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Labor Arbitration and Federal Pre-emption: The Overruling of Black v. Cutter Laboratories

In the 1956 case of Black v. Cutter Laboratories, the United States Supreme Court exhibited some judicial hostility toward the labor arbitration process by allowing a state court to overturn an arbitration board determination that an employee had been fired for her union activity and not for her communist affiliations. In this Article, Professor Kovarsky examines the opinions of the arbitration board, the California Supreme Court, and the United States Supreme Court in the Black case, and then analyzes subsequent United States Supreme Court decisions involving both communism and judicial review of arbitration awards in labor disputes. He concludes on the basis of these later cases that Black v. Cutter Laboratories has been impliedly overruled and that a federal policy deferring to arbitration awards in labor disputes has been announced that pre-empts the field.

Irving Kovarsky*

The substantial use of labor arbitration as a democratic means of resolving employer–union differences is a twentieth century development. During the formative years of the United States, industrialists, economists, and judges exhibited hostility toward unions, and the growth of organized labor and collective bargaining was retarded. Since unions were not in a position to make many demands, even in the limited industrial areas where collective bargaining was practiced, labor arbitration was resorted to infrequently. Starting with the Railway Labor Act of 1926,[1] the Norris-La Guardia Act of 1932,[2] and the National Labor Rela-

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1. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151–88 (1958).

2. 47 Stat. 70 (1932), 29 U.S.C. §§ 101–15 (1958). See § 102, which discloses the need for union representation, and § 108, which specifies that:

tions Act of 1935,[3] each of which stamped federal approval on the social desirability of union growth, organized labor became powerful, and the use of arbitration spread. The Norris-La Guardia Act, primarily concerned with the labor injunction, expresses the need for union organization and the desirability, from a public viewpoint, of collective bargaining.[4] The Labor Management Relations Act of 1947[5] was intended to equalize labor-management power and responsibility and the Labor-Management Reporting and Disclosure Act of 1959[6] was designed to protect both employee and employer from union racketeering, undemocratic procedures, and some forms of economic pressures, but organized labor remains a potent economic and political force in spite of these legislative dampers. With unions and employers constantly at odds, the need for arbitration is apparent even where there is evidence of good faith and mutual respect.

The judicial attitude toward both commercial and labor arbitration has been negative. In many respects, the badgering of the arbitration process by the courts is peculiar since some claim that our judicial system itself is an outgrowth of voluntary arbitration.[7] In addition, the procedure developed in the mercantile courts about the twelfth century resembled more closely the arbitration process than a technical legal proceeding.[8] Arbitration has been subjected to judicial review all too frequently in the past.

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

3. 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151–68 (1958), as amended, 29 U.S.C. §§ 153–64 (Supp. III, 1962).

4. 47 Stat. 70 (1932), 29 U.S.C. §§ 102, 108 (1958).

5. 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141–88 (1958), as amended, 29 U.S.C. §§ 153–87 (Supp. III, 1962).

6. 73 Stat. 519–46 (1959), 29 U.S.C. §§ 401–531 (Supp. III, 1962).

7. See, *e.g.*, SEAGLE, THE HISTORY OF LAW 60-61 (1946).

8. 5 ENCYC. SOC. SCI. *Law Merchant* 270–74 (1937). After commerce became important in medieval Italy, specialized tribunals sprang up to deal with problems peculiar to the merchant. At first the *consules communi*, made up of important corporate officials, were given the power to administer this new system. The *consules communi* turned the increasing work load over to judiciary consuls and later help was sought from the *consules mercatorum*, who were in charge of guilds. Gradually the jurisdiction of the *consules mercatorum* was extended to the foreign merchant. Remedies provided bore a moral rather than a legalistic stamp, and lawyers were not permitted to appear at hearings. This system, with some modification and change, spread throughout Europe and Asia. It should be noted that the Roman system was concerned with commercial arbitration rather than labor arbitration.

Starting with *Marbury v. Madison*,[9] which approved judicial review of legislative action, judicial control was naturally extended to administrative agencies and arbitrators. Since arbitration is contractually conceived, judges intervened on the basis of their ability and function to interpret contracts.

Courts have been "in the driver's seat" for a long time, and they zealously guard against any erosion of judicial prerogatives. This power has resulted in interference with the arbitration process and has limited the effectiveness of "private jurisprudence." Although revolutionary changes have taken place recently and courts have begun to act with restraint, to this day they exhibit needless antagonism toward arbitration.[10] As evidence of this, the Supreme Court during its last term had to reiterate its position, which some lower courts had ignored, that an agreement to arbitrate is binding.[11]

Subversion, communism, and the rights protected in the first and fourteenth amendments have received considerable attention from congressional investigators, newspapers, learned journals, and individuals and groups concerned with the territorial safety of the United States and the protection of civil liberties. The decisions of many arbitrators and judges that permitted the discharge of employees for communist tendencies reflected the political climate that followed World War II. In some instances, the employees discharged for communistic sympathies had been active in their unions—a fact that raises the question of whether the employer was simply patriotic or was antiunion in violation of federal legislation.

When judicial antagonism toward arbitration is coupled with an understandable desire to prevent the growth of communism and subversion, court hostility is noticeable and decisions are sometimes intemperate. This Article hopes to develop the notion that

9. 5 U.S. (1 Cranch) 137 (1803).

10. See Local 1386, Textile Workers v. American Thread Co., 291 F.2d 894 (4th Cir. 1961); Vulcan-Cincinnati, Inc. v. Steelworkers Union, 289 F.2d 103 (6th Cir. 1961); Local 201, Int'l Union of Elec. Workers v. General Elec. Co., 283 F.2d 147 (1st Cir. 1961); Local 1357, Retail Clerks Int'l Ass'n v. Food Fair Stores, Inc., 202 F. Supp. 322 (E.D. Pa. 1961). It should be noted that these decisions were made after United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). The *Steelworkers* cases granted sweeping protection to the arbitration process. See text accompanying notes 67–87 *infra*.

11. See Drake Bakeries Inc. v. Local 50, American Bakery Workers, 370 U.S. 254 (1962), *affirming* 294 F.2d 399 (2d Cir.), *withdrawing on rehearing in banc* 287 F.2d 155 (2d Cir. 1961).

Black v. Cutter Laboratories,[12] which involved arbitration and communism, is such a decision, and that it has been impliedly overruled by subsequent decisions of the United States Supreme Court.

