APPENDIX B

ARBITRATION AND RIGHTS UNDER COLLECTIVE AGREEMENTS

REPORT OF THE COMMITTEE ON LAW AND LEGISLATION FOR 1965*

The year 1965 was replete with judicial decisions affecting the labor arbitration process and other incidents of collective bargaining agreements.[1] Unlike 1964, however, this year was marked by a paucity of so-called "big" decisions that finally resolved major problem areas or established new lines of labor relations policy. Rather, 1965 was a year in which the courts, in the main, were required to apply, modify, and refine principles established by the "big" cases of the recent past.

Thus, the courts were concerned with how to apply *John Wiley & Sons* v. *Livingston* [2] to questions of procedural arbitrability and survival of obligations under collective agreements after changes in ownership of the business entity; how to deal with instances where an allegedly arbitrable grievance is also the subject of pending NLRB proceedings, or where a decertification proceeding is pending against the party seeking arbitration; [3] how to apply the

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The Committee's Chairman acknowledges with gratitude the valuable assistance of C. Douglas Kranwinkle, Esq. of the California Bar, in the preparation of this Report.

This Report treats only selected Railway Labor Act cases. Although all state and Federal cases were read, only those are cited which bore some evidence of the facts and reasoning involved. A number of cases were too sparse in factual statement to be helpful.

1 By late December, there were over 150 reported decisions affecting these areas.

2 376 U.S. 543 (1964).

3 *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261 (1964), is the latest Supreme Court ruling on these questions.

Steelworkers Trilogy [4] in cases where non-arbitrability is raised as a defense; and how to deal with employee suits for alleged violations of collective agreements which contain grievance and arbitration procedures.[5]

I. INTERPRETING AND REFINING *JOHN WILEY & SONS V. LIVINGSTON* [6]

One of the principal holdings of *Wiley* was that questions of procedural arbitrability are for arbitrators, and not courts, to determine. This ruling was grounded upon the rationale that since procedural questions are usually intertwined with the merits of the underlying dispute, a court attempting to determine procedural issues would, in many instances, intrude upon the substantive matters in dispute, a province reserved for the arbitrator.

A number of cases raised this issue again this year and, where the procedural issues were related to the merits, the courts uniformly refused to determine them.[7] Yet a question frequently has been raised as to whether there may be exceptions to this rule when the procedural questions are totally unrelated to the merits of the dispute. In most of the cases in which the possibility of this distinction has been raised, it has been rejected and the courts have held that procedural questions, whether or not related to the merits, are for the arbitrator to determine.[8] A New York Supreme

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4 *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), 46 LRRM 2423; *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), 46 LRRM 2416; *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960), 46 LRRM 2414.

5 *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Smith* v. *Evening News*, 371 U.S. 195 (1962).

6 376 U.S. 543 (1964).

7 *Carpenters Union, Local 824* v. *Brunswick Corp.*, 342 F.2d 792, 58 LRRM 2718 (6th Cir. 1965); *Association of Industrial Scientists* v. *Shell Dev. Co.*, 59 LRRM 2770 (9th Cir. 1965); *Local 595, International Assoc. of Machinists* v. *Howe Sound Co.*, 60 LRRM 2065 (3rd Cir. 1965); *Sheet Metal Workers, Local 17* v. *Aetna Steel Prods. Corp.*, 60 LRRM 2273 (D. Mass. 1965); *Hellman* v. *Davis*, 60 LRRM 2016 (S.D. N.Y. 1965); *Communication Workers* v. *General Tel. Co.*, 236 F. Supp. 588, 58 LRRM 2141 (E.D. Ky. 1965); *Amalgamated Meat Cutters, Local 195* v. *Way*, 238 F. Supp. 726, 58 LRRM 2308 (E.D. Pa. 1965); *Electric Boat Div., General Dynamics Corp.* v. *Local 1302, Carpenters Union*, 59 LRRM 2623 (D. Conn.), *aff'd*, 59 LRRM 2625 (2d Cir. 1965); *Vincent J. Smith* v. *International Bhd. of Teamsters, Local 644*, 59 LRRM 2652 (N.Y. App. Div. 1965); *In re Metropolitan Opera Assoc.*, 60 LRRM 2208 (N.Y. Sup. Ct. 1965), *vacating* 60 LRRM 2042 (N.Y. Sup. Ct. 1965); *cf. Capital Airways, Inc.* v. *Airline Pilots Assoc.*, 341 F.2d 288, 58 LRRM 2404 (6th Cir. 1965) *cert. denied*, 381 U.S. 913, reaching the same result in a Railway Labor Act context.

8 *Rochester Tel. Corp.* v. *Communication Workers*, 340 F.2d 237, 58 LRRM 2223 (2d Cir. 1965); *Brewery Workers, Local 366* v. *Adolph Coors Co.*, 240 F. Supp. 279, 59 LRRM 2950 (D. Colo. 1964), *aff'd*, 60 LRRM 2176 (10th Cir. 1965); *Fitchberg Paper Co.* v. *MacDonald*, 60 LRRM 2217 (D. Mass. 1965); *In re Long Island Lumber Co., Inc.*, 59 LRRM 2237 (N.Y. Ct. App. 1965).

Court decision stands alone in its acceptance of the distinction,[9] and this despite a contrary decision of the New York Court of Appeals in a case decided only a few weeks earlier.[10]

The reasoning of those courts rejecting the distinction, and thus seemingly extending *Wiley* beyond its initial bounds, has been twofold: (1) Almost all, if not at all, procedural matters are some extent connected with the merits of the dispute or at least require interpretation of the collective agreement, a function reserved for the arbitrator; [11] and, (2) a judicial determination of procedural arbitrability would necessarily delay the submission of the basic dispute to arbitration, contrary to the presumed desire of the parties to effect a speedy arbitral settlement of disputes and contrary to the aims of national labor policy.[12]

A related problem that has arisen involves the scope of the courts' function when dealing with collective agreements which contain procedural clauses expressly providing that failure to adhere to a prescribed procedure forecloses arbitration. Faced with this type of contract language, and with the allegation that the grieving party had not followed the procedure, the Second Circuit in *Rochester Telephone Corp.* v. *Communication Workers of America*,[13] nonetheless, directed arbitration of the procedural questions. The court said that a procedural provision of this nature will preclude arbitration only "when the intended preclusive effect of [the] provision and the fact of breach are both so plain that no rational mind could hurdle the barrier." [14] The test was not met in this case because there were disputed issues of fact as to whether the union had requested extension of the time period set by the procedural provision, and whether such a request would be an effective substitute for the required written notice. The latter issue, the court noted, would turn in part on the arbitral history of the parties and thus was particularly suitable for determination by an arbitrator.

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9 *Pepsi-Cola Co.* v. *Soft Drink Workers, Local 812*, 59 LRRM 2430 (N.Y. Sup. Ct. 1965).
10 *In re Long Island Lumber Co., Inc.*, 59 LRRM 2237 (N.Y. Ct. App. 1965).
11 *Brewery Workers, Local 366* v. *Adolph Coors Co.*, 240 F. Supp. 279, 59 LRRM 2950 (D. Colo. 1964), *aff'd*, 60 LRRM 2176 (10th Cir. 1965).
12 *Amalgamated Meat Cutters, Local 195* v. *Way*, 238 F. Supp. 726, 58 LRRM 2308 (E.D. Pa. 1965); *Brewery Workers, Local 366* v. *Adolph Coors Co., supra*, note 11.
13 340 F.2d 237, 58 LRRM 2223 (2nd Cir. 1965).
14 *Id.* at 239, 58 LRRM at 2224.

In applying the *Wiley* rule on procedural arbitrability, the courts naturally have had to determine whether the particular issues at bar are in fact procedural or whether, instead, they go to questions of substantive arbitrability. Thus, in 1965, the following issues were viewed as procedural and, consequently, to be determined by arbitrators: timeliness of demand for adjustment of referral to arbitration; [15] compliance with preliminary steps of the grievance procedure; [16] waiver; [17] whether grievances may be consolidated for arbitration; [18] whether the party seeking arbitration is a proper party to pursue that remedy under the contract; [19] and whether a grievance has been stated as specifically as the agreement requires.[20]

B. *Obligations of Successors to the Business Entity*

Two 1965 decisions [21] raised other issues involved in *Wiley:* under what circumstances does a successor to ownership assume the obligations of a collective agreement entered into by its predecessor, and who shall determine this question?

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[15] *Id. Local 595, International Assoc. of Machinists* v. *Howe Sound Co.*, 60 LRRM 2065 (3rd Cir. 1965); *Amalgamated Meat Cutters Union, Local 195* v. *Way*, 238 F. Supp. 726, 58 LRRM 2308 (E.D. Pa. 1965); *Communication Workers* v. *General Tel. Co.*, 236 F. Supp. 588, 58 LRRM 2141 (E.D. Ky. 1965); *In re Long Island Lumber Co., Inc.*, 59 LRRM 2237 (N.Y. Ct. App. 1965); *Vincent J. Smith, Inc.* v. *International Bhd. of Teamsters, Local 644*, 59 LRRM 2652 (N.Y. App. Div. 1965); *In re Metropolitan Opera Assoc.*, 60 LRRM 2208 (N.Y. Sup. Ct. 1965).

[16] *In re Long Island Lumber Co., Inc., supra*, note 15; *Vincent J. Smith, Inc.* v. *International Bhd. of Teamsters, Local 644, supra*, note 15; *Hellman* v. *Davis*, 60 LRRM 2016 (S.D. N.Y. 1965).

[17] *Brewery Workers, Local 366* v. *Adolph Coors Co.*, 240 F. Supp. 279, 59 LRRM 2950 (D. Colo. 1964), *aff'd*, 60 LRRM 2176 (10th Cir. 1965); *In re Metropolitan Opera Assoc.*, 60 LRRM 2208 (N.Y. Sup. Ct. 1965).

[18] *Fitchberg Paper Co.* v. *MacDonald*, 60 LRRM 2217 (D. Mass. 1965).

