APPENDIX C

REPORT OF COMMITTEE ON LAW AND LEGISLATION JANUARY 1963

During the year 1962 the Committee devoted itself to carrying forward the two projects initiated in 1961[1]: (1) a review of new state legislation affecting arbitration, and (2) a survey of the impact on federal and state courts of the Supreme Court decisions in the *American Manufacturing, Warrior & Gulf,* and *Enterprise Wheel* cases [hereinafter referred to as the trilogy].[2] As to the first project, the only significant statutory developments involving labor arbitration which have come to the Committee's attention were those in New York. They are discussed in Section I of the Report. The survey of reported cases is set forth in Section II. It is headed by the current decisions of the United States Supreme Court, which obviously reflect far more than the impact of the trilogy. There follows, in accordance with the pattern of last year's Report, a survey of reported cases in the federal courts of appeals and district courts and in the state courts, which survey, though by no means complete, seems sufficiently broad to justify generalizations which follow.

It again can be said this year, as it was in last year's Report, that the federal courts, with few exceptions, have followed the law of the trilogy[3] and, further, have sought to apply the philosophy underlying

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[1] Report of NAA Committee on Law and Legislation, in *Collective Bargaining and the Arbitrator's Role* (Washington: BNA Incorporated, Kahn, ed., 1962), p. 249.

[2] United Steelworkers v. American Mfg., 34 LA 559, 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 34 LA 561, 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 34 LA 569, 363 U.S. 593 (1960). These cases continue to be the subject of extensive commentary, including the following articles appearing during the past year: Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy,* 9 U.C.L.A. L.Rev. 360 (1962); Gregory *Enforcement of Collective Agreements by Arbitration,* 48 Va.L.Rev. 883 (1962); Smith, *The Question of "Arbitrability"—The Roles of the Arbitrator, the Court, and the Parties,* 16 Sw.L.J. (1962); Wellington, *Judicial Review and the Promise to Arbitrate,* 37 N.Y.U.L.Rev. 471 (1962).

[3] Last year's Report sets forth the following summary of that law, appearing in Kagel, "Recent Supreme Court Decisions and the Arbitration Process," in *Arbitration and Public Policy* (Washington: BNA Incorporated, Pollard ed., 1961), pp. 1, 3-4:

those holdings. But a number of problems have arisen in connection with the interpretation and application of that law. It is believed that among those that merit attention are the following:

As to the Supreme Court, the law of the trilogy was directly involved only in *Sinclair* and *Drake Bakeries,* both dealing with the question whether an employer's claim for damages for an alleged breach of a no-strike clause is an arbitrable matter. Consistently with the trilogy, the Court held that this is "a question for the courts and is to be determined by the contract between the parties." And, as set forth below, it construed the contract in *Sinclair* as precluding arbitration and the contract in *Drake Bakeries* as requiring arbitration. But it has been noted that while the Court rejected an employer's claim to the effect that there is a presumption of non-arbitrability in these circumstances, it omitted any mention of the presumption of arbitrability promulgated in the trilogy, presumably recognizing that arbitrability of an alleged breach of the no-strike clause raises different considerations.[4]

As to the lower federal courts, it is believed, first, that such decisions as *Otis Elevator* and *General Electric (Carey)* raise important and difficult problems as to the extent to which the law and philosophy of the trilogy permit a court to vacate an award or, in particular, to refuse to direct arbitration on the basis that the award or claim violates "public policy" or is "unlawful."[5]

Related in some respects to the foregoing is the broad problem involving "the interrelationships between arbitrators, the courts and the NLRB."[6] While the Supreme Court has decided that the NLRB's authority to deal with an unfair labor practice which also violates a collective contract is not exclusive, cases such as *Raytheon, Sinclair Refining Co.* v. *NLRB, Olin Mathieson, Hurley* and *Westinghouse (Carey)* suggest that "the law of the trilogy may have the possible

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On arbitrability: The courts are limited to finding whether there is a collective bargaining agreement in existence; whether there is an arbitration clause; and whether there is an allegation that a provision of the agreement has been violated. If the arbitration clause is broad enough to include the alleged "dispute", then arbitration must be ordered.

On enforceability of awards: If the arbitrator stays within the submission and makes his award on his construction of the contract, then the award must be enforced.

In either arbitrability or enforcement cases the courts are not to get into the merits of the case; they are not to substitute their judgment for that of the arbitrator; they shall not refuse to act because they believe a claim is frivolous or baseless.

4 Summers, *Labor Law Decisions of the Supreme Court, 1961 Term,* Address, Labor Law Section of American Bar Association, San Francisco, Calif., Aug. 7, 1962.

5 See Blumrosen, *Public Policy Considerations in Labor Arbitration Cases,* 14 Rutgers L.Rev. 217 (1960); Meiners, *Arbitration Awards and "Public Policy",* 17 Arb.J. (n.s.) 145 (1962).

6 Aaron, *supra* note 2, at 374.

effect of blurring still further the shadowy lines of demarcation that presently exist."[7]

Next, several decisions implicitly or explicitly raise questions as to the extent to which evidence extrinsic to the terms of the agreement may be used by the courts in determining arbitrability. The *Pacific Northwest Bell Telephone* case (p. 349) contains the fullest and most discriminating discussion of the problem.

The question whether the court or the arbitrator shall decide issues as to compliance with the procedural requirements of the contractual grievance procedure again has been presented. The *General Electric (Carey)* case contains a discussion of the authorities, and provides an interesting reconciliation of the contrary results.

The *General Electric (Carey)* and the *Westinghouse* cases suggest interesting questions as to whether, or the extent to which, the parties may contract for a test of arbitrability differing from the test of the trilogy.

The Riss case, the *General Electric (UE)* case, and the *Procter & Gamble* case raise the question whether the policy of the trilogy is applicable to resolution of issues as to the "compulsory" nature of the arbitration clause.

As to the state courts, it likewise can be said again this year that they generally have followed the law of the trilogy, either in fashioning state law, as in the *Jersey Central Power* case, or in applying federal law, as in the *Gould-National* case. The *General Electric (Fitzgerald)* case and the *Anaconda* case are illustrative of an occasional aberration.

The decisions of the United States Supreme Court establish the following principles:[8]

(1) State courts have concurrent jurisdiction with the federal courts over suits arising out of Section 301 of the LMRA.

(2) The substantive law to be applied in suits arising out of Section 301 in either a federal or state court is federal law.

(3) Although a labor-management agreement may not be a "collective bargaining contract" and may not grant the union exclusive recognition, it is nevertheless cognizable under Section 301.

(4) Though the collective agreement lacks an express no-strike clause, a provision that a dispute shall be settled exclusively and

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[7] Ibid.

[8] Among the articles commenting on various aspects of the Courts' decisions are the following: Christensen, *Arbitration, Section 301, and the National Labor Relations Act,* 37 N.Y.U. L.Rev. 411 (1962); Feldesman, *Section 301 and the National Labor Relations Act,* 30 Tenn. L.Rev. 16 (1962); Fleming, *Arbitrators and the Remedy Power,* 48 Va. L.Rev. 1199 (1962); Isaacson, *The Grand Equation: Labor Arbitration and the No-Strike Clause,* 48 A.B.A. J. 914 (1962); Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements,* 37 N.Y.U. L.Rev. 448 (1962); Summers, *supra* note 4; Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U. L.Rev. 362 (1962).

finally by compulsory arbitration imposes upon the union an obligation not to strike over that controversy.

(5) The authority of the NLRB to deal with an unfair labor practice which also violates a collective contract is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301.

(6) As noted above, whether an employer's claim for damages for an alleged breach of a no-strike clause is an arbitrable matter is "a question for the courts and is to be determined by the contract entered into by the parties." Where the contractual grievance and arbitration provisions provide only for submission of grievances by the union and for invocation of arbitration at the option of the union, the employer's action for damages under Section 301 will not be stayed. But where the arbitration provisions cover "all complaints, disputes, or grievances" and do not exclude claims or complaints of the employer, the claim of violation of the no-strike clause presents an arbitrable issue requiring a stay.

(7) The Norris-La Guardia Act bars the federal courts in suits under Section 301 from enjoining a strike over an arbitrable issue in violation of a no-strike clause.

(8) When a union is liable in a suit under Section 301 for damages for violation of the no-strike clause, its officers and members are not liable for these damages.

(9) Suits to vindicate individual employee rights arising from a collective contract are within the coverage of Section 301. The Court's *Westinghouse* principle, noted in last year's Report as "moribund, if not already dead," has been given a proper burial.

(10) Section 301 does not exclude all suits brought by employees instead of unions.

As indicated above, these significant rulings of the Supreme Court reach into areas beyond the scope of this Committee's projects for the year, and no attempt has been made to explore and analyze their many implications. It is noted, however, that the Court's decisions necessarily leave unresolved or suggest numerous problems of great importance.[9] Facets of at least two of these problems are expected to be considered by the Court during the present term. Its grant of certiorari in the *Raytheon* case will bring before it a question arising from its holding that NLRB jurisdiction is not exclusive. And the grant of certiorari in the *Riss* case presumably will require consideration of whether, or the extent to which, there must be "an agreement for compulsory arbitration" in order to qualify for enforcement under Section 301.

As in last year's Report, the lower federal and state cases summarized in Section II are listed by geographical area. And to provide

[9] Many of these problems are considered in the articles cited *supra*, note 8.

continuity, we again have listed all cases under the topical headings utilized last year in a Topical Index to the Report.

I. NEW STATE LEGISLATION

The only significant statutory developments involving labor arbitration which have come to the Committee's attention are those in New York.[10] In that state there were two important developments.

First, the Legislature repealed the present Civil Practice Act and enacted a new Civil Practice Law and Rules, to be effective on September 1, 1963. In so doing, it has substituted a new arbitration article, Article 75 of the CPLR, for the existing statute, Article 84 of the CPA. It is believed that for our purposes it is unnecessary to attempt to summarize the changes incorporated in the new article. For, in the language of the Advisory Committee on Practice and Procedure of the Temporary Commission on the Courts:

> This article does not differ markedly from present law; most of the changes are made to consolidate, clarify and simplify existing provisions. Procedures used by arbitrators and the courts remain essentially unchanged.[11]

The second major development in New York was the Legislature's enactment of a new section of the CPA article which is intended to abrogate the notorious *Cutler-Hammer* doctrine developed by New York's judiciary. This section is as follows:

> § 1448-a. *Arbitrability not to depend upon merits of claims.* In determining any matter arising under this article, the court or judge shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.[12]

An interesting and unusual question is presented by reason of the fact that no like section is included in the new CPLR. As Section 1448-a was enacted a few days after the enactment of the new CPLR and the repealer of the CPA, uncertainty has arisen as to whether Section 1448-a is included in the repealer. In any event, the significance of this section has been dwarfed by developments on the federal scene,

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10 Arizona has enacted the Uniform Arbitration Act, but with the provision that it "shall have no application to arbitration agreements between employers and employees or their respective representatives." Sec. 12-1517. Michigan has enacted certain statutory amendments making future dispute arbitration clauses in contracts specifically enforceable, but these statutes, as amended, exclude "collective contracts between employers and employees or associations of employees in respect to terms or conditions of employment." Acts Nos. 27 and 34, Public Acts of 1962.

11 See also Weinstein, *Notes on Proposed Revision of the New York Arbitration Law*, 16 Arb. J. (n.s.) 61 (1961).

12 See Note, *New York Civil Practice Act Section 1448-a; Its Effect on the Judicial Role in Arbitration*, 62 Colum. L.Rev. 1480 (1962).

particularly by decisions of the Supreme Court involving federal-state relations in the enforcement of collective agreements.