I. *BLACK v. CUTTER LABORATORIES*

In 1946, Mrs. Doris Walker, a member of the Communist Party, was given a clerical job with Cutter Laboratories after falsifying an employment questionnaire. The employer in 1947 learned of Mrs. Walker's membership in the Communist Party, but did not discharge her. Throughout her employment, Mrs. Walker was an active member in a left-wing labor organization. Although submitting a noncommunist affidavit required by the Taft-Hartley Act,[13] Mrs. Walker refused to testify before the NLRB with respect to membership in the Communist Party. In 1949, difficulty was experienced in negotiating a new contract. A strike resulted, and an unfair labor practice charge was brought against Cutter Laboratories. The union sponsored a broadcast giving its point of view, and a vice-president of the firm expressed anger because of the publicity. Mrs. Walker was later discharged.

A. THE ARBITRATION BOARD DECISION

A tripartite board was convened to arbitrate the discharge, and Mrs. Walker, during the course of the hearing, refused to testify with respect to her membership in the Communist Party. The majority opinion issued by the arbitration board, couched in strong language and concerned with civil liberties, explained Mrs. Walker's refusal to testify.

> First, the consequence of answering that question . . . is economic death because more and more private employers are placing themselves in the positions of the guardians . . . of the so-called loyalty of employees and a process is developing in this country which, if carried to its logical conclusion, would result in the elimination of the Communist issue by the method always preferred by Fascists . . . a process which history shows never ends with Communists but always goes on to liberals, trade unionists, people of minority races and colors, and finally the destruction of all culture.[14]

The majority of the panel concluded that Mrs. Walker was not discharged for her communistic bent, but for her active role in

12. 351 U.S. 292, *rehearing denied*, 352 U.S. 859 (1956).

13. Labor Management Relations Act (Taft-Hartley Act) § 9(h), 61 Stat. 146 (1947). This requirement was repealed by the Landrum-Griffin Act, § 201(d), 73 Stat. 525 (1959).

14. Cutter Labs., 15 Lab. Arb. 431, 441 (1950).

the union; that the "policing of the political doctrine and philosophy of Communism, is not within the province of private employers; that the history of the labor movement indicates all too frequently that the charge of Communism is either a fabrication or a lever seized upon by employers for the purpose of interfering with, weakening or destroying trade unions and that such was the motive here."[15]

The majority indicated that an arbitration hearing was not the proper forum to consider problems of democratic survival.[16] An important point made by the arbitration board, in light of later United States Supreme Court decisions,[17] was that *the collective bargaining contract authorized the arbitration board to make this decision.*[18]

B. THE CALIFORNIA SUPREME COURT DECISION

The case came before the California Supreme Court[19] after the lower state courts approved the arbitration award.[20] The California court, reversing the lower courts, ruled that the award was unenforceable because it was contrary to the public policy of California and because the arbitrators had exceeded their authority.

In many respects, the majority opinion of the California Supreme Court is confusing. The court invoked section 1288 of the California Code of Civil Procedure,[21] which permits the vacating of an arbitration award if authority is exceeded. Yet in no manner did the court disclose how the arbitrator exceeded his authority based upon the collective bargaining agreement. Presumably, the court meant that the arbitrator exceeded his authority by rendering a decision contrary to the laws of California.[22] The

15. *Ibid.*

16. *Id.* at 442. The majority position was weakened by this irrelevant reference, for an employer actually can discharge an employee for communism because of a need for security, damage to business reputation, and so forth. See Hearst Publishing Co., 30 Lab. Arb. 642 (1958); New York Mirror, 27 Lab. Arb. 548 (1956); Westinghouse Air Brake Co., 27 Lab. Arb. 265 (1956); New York Times Co., 26 Lab. Arb. 609 (1956); Liquid Carbonic Corp., 22 Lab. Arb. 709 (1954); Publishers' Ass'n, 19 Lab. Arb. 40 (1952); Los Angeles Daily News, 19 Lab. Arb. 39 (1952); Bell Aircraft Corp. 16 Lab. Arb. 234 (1951); Jackson Indus., Inc., 9 Lab. Arb. 753 (1948).

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

18. 15 Lab. Arb. at 442–43.

19. Black v. Cutter Labs., 43 Cal. 2d 788, 278 P.2d 905 (1955), *writ of cert. dismissed,* 351 U.S. 292 (1956).

20. Black v. Cutter Labs., 266 P.2d 92 (Cal. Dist. Ct. App. 1954).

21. Black v. Cutter Labs., 43 Cal. 2d 788, 798, 278 P.2d 905, 911 (1955).

22. The court said "the very award itself is illegal in that it orders re-

court referred (1) to the California Criminal Syndicalism Act,[23] which describes prohibited revolutionary conduct, (2) to the presence of a "clear and present danger" as determined by the California legislature and courts, and (3) to the subversive nature of the Communist Party as described by the United States Supreme Court in *Dennis v. United States*.[24] But there was no finding that Mrs. Walker's membership in the union constituted "a clear and present danger" to California nor that the state and federal laws controlling communist activity were designed to reach mere membership in a particular organization. In fact, the *Dennis* case, relied upon by the court as precedent, did not hold that membership in the Communist Party constituted a crime under the federal law.

The dissenting opinion by Justice Traynor followed the line of reasoning adhered to by the arbitration board and noted that the firm, by waiting more than two years after knowing of Mrs. Walker's communist affiliation and her falsification of the employment questionnaire, waived the right of discharge.[25] It should be noted that Justice Traynor's opinion is in line with decisions subsequently made by the United States Supreme Court in *Textile Workers Union v. Lincoln Mills*[26] and the later Steelworkers cases. *Lincoln Mills* stands for the proposition that an agreement to arbitrate is enforceable under section 301 of the Taft-Hartley Act, and the later cases—*Warrior & Gulf*,[27] *Enterprise Wheel & Car*,[28] and *American Mfg. Co.*[29]—limited judicial review of an arbitration award.

The question of federal pre-emption was not discussed in the California Supreme Court majority opinion although reference was made to the Internal Security Act of 1950,[30] the Smith Act of 1948,[31] and the Communist Control Act of 1954.[32] Nor was mention made of the unfair labor practice provisions of the Taft-Hartley Act, the noncommunist affidavit submitted by Mrs. Walk-

instatement as an employee of one whose dedication to and active support of communist principles and practices stands proved and unchallenged in the record." *Id.* at 800, 278 P.2d at 912.

23. CAL. PEN. CODE §§ 11400–02.

24. 341 U.S. 494 (1951).

25. 43 Cal. 2d at 809–10, 278 P.2d at 918.

26. 353 U.S. 448 (1957).

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

28. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

29. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

30. 64 Stat. 987–1030 (1950), as amended, 50 U.S.C. §§ 781–824 (1958).

31. 62 Stat. 807–12 (1948), as amended, 18 U.S.C. §§ 2381–90 (1958).