[19] *Local 824, Carpenters Union* v. *Brunswick Corp.*, 342 F.2d 792, 58 LRRM 2718 (6th Cir. 1965) (employee gave notice of intent to arbitrate, although contract provided only for union or employer to give such notice; union, having failed to give notice itself, sought to compel arbitration); *Electric Boat Div., General Dynamics Corp.* v. *Local 1302, Carpenters Union*, 59 LRRM 2623 (D. Conn.), *aff'd*, 59 LRRM 2625 (2nd Cir. 1965) (employer claimed union was not proper party to seek arbitration, since the dispute involved more than one craft or trade; contract provided that if a dispute involved more than one craft or trade, only the Metal Trades Council could process it; the union alleged the Council gave it authority to process the dispute in the Council's name); *Association of Industrial Scientists* v. *Shell Dev. Co.*, 59 LRRM 2770 (9th Cir. 1965) (employer contended the grievance procedure was open only to individual employees, and not the Association).

[20] *Vincent J. Smith, Inc.* v. *International Bhd. of Teamsters*, 59 LRRM 2652 (N.Y. App. Div. 1965).

[21] *In re Freed*, 59 LRRM 2124 (N.Y. Sup. Ct. 1965); *Local 75, International Bhd. of Teamsters* v. *Wisconsin Employment Relations Bd.*, 59 LRRM 2885 (Wis. Cir. Ct. 1965).

In *Local 75, International Brotherhood of Teamsters* v. *Wisconsin Employment Relations Board*,[22] a state court distinguished *Wiley* on the former of these issues while following *Wiley* on the latter. The case involved a sugar company, Menominee, which had entered into a collective agreement with plaintiff union covering employees in one of its plants. Wisconsin Sugar Company was thereafter incorporated and leased the plant from Menominee, commencing operations identical to those formerly conducted by Menominee. When Wisconsin Sugar refused to recognize the collective agreement as binding it, plaintiff union petitioned the state Employment Relations Board to order Wisconsin Sugar to submit certain disputes to the contract grievance procedure. The Board, finding that Wisconsin Sugar was not a successor or assign of Menominee, dismissed the petition. On petition for review, this decision of the Board was affirmed by the court. The fact that Wisconsin Sugar did not acquire the facility in question as a result of a merger was deemed sufficient to distinguish the case from *Wiley*, which involved a merger with "the business entity remaining the same." The court also stated that the record in the present case showed a "lack of any substantial continuity of identity in the business enterprise," but did not elaborate or state what facts led to this crucial conclusion.

On the question of whether this issue should have been decided in the first instance by an arbitrator, the court purported to follow *Wiley*, holding that this is a matter for court determination. Essentially, it reasoned, this is a question of whether the employer is contractually obligated to arbitrate any disputes with the union.

The second case involving a successor, *In re Fried*,[23] arose in the New York Supreme Court. Here the union had entered into a collective agreement with a partnership, the agreement listing only one party as a general partner. Plaintiff, who had become a partner after the agreement was entered into but was a partner at the time the dispute arose, argued that he had never agreed to arbitration and therefore should be free of that duty and of any arbitral award. Citing *Wiley* and *Wackenhutt*,[24] the court rejected plaintiff's contentions and ruled the agreement binding on

[22] *Supra*, note 21.
[23] 59 LRRM 2124 (N.Y. Sup. Ct. 1965).
[24] *Wackenhut Corp.* v. *International Union, United Plant Guard Workers*, 332 F.2d 954, 55 LRRM 2554 (9th Cir. 1964).

the new partnership. The evidence, it found, showed an apparent substantial similarity of operation and continuity of identity of the business enterprise before and after the change in makeup of the firm. The *Wiley* succession doctrine thus applies to changes effectuated in partnerships as well as to corporate mergers.

II. MATTERS OF SUBSTANTIVE ARBITRABILITY

A. *Suits to Compel or Stay Arbitration*

1. *Judicial Attitude in Cases Involving Broad Arbitration Clauses*

The judicial attitude toward substantive arbitrability continues to reflect the policy first enunciated in the *Steelworkers* Trilogy.[25] Although a few aberrations were apparent in 1965, the great majority of courts looked only to the face of the agreement to determine if the particular grievance in issue could be covered by the arbitration provisions. If the contract language were at all susceptible of an interpretation in favor of coverage, the decisions were cast for arbitrability.

If no contractual obligation to arbitrate is present, the courts will not compel arbitration,[26] but will stay an arbitration intiated by one of the parties.[27] A like result will be reached when the grievance arises and is pressed during the period between the expiration of a prior collective agreement and the execution of a new one so long as there is no evidence that the parties extended the old agreement to span the interim period.[28]

In dealing with questions of substantive arbitrability, there has been some variance among the courts with respect to the types of evidence that may be scrutinized. The prevailing view is in line with Supreme Court rulings, namely, that this evidence may not include matters going to the merits of the underlying grievance.[29]

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

[26] *In re Alpha Amp. Corp.*, 60 LRRM 2471 (N.Y. Sup. Ct. 1965).

[27] *In re Brown, Harris, Stevens, Inc.*, 59 LRRM 2941 (N.Y. Sup. Ct. 1965); *Wrecking Contractors Assoc., Inc.* v. *Local 95, Housewreckers Union*, 58 LRRM 2656 (N.Y. Sup. Ct. 1965).

[28] *International Bhd. of Elec. Workers, Local 1102* v. *Wadsworth Elec. Mfg. Co.*, 58 LRRM 2861 (E.D. Ky. 1965); *cf. Geoghehan* v. *Conlan Trucking, Inc.*, 59 LRRM 2652 (N.Y. Sup. Ct. 1965).

[29] *Communication Workers* v. *Bell Tel. Laboratories, Inc.*, 59 LRRM 2954 (3rd Cir. 1965); *Flintkote Co.* v. *Textile Workers Union*, 60 LRRM 2071 (D. N.J. 1965); *Silvercup Bakers, Inc.* v. *Strauss*, 60 LRRM 2103 (E.D. N.Y. 1965); *International Bhd. of Teamsters, Local 782* v. *Blue Cab Co., Inc.*, 60 LRRM 2491 (7th Cir. 1965).

Thus, a Nevada Supreme Court reversed a trial court for applying a rule of practical construction to find whether the parties past practice had excluded the dispute from the grievance procedure. It could not be said "with positive assurance" that the arbitration clauses of the collective agreement were not susceptible of an interpretation covering the dispute. To apply a rule of practical construction in that context is to indulge in interpretation of the collective agreement, a function for an arbitrator, not a court.[30] Similarly, where the arbitration clause of a collective agreement is susceptible to an interpretation covering the dispute, the courts ought not to resort to bargaining history to determine whether the parties intended to exclude such disputes. If a court has to resort to bargaining history, the necessity demonstrates that the arbitration clause is not clear and unambiguous and, thus, arbitration is required to interpret the intent of the parties.[31]

Silence of the agreement on the subject matter of the underlying dispute is generally not sufficient to preclude arbitration where the arbitration clause is broad. The party opposing arbitration must make a positive showing that the subject matter was excluded from its coverage.[32] One district court, however, in a case involving both a broad arbitration clause and the usual provision prohibiting the arbitrator from adding to, subtracting from, or altering the terms of the agreement, has ruled that arbitration will be enjoined when the agreement is silent on the subject matter of the dispute. This follows, the court reasoned, because there is no language in the agreement to be interpreted or applied by the arbi-

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30 *Reynolds Elec. & Eng'r. Co., Inc.* v. *United Bhd. of Carpenters and Joiners, Local 1780*, 401 P.2d 60, 59 LRRM 2579 (Nev. 1965), *cert. denied*, 60 LRRM 2353 (1965).

31 *Silvercup Bakers, Inc.* v. *Strauss, supra*, note 29.

32 "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960). For a 1965 decision applying this *Warrior & Gulf* principle, see *Association of Industrial Scientists* v. *Shell Dev. Co.*, 59 LRRM 2770 (9th Cir. 1965).

trator.[33] The court did concede that some of the language in the Supreme Court decisions on arbitrability might be interpreted as not to accord with this approach.[34]

Under broad arbitration clauses [35] the courts have held a wide range of subject matters to be arbitrable: a damage claim arising from an illegal secondary boycott; [36] a breach of contract claim where a violation under Sections 8 (a) (5) and 8 (d) arguably exists;[37] a dispute over activity allegedly protected under Sections

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[33] *Flintkote Co.* v. *Textile Workers Union,* 60 LRRM 2071 (D. N.J. 1965). This dispute grew out of a partial plant-closure effected by the company. The union presented grievances demanding lost wages and lost dues on the ground that the company, by representing to the union during contract negotiations that it would not close plants during the term of the contract, had induced the union to withdraw its demands for severance pay. The grievance and arbitration provisions covered any matters of interpretation or application of the agreement, or any grievance of any employee. The union conceded that no express provision of the agreement covered the disputes, but argued that such a provision would have been written into the contract if the employer had not misrepresented its intentions during bargaining.

[34] *Id.* at 2076.

[35] Such as "the interpretation or application of the terms of this agreement"; or, "any dispute"; or, "any grievance."

[36] *Old Dutch Farms, Inc.* v. *International Bhd. of Teamsters, Local 584,* 59 LRRM 2745 (E.D. N.Y. 1965). The employer sued under § 303 for damages caused by conduct held by the N.L.R.B. and the Court of Appeals to have been an unlawful secondary boycott. The grievance procedure covered "any and all disputes and controversies arising under or in connection with the terms and provisions of this agreement . . . or in respect to anything . . . germane to the subject matter of this agreement." Since the dispute was within the inclusive language of the arbitration clause, the union's motion for a stay pending arbitration was granted. The Court held that arbitration in this case would not impair any Board proceeding and that arbitration is not limited to traditional claims of a contractual type unless expressly so limited by the contract. Thus the agreement to arbitrate was enforceable even though it resulted in plaintiff having to arbitrate an unfair labor practice claim within the terms of L.M.R.A. § 303. *Cf. United States Steel Corp.* v. *Seafarers Int'l. Union,* 237 F. Supp. 529, 58 LRRM 2344 (E.D. Pa. 1965), where an opposite result was reached under an arbitration provision limited to contract claims. Here an employer brought both § 301 and § 303 actions. The court stayed the § 301 action pending arbitration, but allowed the § 303 action to proceed to the point of trial, stating that if the arbitration were not then completed either party could apply for a continuance of the court action. The court said this type of relief would allow a speedy determination of the issues, allow discovery before memory faded, and at the same time avoid piecemeal determination of the controversy.