II. COURT DECISIONS

A. UNITED STATES SUPREME COURT

Charles Dowd Box Co. v. *Courtney,* 368 U.S. 502 (1962). The action was brought in a Massachusetts court by union officers on behalf of the members to enforce a collective agreement. A money judgment in conformity with the wage provisions of the agreement was affirmed by the highest state court and in turn by the Supreme Court, which held that Section 301 (a) does not operate to divest a state court of jurisdiction over a suit for violation of a contract between an employer and a labor organization in an industry affecting interstate commerce. Relying on the language and legislative history of the statute, the Court concluded that there was concurrent state and federal jurisdiction.

The Court expressly refrained from intimating any views on the questions: whether the Norris-La Guardia Act is applicable to a suit brought in a federal court for violation of a collective agreement; if so, whether Norris-La Guardia is applicable to a state court suit; and whether there might be impediments to the free removal to a federal court of such a suit.

Retail Clerks v. *Lion Dry Goods,* 369 U.S. 17 (1962). The unions brought an action under Section 301 to enforce arbitration awards made pursuant to the provisions of a "strike settlement agreement." The Court held that although the agreement may not be a "collective bargaining contract" and may not grant the unions exclusive recognition, it is nevertheless a "contract cognizable under the statute. The Court therefore reversed the action of the lower federal courts dismissing the complaint, and remanded the cause for further proceedings.

Local 174, Teamsters v. *Lucas Flour Co.,* 369 U.S. 95 (1962). A union and an interstate employer were parties to a collective agreement under which the employer reserved the right to discharge any employee "if his work is not satisfactory", and which provided that any difference between the parties "shall be submitted to arbitration" but omitted any no-strike clause. An employee was discharged for unsatisfactory work. The union called a strike in protest. After the 8-day strike was terminated, the issue of discharge was submitted to arbitration, and the discharge was upheld. Meanwhile the employer brought this state court action for damages caused by the strike. In affirming a judgment for the employer, the Court resolved three principal issues, two by text, and one by footnote.

(1) Principles of federal substantive law, rather than of state

law, must be applied by state courts in exercising jurisdiction over litigation within the purview of Section 301 (a).

(2) Under federal law the strike violated the agreement despite the absense of a no-strike clause covering the dispute. While expressly rejecting any notion of the courts below "that a strike during the term of a collective bargaining agreement is *ipso facto* a violation of the agreement", the Court held that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement."

(3) Relegated to a footnote was the Court's disposition of the contention that the NLRB had exclusive jurisdiction. The Court said:

> Since this was a suit for violation of a collective bargaining contract within the purview of § 301 (a) . . ., the preemptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. . . .

Sinclair Refining Co. v. *Atkinson,* 370 U.S. 195 (1962). The employer, alleging that the union had engaged in strikes over arbitrable issues in violation of an express no-strike clause, sought injunctive relief in an action in a federal district court under Section 301. The union's motion to dismiss on the ground that the court lacked jurisdiction by virtue of the Norris-La Guardia Act was granted. The Supreme Court affirmed, relying largely upon the language of Norris-La Guardia and the legislative history of Section 301. The Court distinguished the *Chicago River* case, in which injunctive relief was granted under the Railway Labor Act, on the basis of the affirmative duty imposed by the RLA to submit grievances to the Railroad Adjustment Board and of the "far different legislative history" of the RLA. And *Lincoln Mills,* upholding a mandatory injunction to carry out an agreement to arbitrate, did not involve an injunction against conduct specifically non-enjoinable under Norris-La Guardia.

A strong dissent urged accommodation of Section 301 and Norris-La Guardia. After suggesting how this accommodation might be accomplished, the dissent points to anomalies presented by this decision vis-a-vis *Dowd Box* and *Lucas Flour,* and observes that "The decision deals a crippling blow to the cause of grievance arbitration itself."

The same issue was involved in *Chauffeurs Local 795* v. *Yellow Transit Freight Lines,* 370 U.S. 711 (1962), in which the Court reversed *per curiam* the contrary decision of the Tenth Circuit. It is noted that the dissenters in *Sinclair* concurred with the majority in *Yellow Transit* on the ground that "since it is clear that the collective bargaining agreement involved in this case does not bind either party to arbitrate any dispute, . . . no injunction should be granted."

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962). In addition to seeking injunctive relief, as noted above, the employer sued the union for damages under Section 301, and the individual union officers and agents on the basis of diversity jurisdiction. The union moved to dismiss on various grounds and also moved to stay on the grounds that all issues were referrable to arbitration and that important issues in the action were also involved in grievances filed by employees and said to be in arbitration.

The Court directed dismissal of the action against the individual defendants. In brief, the Court reasoned that under Section 301 a suit for violation of the collective agreement is governed by federal law; that the conduct charged against the individuals—violation of the no-strike clause—necessarily charges a violation by the union itself, which comes within Section 301 (a); that Section 301 (b) makes unions suable but exempts agents and members from personal liability; and that "when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages." The Court reserved the question whether a proper Section 301 (a) claim would be stated "if it charged unauthorized, individual action."

The Court upheld the denial of the union's motion to stay pending arbitration of the employer's damage claim. Starting from the proposition that "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties", the Court held that the subject contract was not susceptible to a construction that the employer was bound to arbitrate its damage claim for breach of the no-strike clause since the grievance and arbitration article provided only for submission of grievances by the union and for invocation of arbitration at the option of the union. The Court accordingly did not reach the question whether breaches of the no-strike clause are "grievances." Lastly, the Court was not satisfied that any significant issue in the damage suit would be presented to and decided by an arbitrator.

Drake Bakeries v. *Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254 (1962). This case also involved the question whether an alleged breach of a no-strike clause presented an arbitrable issue. And here, under an arbitration article broadly covering "all complaints, disputes or grievances," and not excluding employer claims or complaints, the Court held that the employer's action must be stayed pending arbitration. It rejected the employer's contention that the parties could not have intended to arbitrate so fundamental a matter as a strike in breach of contract and that only an express inclusion of a damage claim by the employer would suffice to require arbitration. The Court thought it more reasonable to have expected such a matter to be excluded if the parties so intended, especially in the light of provisions in the no-strike clause insulating the union

from damages for unauthorized strikes and providing for arbitration of disciplinary action against the strikers. The Court also rejected the contention that the employer was excused from arbitrating by the union's breach. While not deciding that in no circumstances would such a breach excuse the employer, the Court held that there were no circumstances in this case which sufficed to relieve the employer of its duty to arbitrate.

Smith v. *Evening News Association,* 83 S. Ct. 267 (1962). Defendant Association and the Newspaper Guild were parties to a collective contract containing a provision that "there shall be no discrimination against any employee because of his membership or activity in the Guild." Plaintiff, a maintenance employee of the Association and a member of the Guild, brought an action individually and as assignee of 49 other employees in a Michigan court alleging a breach of the contract in that during a strike of employees belonging to another union defendant refused to permit petitioner and his assignors to report for work while permitting certain nonunion employees to report and paying them full wages even though no work was available. The Michigan Supreme Court affirmed a judgment dismissing for want of jurisdiction on the ground that the complaint alleged a violation of the NLRA exclusively within the jurisdiction of the NLRB.

The Court reversed and remanded. First, the Court held that "the authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301."

Second, the Court rejected the claim "that the predicate for escaping the Garmon rule is not present here because this action by an employee to collect wages in the form of damages" is not a suit for which Section 301 provides. In so doing, the Court made explicit that *Westinghouse* "is no longer authoritative as a precedent," and that individual claims are not excluded from the ambit of Section 301.

Third, the Court held that the same considerations foreclosed the contention that Section 301 excludes all suits brought by employees instead of unions. However, as stated in Justice Black's dissent, the Court refrained "from saying when, for what kinds of breach, or under what circumstances an individual employee can bring a §301 action and when he must step aside for the union to prosecute his claim."

B. OTHER FEDERAL COURTS

1. *First Circuit*

Local 1505, IBEW v. *Local 1836, IAM; Raytheon Co.* v. *Local 1836, IAM,* 304 F.2d 365 (1st Cir. 1962), *cert. granted,* 83 S. Ct. 255 (1962). IBEW was certified as representative of production and main-

tenance employees; IAM subsequently was certified as representative of certain machinists previously within the IBEW unit. Both unions have agreements with the employer. Claiming that the employer had violated the recognition clause of its agreement, IAM demanded that work performed by members of IBEW be assigned to IAM members, and brought this action to compel arbitration of the ensuing dispute. The district court ordered "bilateral arbitration, denying IBEW's request to participate." The court of appeals reversed. It reserved determination of whether it had authority to adopt equitable measures permitting IBEW participation, and ordered the complaint dismissed on the ground that "exclusive jurisdiction to resolve the conflict is in the Labor Board whose certifications have permitted these overlapping claims." The court, while recognizing that NLRB "preemption, as such, does not apply to actions under Section 301," appeared to hold that the dispute involved a matter of representation, appropriately within the Board's exclusive jurisdiction.

Westinghouse Elec. Corp. v. *Local 1790, IAM,* 304 F.2d 449 (1st Cir. 1962). The facts are indicated only in a concurring opinion, from which it appears that the arbitration clause of the agreement provides that "except as otherwise provided in this Agreement," the parties agree to arbitrate "the interpretation, application or claimed violation of this Agreement," but also provides that "if either party shall advise the Association that the grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue . . . [the arbitrator shall be appointed] only after a final judgement (sic) of a Court has determined that the grievance upon which the arbitration has been requested raises an arbitrable issue." It also is indicated that this action to compel arbitration involves the contracting out of unit work, and that there is no provision in the agreement specifically dealing with the subject. In affirming a decree ordering arbitration, the court simply stated *per curiam* that "We see no substantial distinction between the case at bar and *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, . . ." The concurring opinion states that "the parties may, if they please, provide that arbitration will depend upon the court's finding of merit in the claim sought to be arbitrated." but that the clause providing for court determination of arbitrability does not have this effect.

2. *Second Circuit*

Procter & Gamble Independent Union v. *Procter & Gamble,* 298 F.2d 644, 298 F.2d 647 (2d Cir. 1962). In these two decisions, the court of appeals affirmed the judgments of the district court, summarized in the 1962 Report, ordering arbitration of six classification grievances in one case, and of a grievance alleging violation of a prohibition against foremen working at non-supervisory tasks in the second case. Quoting at length from the trilogy, the court rejected the employer's contention that arbitration should be refused because none of the

grievances was specifically covered by any particular provision of the agreement. The 1962 Report notes that the second case also involved a grievance alleging "Violation of past practices and agreements and discrimination against a union official," in that the employer failed to pay the minimum wage required by the agreement for a job on which the grievant had bid. The district court's holding that this grievance was not arbitrable, criticized in the 1962 Report, was not appealed by the union, and the court of appeals expressly refrained from giving any opinion as to the correctness of the ruling below.