32. 68 Stat. 775 (1954), 50 U.S.C. § 841 (1958).

er, or section 301, a section that did not become significant until *Lincoln Mills*. Justice Traynor anticipated the federal-state jurisdictional dichotomy and noted that the federal government had exercised its pre-emptive powers; he was concerned, however, not with federal pre-emption of labor relations, but with the protection of national security, an interest paramount to that of the state.[33]

C. THE UNITED STATES SUPREME COURT DECISION

The United States Supreme Court decision in *Black v. Cutter Laboratories*,[34] made in 1956, pointed to the broad statements made by the California Supreme Court that an order to enforce an arbitration award violates public policy.[35] Mr. Justice Clark, writing for the majority in dismissing the writ of certiorari for lack of a substantial federal question, did not mention section 301 of the Taft-Hartley Act and refused to consider civil rights guarantees, feeling that the decision by the California Supreme Court was adequately grounded in state law and was not limited to a violation of state public policy.[36] According to Mr. Justice Clark, the case involved a contract governed by California law, under which a discharge for "just cause" may include membership in the Communist Party.[37] He added that "of course, the scope of review of such findings under the California Arbitration Act is a matter *exclusively* for the courts of that State, and is not our concern."[38] As will be shown, the United States Supreme Court, as well as the California court in *McCarroll v. Los Angeles County District Council of Carpenters*,[39] have not followed this line of reasoning.

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33. Justice Traynor stated:

> It is a rash assumption that Congress and the Legislature have been inept in their consideration of the problem, or are incapable of meeting it . . . . As the very authorities cited in the majority opinion make clear, neither Congress in enacting subversive control legislation nor the executive department in enforcing it has been insensitive to the nation's security. . . .

43 Cal. 2d at 812–13, 278 P.2d at 919–20.

34. 351 U.S. 292, *rehearing denied*, 352 U.S. 859 (1956).

35. 351 U.S. at 297.

36.

> We believe that the Supreme Court of California construed the term "just cause" to embrace membership in the Communist Party, and refused to apply a doctrine of waiver. As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented. Moreover, even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question.

Id. at 299.

37. *Id.* at 298.

38. *Ibid.* (Emphasis added.)

39. 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932

The postulation that the contracting parties might have agreed that membership in the Communist Party constituted "just cause" for discharge is unreasonable. Not a scintilla of evidence was offered to indicate that an agreement had ever been considered that would have made a discharge for membership in the Communist Party a discharge for "just cause." In fact, since the union was considered to be left wing, it seems unlikely that the "just cause" provision could ever have been given such an interpretation. Furthermore, the Taft-Hartley Act requires that if a party desires to modify the existing collective bargaining contract, he must serve written notice upon the other party.[40] There was no evidence or allegation by either party of a written notice to modify the existing agreement.

Mr. Justice Douglas, presenting the minority view through a civil rights approach, felt that the real issue was the protective cloak of the first and fourteenth amendments and the need for government impartiality where different economic viewpoints are held.[41] Mr. Justice Douglas was uncertain as to the employer's reason for discharging Mrs. Walker—it was either her union activities or her belief in communism—but he felt Mrs. Walker should be protected in either event, for union adherents are entitled to the protection of the Taft-Hartley Act, and "belief cannot be penal-

(1958). In this case, the California Supreme Court acknowledged federal pre-emption in matters blanketed by the Taft-Hartley Act. Justice Traynor, writing the majority opinion, ruled that the federal law controlling collective bargaining contracts is applicable. Although Justice Traynor was concerned with injunctive relief and the Norris-LaGuardia Act, he specifically stated:

> State courts therefore have concurrent jurisdiction with federal courts over actions that can be brought in the federal courts under section 301. It is obvious that in exercising this jurisdiction state courts are no longer free to apply state law, but must apply the federal law of collective bargaining agreements . . . .

Id. at 60, 315 P.2d at 330. *McCarroll* was decided after *Lincoln Mills*, and tends to follow policy established by the United States Supreme Court.

While the issue of communism was not at stake in *McCarroll*, it seems that the California Supreme Court has reversed itself and that *Black* is no longer "good" law. The decision in *McCarroll* is in line with United States Supreme Court decisions favoring federal pre-emption in situations where a state law requires the licensing of union agents, Hill v. Florida, 325 U.S. 538 (1945), bargaining with a union composed of foremen, Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947), certification by a state, LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949), injunctions prohibiting recognition picketing, UMW v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956), and injunctions prohibiting picketing where supervisors are involved, Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co., 370 U.S. 173 (1962), 47 MINN. L. REV. 656 (1963).

40. Labor-Management Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

41. 351 U.S. at 300–02 (1956).

ized consistently with the First Amendment."[42] Supporting the antiunion motive found by the arbitration board, Mr. Justice Douglas noted that Mrs. Walker was discharged more than two years after her wrongdoing was discovered.

In *Black,* the power to make an award was taken out of the hands of the arbitration board because of the communist taint of the employee. The Supreme Court exhibited a reluctance to extend the protection of federal laws to an employee of questionable loyalty. Thus, under the guise of contract interpretation and public policy, the opinion of the California Supreme Court was substituted for the award of the arbitration board.

II. UNITED STATES SUPREME COURT CASES SUBSEQUENT TO *BLACK v. CUTTER LABORATORIES*

A. PENNSYLVANIA V. NELSON

In *Pennsylvania v. Nelson,*[43] decided after the California Supreme Court published its opinion in *Black,* a question of federal pre-emption arose in a case involving a Pennsylvania statute aimed at the control of sedition. The United States Supreme Court, affirming the decision of the Pennsylvania Supreme Court, decided that the federal government had exercised its pre-emptive power by enacting comprehensive legislation controlling communism. The Court based its decision on the grounds that the federal interest in national security is paramount to the state interest[44] and that attempting to enforce a state law prohibiting sedition creates the possibility of conflict with federal enforcement as well as a multiplicity of suits.[45] The decision also referred to state interference with investigations being conducted by the Federal Bureau of Investigation.[46] In addition, article I, section 8 of the United States Constitution delegates to the federal government the duty of defending the United States, and subversion is basically a problem of national defense.

Justice Traynor indicated in *Black* that the use of contract law as a jurisdictional device to retain state control is improper in controversies involving communism. It seems that the Supreme Court accepted this view one year later in *Pennsylvania v. Nelson,*

42. *Id.* at 304. Justice Traynor had anticipated the argument based on the first and fourteenth amendments in his dissent in the California Supreme Court.

43. 350 U.S. 497 (1956).

44. *Id.* at 504–05.

45. *Id.* at 505–08.

46. *Id.* at 507.

although contract law, a traditional playground for the exercise of state jurisdiction, was not considered. Yet the Court in *Black* found an adequate state ground for its decision and failed to consider pre-emption based upon the federal legislation passed to contain communism.