[37] *G. F. Wright Steel & Wire Co.* v. *United Steelworkers,* 59 LRRM 2574 (1st Cir. 1965); *Trailways of New England, Inc.* v. *Amalgamated Assoc. of Street, Elec. Ry. & Motor Coach Employees, Division 1318,* 343 F.2d 815, 58 LRRM 2848 (1st Cir.) *cert. denied,* 60 LRRM 2255 (1965) (court expressly reserved question of whether different result would follow if there were a clear or admitted § 8 (a) 3 and § 8 (d) violation). See also, *Local 24, International Bhd. of Elec. Workers* v. *Hearst Corp.,* 241 F. Supp. 853, 59 LRRM 2297 (D. Md.), *aff'd,* 60 LRRM 2401 (4th Cir. 1965), holding arbitrable a dispute over whether a sympathy shutdown constituted a lockout in violation of the agreement, even though an unfair labor practice might also be involved.

7 and 8 of NLRA;[38] a dispute over the applicability of a unit extension agreement;[39] a dispute over the applicability of a prior arbitration award;[40] a claim that a disputed contract provision was unlawful;[41] the extent of insurance coverage required by a collective agreement;[42] subcontracting;[43] alleged breaches of no strike clauses;[44] the meaning and application of the arbitration clause itself;[45] as well as a host of more conventional contract disputes.[46]

On the other side of the coin, in only a handful of instances have particular disputes been ruled to be nonarbitrable: whether

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[38] *Philadelphia Marine Trade Assoc.* v. *International Longshoremens Assoc.*, 59 LRRM 2680 (E.D. Pa. 1965). The court said: "If the defendants bargained away their right to engage in the activity complained of, they cannot then seek the protection of § 7 to prevent the other parties to the contract from enforcing the . . . grievance procedure."

[39] *B. D. Mkts. Inc.* v. *Local 196, Amalgamated Food Employees Union*, 58 LRRM 2120 (E.D. Pa. 1965).

[40] *In re U.S. Bronze Sign Co.*, 58 LRRM 2335 (N.Y. Sup. Ct. 1965).

[41] *Motor Car Dealers Assoc., Inc.* v. *Automobile Drivers & Demonstrators*, 58 LRRM 2414 (N.D. Cal. 1965). The employer sought declaratory relief to the effect that a contract provision was illegal; the union's motion for a stay pending arbitration was granted on the ground that, although only the courts may ultimately determine the legality issue, the contract provides that the parties should attempt to settle all differences through arbitration before resorting to a court action.

[42] *Chesapeake & Potomac Tel. Co.* v. *Communications Workers*, 239 F. Supp. 334, 58 LRRM 2565 (D. Md. 1965).

[43] *Todd Shipyards Corp.* v. *Industrial Union of Marine Workers, Local 39*, 58 LRRM 2826 (2nd Cir. 1965).

[44] *de Roza, Inc.* v. *Northern California Dist. Council, Hodcarriers Union*, 59 LRRM 2341 (Cal. D.C.A. 1965); *cf. Pietro Scalzetti Co.* v. *International Union of Operating Eng'rs., Local 150*, 60 LRRM 2222 (7th Cir. 1965); *East Shore Newspapers, Inc.* v. *Stereotypers Union, Local 8*, 59 LRRM 2494 (E.D. Ill. 1965).

[45] *Fitchberg Paper Co.* v. *MacDonald*, 60 LRRM 2217 (D. Mass. 1965) (the dispute concerned whether the arbitration clause allowed the union to consolidate grievances; the arbitration clause, which covered "differences . . . as to the meaning and application of this agreement," was held to include disputes as to the meaning and application of the arbitration clause itself).

[46] *Local 24, International Bhd. of Elec. Workers* v. *Hearst Corp.*, 60 LRRM 2401 (4th Cir. 1965), *aff'g* 241 F. Supp. 853, 59 LRRM 2297 (D. Md. 1965) (whether sympathy shutdown constitutes lockout); *Association of Industrial Scientists* v. *Shell Dev. Co.*, 59 LRRM 2770 (9th Cir. 1965) (whether closing of operation and transfer of employees is violation of contract); *G. F. Wright Steel & Wire Co.* v. *United Steelworkers*, 59 LRRM 2574 (1st Cir. 1965) (whether vacation pay and profit sharing is included within the term "wage rates"); *Smiths Transfer Corp.* v. *Local 107, International Bhd. of Teamsters*, 59 LRRM 2479 (E.D. Pa. 1965) (whether assignment to special operation violates contract); *Reynolds Elec. & Eng'r. Co., Inc.* v. *United Bhd. of Carpenters & Joiners, Local 1720*, 401 P.2d 60, 59 LRRM 2579 (Nev. 1965). *cert. denied*, 60 LRRM 2353 (1965) (whether travel time pay is owed); *Thompson* v. *Elliott Precision Block Co.*, 59 LRRM 2075 (Cal. D.C.A. 1965) (whether reinstatement is required); *In re Local 10, Steel Fabricators Union*, 59 LRRM 2542 (N.Y. Sup. Ct. 1965) (whether unilateral change of starting time violates contract); *Farmingdale Window Cleaning Co.* v. *Doe*, 59 LRRM 2125 (N.Y. Sup. Ct. 1965) (whether reinstatement is required).

a prior award is res judicata with respect to a present grievance; [47] a disputed interpretation of contract language rendered moot because of the execution of a new collective agreement omitting the language; [48] which of two collective agreements is the effective one; [49] and, subcontracting under a collective agreement containing a noncompulsory arbitration clause.[50]

2. *Restricted Arbitration Clauses*

Restricted arbitration clauses were the source of some problems for the courts this year. Typically, these restricted provisions fell into two broad categories: (1) clauses which excluded specific types of disputes from the grievance and arbitration procedures; and (2) clauses which prohibited the arbitrators from adding to, subtracting from, or altering the provisions of the agreements.

When dealing with a dispute involving the former type of clause, the courts exhibited reluctance to hold nonarbitrable those disputes which arguably, but not definitely, were within the exclusionary language. Thus, where a collective agreement excluded from arbitration those questions involving "management authority," a dispute over subcontracting was determined to be arbitrable.[51] The agreement, which contained an arbitration clause covering matters of interpretation or application of its terms, also contained a clause providing for the application of certain factors in determining layoffs or transfers. Since the subcontracting dispute might relate to the latter provision the court found that the exclusionary language did not "clearly rebut" the presumption of arbitrability.

Like results were reached in two cases which involved clauses excluding disciplinary action for unauthorized work stoppages

[47] *Todd Shipyards Corp.* v. *Industrial Union of Marine Workers, Local 15,* 59 LRRM 2613 (D. N.J. 1965).

[48] *Interstate Bakeries Corp.* v. *International Bhd. of Teamsters, Local 734,* 59 LRRM 2987 (Ill. App. Ct. 1965).

[49] *Empire State Master Hairdressers Assoc. Inc.* v. *Rizzuto,* 60 LRRM 2239 (N.Y. Sup. Ct. 1965). Here, the union and employer association entered into a collective agreement and executed what were intended to be two identical, original counterparts. In fact, they differed. Although both contained arbitration clauses, the court held that it was not within an arbitrator's power to determine which of the agreements was valid.

[50] *United Packing House Workers* v. *Wilson & Co., Inc.,* 340 F.2d 958, 58 LRRM 2304 (7th Cir. 1965), *cert. denied,* 59 LRRM 2063 (1965), following *Independent Petroleum Workers, Inc.* v. *American Oil Co.,* 324 F.2d 903, 54 LRRM 2598 (7th Cir. 1963), *aff'd by divided court,* 57 LRRM 2512 (1964).

[51] *Fitzgerald* v. *General Elec. Co.,* 59 LRRM 2500 (N.Y. App. Div. 1965).

from the otherwise broad coverage of the grievance and arbitration procedures.[52] In each case the courts found the disputes not clearly excluded since it was uncertain whether the work stoppages were in fact "unauthorized." Similarly, where a clause required negotiation over changes in "delivery methods," excluding from arbitration those disputes arising from such changes, a court held that a dispute over layoffs caused by a change in work week from five days to six was not necessarily excluded.[53] The court refused to look at bargaining history to determine whether the parties intended to encompass disputes of this kind in the exclusionary language. Since the exclusionary provision was at least ambiguous and vague as to this issue, arbitration was ordered. Another court, however, has held nonarbitrable a grievance over a disciplinary suspension where the grievance language in question limited coverage to "dismissals." The court determined that it could say "with positive assurance" that the arbitration clause was not susceptible of an interpretation which would cover the dispute.[54]

In dealing with the typical clauses restricting arbitrators to the express terms of the agreement or prohibiting them from adding to, subtracting from, or altering those terms, some courts have more readily found disputes to be nonarbitrable. Thus, where there were no contract terms dealing with the subject matter of the grievance and where the contract contained a clause of this type, and ignoring possible applicability of the arbitral concept of "past practice," two courts have respectively held nonarbitrable a dispute over the discontinuance of a tradition of giving employees Christmas turkeys,[55] and one over wages claimed to be due after the partial closing of a plant.[56] More in accord with the

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[52] *Los Angeles Paper Bag Co.* v. *Printing Specialties Union, Dist. Council 2,* 59 LRRM 2427 (9th Cir. 1965); *Wooleyham Co.* v. *International Bhd. of Teamsters, Local 107,* 60 LRRM 2205 (E.D. Pa. 1965).

[53] *Silvercup Bakers, Inc.* v. *Strauss,* 60 LRRM 2103 (E.D. N.Y. 1965).

[54] *Chesapeake & Potomac Tel. Co.* v. *Communications Workers,* 239 F. Supp. 334, 58 LRRM 2565 (D. Md. 1965).