Procter & Gamble Independent Union v. *Procter & Gamble Mfg. Co.,* 51 LRRM 2752, 46 CCH. Cas ¶ 17,975 (2d Cir. 1962). The union brought an action to compel arbitration of grievances protesting disciplinary measures against employees. The activities on which the discipline was based, the disciplinary measures, and the filing of the grievances all occurred in the interval between the termination date of a former agreement and the effective date of a new agreement. Reversing the district court, which had held that the grievance procedure previously established was dependent only upon the continued relationship of employer and employee, the court of appeals granted summary judgment for the employer. It held that under the agreement the union, and not the individual employees, had the right to take grievances to arbitration; and that in any event the right to arbitrate, whether in the individual or the union, depends on the existence of an agreement to arbitrate. The court distinguished cases holding that "grievances which are based upon conditions arising *during the term of the agreement to arbitrate* are arbitrable after that term has ended" as inapplicable to grievances "which arise *after the expiration* of the agreement to arbitrate." The court also rejected the union's contentions that failure to give timely notice to federal and state mediation agencies as required by Section 8 (d) of the NLRA operated to extend the expired agreement, and that arbitration could be enforced on the basis that the employer had committed an unfair labor practice.

Milk Drivers Union v. *Dairymen's League Co-Operative Ass'n,* 304 F.2d 913 (2d Cir. 1962). Inasmuch as the state courts have concurrent jurisdiction with the federal courts to compel arbitration pursuant to a collective agreement, a federal district court has discretion to stay such an action if there is a prior action involving the same dispute pending in the state courts.

Black-Clawson Co. v. *IAM 355,* 52 LRRM 2038, 46 CCH Lab. Cas. ¶ 17,996 (2d Cir. 1962). An individual employee, purporting to have complied with the preliminary steps of the grievance procedure contained in an agreement between the union and the employer, demanded that the employer arbitrate the employe's allegedly wrongful discharge. The employer then brought this action in a federal district court under Section 301 for a declaratory judgment that the dispute was not

arbitrable. On cross-motions for summary judgment the district judge held that the defendant union and defendant individual were to be restrained from making any action to compel arbitration. On appeal by the individual, the court of appeals affirmed. The courts first held, after reviewing conflicting authority, that an action for declaratory judgment may be brought under Section 301 as implemented by the Federal Declaratory Judgment Act. Second, the court held that the individual employee had no standing to compel arbitration under the "typical" contractual grievance procedure or under Section 9(a) of the NLRA. The court stated that its conclusion was "dictated not merely by the terms of the collective bargaining structure, and history of section 9(a), but also by what we consider to be a sound view of labor-management relations."

Local 453, IUE v. *Otis Elevator Co.*, 201 F. Supp. 213 (S.D.N.Y. 1962); 206 F. Supp. 853, 50 LRRM 2689, 45 CCH Lab. Cas. ¶ 17,738 (S.D.N.Y. 1962). The union brought this action seeking enforcement of an arbitration award directing reinstatement without back pay of an employee who had been discharged for violation of a company rule prohibiting gambling on the employer's premises following conviction for knowing possession of policy slips on the employer's premises during working hours. The arbitrator found that the discharge was without just cause in that it was too harsh a penalty. In denying the union's motions for preliminary injunctive relief and for summary judgment, the district judges, while holding that there was an arbitrable issue and that they were foreclosed from considering whether commission of a crime is just cause as a matter of law, nevertheless refused to enforce the award. The court noted that the misconduct was a crime; that the employer as owner of the premises also was exposed to criminal prosecution under the criminal statute; and that the aggrieved was carrying on "organized professional gambling." The court believed that the trilogy was not controlling, stating that:

> . . . a collective bargaining agreement may well give an arbitrator power to dispense his own brand of industrial justice, but the contract, and his power under it, are limited by, and must yield to, overriding public policy. This award clashes with that policy. It indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability. The award is, therefore, void and unenforceable.

Carey v. *General Electric Co.*, 50 LRRM 2119, 45 CCH Lab. Cas. ¶ 17,599 (S.D.N.Y. 1962). The motion by the union to compel arbitration of 12 grievances and the objections by the employer raised questions related to numerous problems of current importance. The parties' agreement provides for arbitration of any grievance involving the interpretation or application of a provision of the agreement which

remains unsettled after having been fully processed pursuant to the agreement.

The first question treated by the court was whether the action was governed by New York or federal law. Notwithstanding a provision in the agreement specifically providing that it was to be governed by New York law, the court held that the *Lucas Flour* decision required the application of federal law.

Next, the court turned to the question whether objections to arbitration on the ground that the party seeking to compel it has failed to comply with the procedural requirements of the grievance and arbitration provisions is to be decided by the court or the arbitrator. Following an extensive discussion of relevant judicial decisions and periodical commentary the court adopted the approach reflected by the following quotation:

> Perhaps the contrary results that flow from a consideration of the contractual nature of arbitration provisions and from a consideration of the unique role attributed to the arbitrator by the Supreme Court can be reconciled by an approach under which questions of procedural arbitrability that require resolution of problems similar to those usually handled by an arbitrator, that is, questions that require "the arbitrator to exercise the creative role his function demands," would be submitted to arbitration, reserving to the court questions that do not call for this special competence, as, for example, where the contract provides in specific rather than general terms the procedural requirements and the consequences of noncompliance.

Following this approach, the court held that the question whether certain grievances were brought within a "reasonable time after occurrence or knowledge of the situation" and the question whether the union's defense that it held the grievance in abeyance pending determination of the same issue in another proceeding justified its failure to take certain grievances to the third step within the required three months were arbitrable, but that the question whether the union's failure to request a panel within 10 days barred arbitration was for the court.

As to questions of substantive arbitrability, the court, relying on the trilogy, rejected contentions that certain grievances were not arbitrable because they did not involve interpretation or application of a specific provision or because they were excluded from arbitration by virtue of a clause vesting authority over the question in management. Further, the court held that certain grievances alleging violation of various contractual provisions were not excluded from arbitration by the provision of the arbitration clause that "no arbitrator shall have authority to establish or modify any wage, salary or piece rate, or job classification or authority to decide the appropriate classification of any em-

ployee." The court seemed to approve the union's contention that this provision merely "constitutes a limitation on the authority of the arbitrator, not a bar to arbitration," and held that "The function of the arbitrator . . . will not be to establish or modify any wage, salary, piece rate, or job classification, but to determine whether the wage, rate, or job classification prescribed by the contract was applied in the particular cases before him."

The court next turned to contentions raising the question whether an alleged breach of contract which involves conduct that is within the scope of NLRB jurisdiction is arbitrable. The court answered affirmatively except as to one grievance involving the claim that the employer had granted an employee seniority credit in violation of the provision of the agreement which grants employees transferred out of the unit the right to accumulate credit but which further contains the exception that "Employees in any plant who have been certified in a bargaining unit not covered by this Agreement shall have no rights under this Agreement." Pointing out that the NLRB and a reviewing court had held a similar provision to be an unfair labor practice, the court refused to compel arbitration stating that:

> I am not unmindful of the fact that in holding the provision unlawful and denying arbitration of the grievance based upon it, I am substituting the Court's decision for that of a tribunal bargained for by the parties. I think, however, that it would be incongruous for the court to lend its assistance to a party seeking to enforce an unlawful claim by compelling the other party to arbitrate it.

Lastly, the court adverted to a matter involving differences in state and federal procedures. The action, brought by the union's petition to compel arbitration in New York Supreme Court, was removed to the federal court by the employer, who claimed that upon removal the petition should have been treated as a complaint and the employer given an opportunity to file an answer; and that as the procedure was improper, the motion to compel arbitration should be dismissed. The court stated that it was not clear that the procedure was inappropriate, and declined to dismiss in the absence of a showing of prejudice.

Macneish v. *N.Y. Typographical Union No. 6,* 205 F.Supp. 558 (S.D.N.Y. 1962). The employer moved to compel arbitration of the employer's grievance protesting the union's conduct of disciplinary proceedings against a foreman who was a union member. The employer contended that said disciplinary proceedings grew out of the execution of supervisory duties granted the foreman under a section of the agreement. The union contended that the issue is not arbitrable under the provision that "local Union Laws not affecting wages, hours or working conditions, and the 1959 General Laws of the International . . . , shall not be subject to arbitration;" that the employer is attempt-

ing to get through arbitration what it was unsuccessful in obtaining by negotiation; and that the employer is seeking to attack collaterally a previous award determining the same question. The court granted the motion to compel arbitration and for a stay of the union disciplinary proceedings, holding that the quoted exception was not applicable as the foreman's supervisory activities did affect working conditions, and that the union's other contentions raised matters for the arbitrator's determination.

Duralite Co. v. *Local 485, IUE,* 207 F.Supp. 273 (E.D.N.Y. 1962). The union sought to compel arbitration of grievances which arose prior to the issuance of an NLRB order requiring the employer to cease and desist from recognizing the union as representative of any of its employees and from giving effect to any agreement with the union until the latter was certified. The court dismissed the action, holding that the effect of the Board's order was to render the agreement invalid or, at best, unenforceable.

Coulon v. *Carey Cadillac Renting Co.,* 50 LRRM 2888, 45 CCH Lab. Cas. ¶17,776 (S.D.N.Y. 1962). The union brought suit for a declaratory judgment that the employer has violated the agreement by "farming-out" part of its business to competitive enterprises and furloughing certain of its employees. The employer moved to dismiss on the grounds (1) that the court lacked jurisdiction under the *Westinghouse* case; and (2) that the interpretation of the agreement sought by the union is made illegal by Section 8 (e) of the NLRA, dealing with "hot cargo" agreements. The motion was denied. As to the first ground, the court held that the suit was not merely to enforce individual claims, but concerned the right of the union to maintain the integrity of the agreement, and accordingly was governed, not by *Westinghouse,* but by *Lincoln Mills.* As to the second ground, the court, relying in part on *Warrior & Gulf,* held that Section 8 (e) was not applicable.

United Electrical Workers v. *General Electric Co.,* 208 F.Supp. 870 (S.D.N.Y. 1962). The union brought suit to compel arbitration of various grievances, and moved for summary judgment. The employer also moved for summary judgment on the ground *inter alia* that the agreement does not provide for "compulsory arbitration" but instead contemplates a case by case agreement by the parties as to whether a grievance which has been processed under the grievance procedure should be submitted to arbitration. In support of its position the employer relied not only upon the language of the agreement but also upon past practice and bargaining history. Denying both motions because it believed that there were genuine issues of fact, the court stated that extrinsic evidence was admissible to interpret the ambiguous provisions of the agreement: that it is questionable whether the policy of the trilogy to resolve all doubts in favor of arbitrability is applicable to the issue whether "the crucial clauses provide for com-

pulsory arbitration at all"; but that assuming that the policy is applicable, it does not compel the granting of summary judgment in the presence of issues of fact.

Communication Workers v. *New York Telephone Co.,* 209 F.Supp 389 (S.D.N.Y. 1962). The union sued to compel arbitration of a grievance relating to temporary promotion. The agreement contained a broad arbitration clause, but the section dealing with promotions provided that "In no event shall any grievance or dispute arising out of this Section . . . be subject to the arbitration provisions of this agreement." The court granted the employer's motion for summary judgment dismissing the action. While recognizing that the trilogy required it to compel arbitration except where it was clear that the parties did not so intend, the court believed that the quoted exclusionary language was "clear beyond reasonable dispute."

3. *Third Circuit*

Local 127, United Shoe Workers v. *Brooks Mfg. Co.,* 298 F.2d 277 (3rd Cir. 1962). The union brought an action against the employer for breach of provisions of the agreement barring contracting out and a runaway shop. The district court found that the employer had breached the agreement, and awarded $28,011 compensatory and $50,000 punitive damages. Union dues were included as an element of compensatory damages, which were awarded not only until the expiration date of the agreement but also for the foreseeable duration of the employer's relationship with the union, which the court found to be 20 years. In a decision by the eight judges of the court in banc, all members agreed that the employer violated the agreement; the court divided evenly as to the award of compensatory damages, four voting to affirm and four voting to limit the award to the period preceding the expiration date of the agreement; and a majority of five voted to set aside the award of punitive damages.

