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LABOR LAW — LMRA — NINTH CIRCUIT HOLDS THAT DISPUTE OVER PRIVATE CARD CHECK AGREEMENT IS SUBJECT TO PRIMARY JURISDICTION OF NLRB. — *International Union of Painter & Allied Trades, District 15, Local 159 v. J&R Flooring, Inc.*, 616 F.3d 953 (9th Cir. 2010).

Section 301 of the Labor Management Relations Act<sup>1</sup> (LMRA) grants federal courts broad jurisdiction over labor contract disputes to encourage adherence to these agreements.<sup>2</sup> But if a dispute is representational,<sup>3</sup> it falls within the primary jurisdiction of the NLRB.<sup>4</sup> Private recognition agreements, which contractually resolve representational issues, have thus posed thorny jurisdictional questions.<sup>5</sup> Yet courts have enforced these bargains,<sup>6</sup> particularly those including arbitration clauses, which narrow a court's task to interpreting a clause's scope.<sup>7</sup> Recently, in *International Union of Painter & Allied Trades, District 15, Local 159 v. J & R Flooring, Inc.*,<sup>8</sup> the Ninth Circuit deviated from this standard by holding that a union's action to compel arbitration under a private card check agreement was representational — and thus within the primary jurisdiction of the NLRB — because the contract's lack of specificity would force an arbitrator to rely on general principles of labor law to settle the claim.<sup>9</sup> By focusing on the arbitrator's representational task and not the parties' contractual commitment, the *J & R Flooring* court sidestepped precedent and policy concerns to rule in a manner limiting courts' ability to enforce these agreements. In so usurping the arbitrator's gap-filling role, the court provided a rationale to reroute private recognition claims to the NLRB. Though this effect may be blunted with greater specificity in future agreements, the court's reasoning may nonetheless be used to

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<sup>1</sup> 29 U.S.C. § 185(a) (2006).

<sup>2</sup> See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 454–56 (1957).

<sup>3</sup> Such disputes require a court to certify a bargaining agent or define a bargaining unit. See *Hotel Emps., Rest. Emps. Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992).

<sup>4</sup> See *S. Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 806 (1976); Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 BERKELEY J. EMP. & LAB. L. 50, 67 (1994).

<sup>5</sup> See George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 LAB. LAW. 215, 216 (2000).

<sup>6</sup> See *Hotel Emps. & Rest. Emps., Local 57 v. Sage Hospitality Res. LLC*, 390 F.3d 206, 219 (3d Cir. 2004); *Serv. Emps. Int'l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 984–85 (9th Cir. 2003); *N.Y. Health & Human Serv. Union v. NYU Hosps. Ctr.*, 343 F.3d 1117, 1119 (2d Cir. 2003); *Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566–67 (2d Cir. 1993); *Marriott*, 961 F.2d at 1468. *But cf.* *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250, 1252–53 (4th Cir. 1988).

<sup>7</sup> *J.P. Morgan*, 996 F.2d at 567–68.

<sup>8</sup> 616 F.3d 953 (9th Cir. 2010).

<sup>9</sup> *Id.* at 962.

ease abrogation of these contracts, contrary to the parties' intent and the LMRA's stabilizing purpose.

From 2004 to 2007, four Nevada contractors<sup>10</sup> operated under a collective bargaining agreement with the International Union of Painters and Allied Trades, District Council 15, Local 159 under § 8(f)<sup>11</sup> of the National Labor Relations Act<sup>12</sup> (NLRA).<sup>13</sup> This section's carve-out for the construction industry permitted the Union to bargain prior to majority recognition but also allowed the employers to terminate that relationship when the agreement expired. Thus, to cement its bargaining status beyond the imminent end of its agreement, the Union had to convert to traditional majority recognition under § 9(a).<sup>14</sup>