[55] *Boeing Co.* v. *United Auto Workers,* 59 LRRM 2988 (3rd Cir. 1965), *aff'g* 231 F. Supp. 930, 56 LRRM 2833 (E.D. Pa. 1964).

[56] *Flintkote Co.* v. *Textile Workers Union,* 60 LRRM 2071 (D. N.J. 1965). See also, *Torrington Co.* v. *Metal Prods. Workers Union, Local 1645,* 59 LRRM 2588 (2nd Cir. 1965), *cert. denied,* 60 LRRM 2512 (1965), wherein the Second Circuit reversed a summary judgment compelling arbitration because the collective bargaining agreement, on its face, did not cover the subject matter of the dispute (recall of strikers).

Supreme Court's doctrines, however, one court has adopted the view that if there is a possibility that an arbitrator may be able to resolve the dispute by interpreting existing provisions, arbitration will be ordered. If the arbitrator finds the dispute cannot be resolved by interpreting existing terms, it is his responsibility then to hold it to be nonarbitrable.[57]

3. *Arbitrators' Power to Determine Nonarbitrability*

Still troubling the courts is the question of whether an arbitrator may determine a dispute to be nonarbitrable after a court determination of arbitrability.[58] One district court this past year ruled that an arbitrator does not have such power.[59] The question arose on the remand of the 1964 *Kimball* decision,[60] in which the Supreme Court held that a dispute over reemployment rights after a situs change was arbitrable even though production was not commenced at the new situs until after the contract had expired. In its earlier opinion ordering arbitration, the district court had ruled that the question of arbitrability could be determined anew by the arbitrator. Reversing itself on this point, the court said that the Supreme Court unquestionably placed the responsibility for determining arbitrability solely on the district courts and this responsibility can not be abdicated nor may the question be redetermined by arbitrators. To allow arbitrators to "second guess" the courts on these questions would, the court said, seriously disrupt the proper allocation of function and responsibility between courts and arbitrators as formulated in *Wiley*.[61] The language in *Wiley* to the effect that "the arbitrator would ordinarily remain free to reconsider the ground covered by the court insofar as it bore on the merits of the dispute," [62] was taken by the court to relate only to questions of procedural, and not substantive, arbitrability.[63]

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[57] *Camden Industries Co., Inc.* v. *Carpenters Union, Local 1688*, 60 LRRM 2183 (D. N.H. 1965).

[58] See Smith & Jones, "The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law," 63 *Mich. L. Rev.* 751, at 761 (1965). Compare, Jones, "An Arbitral Answer to a Judicial Dilemma: The Carey Decision and Trilateral Arbitration of Jurisdictional Disputes," 11 *U.C.L.A. L. Rev.* 327 (1964).

[59] *Piano & Musical Instrument Workers Union, Local 2549* v. *W. W. Kimball Co.*, 58 LRRM 2752 (N.D. Ill. 1965).

[60] 379 U.S. 357 (1964).

[61] 58 LRRM at 2753.

[62] *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, at 558 (1964).

[63] 58 LRRM 2752, at 2753.

Two other courts, however, have conceived the powers of arbitrators as being broad enough to encompass a redetermination of substantive arbitrability following a court holding that a dispute is arbitrable.[64] One of these courts stated nonetheless that the traditional type of clause covering disputes arising out of "the meaning, interpretation and application" of the provisions of the agreement limits the arbitrator's jurisdiction to the provisions of the agreement without granting him power to decide substantive arbitrability; [65] since the arbitration clause in this case covered "all disputes" between the parties, it was broad enough to include questions of substantive arbitrability.

A fourth court has held that the fact that arbitrability is normally reserved for the courts does not enlarge the scope of judicial review of arbitration in a case where the parties expressly submitted the issues of arbitrability to the arbitrator who ruled the dispute nonarbitrable.[66] There is some indication though that the court applied the standards it would have applied if determining arbitrability in the first instance. The court said that it would have vacated the award if it had been based on the contract language alone as being a "manifest disregard" of the applicable law. But the court found that additional evidence presented to the arbitrator concerning a strike settlement agreement constituted "most forceful evidence" of the parties intent to exclude this grievance from the grievance and arbitration machinery.

B. *Suits to Confirm or to Vacate Awards*

Attempts to have the courts vacate awards were largely unsuccessful in 1965. Several plaintiffs raised arguments that awards were capricious or procured through undue means, corruption or prejudice in that union members of the arbitration panel had failed to support the grievant [67] or that one of the members of the

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[64] *Camden Industries Co., Inc.* v. *Carpenters Union, Local 1688,* 60 LRRM 2183 (D. N.H. 1965); *Silvercup Bakers, Inc.* v. *Strauss,* 60 LRRM 2103 (E.D. N.Y. 1965).

[65] *Silvercup Bakers, Inc.* v. *Strauss, supra,* note 64; *cf. Camden Industries Co.* v. *Carpenters Union, Local 1688, supra,* note 64, where the arbitration provisions required arbitration of any difference or dispute between the parties not satisfactorily adjusted by the initial steps of the grievance procedures and not involving a change in the terms and conditions of the collective bargaining agreement.

[66] *Metal Prods. Workers Union, Local 1645* v. *Torrington Co.,* 59 LRRM 2267 (D. Conn. 1965).

[67] *Alberti* v. *North Amer. Iron & Steel Co.,* 58 LRRM 2720 (N.Y. Sup. Ct. 1965); *cf. O'Brien* v. *Curran,* 59 LRRM 2252 (N.H. 1965).

panel acted as both judge and prosecutor.[68] But, since no bad faith or fraud was found, these arguments were rejected and the awards confirmed. Further, where an award is found to be arbitrary, the proper relief is to remand the dispute to the arbitrator; the court should not decide the merits.[69] Yet even though a court erroneously renders a decision on the merits when vacating an award, it has been held that the decision is res judicata and, in the absence of an appeal, bars a subsequent arbitration of the same dispute.[70]

Those attacks on awards that were successful this year centered on the contention that the arbitrator had exceeded his powers under either the collective agreement or the submission agreement. Thus, in a decision of dubious validity, where the collective agreement restricted the arbitrator to the terms of the agreement and prohibited him from adding terms (the usual "alter, amend or modify" clause), an award holding that past practice had resulted in the addition of an implied term was vacated.[71] Similarly, an award contrary to the express terms of the collective agreement,[72] and one thought (oddly enough) by a federal district judge to be internally inconsistent [73] were vacated. The latter decision (vacating a reinstatement without back pay) is a showcase example of a judge not understanding an arbitrator's thought pattern.

But, where an arbitrator apparently made a harmless error in awarding pay for the wrong date, a court refused to vacate the award since the request for pay in the submission did not specify

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[68] *Local 24, International Bhd. of Elec. Workers* v. *William C. Bloom & Co., Inc.*, 59 LRRM 2545 (D. Md. 1965).

[69] *Smith* v. *Union Carbide Corp.*, 60 LRRM 2110 (6th Cir. 1965).

[70] *International Assoc. of Machinists* v. *Jeffrey Galion Mfg. Co.*, 60 LRRM 2108 (6th Cir. 1965). Also, it was held in *Brown* v. *Bridgeport Rolling Mills Co.*, 59 LRRM 2773 (D. Conn. 1965), that *res judicata* bars a party to an arbitration from raising as a defense in an action to confirm an award issues unsuccessfully pressed in a prior action to vacate the award.

[71] *Torrington Co.* v. *Metal Prods. Workers Union, Local 1645*, 60 LRRM 2263 (D. Conn. 1965).

[72] *International Bhd. of Teamsters, Local 85* v. *Western Transp. Co.*, 59 LRRM 2139 (Cal. Super. 1965) (contract required that employees to be discharged be allowed to continue working without loss of pay until a final award was rendered; an award upholding the discharge, but denying back pay from the date of discharge to the date of the final award was vacated).

[73] *Polycast Corp.* v. *Local 8-102, Oil Workers International Union*, 59 LRRM 2572 (Conn. Super. 1965) (issues submitted: was employee disciplined for cause, if so, what remedy; award holding no just cause but denying back pay held inconsistent, in excess of powers, and vacated).

a particular date;[74] the arbitrator has "broad discretion in fashioning remedies." And, in deciding an action to vacate an award on the ground the arbitrator exceeded his authority, several courts felt constrained not to look at the merits of the dispute; if, on the face of the collective agreement or the submission agreement, the award is within the arbitrator's powers, the suit to vacate will be dismissed.[75]

A related problem involves the effect of an attempted reopening of an award by the arbitrator who rendered it. Under New York law, after a final award an arbitrator has no power to reopen the proceeding and cannot alter or modify the award.[76] A California court reached the same result, holding that further proceedings after a final award has been rendered are mere surplusage, null and void, and will not vitiate the first final award.[77]

III. RIGHTS OF INDIVIDUAL EMPLOYEES

Certainly one of the most significant decisions of the year was *Republic Steel Corp.* v. *Maddox*,[78] which involved an employee's suit against his employer for severance pay under a collective bargaining agreement. The agreement had a three-step grievance procedure, culminating in arbitration and drawn broadly enough to encompass claims of the type plaintiff sought to vindicate in his action.

The defense of failure to exhaust the remedies of the contract was rejected by the courts below on the following rationale: since the employment relationship was ended by the discharge of plaintiff, there existed no further danger of industrial strife of the type warranting the application of Federal law; therefore, state law applies, and, in this case, state law did not require exhaustion of contract remedies prior to the bringing of a court action for damages.

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[74] *American Bosch Arma Corp.* v. *International Union of Elec. Workers, Local 794,* 59 LRRM 2798 (N.D. Miss. 1965).

[75] *Local 7-644, Oil Workers International Union* v. *Mobil Oil Co.,* 59 LRRM 2938 (7th Cir. 1965); *United Steelworkers* v. *Castor Mach. Co.,* 59 LRRM 2425 (6th Cir. 1965); *American Bosch Arma Corp.* v. *International Union of Elec. Workers, Local 794, supra,* note 74.

[76] *Indigo Springs, Inc.* v. *New York Hotel Trades Council,* 59 LRRM 3024 (N.Y. Sup. Ct. 1965).