B. TEXTILE WORKERS UNION V. LINCOLN MILLS

In *Textile Workers Union v. Lincoln Mills,*[47] a landmark and controversial decision,[48] a union and an employer negotiated a contract providing for the arbitration of disputes. Because of a disagreement over work-loads and work-assignments, the union sought an order forcing the employer to arbitrate under section 301 of the Taft-Hartley Act.[49] Mr. Justice Douglas, writing the majority opinion, noted that Congress endorsed the use of arbitration as a democratic means of maximizing plant justice and industrial peace and maintained that section 301 must be interpreted in this light.[50] The Court ordered enforcement of the agreement to arbitrate under section 301, a solution not considered in *Black.* Mr. Justice Douglas charged lower courts with the task of developing, obviously in a piecemeal fashion, contractual ground rules.[51] He explicitly stated that "federal interpretation of the federal law will govern, not state law. . . . 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. . . ."[52]

47. 353 U.S. 448 (1957).

48. See Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1 (1957).

49. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court. . . ." 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

50. 353 U.S. at 453–56.

51. *Id.* at 457. In some respects the Supreme Court approach, ordering the federal courts to fashion a body of law to control arbitration, is startling since legislative or judicial indicators are absent. There is little in the Taft-Hartley Act that could be used for judicial guidance, and the Supreme Court mandate is a rather obvious display of the rule-making powers of a court.

52. *Ibid.* In line with the position taken in *Lincoln Mills,* Justice Traynor, in McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 60, 315 P.2d 322, 330 (1957), *cert. denied,* 335 U.S. 932 (1958), also indicated that a state court must apply substantive federal law where jurisdiction is concurrent. See note 39 *supra.*

The United States Arbitration Act, 9 U.S.C. §§ 1–14 (1958), has been interpreted to exclude collective bargaining contracts from coverage. In Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85, 100 (1st Cir. 1956) the court took the position that collective bargaining contracts are protected by § 1 of the Arbitration Act; although the decision was affirmed by the Supreme Court, the legal support assigned for enforcement

Without question, the Taft-Hartley Act was intended to encourage collective bargaining and the settlement of disputes by private means.[53] As a consequence, it seems that Congress could have clearly outlined the methods by which agreements to arbitrate would be enforced. Section 301 only refers to "suits for violation of contracts," and the Taft-Hartley Act does not assign power of enforcement to the courts. According to Justice Douglas, however, courts can enforce agreements to arbitrate without specific authorization in the Taft-Hartley Act.[54]

For the purpose of evaluating *Black*, federal policy favoring collective bargaining and arbitration is clearly enunciated and expresses the pre-emptive will of Congress.[55] To engage in collective bargaining, a contractual undertaking is necessary; therefore, federal pre-emption seems explicit. In fact, section 8(d) of the Taft-Hartley Act requires a written contract if requested. Permitting state law to undermine the arbitration process on the basis of contract law appears to be contrary to congressional intent.

The decision in *Black* came before *Lincoln Mills*, but public policy favoring collective bargaining and arbitration was no different when the *Black* decision was rendered. Furthermore, even before *Lincoln Mills*, there was some speculation whether section 301 created a new federal right.[56] It is difficult to understand why the Court in *Black* did not consider pre-emption based on section 301.

Lincoln Mills holds that a new substantive right was created by section 301.[57] Mr. Justice Douglas also stated:

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was § 301 of the Taft-Hartley Act rather than the Arbitration Act. General Elec. Co. v. Local 205, United Elec. Workers, 353 U.S. 547 (1957).

53. See Labor-Management Relations Act §§ 201–04, 61 Stat. 152–54 (1947), as amended, 29 U.S.C. §§ 171–74 (1958).

54. 353 U.S. at 455.

55. In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), the United States Supreme Court held that a state court could not award damages to an employer economically injured by a union seeking the right of representation and a union shop agreement because the dispute was pre-empted by federal law. Even though the NLRB had not exercised jurisdiction, state courts could not regulate the picketing activities. According to Mr. Justice Frankfurter, if "the activity regulated was a merely peripheral concern of the Labor Management Relations Act," or "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," then the individual state can regulate the labor dispute. *Id.* at 243–44. Mr. Justice Frankfurter in *Garmon* could not apply either exception to deny federal regulation. How can *Black* be pigeonholed into either exception to federal regulation?

56. See Comment, *The Specific Enforcement of Collective Bargaining Agreements Under Section 301(a) of the Taft-Hartley Act*, 21 U. CHI. L. REV. 251, 253–54 (1954).

57. 353 U.S. at 456–57.

> It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate. We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.[58]

If agreements to arbitrate are enforceable as part of the federal substantive law, why should *Black* be an exception? There is no apparent reason to distinguish between agreements to arbitrate in the absence of contractual differences. Evidently, the Supreme Court in *Black,* supporting the traditional position that state law governs contracts, considered section 301 as a procedural device rather than as substantive law that provided a federal forum to air a breach of contract suit.

Mr. Justice Douglas in *Lincoln Mills* decided that irrespective of the Norris-La Guardia Act, injunctive aid is available to enforce agreements to arbitrate. Without delving into the problem of whether the Court properly carved out an exception to the Norris-La Guardia Act, criticism has been levied at *Lincoln Mills* because of the prospect of judicial interference with arbitration by injunctive order. This criticism is unrealistic. The social impact of industrial warfare is often overlooked by those who prefer to turn away from legal maneuvers and who favor complete autonomy for the arbitrator. Courts without doubt have needlessly tampered with the arbitration process. Yet, if industrial peace can be maximized by the limited procedural interference of the judiciary that forces contestants to live up to their agreements, the public is benefited. In *Black,* the judiciary interfered with the arbitration process rather than extending a helping hand.

Some scholars adhere to the views eloquently expounded by Mr. Justice Frankfurter[59] and are concerned with states' rights and the need to limit the judicial role.[60] Congress unquestionably *can* pre-empt labor relations in interstate commerce; the question, when the "signals" are not perfectly clear, is always whether Congress *has* exercised this power. Often judges needlessly play with the problem of determining congressional intent instead of looking to the realities of the economic situation. The attempts made to ascertain congressional intent are often so futile and unconvincing that members of the judiciary leave themselves open to

58. *Id.* at 456.

59. In the three 1960 Supreme Court decisions pertaining to arbitration, Mr. Justice Frankfurter, at least to some extent, followed a view that would limit the role of the judiciary. See cases cited note 17 *supra.*

60. See Gregory, *The Law of the Collective Agreement,* 57 MICH. L. REV. 635, 637 (1959).

ridicule. In reality, those influenced by the Frankfurterian conception of judicial propriety will adhere to one view, whereas others steeped in the realism of the economic situation will lean toward the views often expressed by Mr. Justice Douglas.