To do so, the Union turned to the agreement's card check provision,<sup>15</sup> which required the employers to "submit" to a card check administered by a third party.<sup>16</sup> Under the agreement, "[a]ny disputes" arising over the provision would be subject to "expedited arbitration."<sup>17</sup> Though the timing of the employers' reactions differed, their responses did not. All of the employers refused to cooperate in a card check, with three employers objecting to the proposed procedures and one objecting to any card check.<sup>18</sup> The Union nevertheless conducted unilateral card checks, shortly before the expiration of its agreement and through third parties of its choosing, who verified employee names but did not follow other standard NLRB procedures.<sup>19</sup> All of the employers rejected the results, maintaining they had no duty to bargain with the Union under § 9(a).<sup>20</sup>

Following the agreement's expiration in January 2007, the Union filed unfair labor practice charges with the NLRB against the employers.<sup>21</sup>

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<sup>10</sup> The contractors were J&R Flooring, Inc., Freeman's Carpet Service, Inc., FCS Flooring, Inc., and Flooring Solutions of Nevada, Inc. (FSI). *Id.* at 957.

<sup>11</sup> 29 U.S.C. § 158(f) (2006).

<sup>12</sup> *Id.* §§ 151-169.

<sup>13</sup> *J&R Flooring*, 616 F.3d at 956.

<sup>14</sup> 29 U.S.C. § 159(a).

<sup>15</sup> A card check is a mechanism for determining majority support outside an NLRB election; employees may express support for a union on distributed forms. *See* *Hotel Emps., Rest. Emps. Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1465 n.1 (9th Cir. 1992).

<sup>16</sup> *J&R Flooring*, 616 F.3d at 956.

<sup>17</sup> *Id.* (quoting article 4 of the agreement). A separate provision governed arbitration of disputes for the entire contract. *Id.* at 957.

<sup>18</sup> *Id.* at 957-58. FSI repudiated any card check; the other employers objected to the proposed procedures. *Id.*

<sup>19</sup> *See id.*

<sup>20</sup> *Id.* FSI ceased bargaining altogether; the other employers continued to discuss a successor agreement with the Union. Custom Floors, Inc., Case No. 28-CA-21226, at 7, 9 (Nat'l Labor Relations Bd. Sept. 5, 2007) (decision of A.L.J. Parke), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45800455fa>.

<sup>21</sup> *J&R Flooring*, 616 F.3d at 958.

None of the parties sought arbitration at the time.<sup>22</sup> The NLRB General Counsel issued a complaint that the employers had illegally refused to bargain by failing to comply with the card check provision.<sup>23</sup> In September 2007, an administrative law judge held for the employers, ruling that the Union could not rely on the card check results because there had been no agreement on the procedures.<sup>24</sup> The refusal to accept certain procedures was a question of contract interpretation, not anti-union animus, and the Union should have first arbitrated that dispute.<sup>25</sup>

The Union next filed suit in federal district court, seeking to compel arbitration of whether it had established proof of majority support under the agreement and, if so, what the appropriate remedy should be.<sup>26</sup> The district court found that the questions proposed for arbitration were primarily representational and within the primary jurisdiction of the NLRB.<sup>27</sup> It granted the employers' motion for summary judgment, denied the Union's motion to compel arbitration, and dismissed the case for lack of jurisdiction.<sup>28</sup> The Union appealed.

The Ninth Circuit Court of Appeals affirmed.<sup>29</sup> Writing for a unanimous panel, Judge Schroeder<sup>30</sup> began by acknowledging the dueling precedents guiding the court's decision: while "[t]he Supreme Court has long supported arbitration of labor [contract] disputes,"<sup>31</sup> it has also "long recognized" that allegations of unfair labor practices remain with the NLRB<sup>32</sup> — with this latter rule extending to representational claims.<sup>33</sup> The court noted that though the Supreme Court had not confronted a case like *J & R Flooring*, where parties contracted over the means of resolving a representational dispute, the Ninth Circuit had issued a series of notable opinions on the issue.<sup>34</sup>

In *Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp.*,<sup>35</sup> the Ninth Circuit found it had jurisdiction to compel

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* The Union's appeal of this ruling was pending at the time of the Ninth Circuit's decision. A three-member NLRB panel later affirmed the administrative law judge's findings as to three of the employers, reversing only as to FSL. *J & R Flooring, Inc.*, 355 N.L.R.B. No. 123 (Aug. 26, 2010); see also *J & R Flooring, Inc.*, 356 N.L.R.B. No. 9 (Oct. 22, 2010).