[77] *Shippers Express Co.* v. *International Bhd. of Teamsters, Local 70,* 59 LRRM 2744 (Cal. Super. 1965).

[78] 379 U.S. 650 (1965).

The Supreme Court reversed, in an opinion which signaled the end to the application of state rules on exhaustion of contract remedies in suits falling within Section 301 jurisdiction. The decision also carries many other important implications for breach of contract claims by individual employees. The Court held that, as a general rule, in cases to which federal labor law applies under Section 301, federal policy requires that individual employees at least attempt to gain redress for their grievances under the negotiated grievance procedure prior to resorting to a court action. If the employee is precluded by the collective agreement from pressing the grievance himself, he must at least attempt to have his union do so unless the agreement specifically provides to the contrary.[79] The Court did indicate, however, that if the employee could not initiate the grievance procedure, and if his union refused to do so, a court action for damages might then be appropriate.[80]

Mr. Justice Black entered a vigorous dissent to the majority opinion. He argued that suits which involve only one employee and which do not involve disputes between an employer and a collective bargaining representative are ordinary "run of the mill" contract cases, not threatening industrial peace. Therefore, he concluded, they are outside of the policies underpinning the *Lincoln Mills* [81] exhortation to fashion a uniform body of federal labor law. The majority holding, he argued, runs "counter to the Court's long established policy of preserving the ancient, treasured right to judicial trials in independent courts according to due process of law." [82]

Seventeen cases decided in 1965 have involved questions related to the ones raised in *Maddox*.[83] Generally, when the suit arises under a collective agreement which contains a grievance clause allowing individual employees to initiate the procedures and

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[79] *Id.* at 652.
[80] *Id.* at 659.
[81] *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957).
[82] 379 U.S. at 666 (1965).
[83] Two of these arose under the Railway Labor Act. In the *Maddox* case, the Court indicated it was close to overruling *Moore* v. *Illinois Central R.R. Co.*, 312 U.S. 630, 8 LRRM 455, in which it had held that an employee covered by the Railway Labor Act could pursue common law remedies independent of his rights under the Act and irrespective of whether or not he had pursued the statutory procedure. In *Walker* v. *Southern Ry. Co.*, 237 F. Supp. 278, 58 LRRM 2305 (W.D. N.C. 1965),

plaintiff has not attempted to follow the contract remedy, as a matter of Federal law he is precluded from asserting his grievance in a court action.[84] Further, one court has held that an employee may not sue his union for failure fairly to represent his interests if: (1) the underlying grievance is subject to adjustment under the grievance procedure of a collective bargaining contract; (2) the grievance procedure may be set in motion by individual employees, and (3) plaintiff has failed to pursue that remedy.[85]

Differences have arisen with respect to the implications of *Maddox* for cases where the employee asserts that the grievance procedure is not open to him as an individual and that the union and employer have refused to process his grievance. As was indicated earlier, the Supreme Court suggested that there was room for a different rule under facts such as these.[86]

Several courts have held that where the plaintiff has requested his union to process the grievance and the union has refused or failed to do so, suit may be brought against the employer to vindicate the claim without further reference to the grievance procedure.[87] Also, in a suit for wages wherein the defendant employer had obtained a stay of the action and an order directing arbitration, the employee was later held entitled to have the stay vacated and an order directing the employer to answer; the grievance pro-

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decided a week before *Maddox*, a district court held that state law was determinative of whether an employee covered by the Railway Labor Act must exhaust the administrative remedies prior to instituting suit; North Carolina law did not require such exhaustion if the employee had accepted the discharge as final. In *Beebe* v. *Union R.R. Co.*, 208 A.2d 16, 58 LRRM 2813 (Pa. Super. 1965), the court held that under *Maddox*, federal law is determinative of whether exhaustion of remedies is required, and that, in the light of *Maddox*, nothing is left of *Moore;* an employee covered by the Railway Labor Act must exhaust his administrative remedies prior to bringing a common law action for breach of contract.

[84] *Walls* v. *Southern Ry. Co.*, 60 LRRM 2390 (5th Cir. 1965); *Rhine* v. *Union Carbide Corp.*, 343 F.2d 12, 58 LRRM 2724 (6th Cir. 1965); *Steen* v. *Local 163, United Auto Workers*, 59 LRRM 2827 (E.D. Mich. 1965); *Salvatore* v. *Allied Chem. Corp.*, 238 F. Supp. 232, 58 LRRM 2371 (S.D. W.Va. 1965); *Jacobs* v. *Ford Instrument Co.*, 60 LRRM 2095 (N.Y. App. Div. 1965); *Bilinski* v. *Delco Appliance Div., General Motors Corp.*, 59 LRRM 2125 (N.Y. App. Div. 1965); *Kennedy* v. *Bell Tel. Co.*, 60 LRRM 2172 (Pa. Super. 1965); *cf. Gordon* v. *Thor Power Tool Co.*, 59 LRRM 2180 (Ill. App. 1965), wherein the same result was reached as to the need for exhaustion, but the court held this a matter of state law even though it recognized the applicability of federal law under § 301 to another issue.

[85] *Steen* v. *Local 163, United Auto Workers, supra,* note 84.

[86] See text accompanying note 80, *supra.*

[87] *Desrosiers* v. *American Cyanimide Co.*, 58 LRRM 2713 (D. Conn. 1965); *Gilliam* v. *Roadway Express Inc.*, 58 LRRM 2747 (Ohio Ct. App. 1965); *cf. Carey* v. *Carter*, 58 LRRM 2609 (D.C. Cir. 1965). (Trial required on dispute as to whether employee had in fact requested his union to act).

cedure was open only to the employer and the union, and the employer had refused to initiate the procedure after being requested to do so by plaintiff.[88] The employer was deemed to have waived his right to insist that the dispute be settled through the grievance and arbitration procedure.

Further, an employee need not exhaust his remedies under the collective agreement where his claim is totally unrelated to the agreement,[89] or where resort to the grievance machinery is not mandatory under the terms of the agreement,[90] or where the employer has breached the agreement in such a way as to affect the employee's ability adequately to assert his grievance under the grievance procedure.[91]

Related to the exhaustion issue is the question of whether an employee may pursue a court remedy after the grievance procedure has been rendered useless to him by reason of agreement between the union and employer disposing of the grievance. Again this year, it was held that where, in good faith and without fraud, a dispute has been settled adversely to the plaintiff's interests, that settlement is dispositive of a court action seeking to secure the same rights. In *Simmons* v. *Union News Co.*,[92] plaintiff

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88 *Zuber* v. *Commodore Pharmacy, Inc.*, 60 LRRM 2007 (N.Y. App. Div. 1965). Justice Rabin dissented persuasively on the following grounds: the employee's cause of action arose solely from the collective bargaining agreement; all of the rights growing out of the employment contract were relegated to the collective agreement for their correlative remedies, and the employee was bound by that agreement; the rights given to the employee were, under the agreement, enforceable only through the union; although the employee may have a cause of action against the union for representing him unfairly, he has no direct cause of action against his employer.

89 *Wigfall* v. *Rowland*, 58 LRRM 2366 (N.Y. Sup. Ct. 1965) (libel action against employer).

90 *Id.* But see *Gordon* v. *Thor Power Tool Co.*, 59 LRRM 2180 (Ill. App. 1965), holding that state, rather than federal, law determines the need for exhaustion and that under Illinois law the contract procedure must be followed prior to suit even if the contract language is discretionary.

91 *Andrews* v. *Victor Metal Prods. Corp.*, 60 LRRM 2311 (Ark. 1965) (defendant, upon discharging plaintiff, failed to give plaintiff and her union a written statement of the grounds of discharge as was required by the contract). The court did not state sufficient facts to indicate whether or not the contract was within the interstate commerce jurisdictional requirement for federal law to apply under § 301; only Arkansas cases were cited.

92 341 F.2d 531, 58 LRRM 2521 (6th Cir. 1965), *cert. denied*, 60 LRRM 2255 (1965). The underlying dispute was involved in two earlier cases concerning the discharge of one of plaintiff's fellow employees. *Union News Co.* v. *Hildreth*, 295 F.2d 658 (6th Cir. 1961); *Hildreth* v. *Union News Co.*, 315 F.2d 548 (6th Cir.), *cert. denied*, 375 U.S. 826 (1963). The *Hildreth* cases contain a complete discussion of the facts and reasoning of the court.

sued to recover damages for wrongful discharge. The discharge followed a suspicion by the defendant employer that certain employees had been mishandling or stealing funds. Defendant and plaintiff's union agreed upon a trial layoff of a group of employees, including plaintiff, which, since the chronic thefts then apparently ceased, was ultimately converted to a permanent discharge. The Seventh Circuit based affirmance of the trial court's dismissal of the action upon two related decisions in which it had been held that an employee was precluded from suing for wrongful discharge if his union had, in good faith, negotiated with the employer and conceded that the discharge was proper under the "just cause" provisions of the contract.[93]

Consistent with his *Maddox* dissent, Mr. Justice Black, dissented to a denial of certiorari in the *Simmons* case. He observed that even the majority in *Maddox* [94] had preserved the right of an employee to sue his employer if his union refused to press the grievant's cause. He argued that the National Labor Relations Act does not give unions and employers the right to "negotiate away alleged breaches of a contract claimed by individual employees," and that an employee should not be deprived of an independent judicial determination of his claim by an agreement between his union and employer that no breach exists.

Other 1965 decisions dealing with the rights of individual employees under collective bargaining agreements generally consisted of reaffirmations of previously established principles. Thus: individual employees have standing under Section 301 when the dispute is personal to them, but their union is also a proper party plaintiff in such a case; [95] an employee has no standing in a suit to vacate an arbitration award,[96] or to sue for specific performance

[93] *Union News Co.* v. *Hildreth, supra,* note 92; *Hildreth* v. *Union News Co., supra,* note 92. See also *Owens* v. *VACA,* 59 LRRM 2165 (Mo. Ct. App. 1965), wherein it was held that a union has discretion as to whether or not to press an employee's grievance; a good faith exercise of that discretion is a defense to an employee's suit against the union. *Cf. Freedman* v. *National Maritime Union,* 59 LRRM 2651 (2nd Cir. 1965), dismissing on the merits a suit by an employee against his union for failure to process his grievance.