Harris Structural Steel Co. v. *United Steelworkers of America,* 298 F.2d 363 (3rd Cir. 1962). The employer sued in a New Jersey court seeking to have a grievance resulting from the demand of union members for "Christmas gifts" declared to be outside the scope of the agreement and its arbitration provisions. The union removed the case to a federal district court, which dismissed the employer's complaint and upheld the union's counterclaim seeking arbitration. The court of appeals affirmed. Although the evidence was conflicting as to the parties' intent concerning the inclusion of the subject matter within the agreement, the court stated that five points were "very clear"; (1) the employer recognized the union as exclusive representative; (2) the issue of bonus payments was not specifically excluded from the grievance provisions of the agreement; (3) the grievance and arbitration provisions expressly included any question relating to wages, in addition to "differences" as to meaning and application; (4)

the sums which had been granted to employees at or near the Christmas season were estimated in terms of wages; and (5) the agreement contained a no-strike clause. Relying on *Lincoln Mills* and *Warrior & Gulf,* the court reached the "irresistible" conclusion that the grievance was arbitrable.

Yale & Towne Mfg. Co. v. *Local 1717, IAM* (3rd Cir. 1962). The employer brought an action under Section 301 for damages for alleged breach of a no-strike clause. The union moved to stay the action pending arbitration, pointing to the broad arbitration clause which expressly granted either party the right to invoke the grievance procedure in the consideration of any difference between the company and employees involving the interpretation or application of the agreement. Reversing the trial court, the court of appeals directed that the stay be granted. Recognizing the "divided authority" among the federal circuits, and distinguishing a number of decisions denying arbitrability, the court held that the trilogy made it "clear that the alleged strike gave rise to a 'difference' between the company and the union which on its face is governed by the collective bargaining agreement."

International Association of Machinists v. *Crown Cork and Seal Co.,* 300 F.2d 127 (3rd Cir. 1962). The arbitrator found that the employer had breached the agreement, but failed to make an express disposition of the question of damages which also had been submitted to him. Affirming the district court's order returning the issue of damages to the arbitrator, the court of appeals stated that "If, as the company contends, this failure is considered as indication that the arbitrator thought damages improper, the district court's action in returning it to him for clarification nonetheless must be affirmed in light of the Supreme Court's holding in United Steelworkers of America v. Enterprise Wheel & Car Corp., . . ."

Local 149, Boot and Shoe Workers Union v. *Faith Shoe Co.,* 201 F.Supp. 234 (M.D.Pa. 1962). The union brought an action to enforce an award of $116,000 arising out of a dispute concerning the removal of work from the employer's Wilkes-Barre plant to its Oil City plant. The agreement contained a broad arbitration clause, and provided for arbitration in accordance with the rules of the American Arbitration Association. Although due notice was given, the employer failed to appear at the hearing or to submit statements of its position. The employer moved to dismiss the complaint on the ground, among others, that an ex parte award is void and that an action to enforce the award therefore fails to state a claim upon which relief can be granted. In denying the motion, the court relied largely upon the fact that the agreement incorporated the rules of the Association which provide in Rule 27 for arbitration in the absence of a party. Cases holding that an ex parte award is void were distinguished on the ground that they involved arbitration clauses which provided no means by which the hearing could proceed ex parte.

Philadelphia Photo-Engravers' Union v. *Parade Publications, Inc.*, 202 F.Supp. 685 (E.D.Pa. 1962). The union brought an action to compel arbitration of a grievance concerning the employer's refusal to pay a premium rate to an employee. The employer's position was that as the agreement deals only with minimum wages, any dispute concerning premium rates is not arbitrable. Relying on the law of the trilogy the court held that where, as here, "there is a broad arbitration clause and a no-strike provision, unless the parties have specifically *excluded* a subject matter from the arbitration provision, it must be submitted to arbitration."

United Cement Workers v. *Celotex Corp.*, 205 F.Supp. 957 (E.D.Pa. 1962). The union brought suit to compel the employer to submit a dispute concerning subcontracting to arbitration. The agreement contained a standard arbitration clause covering questions of interpretation, a no-strike clause, and a management rights clause. It made no specific reference to subcontracting. Relying on the *Warrior & Gulf* case, the court ordered arbitration.

Sportswear & Garment Workers' Union v. *Evans Mfg. Co.*, 206 F.Supp. 572 (E.D.Pa. 1962). The union moved for summary judgment in an action to enforce an arbitrator's award. The agreement provided that the employer, a Philadelphia manufacturer, would not conduct manufacturing elsewhere without union consent. The union gave the employer permission to open a North Carolina plant on the conditions, among others, that the North Carolina plant operate under a collective agreement with the union, and that the employer use his best efforts and good faith in helping the union organize the plant. The arbitrator decided that because these conditions were not met, permission had not been granted and that, therefore, the employer violated the agreement by opening a plant in North Carolina. The employer challenged this conclusion on the basis that the performance of the conditions might have been violative both of the NLRA and the North Carolina right to work law. The court rejected the contention in the absence of a showing that either the union or the employer used any illegal methods in attempts to carry out the conditions, and granted summary judgment.

Industrial Union of Marine and Shipbuilding Workers v. *American Dredging Co.*, 202 F.Supp. 940 (E.D.Pa. 1962). On reargument of this decision, which was noted in last year's Report, the Company asserted that it had complied with the award as to reinstatement of two discharged employees by offering them certain available jobs, which they refused. The Union, claiming that the offer did not comply with the award, urged the application of the rule, followed in cases under the NLRA, that the rejection of offers of limited or discriminatory reinstatement does not toll the running of back pay. The employer urged the application of the mitigation of damages rule based on state law. The court approved in substance the latter rule, holding that in

the absence of a showing of unfair labor practices, back pay should be reduced by the amount the employee would have earned at the job offered, provided it was not too far out of line with the position from which he was discharged or one that he was incapable of performing.

Giordano v. *Mack Trucks,* 203 F.Supp. 905 (D.N.J. 1962). The union and the employer were parties to a "Master Bargaining Agreement" covering employees at the Plainfield, New Jersey, plant. After termination of the agreement, and following lengthy negotiations over the employer's prospective transfer of operations to Hagerstown, Maryland, the union and the employer executed a "Shop Separation, Pension and Transfer Agreement," covering all the terms relating to the separation, pension and transfer of the Plainfield employees, and containing an arbitration clause for the resolution of all disputes concerning the interpretation and application of that agreement. Plaintiffs, some 116 of a total of about 2700 unit employees, brought this diversity action against the employer to enforce their alleged "vested rights" obtained through prior contracts. The court granted judgment on the pleadings for defendant, holding *inter alia* that plaintiff's "vested rights" were governed by the separation agreement; that any attack on the union's representative status is a matter exclusively for the NLRB; and that any disagreement as to the application or interpretation of the separation agreement should be submitted to arbitration by the union as provided in that agreement.

Local 1241, IBEW v. *Columbia Broadcasting System,* 207 F.Supp. 423 (E.D.Pa. 1962). The union brought this action to vacate, correct, or modify an award finding that the employer had discharged an employee for "just cause". In rejecting various contentions that the arbitrator had erred and in granting summary judgment to the employer, the court held that the principles of the trilogy were equally applicable to actions to set aside, and actions to enforce, an award.

Panza v. *Armco Steel Corp.,* 208 F.Supp. 50 (W.D.Pa. 1962). Plaintiff employees brought a class action to recover damages (1) for breach of seniority rights under collective agreements on the shutting down and movement of certain of the employer's plant facilities from Etna to Ambridge, Pennsylvania, and (2) based upon the employer's alleged fraud in misrepresenting certain material facts to the union and the district court. The issue as to whether the Etna employees had a right to follow their jobs to Ambridge had been submitted to an arbitrator, who made an award in accordance with a settlement between the union and employer granting 206 jobs to Etna employees, who had numbered some 850. The court dismissed the complaint. It held that since the subjects of seniority and interplant transfers were not expressly excluded from arbitration under the agreement, an arbitrable issue was presented under the principles of *Warrior & Gulf,* and that the matter having been voluntarily submitted to arbitration by the union, there was "no basis upon which dissatisfied individual

constituent employees can attack an arbitration award in conformity with law and equity." As to the second cause of action, based upon alleged fraud at the arbitration hearing, the court held that an arbitration award creates rights "even as a judgment does", and cannot be attacked collaterally.

4. *Fourth Circuit*

Local 149, UAW v. *American Brake Shoe Co.,* 298 F.2d 212 (4th Cir. 1962), *cert. denied,* 369 U.S. 873 (1962). The union had obtained enforcement of an arbitration award through a district court judgment affirmed by the court of appeals. It then sought to recover reasonable attorneys' fees as costs on the ground that the employer's refusal to abide by the award was arbitrary and without any meritorious basis. The court held that under Section 301 the district court had traditional equitable power to award attorneys' fees for an unjustifiable refusal to abide by an award, but declined to do so in this case on the ground that "in view of the lingering doubt concerning the *Westinghouse* case there was justification for the litigation here involved."

IAM, Lodge 1652 v. *Int'l Aircraft Services,* 302 F.2d 808 (4th Cir. 1962). The union brought this action under Section 301 to compel the employer to submit certain grievances to arbitration. The collective agreement expired on November 9. On November 30, 110 employees struck. During the strike, 75 replacements were hired and began working. In addition, the employer arranged for 27 others to work, but the strike ended on December 16, before any of the 27 began work. At the strike's termination, the parties entered into a strike-settlement agreement, under which the parties were to sign a new collective agreement embodying agreed terms and providing for reinstatement of strikers as vacancies occurred. The new agreement contained seniority provisions, a no-strike clause, and a broad arbitration clause. The arbitration clause, however, was limited by provisions of the strike-settlement agreement which, though it provided for retroactive application of the new collective agreement to November 9 (the termination date of the prior agreement), provided that any acts between November 9 and December 16 that may have been in violation of the new agreement should nevertheless not be deemed violations of the agreement or the subject of a grievance or arbitration. Thereafter the union filed grievances as follows: (1) that the employer hired four new employees after December 16 instead of recalling four strikers; (2) that the employer improperly hired after December 16 the 27 replacements and refused to rehire the strikers; and (3) that the employer refused to discharge the 75 replacements hired during the strike and the 27 who reported after the strike's end, and would not re-hire the strikers.

As to the first two, the union contended that the exclusion clause was inapplicable because the acts complained of occurred after Decem-

ber 16. The employer asserted that it had arranged for the employment of these replacements before that date and was bound to honor its obligation. Reversing the district court's entry of summary judgment for the employer, the court of appeals held that under NLRA precedents "the critical time seems to be when the arrangements with the replacement workers became irrevocable and fixed"; that the evidence was insufficient in this regard; and therefore that the case must be remanded to the district court for a hearing solely to determine the time of hiring. Under *Warrior & Gulf,* if it is found that the hiring did not occur until after December 16, "no argument that the purpose of the exclusion clause was to bar controversies arising out of the strike can prevail." But if it is found that the replacements were hired during the strike, the requirement of an "express provision excluding a particular matter from arbitration" would be satisfied.