Mr. Justice Frankfurter, at least to some extent, plucked the strings of states' rights in *Lincoln Mills* since congressional intent was not clearly delineated.[61] He recognized that:

> [The creation of a new body of law under section 301] present[s] hazardous opportunities for friction in the regulation of contracts between employers and unions. [It] involve[s] the division of power between State and Nation, between state courts and federal courts, including the effective functioning of this Court . . . .[62]

But even Mr. Justice Frankfurter admits:

> that a fair reading of § 301 in the context of its enactment shows that the suit that Congress primarily contemplated was the suit against a union for strike in violation of contract. From this it might be possible to imply a federal right to bring an action for damages based on such an event. In the interest of mutuality, so close to the heart of Congress, we might in turn find a federal right in the union to sue for a lockout in violation of contract . . . .[63]

The position taken by Mr. Justice Frankfurter can be cited to point to error in *Black*. Since the union struck (admittedly not in violation of a contract), Mr. Justice Frankfurter would seem to concede that the union has a federal right under section 301 to sue for damages if it is wrongfully locked out. Even though only a single worker, Mrs. Walker, was involved, could it not be argued that she was wrongfully locked out? The line of reasoning herein suggested seems but a short step from the position advanced by Mr. Justice Frankfurter. Or would Mr. Justice Frankfurter, forced to make a choice, turn to *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,[64] and hold that the right to bring suit is a personal right that cannot be pre-empted under section 301?[65]

61. 353 U.S. at 462. Mr. Justice Frankfurter in *Lincoln Mills* was also concerned with the authority of the courts to fashion a body of rules.

62. *Id.* at 464.

63. *Id.* at 479.

64. 348 U.S. 437 (1954). In this case, the Court concluded that § 301 does not give a federal court jurisdiction over a suit by a labor organization to enforce a collective bargaining contract. In Smith v. Evening News Ass'n, 371 U.S. 195 (1962), the Supreme Court expressly reversed *Westinghouse*. In fact, *Westinghouse* had been impliedly reversed by Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962), and Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

65. This decision would be illogical because an employer owes a duty to

Mr. Justice Frankfurter in *Lincoln Mills* unqualifiedly states "that judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes."[66] According to Mr. Justice Frankfurter, enforcing an agreement to arbitrate is judicial interference, but evidently there is no judicial interference in *Black* where the California Supreme Court refused to enforce the arbitration award, plucking public policy from the ether waves. It is difficult to rationalize the voting position taken by Mr. Justice Frankfurter in *Black* with his views expressed in *Lincoln Mills.*

C. THE STEELWORKERS CASES: THE MAGNA CHARTA OF ARBITRATION?

Prior to 1960, some of the federal courts[67] followed the approach taken by the New York courts in *Cutler-Hammer.*[68] There the employer and union differed in their interpretation of a clause "to discuss payment," and judicial interpretation was substituted for the arbitration award when the court decided it was equipped with special insights not available to others. According to this view, courts can question the arbitrators' judgment in each case. As a matter of fact, this view is merely a hangover of the hostility traditionally expressed by the judiciary toward arbitration, and *Lincoln Mills* did not eradicate the rule expounded in *Cutler-Hammer.*

Because of widespread speculation concerning *Lincoln Mills,* the Supreme Court in 1960 handed down three decisions intended to supply "markers" for court review. These three decisions eliminated the *Cutler-Hammer* doctrine in federal courts. In *Enterprise Wheel & Car Corp.,*[69] several employees were discharged for participating in a temporary walkout. The employer refused to arbitrate as provided for in the agreement, and the union successfully petitioned the district court for an enforcement order. The arbitrator found the discharges improper and reduced punishment to a ten-day suspension. The employer refused to comply with the award, and the court of appeals, reversing the district court, decided that the award was not completely enforceable because the

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the contracting union as well as to the employee to abide by the arbitrator's award. The Supreme Court noted this in Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

66. 353 U.S. at 463.

67. See, *e.g.,* Davenport v. Procter & Gamble Mfg. Co., 241 F.2d 511 (2d Cir. 1957).

68. International Ass'n of Machinists v. Cutler-Hammer, Inc., 297 N.Y. 519, 74 N.E.2d 464 (1947).

69. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

collective bargaining contract had expired.[70] Thus, the back pay award from the date the contract expired and the reinstatement order were beyond the arbitrator's authority to grant.

Speaking through Mr. Justice Douglas, the Supreme Court reversed the court of appeals and held:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.[71]

The Court adopted a rule popular among arbitrators and labor economists that the judiciary should not tamper with the decision of an arbitrator. Although it is not clear whether the arbitrator exceeded his authority, any doubt should be resolved in the arbitrator's favor according to the Court.[72] It appears that the judiciary cannot rightfully refuse to enforce an award unless the arbitrator *clearly* exceeds his authority.[73]

In *American Manufacturing Co.*,[74] the contract contained an "all disputes" provision as to the "meaning, interpretation and application of the provisions of this agreement."[75] The agreement also included a clause giving management the right to punish employees "for cause" and employment rights of employees were to be based on seniority "where ability and efficiency are equal."[76] An employee, after receiving workmen's compensation benefits, claimed that he was entitled to reinstatement under the seniority clause. The employer would neither reinstate the employee nor arbitrate, and the district court and court of appeals[77] refused to order arbitration.

The Supreme Court, reversing the court of appeals, decided that section 203(d) of the Taft-Hartley Act[78] favors arbitration, and since the agreement contained an "all disputes" clause, even an apparently unjustified claim must be processed. Mr. Justice Douglas said:

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70. Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327 (1959).

71. 363 U.S. at 596.

72. *Id.* at 597–98. Presumably Mr. Justice Douglas would adhere to the same viewpoint if the arbitrator decided that he was not empowered to hear the controversy.

73. This approach still presents the problem of deciding whether an arbitrator clearly exceeds his authority. Judges hostile to arbitration will find it possible to indicate that authority has been clearly exceeded.

74. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

75. *Id.* at 565.

76. *Id.* at 565–66.

77. United Steelworkers v. American Mfg. Co., 264 F.2d 624 (6th Cir. 1959).

78. 61 Stat. 153 (1947), 29 U.S.C. § 173(d) (1958).

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.[79]

Shouldn't the arbitration board in *Black* have been accorded the same judicial courtesy?