<sup>26</sup> *J & R Flooring*, 616 F.3d at 958.

<sup>27</sup> *Id.* at 959.

<sup>28</sup> *Id.* at 958–59.

<sup>29</sup> *Id.* at 955.

<sup>30</sup> Judge Schroeder was joined by Judge Callahan and District Judge Lynn, sitting by designation.

<sup>31</sup> *J & R Flooring*, 616 F.3d at 959 (citing *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960)).

<sup>32</sup> *Id.* at 959–60 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)).

<sup>33</sup> *Id.* at 960.

<sup>34</sup> *Id.*

<sup>35</sup> 961 F.2d 1464 (9th Cir. 1992).

employer participation in a card check because the parties had specifically agreed to that mechanism in their contract.<sup>36</sup> Building on this holding, in *Service Employees International Union v. St. Vincent Medical Center*,<sup>37</sup> the Ninth Circuit found it had jurisdiction to enforce a neutrality agreement, despite extracontractual issues raised by an intervening failed election, because the union challenged contractual violations and not the election result.<sup>38</sup> The *J & R Flooring* court read *Marriott* to establish that representational issues, if contractually resolved, may be enforced in federal court, but read *St. Vincent* to require that such issues be “detailed” to fall under § 301.<sup>39</sup> In sum, the court stated that a dispute is contractual only if it does not “require the district court or the arbitrator to ‘resolve any other representational issues not already resolved by the parties.’”<sup>40</sup>

The court held that the Union’s claim failed this test. First, it found that the claim had “never been” contractual because the Union’s initial NLRB challenge concerned majority status, not contract language.<sup>41</sup> The Union’s acknowledgement that an NLRB decision would “trump” an arbitral award supported this conclusion.<sup>42</sup> Further, the agreement specified only that the employers would submit to a card check, not to specific card check procedures; thus, any dispute as to the conduct and result of the card check was representational, not contractual, because an arbitrator would have to look to “general principles” of labor law, such as those NLRB procedures the third parties had overlooked, to resolve the dispute.<sup>43</sup> The court then laid down the rule that “where the parties have contractually agreed only to use a card check to determine whether a union has established its § 9(a) majority status, the issue of whether the union established its § 9(a) status remains primarily representational and within the NLRB’s primary jurisdiction.”<sup>44</sup> The court dismissed the Union’s Federal Arbitration Act argument as similarly foreclosed by the representational finding and denied attorneys’ fees to both parties.<sup>45</sup>

The *J & R Flooring* decision departs from circuit precedent and guiding Supreme Court opinions dictating that courts’ inquiries into labor arbitration claims stop at whether a clause is “susceptible of an

<sup>36</sup> *J & R Flooring*, 616 F.3d at 960–61; see *Marriott*, 961 F.2d at 1468–70.

<sup>37</sup> 344 F.3d 977 (9th Cir. 2003).

<sup>38</sup> *J & R Flooring*, 616 F.3d at 961; see *St. Vincent*, 344 F.3d at 984–86.

<sup>39</sup> *J & R Flooring*, 616 F.3d at 961–62.

<sup>40</sup> *Id.* at 961 (quoting *St. Vincent*, 344 F.3d at 984).

<sup>41</sup> *Id.* at 961–62.

<sup>42</sup> *Id.* at 962. This observation is true of any dispute over a private recognition agreement. See *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964); Strom, *supra* note 4, at 79–80.