As to the last grievance, the employer asserted that it was not arbitrable because it directly contravened the provision of the strike settlement agreement that strikers are to be reinstated "as vacancies occur." This, said the court, was really a contention that the grievance is not arbitrable because it is "utterly without merit"—precisely what the Supreme Court rejected in *American Manufacturing.* Accordingly, the court ordered that the grievance be processed through the grievance machinery.

Freight Drivers v. *Anchor Motor Freight,* 207 F. Supp. 1 (D.Md. 1962). The union brought an action under Section 301 to compel arbitration of a seniority dispute. At the time of the execution of the relevant agreements (Master Agreement and Local Rider), the employer's trailers were of four-car or five-car capacity. Thereafter, he acquired for the first time trailers capable of carrying six vehicles. The Master Agreement contained rate provisions for six-car shipments, a no-strike clause, and a grievance and arbitration article covering "any and all disputes." The Local Rider contained provisions for the dispatching of trucks and drivers on a seniority basis. A dispute arose concerning the employer's refusal to observe this dispatch system for the dispatching of newly acquired six-vehicle trailers. The union contended that the matter is subject to the grievance procedure; the employer contended that it was a matter for negotiation under the agreement. Neither party sought a substantive determination, but sought only a determination of their respective contentions. The court, relying on the trilogy, directed arbitration of this issue.

District 50, UMWA v. *Revere Copper and Brass,* 204 F.Supp. 349 (1962). The union brought an action under Section 301 to require the employer to comply with an award interpreting the seniority provisions of the agreement in reference to lay-off of employees. The parties had agreed that the arbitrator would limit himself to a decision with respect to the scope and meaning of the seniority provisions and that their application with respect to specific employees who were

laid off would be made by the parties. The arbitrator summarized his decision as follows:

> To recapitulate: If a junior employee is on a particular job and his work history as a whole *clearly* demonstrates that he has greater ability than does a senior employee who has not performed that particular job, that senior employee cannot displace that junior employee on that particular job. If a junior employee is on a particular job and his work history viewed as a whole does not *clearly* demonstrate that he has greater ability than does a senior employee who has not performed that particular job, that senior employee can displace that junior employee if, and only if, that senior employee, after a short period of orientation and familiarization should be able to meet the product quality and production standards for that particular job.

The parties met to review and apply the decision to particular situations, but no agreement was reached. The employer proposed further arbitration; the union brought this action.

The court held that "enforcement of the arbitrator's decision is not possible here, because it is not presently self-executing." In view of the trilogy and related cases, the court believed that any attempt by it to determine what constituted compliance with the award would invade the arbitrator's province. The court granted summary judgment to the employer on condition that the employer file a written statement agreeing to continue its past offer to arbitrate for a period of 30 days.

5. *Fifth Circuit*

Taft Broadcasting Co. v. *Radio Broadcast Technicians Local 253,* 298 F.2d 707 (5th Cir. 1962). The employer determined to change the operation of its radio station by eliminating direct control by a technician at the transmitter and installing equipment to permit remote control. The union demanded that the employer not make the change unilaterally and requested discussion. Following the employer's declination and the union's demand for arbitration, the employer brought an action for a declaratory judgment that the controversy was not subject to arbitration under a broad arbitration clause. The court affirmed the judgment of the district court which ordered arbitration. Referring to provisions of the agreement bearing upon the work of the transmitter technicians, the court held that the union's claim, involving job security, "on its face rested on the contract", and that the court was forbidden by the trilogy from looking to the merits by construing these contractual provisions.

Sinclair Refining Co. v. *NLRB,* 306 F.2d 569 (5th Cir. 1962). In accordance with the terms of the agreement, the union filed a grievance alleging that the demotion of two employees was violative of the agreement. The employer took the position that since the demotion was occasioned by lack of work, the controversy was not intrinsically

subject to the grievance procedure because under the management's rights provision of the agreement the right to relieve employees from duties for lack of work was a management prerogative. But the employer did not challenge arbitrability. It stated that while the controversy was a matter for determination by the grievance machinery, on its merits the action was of a kind committed solely to management. And it consistently offered to produce whatever data the arbitrator required. While the grievance was in the first two steps the Union demanded that the employer furnish certain information, alleging that it was necessary for evaluation of the grievance. The employer refused on the ground that since the union had no right to question management's judgment that there was a lack of work, there was no subject matter for grievance determination. The union thereupon filed charges alleging that the refusal to furnish the data was a failure to bargain in good faith. The NLRB upheld the charges. It held that the grievance was cognizable under the agreement, construing the management's rights clause as meaning that while it "exempts from the grievance procedure any management decision as to what personnel action to take in case of lack of work that Article does not remove form the grievance procedure any dispute, such as exists here, as to whether there actually is any lack of work."

The court of appeals denied enforcement on the ground that "the Board proceeding may not be used to secure data for use in a grievance where determination of relevance and pertinency requires determination of the critical substantive issue of the grievance itself." The court reasoned that a grievance involves a claim of breach of contract; that determination of a contract breach is not ordinarily for the Board but rather is to be left to the ordinary processes of the law; that where the parties have prescribed a voluntary grievance procedure for settlement of controversies, courts are to enforce it and to remain out of determination of the merits; and that what the Supreme Court in *Warrior & Gulf* "says of the relative incapacity of Judges applies with equal force to those comprising the National Labor Relations Board."

The court noted that the NLRB's most recent decision on the subject was in "complete accord." In that case, *Hercules Motor Corp.*, 136 NLRB No. 145, 50 LRRM 1021 (1962), the employer refused to furnish certain time study and job evaluation data which the union sought in support of a grievance regarding wage rates. The employer took the position that the matter could not be the subject of a grievance under the agreement and suggested that the union take the matter to arbitration. A majority of the NLRB held that the employer had not unlawfully refused to bargain, since the employer merely had sought to channel the dispute as to the interpretation of the agreement through the contractual grievance and arbitration procedure.

Deaton Truck Line v. *Teamsters, Local 612*, 51 LRRM 2552, 46 CCH Lab. Case ¶ 17,910 (5th Cir. 1962). The union brought an

action under Section 301 to compel arbitration of a dispute concerning the manner of paying state license fees on owner-operated trucks under lease to a motor carrier. The subject of the dispute was covered in an agreement between the carrier and the union which represented both employees and owner-drivers. The court affirmed a judgment of the district court ordering arbitration and providing for court-appointment of an arbitrator in the event that the parties did not agree upon one. It rejected the contention that there was lack of jurisdiction because the dispute was "between independent contractor-lessors and their lessee," holding that Section 301 is "broad enough to include any agreement significant to the maintenance of labor peace between the employer and the Union." It rejected the contention that the words "may be submitted to arbitration" in the arbitration clause prevented arbitration from being compulsory, as it construed "may" to give either party the option to require arbitration. And it considered the district court's provision for court-appointment of an arbitrator as within the "range of judicial inventiveness" encompassed by *Lincoln Mills.*

New Orleans S.S. Ass'n v. *General Longshore Workers,* 49 LRRM 2941, 44 CCH Lab Cas. ¶ 17,575 (E.D.La. 1962). The employer brought an action to enforce an arbitration award finding that the unions had engaged in work stoppages in violation of the agreement and ordering the unions and their agents to cease and desist from such conduct. In granting judgment for the employer, the court rejected the defense that such judgment would contravene the Norris-La Guardia Act. It stated that "the Court is not being asked to enforce a 'no-strike' provision in a union-management contract, but to enforce the award of an arbitrator who ordered that the membership of two unions cease and desist from engaging in work stoppages."

6. *Sixth Circuit*

General Drivers v. *Riss and Co.,* 298 F.2d 341 (6th Cir. 1962), *cert. granted,* 83 S.Ct. 31 (1962). The union and six individual employees brought an action to enforce an order of a Joint Area Cartage Committee directing the employer to reinstate with back pay the six employees. The union and the employer were parties to an agreement which contains a grievance procedure under which disputes are "first to be taken up with the employer and union and then to be processed through" Joint Local, State, and Area Committees; which prohibits strikes and lockouts "without first using all possible means of settlement"; and which provides that "failure to comply with any final decision, withdraws the benefits" of the grievance procedure. The court affirmed the district court's dismissal of the complaint for want of jurisdiction. It first held that the grievance procedure did not constitute "an agreement for compulsory arbitration", that the order of the Joint Area Committee was not an enforceable arbitration award, and therefore that the principles of *Lincoln Mills* and of the trilogy were not controlling. Turning to the allegations of the complaint, the

court further held that the complaint "does not contain facts which would show that the [individual] plaintiffs were warranted under the contract to leave their jobs on January 25th", for which conduct they were discharged. And finally the court held that "the purpose of the action is to recover for the individual plaintiffs lost wages together with incidental benefits to the Union based on the payment of wages to employees", and that this brought the case within the ambit of the *Westinghouse* case.

Palnau v. *Detroit Edison Co.*, 301 F.2d 702 (6th Cir. 1962). An employee who had been discharged for insubordination brought this action under Section 301 and under Section 9 (a) of the NLRA against the employer and against the union. The employer had declined arbitration in the absence of a timely request by the union which had refused to process plaintiff's grievance. The court affirmed the district court's dismissal for lack of jurisdiction. As to the decision against the employer, the court reasoned that the agreement did not provide for "automatic arbitration" of grievances or authorize the employee to request arbitration, but merely provided that either party "may" request arbitration; and that in the absence of a timely request by the union, the employer could not be said to have violated the agreement. As to the action against the union, the court held that the agreement gave the union discretion to decide whether to request arbitration, and, in any event, that Section 301 does not confer jurisdiction to adjudicate individual rights under the doctrine of *Westinghouse*. As to Section 9 (a) of the NLRA, no facts were pleaded to show that the union acted arbitrarily and in bad faith.

Oddie v. *Ross Gear and Tool Co.*, 50 LRRM 2763, 45 CCH Lab. Cas. ¶ 17,728 (6th Cir. 1962), *cert. denied*, 83 S.Ct. 318 (1962). Since 1936 the union has represented employees in a Detroit plant, originally owned and operated by the Gemmer Co., under succeeding collective agreements. In 1956 Gemmer was purchased by Ross Gear and Tool Co. which also had a plant in Lafayette, Indiana. On January 13, 1961, employees of the Gemmer Division were notified that their employer, Ross, had formed a Tennessee Division and that some products manufactured in Detroit and Lafayette were to be transferred to a new plant in Lebanon, Tennessee. On May 22, 1961, the employer announced its decision to terminate Gemmer operations and transfer them to Lebanon, and to discontinue operations on or about September 2, 1961.

The collective agreement then in effect at the Gemmer Division had been negotiated in 1958 and was to expire on October 1, 1961. The recognition clause provided that:

> 1. The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, . . .

The agreement also contained seniority provisions giving certain seniority and recall-to-work rights to the employees in the employer's operation of the Detroit plant.

On June 15, 1961, plaintiffs, employees of the Gemmer Division, brought a diversity action in federal district court on behalf of themselves and other employees similarly situated for a declaration of rights with respect to their seniority or recall-to-work rights under the agreement. The district court held that the 1958 agreement granted employees certain benefits and rights that became "vested" in the sense that they could not be unilaterally denied without their consent or other agreed means, such as the right to discharge; that these rights extended beyond the time limitations of the agreement; that these rights applied to a "plant" regardless of physical location under the contract and previous contracts; and that these rights included, among other things, seniority rights for the purpose of rehiring after layoff, which could go beyond an anniversary date as provided in the agreement. The court, relying on *Zdanok* v. *Glidden Co.*, 288 F.2d 99 (2d Cir. 1961), held that the employer had an obligation and duty to rehire on the basis of seniority those employees laid off in Detroit when that plant's operations were removed to Lebanon, Tennessee.

