. In *Schermerhorn I* it was announced: "It is one thing if § 14(b) and a state law prohibiting the union or the agency shop have no impact on §§ 7 and 8 at all, and the union and agency shops are therefore not unfair practices under federal law even in those States which prohibit them. It is quite another matter, however, if § 14(b) removes the protection of the § 8(a) (3) proviso and the union and agency shops become unfair labor practices in States where state law forbids them, for then the obvious question is precipitated as to whether a State as well as the Board may enjoin such union-security arrangements." *Retail Clerks Int'l Ass'n. v. Schermerhorn*, 373 U.S. 746, 756-57 (1963).

point of the employer, would be changed, for the refusal to bargain over a proposal to commit an unfair labor practice would not itself be an unfair labor practice, and thus could not be ordered.⁹⁸ On the other hand, the union's proposal of an agency shop agreement would be a Section 8(b) (2) violation as an "attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)."⁹⁹

These are the implicit results from *General Motors* and the *Schermerhorn* decisions. In *General Motors*, attention was called to the fact that the controlling state law did not forbid the agency shop, and furthermore, the Court recognized a different result might obtain in a state outlawing such practices. Then, in *Schermerhorn I* the Court spoke in terms of Section 14(b) removing the protection of Section 8(a) (3), thus resulting in the agency shop becoming an unfair labor practice in a state prohibiting such an arrangement. This concept was certainly reaffirmed in *Schermerhorn II* in the sidestepping process used to get around the doctrine of *San Diego Bldg. Trades Council v. Garmon*.¹⁰⁰ The Court refused to adopt the position that the agreement was not an unfair labor practice, but pointed out that *Garmon* "does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations."¹⁰¹ This would appear to be a recognition that in states such as Nebraska the agency shop agreement itself constitutes the commission of an unfair labor practice.

With this in mind, attention should now be given to what is probably the key sentence in the paragraph quoted above. "Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under *Garmon*."¹⁰² This could only be additional reference to the fact that in states outlawing agency shop agreements, such an arrangement constitutes an unfair labor practice, and in the absence of an ac-

⁹⁸ NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); NLRB v. Int. Bhd. of Elec. Workers, 266 F.2d 349 (5th Cir. 1959); NLRB v. National Maritime Union, 175 F.2d 686 (2d Cir. 1949).

⁹⁹ 61 Stat. 140 (1947), as amended 65 Stat. 601 (1951), 29 U.S.C. § 158(b) (2) (1958).

¹⁰⁰ 359 U.S. 236 (1959). For other cases dealing with *Garmon* pre-emption question see note 8 *supra*.

¹⁰¹ Retail Clerks Int'l. Ass'n. v. Schermerhorn, 84 Sup. Ct. 219, 222 (1963).

¹⁰² *Id.* at 223.

tual contract the NLRB has sole jurisdiction. If, and only if, such a contract is entered into, Section 14(b) and *Schermerhorn II* give the states, concurrently with the Board, the remedial powers.

E. CONCLUSION

Some final observations are now appropriate. In those states having no "right-to-work" legislation, the *General Motors* decision governs any refusal to bargain over an agency shop arrangement, and such a refusal constitutes an unfair labor practice. In states like Nebraska, having such laws, a refusal to bargain over an agency shop proposal would not constitute an unfair labor practice because of the operation of Section 14(b) on Section 8(a) (3). In Nebraska, however, any insistence upon bargaining over such a provision would itself be a violation of Section 8(b) (2) and an unfair labor practice. In such a situation, the NLRB would have exclusive jurisdiction. State authority to act will only begin when the contract itself has in fact been executed. Until this time the *Garmon* pre-emption doctrine is determinative.

Fredric H. Kauffman '64