[94] *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), discussed in text accompanying note 78, *supra.*

[95] *Telephone Workers* v. *New England Tel. & Tel. Co.,* 59 LRRM 2006 (D. Mass. 1965) (dispute over discharge of an employee growing out of the theft of a company car by the employee's brother).

[96] *Local 100, Transport Workers Union* v. *Manhattan & Bronx Transit Operating Authority,* 60 LRRM 2272 (N.Y. Sup. Ct. 1965) (after award, only remedy employee has is against his union).

of an arbitration clause where, in each case, the grievance procedure entrusts control of the arbitration process to the union and employer; [97] and, employees who have accepted a union-employer settlement following an arbitration award have released their claims and may not sue to enforce the award.[98]

IV. SECTION 301 SUITS GENERALLY

A. *Jurisdiction*

The great bulk of Section 301 cases involved arbitrability or employee rights under collective bargaining agreements. These have been discussed under the appropriate topics. However, a number of problems involving questions of jurisdiction, procedure, and substantive rights to be vindicated under Section 301 also faced the courts in 1965; they will be considered here.

1. *"Violation of Contracts"*

In several of these cases, the question of what constitutes suits for "violation of contracts" within the meaning of Section 301 was raised. The courts have adopted a liberal interpretation of this phrase, finding that it encompasses: (1) refusals to abide by an arbitrator's decision where the collective agreement provides for "final and binding" arbitration awards;[99] (2) misuses or abuses by an arbitrator of the powers conferred upon him by the agreement; [100] (3) actions to stay arbitration, since the issues raised are identical to those in suits to compel arbitration; [101] and

[97] *Woody* v. *Sterling Aluminum Prods., Inc.*, 59 LRRM 2997 (E.D. Mo. 1965). The court also held that, even though the first two steps of the grievance procedure were open to individual employees, specific performance of those steps would be inappropriate since they were largely procedural and a decree ordering the employer to comply with those steps would be substantially ineffectual; the dispute involved a major management policy decision (closing of a plant) which obviously, according to the court, employees and foremen could not resolve in the early steps of the grievance procedure.

[98] *Layton* v. *Selb Mfg. Co.*, 60 LRRM 2169 (E.D. Mo. 1965).

[99] *Kracoff* v. *Retail Clerks, Local 1357*, 59 LRRM 2942 (E.D. Pa. 1965) (removal of employer's suit to vacate award held proper).

[100] *Id.*

[101] *Camden Industries Co., Inc.* v. *Carpenters Union, Local 1688*, 60 LRRM 2183 (D. N.H. 1965). The *Camden* case also held that, where the initial complaint filed in the state court does not allege facts indicating that removal is proper, the 20-day time period for removal prescribed by 28 U.S.C. § 1446(b) does not commence running until a pleading is filed which sets forth such facts. In this case, the complaint did not allege interstate commerce. After 20 days had elapsed, the defendant union served interrogatories upon the plaintiff, inquiring whether the plaintiff was engaged in interstate commerce. The court held that, since the initial complaint did not state a removable cause of action, the later removal petition was timely.

(4) actions charging conspiracy and misrepresentation to deprive employees of their rights under implied and express terms of collective bargaining agreements.[102]

Similarly, in a suit to enjoin arbitration which was removed to a Federal district court, remand was denied where the complaint indicated a collective bargaining agreement had been executed even though the employer alleged that he had signed under duress.[103] Assuming plaintiff's allegations to be true, the contract was only voidable and not void since plaintiff knew what he was signing. The existence of such an agreement and its violation is sufficient to give Federal district courts jurisdiction under Section 301. However, a suit by employees alleging that their union and employer had conspired to deprive plaintiffs of super-seniority acquired under previous collective agreements was determined by the Third Circuit to be outside the jurisdiction of Section 301 because the plaintiffs sought redress, not for violation of a collective agreement, but for alleged violation by the application of a collective agreement adverse to rights assertedly vested in them prior to the execution of the new agreement.[104]

2. *U. S. Arbitration Act*

Several other issues involving Section 301 jurisdiction also arose in 1965. In one case it was argued that Section 1 of the United States Arbitration Act [105] specifically precludes district courts from enforcing arbitration clauses of contracts covering employees involved in interstate commerce. That section, however, was intended to cover only workers engaged in the actual movement of interstate or foreign commerce, and does not relate to arbitra-

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[102] *Humphrey* v. *Dealers Transp. Co.*, 59 LRRM 3020 (W.D. Ky. 1965). This case is the remand of *Humphrey* v. *Moore*, 375 U.S. 335 (1964). Involved in the 1965 case is the allegation that the employers were liable for having misrepresented the nature of their agreement whereby one employer ceased doing business in the Louisville area. The court held that the employers might be liable for breach of an implied covenant not to do anything which would have the effect of destroying or injuring the rights of the union and employees by misrepresenting the nature of the dealings; this would provide a basis for finding a breach of the covenant of good faith and fair dealing inherent in every contract.

[103] *Omaha Beef Co., Inc.* v. *Amalgamated Meat Cutters Local 371*, 59 LRRM 2719 (D. Conn. 1965). The employer argued that its suit was based upon the nonexistence of a contract and, therefore, was not within the jurisdiction of § 301.

[104] *Adams* v. *Budd Co.*, 59 LRRM 2902 (3rd Cir. 1965).

[105] 61 Stat. 669 (1947), *as amended*, 9 U.S.C. § 1 (1953).

tion under contracts of workers engaged in other facets of interstate commerce.[106]

3. *Proper Parties*

A number of other cases involved the question of who are proper parties in Section 301 suits. In one of these, an employer defendant challenged the union plaintiff's right to seek damages under 301 for breach of a collective agreement, since the complaint did not allege present representational status of the union. The Court of Appeals reversed a summary judgment for the employer, stating that whether or not the union presently represents the employees is irrelevant; the courts should relate the language of the statute to representation at the time the alleged violation occurred.[107]

4. *Removal Jurisdiction*

Removal jurisdiction again presented difficulties for the courts. A major problem in this area still unresolved is what rules apply when suit is filed in a state court seeking injunctive relief against breach of a labor contract or a stay of arbitration; defendant removes the action to a Federal district court claiming jurisdiction under Section 301; then, after removal, the argument is made that the district court has no jurisdiction due to the Norris-LaGuardia Act and must either remand or dismiss.

5. *Preemption*

State courts, in the absence of removal, have continued to hold that Section 301 does not preempt the area, that they may issue injunctions in such cases provided a state anti-injunction act does not compel a different result.[108] But Federal courts have had more difficulty with this problem. The interrelationship of Section 301

[106] *Pietro Scalzetti Co.* v. *International Union of Operating Eng'rs., Local 150,* 60 LRRM 2222 (7th Cir. 1965).

[107] *Mailers' Union, Local 3* v. *Globe-Democrat Pub. Co.,* 60 LRRM 2118 (8th Cir. 1965).

[108] *Drysdale Const. Co.* v. *Operative Plasterers, Local 538,* 59 LRRM 2530 (Iowa 1965); *Shaw Elec. Co.* v. *International Bhd. of Elec. Workers, Local 98,* 208 A.2d 769, 58 LRRM 2852 (Pa. 1965); *Great Atl. & Pac. Tea Co., Inc.* v. *Retail Store Employees Union, Local 782,* 60 LRRM 2425 (Mo. Cir. Ct. 1965); *Perry & Sons* v. *Robilotto,* 59 LRRM 2455 (N.Y. App. Div. 1965); *Thaddeus Suski Prods., Inc.* v. *VOLA,* 59 LRRM 2431 (N.Y. Sup. Ct. 1965); *Spencer-Traunge Lithograph Corp.* v. *Lithographers Union, Local 11L,* 59 LRRM 2678 (N.Y. Sup. Ct. 1965).

and the anti-injunction provisions of the Norris-LaGuardia Act has not yet been fully and finally articulated. Nonetheless, the trend of the decisions in the context of actions to stay arbitrations appears to be that removal is proper and dismissal unnecessary. The rationale behind this result is that under 301 a Federal district court may grant specific performance of an arbitration clause without violating Norris-LaGuardia even if it develops that injunctive relief is incidentally required.[109] Since suits to stay arbitration are identical to suits to compel arbitration with respect to the issues raised, the same rules apply.

B. *Standing to Sue When Impliedly Precluded from Arbitration*

One of the most difficult of the problems the courts have been called upon to resolve this year is how to apply the rule of *Atkinson* v. *Sinclair Refining Co.*[110] to cases where employers are impliedly, but not expressly, precluded from initiating or controlling the arbitration machinery. In one case raising this problem, the grievance and arbitration procedures, from beginning to end, were open only to "claims, disputes or grievances of any kind of an employee against the Company." Moreover, the history of the operation of the agreement and its predecessors showed that the Company had never filed or processed a grievance. Faced with this language and history, a court refused to stay the employer's damage action for breach of a no-strike clause despite the union's argument that the *Sinclair* rule applies only when an employer is expressly precluded from utilizing the contract procedure.[111]

On slightly different facts and in a different procedural context, a second court denied a union's motion for an injunction prohibiting an employer from taking a dispute over an alleged breach

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109 See *Fitchberg Paper Co.* v. *MacDonald*, 60 LRRM 2217 (D. Mass. 1965); *Camden Industries Co., Inc.* v. *Carpenters Union, Local 1688*, 60 LRRM 2183 (D. N.H. 1965).

110 370 U.S. 238 (1962).