The court of appeals reversed. First, the court held that the "plain, unambiguous language" of the recognition clause limited the application of the agreement "to employees in the defendant's plants which were within the city limits of Detroit." These words were not used merely for the purpose of giving the present location of the employer, as was the situation in *Zdanok*. Second, the court rejected the contention that the employees' seniority rights were "vested" rights which could not be cut off by the relocation. The court stated that the true question was whether the employees had acquired any rights under the agreement as employees of the Tennessee plant. Under its construction of the agreement, they had not. Accordingly, "we do not reach the question of any rights being cut off by unilateral action on the part of the defendant, either during the existence of the bargaining agreement or after its expiration." Finally, the court relied upon evidence indicating that the union had similarly construed the agreement until shortly after the *Zdanok* decision.

General Drivers v. *American Radiator & Standard Sanitary Corp.*, 309 F.2d 434 (6th Cir. 1962). The union brought suit to compel the employer "to arbitrate the change from an incentive pay system to a straight hourly pay system . . ." The Master Agreement contained an arbitration provision and a no-strike clause. A Wage Plan Agreement, entered into subsequently, provided that the employer might cancel any incentive application when new or changed conditions made it impracticable, "in the Company's judgment," to accurately measure the operation for incentive application, and further provided that the arbitration procedure should be utilized only for specified matters which did not include the dispute in question. The court affirmed

per curiam a judgment that the employer was not obligated to arbitrate.

Johnson v. *Archer-Daniels-Midland Co.*, 203 F.Supp. 636 (E.D. Mich. 1962). Five employees at the employer's Wyandotte, Michigan, plant brought this diversity action seeking recognition of a right to employment, based upon contractual seniority rights, at the employer's Peoria, Illinois, plant to which it was removing its operations. The union and the employer had negotiated an amendment to their collective agreement providing for termination of seniority and payment of a severance allowance upon shutdown of the Wyandotte plant. The court granted a motion to dismiss the complaint on the ground in substance that any transfer rights which plaintiffs may have had, were bargained away by the amendment.

International Union, UAW v. *Weatherhead Co.*, 203 F.Supp. 612 (N.D.Ohio, 1962). The union brought an action under Section 301 to compel arbitration of a subcontracting dispute. The agreement contained a broad arbitration clause and a no-strike clause, and contained no provision limiting the scope of arbitration. However, under a previous agreement containing like provisions an arbitrator had found that the employer had not violated the agreement by contracting out certain work. The court, relying largely on *Warrior & Gulf*, directed arbitration. As to the effect of the prior award, the court held that the doctrines of collateral estoppel and res judicata were not applicable, both because a different grievance was involved and because the arbitrator expressly refrained from passing on whether the contract contained limitations as to the right to subcontract.

Johnson v. *Union Carbide Nuclear Co.*, 205 F.Supp. 322 (E.D. Tenn. 1962). Plaintiff, an individual employee, brought an action in federal district court against the employer and against the union, claiming violation of her seniority rights under the collective agreement. The union had processed the grievance through the first four steps of the grievance procedure, but refused to process the grievance to arbitration. The court granted the company's motion to dismiss on the ground that plaintiff had failed to comply with the contractual grievance and arbitration procedures, but denied the union's motion to dismiss.

United Steelworkers of America v. *General Electric Co.*, 51 LRRM 2531, 46 CCH Lab. Cas. ¶ 17,971 (N.D.Ohio 1962). The union brought an action under Section 301 to compel the employer to arbitrate grievances resulting from the employer's action in changing the method of payment of certain employees from piece-work to day rate. The employer took the position that the matter was excluded from arbitration by the provision that no arbitrator shall have authority to "establish, modify, or eliminate" a wage rate. Relying on the trilogy, the court granted the union's motion for summary judgment. It held that the subject matter of the grievance was not expressly excluded from arbitration by the said provision.

7. *Seventh Circuit*

International Union, UAW v. *Webster Electric Co.,* 299 F.2d 195 (7th Cir. 1962). The union brought an action seeking a judgment declaring that the employer does not have the right to subcontract janitorial work performed by employees within the unit covered by the agreement. The agreement contained union-shop, no-strike, no-lockout, and seniority clauses, but neither a management rights clause nor a clause specifically reserving the right to subcontract. The district court, relying on the *Warrior & Gulf* case, held that the employer did not have the right to subcontract work in the absence of an express contractual reservation. The court of appeals affirmed, though it disagreed with the district court's rationale. The appellate court stated that *Warrior & Gulf* did not decide the substantive question, but merely decided that an arbitrable question was presented. Here, in the absence of an arbitration clause, the question was for the court. And the court held that under the union shop clause, "it would be inconsistent with the basic purpose of the agreement to approve the contracting out of the janitorial job here involved." The court disagreed, however, with the district court's ruling that the employer's action also was violative of the no-lockout clause.

International Chemical Workers Union v. *Olin Mathieson Chemical Corp.,* 205 F.Supp. 363 (S.D.Ill. 1962). Chemical Workers and the IAM each had been certified by the NLRB as representative of certain employees. Thereafter, the employer commenced to perform certain "pyrotechnic" work and assigned the work to employees represented by the IAM. Chemical Workers filed a grievance alleging that the employer was required to assign work to employees represented by it. The employer refused to process the grievance, and filed a motion with the NLRB to clarify its certification of the IAM by deciding that the employees engaged in the disputed work were within the IAM unit. Chemical Workers contemporaneously brought this action to compel arbitration of the dispute. The court dismissed the complaint, holding that the NLRB has exclusive jurisdiction to determine the appropriate bargaining unit and to settle questions of representation.

Retail Clerks v. *Montgomery Ward & Co.,* 50 LRRM 2702, 45 CCH Lab. Cas. ¶ 17,735 (N.D.Ill. 1962). Plaintiff unions brought an action under Section 301 to enforce the recognition clause of agreements which became effective in 1958 for a five-year term. The NLRB intervened and moved for summary judgment on the ground that the unions had been decertified in 1960. The motion was granted, the court holding, largely in reliance on *Modine Mfg. Co.* v. *IAM,* 216 F.2d 326 (6th Cir. 1954), that "since employees have a right to vote for no union as well as for union representation, the contracting union will lose its contractual rights where no new union representative is chosen in the same manner as where a rival union is selected."

Local 702, IBEW v. *Central Illinois Public Service Co.,* 51 LRRM

2617, 46 CCH Lab. Cas. ¶ 17,953 (E.D.Ill. 1962). The union brought an action under Section 301 to compel arbitration of a dispute arising out of the employer's announced discontinuance of discounts to employees on space heating gas bills. The employer opposed the union's motion for summary judgment on the grounds *inter alia* that the arbitration and no-strike clauses are ambiguous and require evidence to show the intent of the parties, and that rates cannot be arbitrated as their determination is preempted by the state commerce commission and arbitration on this matter would conflict with state law. The court granted summary judgment for the union. Noting that the broad arbitration clause contained no exclusion of the matter in dispute, it held that under the decisions of the United States Supreme Court there was no ambiguity. And it simply did "not concur" in the contention that employee rate discounts are illegal under state law.

8. *Eighth Circuit*

Selb Mfg. Co. v. *IAM, Dist. No. 9*, 305 F.2d 177 (8th Cir. 1962). The union brought an action under Section 301 to enforce an award finding that the employers had violated a clause of the collective agreement prohibiting subcontracting under certain circumstances. The award required the employers to return to their plants in St. Louis machinery, equipment and work they had transferred to subsidiary plants in Arkansas and Colorado, and to recall all St. Louis employees laid off and to reinstate them without loss of seniority or loss of pay. The district court granted enforcement, and the court of appeals affirmed in a per curiam opinion, stating that "while we realize this case is one of much importance to the appellants, and that the validity and coverage of . . . [the subcontracting clause] is debatable, we are convinced that the judgment must be affirmed under the teachings of" the trilogy and subsequent decisions of the Supreme Court.

United Furniture Workers, Local 395 v. *Virco Mfg. Co.*, 50 LRRM 2681, 45 CCH Lab. Cas. ¶ 17,771 (E.D.Ark. 1962). The union brought an action under Section 301 to enforce an award finding that the discharge of an employee was not for "just cause" within the meaning of the agreement and ordering reinstatement with limited back pay. The arbitration clause of the agreement limited the arbitrator to "application and interpretation" of the agreement, and provided that "He shall have no power to substitute his discretion for the Company's discretion in cases where under this agreement discretion is reserved to the Company." The agreement contained a management clause, and provided that employees might be discharged for "just cause", and that "violation of a Company rule or rules (should) be deemed to be just cause." The employee was discharged for alleged violation of two Company rules: (1) the rule prohibiting the use of abusive or insulting language toward a fellow employee; and (2) the rule prohibiting loitering in the rest room. The arbitrator found that the

employee's language had not in fact violated the first rule. As to the second rule, the arbitrator considered a pamphlet and bulletin which set forth the rules, and actual practices in the plant respecting their application, and concluded that "either by 'waiver' or by a process of semi-official interpretation on the Company's part", the agreement did not authorize the discharge under the circumstances. The arbitrator, however, limited back pay because of the violation of the rule and the Company's good faith.

The court granted enforcement. As to the first rule, the court held that the arbitrator's determination was final. As to the second rule, the court held that the arbitrator did not exceed his powers. Under *Warrior & Gulf* he had the right in interpreting the agreement "to consider not only the formal agreement but collateral materials as well, including the actual practices prevailing in the . . . plant."

Int'l Bhd. of Pulp, Sulphite and Paper Mill Workers v. *Hurley Co.*, 50 LRRM 2652, 45 CCH Lab. Cas. ¶ 17,786 (W.D. Ark. 1962). The union brought an action under Section 301 to compel arbitration of certain grievances. The employer resisted arbitration on the ground that the employees involved were "temporary employees", excluded from the coverage of the agreement. The evidence disclosed that "temporary employees" were excluded from the unit found appropriate by the NLRB, that challenges to the votes of certain employees on the ground that they were "temporary employees" were upheld by the NLRB, and that "temporary employees" are excluded from coverage of the agreement subsequently executed by the parties. Shortly thereafter, disagreements arose with respect to certain employees, and the union filed the instant grievances under the contractual procedure for handling "complaints and/or grievances arising in any department of the plant covered by this Agreement." The court granted the union's motion for summary judgment. Relying on the breadth of the arbitration clause and the "liberal construction" required by the trilogy, the court was convinced that the clause was "broad enough to cover disputes relating to the application and interpretation of the contract, including disputes as to whether given employees are covered by the contract."

Local 5-475, International Woodworkers v. *Georgia Pacific Corp.*, 52 LRRM 2030, 46 CCH Lab. Cas. ¶ 18,042 (W.D. Ark. 1962). The union brought an action under Section 301 to compel arbitration of a grievance that the employer had undertaken to expand the work of the millwright crews at the expense of other types of employees, causing certain of the latter to lose work and compensation. The employer contested arbitrability on the grounds that its action was within the management functions clause of the agreement and that the agreement failed to contain a no-strike clause. The court directed arbitration. It held that the dispute was arbitrable since the agreement contained an arbitration clause covering differences concern-

ing wages, hours, or other conditions of employment, and since the dispute related to seniority, recognized in the agreement as a condition of employment. The court also held that a provision against suspension of work pending processing of a grievance was the equivalent of a no-strike clause, and that in any event under the *Lucas Flour* case a no-strike commitment is implied from the agreement to arbitrate.