<sup>43</sup> *J & R Flooring*, 616 F.3d at 962.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 962–63. This comment does not address the Federal Arbitration Act claim.

interpretation that covers the asserted dispute.”<sup>46</sup> Though the Union’s conduct and flawed claim may have contributed to this outcome, the court’s shift in scrutiny from the arbitration clause to the arbitrator’s task will extend beyond this holding. At a minimum, the court’s injection of a novel specificity requirement into what had been a purposefully lax analysis<sup>47</sup> opens the door to heightened requirements for court enforcement of private recognition agreements. Although this effect may be tempered by greater detail in future agreements, the ruling may become a method of barring court enforcement of these agreements, because labor contracts and arbitration inherently entail reference to outside principles.<sup>48</sup> This new impediment to § 301 jurisdiction could send these disputes to the NLRB, where an overloaded docket<sup>49</sup> and inadequate remedies<sup>50</sup> would weaken a central tool for private labor ordering<sup>51</sup> and lessen the costs of abrogating labor contracts, contrary to the purpose of the LMRA.<sup>52</sup>

It is true that the court was presented with an unsympathetic fact pattern: the Union’s last-minute, unilateral card check smacked of bad faith; the pertinent contract provision was brief;<sup>53</sup> the Union first sought NLRB enforcement, creating the appearance that its claim was an “end run” around the NLRB;<sup>54</sup> and the framing of the motion to compel arbitration listed toward the representational.<sup>55</sup> Given these

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<sup>46</sup> *E.g.*, *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986); *Serv. Emps. Int’l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 983 (9th Cir. 2003).

<sup>47</sup> *See, e.g.*, *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960) (limiting judicial inquiry into arbitration claims); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (same); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960) (same).

<sup>48</sup> *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 *IND. L.J.* 1589, 1606–10 (2008).

<sup>49</sup> *See, e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1567 n.178 (2002).

<sup>50</sup> *See* Benjamin I. Sachs, *Labor Law Renewal*, 1 *HARV. L. & POL’Y REV.* 375, 390 (2007).

<sup>51</sup> *See* Cynthia Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 *COMP. LAB. L. & POL’Y J.* 351, 358 (2007).

<sup>52</sup> *See* *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 454–56 (1957). Although the LMRA was enacted well before the naissance of modern private recognition agreements, its reach extends to labor agreements “between employers and labor organizations significant to the maintenance of labor peace between them.” *Retail Clerks Int’l Ass’n, Local Unions Nos. 128 & 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 25–28 (1962). Thus, both the LMRA’s grant of federal court jurisdiction over labor contracts and its goal of stabilizing labor relations have been found to apply to private recognition agreements. *See* *Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 564–67 (2d Cir. 1993) (citing *Retail Clerks*, 369 U.S. at 27).

<sup>53</sup> The contract did not specify card check procedures; however, it did detail other key issues, such as appropriate bargaining units. *Custom Floors, Inc.*, Case No. 28-CA-21226, at 4 (Nat’l Labor Relations Bd. Sept. 5, 2007) (decision of A.L.J. Parke), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45800455fa>.

<sup>54</sup> *Local No. 3-193 Int’l Woodworkers of Am. v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1299 (9th Cir. 1980).

<sup>55</sup> *Compare J & R Flooring*, 616 F.3d at 958 (“The issues the Union identified for arbitration were ‘[w]hether the union established its status as the majority representative under § 9(a) pur-

difficulties, the court may have, at most, found that the Union's effort to arbitrate the *results* of the card checks exceeded the contractual commitment to *submit* to a card check, though this approach is undercut by the presumption of arbitrability. The court also could have deferred jurisdiction on prudential grounds to permit final NLRB action, though such a deferral is not required.<sup>56</sup> But the court went further, recasting precedent to deny the Union's claim.