Mr. Justice Douglas was concerned with the failure of the judiciary to come to grips with economic realities and the unwarranted "preoccupation with ordinary contract law."[80] Could it be argued that the California Supreme Court in *Black* was unnecessarily preoccupied with contract law rather than with the maintenance of industrial peace in accordance with the system provided in the Taft-Hartley Act? There is no apparent reason to find a "preoccupation" in *Lincoln Mills,* but not in *Black.* In Mr. Justice Frankfurter's dissenting opinion in *Lincoln Mills,* Senator Taft is quoted in support of pre-emption:

> "[O]f course, the basis for the jurisdiction is the Federal law—in other words, we are saying that all matters of collective-bargaining contracts shall be made in certain ways. . . . I don't quite see why suits regarding such collective-bargaining contracts, when made, are not properly the subject of Federal law . . . ."[81]

The employer in *Warrior & Gulf*[82] furloughed indefinitely certain plant maintenance employees after independent contractors had been hired to do the work. Independent contractors then offered to hire some of the furloughed employees at a reduced wage. Included in the collective bargaining contract were "no-strike" and "all disputes" provisions, although legal issues and management prerogatives were excluded from the agreement to arbitrate. The employer refused to arbitrate the layoffs under the "all disputes" provision and the union sought an enforcement order under section 301.

The Supreme Court took the position that the union-management agreement determines whether a dispute is arbitrable. Since federal policy favors arbitration, an agreement should be enforced unless the subject matter is *clearly* excluded. Thus, all doubt is resolved in favor of the arbitrator's decision, whether for or against

79. 363 U.S. at 567–68.
80. *Id.* at 567.
81. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 526 (1957).
82. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

arbitrability. Mr. Justice Clark in *Black* went out of his way, it seems, to cast doubt on the jurisdiction of the arbitrator.

The employer in *Warrior & Gulf* contended that the management prerogative clause gave the company exclusive control over the contracting out of work. The Court decided that "the ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[83] If the point previously made is accepted, that state courts lack jurisdiction to apply their own laws, then *Black* has been reversed by implication because the authority of the arbitrator was apparently contractually unlimited.[84]

To buttress this position further, in *Charles Dowd Box Co. v. Courtney*,[85] a 1962 Supreme Court decision, Mr. Justice Stewart, writing for a unanimous Court, announced that section 301 and *Lincoln Mills* did not oust state courts from jurisdiction and that controversies involving contracts could be heard in a state court. But Mr. Justice Stewart, in writing the majority opinion for the Supreme Court in *Local 174, Teamsters Union v. Lucas Flour Co.*,[86] concluded that although a state court may have the necessary jurisdiction to hear a controversy involving section 301, federal law must be applied.

> The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount . . . .
>
> More important, the subject matter of § 301(a) "is peculiarly one that calls for uniform law." . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. . . .[87]

If state and federal law "might have different meanings" and "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements," why is not the same disruption evident in *Black?*

III. HAS *BLACK v. CUTTER LABORATORIES* BEEN OVERRULED?

Once federal policy is adopted favoring arbitration, state law necessarily disappears from the scene. Thus, state public policy or state contract law should not be interjected to oust federal juris-

83. *Id.* at 582.
84. See text accompanying note 18 *supra.*
85. 368 U.S. 502 (1962).
86. 369 U.S. 95 (1962).
87. *Id.* at 103.

diction. Evidently counsel in *Black* did not consider shopping about for a more favorable forum, particularly after the two lower court opinions in California favored the arbitrator's award.[88] When the California Supreme Court reversed the lower courts, it may have been too late to consider moving the case to the NLRB on the basis of an unfair labor practice charge or to a federal court for other reasons. In addition, the attorneys for Mrs. Walker may have been confident that the United States Supreme Court would adopt their point of view.[89] Furthermore, *Black* arose before *Lincoln Mills,* the first Supreme Court decision declaring that section 301 created a new substantive right. Finally, the Norris-La Guardia Act limits the use of the injunction in federal courts involving "labor disputes" so that the state tribunal may have appeared more favorable.

Whatever the reason may have been for proceeding in a state court, it seems unnecessary to allow an employer to nullify an agreement to arbitrate. The many advantages of arbitration over a legal proceeding, such as the expertise of the arbitrator, speed, and lesser costs, are done away with when court intervention is permitted. As a general rule, limiting the role of the judiciary seems to be the better policy, and the three 1960 *Steelworkers* decisions prohibiting judicial interference with the arbitration process unquestionably adopt such a policy. Since the employer in *Black* was not engaged in defense work and Mrs. Walker held only a clerical position, the better policy is one of judicial "hands-off." In *Black* there was evidence of industrial unrest that erupted in a strike. The dispute related to wage and other contractual issues, and no evidence was produced indicating that communist philosophy was being spread or that a revolution was in the wind. Yet the Supreme Court in *Black* permitted state public policy to prevail over the need expressed in the Taft-Hartley Act to promote collective bargaining and arbitration.

If the need for collective bargaining is fully accepted, then federal legislation necessarily takes priority over state control even where Congress fails to signal pre-emption clearly. An exception is sometimes made on the basis of public safety.[90] But even then

88. See Petition for Certiorari, pp. 13–14, Black v. Cutter Labs., 351 U.S. 292 (1955).

89. A curious aspect of the *Black* case is that the brief submitted to the United States Supreme Court urged federal pre-emption on the basis of § 7 of the Taft-Hartley Act. *Id.* at 32; Brief for Petitioner, pp. 41–42, 84–88, Black v. Cutter Labs., 351 U.S. 292 (1955). Yet, neither the majority nor the dissent in *Black* specifically considered this point.

90. There was violence on the picket line in the following cases: Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment

care must be exercised that the attempt at state control does not interfere with federal regulation.[91] *Black* permits such interference under the guise of state public policy, a discordant note when the need for labor-management harmony is considered.

Mr. Justice Frankfurter has taken the position that federal jurisdiction should not be exercised in peripheral matters.[92] Federal interest expressed in national security and the promotion of arbitration and collective bargaining can hardly be considered as peripheral matters. *Lincoln Mills* stands for the proposition that collective bargaining is not a peripheral matter, and under *Pennsylvania v. Nelson,* national security must be controlled by federal officials rather than by state authorities. Even *McCarroll,*[93] a California Supreme Court decision, holds that a state court must apply federal substantive law governing labor-management contracts,[94] and in *Lucas Flour Co.,*[95] the Supreme Court unequivocally agreed.

Most collective bargaining agreements provide for arbitration.[96] The need to develop a system of private jurisprudence, minimizing court interference, is apparent. Based on *Black,* courts can interject public policy as a means of circumventing the intent of the parties who contract for arbitration. *Lincoln Mills* supports the notion that arbitration is a better device to settle disputes than is court adjudication.

Relations Bd., 351 U.S. 266 (1956); Erwin Mills, Inc. v. Textile Workers, 235 N.C. 107, 68 S.E.2d 813 (1952).

91. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Pennsylvania v. Nelson, 350 U.S. 497 (1956).

92. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) (by implication). This leaves open to the courts the interpretation of periphery.

93. McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied,* 355 U.S. 932 (1958).

94. Although the position taken in this Article would exclude state jurisdiction, there is another problem involving the proper federal forum that requires further judicial consideration. Section 10(a) of the Taft-Hartley Act grants exclusive jurisdiction to the NLRB to prevent unfair labor practices. 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958). In accordance with *Lincoln Mills,* § 301 creates a federal substantive law for which remedies are available if an agreement to arbitrate is breached. If the controversy involves an unfair labor practice and a contract violation, but charges have not been preferred before the NLRB, can a court adjudicate the controversy under § 301? See Lodge 12, Dist. 371, Int'l Ass'n of Machinists v. Cameron Iron Works, 257 F.2d 467 (5th Cir.), *cert. denied,* 358 U.S. 880 (1958). The Supreme Court, in Smith v. Evening News Ass'n, 371 U.S. 195 (1962), decided that a court can adjudicate an unfair labor practice that violates a collective bargaining agreement.

95. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

96. Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining,* 43 VA. L. REV. 1261, 1274 (1957).

In *Black*, the United States Supreme Court avoided considering pre-emption by holding that a federal question was not presented and accepted state contract law and policy as sufficient reason for dismissing certiorari. *Black* stands for the proposition that state policy can be interjected into a union-management contract even though the effect of section 301 of the Taft-Hartley Act is nullified. If *Black* is followed, the federal courts would permit state law to prevail in all situations where an employer refuses to arbitrate. *Lincoln Mills* clearly states that federal law will control agreements to arbitrate.[97] It seems that the United States Supreme Court in *Lincoln Mills* reversed the stand taken by the California Supreme Court in *Black*.

The three 1960 *Steelworkers* cases represent additional evidence of the reversal of *Black*. *Enterprise Wheel & Car Corp.* holds that the judiciary cannot examine the merits of an arbitration award;[98] *American Manufacturing Co.* indicates that court review is limited when an arbitrator is authorized to proceed under an "all disputes" provision;[99] *Warrior & Gulf* states that an agreement to arbitrate should be enforced without equivocation.[100] In *Black*, the California Supreme Court was permitted to reverse the arbitrator. It seems reasonable to assume that under the *Steelworkers* cases the arbitrator can no longer be overruled so easily. Furthermore, *Lucas Flour Co.*, a 1962 decision, holds that a state court must apply federal law. Because *Black* is often classified as a civil liberties case rather than a labor law case, its reversal has been overlooked. But the ability of the courts to question the arbitrator and needlessly badger the arbitration process has been substantially clipped by the three *Steelworkers* decisions. There is already substantial evidence that the courts are not as anxious to question the arbitrator.[101] Cannot an assumption be made that the same ground rules should pertain to *Black* even though communism was involved?

97. 353 U.S. at 457.
98. 363 U.S. at 597–98.
99. 363 U.S. at 567–68.
100. 363 U.S. at 583–84.
101. Radio Corp. v. Association of Professional Eng'r Employees, 291 F.2d 105 (3d Cir.), *cert. denied*, 368 U.S. 898 (1961); Local 95, Office Employees Union v. Nekoosa-Edwards Paper Co., 287 F.2d 452 (7th Cir. 1961); International Tel. & Tel. Co. v. Local 400, Int'l Union of Elec. Workers, 286 F.2d 329 (3d Cir. 1960); American Brake Shoe Co. v. Local 49, UAW, 285 F.2d 869 (4th Cir. 1961), *cert. denied*, 369 U.S. 873 (1962); Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 195 F. Supp. 134 (E.D.N.Y. 1961), *aff'd*, 298 F.2d 647 (2d Cir. 1962); Retail Department Store Employees v. Sears Roebuck & Co., 47 L.R.R.M. 2354 (W.D. Wash. 1960); Local 18, UMW v. American Smelting & Ref. Co., 47

With respect to pre-emption where communism is an issue, evidence was available prior to 1947 indicating some infiltration in the union movement.[102] When the Taft-Hartley Act was enacted in 1947, section 9(h) required union officials to submit a noncommunist affidavit,[103] although an employer was not permitted to question its veracity.[104] One reason for this denial was the need to protect the civil rights of those filing affidavits. Since employers have equated communism with unionism, power to take action was given to the Department of Justice. It seems logical to conclude that Congress exercised its power of pre-emption by providing for the non-communist affidavit. Mrs. Walker in *Black* did submit a non-communist affidavit.

Other federal legislation would indicate federal pre-emption where communism is an issue. Under the Subversive Activities Control Act of 1950,[105] the communist and communist front organizations were to be controlled by the Subversive Activities Control Board. In 1954, the investigative power of this Board was extended to communist infiltrated organizations.[106] Under the 1954 legislation, labor unions dominated by communists can be investigated and regulated by preventing known members of organizations registered with the Subversive Activities Control Board from holding office or employment with the union.[107] If the union itself is required to register, it cannot act as an exclusive bargaining representative.[108] Are not these positive signs of pre-emption?

Another indication of federal pre-emption is the finding by the arbitration board in *Black* that the employer discharged Mrs. Walker for her active role in the union, a violation of sections 8(a)(1) and 8(a)(3) of the Taft-Hartley Act.[109] Because of the extensive protection given to union advocates in Taft-Hartley, it seems that state law should not be permitted to prevail.[110] Al-

L.R.R.M. 2269 (D. Idaho 1960); UAW v. Waltham Screw Co., 47 L.R.R.M. 2196 (D. Mass. 1960).

102. H.R. REP. NO. 1, 77th Cong., 1st Sess. 9–10 (1941).

103. Labor-Management Relations Act, ch. 120, § 9(h), 61 Stat. 146 (1947). This section has been repealed and replaced by § 201(d) of the Landrum-Griffin Act of 1959. 73 Stat. 525 (1959).

104. NLRB v. Vulcan Furniture Mfg. Corp., 214 F.2d 369 (5th Cir.), *cert. denied*, 348 U.S. 873 (1954); West Tex. Utils. Co. v. NLRB, 184 F.2d 233 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 939 (1951).

105. 64 Stat. 987 (1950), 50 U.S.C. §§ 781–98 (1958).

106. 68 Stat. 777 (1954), 50 U.S.C. § 792(a) (1958).

107. 68 Stat. 777 (1954), 50 U.S.C. § 784(a)(1)(E) (1958).

108. 68 Stat. 779–80 (1954), 50 U.S.C. § 792(h)(2) (1958).

109. 61 Stat. 140 (1947), 29 U.S.C. §§ 158(a)(1), (3) (1958).

110. See Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957). Here, among other things, an employer refused to bargain after a union had been

though mentioned in the brief presented to the United States Supreme Court, there is no positive indication in *Black* that federal pre-emption based on the commission of an unfair labor practice was even considered.