9. *Ninth Circuit*

Pacific Northwest Bell Telephone Co. v. *Communications Workers,* 51 LRRM 2405, 46 CCH Lab. Cas. ¶ 17,899 (9th Cir. 1962). The employer brought an action under Section 301 seeking a declaration that it had no obligation to arbitrate the union's claim that the employer had violated the agreement by a disciplinary suspension. The arbitration clause provided that it "shall apply only to controversies between the Union and the Company regarding the true intent and meaning of any provision of this Contract, or regarding a claim that either party hereto has not fulfilled a commitment made in this Contract." The agreement contained an article dealing with dismissal but did not deal expressly with disciplinary suspension. The district court, excluding evidence of bargaining history, held that the dispute was arbitrable. The court of appeals rejected the contention that the arbitration clause failed to cover the dispute, stating that "collective bargaining contracts by their very nature cannot be limited to their express provisions." But the court held that the lower court had erred in refusing to consider bargaining history and remanded for a new trial. It held that the parol evidence rule did not preclude such evidence. And, distinguishing *Warrior,* it held that the tendered evidence went to arbitrability and not to the merits. For such evidence did not disclose bargaining upon the underlying issue of the employer's right to resort to disciplinary suspension, but rather disclosed that the union unsuccessfully had attempted to secure a provision expressly *including* disputes relating to disciplinary suspension within the arbitration clause.

Package and Utility Drivers, Local 396 v. *Hearst Publishing Co.,* 206 F.Supp. 594 (S.D. Cal. 1962). The union brought an action under Section 301 to compel the employer to arbitrate a dispute arising out of the discontinuance by the employer of one of the two newspapers it operated in Los Angeles and the hiring of new employees for purposes of the continuing newspaper. The union requested arbitration of issues as to the right of the employer to terminate employees of the discontinued newspaper, as to the failure of the employer to apply the agreement in retaining certain employees and to apply the agreement to those retained, and as to the appropriate remedy. The employer moved for summary judgment on the grounds that it has the absolute right to go out of business and the attendant discharges raised no arbitrable issue; that the union has foreclosed arbitration by filing.

charges with the NLRB; and that the subject matter is within the exclusive jurisdiction of the NLRB. The agreement, which never was terminated by the employer, contained a broad arbitration and no-strike clause. The court directed arbitration. It held that the union's claims of violation of specific contractual provisions raised arbitrable issues under the law of the trilogy and that notwithstanding the filing of charges with the NLRB there was arbitral jurisdiction.

Independent Soap Workers (Procter & Gamble Mfg. Co.), 50 LRRM 2972, 45 CCH Lab. Cas. ¶ 17,789 (N.D. Cal. 1962). The union brought an action to compel arbitration of a grievance under a grievance procedure which provided that in the first step the grievance "shall" be presented or taken to certain persons; that in step four an unadjusted grievance may be taken to a board of arbitration; and that, among other things, "the Company and the Union will stipulate the grievance jointly in writing and the Board will act only on the stipulation and will not add to nor take away from the terms of this Agreement in making this decision." The grievance in question was processed through the first three steps; the union requested arbitration; the employer declined to arbitrate or to enter into a joint stipulation, contending that the dispute did not involve interpretation or application of the agreement. The court denied the union's petition to arbitrate on the ground that the joint stipulation was intended as a condition precedent to arbitration, either party being free to nullify the arbitration clause by refusing to stipulate. In so interpreting the arbitration clause, the court relied in part upon precontract negotiations evidencing such an understanding, and the use of the word "shall" in the first step of the grievance procedure, as distinguished from the word "will" in the sentence dealing with the joint stipulation.

10. *Tenth Circuit*

International Union, UAW v. *Cardwell Mfg. Co.,* 304 F.2d 801 (10th Cir. 1962). The union brought an action to compel arbitration of a grievance arising out of the employer's use of a foreman for production work, allegedly in violation of one of the general provisions of the agreement. The arbitration clause covered "any dispute . . . concerning the interpretation, application, claim of breach or violation" of the agreement. The district court dismissed the suit, relying upon the union's "admission" of the employer's affidavit to the effect that in pre-contract negotiations the union had unsuccessfully sought a specific provision covering the subject matter of the grievance. The court of appeals reversed, holding that:

> It may be that the parties did not intend to include this particular grievance in their agreement to arbitrate. But even so, the disputed question calls for an interpretation and application of the terms of the agreement—a matter which the parties expressly committed to arbitration. The case is therefore reversed and re-

manded with instructions to enter an order requiring the employer to arbitrate the arbitrability of the grievance.

Red Ball Motor Freight, Inc. v. *General Drivers, Local 961,* 202 F. Supp. 904 (D. Col. 1962). The employer brought an action under Section 301 against the union and an individual union member "for Enforcement of Arbitration". The court granted the individual member's motion to dismiss as to him. It held that Section 301 confers no jurisdiction of actions by or against individuals.

District 22, UMWA v. *Roncco,* 204 F.Supp. 1 (D. Wyoming 1962). The union brought an action for damages and declaratory relief, alleging various contractual violations. The court dismissed for lack of jurisdiction. As to allegations that the employer failed to pay time and a half for certain work, to sell "house coal" to employees, and to comply with seniority provisions, the court held that these were "uniquely personal" rights over which it lacked jurisdiction under the *Westinghouse* case. As to the allegation that the employer failed to make welfare fund payments, the court held that the trustees were indispensable parties plaintiff and that it lacked jurisdiction in their absence. As to the allegation that the employer failed to check off dues and initiation fees, the court found that the dispute was subject to compulsory and binding arbitration under the agreement, and that it did not have jurisdiction unless and until such remedies were exhausted.

Truck Drivers Union v. *Grosshans & Petersen,* 209 F.Supp. 164 (D. Kan. 1962). The union brought an action under Section 301 to compel arbitration of a claim that the employer had refused to pay wage scales in accordance with the collective agreement. Among other defenses, the employer asserted that the Supreme Court's *Westinghouse* decision was controlling because the union was attempting to recover wages, a uniquely personal right. The court, while stating that *Westinghouse* had not been overruled, held that under *Lincoln Mills* it possessed jurisdiction as the union was not seeking relief on behalf of individual employees but was seeking to enforce its "group right" to arbitrate grievances filed by the union on behalf of employees. The court further held, with respect to the employer's argument based upon the provision of the grievance procedure that a grievance not presented within five days after the alleged incident is waived, that it is the court's duty to determine whether the parties have complied with the contractual conditions precedent to arbitration.

Division 892, Street, Electric Ry. & Motor Coach Employees v. *M. K. & O. Transit Lines,* 210 F.Supp. 351 (N.D. Okla. 1962). The union brought an action under Section 301 to compel arbitration of the terms of a new contract pursuant to an agreement providing for arbitration of disputes "including changes, additions and modifications to any agreement which cannot be resolved by negotiations." The court granted the union's motion for summary judgment.

held, first, that the right to arbitrate did not expire with the expiration of the agreement, for the matters in dispute arose during the term of the agreement. Second, it rejected the authority of *Boston Printing Pressman's Union* v. *Potter Press,* 241 F.2d 787 (1st Cir. 1957) as "at odds" with *Lincoln Mills* and the trilogy, noting that the court in *Potter Press* had based its decision on the United States Arbitration Statute.

11. *District of Columbia Circuit*

No relevant cases have been reported.

C. STATE COURTS

1.*California*

O'Malley v. *Wilshire Oil Co.,* 51 LRRM 2767, 46 CCH Lab. Cas. ¶ 17,969 (Cal. Dist. Ct. App. 1962). The union petitioned for an order directing arbitration of a grievance protesting the contracting out by the employer of some of its transportation work. The agreement contained a provision barring any modification by arbitration, and a provision placing certain restrictions on contracting out limited solely to upkeep and repair work. In pre-contract negotiations the employer had successfully resisted proposals to restrict contracting out of any work. The court affirmed a judgment denying the union's petition. While recognizing that it must apply federal substantive law, it held that the foregoing facts differed "radically" from those in *Warrior* in that they constituted "forceful evidence of a purpose to exclude the claim", and accordingly that the arbitration clause was not susceptible to an interpretation covering the asserted dispute.

2. *Connecticut*

Local 1078, UAW v. *Anaconda American Brass Co.,* 183 A.2d 623 (Conn. Sup. Ct. Err. 1962). The union applied for an order vacating an award involving a grievance alleging a violation of a clause limiting the performance of unit duties by non-unit personnel. The parties submitted the issue whether the employer's "present operating practice" violated the clause. The arbitrator awarded that it did not "so long as the work involved does not occupy the major portion of the foreman's time." The court vacated the award on the ground that the arbitrator had exceeded his powers, and the Supreme Court of Errors affirmed. The court held that the award exceeded the scope of the submission, for "the arbitrator not only answered the question submitted but he also defined a course which could be followed in the future."

3. *Massachusetts*

Morceau v. *Gould-National Batteries,* 181 N.E. 2d 664 (1962). The union brought an action to enforce an award directing the employer

(Gould) to offer employment to a named employee and to pay him lost wages. The employee had been employed by Gould's predecessor (Nicad) from August 19 to September 1, 1957, when Gould purchased Nicad and the latter's employees struck. Thereafter the union and Gould negotiated a collective agreement and a separate stipulation for the reemployment of former employees of Nicad. The strike ended and Gould hired a number of former employees of Nicad, but did not include the aggrieved, who had probationary status only. The parties submitted to the arbitrator the questions in substance: (1) whether the union had authority to represent the aggrieved under the terms of the collective agreement, and (2) if so, whether Gould violated the separate stipulation. In reaching his conclusion answering both questions in the affirmative, the arbitrator made a finding that whatever right the union had to represent the aggrieved must have originated in the stipulation and that its rights did not arise out of the agreement as the aggrieved was never an employee of Gould. The lower court held that the arbitrator having so determined, and since the stipulation was not incorporated in the submitted statement of the first question, the arbitrator was foreclosed from considering the second issue and thus did not conform to his authority under the submission. The Supreme Judicial Court disagreed, and upheld the award. Relying on the principles of the trilogy, the court stated that "an intention of the parties to lose the substance of the dispute in the form of the reference [submission] would be inconsistent with the underlying purpose" of the arbitration process, and that in context there was an implication in the first question that it was to be answered as though the grievance were a grievance under the main contract and as though the aggrieved had the status he had had with Nicad.