It is well established that § 301 broadly sweeps labor contract disputes into court to promote stable labor relations.<sup>57</sup> This is doubly true of arbitration claims, the preferred means of resolving labor disputes,<sup>58</sup> where Supreme Court precedent compels enforcement of most claims. Pertinently, courts must order arbitration absent "positive assurance" that a dispute falls outside an arbitration clause's parameters.<sup>59</sup> The Court has repeatedly affirmed this doctrine on the basis of both arbitrator expertise<sup>60</sup> and the salutary effect of arbitration on labor relations, regardless of the availability of NLRB redress.<sup>61</sup>

Although the Court has often applied this policy to collective bargaining agreements and has explicitly held that courts have joint jurisdiction with the NLRB over representational disputes to compel arbitration,<sup>62</sup> it has not addressed the arbitrability of private recognition agreements like that in *J & R Flooring*. However, because private recognition agreements are contracts between unions and employers, albeit contracts addressing organizing concerns,<sup>63</sup> circuit courts have held that the LMRA applies.<sup>64</sup> Consequently, the small body of circuit court law addressing these agreements has tracked the Court's reason-

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suant to the terms of the contract? If so, what is the appropriate remedy?" (alteration in original), *with* Serv. Emps. Int'l Union v. St. Vincent Med. Ctr., 344 F.3d 977, 979 (9th Cir. 2003) ("The Union . . . alleged that the Employer violated various provisions of an agreement that restricted the parties' behavior during union organizing campaigns."). The Union could have instead moved to compel arbitration of the employers' failure to "submit" to a card check.

<sup>56</sup> *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964) (stating that a potential conflict between court and NLRB findings "is no barrier to resort to a tribunal other than the Board").

<sup>57</sup> *See, e.g., Retail Clerks*, 369 U.S. at 28.

<sup>58</sup> *See* JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 1419-24 (5th ed. 2006).

<sup>59</sup> *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-85 (1960) ("[J]udicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate . . . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83); *see also* *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (restricting court review to the scope of the arbitration clause, excluding the merits of the claim).

<sup>60</sup> *See, e.g., AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

<sup>61</sup> *See Carey*, 375 U.S. at 272.

<sup>62</sup> *See id.*

<sup>63</sup> *See, e.g.,* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 832-40 (2005); Cooper, *supra* note 48, at 1592-93.

<sup>64</sup> *See* cases cited *supra* note 6.

ing.<sup>65</sup> Though “primarily representational” disputes remain with the NLRB, “primarily contractual”<sup>66</sup> disputes stay with the court, for “while the *courts* may not resolve representational issues, the *parties* may resolve these issues contractually.”<sup>67</sup> The decision to enforce a contract is strengthened by an arbitration clause,<sup>68</sup> since this resolution of the representational issue leaves the court only with the “narrow”<sup>69</sup> question of whether the clause is “susceptible of an interpretation that covers the asserted dispute.”<sup>70</sup> If it is, the court must compel arbitration.

The *J & R Flooring* court went beyond this permitted scope of analysis. Instead of applying the precedential test of whether “the district court [would] be required to ‘resolve any other representational issues not already resolved by the parties,’”<sup>71</sup> the court recast the test as whether the “district court *or the arbitrator* [would have] to ‘resolve any other representational issues not already resolved by the parties.’”<sup>72</sup> This examination of the arbitrator’s considerations layers an additional requirement onto a heretofore minimalist test. Although specificity in private recognition agreements has been notionally suggested to prevent a finding that a claim is representational,<sup>73</sup> § 301 jurisprudence suggests that so long as parties commit to specific obligations (card check) and forums (arbitration) to resolve representational issues, contract adherence and arbitrator expertise should prevail.<sup>74</sup> Indeed, the lingering question of how much specificity is necessary to support jurisdiction runs afoul of the stabilizing intent of the presumption of arbitrability and the directive to enforce “as far as is possible” parties’ intent in labor contract claims.<sup>75</sup> By complicating this analy-

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<sup>65</sup> See *Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566–68 (2d Cir. 1993) (discussing rationale for finding § 301 jurisdiction over private recognition agreements).

<sup>66</sup> *United Ass’n of Journeymen, Local 342 v. Valley Eng’rs*, 975 F.2d 611, 614 (9th Cir. 1992).

<sup>67</sup> *Hotel Emps., Rest. Emps. Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992).