111 *Boeing Co.* v. *United Auto Workers*, 60 LRRM 2225 (E.D. Pa. 1965); *cf. Retail Clerks, Locals 128 & 633* v. *Lyon Dry Goods Inc.*, 346 F.2d 411, 58 LRRM 2611 (6th Cir. 1965), where the court denied relief to plaintiff union which sought enforcement of an award. The award was held void since the union was not a proper party to the arbitration; any arbitration held at the union's behest was void. The agreement gave the right of arbitration to "any individual employee who may have a grievance." *Certiorari* was denied. 60 LRRM 2234 (1965).

of a no-strike clause to arbitration.[112] Here again the agreement did not expressly obligate the employer to follow the grievance and arbitration procedure, nor did it expressly preclude him from so doing. The grievance provisions covered "any dispute or difference" which may arise between the parties. The first two steps of the four-step procedure could be set in motion only by an employee or the union. If no satisfactory adjustment were made during those steps, the third step called for referral of the dispute to a group consisting of union and employer representatives. The fourth step allowed "either party to the dispute" to submit it to arbitration.

Rejecting the argument that the employer could not submit disputes to arbitration, the court held that step three was an appropriate step for the employer to initiate under the terms of the agreement; steps one and two were not indispensible; and, therefore, the employer had a right to submit the dispute to arbitration. Commencing with step three, the employer was included within the phrase "either party" as contained in the language of step four.

A third court, dealing with an undisputed exclusion of an employer, held that where the employer's court action depends upon an interpretation of the collective agreement, and the union has submitted the same dispute to arbitration, the employer's suit will be stayed pending the arbitrator's determination.[113]

C. *The Role of the Courts, Absent a Mandatory Arbitration Clause*

The proper role of the district courts under Section 301 has been disputed in cases where the collective agreement either contains no arbitration procedure or provides for arbitration at the joint discretion of the parties. If there is no arbitration provision, the courts, not surprisingly, may assume the function of an arbitrator, weigh all the relevant facts including bargaining history,

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[112] *Local 463, Papermakers Union* v. *Federal Paper Board Co., Inc.*, 58 LRRM 2593 (D. Conn. 1965). See Jones, "Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses," 11 *U.S.L.A. L. Rev.* 675, 781-87 (1964).
[113] *Los Angeles Paper Bag Co.* v. *Printing Specialties Union, Dist. Council 2*, 59 LRRM 2427 (9th Cir. 1965).

and then determine the proper application of the agreement.[114] Again, a district court has been ordered to follow the same course where the arbitration provisions of the contract were non-mandatory. In this case, the employer defendant argued that the effect of the district court assuming such a role was to force mandatory arbitration upon the parties where they have expressly agreed to other than mandatory arbitration and that the union's proper remedy was self-help. The Court of Appeals stated, however, that this argument would subvert the purpose of Section 301 which was "to expand the availability of forums for the enforcement of labor contracts . . . with the ultimate aim of promoting industrial peace." [115]

D. *Section 301 Miscellany*

Various other questions were determined in Section 301 suits in 1965: a state statute of limitations applies in a 301 suit for benefits alleged to be due where the underlying substantive rights depend entirely upon state law for their existence; [116] it is error to refuse to allow a plaintiff to amend a complaint in order to allege jurisdiction under 301 where diversity jurisdiction is found to be lacking; [117] and, an employer under 301 cannot sue his employees, charging a conspiracy to deprive him of his rights under a collective bargaining agreement, since 301 provides only for suits between an employer and a labor organization and states that money judgments shall not be enforceable against individual members of a labor organization.[118]

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114 *Telephone Workers* v. *New England Tel. & Tel. Co.*, 59 LRRM 2006 (D. Mass. 1965). The question raised was whether the employer had violated the contract by failing to suspend the grievant before final discharge, as required by the contract. On the merits, the court held that suspension was merely authorized, and not required, and entered judgment for the employer dismissing the suit.

115 *Allied Oil Workers Union* v. *Ethyl Corp.*, 341 F.2d 47, 58 LRRM 2267 (5th Cir. 1965). The dispute arose over the drafting of employees for overtime work against their will. On the merits, the Court of Appeals held for the employer and affirmed the district court.

116 *United Auto Workers* v. *Hoosier Cardinal Corp.*, 59 LRRM 2448 (7th Cir. 1965).

117 *Martin* v. *Ethyl Corp.*, 341 F.2d 1, 58 LRRM 2275 (5th Cir. 1965).

118 *Digby* v. *Denner*, 58 LRRM 2440 (Colo. 1965). This holding was a dismissal of an employer's counter-claim by a state court. The employees had sued their employer alleging the torts of assault, battery, and conspiracy. The court, in dismissing a counter-claim by the employer, held that, though it was phrased in such a way as to make it appear not to be a claim for violation of a collective agreement, it was in fact such a claim and thus fell within § 301. Federal law was applicable.

V. JURISDICTIONAL OVERLAPS: ARBITRATIONS NLRB PROCEEDINGS AND COURT ACTIONS

Actions based upon alleged illegal secondary boycotts,[119] and actions arguably or clearly involving unfair labor practices,[120] must yield to arbitration when the collective agreement contains a broad arbitration clause and the underlying dispute falls within that clause. This represents a continuing application of the doctrine developed by the Court in *Smith* v. *Evening News Co.*[121] and *Carey* v. *Westinghouse Elec. Corp.*[122]

This doctrine, however, continues to present some conflicts. One instance of conflict which arose several times this year occurs where a decertification petition is pending before the NLRB and the union challenged by the petition seeks to compel arbitration of grievances. It appears well established now that in this situation the employer is obligated to arbitrate, at least until a decertification order is issued by the NLRB.[123] And the same result follows where a representation dispute pending before the NLRB involves an extension-of-unit controversy.[124]

The basis of this rule is that: (1) the grievances have arisen under collective agreements wherein the unions were treated as the authorized agents of the employees; (2) to hold otherwise would be to interpose court decisions in matters pending before the Board; and (3) to allow allegations like this to postpone arbitration would equip an employer with an additional delaying

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119 *Old Dutch Farms Inc.* v. *International Bhd. of Teamsters, Local 584,* 59 LRRM 2745 (E.D. N.Y. 1965).

120 *Old Dutch Farms, Inc.* v. *International Bhd. of Teamsters, Local 584, supra,* note 119; *Trailways of New England, Inc.* v. *Amalgamated Assoc. of Street, Elec. Ry. & Motor Coach Employees, Division 1318,* 343 F.2d 815, 58 LRRM 2848 (1st Cir.), *cert. denied,* 60 LRRM 2255 (1965); *G. F. Wright Steel & Wire Co.* v. *United Steelworkers,* 59 LRRM 2574 (1st Cir. 1965); *Local 24, International Bhd. of Elec. Workers* v. *Hearst Corp.,* 241 F. Supp. 853, 59 LRRM 2297 (D. Md.) *aff'd.* 60 LRRM 2401 (4th Cir. 1965); *Philadelphia Marine Trade Assoc.* v. *International Longshoreman's Assoc.,* 59 LRRM 2680 (E.D. Pa. 1965).

121 371 U.S. 195, 51 LRRM 2646 (1962).

122 375 U.S. 261 (1964).

123 *International Tel. & Tel. Corp.* v. *Local 400, International Union of Elec. Workers,* 59 LRRM 3033 (D. N.J. 1965); *Martin J. Kelley Inc.* v. *Local 677, International Bhd. of Teamsters,* 206 A.2d 417, 58 LRRM 2163 (Conn. 1965); *Olympic Glove Co.* v. *Livingston,* 60 LRRM 2176 (N.Y. Sup. Ct. 1965).

124 *B. D. Mkts. Inc.* v. *Local 196, Amalgamated Food Employees Union,* 58 LRRM 2120 (E.D. Pa. 1965); *cf., McGuire* v. *Humble Oil & Refining Co.,* 58 LRRM 2727 (S.D. N.Y. 1965). (Union's motion for preliminary injunction against institution of changes denied; insufficient showing of threat of irreparable injury.)

tactical maneuver both inimical to the bargaining process and enable him to reinforce his decertification petition with the added disgruntlement of voting employees because of union inability to resolve grievances.

Nonetheless, in a closely related fact situation, one New York court has granted a stay of arbitration.[125] Here, after an employee had filed charges with the NLRB claiming that the employer had entered into a contract with the union despite the fact the latter did not represent a majority of the employees, the union started an arbitration proceeding with respect to certain grievances. In granting the stay, the court distinguished the types of cases discussed above as concerning breaches of contract, disputes, or unfair labor practices under "valid, subsisting agreements." Here, the court said, the matter pending before the Board questions the very validity of the entire contract. The court could have protected the *status quo,* however, had it allowed the arbitrations to proceed, subject to motions to vacate arbitral awards in the event that the union were later decertified. It would not then have interfered in the collective bargaining process.

The timing of Board and arbitration decisions has proved to be critical. Thus, where the Board in determining election challenges had tangentially found that an employee had been properly discharged, arbitration of the same issue was deemed foreclosed and a stay granted [126] despite real distinctions between the proceedings relied upon in the well-reasoned dissent of Judge Field.

On the other hand, in *Old Dutch Farms, Inc.* v. *International Brotherhood of Teamsters, Local 584,*[127] the fact that the NLRB

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[125] *In re Vera Ladies Belt & Novelty Co.*, 58 LRRM 2544 (N.Y. Sup. Ct. 1965).

[126] *In re Buchholtz,* 58 LRRM 2462 (N.Y. Ct. App. 1965). Judge Fuld dissented, arguing that the issue before the Board was whether the discharge constituted an unfair labor practice, while the issue in the court action was whether the discharge constituted a violation of the collective agreement; the Board was limited to determining whether the discharge constituted an unfair labor practice because, for election purposes, the N.L.R.A. defines an employee as including one whose discharge is the result of an unfair labor practice. But see, *Fibreboard Paper Prods. Corp.* v. *International Assoc. of Machinists, Local 1304,* 59 LRRM 2127 (9th Cir. 1965), holding that an N.L.R.B. determination in an unfair labor practice proceeding of whether a contract had expired is not *res judicata* in a union's later action for breach of contract; the Board finding was not essential to the decision and did not, in fact, relate to contract termination.

[127] 59 LRRM 2745 (E.D. N.Y. 1965).

had ruled that certain conduct of the defendant union constituted an unfair labor practice did not excuse the employer from continuing to arbitrate a dispute over that conduct. Failure to pursue the arbitration barred a Section 303 suit for damages.