A more difficult problem in *Black* is whether an arbitrator properly hears a case where an unfair labor practice is committed. The three *Steelworkers* cases protecting the award from court review did not consider unfair practice violations. In *United Electrical Workers v. Worthington Corp.*,[111] Judge Magruder decided that the arbitrator could make an award in similar circumstances. Two employees were discharged for refusing to testify before the House Committee on Un-American Activities. The employer, who appeared before the arbitrator under a reservation, claimed that an award could not be made because of federal pre-emption based on the Taft-Hartley Act. The arbitrator ruled in favor of reinstating the discharged employees, and the union petitioned the district court to enforce the award in accordance with section 301. Insofar as the union claimed irregularity of discharge, the arbitrator could, according to Judge Magruder, hear the dispute even though there may have been a violation of section 8(a)(5).[112]

In *Worthington*, Judge Magruder traced the development of federal pre-emption in the realm of labor law and noted that the only controversies in interstate commerce over which a state court properly exercises jurisdiction are violence[113] or a tort compensable under state law.[114] Judge Magruder carefully noted that the Supreme Court had not yet decided whether an arbitrator could make a decision where there is both a contract violation and an unfair labor practice.[115] Judge Magruder ruled in favor of the arbitrator because "the majority decision of the arbitrators in

certified by the NLRB, a possible violation of § 8(a)(5). 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1958). The Supreme Court refused to permit the state to take jurisdiction even though the NLRB would not adjudicate the controversy because of the monetary yardsticks then in effect.

111. 236 F.2d 364 (1st Cir. 1956).

112. 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1958). It is perhaps noteworthy that Judge Magruder did not interject state public policy. As a point of distinction, however, Judge Magruder was asked to enforce the award and the federal law, while in *Black* the California Supreme Court dealt with state law.

113. Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); Allen-Bradley Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

114. International Union, UAW v. Russell, 356 U.S. 634 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

115. 236 F.2d at 367.

fact passed only upon the wrongful discharge aspect of the case and turned aside the refusal to bargain aspect."[116]

On December 10, 1962, the Supreme Court decided in *Smith v. Evening News Ass'n*[117] that a state court can adjudicate a dispute arising under section 301 even if the employer's actions constitute an unfair labor practice. Mr. Justice White, writing the majority opinion, could find nothing in the Taft-Hartley Act that prevented concurrent NLRB and state court jurisdiction. By analogy, it would appear that an arbitrator can make an award if an unfair labor practice occurs because there is nothing in the Taft-Hartley Act to prevent it. Mr. Justice White did indicate that court jurisdiction could be denied if there was compelling reason; presumably, jurisdiction could also be denied an arbitrator for a similar reason.

The United States Supreme Court decision in *Black* is dated June 4, 1956, while Judge Magruder's opinion in *Worthington* is dated July 31, 1956. Thus, Judge Magruder spoke in *Worthington* seven weeks after the *Black* decision was published. Had *Worthington* been published prior to *Black*, one speculates whether the prestige of Judge Magruder would have influenced the majority of the United States Supreme Court in *Black* to favor the arbitration process rather than a nebulous state policy.

CONCLUSION

I believe that *Lincoln Mills*, the three *Steelworkers* cases, and *Lucas Flour Co.* overrule *Black*. There are, of course, legal problems yet to be ruled upon. In a society committed to arbitration, it can be anticipated that spheres of control will be rapidly defined by the Supreme Court to minimize labor-management friction. The Court, in *Lincoln Mills* and the *Steelworkers* cases, has already plotted a course favoring arbitration over court intervention. It currently appears that interference with the arbitration process will not be tolerated by the Court even where state public policy is interjected. Since section 301 favors federal contract law, state control must take a back seat unless it fits into the federal scheme.[118]

116. *Id.* at 370.

117. 371 U.S. 195 (1962).

118. In *Lincoln Mills*, Justice Douglas indicated that to create a federal substantive law,

> the range of judicial inventiveness will be determined by the nature of the problem . . . . 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 . . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

353 U.S. 448, 457 (1957).

Pre-emption is also indicated in *Black* because of the federal legislation enacted to corner the communist.[119] The rationale appearing in *Pennsylvania v. Nelson*[120] and *Lucas Flour Co.*[121] supports this conclusion.[122] Furthermore, pre-emption and the application of federal law is indicated in *Black* because of the unfair labor practices set out in the Taft-Hartley Act. *Smith v. Evening News Ass'n* supports this conclusion. *Black* is a decision that affects both civil rights and labor law, and it is in need of reconsideration on both counts.

Because *Black* has not been expressly overruled, state courts continue to follow its reasoning. In *Carey v. Westinghouse Electric Corp.*,[123] the union requested an order in a state court to force the employer to arbitrate, as required by contract, after three employees were discharged for invoking the first and fifth amendments before the House Committee on Un-American Activities. The New York Supreme Court decided that the employer was not obligated to arbitrate, stating:

> The three employees were perhaps within their constitutional rights in refusing to answer the questions put to them and even to their warped political beliefs but they have no constitutional right to employment . . . . The firing was for "just cause" as a matter of law and therefore there is no arbitrable dispute.[124]

The New York court, citing *Black,* stated that the people of New York, as well as California, abhor communism, and that the advocacy of a foreign economic system is contrary to public policy in New York. It must be admitted that the New York court matched the fervor of the California Supreme Court.

In *Local 453, International Union of Electrical Workers v. Otis Elevator Co.*,[125] an employee was discharged for gambling on his

119. See statutes cited notes 30–32 *supra.*

120. 350 U.S. 497 (1956).

121. 369 U.S. 95 (1962).

122. If communism was intended as an exception to federal policy favoring arbitration, it should have been clearly enunciated in legislation or contractually excluded. Since unions and employers must bargain in good faith and must sign contracts if requested after an agreement is reached, federal law necessarily controls. The Taft-Hartley Act does not provide for class exceptions to policy favoring arbitration. Thus, all disputes should be arbitrated in the absence of a contractual exclusion. Although Congress has already expressed a strong desire to prevent the spread of communism, it would seem that the federal interest lies in controlling subversion rather than membership. If a state court is permitted to deal with federal problems, as indicated in *Dowd Box Co.*, federal law prohibiting communism and controlling subversion should prevail rather than state law as in *Black. Lucas Flour Co.* calls for such an approach.

123. 31 Lab. Arb. 74 (N.Y. Sup. Ct. 1958).

124. *Id.* at 74–75.

125. 206 F. Supp. 853 (S.D.N.Y. 1962).

employer's premises. The arbitrator ruled that the employee should be reinstated. On a petition to enforce the award, a federal district court decided that the award was unenforceable because it was against the public policy of New York to indulge in crime. The district court judge cited *Black* as authority for his decision.

It is hoped that this Article will help to dispel decisions similar to *Carey* and *Otis Elevator Co.* for the reasons assigned.