<sup>68</sup> See Davies, *supra* note 5, at 217–18.

<sup>69</sup> *J.P. Morgan*, 996 F.2d at 567.

<sup>70</sup> *Serv. Emps. Int’l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 983 (9th Cir. 2003) (quoting *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986)) (internal quotation marks omitted).

<sup>71</sup> *Id.* at 984 (quoting *Marriott*, 961 F.2d at 1469).

<sup>72</sup> *J & R Flooring*, 616 F.3d at 961 (emphasis added) (quoting *St. Vincent*, 344 F.3d at 984).

<sup>73</sup> See Davies, *supra* note 5, at 217–18.

<sup>74</sup> See, e.g., *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1960) (“Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes . . . .’ That policy can be effectuated only if the means chosen by the parties for settlement of their differences . . . is given full play.” (quoting 29 U.S.C. § 173(d))).

<sup>75</sup> *Local 3-7, Int’l Woodworkers v. Daw Forest Prods. Co.*, 833 F.2d 789, 792 (9th Cir. 1987) (quoting 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 95, at 396 (1963)); see also *Marriott*, 961 F.2d at 1466 (“Invalidating a contract as unenforceably vague is disfavored . . . . A labor contract need only ‘be sufficiently certain “such that the court can determine what the terms of [the] agreement are.”’” (quoting *Daw Forest*, 833 F.2d at 793 (quoting CORBIN, *supra*, § 95, at 394) (second alteration in original))).

sis, the court not only failed to give effect to these parties' labor ordering, but also limited the availability of courts as an enforcement mechanism for future disputes, disrupting the binding force of these increasingly common<sup>76</sup> contracts.

Although *J & R Flooring* may be isolated as a bad claim under a bad contract, the rationale underlying the decision suggests the potential for a broader and more destabilizing approach in this evolving area of law. In finding fault with an arbitrator's reliance on general principles of labor policy, a practice at the core of arbitrator expertise, the court severely restricted the range of private recognition agreements enforceable under § 301. The contract in *J & R Flooring* was unusually thin, but it is unlikely that many more conventional private recognition agreements could meet the trying test of providing an arbitrator with comprehensive guidance in resolving a claim. Negotiating such a complete contract would be inefficient, if not impossible.<sup>77</sup> Imagine the improbability of an employer and union's resolving ex ante all contingencies an arbitrator might need to address, including fluctuating bargaining units, individual employee eligibility and card validity, and the boundary drawing inherent in responding to proscribed coercion.<sup>78</sup> Requiring that parties fill these gaps not only ignores the transactional benefits intrinsic to leaving issues for arbitration,<sup>79</sup> but also raises a formidable barrier to court enforcement — a requirement that swallows the rule of elevating labor arbitration.

In the LMRA, Congress encouraged the enforcement of parties' contractual agreements to resolve labor disputes; that purpose has commanded wide judicial enforcement of labor arbitration clauses since the LMRA's adoption.<sup>80</sup> By departing from this precedent, *J & R Flooring* conflicts with the purpose of the LMRA. In stiffening the test for § 301 jurisdiction, the court eased the path to future contract abrogation, reducing the value of employer concessions in these agreements by weakening unions' ability to enforce them.<sup>81</sup>

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<sup>76</sup> See Brudney, *supra* note 63, at 828–32.

<sup>77</sup> See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 594–95 (2003).

<sup>78</sup> Cf. Cooper, *supra* note 48, at 1606–10 (listing many considerations in such agreements).

<sup>79</sup> See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (“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.”).

<sup>80</sup> See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1960); *Warrior & Gulf*, 363 U.S. at 582; *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

<sup>81</sup> Cf. *Verizon Info. Sys.*, 335 N.L.R.B. 558, 558 (2001) (holding that when one party benefits from a private recognition agreement, it is then bound to abide by its terms because “the fundamental policies of the [LMRA] can best be effectuated by holding the Petitioner to its bargain,” *id.* at 560).