4. *New Jersey*

Jersey Central Power and Light Co. v. *Local 1289, IBEW,* 38 N.J. 95, 183 A.2d 41 (1962). The employer brought action to compel the union to arbitrate a dispute arising from the following circumstances: For years the parties disagreed upon whether under their agreements the employer had the right on a permanent basis to change the work schedules of maintenance employees in its power plants, so as to assign them for work at times other than 8 A.M. to 4:30 P.M., Monday through Friday. The employer insisted that pay should be at straight-time rate for the first eight hours; the union contended that the pay must be at a premium rate. In negotiations for the current agreement the parties were unable to resolve the dispute. The relevant provisions of the preceding agreement were repeated without change, but in a "Statement of Principle" presented to the union the employer reiterated its view and said that it agreed to extend the present language "into the new contract with the understanding that it is not conceding the merits of the issue." In the trial court

the union contended successfully that there was no merit in the employer's position and hence that arbitration should not be ordered. On appeal the union further contended that the arbitration clause did not embrace the dispute, and that the matter was moot because the agreement expired during the pendency of the appeal. The New Jersey Supreme Court reversed and ordered judgment for the plaintiff employer. As to the contention that the arbitration clause did not embrace the dispute, the Union relied on the following sentence which preceded the 5-step grievance procedure: "Any dispute arising from the interpretation of this Agreement will be referred for discussion between the Company and the Negotiating Committee of the System Council." The court rejected the construction that the dispute must end in "discussion" as one which "would stunt the role of arbitration." It construed the sentence to mean "only that if a dispute should arise from the interpretation of the agreement, the parties shall discuss it at a high policy level, but that if the dispute is not there resolved, the stipulated procedure including arbitration may be pursued." As to the union's contention that a court should not order arbitration of a dispute which lacks merit, the court noted that the "question is now before us for the first time." It rejected decisions of the lower New Jersey courts applying the *Cutler-Hammer* doctrine and the doctrine "that arbitration should be ordered only if the contention advanced by the moving party is reasonably debatable in the mind of the ordinary layman." And in reliance upon the trilogy and succeeding Supreme Court decisions it adopted the view that "the judiciary may not examine the merits of a dispute which on its face falls within the provision for arbitration in a collective bargaining agreement." And, lastly, the court rejected the claim that the dispute was moot because the agreement had expired, and the relief sought would have but prospective impact since the employer claimed only a right to do something not yet done. After quoting the agreement's typical termination provision providing for continuance absent notification, the court said:

> Successive collective bargaining agreements are not isolated transactions but rather are expressions of a continuous relationship between the parties. The provision we have just quoted reflects that sense of continuity, with a reservation in either party to seek change or to terminate. Here, the agreement was simply renewed or continued with certain changes not pertinent to the dispute. It is understandable of course that the parties did not intend a decision of the arbitrators shall bar them from bargaining thereafter for a different result or principle. But it is something else to say that a dispute in arbitration becomes moot with the expiration of the annual term when the agreement as renewed continues the very provisions implicated in the controversy. . . .

Donnelly v. *United Fruit Co.*, 75 N.J. Super. 383, 188 A.2d 415

(App. Div. 1962). A discharged employee brought an action against both the union and the employer, alleging *inter alia* that the union had wrongfully refused to take the discharge to arbitration and that the employer had wrongfully refused to arbitrate plaintiff's claim. The court affirmed an order granting motions for summary judgment by both defendants. As to the union's motion, the court relied in part upon the principle that "an honest policy decision to sacrifice a weak, though possibly meritorious, claim of one member in order to preserve the bargaining position of the union in its overall relations with management, does not provide the disappointed employee with a basis for suit against the union." As to the employer's motion, the court held that "the agreement conferred no individual right upon plaintiff to set in motion the machinery of arbitration."

5. *New York*

Matter of Astoria Medical Group (Health Insurance Plan), 11 N.Y. 2d 128, 182 N.E. 2d 85, 227 N.Y.S. 2d 401 (1962). Health Insurance Plan (HIP), a nonprofit corporation, is engaged in writing insurance policies which provide complete medical care. To assure such care to its policyholders, HIP entered into contracts with partnerships of physicians, called Medical Groups, under which they agreed to furnish necessary medical services. These contracts provided for arbitration of unresolved issues in accordance with an arbitration clause which provided, in part, that "One arbitrator shall be appointed by HIP and another by the GROUP, who jointly shall appoint a third arbitrator," and that the decision of two of the three was to be final and binding. A dispute arose; the Groups demanded arbitration and appointed an arbitrator. HIP designated as its arbitrator a physician who was one of its incorporators, its president from 1950 to 1957, and currently a member of its board of directors and a paid consultant. The Groups then moved to disqualify him on the ground of personal interest, bias and partiality arising out of his relationship with HIP. The Court of Appeals reversed the order granting the motion. While it held that in an appropriate case the courts had inherent power to disqualify an arbitrator before an award has been rendered, it further held that this was not such a case. It stated that "arbitration is essentially a creature of contract"; that the parties "must be taken to have contracted with reference to established practice and usage in the field of arbitration"; and that "in the light of accepted practice, which sanctions and contemplates two non-neutral arbitrators on a tripartite board, the parties must be deemed to have intended that each was to be free to appoint any arbitrator desired however close his relationship to it or to the dispute." The court noted the wide use of tripartite arbitration in labor as well as in commercial arbitration. In reaching its decision, the court pointed out that it was not holding that "a person may serve as his own arbitrator" or that "he may be deaf to the testimony or blind to the evidence pre-

sented"; and that an award is subject to attack for misconduct by the party-appointed arbitrator. One judge dissented on the ground that the arbitrator in question was essentially a "party" to the dispute.

It is of interest to note that the doctrine of this case accords with the provision of § 7511 of the new CPLR which permits vacating an award only where the "partiality" is that "of an arbitrator appointed as a neutral."

Carey v. *Westinghouse Electric Corp.*, 11 N.Y. 2d 452, 184 N. E. 2d 298, 230 N.Y.S. 2d 703 (1962). The New York Court of Appeals affirmed the decision of the Appellate Division, considered in detail in last year's Report. Worthy of note, however, is the court's discussion of the grievance which involved the employer's refusal to apply the terms and conditions of the agreement covering production and maintenance employees in the unit represented by the union to employees transferred from that unit into a laboratory covered by an agreement for salaried employees represented by another labor organization. A majority of the court held that this grievance, "involving the definition of the bargaining units, seems to us under Federal law to be within the exclusive jurisdiction of the National Labor Relations Board, which has the expertise to make clear the precise nature of the bargaining units certified by it." Judge Fuld dissented, in part as follows:

> The controlling statute, section 301 . . ., envisages parallel private and public proceedings in situations where a breach of an agreement also involves determinations under the act. Section 301 was designed to vindicate private rights under a contract while section 8, relating to unfair labor practices, and section 9, relating to representation, were designed to vindicate public rights provided under the statute. The circumstance that there might be a claim before the National Board *at some date in the future* should not operate to deprive the parties of contract rights at the present time. . . . The pre-emption postulates enunciated by the Supreme Court over the past several years . . . concerned actions instituted in state courts to remedy torts which constituted, arguably, an unfair labor practice or, arguably, a protected activity under the federal statute. The prohibitions spelled out in those cases against state court intrusion upon the exclusive jurisdiction of the National Labor Relations Board have no applicability to actions for breach of a collective bargaining agreement.

Chupka v. *Lorenz-Schneider Co.*, 12 N.Y. 2d 1, 233 N.Y.S. 2d 929, 186 N.E. 2d 191 (1962). The employer, who was engaged in the business of distributing snack products through route salesmen, was party to a collective agreement which, among other things, prohibited the employer from making any agreement with any of its employees inconsistent with the collective agreement. The employer, however, sold routes to four route salesmen under an agreement reciting that the sales-

men were no longer employees but would be independent contractors. In an arbitration proceeding held pursuant to a broad arbitration clause in the collective agreement, the arbitrator held that the sale violated the agreement and ordered the employer to restore the routes to the coverage of the agreement. The four route salesmen, who were not parties to the arbitration, joined the employer in a proceeding to vacate the award. The Appellate Division affirmed an order holding that the award was valid as to the employer and that the route salesmen had no standing in the arbitration proceeding. From this affirmance, and from the denial of relief in a declaratory judgment action, the route salesmen appealed on alleged constitutional grounds, contending that they are being deprived of property rights without due process of law in that their contractual rights as route purchasers are being taken from them in litigation to which they are not parties and as to which they are refused access to the courts. The Court of Appeals dismissed the appeals upon the grounds:

> First, as union-member beneficiaries of a collective bargaining agreement they have disabled themselves from asserting in the courts any right to litigate any controversy between the employer and the employees represented by the union. Secondly—and perhaps this is another way of saying the same thing—any agreement which they attempted to make with their employer relating to the matters covered by collective bargaining was necessarily subject to the collective bargaining agreement itself.

Bucholz v. *IUE, Local 463,* 15 App. Div. 2d 394, 224 N.Y.S. 2d 638 (1st Dep't 1962). The employer moved to stay an arbitration sought by the union involving the discharge of an employee. Prior to the demand for arbitration the union filed a charge with the NLRB alleging that the discharge was an unfair labor practice. The Regional Director dismissed the charge, and thereafter sustained a challenge to the employee's vote in an NLRB election. Both rulings were upheld by the Board on appeal. The court granted the motion for a stay. While stating that "the mere fact that the Board has jurisdiction does not in and of itself deprive an arbitrator of jurisdiction", the court held that "the rule is quite different where either party has already submitted its claim to the Board and the latter has accepted and ruled on it."

Fitzgerald v. *General Electric Co.,* 231 N.Y.S. 2d 426 (Sup. Ct. 1962). The union petitioned to compel arbitration of a dispute arising out of the employer's decision to subcontract janitorial services. The agreement contained an arbitration clause involving "interpretation or application of a provision of this agreement." The provision in dispute was the recognition clause. During negotiations of the agreement the specific question of the employer's right to subcontract was raised, rejected by the employer, and not incorporated in the

agreement. The court dismissed the union's petition on the ground that "Absent any provision to the contrary, the decision . . . to engage in subcontracting must be considered within the traditional confines of management prerogative as reaffirmed in Article 27 of the agreement." The court rejected the contention that the new Section 1448-a of the CPA was applicable, stating that it "merely precludes the court from inquiring into the bona fides of a dispute, but does not take away the court's function to determine whether the arbitration agreement itself is broad enough to encompass the dispute." Further, the court stated that in any event the effect of Section 1448-a was obviated by the provision of the agreement that arbitration shall proceed "only after the final judgment of a court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues."

Application of State Master Hairdressers' Ass'n, 231 N.Y.S. 2d 662 (Sup. Ct., Spec. Term, Kings Co. 1962). The union and the employer were parties to a 5-year agreement which provided that the agreement may be reopened annually for the proposal of "changes" by either party, and that any dispute or controversy arising between them concerning such proposed changes shall be submitted to arbitration on request of either party. The union submitted a written proposal in accordance with these provisions seeking a "change" by inserting a provision for contributions to be paid by the employer to the union towards a health and welfare fund. The parties were unable to reach an agreement; the union requested arbitration. The employer moved to stay arbitration on the ground that the union's proposal, not being covered by the agreement, constitutes a new provision and not a "change" and hence is beyond the scope of the arbitration clause. The court denied the motion. The court stated that under the new Section 1448-a of the Civil Practice Act, which "changed the law of this state to conform to that expressed" in the trilogy, "the function of the court is confined to ascertaining whether a party seeking arbitration has a prima facie claim governed by the contract and is not to consider the merits or the tenability of the claim sought to be arbitrated." Here, the provision for reopening was broad enough to include the union's proposed change.

6. *Tennessee*

Mechanics Universal Joint Division, Borg-Warner Corp v. *Fooshee,* 354 S.W. 2d 59 (1962). An employer filed a bill in state court against a labor union and others for a declaration of rights under a collective agreement and to set aside an arbitration award involving the discharge of a grievant. The Supreme Court of Tennessee affirmed the decree of the lower court sustaining the union's demurrer to the bill. An arbitrator's finding that an assistant supervisor (not a member of the bargaining unit) was entitled to certain benefits un-