In *Acme Industrial Co.* v. *NLRB*,[128] the Seventh Circuit appears even further to have insulated the arbitral process from Board interference. The case arose on the employer's petition to review and set aside a Board order finding 8 (a) (5) and (1) violations in the employer's failure to comply with a union request for information regarding the removal of equipment from a plant covered by a collective bargaining agreement between the employer and union. The order required the employer to cease and desist from refusing to bargain in this fashion and also required the employer to furnish the requested information.

The collective agreement contained a subcontracting clause stating that it was company policy not to subcontract where layoffs might result. There was also a work transfer clause providing that, if equipment were moved from the plant, employees subject to reduction or layoff might transfer to the new location. Upon the employer's refusal to submit information with respect to certain equipment removals, the union filed eleven grievances dealing with work transfers and subcontracting. It also filed the unfair labor practice charges that resulted in the Board order discussed above.

The Board, in issuing its order, noted that the requested information was necessary to enable the union intelligently to evaluate the grievances. It then said that in such a situation Section 8 (a) (5) and 8 (d) create a duty to divulge. But the court, denying enforcement, rejected this reasoning. Since factors bearing on a determination of the relevancy of the requested information were interrelated with the construction and application of the contract provisions, the court reasoned, the Board's intervention to make the relevancy determination, assessing for itself the proper interpretation and application of the contract provisions, contravened the *Warrior & Gulf* policy concerning the priority to be accorded the grievance and arbitration procedures. The Supreme Court has *Acme* before it on certiorari and it will be of consider-

[128] 60 LRRM 2220 (7th Cir. 1965).

able interest to see not only what it decides but how it reasons its decision.

A jurisdictional conflict between unions presented still another instance of conflict between arbitration and NLRB proceedings. In *United Auto Workers* v. *General Motors Corp.*[129] a district court was petitioned to resolve seemingly conflicting Board and umprie decisions as to jurisdiction over particular work. The umpire had ruled in favor of the Auto Workers, but the Board in a subsequent petition by the Die Sinkers Conference had awarded jurisdiction to that union after finding that the umpire had decided a "work assignment" rather than a representation dispute. Since the scope of the umpire's award was to some extent ambiguous, the court dismissed the suit and ordered the parties to take steps to complete the arbitration so that the manner in which the arbitral award was to be implemented could be definitely ascertained.

VI. MISCELLANEOUS DECISIONS

A number of other decisions had a bearing on arbitration and other rights and obligations under collective bargaining agreements, yet do not readily lend themselves to categorization:

A. An employer who erroneously, but in good faith, demands that a union elect between arbitration and an NLRB proceeding and refuses to proceed with arbitration upon the union's failure to make such election does not necessarily commit an unfair labor practice thereby.[130] The Board in this case found Sections 8 (a) (1) and 8 (a) (3) violations but rejected the union's argument that the refusal to arbitrate constituted an 8 (a) (5) violation. The order was enforced by the Court of Appeals which denied the union's motion for an order compelling the Board to find an 8 (a) (5) violation.

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129 59 LRRM 2411 (E.D. Mich. 1965).

130 *Amalgamated Clothing Workers* v. *N.L.R.B.*, 343 F.2d 329, 58 LRRM 2429 (D.C. Cir. 1965). The union argued that, since the employer did not contend the dispute was not arbitrable and since the grievance was found to involve unfair labor practices, the refusal to arbitrate was an exercise in bad faith; this bad faith elevated it, too, into the unfair labor practice category. The court found no effective difference in implications of bad faith arising from a legal mistake like this one or a mistake concerning the scope or applicability of a collective bargaining agreement. It is within the board's discretion to draw, or refuse to draw, those inferences.

B. In *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*,[131] the National Railroad Adjustment Board had ordered an employee who had been discharged because of an alleged physical disability to be reinstated with back pay. The district court, in an opinion affirmed by the Ninth Circuit, denied enforcement of the award on the ground that no express or implied provision of the labor contract would sustain it. Reversing these decisions, the Supreme Court ruled that the controversy was a minor dispute [132] and that the district court, therefore, could not even review the reinstatement order.[133] The District courts do not have power to review the merits of a minor dispute merely because a part of an Adjustment Board award is a money award; they may only determine the correctness of the money award.

C. *In Jenkins Bros.* v. *Steelworkers Union,* a decision important in resolving the division of tribunal powers among courts and arbitrators under Federal law, the Second Circuit held that an arbitration over a discharge for theft will not be enjoined on the ground that the employee has already been convicted of the theft in a state court. This was so even though the highest court of the state had adopted the position that an award in favor of the grievant would be against state policy under these circumstances.[134] The question of whether an arbitration award would be enforceable is a matter of Federal law. In contrast, a New York state court has stayed an arbitration over a discharge for assault pending conclusion of an indictment against the grievant for the assault.[135]

D. Under a broad arbitration clause, a union may submit to arbitration a dispute over alleged pension fund delinquencies, even though the contract imposes a duty upon the pension fund trustees to sue to collect the funds.[136] The remedies are for the

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131 60 LRRM 2496 (U.S.S.C. 1965).
132 Railway Labor Act § 3 First (i), 45 U.S.C. § 153, First (i).
133 Railway Labor Act § 3, First (m), 45 U.S.C. § 153 First (m) provides that Adjustment Board awards "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." See also, *Lyon* v. *Atlantic Coast Line R.R. Co.*, 60 LRRM 2365 (W.D. S.C. 1965), wherein it was held that an employee who has submitted a claim to the Adjustment Board and participated in the hearing may not later raise the same issues in a court action.
134 *Jenkins Bros.* v. *Local 5623, United Steelworkers,* 341 F.2d 987, 58 LRRM 2542 (2nd Cir.), *cert. denied,* 60 LRRM 2233 (1965).
135 *In re Marabello,* 58 LRRM 2766 (N.Y. App. Div. 1965).
136 *In re Richlee Sales Co.,* 59 LRRM 2544 (N.Y. Sup. Ct. 1965).

protection of the employees and are cumulative.[137] Essentially, the arbitration will determine if there are "delinquencies;" prior to that determination, no duty would arise to prompt suit by the fund's trustees.

E. In response to a novel effort to circumvent future arbitration, a New York state court held that it would not mandate an arbitrator to rule that a party in the future must comply with the terms of the contract.[138] This constitutes a "transparent device" to remove future alleged breaches from the grievance procedures and put them in the courts by use of contempt proceedings for failure to comply with a mandatory injunction to be contained by court direction in the arbitrator's award.

"Arbitration & Rights Under Collective Agreements," 46 *Chi. B. Rec.* 475 (1965).

Baer, "Subcontracting—Twilight Zone in the Management Function," 16 *Lab. L. J.* 643 (1965).

Bernstein, "Nudging & Shoving All Parties to a Jurisdictional Dispute Into Arbitration: The Dubious Procedure of National Steel, "78 *Harv. L. Rev.* 784 (1965).

Burstein, "Labor Arbitration—A New Theology," 10 *Vill. L. Rev.* (1965).

Clark, "Interplay Between the LMRA & Arbitration: Concurrent Unfair Labor Practices & Grievances," 16 *Lab. L. J.* 412 (1965).

Coulson, "Spring Cleanup on Labor Arbitration Procedure," 16 *Lab. L. J.* 259 (1965).

Farmer, "Compulsory Arbitration—A Management Lawyer's View," 51 *Va. L. Rev.* 396 (1965).

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[137] *Id. Cf., Sixteen West Garage Corp.* v. *Garage Employees, Local 272,* 59 LRRM 2608 (N.Y. Sup. Ct. 1965), holding that an individual employer operating under a multi-employer collective bargaining agreement has standing to stay arbitration. The employer claimed that no arbitration agreement bound him.

[138] *In re International Assoc. of Machinists, Lodge 1053,* 59 LRRM 2619 (N.Y. Sup. Ct. 1965).

Feller, "Compulsory Arbitration—A Union Lawyer's View," 51 *Va. L. Rev.* 410 (1965).

Foster, "Disloyalty to the Employer: A Study of Arbitration Awards," 20 *Arb. J.* 157 (1965).

Goldberg, "A Supreme Court Justice Looks at Arbitration," 20 *Arb. J.* 13 (1965).

Harris, "National Labor Relations Board & Arbitration—The Battle of Concurrent Jurisdiction," 16 *Syracuse L. Rev.* 545 (1965).

Harris, "Supervisory Performance of Bargaining Unit Work," 20 *Arb. J.* 129 (1965).

Hays, "The Future of Labor Arbitration," 74 *Yale L. J.* 1019 (1965).

Jones, "Compulsion & The Consensual in Labor Arbitration," 51 *Va. L. Rev.* 369 (1965).

Jones, "On Nudging & Shoving The National Steel Arbitration into a Dubious Procedure," 79 *Harv. L. Rev.* 327 (1965).

Kohrs & Metzler, "Tests & 'The Requirements of The Job,'" 20 *Arb. J.* 103 (1965).

Ratner, "The Emergent Role of District Courts in National Labor Policy," 38 *F. R. D.* 81 (1965).

Rose, "Do the Requirements of Due Process Protect the Rights of Employees Under Arbitration Procedure?," 16 *Lab. L. J.* 44 (1965).

Smith & Clark, "Reappraisal of the Role of the States in Shaping Labor Relations Law," 1965 *Wisc. L. Rev.* 411.

Smith & Jones, "The Supreme Court & Labor Dispute Arbitration: The Emerging Federal Law," 63 *Mich. L. Rev.* 751 (1965).

Summers, "Labor Law in the Supreme Court: 1964 Term," 75 *Yale L. J.* 59 (1965).

Note, "Labor Agreements—Implied Limitations on Plant Removal & Relocation," 1965 *Duke L. J.* 546.

Note, "Admissibility of Parol Evidence in Judicial Determinations of Arbitrability," 63 *Mich. L. Rev.* 1274 (1965).

Note, "Jurisdiction of Federal Courts to Enjoin Labor Disputes," 32 *Tenn. L. Rev.* 264 (1965).

Note, "Refusal to Process a Grievance, the NLRB, & The Duty of Fair Representation: A Plea for Pre-emption," 26 *U. Pitt. L. Rev.* 593 (1965).